

SISSON

96th Congress }
1st Session }

COMMITTEE PRINT

{ COMMITTEE
PRINT No. 96-2

LEGISLATIVE HISTORY OF THE CIVIL
SERVICE REFORM ACT OF 1978

COMMITTEE ON
POST OFFICE AND CIVIL SERVICE
HOUSE OF REPRESENTATIVES



MARCH 27, 1979

VOLUME NO. II

Printed for the use of the Committee on Post Office and Civil Service

LEGISLATIVE HISTORY OF THE CIVIL
SERVICE REFORM ACT OF 1978

COMMITTEE ON
POST OFFICE AND CIVIL SERVICE
HOUSE OF REPRESENTATIVES



MARCH 27, 1979

VOLUME NO. II

Printed for the use of the Committee on Post Office and Civil Service

U.S. GOVERNMENT PRINTING OFFICE

33-782 O

WASHINGTON · 1979

COMMITTEE ON POST OFFICE AND CIVIL SERVICE

JAMES M. HANLEY, New York, *Chairman*

MORRIS K. UDALL, Arizona, *Vice Chairman*

CHARLES H. WILSON, California

WILLIAM D. FORD, Michigan

WILLIAM (BILL) CLAY, Missouri

PATRICIA SCHROEDER, Colorado

GLADYS NOON SPELLMAN, Maryland

HERBERT E. HARRIS II, Virginia

ROBERT GARCIA, New York

GEORGE THOMAS (MICKEY) LELAND,
Texas

GERALDINE A. FERRARO, New York

CHARLES W. STENHOLM, Texas

DONALD JOSEPH ALBOSTA, Michigan

EDWARD J. DERWINSKI, Illinois

GENE TAYLOR, Missouri

BENJAMIN A. GILMAN, New York

JIM LEACH, Iowa

TOM CORCORAN, Illinois

JAMES A. COURTER, New Jersey

CHARLES PASHAYAN, Jr., California

WILLIAM E. DANNEMEYER, California

DANIEL B. CRANE, Illinois

DAVID MINTON, *Executive Director and General Counsel*

THEODORE J. KAZY, *Minority Staff Director*

ROBERT E. LOCKHART, *Deputy General Counsel*

J. PIERCE MYERS, *Assistant General Counsel*

(II)

CONTENTS

VOLUME NO. II

S. 2640, as introduced in the Senate, March 3, 1978. (Note: Page 1 of the bill is reproduced at this point in the 2-volume publication. See pages 1-64 of volume No. I for the identical language which appears in the House bill)-----	Page 1279
Committee print amendment No. 2084 containing Senate committee amendments to S. 2640-----	1280
Committee print dated June 1, 1978 (an amendment in the nature of a substitute), to S. 2640, in the Senate committee-----	1306
S. 2640 as reported by the Committee on Governmental Affairs, July 10, 1978-----	1363
Senate Report No. 95-969, of the Committee on Governmental Affairs on S. 2640, July 10, 1978-----	1461
Debate on the Senate floor during consideration of S. 2640, August 24, 1978-----	1605
Debate on the Senate floor during consideration of the conference report on S. 2640, the Civil Service Reform Act of 1978, October 4, 1978-----	1725
S. 2640, as passed by the Senate, August 24, 1978-----	1729
Conference report on S. 2640, the Civil Service Reform Act of 1978-----	1843

STATEMENTS ON THE HOUSE FLOOR ON CIVIL SERVICE REFORM ACT OF 1978

Statement by—

Hon. William D. Ford of Michigan-----	2003
Hon. William (Bill) Clay of Missouri-----	2015
Hon. Patricia Schroeder of Colorado-----	2016

Purpose:

Amdt. No. 2084

95TH CONGRESS
2d Session

S. 2640

IN THE SENATE OF THE UNITED STATES

MAY 15 (legislative day, APRIL 24), 1978

Referred to the Committee on Governmental Affairs and ordered to be printed

AMENDMENTS

Intended to be proposed by Mr. RIBICOFF (for himself, Mr. PERCY, Mr. SASSER, and Mr. JAVITS) to S. 2640, a bill to reform the civil service laws, viz:

- 1 On page 126, redesignate title VII as title VIII.
- 2 On page 126, between lines 18 and 19, insert the fol-
- 3 lowing new title:

1 "TITLE VII—LABOR-MANAGEMENT RELATIONS
 2 "LABOR-MANAGEMENT RELATIONS
 3 "SEC. 701. (a) Chapter 71 of subpart F of part III
 4 of title 5, United States Code, is amended to add the follow-
 5 ing subchapter III:
 6 "SUBCHAPTER III—FEDERAL SERVICE LABOR-
 7 MANAGEMENT RELATIONS
 8 "§ 7161. Findings and purpose
 9 " (a) The Congress finds that the public interest de-
 10 mands the highest standards of employee performance and
 11 the continued development and implementation of modern
 12 and progressive work practices to facilitate and improve
 13 employee performance and the efficient accomplishment of
 14 the operations of the Government.
 15 " (b) The Congress further finds that while significant
 16 differences exist between Federal and private employment,
 17 experience under Executive Order 11491, as amended, indi-
 18 cates that the statutory protection of the right of employees
 19 to organize, bargain collectively within limits prescribed by
 20 this subchapter, and participate through labor organizations
 21 of their own choosing in decisions which affect them can be
 22 accomplished with full regard for the public interest and
 23 contributes to the effective conduct of public business. Such
 24 protection facilitates and encourages the amicable settlement
 25 of disputes between employees and their employers involv-

1280

1 ing personnel policies, practices and matters affecting work-
2 ing conditions.

3 “(c) It is the purpose of this subchapter to prescribe
4 certain rights and obligations of the employees of the Fed-
5 eral Government, subject to the paramount interest of the
6 public, and to establish procedures which are designed to
7 meet the special requirements and needs of the Federal
8 Government.

9 “§ 7162. Definitions; application

10 “(a) For the purpose of this subchapter—

11 “(1) “Agency” means an Executive agency as
12 defined in section 105 of this title, except the General
13 Accounting Office;

14 “(2) “Employee” means an individual—

15 “(A) employed in an agency;

16 “(B) employed in a nonappropriated fund
17 instrumentality described in section 2105 (c) of
18 this title;

19 “(C) employed in the Veterans’ Canteen
20 Service, Veterans’ Administration, described in sec-
21 tion 5102 (c) (14) of this title; or

22 “(D) who was an employee (as defined
23 under subparagraphs (A), (B), or (C) of this
24 paragraph) and was separated from service as a
25 consequence of, or in connection with, an unfair

1 labor practice under section 7174 of this subchapter;
2 but does not include—

3 “(i) an alien or noncitizen of the United
4 States who occupies a position outside the
5 United States;

6 “(ii) a member of the uniformed services;

7 “(iii) for the purpose of exclusive recog-
8 nition or national consultation rights (except as
9 authorized under the provisions of this sub-
10 chapter), a supervisor, a management official
11 or a confidential employee;

12 “(3) “Labor organization” means a lawful or-
13 ganization of any kind in which employees participate
14 and which exists for the purpose, in whole or in part,
15 of dealing with agencies concerning grievances, person-
16 nel policies and practices, or other matters affecting the
17 working conditions of their employees; but does not
18 include an organization which—

19 “(A) consists of management officials, con-
20 fidential employees, or supervisors, except as au-
21 thorized under this subchapter;

22 “(B) assists or participates in a strike against
23 the Government of the United States or any agency
24 thereof or imposes a duty or obligation to conduct,
25 assist, or participate in such a strike;

1 “(C) advocates the overthrow of the constitu-
2 tional form of government in the United States; or

3 “(D) discriminates with regard to the terms
4 or conditions of membership because of race, color,
5 religion, national origin, sex, age, or handicapping
6 condition;

7 “(4) “Agency management” means the agency
8 head and all management officials, supervisors, and other
9 representatives of management having authority to act
10 for the agency on any matters relating to the implement-
11 ation of the agency labor-management relations program
12 established under this subchapter;

13 “(5) “Authority” means the Federal Labor Rela-
14 tions Authority under section 7163 of this subchapter;

15 “(6) “General Counsel” means the General Coun-
16 sel of the Federal Labor Relations Authority;

17 “(7) “Panel” means the Federal Service Impasses
18 Panel under section 7173 of this subchapter;

19 “(8) “Assistant Secretary” means the Assistant
20 Secretary of Labor for Labor-Management Relations;

21 “(9) “Confidential employee” means an employee
22 who assists and acts in a confidential capacity to per-
23 sons who formulate and effectuate management policies
24 in the field of labor relations;

25 “(10) “Management official” means an employee

1 having authority to make, or to influence effectively the
2 making of, policy necessary to the agency or activity
3 with respect to personnel, procedures or programs;

4 “(11) “Supervisor” means an employee having
5 authority, in the interest of an agency, to hire, transfer,
6 suspend, layoff, recall, promote, discharge, assign, re-
7 ward, or discipline other employees or responsibly to
8 direct them, or to adjust their grievances, or effectively
9 to recommend such action, if in connection with the
10 foregoing the exercise of authority is not of a merely
11 routine or clerical nature, but requires the use of inde-
12 pendent judgment;

13 “(12) “Professional employee” means—

14 “(A) any employee engaged in the perform-
15 ance of work—

16 “(i) requiring knowledge of an advanced
17 type in a field of science or learning customarily
18 acquired by a prolonged course of specialized
19 intellectual instruction and study in an institu-
20 tion of higher learning or a hospital, as distin-
21 guished from knowledge acquired by a general
22 academic education, or from an apprenticeship,
23 or from training in the performance of routine
24 mental, manual or physical process;

1 “(ii) requiring the consistent exercise of
2 discretion and judgment in its performance;

3 “(iii) which is predominantly intellectual
4 and varied in character (as opposed to routine
5 mental, manual, mechanical or physical work);
6 and

7 “(iv) which is of such a character that
8 the output produced or the result accomplished
9 cannot be standardized in relation to a given
10 period of time; or

11 “(B) any employee who has completed the
12 courses of specialized intellectual instruction and
13 study described in subparagraph (A) of this para-
14 graph and is performing related work under the
15 direction or guidance of a professional person to
16 qualify the employee to become a professional em-
17 ployee as defined in subparagraph (A) of this
18 paragraph.

19 “(13) “Agreement” means an agreement entered
20 into as a result of collective bargaining pursuant to the
21 provisions of this subchapter;

22 “(14) “Collective bargaining”, “bargaining” or
23 “negotiating” means the performance of the mutual
24 obligation of the representatives of the agency and the

1 exclusive representative as provided in section 7169
2 of this subchapter;

3 “(15) “Exclusive representative” includes any
4 labor organization which has been—

5 “(A) selected pursuant to the provisions of
6 section 7168 of this subchapter as the representa-
7 tive of the employees in an appropriate collective
8 bargaining unit; or

9 “(B) certified or recognized prior to the effec-
10 tive date of this subchapter as the exclusive rep-
11 resentative of the employees in an appropriate col-
12 lective bargaining unit;

13 “(16) “Person” means an individual, labor orga-
14 nization, or agency covered by this subchapter; and

15 “(17) “Grievance” means any complaint by any
16 person concerning any matter which falls within the
17 coverage of a grievance procedure.

18 “(b) This subchapter applies to all employees and
19 agencies in the executive branch, except as provided in sub-
20 sections (c), (d), and (e) of this section.

21 “(c) This subchapter does not apply to—

22 “(1) the Federal Bureau of Investigation;

23 “(2) the Central Intelligence Agency;

24 “(3) the National Security Agency;

25 “(4) any other agency, or office, bureau, or entity

1 within an agency, which has as a primary function intelli-
 2 gence, investigative, or security work, when the head
 3 of the agency determines, in the agency head's sole
 4 judgment, that this subchapter cannot be applied in a
 5 manner consistent with national security requirements
 6 and considerations;

7 “(5) any office, bureau or entity within an agency
 8 which has as a primary function investigation or audit of
 9 the conduct or work of officials or employees of the
 10 agency for the purpose of insuring honesty and integrity
 11 in the discharge of their official duties, when the head
 12 of the agency determines, in the agency head's sole
 13 judgment, that this subchapter cannot be applied in a
 14 manner consistent with the internal security of the
 15 agency;

16 “(6) the United States Postal Service; or

17 “(7) the Foreign Service of the United States:
 18 Department of State, International Communication
 19 Agency, and Agency for International Development, and
 20 their successor agency or agencies;

21 “(8) the Tennessee Valley Authority; or

22 “(9) personnel of the Federal Labor Relations
 23 Authority, including the Office of General Counsel, and
 24 the Federal Service Impasses Panel.

25 “(d) The head of an agency may, in the agency

1 head's sole judgment, suspend any provision of this sub-
 2 chapter with respect to any agency, installation or activity
 3 located outside the United States, when the agency head
 4 determines that this is necessary in the national interest,
 5 subject to the conditions the agency head prescribes.

6 “(e) Employees engaged in administering a labor-
 7 management relations law (except as otherwise provided
 8 in subsection (c) (9) of this section) shall not be repre-
 9 sented by a labor organization which also represents other
 10 employees covered by the law, or which is affiliated directly
 11 or indirectly with an organization which represents such
 12 employees.

13 “§ 7163. Federal Labor Relations Authority; Office of the
 14 General Counsel

15 “(a) The Federal Labor Relations Authority is an
 16 independent establishment in the executive branch.

17 “(b) The Authority is composed of a Chairperson and
 18 two members, not more than two of whom may be adher-
 19 ents of the same political party and none of whom may
 20 hold another office or position in the government of the
 21 United States except where provided by law or by the
 22 President.

23 “(c) Members of the Authority shall be appointed by
 24 the President, by and with the advice and consent of the
 25 Senate. Authority members shall be eligible for reappoint-

1 ment. The President shall designate one member to serve
2 as Chairperson of the Authority.

3 “(d) The term of office of each member of the Au-
4 thority is 5 years. Notwithstanding the preceding provisions
5 of this subsection, the term of any member shall not expire
6 before the earlier of—

7 “(1) the date on which the member's successor
8 takes office or

9 “(2) the last day of the session of the Congress
10 beginning after the date the member's term of office
11 would (but for this sentence) expire. An individual
12 chosen to fill a vacancy shall be appointed for the unex-
13 pired term of the member such individual replaces. Any
14 member of the Authority may be removed by the
15 President.

16 “(e) A vacancy in the Authority shall not impair the
17 right of the remaining members to exercise all of the powers
18 of the Authority.

19 “(f) The Authority shall make an annual report to
20 the President for transmittal to the Congress, which shall
21 include information as to the cases it has heard and the
22 decisions it has rendered.

23 “(g) There is an Office of the General Counsel in the
24 Federal Labor Relations Authority. The General Counsel
25 shall be appointed by the President by and with the advice

1 and consent of the Senate. The term of office of the General
2 Counsel is 5 years. The General Counsel shall be eligible
3 for reappointment. The General Counsel may be removed
4 by the President. The General Counsel shall hold no other
5 office or position in the government of the United States
6 except where provided by law or by the President.

7 “§ 7164. Powers and duties of the Authority; the General
8 Counsel

9 “(a) The Authority shall administer and interpret this
10 subchapter, decide major policy issues, prescribe regula-
11 tions, disseminate information appropriate to the needs of
12 agencies, labor organizations and the public pursuant to sec-
13 tion 7181 of this subchapter.

14 “(b) The Authority shall, subject to its regulations—
15 “(1) decide questions as to the appropriate unit
16 for the purpose of exclusive recognition and related
17 issues submitted for its consideration;

18 “(2) supervise elections to determine whether a
19 labor organization is the choice of a majority of the em-
20 ployees in an appropriate unit as their exclusive rep-
21 resentative, and certify the results;

22 “(3) decide questions as to the eligibility of labor
23 organizations for national consultation rights; and

24 “(4) decide unfair labor practice complaints.

1 “(c) The Authority may consider, subject to its reg-
2 ulations—

3 “(1) appeals on negotiability issues as provided
4 in subsection (e) of section 7169 of this subchapter;

5 “(2) exceptions to arbitration awards as provided
6 in section 7171 of this subchapter;

7 “(3) appeals from decisions of the Assistant Sec-
8 retary issued pursuant to section 7175 of this subchapter;

9 “(4) exceptions to final decisions and orders of
10 the Federal Service Impasses Panel issued pursuant to
11 section 7173 of this subchapter; and

12 “(5) other matters it deems appropriate to assure
13 the effectuation of the purposes of this subchapter.

14 “(d) The Authority shall adopt an official seal which
15 shall be judicially noticed.

16 “(e) The principal office of the Authority shall be in
17 or about the District of Columbia but it may meet and exer-
18 cise any or all of its powers at any time or place. Subject to
19 subsection (g) of this section, the Authority may by one or
20 more of its members or by such agents as it may designate,
21 make any inquiry necessary to carry out its duties wherever
22 persons subject to this subchapter are located. A member who
23 participates in such inquiry shall not be disqualified from
24 later participating in a decision of the Authority in the same
25 case.

1 “(f) The Authority shall appoint an Executive Direc-
2 tor, such attorneys, regional directors, administrative law
3 judges, and other officers and employees as it may from time
4 to time find necessary for the proper performance of its
5 duties and may delegate to such officers and employees au-
6 thority to perform such duties and make such expenditures
7 as may be necessary.

8 “(g) All of the expenses of the Authority including
9 all necessary traveling and subsistence expenses outside the
10 District of Columbia incurred by members, employees, or
11 agents of the Authority under its orders, shall be allowed
12 and paid on the presentation of itemized vouchers therefor
13 approved by the Authority or by an individual it designates
14 for that purpose and pursuant to applicable law.

15 “(h) The Authority is expressly empowered and di-
16 rected to prevent any person from engaging in conduct
17 found violative of this subchapter. In order to carry out its
18 functions under this subchapter, the Authority is authorized
19 to hold hearings, subpoena witnesses, administer oaths, and
20 take the testimony or deposition of any person under oath,
21 and in connection therewith, to issue subpoenas requiring
22 the production and examination of evidence as described in
23 section 7179 (d) of this subchapter relating to any matter
24 pending before it and to take such other action as may be
25 necessary. Also in the exercise of the functions of the
26 Authority under this subchapter—

1 “(1) the Authority may request from the Direc-
2 tor of the Office of Personnel Management an advisory
3 opinion concerning the proper interpretation of regu-
4 lations or other policy directives promulgated by the
5 Office of Personnel Management in connection with a
6 matter before the Authority for adjudication;

7 “(2) whenever a regulation or other policy direc-
8 tive issued by the Office of Personnel Management is at
9 issue in an appeal before the Authority, the Authority
10 shall timely notify the Director, and the Director shall
11 have standing to intervene in the proceeding and shall
12 have all the rights of a party to the proceeding; and

13 “(3) the Director may request that the Authority
14 reopen an appeal and reconsider its decision on the
15 ground that the decision was based on an erroneous in-
16 terpretation of law or of controlling regulation or other
17 policy directive issued by the Office of Personnel
18 Management.

19 “(i) In any matters arising under subsection (b) of
20 this section, the Authority may require an agency or a labor
21 organization to cease and desist from violations of this sub-
22 chapter and require it to take such affirmative action as it
23 considers appropriate to effectuate the policies of this sub-
24 chapter.

25 “(j) The General Counsel is authorized to—

1 “(1) investigate complaints of violations of sec-
2 tion 7174 of this subchapter;

3 “(2) make final decisions as to whether to issue
4 notices of hearing on unfair labor practice complaints and
5 to prosecute such complaints before the Authority;

6 “(3) direct and supervise all field employees of
7 the General Counsel in the field offices of the Federal
8 Labor Relations Authority;

9 “(4) perform such other functions as the Author-
10 ity prescribes; and

11 “(5) prescribe regulations needed to administer
12 the General Counsel's functions under this subchapter.

13 “(k) Notwithstanding any other provisions of law,
14 including chapter 7 of this title, the decisions of the Au-
15 thority on any matter within its jurisdiction shall be final
16 and conclusive, and no other official or any court of the
17 United States shall have power or jurisdiction to review any
18 such decision by an action in the nature of mandamus on
19 appeal of that decision or by any other means: *Provided*,
20 That nothing in this section shall limit the right of persons
21 to judicial review of questions arising under the Constitu-
22 tion of the United States.

23 “§ 7165. Employees' rights

24 “(a) Each employee shall have the right to form, join,
25 or assist any labor organization, or to refrain from such

1 activity, freely and without fear of penalty or reprisal, and
 2 each such employee shall be protected in exercising such
 3 right. Except as otherwise provided under this subchapter,
 4 such right includes the right to participate in the manage-
 5 ment of a labor organization, the right to act for the organi-
 6 zation in the capacity of a representative, and the right, in
 7 such capacity, to present the views of the organization to
 8 agency heads and other officials of the executive branch of
 9 the Government, the Congress, or other appropriate author-
 10 ities; and the right to bargain collectively subject to the
 11 limits prescribed in section 7169 (c) of this subchapter
 12 through representatives of their own choosing.

13 “ (b) This subchapter does not authorize participation
 14 in the management of a labor organization or acting as a
 15 representative of such an organization by a management
 16 official, a confidential employee or a supervisor, except as
 17 specifically provided in this subchapter, or by an employee
 18 when the participation or activity would result in a con-
 19 flict or apparent conflict of interest or would otherwise be
 20 incompatible with law or with the official duties of the
 21 employee.

22 “ § 7166. Recognition of labor organizations in general

23 “ (a) An agency shall accord exclusive recognition
 24 or national consultation rights at the request of a labor or-
 25 ganization which meets the requirements for the recognition
 26 or consultation rights under this subchapter.

1 “ (b) When recognition of a labor organization has
 2 been accorded, the recognition continues as long as the
 3 organization continues to meet the requirements of this sub-
 4 chapter applicable to that recognition, except that this sec-
 5 tion does not require an election to determine whether an
 6 organization should become, or continue to be recognized
 7 as, exclusive representative of the employees in any unit or
 8 subdivision thereof within 12 months after a prior valid
 9 election with respect to such unit.

10 “ (c) Recognition of a labor organization does not—

11 “ (1) preclude an employee, regardless of whether
 12 the employee is in a unit of exclusive recognition, from
 13 exercising grievance or appellate rights established by
 14 law or regulation, or from choosing the employee's own
 15 representative in a grievance or appellate action, except
 16 when the grievance or appeal is covered under a negoti-
 17 ated procedure as provided in section 7171 of this sub-
 18 chapter.

19 “ (2) preclude or restrict consultations and deal-
 20 ings between an agency and a veterans organization
 21 with respect to matters of particular interest to em-
 22 ployees with veterans preference; or

23 “ (3) preclude an agency from consulting or deal-
 24 ing with a religious, social, fraternal, professional or other
 25 lawful association, not qualified as a labor organization,

1 with respect to matters or policies which involve individual members of the association or are of particular applicability to it or its members.

2
3
4 “(d) Consultations and dealings under paragraph (3) of subsection (c) of this section shall be so limited that they do not assume the character or formal consultation on matters of general employee-management policy covering employees in that unit, or extend to areas where recognition of the interests of one employee group may result in discrimination against or injury to the interest of other employees.

5
6
7
8
9
10
11
12 **“§ 7167. National consultation rights**

13 “(a) An agency shall accord national consultation rights to a labor organization which qualifies under criteria established by the Federal Labor Relations Authority as the representative of a substantial number of employees of the agency. National consultation rights shall not be accorded for any unit where a labor organization already holds exclusive recognition at the national level for that unit. The granting of national consultation rights does not preclude an agency from appropriate dealings at the national level with other organizations on matters affecting their members. An agency shall terminate national consultation rights when the labor organization ceases to qualify under the established criteria.

1 “(b) When a labor organization has been accorded national consultation rights, the agency, through appropriate officials, shall notify representatives of the organization of proposed substantive changes in personnel policies that affect employees it represents and provide an opportunity for the organization to comment on the proposed changes. The labor organization may suggest changes in the agency's personnel policies and have its views carefully considered. It may consult in person at reasonable times, on request, with appropriate officials on personnel policy matters, and at all times present its views thereon in writing. An agency is not required to consult with a labor organization on any matter on which it would not be required to negotiate if the organization were entitled to exclusive recognition.

2
3
4
5
6
7
8
9
10
11
12
13
14
15 “(c) Questions as to the eligibility of labor organizations for national consultation rights may be referred to the Authority for decision.

16
17
18 **“§ 7168. Exclusive recognition**

19 “(a) An agency shall accord exclusive recognition to a labor organization when the organization has been selected, in a secret ballot election, by a majority of the employees in an appropriate unit as their representative; provided that this section shall not preclude an agency from according exclusive recognition to a labor organization, without an election, where the appropriate unit is established through the

1 consolidation of existing exclusively recognized units repre-
2 sented by that organization.

3 “(b) A unit may be established on a plant or installa-
4 tion, craft, functional, or other basis which will ensure a clear
5 and identifiable community of interest among the employees
6 concerned and will promote effective dealings and efficiency
7 of agency operations. A unit shall not be established solely
8 on the basis of the extent to which employees in the proposed
9 unit have organized, nor shall a unit be established if it
10 includes—

11 “(1) any management official, confidential em-
12 ployee, or supervisor, except as provided in section
13 7182 of this subchapter;

14 “(2) an employee engaged in Federal personnel
15 work in other than a purely clerical capacity; or

16 “(3) both professional and nonprofessional em-
17 ployees, unless a majority of the professional employees
18 vote for inclusion in the unit.

19 “Questions as to the appropriate unit and related
20 issues may be referred to the Authority for decision.

21 “(c) All elections shall be conducted under the super-
22 vision of the Authority or persons designed by the Author-
23 ity and shall be by secret ballot. Employees eligible to
24 vote shall be provided the opportunity to choose the labor
25 organization they wish to represent them, from among

1 those on the ballot or “no union”, except as provided in
2 paragraph (4) of this subsection. Elections may be held
3 to determine whether—

4 “(1) a labor organization should be recognized as
5 the exclusive representative of employees in a unit;

6 “(2) a labor organization should replace another
7 labor organization as the exclusive representative;

8 “(3) a labor organization should cease to be the
9 exclusive representative;

10 “(4) a labor organization should be recognized
11 as the exclusive representative of employees in a unit
12 composed of employees in units currently represented
13 by that labor organization or continue to be recognized
14 in the existing separate units.

15 “§ 7169. Representation rights and duties; good faith
16 bargaining; scope of negotiations; resolution
17 of negotiability disputes

18 “(a) When a labor organization has been accorded
19 exclusive recognition, it is the exclusive representative of
20 employees in the unit and is entitled to act for and nego-
21 tiate agreements covering all employees in the unit. It is re-
22 sponsible for representing the interests of all employees in
23 the unit without discrimination and without regard to labor
24 organization membership. The labor organization shall be
25 given the opportunity to be represented at formal discus-

1 sions between management and employees or employee rep-
 2 resentatives concerning grievances, personnel policies and
 3 practices, or other matters affecting general working con-
 4 ditions of employees in the unit. The agency and the labor
 5 organization, through appropriate representatives, shall meet
 6 and negotiate in good faith for the purpose of arriving at an
 7 agreement.

8 “(h) The duty of the agency and the labor organiza-
 9 tion to negotiate in good faith includes—

10 “(1) to approach the negotiations with a sincere
 11 resolve to reach an agreement;

12 “(2) to be represented at the negotiations by ap-
 13 propriate representatives prepared to discuss and nego-
 14 tiate on all negotiable matters;

15 “(3) to meet at reasonable times and places as
 16 may be necessary; and

17 “(4) if an agreement is reached, to execute upon
 18 request a written document embodying the agreed terms,
 19 and to take such steps as are necessary to implement
 20 the agreement.

21 “(c) An agency and a labor organization that has
 22 been accorded exclusive recognition, through appropriate
 23 representatives, shall meet at reasonable times and negotiate
 24 in good faith with respect to personnel policies and prac-
 25 tices and matters affecting working conditions, so far as may

1 be appropriate under this subchapter and other applicable
 2 laws and regulations, including policies set forth in the Fed-
 3 eral Personnel Manual; published agency policies and regula-
 4 tions for which a compelling need exists under criteria estab-
 5 lished by the Federal Labor Relations Authority and which
 6 are issued at the agency headquarters level or at the level of a
 7 primary national subdivision; and a national or other control-
 8 ling agreement at a higher level in the agency. They may
 9 negotiate an agreement; determine appropriate techniques,
 10 consistent with section 7173 of this subchapter, to assist in
 11 such negotiation; and execute a written agreement or memo-
 12 randum of understanding.

13 “(d) In prescribing regulations relating to personnel
 14 policies and practices and working conditions, an agency
 15 shall have due regard for the obligation imposed by this
 16 section. However, the obligation to negotiate does not
 17 include matters with respect to the number of employees
 18 in an agency; the numbers, types, and grades of positions
 19 or employees assigned to an organizational unit, work proj-
 20 ect or tour of duty; or the technology of performing its work.
 21 This does not preclude the parties from negotiating agree-
 22 ments providing appropriate arrangements for employees
 23 adversely affected by the impact of realignment of work
 24 forces or technological change.

25 “(e) If, in connection with negotiations, an issue de-

1 velops as to whether a proposal is contrary to this subchap-
 2 ter or other applicable law, regulation, or controlling agree-
 3 ment and therefore not negotiable, it shall be resolved as
 4 follows:

5 “(1) An issue which involves interpretation of a
 6 controlling agreement at a higher agency level is re-
 7 solved under the procedures of the controlling agreement,
 8 or, if none, under agency regulations;

9 “(2) An issue other than as described in para-
 10 graph (1) of this subsection which arises at a local level
 11 may be referred by either party to the head of the agency
 12 for determination;

13 “(3) An agency head’s determination as to the
 14 interpretation of the agency’s regulations with respect
 15 to a proposal is final;

16 “(4) A labor organization may appeal to the Au-
 17 thority for a decision when—

18 “(i) it disagrees with an agency head’s deter-
 19 mination that a proposal would violate this sub-
 20 chapter or other applicable law or regulation of
 21 appropriate authority outside the agency,

22 “(ii) it believes that an agency’s regulations,
 23 as interpreted by the agency head, violate this sub-
 24 chapter or other applicable law or regulation of
 25 appropriate authority outside the agency, or are not

1 otherwise applicable to bar negotiations under sub-
 2 section (c) of this section.

3 “§ 7170. Basic provisions of agreements

4 “Each agreement between an agency and a labor
 5 organization is subject to the following requirements:

6 “(a) In the administration of all matters covered by
 7 the agreement, officials and employees are governed by
 8 existing or future laws and the regulations of appropriate au-
 9 thorities, including policies set forth in the Federal Personnel
 10 Manual; by published agency policies and regulations in
 11 existence at the time the agreement was approved; and by
 12 subsequently published agency policies and regulations re-
 13 quired by law or by the regulations of appropriate authorities,
 14 or authorized by the terms of a controlling agreement at a
 15 higher agency level;

16 “(b) Management officials of the agency retain the
 17 right to determine the mission, budget, organization, and in-
 18 ternal security practices of the agency, and the right in
 19 accordance with applicable laws and regulations—

20 “(1) to direct employees of the agency;

21 “(2) to hire, promote, transfer, assign, and retain
 22 employees in positions within the agency, and to sus-
 23 pend, demote, discharge, or take other disciplinary action
 24 against employees;

1 “(3) to relieve employees from duties because of
2 lack of work or for other legitimate reasons;

3 “(4) to maintain the efficiency of the Government
4 operations entrusted to them;

5 “(5) to determine the methods, means, and per-
6 sonnel by which such operations are to be conducted;
7 and

8 “(6) to take whatever actions may be necessary to
9 carry out the mission of the agency in situations of
10 emergency.

11 However, nothing in this subsection shall preclude the parties
12 from negotiating procedures which management will observe
13 in exercising its authority to decide or act, reserved under
14 this subsection; or, from negotiating appropriate arrange-
15 ments for employees adversely affected by the impact of
16 management's exercising its authority to decide or act,
17 reserved under this subsection: *Provided*, That such negotia-
18 tions shall not unreasonably delay the exercise by manage-
19 ment of its authority to decide or act: *And provided fur-*
20 *ther*, That such procedures and arrangements so negotiated
21 shall be consonant with law and regulation as provided in
22 section 7169 (c) and shall not have the effect of negating
23 the authority reserved under this subsection; and

24 “(c) Nothing in the agreement shall require an em-
25 ployee to become or to remain a member of a labor organi-

1 zation, or to pay money to the organization except pursuant
2 to a voluntary, written authorization by a member for the
3 payment of dues through payroll deductions.

4 “The requirements of this section shall be expressly
5 stated in the initial or basic agreement and apply to all
6 supplemental, implementing, subsidiary, or informal agree-
7 ments between the agency and the organization.

8 “§ 7171. **Grievance procedures**

9 “(a) An agreement between an agency and a labor
10 organization shall provide a procedure, applicable only to
11 the unit, for the consideration of grievances. Subject to the
12 provisions of subsection (d) of this section and so long as
13 it does not otherwise conflict with statute, the coverage
14 and scope of the procedure shall be negotiated by the
15 parties to the agreement. It shall be the exclusive procedure
16 available to the parties and the employees in the unit for
17 resolving grievances which fall within its coverage except
18 as otherwise provided in this section.

19 “(h) Any employee or group of employees in the
20 unit may present grievances falling within the coverage of
21 the negotiated grievance procedure to the agency and have
22 them adjusted, without the intervention of the exclusive
23 representative, as long as the adjustment is not inconsistent
24 with the terms of the agreement and the exclusive repre-

1 tentative has been given opportunity to be present at the
2 adjustment.

3 “ (c) A negotiated grievance procedure shall provide
4 for arbitration as the final step of the procedure. Arbitration
5 may be invoked only by the agency or the exclusive rep-
6 resentative. Except as provided in subsection (g) of this
7 section, the procedure must also provide that the arbitrator
8 is empowered to resolve questions as to whether or not a
9 grievance is on a matter subject to arbitration.

10 “ (d) A negotiated grievance procedure may cover any
11 matter within the authority of an agency so long as it does
12 not otherwise conflict with this subchapter, except that it
13 may not include matters involving examination, certification
14 and appointment, suitability, classification, political activities,
15 retirement, life and health insurance, national security or the
16 Fair Labor Standards Act (chapter 8, title 29, United States
17 Code).

18 “ (e) Matters covered under sections 4303 and 7512 of
19 this title which also fall within the coverage of the negotiated
20 grievance procedure may, in the discretion of the aggrieved
21 employee, be raised either under the appellate procedures
22 of section 7701 of this title or under the negotiated grievance
23 procedure, but not under both procedures. Similar matters
24 which arise under other personnel systems applicable to em-

1 ployees covered by this subchapter may, in the discretion
2 of the aggrieved employee, be raised either under the ap-
3 pellate procedures, if any, applicable to those matters, or
4 under the negotiated grievance procedure, but not under
5 both procedures.

6 “ (f) An aggrieved employee affected by a prohibited
7 personnel practice under section 2302 (b) (1) of this title
8 which also falls under the coverage of the negotiated griev-
9 ance procedure may raise the matter under a statutory proce-
10 dure or the negotiated procedure, but not both. Selection of
11 the negotiated procedure in no manner prejudices the right
12 of an aggrieved employee to request the Equal Employment
13 Opportunity Commission to review a final decision in the
14 same manner as provided for in section 3 of Reorganization
15 Plan Numbered 1 of 1978; or, where applicable, to request
16 review by the Equal Employment Opportunity Commission
17 pursuant to its regulations.

18 “ (g) Questions that cannot be resolved by the parties
19 as to whether or not a grievance is on a matter excepted by
20 subsection (d) of this section shall be referred for resolution
21 to the agency responsible for final decisions relating to those
22 matters.

23 “ (h) In matters covered under sections 4303 and
24 7512 of this title which have been raised under the negotiated

1 grievance procedure in accordance with the provisions of sub-
 2 section (e) of this section, an arbitrator shall be governed by
 3 the provisions of section 7701 (c) of this title.

4 “ (i) Allocation of the costs of the arbitration shall be
 5 governed by the collective-bargaining agreement. An arbit-
 6 rator shall have no authority to award attorney or other
 7 representative fees.

8 “ (j) Either party may file exceptions to any arbitra-
 9 tor’s award with the Federal Labor Relations Authority:
 10 *Provided, however,* That no exceptions may be filed to awards
 11 concerning matters covered under subsection (e) of this sec-
 12 tion. Decisions of the Authority on exceptions to arbitration
 13 awards shall be final, except for the right of an aggrieved
 14 employee under subsection (f) of this section.

15 “ (k) In matters covered under sections 4303 and 7512
 16 of this title which have been raised under the provisions of
 17 the negotiated grievance procedure in accordance with the
 18 provisions of subsection (e) of this section, the provisions of
 19 section 7702 of this title pertaining to judicial review shall
 20 apply to the award of an arbitrator in the same manner and
 21 under the same conditions as if the matter had been decided
 22 by the Merit Systems Protection Board. In such cases the
 23 word “arbitrator” shall replace the words “Merit Systems
 24 Protection Board” and “Board” where appropriate in section

1 7702 for purposes of applying its provisions. In matters simi-
 2 lar to those covered under sections 4303 and 7512 which
 3 arise under other personnel systems and which an aggrieved
 4 employee has raised under the negotiated grievance pro-
 5 cedure, judicial review of an arbitrator’s award may be ob-
 6 tained in the same manner and on the same basis as could
 7 be obtained of a final decision in such matters raised under
 8 applicable appellate procedures.

9 “ § 7172. **Approval of agreements**

10 “ An agreement with a labor organization as the exclu-
 11 sive representative of employees in a unit is subject to the
 12 approval of the head of the agency or an official designated
 13 by the head of the agency. An agreement shall be approved
 14 within 45 days from the date of its execution if it conforms
 15 to this subchapter and other applicable laws, existing pub-
 16 lished agency policies and regulations (unless the agency
 17 has granted an exception to a policy or regulation) and
 18 regulations of other appropriate authorities. An agreement
 19 which has not been approved or disapproved within 45 days
 20 from the date of its execution shall go into effect without
 21 the required approval of the agency head and shall be
 22 binding on the parties subject to the provisions of this sub-
 23 chapter and other applicable laws, and the regulations of
 24 appropriate authorities outside the agency. A local agree-
 25 ment subject to a national or other controlling agreement at

1 a higher level shall be approved under the procedures of the
 2 controlling agreement, or, if none, under agency regulations.
 3 “ § 7173. Negotiation impasses; Federal Service Impasses
 4 Panel
 5 “ (a) Upon request, the Federal Mediation and Con-
 6 ciliation Service shall provide services and assistance to
 7 agencies and labor organizations in the resolution of nego-
 8 tiation impasses.
 9 “ (b) When voluntary arrangements including the
 10 services of the Federal Mediation and Conciliation Service
 11 or other third-party mediation fail to resolve a negotiation
 12 impasse, either party may request the Federal Service Im-
 13 passes Panel provided for under subsection (c) of this section
 14 to consider the matter.
 15 “ (c) There is a Federal Service Impasses Panel as
 16 a distinct organizational entity within the Authority. The
 17 Panel is composed of a Chairperson and at least two other
 18 members, appointed by the President solely on the basis of
 19 fitness to perform the duties and functions of the office from
 20 among individuals who are familiar with Government opera-
 21 tions and knowledgeable in labor-management relations. No
 22 employee as defined under section 2105 of this title shall
 23 be appointed to serve as a member of the Panel.
 24 “ (d) The members of the Panel (in equal numbers)
 25 shall be appointed for respective terms of 1 year and of 3

1 years, and the Chairperson for a term of 5 years. Their
 2 successors shall be appointed for terms of 5 years, except
 3 that an individual chosen to fill a vacancy shall be appointed
 4 for the unexpired term of the member whom such individual
 5 shall replace. Any member of the Panel may be removed
 6 by the President.
 7 “ (e) The Panel may appoint an executive secretary
 8 and such other employees as it may from time to time find
 9 necessary for the proper performance of its duties. Each
 10 member of the Panel is entitled to pay at a rate equal to
 11 the daily equivalent of the maximum annual rate of basic
 12 pay currently paid, from time to time, under the General
 13 Schedule for each day the member is engaged in the per-
 14 formance of official business on the work of the Panel, includ-
 15 ing traveltime, and is entitled to travel expenses and a per
 16 diem allowance under section 5703 of this title.
 17 “ (f) The Panel or its designee shall promptly inves-
 18 tigate any impasse presented to it under subsection (b) of
 19 this section. The Panel shall consider the matter and shall
 20 either recommend procedures to the parties for the reso-
 21 lution of the impasse or assist the parties in arriving at a
 22 settlement through whatever methods and procedures, includ-
 23 ing factfinding and recommendations, it may deem appro-
 24 priate to accomplish the purposes of this section. Arbitration
 25 or third-party factfinding with recommendations to assist in

1 the resolution of an impasse may be used by the parties only
 2 when authorized or directed by the Panel. If the parties do
 3 not arrive at a settlement, the Panel may hold hearings,
 4 compel under section 7179 of this subchapter the attendance
 5 of witnesses and the production of documents, and take what-
 6 ever action is necessary and not inconsistent with this
 7 subchapter to resolve the impasse. Notice of any final action
 8 of the Panel shall be promptly served upon the parties, and
 9 such action shall be binding upon them during the term of
 10 the agreement unless the parties mutually agree otherwise.

11 "§ 7174. Unfair labor practices

12 "(a) It shall be an unfair labor practice for an
 13 agency—

14 "(1) to interfere with, restrain, or coerce an em-
 15 ployee in the exercise of rights assured by this sub-
 16 chapter;

17 "(2) to encourage or discourage membership in
 18 any labor organization by discrimination in regard to
 19 hiring, tenure, promotion, or other conditions of employ-
 20 ment;

21 "(3) to sponsor, control, or otherwise assist any
 22 labor organization, except that the agency may furnish
 23 to a labor organization customary and routine services
 24 and facilities when consistent with the best interest of
 25 the agency, its employees, and the organization and

1 when the services and facilities are furnished, if
 2 requested, on an impartial basis to organizations having
 3 equivalent status;

4 "(4) to discipline or otherwise discriminate
 5 against an employee because the employee has filed a
 6 complaint, affidavit, petition, or given any information
 7 or testimony under this subchapter;

8 "(5) to refuse to accord appropriate recognition
 9 to a labor organization qualified for such recognition; or

10 "(6) to refuse to consult or negotiate in good
 11 faith with a labor organization as required by this
 12 subchapter.

13 "(b) It shall be an unfair labor practice for a labor
 14 organization—

15 "(1) to interfere with, restrain, or coerce an
 16 employee in the exercise of the rights assured by this
 17 subchapter;

18 "(2) to cause or attempt to cause an agency to
 19 coerce an employee in the exercise of rights under this
 20 subchapter;

21 "(3) to coerce or attempt to coerce an employee or
 22 to discipline, fine, or take other economic sanction
 23 against a member of the labor organization as punish-
 24 ment or reprisal or for the purpose of hindering or im-

1 peding work performance, productivity, or the discharge
 2 of duties owed as an employee of the United States;
 3 “(4) to call or engage in a strike, work stoppage,
 4 or slowdown; picket an agency in a labor-management
 5 dispute when such picketing interferes or reasonably
 6 threatens to interfere with an agency’s operations; or
 7 condone any such activity by failing to take affirmative
 8 action to prevent or stop it;
 9 “(5) to discriminate against an employee with re-
 10 gard to the terms or conditions of membership because
 11 of race, color, religion, national origin, sex, age, or
 12 handicapping condition; or
 13 “(6) to refuse to consult, or negotiate in good
 14 faith with an agency as required by this subchapter.
 15 “(c) It shall be an unfair labor practice for a labor
 16 organization which is accorded exclusive recognition to deny
 17 membership to an employee in the appropriate unit except
 18 for failure to meet reasonable occupational standards uni-
 19 formly required for admission, or for failure to tender initia-
 20 tion fees and dues uniformly required as a condition of acquir-
 21 ing and retaining membership. This subsection does not pre-
 22 clude a labor organization from enforcing discipline in ac-
 23 cordance with procedures under its constitution or bylaws
 24 which conform to the requirements of this subchapter.

1 “(d) Issues which can properly be raised under an
 2 appeals procedure may not be raised under this section.
 3 Except for matters wherein, under section 7171 (e) of this
 4 title, an employee has an option of using either the appel-
 5 late procedures of section 7701 of this title or the negotiated
 6 grievance procedure, issues which can be raised under a
 7 grievance procedure may, in the discretion of the aggrieved
 8 party, be raised under that procedure or the complaint pro-
 9 cedure under this section, but not under both procedures.
 10 Appeals or grievance decisions shall not be construed as
 11 unfair labor practice decisions under this subchapter nor as
 12 a precedent for such decisions. All complaints under this
 13 section that cannot be resolved by the parties shall be filed
 14 with the Authority.

15 “(e) Questions as to whether an issue can properly
 16 be raised under an appeals procedure shall be referred for
 17 resolution to the agency responsible for final decisions
 18 relating to those issues.

19 “§ 7175. Standards of conduct for labor organizations

20 “(a) An agency shall accord recognition only to a
 21 labor organization that is free from corrupt influences and
 22 influences opposed to basic democratic principles. Except as
 23 provided in subsection (b) of this section, an organization
 24 is not required to prove that it has the required freedom when
 25 it is subject to governing requirements adopted by the orga-

1 nization or by a national or international labor organization
 2 or federation of labor organizations with which it is affiliated
 3 or in which it participates, containing explicit and detailed
 4 provisions to which it subscribes calling for—
 5 “(1) the maintenance of democratic procedures
 6 and practices, including provisions for periodic elections
 7 to be conducted subject to recognized safeguards and pro-
 8 visions defining and securing the right of individual
 9 members to participation in the affairs of the organiza-
 10 tion, to fair and equal treatment under the governing
 11 rules of the organization, and to fair process in disci-
 12 plinary proceedings;
 13 “(2) the exclusion from office in the organization
 14 of persons affiliated with communist or other totalitarian
 15 movements and persons identified with corrupt influ-
 16 ences;
 17 “(3) the prohibition of business or financial inter-
 18 ests on the part of organization officers and agents which
 19 conflict with their duty to the organization and its mem-
 20 bers; and
 21 “(4) the maintenance of fiscal integrity in the
 22 conduct of the affairs of the organization, including pro-
 23 vision for accounting and financial controls and regular
 24 financial reports or summaries to be made available to
 25 members.

1 “(b) Notwithstanding the fact that a labor organiza-
 2 tion has adopted or subscribed to standards of conduct as
 3 provided in subsection (a) of this section, the organization
 4 is required to furnish evidence of its freedom from corrupt
 5 influences or influences opposed to basic democratic prin-
 6 ciples when there is reasonable cause to believe that—

7 “(1) the organization has been suspended or ex-
 8 pelled from or is subject to other sanction by a parent
 9 labor organization or federation of organizations with
 10 which it had been affiliated because it has demonstrated
 11 an unwillingness or inability to comply with governing
 12 requirements comparable in purpose to those required
 13 by subsection (a) of this section; or

14 “(2) the organization is in fact subject to influ-
 15 ences that would preclude recognition under this sub-
 16 chapter.

17 “(c) A labor organization which has or seeks recog-
 18 nition as a representative of employees under this subchap-
 19 ter shall file financial and other reports with the Assistant
 20 Secretary, provide for bonding of officials and employees
 21 of the organization, and comply with trusteeship and election
 22 standards.

23 “(d) The Assistant Secretary shall prescribe the regu-
 24 lations needed to effectuate this section. These regulations
 25 shall conform generally to the principles applied to unions

1 in the private sector. Complaints of violations of this section
 2 shall be filed with the Assistant Secretary. In any matters
 3 arising under this section, the Assistant Secretary may re-
 4 quire a labor organization to cease and desist from viola-
 5 tions of this section and require it to take such affirmative
 6 action as he considers appropriate to effectuate the policies
 7 herein.

8 “§ 7176. Allotments to representatives

9 “(a) Where, pursuant to an agreement negotiated in
 10 accordance with the provisions of this subchapter, an agency
 11 has received from an employee in a unit of exclusive recog-
 12 nition a written assignment which authorizes the agency to
 13 deduct from the wages of such employee amounts for the
 14 payment of regular and periodic dues of the labor organi-
 15 zation having exclusive recognition for such unit, such assign-
 16 ment shall be honored. Except as required under subsection
 17 (b) of this section, any such assignment shall be revocable
 18 at stated intervals of not more than 6 months.

19 “(b) An allotment for the deduction of labor orga-
 20 nization dues terminates when—

21 “(1) the dues withholding agreement between the
 22 agency and the labor organization is terminated or ceases
 23 to be applicable to the employee; or

24 “(2) the employee has been suspended or ex-
 25 pelled from the labor organization.

1 “§ 7177. Use of official time

2 “Solicitation of membership or dues, and other internal
 3 business of a labor organization, shall be conducted during
 4 the non-duty hours of the employees concerned. Employees
 5 who represent a recognized labor organization shall not be
 6 on official time when negotiating an agreement with agency
 7 management, except to the extent that the negotiating parties
 8 agree to other arrangements which may provide that the
 9 agency will either authorize official time for up to 40 hours
 10 or authorize up to one-half the time spent in negotiations
 11 during regular working hours, for a reasonable number of
 12 employees, which number normally shall not exceed the
 13 number of management representatives.

14 “§ 7178. Remedial actions

15 “When it is determined by appropriate authority,
 16 including an arbitrator, that certain affirmative action will
 17 effectuate and further the policies of this subchapter, such
 18 affirmative action may be directed by the appropriate author-
 19 ity so long as such action is consistent with statute including
 20 section 5596 of this title.

21 “§ 7179. Subpenas

22 “(a) Any member of the Federal Labor Relations Au-
 23 thority, including the General Counsel, or the Panel, and any
 24 employee of the Authority designated by the Authority
 25 may—

1 “(1) issue subpoenas requiring the attendance and
2 testimony of witnesses and the production of docu-
3 mentary or other evidence from any place in the United
4 States or any territory or possession thereof, the Com-
5 monwealth of Puerto Rico, or the District of Columbia:
6 *Provided, however,* That no subpoena shall issue under
7 this section requiring the disclosure of intramanage-
8 ment guidance, advice, counsel, or training within an
9 agency or between an agency and the Office of Personnel
10 Management paid

11 “(2) administer oaths, take or order the taking
12 of depositions, render responses to written interrogatories,
13 examine witnesses, and receive evidence.

14 “(b) In the case of contumacy or failure to obey a
15 subpoena issued under subsection (a) (1), the United States
16 district court for the judicial district in which the person
17 to whom the subpoena is addressed resides or is served may
18 issue an order requiring such person to appear at any
19 designated place to testify or to produce documentary or other
20 evidence. Any failure to obey the order of the court may be
21 punished by the court as a contempt thereof.

22 “(c) Witnesses (whether appearing voluntarily or
23 under subpoena) shall be paid the same fee and mileage
24 allowances which are paid subpoenaed witnesses in the courts
25 of the United States,

1 “§ 7180. Issuance of regulations

2 “ The Authority, including the General Counsel, and
3 the Panel and the Federal Mediation and Conciliation Serv-
4 ice shall each prescribe rules and regulations to carry out
5 the provisions of this subchapter applicable to each of them,
6 respectively. Unless otherwise specifically provided in this
7 subchapter, the provisions of subchapter II of chapter 5 of
8 this title shall be applicable to the issuance, revision, or
9 repeal of any such rule or regulation.

10 “§ 7181. Compilation and publication of proceedings, deci-
11 sions, actions

12 “(a) The Authority shall maintain a file of its pro-
13 ceedings and shall publish the texts of its decisions and the
14 actions taken by the Panel under section 7173 of this
15 subchapter.

16 “(b) All files maintained under subsection (a) of
17 this section shall be open to inspection and reproduction
18 subject to the provisions of section 552 of this title.

19 “§ 7182. Continuation of existing laws, recognitions,
20 agreements, policies, regulations, procedures,
21 and decisions

22 “(a) Nothing contained in this subchapter shall pre-
23 clude—

24 “(1) the renewal or continuation of an exclusive
25 recognition, certification of a representative, or a lawful

1 agreement between an agency and a representative of
2 its employees entered into before the effective date of
3 this subchapter; or

4 “(2) the renewal, continuation, or initial accord-
5 ing of recognition for units of management officials or
6 supervisors represented by labor organizations which
7 historically or traditionally represent management offi-
8 cials or supervisors in private industry and which hold
9 exclusive recognition for units of such officials or super-
10 visors in any agency on the effective date of this sub-
11 chapter.

12 “(b) Policies, regulations, and procedures established,
13 and decisions issued, under Executive Order 11491, as
14 amended, or under the provision of any related Executive
15 order in effect on the effective date of this statute shall re-
16 main in full force and effect until revised or revoked by
17 Executive order or statute, or unless superseded by appro-
18 priate decision or regulation of the Authority’.

19 “(b) CONTINUANCE OF TERMS OF OFFICE.—Any term
20 of office of any member of the Federal Labor Relations
21 Authority and the General Counsel of the Federal Labor
22 Relations Authority serving on the effective date of this act
23 shall continue in effect until such time as such term would
24 expire under Reorganization Plan Numbered 2 of 1978, and
25 upon expiration of such term, appointments to such office

1 shall be made under section 7163 of title 5, United States
2 Code. Any term of office of any member of the Federal Serv-
3 ice Impasses Panel serving on the effective date of this Act
4 shall continue in effect until such time as members of the
5 Panel are appointed pursuant to section 7173 of title 5,
6 United States Code.

7 “(c) FUNDING.—There are hereby authorized to be
8 appropriated such sums as are necessary to carry out the
9 functions and purposes of this subchapter.

10 “(d) SEVERABILITY.—If any provisions of this sub-
11 chapter, or the application of such provision to any person
12 or circumstance, shall be held invalid, the remainder of this
13 subchapter or the application of such provision to persons or
14 circumstances other than those as to which it is held invalid,
15 shall not be affected thereby.

16 “(e) The analysis of chapter 71 of subpart F of part III
17 of title 5, United States Code, is amended to add the follow-
18 ing subchapter III:

“SUBCHAPTER III—FEDERAL SERVICE LABOR-
MANAGEMENT RELATIONS

“Sec.

“7161. Findings and purpose.

“7162. Definitions; application.

“7163. Federal Labor Relations Authority; Office of the General Counsel.

“7164. Powers and duties of the Authority; the General Counsel.

“7165. Employees’ rights.

“7166. Recognition of labor organizations in general.

“7167. National consultation rights.

“7168. Exclusive recognition.

“7169. Representation rights and duties; good faith bargaining; scope of
negotiations; resolution of negotiability disputes.

“7170. Basic provisions of agreements.

- "Sec.
 "7171. Grievance procedure.
 "7172. Approval of agreements.
 "7173. Negotiation impasses; Federal Service Impasses Panel.
 "7174. Unfair labor practices.
 "7175. Standards of conduct for labor organizations.
 "7176. Allotments to representatives.
 "7177. Use of official time.
 "7178. Remedial actions.
 "7179. Subpenas.
 "7180. Issuance of regulations.
 "7181. Compilation and publication of proceedings, decisions, actions.
 "7182. Continuation of existing laws, recognitions, agreements, policies, regulations, procedures, and decisions."

1 “(f) Section 5314 of title 5, United States Code, is
 2 amended by adding at the end thereof:

3 “(66) Chairperson, Federal Labor Relations Au-
 4 thority.”

5 “(g) Section 5315 of title 5, United States Code, is
 6 amended by adding at the end thereof:

7 “(114) Members (2), Federal Labor Relations
 8 Authority.”

9 “(h) Section 5316 of title 5, United States Code, is
 10 amended by adding at the end thereof:

11 “(141) General Counsel, Federal Labor Relations
 12 Authority.”

13 “REMEDIAL AUTHORITY

14 “SEC. 702. Section 5596 of title 5, United States Code,
 15 is amended to read after subsection (a) as follows:

16 “(b) An employee of an agency who, on the basis of an
 17 administrative determination or a timely appeal, is found by
 18 appropriate authority to have suffered a withdrawal, reduc-

1 tion, or denial of all or part of the employee's pay, allowances,
 2 differentials, or other monetary or employment benefits, or a
 3 denial of an increase in such pay, allowances, differentials, or
 4 other monetary or employment benefits, which would not have
 5 occurred but for unjustified or unwarranted action taken by the
 6 agency—

7 “(1) is entitled, on correction of the action, to be
 8 made whole for all losses suffered less, in applicable cir-
 9 cumstances, interim earnings. Such correction may in-
 10 clude, where appropriate, reinstatement or restoration to
 11 the same or substantially similar position or promotion to
 12 a higher level position; and

13 “(2) for all purposes, is deemed to have performed
 14 service for the agency during the period of the unjustified
 15 or unwarranted action except that—

16 “(A) annual leave restored under this para-
 17 graph which is in excess of the maximum leave
 18 accumulation permitted by law shall be credited to
 19 a separate leave account for the employee and shall
 20 be available for use by the employee within the time
 21 limits prescribed by regulations of the Office of
 22 Personnel Management, and

23 “(B) annual leave credited under subpara-
 24 graph (A) of this paragraph but unused and still
 25 available to the employee under regulations pre-

1 scribed by the Office of Personnel Management shall
 2 be included in the lump-sum payment under section
 3 5551 or 5552 (1) of this title but may not be re-
 4 tained to the credit of the employee under section
 5 5552 (2) of this title.

6 “ (c) For the purposes of this section—

7 “ (1) An “unjustified or unwarranted action” shall
 8 include—

9 “ (A) any act of commission, either substan-
 10 tive or procedural, which violates or improperly
 11 applies a provision of law, Executive order, regu-
 12 lation, or collective bargaining agreement; and

13 “ (B) any act of omission, or failure to take
 14 an action, or confer a benefit, which must be taken
 15 or conferred under a nondiscretionary provision of
 16 law, Executive order, regulation, or collective bar-
 17 gaining agreement;

18 “ (2) An “administrative determination” shall in-
 19 clude, but is not limited to, a decision, award, or order,
 20 issued by—

21 “ (A) a court having jurisdiction over the
 22 matter involved;

23 “ (B) the Office of Personnel Management;

24 “ (C) the Merit Systems Protection Board;

1 “ (D) the Federal Labor Relations Au-
 2 thority;

3 “ (E) the Comptroller General of the United
 4 States;

5 “ (F) the head of the employing agency or an
 6 agency official to whom corrective action authority is
 7 delegated;

8 “ (G) an arbitrator under a negotiated bind-
 9 ing arbitration agreement between a labor organi-
 10 zation and agency management.

11 “ (3) An “appropriate authority” shall include,
 12 but is not limited to—

13 “ (A) a court having jurisdiction;

14 “ (B) the Office of Personnel Management;

15 “ (C) the Merit Systems Protection Board;

16 “ (D) the Federal Labor Relations Authority;

17 “ (E) the Comptroller General of the United
 18 States;

19 “ (F) the head of the employing agency or
 20 an agency official to whom corrective action author-
 21 ity is delegated;

22 “ (G) an arbitrator under a negotiated bind-
 23 ing arbitration agreement between a labor organi-
 24 zation and agency management.

25 “ (d) The provisions of this section shall not apply to

1 reclassification actions nor shall they authorize the setting
2 aside of an otherwise proper promotion action by a selecting
3 official from a group of properly ranked and certified candi-
4 dates.

5 “ (e) The Office of Personnel Management shall pre-
6 scribe regulations to carry out this section. However, the
7 regulations are not applicable to the Tennessee Valley Au-
8 thority and its employees.’ ”

9 On page 126, line 19, strike out “VII” and insert in lieu
10 thereof “VIII”.

11 On page 126, line 21, strike out “701” and insert in lieu
12 thereof “801”.

13 On page 127, line 18, strike out “702” and insert in lieu
14 thereof “802”.

15 On page 127, line 24, strike out “703” and insert in lieu
16 thereof “803”.

17 On page 128, line 7, strike out “704” and insert in lieu
18 thereof “804”.

19 On page 128, line 19, strike out “705” and insert in lieu
20 thereof “805”.

TABLE OF CONTENTS—Continued

TITLE VI—RESEARCH, DEMONSTRATION, AND OTHER PROGRAMS

- Sec. 601. Research and demonstration projects.
- Sec. 602. Intergovernmental Personnel Act amendments.
- Sec. 603. Amendments to the mobility program.

TITLE VII—LABOR-MANAGEMENT RELATIONS

- Sec. 701. Labor-management relations.
- Sec. 702. Remedial authority.

TITLE VIII—MISCELLANEOUS

- Sec. 801. Savings provisions.
- Sec. 802. Authorization of appropriations.
- Sec. 803. Powers of President unaffected except by express provisions.
- Sec. 804. Technical and conforming amendments.
- Sec. 805. Effective dates.

FINDINGS AND STATEMENT OF PURPOSE

SEC. 3. It is the policy of the United States that—

(1) in order to provide the people of the United States with a competent, honest, and productive Federal work force reflective of the Nation's diversity, and to improve the quality of public service, Federal personnel management should be implemented consistent with merit system principles and free from prohibited personnel practices and such principles and practices should be expressly stated to furnish guidance to Federal agencies in carrying out their responsibilities in administering the public business and to avoid conduct which undermines the merit system principles and the integrity of the merit system;

(2) the merit system principles which shall govern in the competitive service and in the executive branch of the Federal Government should be expressly stated to furnish guidance to Federal agencies in carrying out their responsibilities in administering the public business and prohibited personnel practices should be statutorily defined to enable Government officers and employees to avoid conduct which undermines the merit system principles and the integrity of the merit system;

(3) Federal employees should receive appropriate protection through increasing the authority and powers of the independent Merit Systems Protection Board in processing hearings and appeals affecting Federal employees;

(4) the authority and power of the Special Counsel should be increased so that the Special Counsel may investigate allegations involving prohibited personnel practices, and protect Federal employees from reprisals for the lawful disclosure of information and from political coercion and to bring disciplinary charges against agency officials and employees who engage in such conduct;

(5) the function of filling positions and other personnel functions in the competitive service and in the executive branch should be delegated in appropriate cases to the agencies to expedite processing appoint-

1 ments and other personnel actions, with the control and
2 oversight of this delegation being maintained by the
3 Office of Personnel Management to protect against pro-
4 hibited personnel practices and the use of unsound man-
5 agement practices by the agencies;

6 (6) a Senior Executive Service should be estab-
7 lished to provide the flexibility needed by Executive
8 agencies to recruit and retain the highly competent and
9 qualified executives needed to provide more effective
10 management of Executive agencies and their functions,
11 and the more expeditious administration of the public
12 business;

13 (7) in appropriate instances, pay increases should
14 be based on quality of performance rather than length
15 of service;

16 (8) a research and demonstration program should
17 be authorized to permit Federal agencies to experiment
18 with new and different personnel management concepts
19 in controlled situations to achieve more efficient manage-
20 ment of the Government's human resources and greater
21 productivity in the delivery of service to the public;
22 and

23 (9) the training program of the Government should
24 include retraining of employees for positions in other
25 agencies to avoid separations during reductions in force

1 and the loss to the Government of the knowledge and
2 experience that these employees possess, and to maintain
3 the morale and productivity of employees.

4 TITLE I—MERIT SYSTEM PRINCIPLES

5 MERIT SYSTEM PRINCIPLES; PROHIBITED PERSONNEL

6 PRACTICES

7 SEC. 101. (a) Title 5, United States Code, is amended
8 by inserting, after chapter 21, the following new chapter:

9 "CHAPTER 23.—MERIT SYSTEM PRINCIPLES

- "Sec.
- "2301. Merit system principles.
- "2302. Prohibited personnel practices.
- "2303. Responsibility of the General Accounting Office.

10 "§ 2301. Merit system principles

11 "(a) (1) Except as provided in paragraph (2) of this
12 subsection, this chapter shall apply to—

- 13 "(A) an Executive agency;
- 14 "(B) the Administrative Office of the United States
15 Courts; and
- 16 "(C) the Government Printing Office.

17 "(2) This chapter shall not apply to—

- 18 "(A) a Government corporation;
- 19 "(B) the Central Intelligence Agency, the Defense
20 Intelligence Agency, and the National Security Agency,
21 and, as determined by the President, an executive
22 agency or unit thereof whose principal function is the
23 conduct of foreign intelligence or counterintelligence
24 activities;

1 “(C) the General Accounting Office; and
 2 “(D) any position excluded from the application
 3 of this chapter by the President because of its confidential
 4 or policymaking character.
 5 “(b) Federal personnel management, shall be imple-
 6 mented consistent with the following merit system principles:
 7 “(1) Recruitment should be from qualified candidates
 8 from appropriate sources in an endeavor to achieve a work
 9 force from all segments of society, and selection and ad-
 10 vancement should be determined solely on the basis of rela-
 11 tive ability, knowledge, and skills, after fair and open com-
 12 petition which assures that all receive equal opportunity.
 13 “(2) All applicants and employees should receive fair
 14 and equitable treatment in all aspects of personnel manage-
 15 ment without regard to political affiliation, race, color, reli-
 16 gion, national origin, sex, marital status, age, or handicapping
 17 condition, and with proper regard for their privacy and
 18 constitutional rights.
 19 “(3) Equal pay should be provided for work of equal
 20 value to attract and retain highly qualified personnel, with
 21 appropriate consideration of both national and local rates
 22 paid by non-Federal employers, and appropriate incentives
 23 and recognition should be provided for excellence in
 24 performance.
 25 “(4) All employees should maintain high standards of

1 integrity, conduct, and concern for the public interest.
 2 “(5) The Federal work force should be used efficiently
 3 and effectively.
 4 “(6) Employees should be retained on the basis of the
 5 adequacy of their performance, inadequate performance
 6 should be corrected, and employees should be separated who
 7 cannot or will not improve their performance to meet re-
 8 quired standards.
 9 “(7) Employees should be provided effective education
 10 and training in cases in which such education and training
 11 would result in better organizational and individual perform-
 12 ance.
 13 “(8) Employees should be—
 14 “(A) protected against arbitrary action, personal
 15 favoritism, or coercion for partisan political purposes,
 16 and
 17 “(B) prohibited from using their official authority
 18 or influence for the purpose of interfering with or affect-
 19 ing the result of an election or a nomination for election.
 20 “(c) Pursuant to his authority under this title, the
 21 President may take such actions, including the issuance of
 22 rules, regulations, or directives, as the President determines
 23 are necessary to assure that personnel management in the
 24 agencies covered by this section is based on and embodies
 25 the merit system principles.

1 "§ 2302. Prohibited personnel practices

2 " (a) For the purpose of this section, 'personnel action'
3 means—

4 " (1) an appointment;

5 " (2) a promotion;

6 " (3) an action under chapter 75 of this title or
7 other disciplinary or corrective action;

8 " (4) a detail, transfer, or reassignment;

9 " (5) a reinstatement;

10 " (6) a restoration;

11 " (7) a reemployment;

12 " (8) a performance evaluation under chapter 43 of
13 this title;

14 " (9) a decision concerning pay, benefits, awards,
15 or education, or training if it may reasonably be ex-
16 pected to lead to a personnel action within the meaning
17 of this subsection; or

18 " (10) any other action which results in a significant
19 change in working conditions or status;

20 with respect to an employee in, or applicant for, a position
21 in the competitive service, a career position in the Senior
22 Executive Service, or a position in the excepted service in
23 an executive agency other than a position which is excepted

1 from the competitive service because of its confidential or
2 policymaking character.

3 " (b) Any employee who has authority to take, direct
4 others to take, recommend, or approve any personnel action,
5 shall not, with respect to such authority—

6 " (1) discriminate for or against any employee or
7 applicant for employment on the basis of race, color,
8 religion, sex, or national origin as prohibited by the
9 Civil Rights Act of 1964, as amended (42 U.S.C.
10 2000e-16), age as prohibited by the Age Discrimination
11 in Employment Act of 1967, as amended (29 U.S.C.
12 631, 633a), handicapping condition as prohibited by
13 section 501 of the Rehabilitation Act of 1973 (29 U.S.C.
14 791) and marital status or political affiliation, under
15 applicable law and regulation;

16 " (2) solicit or consider any recommendation or
17 statement, oral or written, with respect to any individual
18 who requests or is under consideration for any person-
19 nel action unless such recommendation or statement is
20 based on the personal knowledge or records of the person
21 furnishing it and consists of—

22 " (A) an evaluation of the work performance,
23 ability, aptitude, or general qualifications of such in-
24 dividual; or

1 “(B) an evaluation of the character, loyalty,
2 or suitability of such individual;

3 “(3) coerce the political activity of any person,
4 obligate any person to make any political contribution
5 (including providing any political service), or take any
6 action against any employee or applicant as a reprisal
7 for the refusal of any person to engage in such political
8 activity, make such contribution, or provide such service;

9 “(4) willfully deceive or obstruct any person with
10 respect to such person’s right to compete for Federal
11 employment;

12 “(5) influence any person to withdraw from com-
13 petition for any position for the purpose of improving
14 or injuring the prospects of any applicant for employ-
15 ment;

16 “(6) grant any preference or advantage not author-
17 ized by law, rule, or regulation to any employee or
18 applicant for employment (including defining the scope
19 or manner of competition or the requirements for any
20 position) for the purpose of improving or injuring the
21 prospects of any particular individual or category of
22 individuals;

23 “(7) appoint, employ, promote, advance, or advo-
24 cate for appointment, employment, promotion, or

1 advancement, in or to a civilian position, any individual
2 who is a relative (as defined in section 3110(a)(3)
3 of this title) of such employee if such position is in
4 the agency in which such employee is serving as a
5 public official (as defined in section 3110(a)(2) of
6 this title) or over which such employee exercises juris-
7 diction or control as such an official;

8 “(8) take action or threaten to take action against
9 any employee or applicant for employment as a reprisal
10 for the exercise of any appeal right granted by law,
11 rule, or regulation; or for the disclosure, not expressly
12 prohibited by law, of information concerning violations
13 of law, rules, or regulations, or gross waste, or any sub-
14 stantial and specific danger to the public health or safety;
15 *Provided*, That this paragraph does not apply to the
16 disclosure of any information described in sections 552
17 (b) (1), (3), (4), (6), and (7) of this title, or to
18 the disclosure of any information which is knowingly
19 false or made with willful disregard for its truth or
20 falsity;

21 The term ‘prohibited personnel practice’, when used in
22 this title, means action described in this subsection. This
23 section is not authority to withhold information from Con-
24 gress or take any personnel action against an employee who
25 discloses information to Congress.

1 “(c) The head of each executive agency shall be re-
 2 sponsible for the prevention of prohibited personnel prac-
 3 tices, for the compliance with and enforcement of applicable
 4 civil service laws, rules, and regulations, as well as other
 5 aspects of personnel management. Any individual to whom
 6 the head of an executive agency delegates authority for
 7 personnel management, or for any aspect thereof, shall be
 8 similarly responsible within the limits of the delegation.

9 “(d) This section shall not be construed to extinguish
 10 or lessen any effort to achieve equal employment opportunity
 11 through affirmative action or any right or remedy available
 12 to any employee or applicant for employment in the civil
 13 service under the provisions of the Civil Rights Act of 1964,
 14 as amended (42 U.S.C. 2000e-16), prohibiting discrimina-
 15 tion based on race, color, religion, sex, or national origin, the
 16 Age Discrimination in Employment Act of 1976, as
 17 amended (29 U.S.C. 631, 633a), prohibiting age discrimi-
 18 nation, section 501 of the Rehabilitation Act of 1973 (29
 19 U.S.C. 791), prohibiting discrimination on account of handi-
 20 capping condition, or under any other applicable law or
 21 regulations prohibiting discrimination on such grounds or on
 22 the basis of marital status or political affiliation.

23 **“§ 2303. Responsibility of the General Accounting Office**

24 “If ordered by either House of Congress, or upon his
 25 own initiative, or if requested by any committee of the House

1 of Representatives or the Senate, the Comptroller General
 2 shall conduct audits and reviews to determine compliance
 3 with the laws, rules, and regulations governing employment
 4 in the executive branch and in the competitive service and to
 5 assess the effectiveness and soundness of Federal personnel
 6 management.”.

7 (b) (1) The table of chapters for part III of title 5,
 8 United States Code, is amended by adding after the item
 9 relating to chapter 21 the following new item:

“23. Merit system principles..... 2301.”

10 (2) Section 7153 of title 5, United States Code, is
 11 amended—

12 (A) by striking out “Physical handicap” in the
 13 catch-line and inserting in lieu thereof “Handicapping
 14 condition”; and

15 (B) by striking out “physical handicap” each place
 16 it appears in the text and inserting in lieu thereof “handi-
 17 capping condition”.

18 (3) The table of sections for chapter 71 of title 5,
 19 United States Code, is amended by striking out “physical
 20 handicap” in the item relating to section 7153 and inserting
 21 in lieu thereof “handicapping condition”.

1 TITLE II—CIVIL SERVICE FUNCTIONS; PER-
2 FORMANCE APPRAISAL; ADVERSE ACTIONS

3 OFFICE OF PERSONNEL MANAGEMENT

4 SEC. 201. (a) Chapter 11 of title 5, United States
5 Code, is amended to read as follows:

6 "CHAPTER 11.—OFFICE OF PERSONNEL
7 MANAGEMENT

"Sec.

"1101. Office of Personnel Management.

"1102. Director; Deputy Director; Associate Directors.

"1103. Functions of the Director.

"1104. Delegation of authority for personnel management.

8 "§ 1101. Office of Personnel Management

9 "The Office of Personnel Management is an independent
10 establishment in the Executive branch. The Office shall have
11 an official seal which shall be judicially noticed and shall
12 have its principal office in the District of Columbia, but it
13 may have field offices in other appropriate locations.

14 "§ 1102. Director; Deputy Director; Associate Directors

15 "(a) There is at the head of the Office of Personnel Man-
16 agement a Director of the Office of Personnel Management
17 appointed by the President, by and with the advice and
18 consent of the Senate.

19 "(b) There is in the Office a Deputy Director of the

1 Office of Personnel Management appointed by the President,
2 by and with the advice and consent of the Senate. The
3 Deputy Director shall perform such functions as the Director
4 may from time to time prescribe and shall act as Director
5 during the absence or disability of the Director or in the event
6 of a vacancy in the Office of the Director.

7 "(c) No person shall, while serving as Director or
8 Deputy Director, serve in any other office or position in the
9 Government of the United States except as otherwise pro-
10 vided by law.

11 "(d) There shall be within the Office of Personnel Man-
12 agement not more than five Associate Directors, who shall be
13 appointed by the Director as executives in the Senior Execu-
14 tive Service, and who shall have such title as the Director
15 shall from time to time determine.

16 "§ 1103. Functions of the Director

17 "The following functions are vested in the Director of
18 the Office of Personnel Management, and shall be performed
19 by the Director, or by such employees of the Office as the
20 Director designates—

21 "(1) securing accuracy, uniformity, and justice in
22 the functions of the Office;

23 "(2) appointing individuals to be employed by the
24 Office;

25 "(3) directing and supervising employees of the

1 Office, distributing business among employees and organi-
2 zational units of the Office, and directing the internal
3 management of the Office;

4 “(4) directing the preparation of requests for ap-
5 propriations and the use and expenditure of funds;

6 “(5) executing, administering, and enforcing—

7 “(A) the civil service rules and regulations of
8 the President and the Office and the statutes gov-
9 erning the same, and

10 “(B) the other activities of the Office including
11 retirement classification, and training activities;
12 except to the extent that the Merit Systems Protection
13 Board or the Special Counsel is authorized to exercise
14 such executing, administering or enforcement functions;

15 “(6) reviewing the operations under chapter 87 of
16 this title;

17 “(7) conducting, or otherwise providing for the
18 conduct of, studies and research into methods of assuring
19 improvements in personnel management; and

20 “(8) aiding the President, as the President may
21 request, in preparing such civil service rules as the Pres-
22 ident prescribes, and otherwise advising the President on
23 actions which may be taken to promote an efficient civil
24 service and a systematic application of the merit system
25 principles, including recommending policies relating to

1 the selection, promotion, transfer, performance, pay,
2 conditions of service, tenure, and separation of
3 employees.

4 “§ 1104. Delegation of authority for personnel management

5 “(a) Notwithstanding any other provision of this title—

6 “(1) the President may delegate, in whole or in
7 part, authority for personnel management functions,
8 including authority for competitive examinations, to the
9 Director of the Office of Personnel Management; and

10 “(2) the Director may delegate, in whole or in
11 part, any function vested in the Director, including au-
12 thority for competitive examinations, to the heads of
13 agencies in the executive branch and other agencies
14 employing persons in the competitive service.

15 “(h) Authority to conduct competitive examinations
16 delegated to the head of an agency under subsection

17 “(a) (2) of this section shall be in accord with standards
18 issued by the Office of Personnel Management and shall be
19 subject to oversight by that Office to assure application of
20 merit system principles in examinations and selections.

21 “(c) Personnel actions taken by an agency under the
22 authority of this section which are contrary to any law, regu-
23 lation, or standard issued by the Office of Personnel Manage-
24 ment shall be canceled by the agency upon the direction of
25 the Office of Personnel Management.”

1 (b) (1) Section 5313 of title 5, United States Code, is
 2 amended by inserting at the end thereof the following new
 3 paragraph:

4 “(24) Director of the Office of Personnel Man-
 5 agement.”

6 (2) Section 5314 of such title is amended by inserting
 7 at the end thereof the following new paragraph:

8 “(67) Deputy Director of the Office of Personnel
 9 Management.”

10 (3) Section 5315 of such title is amended by inserting
 11 at the end thereof the following new paragraph:

12 “(122) Associate Directors of the Office of Per-
 13 sonnel Management (5).”

14 (c) (1) The heading of part I of title 5, United States
 15 Code, is amended by striking out “The United States Civil
 16 Service Commission” and inserting in lieu thereof “Civil
 17 Service Functions and Responsibilities”.

18 (2) The item relating to chapter 11 in the table of
 19 chapters for part II of such title is amended by striking out
 20 “Organization” and inserting in lieu thereof “Office of Person-
 21 nel Management”.

22 MERIT SYSTEMS PROTECTION BOARD AND SPECIAL
 23 COUNSEL

24 SEC. 202. (a) Title 5, United States Code, is amended
 25 by inserting after chapter 11 the following new chapter:

1 “CHAPTER 12.—MERIT SYSTEMS PROTECTION
 2 BOARD AND SPECIAL COUNSEL

“Sec.

“1201. Appointment of members of the Merit Systems Protection Board.

“1202. Term of office; filling vacancies; removal.

“1203. Chairman; Vice Chairman.

“1204. Special Counsel; appointment and removal.

“1205. Powers and functions of the Merit Systems Protection Board;
 subpoenas.

“1206. Authority and responsibilities of the Special Counsel.

“1207. Hearings and decisions on complaints filed by the Special Counsel.

3 “§1201. Appointment of members of the Merit Systems
 4 Protection Board

5 “The Merit Systems Protection Board is composed of
 6 3 members appointed by the President, by and with the
 7 advice and consent of the Senate, not more than 2 of whom
 8 may be adherents of the same political party and none of
 9 whom may hold another office or position in the Government
 10 of the United States. The Chairman and members of the
 11 Board shall be individuals who, by demonstrated activity,
 12 background, training, or experience are especially qualified
 13 to carry out the functions of the Board. The Board shall have
 14 an official seal which shall be judicially noticed. The Board
 15 shall have its principal office in the District of Columbia
 16 and may have field offices in other appropriate locations.

17 “§ 1202. Term of office; filling vacancies; removal

18 “(a) The term of office of each member of the Merit
 19 Systems Protection Board is 7 years.

20 “(b) A Board member appointed to fill a vacancy oc-

1 curring before the end of a term of office of his predecessor
2 serves for the remainder of that term. The appointment is
3 subject to the requirements of section 1201 of this title.

4 “(c) Any Board member appointed for a 7-year term
5 may not be reappointed to any following term but may con-
6 tinue to serve until a successor is appointed and has qualified,
7 except that such member may not continue to serve for more
8 than one year after the date on which the term of the mem-
9 ber would otherwise expire under this subsection.

10 “(d) A Board member may be removed by the Pres-
11 ident only for inefficiency, neglect of duty, or malfeasance in
12 office.

13 “(e) Any term of office of any member of the Merit
14 Systems Protection Board serving on July 1, 1978, shall
15 continue in effect until such time as such term would expire
16 under section 1102 of title 5, United States Code, as in effect
17 immediately before the effective date of this Act, and upon
18 expiration of such term, appointments to such office shall be
19 made under this section.

20 “§ 1203. Chairman; Vice Chairman

21 “(a) The President shall from time to time appoint, by
22 and with the advice and consent of the Senate, one of the
23 Board members to serve as the Chairman of the Merit Sys-
24 tems Protection Board. The Chairman is the chief executive
25 and administrative officer of the Board. The Chairman may

1 continue to serve as Chairman until a successor is appointed
2 and qualified.

3 “(b) The President shall from time to time designate
4 one of the Board members as Vice Chairman of the Board.
5 During the absence or disability of the Chairman, or when
6 the office is vacant, the Vice Chairman shall perform the
7 functions vested in the Chairman.

8 “(c) During the absence or disability of both the
9 Chairman and Vice Chairman, or when both offices are
10 vacant, the remaining Board member shall perform the
11 functions vested in the Chairman.

12 “§ 1204. Special Counsel; appointment and removal

13 “The Special Counsel of the Merit Systems Protection
14 Board shall be appointed by the President from attorneys,
15 by and with the advice and consent of the Senate, for a
16 term of 7 years.

17 “§ 1205. Powers and functions of the Merit Systems Pro-
18 tection Board; subpoenas

19 “(a) (1) The Merit Systems Protection Board shall—
20 “(A) hear, adjudicate, or provide for the hearing
21 or adjudication, of all matters within the jurisdiction
22 of the Board under this title, section 2023 of title 38,
23 and any other law, rule, or regulation; and take final
24 action on any such matter;

25 “(B) order any Federal agency or employee to

1 comply with any order or decision issued by the Board
 2 under the authority granted under subparagraph (A),
 3 and enforce compliance with any such order;

4 “(C) conduct, from time to time, special studies
 5 relating to the civil service and to other merit systems
 6 in the executive branch, and report to the President
 7 and to the Congress as to whether the public interest
 8 in a civil service free of prohibited personnel practices
 9 is being adequately protected; and

10 “(D) order a stay of any personnel action which is
 11 appealable to the Board under section 7701 of this title
 12 pending the outcome of such appeal if the Board deter-
 13 mines that the substantial and adverse impact of the
 14 action on the employee, and the likelihood of the em-
 15 ployee prevailing on appeal, justifies the granting of
 16 such extraordinary relief.

17 “(2) (A) In any proceeding under paragraph 1 (A),
 18 any member of the Board may request from the Director of
 19 the Office of Personnel Management an advisory opinion
 20 concerning the interpretation of any rule, regulation, or other
 21 policy directive promulgated by the Office of Personnel
 22 Management.

23 “(B) If the interpretation or application of any rule,
 24 regulation, or policy directive of the Office of Personnel
 25 Management is at issue in any proceeding under paragraph

1 1 (A), the Board shall promptly notify the Director of the
 2 Office of Personnel Management, and the Director shall have
 3 the right to intervene in any such proceeding.

4 “(3) In enforcing compliance with any order under
 5 paragraph (1) (B), the Board may order that any employee
 6 charged with complying with such order shall not be entitled
 7 to receive payment for service as an employee during any
 8 period beginning after the date specified in the order and
 9 during which the order has not been complied with. The
 10 Board shall certify to the Comptroller General of the United
 11 States that such an order has been issued and no payment
 12 shall be made out of the Treasury of the United States for
 13 any service specified in such order.

14 “(4) In carrying out any study under paragraph (1)
 15 (C), the Board shall make such inquiries as may be neces-
 16 sary and, unless otherwise prohibited by law, shall have
 17 access to personnel records or information collected by the
 18 Office of Personnel Management and may require additional
 19 reports from other agencies as needed

20 “(b) The Chairman of the Merit Systems Protection
 21 Board shall designate representatives to chair boards of
 22 review established under section 3383 (b) of this title.

23 “(c) The Board may delegate the performance of any
 24 of its administrative functions under this title to any officer
 25 or employee of the Board.

1 “(d) The Board shall have the authority to prescribe
2 such regulations as may be necessary for the performance
3 of its functions. The Board shall not issue advisory opinions.
4 The Board may issue rules and regulations, consistent with
5 statutory requirements, defining its review procedures, in-
6 cluding the time limits within which an appeal must be filed
7 and the rights and responsibilities of the parties to an appeal.
8 All regulations of the Board shall be published in the Federal
9 Register.

10 “(e) Except as provided in section 518 of title 28,
11 relating to litigation before the Supreme Court, attorneys
12 designated by the Chairman of the Board may appear for,
13 and represent the Board in, any civil action brought in con-
14 nection with any function carried out by the Board pursuant
15 to this title or as otherwise authorized by law.

16 “(f) The Chairman of the Board may appoint such
17 personnel as may be necessary to perform the functions of
18 the Board. Any appointment made under this subsection
19 to a confidential or policymaking position, or to a position
20 in the Senior Executive Service, shall comply with the pro-
21 visions of this title, except that such appointment shall not
22 be subject to the approval or supervision of the Office of
23 Personnel Management on the Executive Office of the
24 President.

25 “(g) The Board shall prepare and submit to the Presi-

1 dent, and, at the same time, to the appropriate committees of
2 Congress, an annual budget of the expenses of the Board.
3 The President shall include the budget of the Board, as
4 revised by him, as a separate item in the budget required
5 to be transmitted to the Congress under section 11 of
6 title 31.

7 “(h) The Board shall submit to the President and, at
8 the same time, to the appropriate committees of Congress,
9 any proposed legislation relating to the recommendations of
10 the Board in connection with any of its functions under this
11 title.

12 “(i) (1) The Board, the Special Counsel, any adminis-
13 trative law judge appointed under section 3105 of this title,
14 and any member or employee of the Board designated by the
15 Board may—

16 “(A) issue subpoenas requiring the attendance and
17 testimony of witnesses and the production of documen-
18 tary or other evidence from any place in the United
19 States or any territory or possession thereof, the Com-
20 monwealth of Puerto Rico, or the District of Columbia,
21 and

22 “(B) administer oaths, take or order the taking of
23 depositions, order responses to written interrogatories,
24 examine witnesses, and receive evidence.

25 “(2) In the case of contumacy or failure to obey a

1 subpoena issued under paragraph (1) (A), the United States
 2 district court for the judicial district in which the person to
 3 whom the subpoena is addressed resides or is served may issue
 4 an order requiring such person to appear at any designated
 5 place to testify or to produce documentary or other evidence.
 6 Any failure to obey the order of the court may be punished
 7 by the court as a contempt thereof.

8 “(3) Witnesses (whether appearing voluntarily or
 9 under subpoena) shall be paid the same fee and mileage
 10 allowances which are paid subpoenaed witnesses in the courts
 11 of the United States.

12 **“§ 1206. Authority and responsibilities of the Special Coun-
 13 sel**

14 “(a) The Special Counsel may receive and investigate
 15 allegations of prohibited personnel practices described in
 16 section 2302 (b) of this title and may take such action as
 17 provided in this section.

18 “(b) Upon the request of any person, the Special
 19 Counsel shall conduct an investigation if the Special Counsel
 20 has reason to believe that a personnel action was taken, or
 21 is to be taken, as a result of a prohibited personnel practice.

22 “(c) (1) In cases involving alleged reprisal or threat of
 23 reprisal for the disclosure of information described in section
 24 2302 (b) (8) of this title or, in cases involving alleged
 25 political reprisal, coercion, or contributions prohibited under

1 section 2302 (b) (3) of this title, the Special Counsel, except
 2 as provided in paragraph (2) of this subsection—

3 “(A) shall not, during the investigation, disclose
 4 the identity of the complainant, in cases involving al-
 5 leged reprisals, or threat of reprisal for disclosures, with-
 6 out the consent of the complainant unless the Special
 7 Counsel determines such disclosure is unavoidable during
 8 the course of the investigation;

9 “(B) may order a stay of any personnel action if
 10 (i) the action would have a substantial and adverse
 11 impact on the financial or professional status of the
 12 employee and (ii) the likelihood of the employee pre-
 13 vailing upon a final determination made under sub-
 14 paragraph (c) justifies the granting of such extraor-
 15 dinary relief; and

16 “(C) if the Special Counsel determines, in writing,
 17 that a reprisal or a prohibited political action has been
 18 taken, or threatened, against an employee or applicant,
 19 may report the matter to the head of the agency in-
 20 volved, and require the head of such agency to take any
 21 action ordered by the Special Counsel, including can-
 22 celing personnel actions having a substantial and adverse
 23 impact on the financial or professional status of the
 24 employee or applicant and stopping personnel practices

1 which result in the harassment of the employee or
2 applicant.

3 Refusal to carry out actions ordered by the Special Counsel
4 may be cause for disciplinary action by the Special Counsel
5 under subsection (i) of this section.

6 “(2) Paragraph (1) (B) and (C) of this subsection
7 shall not apply in the case of a personnel action which is of
8 a type that is appealable to the Merit Systems Protection
9 Board under section 7701 of this title.

10 “(d) If the Special Counsel determines that there are
11 prohibited personnel practices which require corrective ac-
12 tion, the Special Counsel shall report his findings and recom-
13 mendations to the Merit Systems Protection Board, the
14 agency affected and to the Office of Personnel Management,
15 and may report such findings to the President. The Special
16 Counsel may include in such report suggestions as to what
17 corrective action should be taken, but the final decision on
18 what corrective action should be taken shall be made by the
19 agency involved, subject to guidance and instruction from
20 the Office of Personnel Management. The Special Counsel
21 may furnish a copy of such report to the Congress.

22 “(e) If, in the course of the investigation, the Special
23 Counsel determines that there is reasonable cause to believe
24 that a criminal violation by an employee has occurred, the

1 Special Counsel shall report such determination to the At-
2 torney General, and to the head of the agency involved,
3 and shall submit a copy of such report to the Director of
4 the Office of Personnel Management and the Director of the
5 Office of Management and Budget. Any other violation of
6 any law, rule, or regulation shall be reported to the head
7 of the agency involved. The Special Counsel may require,
8 within 30 days of receipt of such report, a certification
9 by the head of the agency which states—

10 “(1) that such head has personally reviewed the
11 report; and

12 “(2) what action has been, or is to be taken, and
13 when such action will be completed.

14 The Special Counsel shall maintain and make available to
15 the public a list of noncriminal matters referred to agency
16 heads and their certifications of actions taken;

17 “(f) (1) The Special Counsel may receive allegations
18 of possible violations of laws, rules, or regulations or gross
19 waste, or concerning malfeasance, misfeasance or nonfeas-
20 ance, or concerning specific and substantial dangers to public
21 health or safety. Within 15 days of the receipt of the allega-
22 tion, the Special Counsel shall forward all allegations which
23 he finds are not clearly insubstantial to the head of the
24 agency which the allegation concerns.

25 “(2) Within 60 days from receipt of the allegation

1 forwarded by the Special Counsel pursuant to paragraph
 2 (f) (1), the head of the agency shall conduct a thorough
 3 investigation and submit a report, as described in paragraph
 4 (3), to the Comptroller General and the Special Counsel,
 5 unless the agency head and the Special Counsel agree to an
 6 additional 30-day extension. Where appropriate, the agency
 7 head shall delegate the responsibility for the investigation
 8 to the Inspector General or other appropriate unit within
 9 the agency. The Special Counsel shall notify Congress of
 10 each investigation referred to an agency which is not com-
 11 pleted within 90 days from the date the allegation was
 12 referred.

13 “(3) Upon completion of such investigation, the head
 14 of the agency shall report in writing to the Special Counsel
 15 and the Comptroller General. Such report shall include—

16 “(A) a summary of the allegations which initiated
 17 the investigation;

18 “(B) a detailed description of the conduct of the
 19 investigation;

20 “(C) a summary of the evidence adduced from the
 21 investigation;

22 “(D) a listing of any laws, rules, or regulations
 23 found to have been violated; and

24 “(E) a statement of the corrective action taken,
 25 planned, or recommended as a result of the investigation.

1 Either the Special Counsel or the Comptroller General may,
 2 in his discretion, forward any such report to the appropriate
 3 committee of Congress.

4 “(4) The Comptroller General may investigate any
 5 matter referred to him by an agency head under paragraph
 6 (3). The Comptroller General shall file with Congress a
 7 semiannual report, summarizing all reports it receives from
 8 agency heads pursuant to this section.

9 “(g) (1) In addition to the authority otherwise pro-
 10 vided in this section, the Special Counsel may, except as
 11 provided in paragraph (2) of this subsection, conduct an
 12 investigation of any other alleged prohibited practice which
 13 consists of—

14 “(A) political activity by any employee which is
 15 prohibited under subchapter III of chapter 73 of this
 16 title;

17 “(B) political activity by any State or local officer
 18 or employee which is prohibited under chapter 15 of
 19 this title;

20 “(C) arbitrary or capricious withholding of infor-
 21 mation prohibited under section 552 of this title;

22 “(D) such personnel practices as are prohibited
 23 by the civil service law, rules and regulations, including
 24 such practices relating to political intrusion in personnel
 25 decisionmaking; and

1 “(E) involvement by any employee in any pro-
2 hibited discrimination found by any court or appropriate
3 administrative authority to have occurred in the course
4 of any personnel action.

5 “(2) The Special Counsel shall make no investigation
6 of any allegation of any prohibited practice referred to in sub-
7 paragraph (A), (D), or (E) of paragraph (1) of this
8 subsection if the Special Counsel determines that such allega-
9 tion may be more appropriately resolved under an admin-
10 istrative appeals procedure.

11 “(h) During any investigation initiated under subsection
12 (a) or (e) of this section, no disciplinary action shall be
13 taken against any employee for any alleged prohibited ac-
14 tivity under such investigation or any related activity, with-
15 out the approval of the Special Counsel.

16 “(i) If the Special Counsel determines, after any
17 investigation under this section of any prohibited personnel
18 practice by any employee, that disciplinary action should be
19 taken against such employee because of such prohibited per-
20 sonnel practice, the Special Counsel shall prepare a written
21 complaint against such employee containing such determina-
22 tion and present such complaint together with a statement
23 of supporting facts to the Merit Systems Protection Board
24 or to an administrative law judge appointed under section

1 3105 of this title and designated by the Board, for a hearing
2 and decision pursuant to section 1207.

3 “(j) The Special Counsel may bring disciplinary action,
4 in accordance with the procedures set forth in section 1207
5 of this title against any employee who knowingly and will-
6 fully refuses or fails to comply with an order of the Special
7 Counsel under subsection (c) (1) of this section or an order
8 of the Merit Systems Protection Board.

9 “(k) The Special Counsel may appoint such legal, ad-
10 ministrative, and support personnel as may be necessary
11 to perform the functions of the Special Counsel.

12 “(l) The Special Counsel may prescribe such regula-
13 tions as may be necessary for investigations under this
14 section. Such regulations shall be published in the Federal
15 Register.

16 “(m) The Special Counsel shall not issue any advisory
17 opinion concerning any law, rule, or regulation (other than
18 chapter 15 and subchapter III of chapter 73 of this title,
19 or any rule or regulation thereunder).

20 “(n) The Special Counsel shall submit an annual report
21 to Congress on its activities. Such reports shall describe the
22 work of the Special Counsel, including the number, types,
23 and disposition of allegations of prohibited personnel prac-
24 tices filed with it, investigations conducted by it, and actions
25 initiated by it before the Board, as well as a description of

1 the recommendations and reports made by it to other agen-
 2 cies pursuant to subsection (d) or (e) of this section, and
 3 the actions taken by the agencies as a result of the reports
 4 or recommendations. The report required by this subsection
 5 shall include whatever recommendations for legislation or
 6 other action by Congress the Special Counsel may deem
 7 appropriate.

8 **“§1207. Hearings and decisions on complaints filed by the**
 9 **Special Counsel**

10 “Any employee against whom a complaint has been
 11 presented to the Merit Systems Protection Board or an
 12 administrative law judge under section 1206 of this title
 13 shall be entitled to an agency hearing on the record before
 14 the Board or an administrative law judge appointed under
 15 section 3105 of this title and designated by the Board. In
 16 the case of a State or local officer or employee under chapter
 17 15 of this title, such hearing shall be conducted in accordance
 18 with section 1505 of this title. There may be no administra-
 19 tive appeal from a final order of the Board. A final order of
 20 the Board may impose disciplinary action including a reprimand,
 21 suspension, a civil penalty not to exceed \$1,000, or,
 22 in the case of any employee other than a Presidential ap-
 23 pointee, removal, demotion, or debarment from Federal em-
 24 ployment for a period not to exceed 5 years. In the case
 25 of any State or local officer or employee under chapter 15

1 of this title, the Board shall act in accordance with section
 2 1506 of this title. An employee subject to a final order
 3 imposing disciplinary action may obtain judicial review
 4 of the final order of the Board in the United States Court of
 5 Appeals for the circuit in which such employee was employed
 6 at the time of the action.”.

7 (b) (1) Section 5314(17) of title 5, United States
 8 Code, is amended by striking out “Chairman of the United
 9 States Civil Service Commission” and inserting in lieu
 10 thereof “Chairman of the Merit Systems Protection Board”.

11 (2) Section 5315(66) of such title is amended by
 12 striking out “Members, United States Civil Service Com-
 13 mission” and inserting in lieu thereof “Members, Merit
 14 Systems Protection Board”.

15 (3) Section 5315 of such title is further amended by
 16 adding at the end thereof the following new paragraph:

17 “(123) Special Counsel of the Merit Systems
 18 Protection Board.”.

19 (4) Paragraph (99) of section 5316 of such title is
 20 hereby repealed.

21 (c) The table of chapters for part II of title 5, United
 22 States Code, is amended by inserting after the item relating
 23 to chapter 11 the following new item:

“12. Merit Systems Protection Board and Special Counsel.... 1201”.

PERFORMANCE APPRAISALS

1
2 SEC. 203. (a) Chapter 43 of title 5, United States
3 Code, is amended to read as follows:

4 "Chapter 43.—PERFORMANCE APPRAISAL

"SUBCHAPTER I—PERFORMANCE APPRAISAL—GENERAL

"Sec.

"4301. Definitions.

"4302. Establishment of performance appraisal systems.

"4303. Actions based on unacceptable performance.

"4304. Responsibilities of Office of Personnel Management.

"4305. Regulations.

5 "§ 4301. Definitions

6 "For the purpose of this subchapter—

7 "(1) 'agency' means—

8 "(A) an Executive agency;

9 "(B) the Administrative Office of the United
10 States Courts; and

11 "(C) the Government Printing Office;

12 but does not include—

13 "(i) the General Accounting Office;

14 "(ii) the Central Intelligence Agency, the De-
15 fense Intelligence Agency, and the National Secu-
16 rity Agency, and, as determined by the President,
17 an Executive agency, or unit thereof, whose prin-
18 cipal function is the conduct of foreign intelligence
19 or counterintelligence activities;

1 "(iii) a Government corporation; and

2 "(iv) an agency or unit of an agency excluded
3 from coverage of this subchapter by regulation of
4 the Office of Personnel Management; and5 "(2) 'employee' means an individual employed in
6 or under an agency, but does not include—7 "(A) an employee outside the United States
8 who is paid in accordance with local native pre-
9 vailing wage rates for the area in which employed;10 "(B) an individual in the Foreign Service of
11 the United States;12 "(C) a physician, dentist, nurse, or other em-
13 ployee in the Department of Medicine and Surgery,
14 Veterans' Administration, whose pay is fixed under
15 chapter 73 of title 38;16 "(D) a hearing examiner appointed under
17 section 3105 of this title;18 "(E) an individual in the Senior Executive
19 Service;20 "(F) an individual appointed by the President;
21 or22 "(G) an individual occupying a position not
23 in the competitive service excluded from coverage
24 of this subchapter by regulations of the Office of
25 Personnel Management.

1 “(3) ‘unacceptable performance’ means perform-
2 ance which fails to meet established requirements in
3 one or more critical elements of the job.

4 **“§ 4302. Establishment of performance appraisal systems**

5 “(a) Each agency shall develop one or more perform-
6 ance appraisal systems which—

7 “(1) provide for periodic appraisals of job perform-
8 ance of employees;

9 “(2) encourage employee participation in estab-
10 lishing performance objectives; and

11 “(3) use the results of performance appraisals as
12 a basis for training, rewarding, reassigning, promoting,
13 demoting, retaining, and separating employees.

14 “(b) Under such regulations as the Office of Personnel
15 Management shall prescribe, each performance appraisal
16 system shall provide for—

17 “(1) establishing performance standards for each
18 employee under such system, communicating such stand-
19 ards to such employee at the beginning of an appraisal
20 period, and evaluating such employee during such period
21 on such standards;

22 “(2) recognizing and rewarding employees whose
23 performance so warrants;

24 “(3) assisting employees whose performance is un-
25 acceptable to improve; and

1 “(4) reassigning, demoting, or separating em-
2 ployees whose performance continues to be unacceptable.

3 **“§ 4303. Actions based on unacceptable performance**

4 “(a) Subject to the provisions of this section, the head
5 of an agency may at any time demote or remove an employee
6 whose performance is unacceptable.

7 “(b) An employee subject to demotion or removal from
8 the service under this section is entitled to—

9 “(1) at least 30 days’ advance written notice of
10 the proposed action which identifies the expected stand-
11 ard of performance and the areas in which the employee’s
12 performance is unacceptable;

13 “(2) an attorney or other representative;

14 “(3) reply to the notice orally and in writing;

15 “(4) an opportunity during the notice period to
16 demonstrate acceptable performance; and

17 “(5) a written decision which states the reasons for
18 the decision and which, unless proposed by the agency
19 head, has been concurred in by an employee who is in a
20 higher position than the employee who proposed the
21 action.

22 “(c) The head of an agency may, under regulations
23 prescribed by such agency head, extend the notice period
24 under subsection (b) of this section for not more than 30
25 days. An agency head may extend such a notice period for

1 more than 30 days only in accordance with regulations issued
 2 by the Office of Personnel Management. The decision to
 3 retain, remove, or demote an employee shall be made within
 4 30 days after the date of the expiration of the notice period
 5 and may take into account other failures to perform accepta-
 6 bly during the 1-year period ending on the date on which
 7 the action is commenced.

8 “(d) If no action is taken because of performance
 9 improvement during the notice period and the employee’s
 10 performance continues to be acceptable for one year from
 11 the date of the written advance notice provided under sub-
 12 section (b) of this section, any entry or other notation of
 13 the unacceptable performance shall be removed from official
 14 records relating to such employee.

15 “(e) An employee who is a preference eligible or is
 16 in the competitive service and who has been demoted or
 17 removed under the provisions of subsection (b) of this sec-
 18 tion may appeal the action to the Merit Systems Protection
 19 Board. The appeal shall be conducted in accordance with
 20 the procedures established in section 7701 of this title. The
 21 appeals officer shall conduct an evidentiary hearing only if
 22 there are disputes concerning material issues of fact requiring
 23 presentation of evidence. When there is no genuine issue
 24 as to any material fact, the appeals officer shall grant a
 25 summary decision for the party entitled to such decision as

1 a matter of law. The decision of the agency shall be sus-
 2 tained by the appeals officer unless the employee shows
 3 that—

4 “(1) the agency’s procedures contained error that
 5 substantially impaired the rights of the employee;

6 “(2) the demotion or removal was based on dis-
 7 crimination prohibited by section 2302 (b) (1) of this
 8 title; or

9 “(3) the decision to demote or remove was arbi-
 10 trary or capricious.

11 “(f) This section does not apply to—

12 “(1) the demotion to the grade previously held of
 13 a supervisor who has not completed the probationary
 14 period under section 3321 (a) (2) of this title in an
 15 initial supervisory position,

16 “(2) the separation or demotion of an individual
 17 in the competitive service who is serving a proba-
 18 tionary or trial period or who has not completed
 19 one year of current continuous employment under other
 20 than a temporary appointment limited to one year or
 21 less, or

22 “(3) the separation or demotion of an individual
 23 in the excepted service who has not completed one year
 24 of current continuous employment in the same or similar
 25 positions.

1 "§ 7502. Actions covered

2 "This subchapter applies to a suspension for 30 days
3 or less, but does not apply to a suspension under section 7532
4 of this title or an action initiated by the Special Counsel un-
5 der section 1206 of this title.

6 "§ 7503. Cause and procedure

7 "(a) Under regulations prescribed by the Office of
8 Personnel Management, an employee may be suspended for
9 30 days or less only for such cause as will promote the
10 efficiency of the service.

11 "(b) An employee against whom a suspension for 30
12 days or less is proposed is entitled to—

13 "(1) a written notice stating reasons for the
14 proposed action;

15 "(2) a reasonable time to answer orally and in
16 writing and to furnish affidavits and other documentary
17 evidence in support of the answer;

18 "(3) be accompanied by an attorney or other
19 representative; and

20 "(4) a written decision at the earliest practicable
21 date.

22 "§ 7504. Regulations

23 "The Office of Personnel Management may prescribe
24 regulations to carry out the purposes of this subchapter.

1 "SUBCHAPTER II—REMOVAL, SUSPENSION FOR
2 MORE THAN 30 DAYS, REDUCTION IN GRADE
3 OR PAY, OR FURLOUGH FOR 30 DAYS OR LESS

4 "§ 7511. Definitions; application

5 "(a) For the purpose of this subchapter—

6 "(1) 'employee' means—

7 "(A) an individual in the competitive service
8 who is not serving a probationary or trial period
9 under an initial appointment or as a supervisor or
10 manager or who has completed 1 year of current
11 continuous employment under other than a tempo-
12 rary appointment limited to 1 year or less; and

13 "(B) a preference eligible in an Executive
14 agency in the excepted service, and a preference
15 eligible in the United States Postal Service and
16 the Postal Rate Commission, who has completed one
17 year of current continuous service in the same or
18 similar positions;

19 "(2) 'suspension' has the meaning as set forth in
20 section 7501 of this title;

21 "(3) 'grade' means a level of classification under
22 a position-classification system;

23 "(4) 'pay' means the rate of basic pay fixed by
24 law or administrative action for the position held by
25 an employee; and

1 " (5) 'furlough' means the placing of an employee
 2 in a temporary status without duties and pay because
 3 of lack of work or funds or other nondisciplinary reasons.
 4 " (b) This subchapter does not apply to an employee—
 5 " (1) whose appointment is required to be con-
 6 firmed by, or made by and with the advice and con-
 7 sent of, the Senate;
 8 " (2) whose position has been determined to be of
 9 a confidential, policy-determining, or policy-advocating
 10 character by—
 11 " (A) the Office of Personnel Management for
 12 a position that it has excepted from the competitive
 13 service; or
 14 " (B) the head of an agency for a position
 15 which is excepted from the competitive service by
 16 statute;
 17 " (3) whose position is in the Senior Executive
 18 Service; or
 19 " (4) whose position is in an agency, or unit thereof,
 20 excepted from coverage of the merit systems principles
 21 pursuant to section 2301 (a) (2) (B) of this title.
 22 " (c) The Office of Personnel Management may provide
 23 for the application of this subchapter to any position or
 24 group of positions excepted from the competitive service by
 25 regulation of the Office of Personnel Management.

1 "§ 7512. Actions covered
 2 "This subchapter applies to—
 3 " (1) a removal;
 4 " (2) a suspension for more than 30 days;
 5 " (3) a reduction in grade;
 6 " (4) a reduction in pay of an amount exceeding
 7 one step of the employee's grade or 3 percent of the
 8 employee's basic pay; and
 9 " (5) a furlough for 30 days or less;
 10 but does not apply to—
 11 " (A) a suspension or removal under section 7532
 12 of this title,
 13 " (B) a reduction in force action under section
 14 3502 of this title,
 15 " (C) the demotion of a supervisor who has not
 16 completed the probationary period under section 3321
 17 (a) (2) of this title in an initial supervisory position
 18 if such demotion is to the grade held immediately be-
 19 fore becoming such a supervisor,
 20 " (D) a demotion or removal under section 4303
 21 of this title, or
 22 " (E) an action initiated by the Special Counsel
 23 under section 1206 of this title.
 24 "§ 7513. Cause and procedure
 25 " (a) Under regulations prescribed by the Office of Per-

1 sonnel Management, an agency may take an action covered
2 by this subchapter against an employee only for such cause
3 as will promote the efficiency of the service.

4 “(b) An employee against whom an action is pro-
5 posed is entitled to—

6 “(1) at least 30 days' advance written notice, ex-
7 cept when there is reasonable cause to believe the em-
8 ployee has committed a crime for which a sentence of
9 imprisonment can be imposed, stating specific reasons
10 for the proposed action;

11 “(2) a reasonable time to answer orally and in
12 writing and to furnish affidavits and other documentary
13 evidence in support of the answer;

14 “(3) be accompanied by an attorney or other repre-
15 sentative; and

16 “(4) a written decision and reasons therefor at the
17 earliest practicable date.

18 “(c) An agency may in its discretion provide by regu-
19 lation for a hearing which may be in lieu of or in addition to
20 the opportunity to answer provided under subsection (b) (2)
21 of this section.

22 “(d) An employee against whom an action is taken
23 under this section is entitled to appeal to the Merit Systems
24 Protection Board under section 7701 of this title.

1 “(e) Copies of the notice of proposed action, the answer
2 of the employee when written, a summary thereof when
3 made orally, the notice of decision and reasons therefor, and
4 any order effecting an adverse action shall be maintained by
5 the agency and shall be furnished to the Merit Systems Pro-
6 tection Board upon its request and to the individual affected
7 upon such individual's request.

8 “§ 7514. Regulations

9 “The Office of Personnel Management may prescribe
10 regulations to carry out the purposes of this subchapter,
11 except as it concerns any matter with respect to which the
12 Merit Systems Protection Board may prescribe regulations.”

13 (b) The table of sections for chapter 75 of title 5,
14 United States Code, is amended by striking out all the items
15 preceding the item relating to subchapter III and inserting
16 in lieu thereof the following:

17 “Chapter 75.—ADVERSE ACTIONS

“SUBCHAPTER I.—SUSPENSION OF 30 DAYS OR LESS

“Sec.

“7501. Definitions; application.

“7502. Actions covered.

“7503. Cause and procedure.

“7504. Regulations.

“SUBCHAPTER II.—REMOVAL, SUSPENSION FOR MORE THAN 30 DAYS, REDUCTION IN GRADE OR PAY, OR FURLOUGH FOR 30 DAYS OR LESS

“7511. Definitions; application.

“7512. Actions covered.

“7513. Cause and procedure.

“7514. Regulations.”

APPEALS

1
2 SEC. 205. Chapter 77 of title 5, United States Code, is
3 amended to read as follows:

4 "Chapter 77.—APPEALS

"Sec.
"7701. Appellate procedures.
"7702. Judicial review of decisions of the Merit Systems Protection Board.

5 "§ 7701. Appellate procedures

6 "(a) An employee, or applicant for employment, may
7 submit an appeal to the Merit Systems Protection Board
8 from any action which is appealable to the Board under
9 any law, rule, or regulation. An appellant shall have the
10 right to be accompanied by an attorney or other representa-
11 tive. The appeal shall be processed in accordance with regu-
12 lations prescribed by the Board.

13 "(b) The Board may refer any case appealable to it to
14 an appeals officer, or a hearing examiner appointed under
15 section 3105 of this title, who shall make a decision—

16 "(1) on the record after receipt of the written
17 representations of the parties; or

18 "(2) where there are material issues of fact re-
19 quiring presentation of evidence, after conducting an
20 evidentiary hearing.

21 "(c) The decision of the agency shall be sustained by
22 the appeals officer or hearing examiner unless the employee
23 shows that—

1 "(1) the agency's procedures contained error that
2 substantially impaired the rights of the employee;

3 "(2) such decision was based on discrimination pro-
4 hibited by section 2302 (b) (1) of this title; or

5 "(3) such decision was arbitrary or capricious.

6 "(d) Any decision under subsection (b) of this section
7 shall be final unless a party to the appeal or the Office of
8 Personnel Management petitions the Board for a review
9 within 30 days after receipt of the decision, unless the Board,
10 for good cause shown, extends the 30-day period or reopens
11 and reconsiders a case on its own motion. One member of the
12 Board may grant a petition or otherwise direct that a deci-
13 sion be reviewed by the full Board. This procedure shall not
14 apply if, by law, a decision of a hearing examiner is required
15 to be acted upon by the Board.

16 "(e) (1) Subject to paragraph (2) of this subsection,
17 in the case of any complaint of discrimination which under
18 title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e
19 et seq.) is required to be heard by the Board, an appeals
20 officer assigned to hear discrimination complaints filed under
21 section 717 (b) of the Civil Rights Act of 1964 (42 U.S.C.
22 2000e-16 (b)) may make a decision on the record or con-
23 duct an evidentiary hearing, as the circumstances may war-
24 rant, pursuant to regulations prescribed by the Board.

25 "(2) An appeal may be heard under paragraph (1) of

1 this subsection if the employee, or applicant for Federal
 2 employment, submits the discrimination complaint to the
 3 agency, which shall have 60 days to resolve the complaint.
 4 If the complaint is not resolved to the satisfaction of the
 5 complainant or if the agency fails to issue a final decision
 6 thereon within 60 days, the complainant may appeal to the
 7 Board. Such an appeal must be submitted within 30 days of
 8 notice to the complainant of the agency's decision or follow-
 9 ing expiration of the 60-day period if the agency has failed
 10 to issue a decision on the complaint. Class complaints of
 11 discrimination may be processed by an appeals officer pur-
 12 suant to regulations prescribed by the Board.

13 “(f) Members of the Board and hearing examiners or
 14 appeals officers assigned by the Board may—

15 “(1) consolidate appeals filed by two or more
 16 appellants, or

17 “(2) join two or more appeals filed by the same
 18 appellant and hear and decide them concurrently,

19 if the Board or the appeals officer, as the case may be,
 20 determines in its discretion that such action could result in
 21 the appeals' being processed more expeditiously and such
 22 action would not prejudice the parties.

23 “(g) Notwithstanding any other provision of law, an
 24 employee who has been affected by an action appealable
 25 to the Board and who alleges that discrimination prohibited

1 by section 2302(b) (1) of this title was a basis for the
 2 action shall have both the issue of discrimination and the
 3 appealable action decided by the Board in the appeal deci-
 4 sion under the Board's appellate procedures.

5 “(h) Members of the Board, hearing examiners, and
 6 appeals officers assigned by the Board may require payment
 7 by the agency which is the losing party to a proceeding
 8 before the Board, of reasonable attorney fees incurred by
 9 an employee, if the employee is the prevailing party and
 10 the deciding official or officials determine that payment by
 11 the agency is warranted on the grounds that the agency's
 12 action was wholly without basis in fact or law.

13 “(i) The Board may, by regulation, provide for alterna-
 14 tive methods for settling matters subject to the appellate
 15 jurisdiction of the Board. A decision under such a method
 16 shall be final, unless the Board reopens and reconsiders a
 17 case at the request of the Office of Personnel Management
 18 under subsection (c) of this section.

19 “(j) The Merit Systems Protection Board may pre-
 20 scribe regulations to carry out the purposes of this section.
 21 “§ 7702. **Judicial review of decisions of the Merit Systems**
 22 **Protection Board**

23 “(a) Any employee, or applicant for employment,
 24 adversely affected or aggrieved by a final order or decision

1 of the Merit Systems Protection Board may obtain judicial
2 review of such an order or decision.

3 “(b) A petition to review a final order or decision
4 of the Board shall be filed in the Court of Claims or a
5 United States Court of Appeals as provided in chapters 91
6 and 158, respectively, of title 28, except for actions filed
7 in the United States district courts under section 717 (c)
8 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16 (c)),
9 under section 15 of the Age Discrimination in Employment
10 Act of 1967 (29 U.S.C. 633a (c)), or under section 8715
11 or 8912 of this title. Notwithstanding any other provision
12 of law, any petition for review must be filed within 30 days
13 after the date the petitioner received notice of the final
14 order or decision of the Board.

15 “(c) In cases filed in the United States Court of Claims
16 or a United States Court of Appeals, the court shall re-
17 view the administrative record for the purpose of determin-
18 ing whether the findings were arbitrary or capricious, and
19 not in accordance with law, and whether the procedures re-
20 quired by statute and regulations were followed. The admin-
21 istrative findings of the Board are conclusive if supported by
22 substantial evidence in the administrative record. If the
23 court determines that further evidence is necessary, it shall
24 remand the case to the Board. The Board, after such fur-

1 ther proceedings as may be required, may modify its findings,
2 and shall file with the court the record of such proceedings.
3 The findings of the Board are conclusive if supported by
4 substantial evidence in the administrative record as sup-
5 plemented.

6 “(d) The Director of the Office of Personnel Manage-
7 ment may obtain review of any final order or decision of
8 the Board by filing a petition for judicial review in the
9 United States Court of Appeals for the District of Columbia
10 if the Director disagrees with a legal interpretation by the
11 Board of a law, rule, or regulation involving personnel
12 management and for which such Office has official respon-
13 sibility. In addition to the named respondent, the Board
14 and all other parties to the proceedings before the Board
15 shall have the right to appear in the proceeding before the
16 Court of Appeals. The granting of the petition for judicial
17 review shall be at the discretion of the Court of Appeals.”

18 TECHNICAL AND CONFORMING AMENDMENTS

19 SEC. 206. Section 2342 of title 28, United States Code,
20 is amended—

- 21 (1) by striking out “and” at the end of paragraph
22 (3),
23 (2) by striking out the period at the end of para-
24 graph (4) and inserting in lieu thereof “; and”, and

1 (3) by adding at the end thereof the following new
2 paragraph:

3 “(5) all final orders of the Merit Systems Protec-
4 tion Board except as provided for in section 7702 (b)
5 of title 5.”

6 TITLE III—STAFFING

7 [Material to be supplied later.]

8 TITLE IV—SENIOR EXECUTIVE SERVICE

9 COVERAGE

10 SEC. 401. (a) Chapter 21 of title 5, United States Code,
11 is amended by inserting after section 2101 the following
12 new section:

13 “§ 2101a. The Senior Executive Service

14 “The ‘Senior Executive Service’ consists of positions
15 properly classified above General Schedule 15 and below
16 Executive Level III, or their equivalents, which meet the
17 definition in section 3132 (a) (2) of this title, which, except
18 for those in the Foreign Service, are not filled by Presidential
19 appointment requiring Senate confirmation, and which are
20 not excluded as provided for in section 3132 (a) (1) and
21 (c) of this title.”

22 (b) Section 2102 (a) (1) of title 5, United States Code,
23 is amended by striking out the “and” at the end of subpara-
24 graph (a); and by inserting an “and” at the end of sub-

1 paragraph (B); and by adding at the end thereof the fol-
2 lowing new subparagraph:

3 “(C) Positions in the Senior Executive Service.”

4 (c) Section 2103 (a) of title 5, United States Code, is
5 amended by striking out the period at the end thereof and
6 inserting in lieu thereof the following: “or the Senior
7 Executive Service.”

8 (d) Section 2108 (3) of title 5, United States Code, is
9 amended—

10 (1) in subparagraph (G) (iii), by striking out
11 the period and inserting in lieu thereof a semicolon; and

12 (2) by inserting at the end thereof the following:
13 “but does not include applicants for, or members of, the
14 Senior Executive Service.”

15 (e) The analysis for such chapter 21 is amended by
16 inserting after the item relating to section 2101 the follow-
17 ing new item:

“2101a. The Senior Executive Service.”

18 AUTHORITY FOR EMPLOYMENT

19 SEC. 402. (a) The chapter analysis of chapter 31 of
20 title 5, United States Code, is amended—

21 (1) by striking out the heading for chapter 31 and
22 inserting in lieu thereof the following:

1 "CHAPTER 31.—AUTHORITY FOR EMPLOYMENT

"SUBCHAPTER I—EMPLOYMENT AUTHORITIES";

2 (2) by inserting at the end thereof the following:

"SUBCHAPTER II—THE SENIOR EXECUTIVE SERVICE

"Sec.

"§131. The Senior Executive Service.

"§132. Definitions and exclusions.

"§133. Authorization for number of Senior Executive Service positions.

"§134. Limitations on noncareer Senior Executive Service appointments.

"§135. Biennial report.

"§136. Regulations.";

3 (3) by inserting after section 3112, as added by:

4 this Act, the following new subchapter:

5 "SUBCHAPTER II—THE SENIOR EXECUTIVE

6 SERVICE

7 "§3131. The Senior Executive Service

8 "(a) It is the purpose of this subchapter to establish.

9 and provide for a Senior Executive Service in order to

10 insure that the executive management of the Government

11 of the United States is of the highest quality and is respon-

12 sive to the needs, policies, and goals of the Nation. The Sen-

13 ior Executive Service shall be administered in such manner

14 as to accomplish the following objectives:

15 "(1) provide for a compensation system, including

16 salary, benefits, incentives, and other conditions of em-

17 ployment, designed to attract, reinforce, and retain ex-

18 cellent Government executives;

1 "(2) establish a positive correlation between execu-

2 tive success and compensation and retention, with

3 executive success to be measured on the basis of in-

4 dividual performance and organizational accomplishment

5 (including such factors as improvements in efficiency,

6 productivity, and quality of work or service, cost sav-

7 ings, and timeliness of performance) ;

8 "(3) assure that executives are accountable and

9 responsible for the effectiveness and productivity of

10 employees under them;

11 "(4) make tenure as an executive contingent on

12 successful performance;

13 "(5) recognize exceptional accomplishment;

14 "(6) enable the head of an agency to reassign

15 and transfer Senior Executive Service employees to

16 best accomplish its mission;

17 "(7) provide for severance pay and placement

18 assistance for those who are removed from the Senior

19 Executive Service for nondisciplinary reasons;

20 "(8) protect Senior Executive Service employees

21 from arbitrary or capricious actions;

22 "(9) provide for both program continuity and

23 policy advocacy in the management of public programs;

24 "(10) maintain a merit personnel system free of

25 improper political interference;

1 “(11) insure accountability for honest, economical,
2 and efficient Government;

3 “(12) assure faithful adherence to the law, rules,
4 and regulations relating to equal employment oppor-
5 tunity, political activity, and conflicts of interests; and

6 “(13) provide for the systematic development of
7 talented and effective executives and for the continuing
8 development of incumbents.

9 **“§ 3132. Definitions and exclusions**

10 “(a) For the purpose of this subchapter—

11 “(1) ‘agency’ means an executive agency, except
12 a Government corporation and the General Accounting
13 Office, but does not include—

14 “(A) any agency or unit thereof excluded from
15 coverage by the President under subsection (c) of
16 this section; or

17 “(B) the Central Intelligence Agency, the De-
18 fense Intelligence Agency and the National Secu-
19 rity Agency, and, as determined by the President,
20 an executive agency or unit thereof whose principal
21 function is the conduct of foreign intelligence or
22 counterintelligence activities.

23 “(2) ‘Senior Executive Service position’ means a
24 position above the GS-15 or equivalent level in which
25 the incumbent—

1 “(A) directs the work of an organizational
2 unit;

3 “(B) is held accountable for the success of
4 specific line or staff programs or projects;

5 “(C) monitors the progress of the organization
6 toward goals and periodically evaluates and makes
7 appropriate adjustments to such goals;

8 “(D) supervises the work of employees other
9 than personal assistants; or

10 “(E) exercises other important policymaking
11 or executive functions;

12 “(3) ‘executive’ means a member of the Senior
13 Executive Service;

14 “(4) ‘career reserved position’ means a position
15 which can only be filled by a career appointee and to
16 which it is justifiable to restrict appointment to career
17 employees in order to insure impartiality, or the public’s
18 confidence in the impartiality, of the Government;

19 “(5) ‘general position’ means any position, other
20 than those identified as career reserved positions, which
21 may be filled by either a career or noncareer appointee
22 or under a limited emergency or term appointment;

23 “(6) ‘career appointee’ means an individual ap-
24 pointed to a Senior Executive Service position based on
25 selection through a competitive staffing process con-

1 sistent with Office of Personnel Management regulations
 2 and, in the case of initial appointment, approval of
 3 executive qualifications by the Office of Personnel
 4 Management;

5 “(7) ‘noncareer appointee’ means an individual ap-
 6 pointed to a Senior Executive Service position without
 7 approval of executive qualifications by the Office of
 8 Personnel Management;

9 “(8) ‘limited emergency appointment’ means a
 10 nonrenewable appointment not to exceed 18 months to
 11 a position established to meet a bona fide, unanticipated,
 12 urgent need; and

13 “(9) ‘limited term appointment’ means a non-
 14 renewable appointment for a term of three years or
 15 less to a position the duties of which will expire during
 16 that time period.

17 “(b) For purposes of paragraph (4) of subsection
 18 (a) of this section, the Office of Personnel Management
 19 shall prescribe the position criteria and regulations governing
 20 the designation of career reserved positions. The designation
 21 of a career reserved position shall be made by the agency;
 22 nondesignation is subject to post audit by the Office of Per-
 23 sonnel Management.

24 “(c) An agency may file with the Office of Personnel
 25 Management an application, setting forth reasons why it,

1 or a unit thereof, should be excluded from placing positions
 2 in the Senior Executive Service. The Office of Personnel
 3 Management shall review the application and reasons and
 4 undertake such other investigation as it considers appropriate
 5 to determine whether the agency or unit should be excluded
 6 from coverage of this subchapter. Upon completion of its
 7 review, the Office of Personnel Management shall recom-
 8 mend to the President whether the agency or unit should
 9 be so excluded, upon written determination by the President.

10 “(d) Any agency or unit which is excluded from
 11 coverage under subsection (c) of this section shall make a
 12 sustained effort to bring its personnel system into conformity
 13 with the Senior Executive Service insofar as is practicable.

14 “(e) The Office of Personnel Management may at any
 15 time recommend to the President that the exclusion from
 16 coverage previously granted to an agency or unit under
 17 subsection (c) of this section be revoked. The revocation of
 18 the exclusion shall be effected upon written determination of
 19 the President.

20 “(f) If any exclusion from this subchapter of any agency
 21 or agency unit is made under subsection (c) of this section,
 22 the Office of Personnel Management forthwith shall transmit
 23 to Congress, for reference to the appropriate committee of
 24 the Senate and the appropriate committee of the House of
 25 Representatives, information concerning the exclusion.

1 “(g) The Office of Personnel Management shall also
2 forthwith transmit to Congress, for reference to the ap-
3 propriate committee of the Senate and the appropriate com-
4 mittee of the House of Representatives, information as to any
5 revocation of exclusion made under subsection (d) of this
6 section.

7 “§ 3133. Authorization for number of Senior Executive
8 Service positions

9 “(a) Each agency shall in each odd-numbered calendar
10 year—

11 “(1) examine its total needs for Senior Executive
12 Service positions for the two fiscal years beginning after
13 such calendar year; and

14 “(2) submit to the Office of Personnel Manage-
15 ment, in accordance with regulations prescribed by the
16 Office, a written request for authority to establish the
17 specific number of positions as Senior Executive Service
18 positions for such fiscal years, including the titles and
19 justifications for each change to the list of career reserved
20 positions.

21 “(b) Each agency request submitted under subsection
22 (a) of this section shall be based on the following factors:

23 “(1) the anticipated program activity and budget
24 requests of the agency for the two fiscal years involved;

1 “(2) the anticipated level of work to be performed
2 by the agency in such fiscal years; and

3 “(3) such other factors as may be prescribed from
4 time to time by the Office of Personnel Management.

5 “(c) The Office of Personnel Management, upon con-
6 sultation with the Office of Management and Budget, shall
7 review the request of each agency and, subject to section
8 3135 of this title, shall authorize for each fiscal year—

9 “(1) the establishment of a specific number of
10 Senior Executive Service positions in each agency; and

11 “(2) the number of positions in the entire Senior
12 Executive Service together with an unallocated pool of
13 not more than 5 percent of the number of allocated
14 positions.

15 “(d) Authorizations made under subsection (c) of this
16 section shall remain in effect until changed in accordance
17 with subsection (e), (g), or (h) of this section.

18 “(e) Each agency may submit to the Office of Per-
19 sonnel Management, in accordance with regulations pre-
20 scribed by the Office, a written request for adjustments to its
21 authorized number of Senior Executive Service positions.
22 The Office may, on its own initiative, make reductions in the
23 number of positions assigned to particular agencies.

24 “(f) Each agency adjustment request submitted under
25 subsection (e) of this section shall be submitted in such

1 form as the Office of Personnel Management shall prescribe
2 and be based on the then current budget and program ac-
3 tivity in the agency.

4 “(g) Subject to subsections (e) and (f) of this sec-
5 tion, the Office of Personnel Management may adjust the
6 allocations made under subsection (c) of this section. The
7 total of all adjustments made during a fiscal year under this
8 subsection may not enlarge the Senior Executive Service
9 beyond the number identified in subsection (c) of this
10 section.

11 “(h) The numbers of positions recommended in the
12 report from the Office of Personnel Management to the Con-
13 gress, provided for in section 3135 of this title, relating to
14 the projected number of positions in the total Senior Execu-
15 tive Service and in each agency, shall be the authorized
16 number effective beginning on October 1 following submis-
17 sion of the report.

18 “§ 3134. Limitations on noncareer Senior Executive Service
19 appointments

20 “(a) On or before December 31 of each year, each
21 agency shall—

22 “(1) examine its needs for employment of non-
23 career Senior Executive Service appointees for the fiscal
24 year beginning in the following year; and

25 “(2) submit to the Office of Personnel Manage-

1 ment, in accordance with regulations prescribed by the
2 Office, a written request for authority to make a specific
3 number of noncareer Senior Executive Service appoint-
4 ments for each fiscal year.

5 “(b) The number of noncareer appointments for each
6 agency will be determined annually by the Office of Personnel
7 Management according to demonstrated need of the agency
8 for such positions, provided that the number of noncareer
9 appointees to the Senior Executive Service, governmentwide,
10 does not exceed 10 percent of the total number of Senior
11 Executive Service positions, governmentwide, based on the
12 authorizations made according to sections 3133 of this title
13 and provided that an agency with four or more Senior
14 Executive Service positions shall be authorized to fill such
15 positions only to the extent the proportion of positions filled
16 as noncareer does not exceed 25 percent or that proportion
17 which was authorized in the agency on the date of enactment
18 of this Act, whichever is greater.

19 “(c) The number of noncareer positions authorized for
20 any agency under subsections (a) and (b) of this section
21 may be adjusted by the Office of Personnel Management for
22 emergency needs that were not anticipated when the original
23 authorizations were made, except that the number of non-
24 career executives, governmentwide, shall not exceed 10 per-
25 cent of the total number of Senior Executive Service positions.

1 **“§3135. Biennial report**

2 “(a) The Office of Personnel Management shall submit
3 to each House of the Congress, at the time the budget is
4 submitted by the President to the first session of each Con-
5 gress, a report on the Senior Executive Service. The report
6 shall include—

7 “(1) the current authorized number of positions
8 then prescribed in the Senior Executive Service, the
9 number of such positions allocated to each agency, the
10 titles of positions which are career reserved, and the pro-
11 jected number of positions to be authorized for the next
12 two fiscal years;

13 “(2) each exclusion in the then current fiscal year
14 from this subchapter of any employee or group of em-
15 ployees under authority of section 3132 (c) of this title;
16 and

17 “(3) the percentage of agency executives at each
18 pay rate, statistical data on the distribution and amount
19 of performance awards in the agency, the proportion of
20 career and noncareer executives employed by each
21 agency, and such other information on the overall pro-
22 gram for the management of the Senior Executive Serv-
23 ice as the Office of Personnel Management considers
24 appropriate.

25 “(b) The Office of Personnel Management shall submit

1 to each House of the Congress, at the time the budget is sub-
2 mitted to the second session of each Congress, an interim
3 report showing adjustments to the biennial report as au-
4 thorized in section 3133 (e), (f), and (g) of this title.

5 **“§3136. Regulations**

6 “The Office of Personnel Management shall prescribe
7 regulations necessary to carry out the purpose of this sub-
8 chapter.”.

9 (b) Section 3104 (a) of title 5, United States Code, is
10 amended by inserting “nonexecutive” after “establish”.

11 (c) Section 3109 of title 5, United States Code, is
12 amended by inserting at the end thereof the following new
13 subsection:

14 “(c) Positions in the Senior Executive Service may
15 not be filled under the authority of subsection (b) of this
16 section.”.

17 **EXAMINATION, CERTIFICATION, AND APPOINTMENT**

18 **SEC. 403.** Chapter 33 of title 5, United States Code, is
19 amended—

20 (1) by inserting the following in the chapter
21 analysis after the item relating to section 3385:

**“SUBCHAPTER VIII—APPOINTMENT, PLACEMENT, TRANS-
FER, AND DEVELOPMENT IN THE SENIOR EXECUTIVE
SERVICE**

“Sec.

“3391. General provisions applicable to career executives.

“3392. Career appointments to the Senior Executive Service.

“3393. Appointments to career positions in the Senior Executive Service.

“3394. Limited appointments to the Senior Executive Service.

“3395. Placement and transfer within the Senior Executive Service.

“3396. Development for and within the Senior Executive Service.

“3397. Regulations.”;

1 (2) by adding at the end thereof the following new
 2 subchapter:
 3 "SUBCHAPTER VIII—APPOINTMENT, PLACE-
 4 MENT, TRANSFER, AND DEVELOPMENT IN
 5 THE SENIOR EXECUTIVE SERVICE
 6 "§ 3391. General provisions applicable to carrier executives
 7 " (a) There shall be qualification standards for all
 8 career reserved positions which shall meet the requirements
 9 established by the Office of Personnel Management.
 10 " (b) Appointees shall meet the qualifications of the
 11 career reserved positions to which they are appointed.
 12 " (c) The appointing authority is responsible for de-
 13 termining that a selectee meets the qualification require-
 14 ments of a particular career reserved position.
 15 " (d) Discrimination on account of race, color, religion,
 16 national origin, sex, marital status, age, and handicapping
 17 condition is prohibited.
 18 " (e) Career appointees in the Senior Executive Serv-
 19 ice who accept Presidential appointments requiring Senate
 20 confirmation shall continue to be covered by the basic pay,
 21 performance awards, incentive awards, severance pay, re-
 22 tirement, and leave provisions of this title.
 23 "§ 3392. Career appointments to the Senior Executive Serv-
 24 ice
 25 " (a) Career recruitment may—
 26 " (1) include all current Federal employees; or

1 " (2) be open to Federal employees and persons
 2 outside of Government.
 3 " (b) The recruitment process shall attempt to reach all
 4 groups of qualified applicants, including women and minor-
 5 ities as designated by the Office of Personnel Management,
 6 and applicants with handicapping conditions.
 7 " (c) Competitive staffing shall be conducted by an
 8 agency executive resources board and the staffing process
 9 shall meet requirements established by the Office of Per-
 10 sonnel Management.
 11 " (d) The Office of Personnel Management may ap-
 12 point members of qualifications review boards from within
 13 and outside the Federal service to certify the executive
 14 qualifications of candidates for entry into the Senior Execu-
 15 tive Service, according to regulations promulgated by the
 16 Office of Personnel Management. The Office of Personnel
 17 Management shall appoint as members of qualification re-
 18 view boards persons knowledgeable about the field of public
 19 management and other occupational fields relevant to the
 20 type of occupation for which an individual is being con-
 21 sidered. The Office of Personnel Management, working with
 22 the various Review Boards, shall set the criteria for estab-
 23 lishing executive qualifications for appointment to the Senior
 24 Executive Service. Such criteria shall include—

1 “(1) demonstrated performance in managerial
2 work;

3 “(2) successful participation in a centrally spon-
4 sored or agency career executive development program
5 approved by the Office of Personnel Management; and

6 “(3) unique or special individual qualities predic-
7 tively approved by the Office of Personnel Management; or
8 tive of success to apply in those cases in which an out-
9 standing candidate would otherwise be excluded from
10 appointment.

11 “(e) Employees with career status from other Gov-
12 ernment personnel systems shall have their executive
13 qualifications approved by the Office of Personnel Manage-
14 ment for career appointment.

15 “(f) Discrimination on account of political affiliation is
16 prohibited.

17 “(g) Employees entering the Senior Executive Service
18 under career appointments shall serve a 1-year probationary
19 period.

20 “(h) The title of each career reserved position shall be
21 published in the Federal Register.

22 “§ 3393. Appointments to general positions in the Senior
23 Executive Service

24 “(a) Each agency shall, after consultation with the

1 Office of Personnel Management, establish qualification stand-
2 ards for all general positions. Such standards shall, to the
3 maximum extent practicable, conform to qualification stand-
4 ards established by the Office of Personnel Management for
5 comparable career reserved positions. The appointing au-
6 thority is responsible for determining that an individual
7 appointed to a general position meets the qualifications
8 established for that position.

9 “(b) The employee given a noncareer appointment
10 may be removed by the appointing authority.

11 “(c) Employees given noncareer appointments do not
12 acquire credit toward career status.

13 “(d) Noncareer appointments cannot be made to career
14 reserved positions as defined in section 3132 (b) (4) of
15 this title.

16 “§ 3394. Limited appointments to the Senior Executive
17 Service

18 “(a) Limited emergency appointments to the Senior
19 Executive Service—

20 “(1) may only be made when filling new positions
21 established under a bona fide emergency as defined in
22 the regulations of the Office of Personnel Management;

23 “(2) may not exceed 18 months and are not re-
24 newable; and

1 “(3) may be filled by the agency without regard
2 to the competitive merit staffing process.

3 “(b) Limited term appointments—

4 “(1) may only be made for positions the duties
5 of which will expire in three years or less;

6 “(2) are not renewable; and

7 “(3) may be filled by the agency without regard
8 to the competitive merit staffing process.

9 “(c) Service under a limited appointment is not cred-
10 itable toward the probationary service requirements of sec-
11 tion 3392 of this title for a career appointment in the Senior
12 Executive Service.

13 “(d) The Office of Personnel Management shall approve
14 use of limited appointment authority before an appointment
15 under this authority may be made.

16 “§ 3395. Placement and transfer within the Senior Execu-
17 tive Service

18 “(a) An executive with a career appointment—

19 “(1) may be reassigned to a Senior Executive
20 Service position in the same agency;

21 “(2) may transfer to a Senior Executive Service
22 position in another agency; and

23 “(3) may request assignment outside the Senior
24 Executive Service.

1 “(b) An executive with a limited appointment—

2 “(1) may be reassigned to another Senior Execu-
3 tive Service position which meets the criteria under
4 which the executive was appointed, except that con-
5 tinuous service in any one agency under a limited emer-
6 gency appointment may not exceed 18 months and
7 under a limited term appointment may not exceed three
8 years;

9 “(2) may not be given a career appointment in the
10 Senior Executive Service except under the competitive
11 merit staffing process; and

12 “(3) may not be given another limited appointment
13 in the same agency after completing the maximum
14 period of service authorized for the employee's original
15 appointment, within one calendar year of the expiration
16 of the limited appointment.

17 “(c) An executive with a noncareer appointment—

18 “(1) may be reassigned to any general Senior
19 Executive Service position in the same agency;

20 “(2) may transfer to a general Senior Executive
21 Service position in another agency;

22 “(3) may be appointed to a noncareer position out-
23 side the Senior Executive Service; and

24 “(4) may not be given a career appointment ex-
25 cept under the merit staffing process.

1 “(d) A career executive may not be involuntarily
2 reassigned, or removed from the Senior Executive Service
3 within 120 days after the appointment of an agency head
4 unless such reassignment or removal is based on an un-
5 satisfactory rating received by the executive prior to the
6 appointment of the agency head.

7 “§ 3396. Development for and within the Senior Executive
8 Service

9 “(a) The Office of Personnel Management shall estab-
10 lish programs for the systematic development of candidates
11 for the Senior Executive Service or require the establish-
12 ment of such programs by agencies which meet criteria pre-
13 scribed by the Office of Personnel Management.

14 “(b) The Office of Personnel Management shall estab-
15 lish programs for the continuing development of executives
16 or require the establishment of such programs by agencies
17 which meet criteria prescribed by the Office of Personnel
18 Management.

19 “(c) The Office of Personnel Management shall assist
20 agencies in the establishment of programs required under
21 subsections (a) and (b) of this section and shall monitor
22 the implementation of such programs. The Office of Person-
23 nel Management shall direct agencies to take corrective action
24 where required.

1 “(d) It shall be the duty of the Office of Personnel Man-
2 agement to encourage and assist individuals to improve
3 their skills and increase their contribution by service in a
4 variety of agencies as well as by accepting temporary place-
5 ments in State or local governments or in the private sector.

6 “(e) An agency head may grant sabbatical leave with
7 full pay and benefits to a career executive for a sabbatical
8 period not exceeding eleven months to permit such person
9 to engage in study or uncompensated work experience which
10 will contribute to the individual's development and effective-
11 ness. The agency head may authorize travel and per diem
12 costs where essential to the developmental period. A sab-
13 batical leave may not be granted more than once in a ten-
14 year period. To be eligible for a sabbatical leave the indi-
15 vidual must have completed at least seven years of Federal
16 service in a position with a level of duties and responsibilities
17 equivalent to the Senior Executive Service and includ-
18 ing at least two years as a member of the Senior Executive
19 Service.

20 “§ 3397. Regulations

21 “‘The Office of Personnel Management shall prescribe
22 regulations necessary to carry out the purpose of this sub-
23 chapter.’”

RETENTION PREFERENCE

1
2 SEC. 404. Chapter 35 of title 5, United States Code, is
3 amended—

4 (f) by adding at the end of the chapter analysis
5 the following new items:

"SUBCHAPTER V—REMOVAL, REINSTATEMENT, AND
GUARANTEED PLACEMENT PROVISIONS IN THE SEN-
IOR EXECUTIVE SERVICE

"Sec.
"3591. Removal from the Senior Executive Service.
"3592. Reinstatement in the Senior Executive Service.
"3593. Guaranteed placement in other personnel systems.
"3594. Regulations.";

6 (2) by adding at the end of subsection (b) of sec-
7 tion 3501 the following new sentence: "This subchapter
8 does not apply to employees in the Senior Executive
9 Service."; and

10 (3) by adding at the end thereof the following new
11 subchapter:

12 "SUBCHAPTER V—REMOVAL, REINSTATEMENT,
13 AND GUARANTEED PLACEMENT PROVISIONS
14 IN THE SENIOR EXECUTIVE SERVICE

15 "§3591. Removal from the Senior Executive Service

16 (a) Career appointees may be removed from the
17 Senior Executive Service—

18 (1) during the one-year period of probation in the
19 Senior Executive Service;

1 (2) for less than fully successful executive per-
2 formance appraisals determined under the provisions of
3 subchapter II of chapter 43 of this title; or

4 (3) for misconduct, neglect of duty, or mal-
5 feasance.

6 (b) Limited emergency appointees may be removed at
7 any time from the Federal service by the appointing author-
8 ity and shall be separated after 18 months.

9 (c) Limited term appointees may be removed at any
10 time from the Federal service by the appointing authority
11 before the expiration of that period and shall be separated
12 after 3 years.

13 (d) Noncareer employees can be removed at any
14 time from the Federal service by the appointing authority.
15 "§ 3592. Reinstatement in the Senior Executive Service

16 "A former Senior Executive Service employee with ca-
17 reer status may be reinstated to any Senior Executive Serv-
18 ice position if—

19 (1) the individual has successfully completed the
20 probationary period in the Senior Executive Service;
21 and

22 (2) the reasons for leaving the Senior Executive
23 Service was not for misconduct, neglect of duty, mal-
24 feasance, or less than fully successful performance.

1 "§ 3593. Guaranteed placement in other personnel systems

2 " (a) Career appointees who are appointed from a
3 career or career-type position within the civil service as
4 determined by the Office of Personnel Management and who
5 are removed for reasons other than misconduct, neglect of
6 duty, or malfeasance from the Senior Executive Service
7 during Senior Executive Service probation shall have the
8 right to placement in a Federal position outside the Senior
9 Executive Service.

10 " (b) Career appointees who are removed from the
11 Senior Executive Service for less than fully successful per-
12 formance and not for misconduct, neglect of duty, or mal-
13 feasant, shall have the right to placement in a Federal
14 position outside the Senior Executive Service.

15 " (c) Career appointees in the Senior Executive Service
16 who accept Presidential appointments outside the Senior
17 Executive Service and who leave these appointments for
18 reasons other than misconduct, neglect of duty, or mal-
19 feasant shall have the right to placement in the Senior
20 Executive Service if the appointee applies within 90 days
21 after the separation from the Presidential appointment.

22 " (d) For purposes of subsections (a) and (b) of this
23 section, placement shall be in a continuing career position
24 equivalent to at least a GS-15 and at either the salary held

1 prior to Senior Executive Service appointment or a salary
2 which is equal to the last Senior Executive Service base pay,
3 whichever is higher. Placement shall not cause the separation
4 or reduction in grade of any other employee in the agency.

5 " (e) Career appointees removed from the Senior Execu-
6 tive Service whose base pay exceeds the top pay rate for
7 the position into which they are placed shall retain their
8 pay. If there are comparability increases under section 5305
9 of this title, these employees will receive half of each com-
10 parability increase until their pay equals the top rate payable
11 for their position.

12 "§ 3594. Regulations

13 "The Office of Personnel Management shall prescribe
14 regulations necessary to the administration of this
15 subchapter."

16 PERFORMANCE RATING

17 SEC. 405. Chapter 43 of title 5, United States Code,
18 is amended—

19 (1) by inserting at the end of the chapter analysis:

"SUBCHAPTER II—PERFORMANCE APPRAISAL IN THE
SENIOR EXECUTIVE SERVICE

- "Sec.
"4311. Senior Executive Service performance appraisal systems.
"4312. Criteria for performance appraisals.
"4313. Ratings for executive performance appraisal.
"4314. Regulations;" and

20 (2) by adding at the end thereof the following:

1 "SUBCHAPTER II—PERFORMANCE APPRAISAL
2 IN THE SENIOR EXECUTIVE SERVICE

3 "§ 4311. Senior Executive Service performance appraisal
4 systems

5 "(a) Each agency, as defined by section 3132 (a) of
6 this title shall, in accordance with standards established by
7 the Office of Personnel Management, develop one or more
8 performance appraisal systems designed to—

9 "(1) provide for systematic appraisals of job per-
10 formance of individuals in the Senior Executive Service;

11 "(2) encourage excellence in performance for in-
12 dividuals in the Senior Executive Service; and

13 "(3) link the performance of each individual in
14 the Senior Executive Service with eligibility for re-
15 tention and performance awards.

16 "(b) Each performance appraisal system for individuals
17 in the Senior Executive Service shall provide—

18 "(1) that performance requirements for each in-
19 dividual be established in consultation with the indi-
20 vidual at the beginning of the rating period and
21 communicated to the individual;

22 "(2) for written appraisals of performance based
23 on the accomplishment of the previously established

1 personal and organizational performance requirements;
2 and

3 "(3) that each individual be shown the appraisal
4 and rating and given an opportunity to respond in writ-
5 ing and have the rating reviewed by an employee in a
6 higher managerial level in the agency prior to final
7 action by the agency head.

8 "(c) Upon determination by the Office of Personnel
9 Management that an agency performance appraisal system
10 does not meet the requirements of this subchapter and the
11 regulations prescribed thereunder, the Office of Personnel
12 Management shall order corrective action.

13 "§ 4312. Criteria for performance appraisals

14 "Appraisals of managerial success in the Senior Execu-
15 tive Service shall—

16 "(1) take into account both individual performance
17 and organizational accomplishment, and

18 "(2) be based on factors such as—

19 "(A) improvements in efficiency, productivity,
20 and quality of work or service;

21 "(B) the effectiveness and productivity of the
22 employees for whom the executive is responsible;

23 "(C) cost savings or cost efficiency; and

24 "(D) timeliness of performance.

1 **“§ 4313. Ratings for executive performance appraisal**

2 “(a) Each performance appraisal system shall provide
3 for annual summary ratings representing a number of levels
4 of performance including one or more fully successful levels,
5 a level of performance which is minimally satisfactory, and
6 an unsatisfactory level.

7 “(b) The head of each agency shall establish a system
8 to appraise the performance of members of the Senior Execu-
9 tive Service. The system shall provide that the appraisal
10 will—

11 “(1) be preceded by a review and appraisal of
12 requirements and accomplishments by a Performance
13 Review Board established under regulations of the Office
14 of Personnel Management. When the performance of a
15 career executive is being appraised the Performance
16 Review Board must include at least one career member.
17 The Performance Review Board shall advise the appoint-
18 ing authority who rates the executive;

19 “(2) take place at least annually, except that no
20 evaluation of a career employee shall be initiated within
21 120 days after the beginning of a new administration,
22 and permit the assignment of an unsatisfactory rating
23 at any time during the performance appraisal period;

1 “(3) not be appealable to the Merit Systems Pro-
2 tection Board and

3 “(4) have the following results:

4 “(A) career employees receiving ratings at
5 any of the fully successful levels may be given per-
6 formance awards as prescribed in section 5384 of
7 this title;

8 “(B) an unsatisfactory rating requires correc-
9 tive action by removal of the employee from the
10 current position through reassignment, transfer, or
11 separation from the Senior Executive Service except
12 that employees who receive 2 unsatisfactory annual
13 ratings in 5 consecutive years shall be separated
14 from the Senior Executive Service, and

15 “(C) employees who twice in any 3-year period
16 receive a less than fully successful annual rating shall
17 be separated from the Senior Executive Service.

18 **“§ 4314. Regulations**

19 “The Office of Personnel Management may prescribe
20 regulations necessary for the administration of this sub-
21 chapter.”.

22 **INCENTIVE AWARDS AND RANKS**

23 **SEC. 406.** (a) Chapter 45 of title 5, United States Code,
24 is amended by adding at the end thereof the following new
25 section:

1 "§ 4507. Incentive awards and ranks in the Senior Execu-
2 tive Service

3 "(a) (1) The head of each agency shall annually sub-
4 mit to the Office of Personnel Management a list of career
5 executives he believes should be appointed as a Meritorious
6 or Distinguished Executive.

7 "(2) Subject to subsections (b) and (c) of this sec-
8 tion, the Office of Personnel Management shall review such
9 list and submit to the President a list of executives it believes
10 should be so appointed.

11 "(3) The President shall confer the rank of—

12 "(A) Meritorious Executive on any such executive
13 who has demonstrated sustained excellence in his posi-
14 tion, and

15 "(B) Distinguished Executive on any such execu-
16 tive who has demonstrated sustained extraordinary
17 accomplishment.

18 "(b) No more than 5 percent of the members of the
19 Senior Executive Service may be appointed to the rank of
20 Meritorious Executive in a calendar year. No more than 15
21 percent of the active duty members of the Senior Executive
22 Service may hold the rank of Meritorious Executive.

23 "(c) No more than 1 percent of the active duty mem-
24 bers of the Senior Executive Service may hold the rank of
25 Distinguished Executive.

1 "(d) Receipt of a meritorious rank shall entitle the
2 individual to an annual award of \$2,500 for a period of five
3 years of active service in the Senior Executive Service.

4 "(e) Distinguished Executives shall receive an annual
5 award of \$5,000 for a period of five years of active service in
6 the Senior Executive Service.

7 "(f) An employee in the Senior Executive Service ap-
8 pointed by the President to another position outside the
9 Senior Executive Service shall be entitled to continue to
10 receive any incentive award granted for service before such
11 appointment."

12 (b) The analysis for such chapter 45 is amended by
13 adding at the end thereof the following new item:
"4507. Incentive awards and ranks in the Senior Executive Service."

14 PAY RATES AND SYSTEMS

15 SEC. 407. (a) Section 5308 of title 5, United States
16 Code, is amended to read as follows:

17 "§5308. Pay limitation

18 "An employee may not be paid, by reasons of any pro-
19 vision of this subchapter, at a rate in excess of the rate of
20 basic pay for Level V of the Executive Schedule, except
21 that executives in the Senior Executive Service may be paid
22 up to a rate of basic pay equal to the rate provided for
23 Executive Level IV."

24 (b) Chapter 53 of title 5, United States Code, is

1 amended by adding at the end thereof the following new
2 subchapter:

3 "SUBCHAPTER VIII—PAY FOR THE SENIOR
4 EXECUTIVE SERVICE

5 "§ 5381. Purpose; definitions

6 "(a) It is the purpose of this subchapter to provide a
7 pay system for the Senior Executive Service, established
8 under subchapter II of chapter 31 of this title, that shall
9 facilitate the accomplishment of the goals of that service,
10 as set forth in section 3131 of this title.

11 "(b) For the purpose of this subchapter, 'agency',
12 'Senior Executive Service position' and 'executive' have the
13 meanings given such terms by section 3132 of this title.

14 "§ 5382. Establishment and adjustment of rates of pay for
15 the Senior Executive Service

16 "(a) There shall be 5 or more rates of basic pay for
17 the Senior Executive Service, and the incumbent of each
18 position shall be paid at one of these rates. These rates of
19 basic pay shall be initially established and thereafter adjusted
20 by the President in accordance with the provisions of this
21 section.

22 "(b) In setting rates of basic pay, the lowest rate for
23 the Senior Executive Service shall not be less than the rate

1 for the sixth step of GS-15 and the highest rate shall not
2 exceed the rate for level IV of the Executive Schedule.

3 "(c) The rates of basic pay for the Senior Executive
4 Service shall be adjusted by the President at the same time
5 he adjusts the rates of pay under section 5305 of this title,
6 and the adjusted rates of basic pay for the Senior Executive
7 Service shall be included in the report transmitted to the
8 Congress by the President under section 5305 (a) (3) or
9 (c) (1) of this title.

10 "(d) The rates of basic pay that are established and
11 adjusted under this section shall be printed in the Federal
12 Register and shall supersede any prior rates of basic pay
13 for the Senior Executive Service.

14 "§ 5383. Setting individual executive pay

15 "(a) The pay rate for each executive will be set by the
16 appointing authority according to criteria established by the
17 Office of Personnel Management.

18 "(b) Except for pay adjustments provided for in section
19 5382 of this title, the base pay of a member of the Sen-
20 ior Executive Service can only be adjusted once during any
21 12-month period.

22 "§ 5384. Performance awards for the Senior Executive
23 Service

24 "(a) To encourage excellence in performance by execu-
25 tives under the Senior Executive Service, performance

1 awards shall be paid to executives in accordance with the
 2 provisions of this section, and shall be in addition to the rate
 3 of basic pay paid under section 5382 of this title and shall
 4 not be subject to the limit placed on salaries under section
 5 5308. It shall be the responsibility of each agency head
 6 to see that the provisions of this section are administered in
 7 the agency in such a way that excellence is encouraged in
 8 the performance of the agency's executives. The Perform-
 9 ance Review Board provided for in section 4313 of this title
 10 will recommend to the appointing authority whether or not
 11 such authority should make a performance award to an ex-
 12 ecutive and the amount of the award.

13 " (b) Each career executive shall annually be eligible
 14 to receive a performance award subject to the following
 15 criteria:

16 " (1) No performance award is to be paid to an
 17 executive whose performance was determined to be less
 18 than fully successful at the time of the executive's most
 19 recent performance evaluation under subchapter II of
 20 chapter 43 of this title.

21 " (2) The amount of a performance award is to be
 22 determined by the agency head but shall not exceed 20
 23 percent of the executive's rate of basic pay.

24 " (3) Performance awards may not be paid in any
 25 fiscal year to more than 50 percent of the executives in

1 an agency which employs 4 or more members of the
 2 Senior Executive Service.

3 " (c) After annual review as provided for in section
 4 3135 (a) and (b) of this title, the Office of Personnel Man-
 5 agement is authorized to issue guidance to agencies concern-
 6 ing the proportion of Senior Executive Service salary ex-
 7 penses that may be appropriately applied to payment of
 8 performance awards and the distribution of awards of each
 9 amount.

10 "§ 5385. Regulations

11 "Subject to such policies and procedures as the Presi-
 12 dent may prescribe, the Office of Personnel Management
 13 shall issue regulations necessary for the administration of
 14 this subchapter."

15 (c) (1) Section 8331 (3) of title 5, United States Code,
 16 is amended by inserting "any performance award under
 17 subchapter VIII of chapter 53 of this title," after "deceased
 18 employee".

19 (2) Section 8704 (c) of title 5, United States Code, is
 20 amended by inserting " , but does not include any performance
 21 award under subchapter VIII of chapter 53 of this title"
 22 before the period at the end thereof.

23 (d) The analysis of chapter 53 of title 5, United States

1 Code, is amended by adding at the end thereof the following
2 new items:

"SUBCHAPTER VIII—PAY FOR THE SENIOR EXECUTIVE
SERVICE

"Sec.

"5381. Purpose; definitions.

"5382. Establishment and adjustment of rates of pay for the Senior
Executive Service.

"5383. Setting individual executive pay.

"5384. Performance awards for the Senior Executive Service.

"5385. Regulations."

3 PAY ADMINISTRATION

4 SEC. 408. Chapter 55 of title 5, United States Code,
5 is amended—

6 (1) by inserting "other than an employee or in-
7 dividual excluded by section 5541 (2) (xvi) of this
8 section" immediately before the period at the end of
9 section 5504 (a) (B);

10 (2) by amending section 5541 (2) by striking out
11 "or" after paragraph (xiv), by striking out the period
12 after paragraph (xv) and inserting "; or" in lieu thereof,
13 and by adding the following paragraph at the end
14 thereof:

15 "(xvi) executive managers occupying Senior Exec-
16 utive Service positions under the Senior Executive Serv-
17 ice established under subchapter II of chapter 31 of
18 this title."; and

1 (3) by inserting "other than a member of the
2 Senior Executive Service" after "employee" in section
3 5595 (a) (2) (i).

4 TRAVEL, TRANSPORTATION, AND SUBSISTENCE

5 SEC. 409. Chapter 57 of title 5, United States Code,
6 is amended—

7 (1) in section 5723 (a) (1) by striking out "; and"
8 and adding in lieu thereof "or of a new member of the
9 Senior Executive Service; and";

10 (2) by adding at the end of subchapter IV the
11 following section:

12 "§ 5752. Travel expenses of Senior Executive Service can-
13 didates

14 "Employing agencies may pay candidates for Senior
15 Executive Service positions travel expenses incurred incident
16 to preemployment interviews requested by the employing
17 agency."; and

18 (3) by adding at the end of the analysis of sub-
19 chapter IV the following new item:

"5752. Travel expenses of Senior Executive Service candidates."

20 LEAVE

21 SEC. 410. Chapter 63 of title 5, United States Code,
22 is amended by inserting in subsection (a) of section 6304
23 "(e), and (f)" in lieu of "and (e)," and by adding at the
24 end of such section the following new subsection:

1: “(f) Annual leave accrued by an individual serving in
2 a position under the Senior Executive Service shall not be
3 subject to the limitation on accumulation otherwise imposed
4 by this section.”

5 DISCIPLINARY ACTIONS

6 SEC. 411. Chapter 75 of title 5, United States Code,
7 is amended—

8 (1) by inserting the following in the chapter anal-
9 ysis after subchapter IV:

“SUBCHAPTER V—SENIOR EXECUTIVE SERVICE

“Sec.
“7541. Definitions.
“7542. Actions covered.
“7543. Cause and procedure.”;

10 and

11 (2) by adding the following after subchapter IV:

12 “SUBCHAPTER V—SENIOR EXECUTIVE SERVICE

13 “§ 7541. Definitions

14 “For the purpose of this subchapter—

15 “(1) ‘employee’ means an individual in the Senior
16 Executive Service who—

17 “(A) has completed a year of current continu-
18 ous service in the Senior Executive Service; or

19 “(B) when appointed to a position in the
20 Senior Executive Service was covered by the pro-
21 visions of subchapter II of this chapter:

22 “(2) ‘disciplinary action’ means an action based

1 on the conduct of the employee which results in in-
2 voluntary removal or suspension for more than 30 days
3 of the employee, including misconduct, neglect of duty,
4 or malfeasance, and not including less than fully success-
5 ful performance:

6 “(3) ‘removal’ means separation from the Federal
7 service;

8 “(4) ‘suspension’ means the placing of an em-
9 ployee in a temporary nonduty nonpay status for
10 disciplinary reasons.

11 “§ 7542. Actions covered

12 “This subchapter applies to a disciplinary removal or
13 suspension for more than 30 days, but does not apply to a
14 suspension or removal under section 7532 of this title.

15 “7543. Cause and procedure

16 “(a) Under regulations prescribed by the Office of
17 Personnel Management, an agency may take disciplinary
18 action against an employee only for such cause as shall
19 promote the efficiency of the service. Removal from the
20 Senior Executive Service for less than fully successful per-
21 formance is not a disciplinary action within the meaning
22 of this provision.

23 “(b) An employee against whom a disciplinary action
24 is proposed is entitled to—

25 “(1) at least 30 days’ advance written notice, un-

1 less there is reasonable cause to believe that the em-
 2 ployee is guilty of a crime for which a sentence of
 3 imprisonment can be imposed, stating specific reasons
 4 for the proposed action;

5 “(2) a reasonable time to answer orally and in
 6 writing and to furnish affidavits and other documentary
 7 evidence in support of the answer;

8 “(3) be accompanied by an attorney or other
 9 representative; and

10 “(4) a written decision and reasons therefor at
 11 the earliest practicable date.

12 “(o) An agency may in its discretion provide, by
 13 regulation, for a hearing which may be in lieu of or in
 14 addition to the opportunity to answer provided under sub-
 15 section (b) (2) of this section.

16 “(d) Copies of the notice of proposed action, the an-
 17 swer of the employee if written and a summary thereof if
 18 made orally, the notice of decision and reasons therefor, and
 19 any order effecting a disciplinary action shall be made a part
 20 of the records of the agency and, on request, shall be fur-
 21 nished to the Merit Systems Protection Board or the Office
 22 of Personnel Management.

23 “(e) An employee in the Senior Executive Service,
 24 against whom a disciplinary action as defined in section
 25 7541 (2) of this title is taken, is entitled to appeal to the

1 Merit Systems Protection Board under section 7701 of this
 2 title. The decision of the agency shall be sustained by the
 3 appeals officer or hearing examiner unless the employee
 4 shows that—

5 “(1) the agency’s procedures contained error that
 6 substantially impaired the rights of the employee;

7 “(2) such decision was based on discrimination
 8 prohibited by section 2302 (b) (1) of this title; or

9 “(3) such decision was arbitrary or capricious.

10 CONVERSION TO THE SENIOR EXECUTIVE SERVICE

11 SEC. 412. (a) During the period beginning on the date
 12 of the enactment of this title and ending on the effective date
 13 of this title, each agency under the guidance and review of
 14 the Office of Personnel Management and the definitions in
 15 chapter 31 of title 5, United States Code, as amended by this
 16 title, shall designate those positions which are to be incor-
 17 porated into the Senior Executive Service and shall designate
 18 those positions which are career reserved. These designations
 19 shall be published in the Federal Register.

20 (b) Each agency shall also submit a request for total
 21 Senior Executive Service space allocations and for the
 22 number of noncareer appointments needed. The Office of
 23 Personnel Management shall establish interim authoriza-
 24 tions within the limits defined in sections 3133 and 3134
 25 of title 5, United States Code, as amended by this Act.

1 (o) Each employee serving in a position at the time
2 it is officially designated as a position in the Senior Execu-
3 tive Service shall have the option to—

4 (1) decline conversion and remain in the current
5 competitive service, may request the reinstatement of the
6 employee's career status from the Office of Personnel Man-
7 agement and be converted to a career appointment in the
8 Senior Executive Service. The names and grounds for status
9 of all such employees who are so reinstated and converted
10 shall be published in the Federal Register.

11 (h) Each employee who has elected an automatic ap-
12 pointment conversion and is under a limited executive assign-
13 ment under subpart F of part 305 of title 5, Code of Federal
14 Regulations, shall—

15 (1) be converted to a Senior Executive Service
16 limited term appointment if the position encumbered
17 immediately before the effective date will terminate
18 within 3 years of the effective date;

19 (2) be converted to a Senior Executive Service
20 noncareer appointment if the position encumbered im-
21 mediately before the effective date is designated as a
22 Senior Executive Service general position; or

23 (3) be converted to a Senior Executive Service
24 noncareer appointment and reassigned to a Senior Execu-

1 tive Service general position if the encumbered position
2 immediately before the effective date is designated as
3 a Senior Executive Service career reserved position.

4 (i) Employees whose actual base pay at the time of
5 conversion exceeds the pay of the rate to which they are
6 converted shall retain their pay. If there are comparability
7 increases under section 5305 of title 5, United States Code,
8 these employees will receive half of each comparability in-
9 crease until the base pay equals the established Senior Execu-
10 tive Service rate.

11 (j) The Office of Personnel Management shall prescribe
12 regulations to carry out the purpose of this section. There
13 shall be a right of appeal to the Merit Systems Protection
14 Board for an employee who believes such employee's agency
15 has violated the employee's right under this section, or
16 under section 3395 (d), section 3593, or section 4313 (b)
17 (2) of this title.

18 **REPEALER**

19 **SEC. 413.** Except for the Presidential authority pro-
20 vided in section 5317 of title 5, United States Code, all au-
21 thority in effect immediately before the effective date of this
22 section for the establishment or the pay, or both, as the case
23 may be, of each position subject to section 401 of this Act
24 is repealed.

SAVINGS PROVISION

1
2 SEC. 414. The enactment of this title shall not decrease
3 the present pay, allowances, or compensation, or future an-
4 nuity of any person.

5 appointment and pay system, retaining the grade,
6 seniority, and other rights and benefits associated with
7 career and career-conditional appointment and election
8 of such option shall not cause the separation, displace-
9 ment, or reduction in grade of any other employee in the
10 agency; or

11 (2) convert to a Senior Executive Service appoint-
12 ment according to the automatic appointment conversion
13 provisions of subsections (d), (e), (f), (g), and (h)
14 of this section.

15 The employee shall be notified in writing that his position
16 has been brought into the Senior Executive Service and
17 what the employee's options are under subsections (d),
18 (e), (f), (g), and (h) of this section. The employee shall
19 be given 90 days from the date of such notification to elect
20 one of the options.

21 (d) Each employee who has elected an automatic
22 appointment conversion, is serving immediately before the
23 effective date in a position designated as a Senior Executive
24 Service position, and is currently under—

1 (1) a career or career-conditional appointment; or

2 (2) a similar type of appointment in an excepted
3 service as determined by the Office of Personnel Man-
4 agement;

5 shall receive a career appointment to that position in the
6 Senior Executive Service not subject to section 3392 (e)
7 and (g) of title 5, United States Code.

8 (e) Each employee who has elected an automatic
9 appointment conversion and is currently under an excepted
10 appointment in a position which is not designated a career
11 reserved position in the Senior Executive Service, but is—

12 (1) a position in schedule C of subpart C of part
13 213 of title 5, Code of Federal Regulations;

14 (2) a position filled by noncareer executive assign-
15 ment under subpart F of part 305 of title 5, Code of
16 Federal Regulations; or

17 (3) a position in the Executive Schedule under
18 subchapter II of chapter 53 of title 5, United States
19 Code, except career Executive Schedule positions;
20 shall receive a noncareer appointment in the Senior Execu-
21 tive Service.

22 (f) Each employee described in subsection (e) of this
23 section who is serving immediately before the effective date
24 in a position designated as a Senior Executive Service career

1 reserved position shall be reassigned to an appropriate Senior
2 Executive Service general position or terminated.

3 (g) Each employee described in subsection (e) of this
4 section who is serving immediately before the effective date,
5 in a position designated as a Senior Executive Service posi-
6 tion and who has reinstatement eligibility to a position in the

7 EFFECTIVE DATE

8 SEC. 416. The provisions of this title shall take effect 9
9 months after the enactment of the title with the exception
10 of section 412, regarding conversion procedures, which shall
11 take effect immediately upon enactment.

12 TITLE V—MERIT PAY

13 PAY FOR PERFORMANCE AMENDMENTS

14 SEC. 501. (a) Part III of title 5, United States Code,
15 is amended by inserting after chapter 53 the following new
16 chapter:

17 "Chapter 54.—MERIT PAY

"Sec.
"5401. Purpose.
"5402. Merit pay system.
"5403. Reports.
"5404. Regulations.

18 "§ 5401. Purpose

19 "It is the purpose of this chapter to provide for a merit
20 pay system which shall—

21 "(1) within available funds, recognize and reward
22 quality performance by varying merit pay adjustments;

1 "(2) use performance appraisals as the basis for
2 determining merit pay adjustments;

3 "(3) within available funds, provide for training to
4 improve objectivity and fairness in the evaluation of
5 performance; and

6 "(4) regulate the costs of merit pay by establishing
7 appropriate control techniques.

8 "§ 5402. Merit pay system

9 "(a) In accordance with the purposes set forth in sec-
10 tion 5401 of this title, the Office of Personnel Management
11 shall establish a merit pay system which shall cover any
12 employee in a position which regularly requires the exercise
13 of managerial or supervisory responsibilities and which
14 is in GS-13 through GS-15 as established under chapters
15 51 and 53 of this title.

16 "(b) (1) An agency may file with the Office of Person-
17 nel Management an application, setting forth reasons why it,
18 or a unit thereof, should be excluded from placing positions
19 under the merit pay system. The Office of Personnel Man-
20 agement shall review the application and reasons, undertake
21 such other investigation as it considers appropriate to deter-
22 mine whether the agency or unit should be excluded from
23 coverage of this subchapter, and upon completion of its
24 review, recommend to the President whether the agency or

1 unit should be so excluded. The President may, in writing,
2 exclude an agency or unit from such coverage.

3 “(2) Any agency or unit which is excluded from cov-
4 erage under this subsection shall make a sustained effort to
5 bring its personnel system into conformity with the merit
6 pay system insofar as is practicable.

7 “(3) The Office of Personnel Management may at any
8 time recommend to the President that the exclusion from
9 coverage previously granted to an agency or unit under this
10 subsection be revoked. The revocation of the exclusion shall
11 be effected upon written determination of the President.

12 “(c) The merit pay system established under subsection
13 (a) of this section shall provide for a range of basic pay for
14 each grade to which it applies, which range shall be limited
15 by the minimum and maximum rate of basic pay of each
16 such grade.

17 “(d) (1) Concurrent with each adjustment under sec-
18 tion 5305 of this title, the Office of Personnel Management in
19 consultation with the Office of Management and Budget shall
20 determine the extent to which such adjustment shall be
21 made in rates of basic pay for all employees covered by the
22 merit pay system, except that each time the President adjusts
23 the rate of pay of members of the Senior Executive Service
24 under section 5382 (c) of this title, the employees covered

1 by the merit pay system shall have their pay adjusted under
2 this subsection at a rate at least equal to the rate applied to
3 the Senior Executive Service.

4 “(2) An increase in pay under this subsection is not
5 an equivalent increase in pay within the meaning of section
6 5335 of this title.

7 “(3) No employee may be paid less than the minimum
8 rate of basic pay of the grade of such employee's position.
9 No employees shall suffer a reduction in the rate of basic pay
10 as a result of the employee's initial coverage by, or subse-
11 quent conversion to, the merit pay system.

12 “(d) (1) Under regulations prescribed by the Office of
13 Personnel Management, the head of each agency may pro-
14 vide for increases within the range of basic pay for any
15 employee covered by a merit pay system.

16 “(2) Determinations to provide pay increases under this
17 subsection to an employee—

18 “(A) may take into account both individual per-
19 formance and organizational accomplishment, and

20 “(B) shall be based on factors such as—

21 “(i) improvements in efficiency, productivity,
22 and quality of work or service;

23 “(ii) cost savings or cost efficiency;

24 “(iii) timeliness of performance; and

1 “(iv) the quality of performance by the em-
2 ployees for whom the manager or supervisor is
3 responsible;

4 “(C) shall be subject to review only in accordance
5 with and to the extent provided by procedures estab-
6 lished by the agency head; and

7 “(D) shall be made in accordance with guidelines
8 issued by the Office of Personnel Management which
9 relate to the distribution of increases available under
10 this subsection.

11 “(3) For any fiscal year, the head of any agency may
12 exercise authority under paragraph (1) of this subsection
13 only to the extent of the funds available for purposes of
14 this subsection.

15 “(4) The funds available for purposes of this subsection
16 to the head of an agency for any fiscal year shall be deter-
17 mined by the Office of Personnel Management on an annual
18 basis, after consultation with the Office of Management and
19 Budget, before the beginning of such fiscal year. The amount
20 so available for any such agency shall be determined by
21 the Office on the basis of—

22 “(A) the additional amount of the adjustments
23 under section 5305 of this title, and

24 “(B) the amount estimated by the Office to reflect

1 within-grade step increases and quality step increases,
2 which would have occurred if the employees covered by the
3 merit pay system in such agency were not so covered.

4 “(e) (1) The head of an agency may pay a cash award
5 to, and incur necessary expenses for the honorary recogni-
6 tion of, any employee covered by a merit pay system who—

7 “(A) by such employee’s suggestion, invention,
8 superior accomplishment, or other personal effort con-
9 tributes to the efficiency, economy, or other improve-
10 ment of Government operations; or

11 “(B) performs a special act or service in the pub-
12 lic interest in connection with or related to such em-
13 ployee’s official employment.

14 “(2) The President may pay a cash award to, and
15 incur necessary expenses for the honorary recognition of,
16 any employee covered by a merit pay system who—

17 “(A) by such employee’s suggestion, invention,
18 superior accomplishment, or other personal effort con-
19 tributes to the efficiency, economy, or other improvement
20 of Government operations; or

21 “(B) performs an exceptionally meritorious special
22 act or service in the public interest in connection with or
23 related to such employee’s official employment.

24 A Presidential award may be in addition to an agency award
25 under paragraph (1) of this subsection.

1 “(3) A cash award under this subsection is in addition
 2 to the basic pay and any merit increase to basic pay of the
 3 employee receiving the award. Acceptance of a cash award
 4 under this subsection constitutes an agreement that the use by
 5 the Government of an idea, method, or device for which the
 6 award is made does not form the basis of a further claim of
 7 any nature against the Government by the employee, his
 8 heirs, or assigns.

9 “(4) A cash award to, and expenses for the honorary
 10 recognition of, any employee covered by a merit pay system
 11 may be paid from the fund or appropriation available to the
 12 activity primarily benefiting or the various activities bene-
 13 fitting. The head of the agency concerned shall determine the
 14 amount to be paid by each activity for an agency award
 15 under paragraph (1) of this subsection. The President shall
 16 determine the amount to be paid by each activity for a Presi-
 17 dential award under paragraph (2) of this subsection.

18 “(5) Except as provided by paragraph (6) of this
 19 subsection, a cash award under this subsection may not ex-
 20 ceed \$10,000.

21 “(6) If the head of an agency certifies to the Office
 22 of Personnel Management that the suggestion, invention,
 23 superior accomplishment, or other meritorious effort for
 24 which the award is proposed is highly exceptional and un-
 25 usually outstanding, a cash award in excess of \$10,000 but

1 not in excess of \$25,000 may be granted with the approval
 2 of such office.

3 “(7) An agency may pay or grant an award under
 4 this subsection notwithstanding the death or separation from
 5 the service of the employee concerned, if the suggestion,
 6 invention, superior accomplishment, other meritorious effort
 7 for which the award is proposed was made or performed
 8 while the employee was in the employ of the Government.

9 “(f) Under regulations prescribed by the Office of Per-
 10 sonnel Management, the benefit of advancement through the
 11 range of basic pay shall be preserved for an employee cov-
 12 ered by the merit pay system, whose continuous service is
 13 interrupted in the public interest by service with the armed
 14 forces, or by service in essential non-Government civilian
 15 employment during a period of war or national emergency.

16 “(g) For purposes of section 5941 of this title, rates
 17 of basic pay subject to increases under the merit pay system
 18 are considered pay fixed by statute.

19 “§ 5403. Reports

20 “Until such time as the merit pay system is fully im-
 21 plemented, the Office of Personnel Management shall submit
 22 to the Congress annual reports on the operation of the merit
 23 pay system and the proposed schedule for completing the
 24 implementation of the system. Thereafter the Office of Per-
 25 sonnel Management shall periodically submit reports to

1 Congress on the effectiveness of the system and the costs
2 associated with implementing it.

3 **“§5404. Regulations**

4 **“The Office of Personnel Management shall prescribe**
5 **regulations necessary for the administration of this chapter.”**

6 **CONFORMING AND TECHNICAL AMENDMENTS**

7 **SEC. 502.** (a) Section 4501 (2) (A) of title 5, United
8 States Code, is amended by striking out “; and” and inserting
9 in lieu thereof “but does not include an individual paid under
10 the merit pay system established under section 5402 of this
11 title; and”.

12 (b) Section 4502 (a) of title 5, United States Code,
13 is amended by striking out “\$5,000” and inserting in lieu
14 thereof “\$10,000”.

15 (c) Section 4502 (b) of title 5, United States Code, is
16 amended—

17 (1) by striking out “Civil Service Commission”
18 and inserting in lieu thereof “Office of Personnel
19 Management”;

20 (2) by striking out “\$5,000” and inserting in lieu
21 thereof “\$10,000”; and

22 (3) by striking out “the Commission” and insert-
23 ing in lieu thereof “the Office”.

24 (d) Section 4506 of title 5, United States Code, is
25 amended by striking out “Civil Service Commission may”

1 and inserting in lieu thereof “Office of Personnel Manage-
2 ment shall”.

3 (e) Section 5332 (a) of title 5, United States Code, is
4 amended by inserting after “applies” the second time it
5 appears the following: “except an employee covered by
6 chapter 54 of this title.”

7 (f) Section 5334 of title 5, United States Code, is
8 amended—

9 (1) in paragraph (2) of subsection (c) by insert-
10 ing “; or for an employee appointed to a position covered
11 by the merit pay system, any dollar amount,” after
12 “step”; and

13 (2) by adding at the end thereof the following new
14 subsection:

15 “(g) In the case of an employee covered by the merit
16 pay system, all references in this section to ‘two steps’ or
17 ‘two step-increases’ shall be deemed to mean 6 percent.”.

18 (g) Section 5335 (e) of title 5, United States Code, is
19 amended by inserting after “individual” the following: “cov-
20 ered by chapter 54 of this title, or,”.

21 (h) Section 5336 (c) of title 5, United States Code, is
22 amended by inserting after “individual” the following: “cov-
23 ered by chapter 54 of this title, or,”.

24 (i) The table of chapters for part III of title 5, United

95TH CONGRESS
2d Session

S. 2640

[Report No. 95-869]

IN THE SENATE OF THE UNITED STATES

MARCH 8 (legislative day, FEBRUARY 6), 1978
Mr. RIMCOFF (for himself, Mr. PERCY, Mr. SASSER, Mr. JAVITS, Mr. CHELES, Mr. EAGLETON, Mr. GLENN, Mrs. HUMPHREY, Mr. JACKSON, Mr. MOSKIE, and Mr. NUNN) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

JULY 10 (legislative day, MAY 17), 1978

Reported by Mr. RIMCOFF, with an amendment

(Strike out all after the enacting clause and insert the part printed in italics)

A BILL

To reform the civil service laws.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3
4
5
6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SHORT TITLE

SECTION 1. This Act may be cited as the "Civil Service Reform Act of 1978".
SEC. 2. The table of contents is as follows:

1363

TABLE OF CONTENTS

- Sec. 1. Short title.
 Sec. 2. Table of contents.
 Sec. 3. Findings and statement of purpose.

TITLE I—MERIT SYSTEM PRINCIPLES

- Sec. 101. Merit system principles; prohibited personnel practices.

TITLE II—CIVIL SERVICE FUNCTIONS; PERFORMANCE APPRAISAL; ADVERSE ACTIONS

- Sec. 201. Office of Personnel Management.
 Sec. 202. Merit Systems Protection Board and Special Counsel.
 Sec. 203. Performance appraisals.
 Sec. 204. Adverse actions.
 Sec. 205. Appeals.
 Sec. 206. Technical and conforming amendments.

TITLE III—STAFFING

- Sec. 301. Volunteer services and probationary periods.
 Sec. 302. Training.
 Sec. 303. Travel, transportation, and subsistence.
 Sec. 304. Retirement.

TITLE IV—SENIOR EXECUTIVE SERVICE

- Sec. 401. Coverage.
 Sec. 402. Authority for employment.
 Sec. 403. Examination, certification, and appointment.
 Sec. 404. Retention preference.
 Sec. 405. Performance rating.
 Sec. 406. Incentive awards and ranks.
 Sec. 407. Pay rates and systems.
 Sec. 408. Pay administration.
 Sec. 409. Travel, transportation, and subsistence.
 Sec. 410. Leave.
 Sec. 411. Disciplinary actions.
 Sec. 412. Conversion to the Senior Executive Service.
 Sec. 413. Repealer.
 Sec. 414. Savings provision.
 Sec. 415. Effective date.

TITLE V—MERIT PAY

- Sec. 501. Pay for performance amendments.
 Sec. 502. Conforming and technical amendments.
 Sec. 503. Effective date.

TITLE VI—RESEARCH, DEMONSTRATION, AND OTHER PROGRAMS

- Sec. 601. Research and demonstration projects.
 Sec. 602. Intergovernmental Personnel Act amendments.
 Sec. 603. Amendments to the mobility program.

TABLE OF CONTENTS—Continued

TITLE VII—LABOR-MANAGEMENT RELATIONS

- Sec. 701. Labor-management relations.
 Sec. 702. Remedial authority.

TITLE VIII—MISCELLANEOUS

- Sec. 801. Savings provisions.
 Sec. 802. Authorization of appropriations.
 Sec. 803. Powers of President unaffected except by express provisions.
 Sec. 804. Technical and conforming amendments.
 Sec. 805. Effective dates.

FINDINGS AND STATEMENT OF PURPOSE

SEC. 3. It is the policy of the United States that—

(1) in order to provide the people of the United States with a competent, honest, and productive Federal work force reflective of the Nation's diversity, and to improve the quality of public service, Federal personnel management should be implemented consistent with merit system principles and free from prohibited personnel practices;

(2) the merit system principles which shall govern in the competitive service and in the executive branch of the Federal Government should be expressly stated to furnish guidance to Federal agencies in carrying out their responsibilities in administering the public business and prohibited personnel practices should be statutorily defined to enable Government officers and employees to avoid conduct which undermines the merit system principles and the integrity of the merit system;

(3) Federal employees should receive appropriate

1 protection through increasing the authority and powers
2 of the independent Merit Systems Protection Board in
3 processing hearings and appeals affecting Federal
4 employees;

5 (4) the authority and power of the independent
6 Special Counsel should be increased so that the Special
7 Counsel may investigate allegations involving prohibited
8 personnel practices, protect Federal employees from re-
9 prials for the lawful disclosure of information and from
10 political coercion, and bring complaints and disciplinary
11 charges against agencies and employees that engage in
12 prohibited personnel practices;

13 (5) the function of filling positions and other per-
14 sonnel functions in the competitive service and in the
15 executive branch should be delegated in appropriate
16 cases to the agencies to expedite processing appoint-
17 ments and other personnel actions, with the control and
18 oversight of this delegation being maintained by the
19 Office of Personnel Management to protect against pro-
20 hibited personnel practices and the use of unsound man-
21 agement practices by the agencies;

22 (6) a Senior Executive Service should be estab-
23 lished to provide the flexibility needed by Executive
24 agencies to recruit and retain the highly competent and

1 qualified executives needed to provide more effective
2 management of Executive agencies and their functions,
3 and the more expeditious administration of the public
4 business;

5 (7) in appropriate instances, pay increases should
6 be based on quality of performance rather than length
7 of service;

8 (8) a research and demonstration program should
9 be authorized to permit Federal agencies to experiment
10 with new and different personnel management concepts
11 in controlled situations to achieve more efficient manage-
12 ment of the Government's human resources and greater
13 productivity in the delivery of service to the public;

14 (9) the training program of the Government should
15 include retraining of employees for positions in other
16 agencies to avoid separations during reductions in force
17 and the loss to the Government of the knowledge and
18 experience that these employees possess, and to maintain
19 the morale and productivity of employees; and

20 (10) the right of Federal employees to organize,
21 bargain collectively, and participate through labor orga-
22 nizations in decisions which affect them, with full regard
23 for the public interest and the effective conduct of public
24 business, should be specifically recognized in statute.

1 **TITLE I—MERIT SYSTEM PRINCIPLES**2 **MERIT SYSTEM PRINCIPLES; PROHIBITED PERSONNEL**8 **PRACTICES**

4 **SEC. 101. (a) Title 5, United States Code, is amended**
5 **by inserting, after chapter 21, the following new chapter:**

6 **"CHAPTER 23—MERIT SYSTEM PRINCIPLES**

^aSec.

^b2301. Merit system principles.

^c2302. Prohibited personnel practices.

^d2303. Responsibility of the General Accounting Office.

7 **"§ 2301. Merit system principles**

8 **"(a) (1) Except as provided in paragraph (2) of this**
9 **subsection, this chapter shall apply to—**

10 **"(A) an Executive agency;**

11 **"(B) the Administrative Office of the United States**
12 **Courts; and**

13 **"(C) the Government Printing Office.**

14 **"(2) This chapter shall not apply to—**

15 **"(A) a Government corporation;**

16 **"(B) the Federal Bureau of Investigation, the Cen-**
17 **tral Intelligence Agency, the Defense Intelligence Agency,**
18 **the National Security Agency, any positions in the Drug**
19 **Enforcement Administration which are excluded from the**
20 **competitive service under section 201 of the Crime Con-**
21 **trol Act of 1976 (90 Stat. 2425); and, as determined by**
22 **the President, an executive agency or unit thereof whose**

1 **principal function is the conduct of foreign intelligence or**
2 **counterintelligence activities;**

3 **"(C) the General Accounting Office; and**

4 **"(D) any position excluded from the application of**
5 **this chapter by the President based on a determination by**
6 **him that it is necessary and warranted by conditions of**
7 **good administration or because of its confidential, policy-**
8 **making, policy determining or policy advocating charac-**
9 **ter, except that any appointee to a position which is ex-**
10 **cluded by the President under this subparagraph shall**
11 **be required to comply with the provisions of section 2302**
12 **of this title.**

13 **"(b) Federal personnel management shall be imple-**
14 **mented consistent with the following merit system principles:**

15 **"(1) Recruitment should be from qualified candidates**
16 **from appropriate sources in an endeavor to achieve a work**
17 **force from all segments of society, and selection and ail-**
18 **lacement should be determined solely on the basis of rela-**
19 **tive ability, knowledge, and skills, after fair and open com-**
20 **petition which assures that all receive equal opportunity.**

21 **"(2) All applicants and employees should receive fair**
22 **and equitable treatment in all aspects of personnel manage-**
23 **ment without regard to political affiliation, race, color, reli-**
24 **gion, national origin, sex, marital status, age, or handicap-**

1 *ping condition, and with proper regard for their privacy and*
2 *constitutional rights.*

3 *"(3) Equal pay should be provided for work of equal*
4 *value to attract and retain highly qualified personnel, with*
5 *appropriate consideration of both national and local rates*
6 *paid by non-Federal employers, and appropriate incentives*
7 *and recognition should be provided for excellence in*
8 *performances.*

9 *"(4) All employees should maintain high standards of*
10 *integrity, conduct, and concern for the public interest.*

11 *"(5) The Federal work force should be used efficiently*
12 *and effectively.*

13 *"(6) Employees should be retained on the basis of the*
14 *adequacy of their performance, inadequate performance*
15 *should be corrected, and employees should be separated who*
16 *cannot or will not improve their performance to meet re-*
17 *quired standards.*

18 *"(7) Employees should be provided effective education*
19 *and training in cases in which such education and training*
20 *would result in better organizational and individual perform-*
21 *ance.*

22 *"(8) Employees should be—*

23 *"(A) protected against arbitrary action, personal*
24 *favoritism, or coercion for partisan political purposes,*
25 *and*

1 *"(B) prohibited from using their official authority*
2 *or influence for the purpose of interfering with or affect-*
3 *ing the result of an election or a nomination for election.*

4 *"(e) Pursuant to his authority under this title, the*
5 *President may take such actions, including the issuance of*
6 *rules, regulations, or directives, as the President determines*
7 *are necessary to assure that personnel management in the*
8 *agencies covered by this section is based on and embodies*
9 *the merit system principles.*

10 *"§ 2302. Prohibited personnel practices*

11 *"(a) For the purpose of this section, 'personnel action'*
12 *means—*

13 *"(1) an appointment;*

14 *"(2) a promotion;*

15 *"(3) an action under chapter 75 of this title or*
16 *other disciplinary or corrective action;*

17 *"(4) a detail, transfer, or reassignment;*

18 *"(5) a reinstatement;*

19 *"(6) a restoration;*

20 *"(7) a reemployment;*

21 *"(8) a performance evaluation under chapter 43 of*
22 *this title;*

23 *"(9) a decision concerning pay, benefits, or awards,*
24 *or a decision concerning education or training if it may*

1 reasonably be expected to lead to a personnel action within
2 the meaning of this subsection; or

3 "(10) any other significant change in duties or
4 responsibilities which is inconsistent with the employee's
5 salary or grade level;

6 with respect to an employee in, or applicant for, a position
7 in the competitive service, a career appointee in the Senior
8 Executive Service, or a position in the excepted service in
9 an executive agency other than a position which is excepted
10 from the competitive service because of its confidential, policy-
11 advocating, policy-determining, or policymaking character.

12 "(b) Any employee who has authority to take, direct
13 others to take, recommend, or approve any personnel action,
14 shall not, with respect to such authority—

15 "(1) discriminate for or against any employee or
16 applicant for employment on the basis of race, color,
17 religion, sex, or national origin as prohibited by the
18 Civil Rights Act of 1964 (42 U.S.C. 2000e-16 or the
19 Fair Labor Standards Act of 1938 (29 U.S.C.
20 206(d)) age as prohibited by the Age Discrimination
21 in Employment Act of 1967 (29 U.S.C. 633a), handi-
22 capping conditions as prohibited by section 501 of the
23 Rehabilitation Act of 1973 (29 U.S.C. 791), or marital
24 status or political affiliation as prohibited by applicable
25 law, rule, or regulation;

1 "(2) solicit or consider any recommendation or state-
2 ment, oral or written, with respect to any individual who
3 requests or is under consideration for any personnel ac-
4 tion unless such recommendation or statement is based on
5 the personal knowledge or records of the person furnish-
6 ing it and consists of—

7 "(A) an evaluation of the work performance,
8 ability, aptitude, or general qualifications of such in-
9 dividual; or

10 "(B) an evaluation of the character, loyalty,
11 or suitability of such individual;

12 "(3) coerce the political activity of any person,
13 obligate any person to make any political contribution
14 (including providing any political service), or take any
15 action against any employee or applicant as a reprisal
16 for the refusal of any person to engage in such political
17 activity, make such contribution, or provide such service;

18 "(4) willfully deceive or obstruct any person with
19 respect to such person's right to compete for Federal
20 employment;

21 "(5) influence any person to withdraw from com-
22 petition for any position for the purpose of improving
23 or injuring the prospects of any applicant for employ-
24 ment;

25 "(6) grant any preference or advantage not author-

1 ized by law, rule, or regulation to any employee or
 2 applicant for employment (including defining the scope
 3 or manner of competition or the requirements for any
 4 position) for the purpose of improving or injuring the
 5 prospects of any particular individual or category of
 6 individuals;

7 “(7) appoint, employ, promote, advance, or advo-
 8 cate for appointment, employment, promotion, or
 9 advancement, in or to a civilian position, any individual
 10 who is a relative (as defined in section 3110(a)(3) of
 11 this title) of such employee if such position is in the
 12 agency in which such employee is serving as a public
 13 official (as defined in section 3110(a)(2) of this title)
 14 or over which such employee exercises jurisdiction or con-
 15 trol as such an official;

16 “(8) take or threaten to take any personnel action
 17 against any employee or applicant for employment as a
 18 reprisal for the disclosure, not prohibited by statute or
 19 Executive Order 11652, or any related amendments
 20 thereto, of information concerning the existence of any
 21 activity which the employee or applicant reasonably be-
 22 lieves constitutes a violation of law, rules, or regulations,
 23 or mismanagement, gross waste of funds, abuse of author-
 24 ity, or a substantial and specific danger to the public
 25 health or safety;

1 “(9) take any personnel action against any em-
 2 ployee or applicant for employment as a reprisal for the
 3 exercise of any appeal right granted by law, rule, or
 4 regulation; or

5 “(10) take any other personnel action that violates
 6 any law, rule, or regulation implementing, or relating
 7 to the merit system principles contained in section 2301.
 8 The term ‘prohibited personnel practice’, when used in
 9 this title, means an action described in this subsection. This
 10 section does not constitute authority to withhold information
 11 from Congress or to take any personnel action against an
 12 employee who discloses information to Congress.

13 “(c) The head of each executive agency shall be re-
 14 sponsible for the prevention of prohibited personnel prac-
 15 tices, for the compliance with and enforcement of applicable
 16 civil service laws, rules, and regulations, as well as other
 17 aspects of personnel management. Any individual to whom
 18 the head of an executive agency delegates authority for per-
 19 sonnel management, or for any aspect thereof, shall be
 20 similarly responsible within the limits of the delegation.

21 “(d) This section shall not be construed to extinguish
 22 or lessen any effort to achieve equal employment opportunity
 23 through affirmative action or any right or remedy available
 24 to any employee or applicant for employment in the civil
 25 service under the provisions of the Civil Rights Act of 1964

1 (49 U.S.C. 2000e-16), prohibiting discrimination based on
 2 race, color, religion, sex, or national origin, the Age Discrimi-
 3 nation in Employment Act of 1976 (29 U.S.C. 633a), pro-
 4 hibiting age discrimination, the Fair Labor Standards Act of
 5 1938 (29 U.S.C. 206(d)), prohibiting discrimination on
 6 account of sex in the payment of wages, section 501 of the Re-
 7 habilitation Act of 1973 (29 U.S.C. 791), prohibiting dis-
 8 crimination on account of handicapping condition, or under
 9 any other applicable law, rule, or regulation prohibiting dis-
 10 crimination on such grounds or on the basis of marital status
 11 or political affiliation.

12 "§ 2303. Responsibility of the General Accounting Office
 13 "If ordered by either House of Congress, or upon his
 14 own initiative, or if requested by any committee of the House
 15 of Representatives or the Senate, the Comptroller General
 16 shall conduct audits and reviews to determine compliance
 17 with the laws, rules, and regulations governing employment
 18 in the executive branch and in the competitive service and to
 19 assess the effectiveness and soundness of Federal personnel
 20 management."

21 (b)(1) The table of chapters for part III of title 5,
 22 United States Code, is amended by adding after the item
 23 relating to chapter 21 the following new item:

"22. Merit system principles----- 2301."

1 (2) Section 7153 of title 5, United States Code, is
 2 amended—

3 (A) by striking out "Physical handicap" in the
 4 catchline and inserting in lieu thereof "Handicapping
 5 condition"; and

6 (B) by striking out "physical handicap" each place
 7 it appears in the text and inserting in lieu thereof "handi-
 8 capping condition".

9 (3) The table of sections for chapter 71 of title 5,
 10 United States Code, is amended by striking out "physical
 11 handicap" in the item relating to section 7153 and inserting
 12 in lieu thereof "handicapping condition".

13 **TITLE II—CIVIL SERVICE FUNCTIONS; PER-**
 14 **FORMANCE APPRAISAL; ADVERSE ACTIONS**
 15 **OFFICE OF PERSONNEL MANAGEMENT**

16 **SEC. 201. (a) Chapter 11 of title 5, United States**
 17 **Code, is amended to read as follows:**

18 **"CHAPTER 11—OFFICE OF PERSONNEL**
 19 **MANAGEMENT**

20 ^{"Sec.}
 "1101. Office of Personnel Management.
 "1102. Director; Deputy Director; Associate Directors.
 "1103. Functions of the Director.
 "1104. Delegation of authority for personnel management.

21 "§ 1101. Office of Personnel Management

22 "The Office of Personnel Management is an independent
 establishment in the Executive branch. The Office shall have

1 an official seal which shall be judicially noticed and shall
2 have its principal office in the District of Columbia, but it
3 may have field offices in other appropriate locations.

4 "§ 1102. Director; Deputy Director; Associate Directors

5 "(a)(1) There is at the head of the Office of Personnel
6 Management a Director of the Office of Personnel Manage-
7 ment appointed by the President, by and with the advice and
8 consent of the Senate for a term of 4 years coterminous with
9 that of the President.

10 "(2) The Director may be removed by the President only
11 for inefficiency, neglect of duty, or malfeasance in office.

12 "(3) A Director appointed to fill a vacancy occurring
13 before the end of a term of office of his predecessor serves for
14 the remainder of the term.

15 "(b) There is in the Office a Deputy Director of the
16 Office of Personnel Management appointed by the President,
17 by and with the advice and consent of the Senate. The
18 Deputy Director shall perform such functions as the Director
19 may from time to time prescribe and shall act as Director
20 during the absence or disability of the Director or in the event
21 of a vacancy in the Office of the Director.

22 "(c) No person shall, while serving as Director or
23 Deputy Director, serve in any other office or position in the
24 Government of the United States except as otherwise provided
25 by law or at the direction of the President, except that the

1 Director or Deputy Director shall not advise the President
2 concerning political appointments.

3 "(d) There shall be within the Office of Personnel Man-
4 agement not more than five Associate Directors, who shall be
5 appointed by the Director as executives in the Senior Execu-
6 tive Service, and who shall have such titles as the Director
7 shall from time to time determine.

8 "§ 1103. Functions of the Director

9 "(a) The following functions are vested in the Director
10 of the Office of Personnel Management, and shall be per-
11 formed by the Director, or by such employees of the Office as
12 the Director designates—

13 "(1) aiding the President, as the President may
14 request, in preparing such civil service rules as the Pres-
15 ident prescribes, and otherwise advising the President on
16 actions which may be taken to promote an efficient civil
17 service and a systematic application of the merit system
18 principles, including recommending policies relating to
19 the selection, promotion, transfer, performance, pay,
20 conditions of service, tenure, and separation of
21 employees;

22 "(2) executing, administering, and enforcing—

23 "(A) the civil service rules and regulations
24 of the President and the Office and the statutes gov-
25 erning the same, and

1 “(B) the other activities of the Office including
2 retirement, classification, and training activities;
3 except to the extent that the Merit Systems Protection
4 Board or the Special Counsel is authorized to exercise
5 such executing, administering or enforcement functions;

6 “(3) securing accuracy, uniformity, and justice in
7 the functions of the Office;

8 “(4) appointing individuals to be employed by the
9 Office;

10 “(5) directing and supervising employees of the
11 Office, distributing business among employees and organi-
12 zational units of the Office, and directing the internal
13 management of the Office;

14 “(6) directing the preparation of requests for ap-
15 propriations and the use and expenditure of funds;

16 “(7) reviewing the operations under chapter 87 of
17 this title; and

18 “(8) conducting, or otherwise providing for the
19 conduct of, studies and research into methods of assuring
20 improvements in personnel management.

21 “(b) In the issuance of rules and regulations, the Direc-
22 tor of the Office of Personnel Management shall be subject to
23 section 553 of this title (notwithstanding the exemption in
24 section 553(a)(2) of this title relating to agency management
25 or personnel).

1 “(a) Notwithstanding any other provision of law, the
2 Director of the Office of Personnel Management shall have
3 the right to intervene in any proceeding before the Equal
4 Employment Opportunity Commission not subject to section
5 7701(h) of this title, if the proceeding involves any civil
6 service employee or applicant and if the Director determines
7 that any order or decision of the Commission in such matter
8 may substantially affect the interpretation or administration
9 of the civil service laws, or the Director possesses information
10 which the Director believes may be relevant to the proceeding.

11 “§ 1104. Delegation of authority for personnel management

12 “(a) Notwithstanding any other provision of this title—

13 “(1) the President may delegate, in whole or in
14 part, authority for personnel management functions,
15 including authority for competitive examinations, to the
16 Director of the Office of Personnel Management; and

17 “(2) the Director may delegate, in whole or in
18 part, any function vested in the Director, including au-
19 thority for competitive examinations, to the heads of
20 agencies in the executive branch and other agencies
21 employing persons in the competitive service.

22 “(b) Authority to conduct competitive examinations
23 delegated to the head of an agency under subsection (a)(2)
24 of this section shall be in accord with standards issued by the
25 Director and shall be subject to oversight by the Director

1 to assure application of merit system principles in examina-
2 tions and selections.

3 "(c) Personnel actions taken by an agency under the
4 authority of this section which are contrary to any law, regu-
5 lation, or standard issued by the Director shall be canceled
6 by the agency upon the direction of the Director.

7 "(d) Nothing in subsection (a) of this section shall be
8 construed as affecting the responsibility of the Director to as-
9 sure compliance with the civil service laws and regulations."

10 (b)(1) Section 5313 of title 5, United States Code, is
11 amended by inserting at the end thereof the following new
12 paragraph:

13 "(24) Director of the Office of Personnel Man-
14 agement."

15 (2) Section 5314 of such title is amended by inserting
16 at the end thereof the following new paragraph:

17 "(67) Deputy Director of the Office of Personnel
18 Management."

19 (3) Section 5315 of such title is amended by inserting
20 at the end thereof the following new paragraph:

21 "(122) Associate Directors of the Office of Per-
22 sonnel Management (5)."

23 (c)(1) The heading of part II of title 5, United States
24 Code, is amended by striking out "The United States Civil

1 Service Commission" and inserting in lieu thereof "Civil
2 Service Functions and Responsibilities".

3 (2) The item relating to chapter 11 in the table of
4 chapters for part II of such title is amended by striking out
5 "Organization" and inserting in lieu thereof "Office of Per-
6 sonnel Management".

7 (d) Notwithstanding the provisions of section 1102 of
8 title 5, United States Code, the term of office of the first
9 Director of Office of Personnel Management appointed under
10 such section shall expire on the last day of the term of the
11 President during which he was appointed.

12 MERIT SYSTEMS PROTECTION BOARD AND SPECIAL
13 COUNSEL

14 SEC. 202. (a) Title 5, United States Code, is amended
15 by inserting after chapter 11 the following new chapter:

16 "CHAPTER 12—MERIT SYSTEMS PROTECTION
17 BOARD AND SPECIAL COUNSEL

"Sec.

"1801. Appointment of members of the Merit Systems Protection Board.

"1802. Term of office; filling vacancies; removal.

"1803. Chairman; Vice Chairman.

"1804. Special Counsel; appointment and removal.

"1805. Powers and functions of the Merit Systems Protection Board;
subpoenas.

"1806. Authority and responsibilities of the Special Counsel.

"1807. Hearings and decisions on complaints filed by the Special Counsel.

18 "§ 1201. Appointment of members of the Merit Systems
19 Protection Board

20 "The Merit Systems Protection Board is composed of

1 3 members appointed by the President, by and with the
 2 advice and consent of the Senate, not more than 2 of whom
 3 may be adherents of the same political party and none of
 4 whom may hold another office or position in the Government
 5 of the United States. The Chairman and members of the
 6 Board shall be individuals who, by demonstrated ability,
 7 background, training, or experience are especially qualified
 8 to carry out the functions of the Board. The Board shall have
 9 an official seal which shall be judicially noticed. The Board
 10 shall have its principal office in the District of Columbia
 11 and may have field offices in other appropriate locations.

12 "§ 1202. Term of office; filling vacancies; removal

13 "(a) The term of office of each member of the Merit
 14 Systems Protection Board is 7 years.

15 "(b) A Board member appointed to fill a vacancy oc-
 16 curring before the end of a term of office of his predecessor
 17 serves for the remainder of that term. The appointment is
 18 subject to the requirements of section 1201 of this title.

19 "(c) Any Board member appointed for a 7-year term
 20 may not be reappointed to any following term but may con-
 21 tinue to serve until a successor is appointed and has qualified,
 22 except that such member may not continue to serve for more
 23 than one year after the date on which the term of the mem-
 24 ber would otherwise expire under this section.

25 "(d) A Board member may be removed by the Pres-

1 ident only for inefficiency, neglect of duty, or malfeasance in
 2 office.

3 "(e) Any term of office of any member of the Merit
 4 Systems Protection Board serving on the effective date of
 5 this Act shall continue in effect until such time as such term
 6 would expire under section 1102 of title 5, United States
 7 Code, as in effect immediately before the effective date of
 8 this Act, and upon expiration of such term, appointments to
 9 such office shall be made under this chapter.

10 "§ 1203. Chairman; Vice Chairman

11 "(a) The President shall from time to time appoint, by
 12 and with the advice and consent of the Senate, one of the
 13 Board members to serve as the Chairman of the Merit Sys-
 14 tems Protection Board. The Chairman is the chief executive
 15 and administrative officer of the Board. The Chairman may
 16 continue to serve as Chairman until a successor is appointed
 17 and qualified.

18 "(b) The President shall from time to time designate
 19 one of the Board members as Vice Chairman of the Board.
 20 During the absence or disability of the Chairman, or when
 21 the office is vacant, the Vice Chairman shall perform the
 22 functions vested in the Chairman.

23 "(c) During the absence or disability of both the
 24 Chairman and Vice Chairman, or when both offices are

1 vacant, the remaining Board member shall perform the
2 functions vested in the Chairman.

3 "§ 1204. Special Counsel; appointment and removal

4 "(a) The Special Counsel of the Merit Systems Protec-
5 tion Board shall be appointed by the President from attorneys,
6 by and with the advice and consent of the Senate, for a
7 term of 4 years coterminous with that of the President. A
8 Special Counsel appointed to fill a vacancy occurring before
9 the end of a term of office of his predecessor serves for the
10 remainder of the term.

11 "(b) The Special Counsel of the Merit System Protec-
12 tion Board shall be removed by the President only for ineffi-
13 ciency, neglect of duty, or malfeasance in office."

14 "§ 1205. Powers and functions of the Merit Systems Pro-
15 tection Board; subpoenas

16 "(a) (1) The Merit Systems Protection Board shall—

17 "(A) hear, adjudicate, or provide for the hearing
18 or adjudication, of all matters within the jurisdiction
19 of the Board under this title, section 2023 of title 38,
20 or any other law, rule, or regulation; and take final
21 action on any such matter;

22 "(B) order any Federal agency or employee to
23 comply with any order or decision issued by the Board
24 under the authority granted under subparagraph (A),
25 and enforce compliance with any such order;

1 "(C) conduct, from time to time, special studies
2 relating to the civil service and to other merit systems
3 in the executive branch, and report to the President
4 and to the Congress as to whether the public interest
5 in a civil service free of prohibited personnel practices
6 is being adequately protected.

7 "(2) (A) One member of the Merit Systems Protection
8 Board may issue a stay, not to exceed 15 days, of an agency
9 personnel action in which a violation of paragraph (8), (8),
10 or (9) of section 2302(b) of this title is alleged by an
11 employee or applicant upon a petition of the Special Counsel
12 demonstrating a reasonable basis for the complaint.

13 "(B) An extension of the stay granted under subpara-
14 graph (A), not to exceed a total of 45 days, may be granted
15 by the Merit Systems Protection Board, upon a petition of the
16 Special Counsel demonstrating that a violation of paragraph
17 (3), (8), or (9) of section 2302(b) of this title probably
18 occurred or probably will occur, but such stay may be ex-
19 tended only if an opportunity to oppose the extension of the
20 stay has been accorded to the agency. The agency shall be
21 accorded a hearing upon request before the Board for this
22 purpose.

23 "(C) A permanent stay may be granted by the Merit
24 Systems Protection Board upon petition of the Special Coun-
25 sel after a hearing before the Board, or an employee desig-

1 nated by the Board to conduct such hearing, in which the
 2 Special Counsel, the employee or applicant involved, and
 3 the agency shall have the right to present all relevant and
 4 material evidence. The Board may grant a permanent stay
 5 upon a demonstration that the personnel action resulted from
 6 a personnel practice prohibited by paragraph (3), (8), or
 7 (9) of section 2302(b) of this title.

8 "(D) As part of its consideration of any petition under
 9 clauses (B) and (C) of this subparagraph the Board may
 10 grant such interim relief as it deems appropriate during
 11 the pendency of the application of the Special Counsel for a
 12 permanent stay.

13 "(3)(A) In any proceeding under paragraph (1)(A)
 14 any member of the Board may request from the Director of
 15 the Office of Personnel Management an advisory opinion
 16 concerning the interpretation of any rule, regulation, or other
 17 policy directive promulgated by the Office of Personnel
 18 Management.

19 "(B) If the interpretation or application of any rule,
 20 regulation, or policy directive of the Office of Personnel
 21 Management is at issue in any proceeding under paragraph
 22 (1)(A), the Board shall promptly notify the Director of the
 23 Office of Personnel Management, and the Director shall have
 24 the right to intervene in any such proceeding. If the Di-
 25 rector exercises his right to intervene in a proceeding before

1 the Board, he shall do so as early in the proceeding as prac-
 2 ticable.

3 "(4) In enforcing compliance with any order under
 4 paragraph (1)(B), the Board may order that any employee
 5 charged with complying with such order, other than an em-
 6 ployee appointed by the President by and with the advice and
 7 consent of the Senate, shall not be entitled to receive payment
 8 for service as an employee during any period that the order
 9 has not been complied with. The Board shall certify to the
 10 Comptroller General of the United States that such an order
 11 has been issued and no payment shall be made out of the
 12 Treasury of the United States for any service specified in
 13 such order.

14 "(5) In carrying out any study under paragraph (1)
 15 (C), the Board shall make such inquiries as may be neces-
 16 sary and, unless otherwise prohibited by law, shall have
 17 access to personnel records or information collected by the
 18 Office of Personnel Management and may require additional
 19 reports from other agencies as needed.

20 "(b) The Chairman of the Merit Systems Protection
 21 Board shall designate representatives to chair boards of
 22 review established under section 3383(b) of this title.

23 "(c) The Board may delegate the performance of any
 24 of its administrative functions under this title to any officer
 25 or employee of the Board.

1 “(d) The Board shall have the authority to prescribe
2 such regulations as may be necessary for the performance
3 of its functions. The Board shall not issue advisory opinions.
4 The Board may issue rules and regulations, consistent with
5 statutory requirements, defining its review procedures, in-
6 cluding the time limits within which an appeal must be filed
7 and the rights and responsibilities of the parties to an appeal.
8 All regulations of the Board shall be published in the Federal
9 Register.

10 “(e) Except as provided in section 518 of title 28,
11 relating to litigation before the Supreme Court, attorneys
12 designated by the Chairman of the Board may appear for
13 the Board, and represent the Board in, any civil action
14 brought in connection with any function carried out by the
15 Board pursuant to this title or as otherwise authorized by law.

16 “(f) The Chairman of the Board may appoint such
17 personnel as may be necessary to perform the functions of
18 the Board. Any appointment made under this subsection
19 to a confidential, policy-determining, policy-advocating, or
20 policymaking position, or to a position in the Senior Execu-
21 tive Service, shall comply with the provisions of this title,
22 except that such appointment shall not be subject to the
23 approval or supervision of the Office of Personnel Manage-
24 ment or the Executive Office of the President.

1 “(g) The Board shall prepare and submit to the Presi-
2 dent, and, at the same time, to the appropriate committees of
3 Congress, an annual budget of the expenses of the Board.
4 The President shall include the budget of the Board, as revised
5 by him, as a separate item in the budget required to be
6 transmitted to the Congress under section 11 of title 31.

7 “(h)(1) The Board shall submit to the President and, at
8 the same time, to the appropriate committees of Congress,
9 any legislative recommendations of the Board relating to any
10 of its functions under this title.

11 “(i)(2) The Board shall submit an annual report to the
12 President and the Congress on its activities, which shall in-
13 clude a description of significant actions taken by the Board
14 to carry out its functions under this title. The report shall also
15 review the activities of the Office of Personnel Management,
16 including an analysis of whether or not the actions of the
17 Office of Personnel Management are in accord with merit
18 system principles and free from prohibited personnel prac-
19 tices.

20 “(i)(1) The Board, the Special Counsel, any adminis-
21 trative law judge appointed under section 3105 of this title,
22 and any member or employee of the Board designated by the
23 Board may—

24 “(A) issue subpoenas requiring the attendance and
25 testimony of witnesses and the production of documen-

1 tary or other evidence from any place in the United
2 States or any territory or possession thereof, the Com-
3 monwealth of Puerto Rico, or the District of Columbia,
4 and

5 "(B) administer oaths, take or order the taking of
6 depositions, order responses to written interrogatories,
7 examine witnesses, and receive evidence.

8 "(2) In the case of contumacy or failure to obey a
9 subpoena issued under paragraph (1)(A), the Board or the
10 Special Counsel, as the case may be, may, through its own
11 attorneys, request the United States district court for the
12 judicial district in which the person to whom the subpoena is
13 addressed resides or is served to an order requiring such per-
14 son to appear at any designated place to testify or to produce
15 documentary or other evidence. Any failure to obey the order
16 of the court may be punished by the court as a contempt
17 thereof.

18 "(3) Witnesses (whether appearing voluntarily or
19 under subpoena) shall be paid the same fee and mileage
20 allowances which are paid subpoenaed witnesses in the courts
21 of the United States.

22 "§ 1206. Authority and responsibilities of the Special Coun-
23 sel

24 "(a) The Special Counsel may receive and investigate
25 allegations of prohibited personnel practices described in

1 section 2302(b) of this title, or initiate on his own such
2 investigations, and may take such action as provided in this
3 section.

4 "(b) The Special Counsel shall conduct an investigation
5 requested by any person if the Special Counsel has reason to
6 believe that a personnel action was taken, or is to be taken,
7 as a result of a prohibited personnel practice.

8 "(c) In cases involving alleged action prohibited by sec-
9 tion 2302(b) (3), (6), or (9) of this title, the Special
10 Counsel—

11 "(1) shall not, during the investigation, disclose the
12 identity of the complainant without the consent of the
13 complainant, unless the Special Counsel determines such
14 disclosure is unavoidable during the course of the in-
15 vestigation;

16 "(2) may petition the Board under section 1205
17 (a)(2) of this title for a stay of an agency personnel
18 action and for any other relief authorized under such
19 section.

20 Refusal by an agency to comply with any stay ordered by the
21 Board or a member thereof may be cause for disciplinary
22 action under subsection (j) of this section.

23 "(d) If the Special Counsel determines that there are
24 prohibited personnel practices which require corrective action,
25 pursuant to subsection (j)(2), the Special Counsel shall, co-

1 cept where the Special Counsel initiates an action before the
 2 Board to correct such practices, report his findings and rec-
 3 ommendations to the Merit Systems Protection Board, the
 4 agency affected and to the Office of Personnel Management
 5 and may report such findings to the President. The Special
 6 Counsel may include in such report suggestions as to what
 7 corrective action should be taken, but the final decision on
 8 what corrective action should be taken shall be made by the
 9 agency involved, subject to guidance and instruction from the
 10 Office of Personnel Management. The Special Counsel may
 11 furnish a copy of such report to the Congress.

12 "(e) If, in the course of the investigation, the Special
 13 Counsel determines that there is reasonable cause to believe
 14 that a criminal violation by an employee has occurred, the
 15 Special Counsel shall report such determination to the At-
 16 torney General, and to the head of the agency involved,
 17 and shall submit a copy of such report to the Director of
 18 the Office of Personnel Management and the Director of the
 19 Office of Management and Budget, except to the extent sub-
 20 section (f) applies. Any other violation of any law, rule, or
 21 regulation shall be reported to the head of the agency involved.
 22 The Special Counsel may require, within 30 days of receipt
 23 by the agency head of such report, a certification by the head
 24 of the agency which states—

1 "(1) that such head has personally reviewed the
 2 report; and

8 "(2) what action has been, or is to be taken, and
 4 when such action will be completed.

5 The Special Counsel shall maintain and make available to
 6 the public a list of noncriminal matters referred to agency
 7 heads under this subsection and their certifications of actions
 8 taken.

9 "(f) (1) Whenever the Special Counsel receives informa-
 10 tion the disclosure of which is protected under subsection 2302
 11 (b) (8) of this title, he shall transmit all information and re-
 12 lated matters to the appropriate agency head. If the agency
 13 head determines that the allegations are clearly substantial
 14 and he conducts an investigation of the allegations, the agency
 15 head shall report his findings of the investigation and reasons
 16 supporting those findings within a reasonable period to the
 17 Comptroller General, except that an agency shall have no ob-
 18 ligation to make such a determination concerning an investi-
 19 gation under this subsection if the allegations are made by an
 20 individual who is not an employee of such agency.

21 "(2) The agency head shall provide a summary of his
 22 activities to the Special Counsel. The Special Counsel shall
 23 transmit such information to the individual who brought the
 24 matter to the attention of the Special Counsel.

25 "(3) The Comptroller General may examine the agency

1 findings to determine whether the agency investigation is ade-
 2 quate and whether the corrective action, if any, taken by the
 3 agency is adequate. The General Accounting Office may re-
 4 port its examination of the agency action to the Congress if
 5 the agency investigation or its proposed corrective action is
 6 inadequate.

7 “(4) The identity of the employee who disclosed informa-
 8 tion under the terms of section 2308(b)(8) shall be re-
 9 vealed only in accordance with the provisions of subsection
 10 (c)(1) of this section.

11 “(5) The General Accounting Office and the Special
 12 Counsel shall report to the Congress by December 31, 1980,
 13 on their experience in handling disclosures under section
 14 2302(b)(8) and investigations pursuant thereto.

15 “(g)(1) In addition to the authority otherwise pro-
 16 vided in this section, the Special Counsel may, except as
 17 provided in paragraph (2) of this subsection, conduct an
 18 investigation of any other alleged prohibited practice which
 19 consists of—

20 “(A) political activity by any employee which is
 21 prohibited under subchapter III of chapter 73 of this
 22 title;

23 “(B) political activity by any State or local officer
 24 or employee which is prohibited under chapter 15 of
 25 this title;

1 “(C) arbitrary or capricious withholding of infor-
 2 mation prohibited under section 552 of this title;

3 “(D) involvement by any employee in any pro-
 4 hibited discrimination found by any court or appropri-
 5 ate administrative authority to have occurred in the
 6 course of any personnel action.

7 “(2) The Special Counsel shall make no investigation
 8 of any allegation of any prohibited practice referred to in
 9 subparagraph (A) or (D) of paragraph (1) of this
 10 subsection if the Special Counsel determines that such allega-
 11 tion may be more appropriately resolved under an admin-
 12 istrative appeals procedure.

13 “(h) During any investigation initiated in accordance
 14 with this section, no disciplinary action shall be taken against
 15 any employee for any alleged prohibited activity under such
 16 investigation or any related activity without the approval of
 17 the Special Counsel.

18 “(i)(1) Except as provided in paragraph (2) of this
 19 subsection, if the Special Counsel determines, after any in-
 20 vestigation under this section of any prohibited personnel
 21 practice by any employee, that disciplinary action should be
 22 taken against such employee because of such prohibited per-
 23 sonnel practice, the Special Counsel shall prepare a written
 24 complaint against such employee containing such determina-
 25 tion and present such complaint together with a statement

1 of supporting facts to the Merit Systems Protection Board
 2 or to an administrative law judge appointed under section
 3 3105 of this title and designated by the Board, for a hearing
 4 and decision pursuant to section 1207.

5 “(2) In the case of an employee in a confidential, policy-
 6 making, policy-determining, or policy-advocating position who
 7 was appointed by the President, by and with the advice and
 8 consent of the Senate, such complaint and statement, and any
 9 response by the employee to such complaint, shall be presented
 10 to the President in lieu of the Board or administrative law
 11 judge referred to in paragraph (1) of this subsection.

12 “(j)(1) The Special Counsel may bring disciplinary
 13 action, in accordance with the procedures set forth in section
 14 1207 of this title against any employee who knowingly and
 15 willfully refuses or fails to comply with an order of the Merit
 16 Systems Protection Board, except that in the case of an
 17 employee described in subsection (i)(2), the Special Counsel
 18 shall submit to the President in lieu of the Board a report
 19 on the actions of such employee, which shall include the
 20 information described in subsection (i)(2).

21 “(2) If the Special Counsel believes there is a pattern
 22 of prohibited personnel practices by any agency or employee
 23 and such practices involve matters which are not otherwise
 24 appealable to the Board under section 7701 of this title,
 25 the Special Counsel may seek corrective action by filing a

1 written complaint with the Board against such agency or
 2 such employee and the Board shall order such corrective
 3 action as it finds necessary.

4 “(k) The Special Counsel may as a matter of right in-
 5 tervene or otherwise participate in any proceeding before
 6 the Merit System Protection Board, except that the Special
 7 Counsel shall comply with the rules of the Board and the
 8 Special Counsel shall not have any right of judicial appeal
 9 in connection with such intervention.

10 “(l) The Special Counsel may appoint such legal, ad-
 11 ministrative, and support personnel as may be necessary to
 12 perform the functions of the Special Counsel. Any appoint-
 13 ment made under this subsection shall not be subject to the
 14 approval or supervision of the Office of Personnel Manage-
 15 ment or the Executive Office of the President.

16 “(m) The Special Counsel may prescribe such regula-
 17 tions as may be necessary for investigations under this sec-
 18 tion. Such regulations shall be published in the Federal
 19 Register.

20 “(n) The Special Counsel shall not issue any advisory
 21 opinion concerning any law, rule, or regulation (other than
 22 chapter 15 and subchapter III of chapter 73 of this title,
 23 or any rule or regulation thereunder).

24 “(o) The Special Counsel shall submit an annual report
 25 to Congress on his activities. Such reports shall describe the

1 work of the Special Counsel, including the number, types,
 2 and disposition of allegations of prohibited personnel prac-
 3 tices filed with it, investigations conducted by it, and actions
 4 initiated by it before the Board, as well as a description of
 5 the recommendations and reports made by it to other agen-
 6 cies pursuant to subsections (d), (e), (i), or (j) of this sec-
 7 tion, and the actions taken by the agencies as a result of the
 8 reports or recommendations. The report required by this sub-
 9 section shall include whatever recommendations for legislation
 10 or other action by Congress the Special Counsel may deem
 11 appropriate.

12 "§ 1207. Hearings and decisions on complaints filed by the
 13 Special Counsel

14 "Any employee against whom a complaint has been
 15 presented to the Merit Systems Protection Board or an
 16 administrative law judge under section 1206 of this title
 17 shall be entitled to a hearing on the record before the
 18 Board or an administrative law judge appointed under
 19 section 5105 of this title and designated by the Board. In
 20 the case of a State or local officer or employee under chapter
 21 15 of this title, such hearing shall be conducted in accordance
 22 with section 1505 of this title. There may be no administra-
 23 tive appeal from a final order of the Board. A final order of
 24 the Board may impose disciplinary action including removal,

1 demotion, or debarment from Federal employment not to
 2 exceed 5 years, reprimand, suspension, or a civil penalty not
 3 to exceed \$1,000. In the case of any State or local officer or
 4 employee under chapter 15 of this title, the Board shall act
 5 in accordance with section 1506 of this title. An employee
 6 subject to a final order imposing disciplinary action may
 7 obtain judicial review of the final order of the Board in the
 8 United States Court of Appeals for the circuit in which such
 9 employee was employed at the time of the action."

10 (b)(1) Section 5314(17) of title 5, United States
 11 Code, is amended by striking out "Chairman of the United
 12 States Civil Service Commission" and inserting in lieu
 13 thereof "Chairman of the Merit Systems Protection Board".

14 (2) Section 5316(66) of such title is amended by
 15 striking out "Members, United States Civil Service Com-
 16 mission" and inserting in lieu thereof "Members, Merit
 17 Systems Protection Board".

18 (3) Section 5315 of such title is further amended by
 19 adding at the end thereof the following new paragraph:

20 "(123) Special Counsel of the Merit Systems Pro-
 21 tection Board."

22 (4) Paragraph (99) of section 5316 of such title is
 23 hereby repealed.

24 (c) The term of office of the first individual appointed
 25 and qualified as the Special Counsel of the Merit Systems

1 Protection Board under section 1204(a) of title 5, United
 2 States Code, as added by subsection (a), shall expire on
 3 the last day of the term of the President during which he
 4 was appointed.

5 (d) The table of chapters for part II of title 5, United
 6 States Code, is amended by inserting after the item relating
 7 to chapter 11 the following new item:

"12. Merit Systems Protection Board and Special Counsel..... 1201".

8 PERFORMANCE APPRAISALS

9 SEC. 203. (a) Chapter 43 of title 5, United States
 10 Code, is amended to read as follows:

11 "CHAPTER 43—PERFORMANCE APPRAISAL

"SUBCHAPTER 1—PERFORMANCE APPRAISAL—GENERAL

"Sec.

"4301. Definitions.

"4302. Establishment of performance appraisal systems.

"4303. Actions based on unacceptable performance.

"4304. Responsibilities of Office of Personnel Management.

"4305. Regulations.

12 "§ 4301. Definitions

13 "For the purpose of this subchapter—

14 "(1) 'agency' means—

15 "(A) an Executive agency;

16 "(B) the Administrative Office of the United
 17 States Courts; and

18 "(C) the Government Printing Office;

19 but does not include—

20 "(i) the General Accounting Office;

1 "(ii) the Central Intelligence Agency, the De-
 2 fense Intelligence Agency, and the National Secur-
 3 ity Agency, and, as determined by the President,
 4 an Executive agency, or unit thereof, whose prin-
 5 cipal function is the conduct of foreign intelligence
 6 or counterintelligence activities;

7 "(iii) a Government corporation; and

8 "(iv) an agency or unit of an agency excluded
 9 from coverage of this subchapter by regulation of
 10 the Office of Personnel Management;

11 "(2) 'employee' means an individual employed in
 12 or under an agency, but does not include—

13 "(A) an employee outside the United States
 14 who is paid in accordance with local native pro-
 15 vailing wage rates for the area in which employed;

16 "(B) an individual in the Foreign Service of
 17 the United States;

18 "(C) a physician, dentist, nurse, or other em-
 19 ployee in the Department of Medicine and Surgery,
 20 Veterans' Administration, whose pay is fixed under
 21 chapter 73 of title 38;

22 "(D) an administrative law judge appointed
 23 under section 3105 of this title;

24 "(E) an individual in the Senior Executive
 25 Service;

1 “(F) an individual appointed by the Presi-
2 dent; or

3 “(G) an individual occupying a position not in
4 the competitive service excluded from coverage of
5 this subchapter by regulations of the Office of Per-
6 sonnel Management; and

7 “(3) ‘unacceptable performance’ means perform-
8 ance which fails to meet established standards in one or
9 more critical elements of the job.

10 “§ 4302. Establishment of performance appraisal systems

11 “(a) Each agency shall develop one or more performance
12 appraisal systems which—

13 “(1) provide for periodic appraisals of job perform-
14 ance of employees;

15 “(2) encourage employee participation in estab-
16 lishing performance objectives; and

17 “(3) use the results of performance appraisals as
18 a basis for training, rewarding, reassigning, promoting,
19 demoting, retaining, and separating employees.

20 “(b) Under such regulations as the Office of Personnel
21 Management shall prescribe, each performance appraisal
22 system shall provide for—

23 “(1) establishing performance standards for each
24 employee under such system, communicating such stand-
25 ards to such employee at the beginning of an appraisal

1 period, and evaluating such employee during such period
2 on such standards;

3 “(2) recognizing and rewarding employees whose
4 performance so warrants;

5 “(3) assisting employees whose performance is un-
6 acceptable to improve; and

7 “(4) reassigning, demoting, or separating employees
8 whose performance continues to be unacceptable, but only
9 after an opportunity to demonstrate acceptable perform-
10 ance.

11 “§ 4303. Actions based on unacceptable performance

12 “(a) Subject to the provisions of this section, the head
13 of an agency may at any time demote or remove an employee
14 whose performance is unacceptable.

15 “(b) An employee subject to demotion or removal from
16 the service under this section is entitled to—

17 “(1) at least 30 days’ advance written notice of the
18 proposed action which identifies the expected standard of
19 performance for the employee, the areas in which the
20 employee’s performance is currently unacceptable, and
21 any other failures to perform acceptably during the 1-
22 year period ending on the date of the notice which may
23 be considered in making a decision on the proposed
24 action;

1 “(2) be accompanied by an attorney or other rep-
2 resentative;

3 “(3) reply to the notice orally and in writing; and

4 “(4) a written decision which states the reasons for
5 the decision and which, unless proposed by the agency
6 head, has been concurred in by an employee who is in a
7 higher position than the employee who proposed the
8 action.

9 “(c) An agency may, under regulations prescribed by
10 the head of the agency, extend the notice period under sub-
11 section (b) of this section for not more than 30 days. An
12 agency may extend such a notice period for more than 30
13 days only in accordance with regulations issued by the Office
14 of Personnel Management. The decision to retain, remove, or
15 demote an employee shall be made within 30 days after the
16 date of the expiration of the notice period. The decision to
17 retain, remove or demote an employee shall be based upon one
18 or more failures to perform acceptably as identified in the
19 notice provided under subsection (b)(1) of this section.

20 “(d) If no action is taken because of performance
21 improvement during the notice period and the employee's
22 performance continues to be acceptable for one year from
23 the date of the notice provided under subsection (b) of this
24 section, any entry or other notation of the unacceptable per-

1 formance shall be removed from official records relating to
2 such employee and shall not subsequently be the basis for an
3 action under this section.

4 “(e) An employee who is a preference eligible or is in
5 the competitive service and who has been demoted or removed
6 under the provisions of subsection (b) of this section may ap-
7 peal the action to the Merit Systems Protection Board. Except
8 as provided in subsection (f), the appeal shall be conducted
9 in accordance with the procedures established in section 7701
10 of this title.

11 “(f)(1) In any appeal under subsection (e) of this
12 section, the agency shall have the initial burden of proof,
13 subject to an opportunity for rebuttal by the employee, in
14 establishing that there is a reasonable basis on the record
15 taken as a whole to believe that the employee failed to satisfy
16 one or more performance standards established for that em-
17 ployee, or otherwise failed to perform acceptably, as set
18 forth in the notice provided to the employee under subsection
19 (b)(1) of this section.

20 “(2) An agency action shall be sustained by the Board,
21 the administrative law judge, or the appeals officer unless—

22 “(A) the agency's procedures contained error that
23 substantially impaired the rights of the employee;

24 “(B) the agency's decision was based on discrimi-
25 nation prohibited by section 2302(b)(1) of this title;

1 trial period under an initial appointment, or who has
2 completed 1 year of current continuous employment in
3 the same or similar positions under other than a tem-
4 porary appointment limited to 1 year or less, but does
5 not include—

6 “(A) an individual in the Senior Executive
7 Service;

8 “(B) an individual occupying a position not in
9 the competitive service excluded from coverage of
10 this subchapter by regulation of the Office of Person-
11 nel Management; or

12 “(C) an individual whose position is in an
13 agency, or unit thereof, excepted from coverage of
14 the merit system principles pursuant to section
15 2301(a)(2)(B) of this title; and

16 “(2) ‘suspension’ means the placing of an em-
17 ployee, for disciplinary reasons, in a temporary status
18 without duties and pay.

19 “§ 7502. Actions covered

20 “This subchapter applies to a suspension for 30 days
21 or less, but does not apply to a suspension under section 7532
22 of this title or an action initiated by the Special Counsel un-
23 der section 1206 of this title.

24 “§ 7503. Cause and procedure

1 “(a) Under regulations prescribed by the Office of
2 Personnel Management, an employee may be suspended for
3 30 days or less only for such cause as will promote the
4 efficiency of the service.

5 “(b) An employee against whom a suspension for 30
6 days or less is proposed is entitled to—

7 “(1) a written notice stating reasons for the pro-
8 posed action;

9 “(2) a reasonable time to answer orally and in
10 writing and to furnish affidavits and other documentary
11 evidence in support of the answer;

12 “(3) be accompanied by an attorney or other
13 representative; and

14 “(4) a written decision at the earliest practicable
15 date.

16 “§ 7504. Regulations

17 “The Office of Personnel Management may prescribe
18 regulations to carry out the purposes of this subchapter.

19 “SUBCHAPTER II—REMOVAL, SUSPENSION
20 FOR MORE THAN 30 DAYS, REDUCTION IN
21 GRADE OR PAY, OR FURLOUGH FOR 30
22 DAYS OR LESS

23 “§ 7511. Definitions; application

24 “(a) For the purpose of this subchapter—

25 “(1) ‘employee’ means—

1 “(A) an individual in the competitive service
2 who is not serving a probationary or trial period
3 under an initial appointment, or who has completed
4 1 year of current continuous employment under
5 other than a temporary appointment limited to 1
6 year or less; and

7 “(B) a preference eligible in an Executive
8 agency in the excepted service, and a preference
9 eligible in the United States Postal Service and the
10 Postal Rate Commission, who has completed one
11 year of current continuous service in the same or
12 similar positions;

13 “(2) ‘suspension’ has the meaning as set forth in
14 section 7501 of this title;

15 “(3) ‘grade’ means a level of classification under
16 a position classification system;

17 “(4) ‘pay’ means the rate of basic pay fixed by
18 law or administrative action for the position held by an
19 employee; and

20 “(5) ‘furlough’ means the placing of an employee
21 in a temporary status without duties and pay because
22 of lack of work or funds or other nondisciplinary reasons.

23 “(b) This subchapter does not apply to an employee—

24 “(1) whose appointment is required to be made by
25 and with the advice and consent of the Senate;

1 “(2) whose position has been determined to be of
2 a confidential, policy-making, policy-determining, or
3 policy-advocating character by—

4 “(A) the Office of Personnel Management for
5 a position that it has excepted from the competitive
6 service; or

7 “(B) the President or the head of an agency
8 for a position which is excepted from the competitive
9 service by statute;

10 “(3) whose position is in the Senior Executive
11 Service; or

12 “(4) whose position is in an agency, or unit thereof,
13 excepted from coverage of the merit systems principles
14 pursuant to section 3301(a)(2)(B) of this title.

15 “(c) The Office of Personnel Management may provide
16 for the application of this subchapter to any position or
17 group of positions excepted from the competitive service by
18 regulation of the Office of Personnel Management.

19 “§ 7512. Actions covered

20 “*This subchapter applies to—*

21 “(1) removal;

22 “(2) a suspension for more than 30 days;

23 “(3) a reduction in grade;

24 “(4) a reduction in pay of an amount exceeding one

1 *step of the employee's grade or 3 percent of the employee's*
2 *basic pay; and*

8 *"(5) a furlough for 30 days or less;*
4 *but does not apply to—*

6 *"(A) a suspension or removal under section 7533*
6 *of this title,*

7 *"(B) a reduction in force action under section 3503*
8 *of this title,*

9 *"(C) the demotion of a supervisor or manager who*
10 *has not completed the probationary period under section*
11 *3321(a)(2) of this title in an initial supervisory position*
12 *if such demotion is to the grade held immediately before*
13 *becoming such a supervisor,*

14 *"(D) a demotion or removal under section 4303*
15 *of this title, or*

16 *"(E) an action initiated by the Special Counsel*
17 *under section 1206 of this title.*

18 *"§ 7513. Cause and procedure*

19 *"(a) Under regulations prescribed by the Office of Per-*
20 *sonnel Management, an agency may take an action covered*
21 *by this subchapter against an employee only for such cause*
22 *as will promote the efficiency of the service.*

23 *"(b) An employee against whom an action is pro-*
24 *posed is entitled to—*

1 *"(1) at least 30 days' advance written notice, ex-*
2 *cept when there is reasonable cause to believe the em-*
3 *ployee has committed a crime for which a sentence of*
4 *imprisonment can be imposed, stating specific reasons*
5 *for the proposed action;*

6 *"(2) a reasonable time to answer orally and in*
7 *writing and to furnish affidavits and other documentary*
8 *evidence in support of the answer;*

9 *"(3) be accompanied by an attorney or other repre-*
10 *sentative; and*

11 *"(4) a written decision and reasons therefor at the*
12 *earliest practicable date.*

13 *"(c) An agency may in its discretion provide by regu-*
14 *lation for a hearing which may be in lieu of or in addition to*
15 *the opportunity to answer provided under subsection (b)(2)*
16 *of this section.*

17 *"(d) An employee against whom an action is taken*
18 *under this section is entitled to appeal to the Merit Systems*
19 *Protection Board under section 7701 of this title.*

20 *"(e) Copies of the notice of proposed action, the answer*
21 *of the employee when written, a summary thereof when*
22 *made orally, the notice of decision and reasons therefor, and*
23 *any order effecting an adverse action shall be maintained by*
24 *the agency and shall be furnished to the Merit Systems Pro-*

1 *tion Board upon its request and to the individual affected*
 2 *upon such individual's request.*

3 "§ 7514. Regulations

4 "The Office of Personnel Management may prescribe
 5 regulations to carry out the purposes of this subchapter,
 6 except as it concerns any matter with respect to which the
 7 Merit Systems Protection Board may prescribe regulations."

8 (b) The table of sections for chapter 75 of title 5,
 9 United States Code, is amended by striking out all the items
 10 preceding the item relating to subchapter III and inserting
 11 in lieu thereof the following:

12 "CHAPTER 75—ADVERSE ACTIONS

"SUBCHAPTER I—SUSPENSION OF 30 DAYS OR LESS

"Sec.

"7501. Definitions; application.

"7502. Actions covered.

"7503. Cause and procedure.

"7504. Regulations.

"SUBCHAPTER II—REMOVAL, SUSPENSION FOR MORE
 THAN 30 DAYS, REDUCTION IN GRADE OR PAY, OR
 FURLOUGH FOR 30 DAYS OR LESS

"7511. Definitions; application.

"7512. Actions covered.

"7513. Cause and procedure.

"7514. Regulations."

13 APPEALS

14 SEC. 205. Chapter 77 of title 5, United States Code, is
 15 amended to read as follows:

16 "CHAPTER 77—APPEALS

"Sec.

"7701. Appellate procedures.

"7702. Judicial review of decisions of the Merit Systems Protection
 Board.

1 "§ 7701. Appellate procedures

2 "(a) An employee, or applicant for employment, may
 3 submit an appeal to the Merit Systems Protection Board
 4 from any action which is appealable to the Board under
 5 any law, rule, or regulation. An appellant shall have the
 6 right to be accompanied by an attorney or other representa-
 7 tive. The appeal shall be processed in accordance with regu-
 8 lations prescribed by the Board.

9 "(b) The Board may refer any case appealable to it to
 10 an administrative law judge appointed under section 3105
 11 of this title, or to an appeals officer, who shall, except as
 12 provided in subsection (c) of this section, render a deci-
 13 sion after conducting an evidentiary hearing with an oppor-
 14 tunity for cross-examination. In any case involving a removal
 15 from the service, the Board shall assign such case to a more
 16 senior appeals officer, or to an administrative law judge.

17 "(c) At any time after the filing of the appeal, any
 18 party may move for summary decision. The adverse party
 19 shall have a reasonable time, fixed by regulations of the
 20 Board, to respond. If the response of the adverse party
 21 shows that he cannot for reasons stated present facts essen-
 22 tial to justify his opposition, the motion may be denied or
 23 a continuance may be ordered to permit affidavits to be ob-
 24 tained or depositions to be taken or discovery to be had. If
 25 the administrative law judge or appeals officer finds, based

1 on the written submission of the parties and other materials
 2 in the record that there are no genuine and material issues
 3 of fact in dispute, the administrative law judge or appeals
 4 officer shall grant a summary decision to the party entitled
 5 to such a decision as a matter of law. The administrative
 6 law judge or appeals officer may, at the request of either
 7 party, provide for oral presentation of views in coming to
 8 a decision under this subsection.

9 “(d)(1) In any appeal from any agency action under
 10 this chapter, the agency shall have an affirmative burden
 11 of proof to establish that there is substantial evidence on
 12 the record taken as a whole that the action from which the
 13 appeal has been taken promotes the efficiency of the service.

14 “(2) An agency action shall be upheld by the Board,
 15 the administrative law judge, or the appeals officer unless—

16 “(A) the agency’s procedures contained error that
 17 substantially impaired the rights of the employee;

18 “(B) the agency’s decision was based on discrimi-
 19 nation prohibited by section 2302(b)(1) of this title;

20 “(C) the agency’s decision is unsupported by sub-
 21 stantial evidence on the record taken as a whole; or

22 “(D) the agency’s decision involved a prohibited
 23 personnel practice, or was otherwise contrary to law.

24 “(e) Any decision under subsections (b) and (c) of this
 25 section shall be final unless a party to the appeal or the

1 Office of Personnel Management petitions the Board for
 2 a review within 30 days after receipt of the decision, unless
 3 the Board, for good cause shown, extends the 30-day period
 4 or reopens and reconsiders a case on its own motion. The
 5 Director of the Office of Personnel Management may peti-
 6 tion the Board for a review only if, in the exercise of his sole
 7 discretion, he determines that the decision is erroneous and
 8 will have a substantial impact on a civil service law, rule,
 9 regulation, or policy directive within the jurisdiction of the
 10 Office of Personnel Management. One member of the Board
 11 may grant a petition or otherwise direct that a decision
 12 be reviewed by the full Board. This procedure shall not
 13 apply if, by law, a decision of an administrative law judge
 14 or appeals officer is required to be acted upon by the Board.

15 “(f)(1) Subject to paragraph (2) of this subsection,
 16 in the case of any complaint of discrimination which under
 17 subsection (h) is required to be heard by the Board, an
 18 appeals officer assigned to hear discrimination complaints
 19 filed under section 717(b) of the Civil Rights Act of 1964
 20 (42 U.S.C. 2000e-16(b)) may make a decision on the
 21 record or conduct an evidentiary hearing, as the circum-
 22 stances may warrant, pursuant to regulations prescribed by
 23 the Board.

24 “(2) An appeal may be heard under paragraph (1) of
 25 this subsection if the employee, or applicant for Federal

1 employment, submits the discrimination complaint to the
 2 agency, which shall have 60 days to resolve the complaint.
 3 If the complaint is not resolved to the satisfaction of the
 4 complainant or if the agency fails to issue a final decision
 5 thereon within 60 days, the complainant may appeal to the
 6 Board. Such an appeal must be submitted within 30 days of
 7 notice to the complainant of the agency's decision or follow-
 8 ing expiration of the 60-day period if the agency has failed
 9 to issue a decision on the complaint. Class complaints of
 10 discrimination may be processed by an appeals officer pur-
 11 suant to regulations prescribed by the Board.

12 "(g) Members of the Board and administrative law
 13 judges or appeals officers assigned by the Board may—

14 "(1) consolidate appeals filed by two or more
 15 appellants, or

16 "(2) join two or more appeals filed by the same
 17 appellant and hear and decide them concurrently,

18 if the Board, the administrative law judge, or the appeals
 19 officer, as the case may be, determines in its discretion that
 20 such action could result in the appeals' being processed more
 21 expeditiously and such action would not prejudice the parties.

22 "(h) Notwithstanding any other provision of law, an
 23 employee who has been affected by an action appealable
 24 to the Board and who alleges that discrimination prohibited
 25 by section 717 of the Civil Rights Act of 1964 (42 U.S.C.

1 3000e-16c), section 6(d) of the Fair Labor Standards Act
 2 of 1938 (29 U.S.C. 206(d)), section 501 of the Rehabilita-
 3 tion Act of 1973 (29 U.S.C. 971), and section 15 of the Age
 4 Discrimination in Employment Act of 1967 (29 U.S.C.
 6 633a), and the rules, regulations, and policy directives issued
 6 thereunder, was a basis for the action shall have both the
 7 issue of discrimination and the appealable action decided
 8 by the Board in the appeal decision under the Board's
 9 appellate procedures.

10 "(i)(1) If any statute referred to in subsection (h), or
 11 if any rule, regulation, or policy directive issued by the Equal
 12 Employment Opportunity Commission pursuant to such
 13 statute, is at issue in any appeal conducted by the Board
 14 pursuant to subsection (f), the Board shall promptly notify
 15 the Equal Employment Opportunity Commission and the
 16 Commission shall, consistent with the provisions of subsec-
 17 tion (f), have the right to participate fully in the proceeding,
 18 including such submissions as it deems appropriate on issues
 19 of fact and law.

20 "(2) Notwithstanding any other provision of law, any
 21 decision and order issued by the Board pursuant to sub-
 22 section (h) of this section shall be the final administrative
 23 decision in the matter unless, pursuant to paragraph (3), the
 24 Equal Employment Opportunity Commission reconsiders the
 25 decision and order of the Board.

1 “(3) The Commission may reconsider the decision and
 2 order of the Board upon a petition from the employee who
 3 brought the proceeding, or on its own initiative, if the Com-
 4 mission finds in writing that the decision and order may
 5 have a substantial impact on the general administration by
 6 the Commission of its responsibilities for preventing dis-
 7 crimination in Federal employment as a whole. The Com-
 8 mission shall have 30 days from the issuance of the decision
 9 and order of the Board to determine whether to reconsider
 10 such decision and order. If the Commission does reconsider
 11 any decision and order of the Board pursuant to this para-
 12 graph, the Commission shall, within 60 days of the issuance
 13 of the decision and order of the Board, consider the entire
 14 record of the proceedings before the Board, and, solely on
 15 the basis of the evidentiary record compiled pursuant to sub-
 16 section (f), taken as a whole, either—

17 “(A) concur in the decision and order of the Board;
 18 or

19 “(B) issue another decision and order, which differs
 20 from the decision and order of the Board to the extent
 21 that the Commission finds in writing that, in its view,
 22 the interpretation by the Board of the meaning of any
 23 statute, rule, regulation or policy directive referred to
 24 in subsection (h) was erroneous, or the application of

1 such law to the evidence in the record was unsupportable,
 2 as a matter of law.

3 “(4) If the Commission concurs pursuant to paragraph
 4 (3)(A) in the decision and order of the Board, such deci-
 5 sion and order of the Board shall be final agency action in
 6 the matter.

7 “(5) If the Commission issues a different decision and
 8 order pursuant to paragraph (3)(B), the Board shall
 9 reconsider and, within 30 days—

10 “(A) concur and adopt in whole the order of the
 11 Commission, together with any additional decision of
 12 the Board as it deems appropriate;

13 “(B) reaffirm the initial decision and order of the
 14 Board; or

15 “(C) reaffirm the initial decision and order of the
 16 Board with such revisions as it deems appropriate.

17 Whenever action is not taken pursuant to subparagraph (A)
 18 the matter shall be immediately certified to the United States
 19 Court of Appeals for the District of Columbia for review.
 20 The administrative record in the proceedings shall be for-
 21 warded by the Board within 30 days to such Court. Such
 22 record shall consist of the factual record compiled by the
 23 Board pursuant to subsection (f), any order or decision
 24 issued by the Board or the Commission, the findings required

1 by paragraph (3), and any transcript of oral arguments
 2 made, or legal briefs filed, before the Board or the Commis-
 3 sion. Upon review, the court shall give due deference to
 4 the respective expertise of each agency. Upon application
 5 by the employee, the Commission may issue such interim
 6 relief as it deems appropriate to mitigate any exceptional
 7 hardship the employee might otherwise incur as a result of
 8 certification under this subsection, except that the Commis-
 9 sion may not stay, or order the employing agency to reverse
 10 an an interim basis, the personnel action on which the appeal
 11 of the matter to the Board was based. The court shall, on
 12 the basis of the record certified to it pursuant to this para-
 13 graph, promptly decide the matter.

14 "(j) Members of the Board, administrative law judges,
 15 and appeals officers assigned to the Board may require pay-
 16 ment by the agency which is the losing party to a proceeding
 17 before the Board, of reasonable attorney fees incurred by
 18 an employee, if the employee is the prevailing party and
 19 the deciding official or officials determine that payment by
 20 the agency is warranted on the grounds that the agency's
 21 action was taken in bad faith, except that where an employee
 22 or applicant for employment is the prevailing party and the
 23 decision is based on a finding of discrimination prohibited
 24 by any law referred to in subsection (k), the awarding of

1 attorney fees shall be governed by the standards applicable
 2 under the Civil Rights Act of 1964 (42 U.S.C. 2000e-
 3 5(k)).

4 "(k) The Board may, by regulation, provide for alterna-
 5 tive methods for settling matters subject to the appellate
 6 jurisdiction of the Board. A decision under such a method
 7 shall be final, unless the Board reopens and reconsiders a
 8 case at the request of the Office of Personnel Management
 9 under subsection (e) of this section.

10 "(l)(1) Upon the submission of any appeal to the Board
 11 under this section, the Board, through reference to such cate-
 12 gories of cases, or other means, as it deems appropriate,
 13 shall establish and announce publicly the date by
 14 which it intends to complete final agency action on the mat-
 15 ter. Such date shall assure expeditious consideration of the
 16 appeal, consistent with the interests of fairness and other pri-
 17 orities of the Board. If the Board fails to complete action on
 18 the appeal by the announced date, and the expected delay will
 19 exceed thirty days, the Board shall publicly announce the new
 20 date by which it intends to complete action on the appeal.

21 "(2) Not later than March 1 of each year, the Board
 22 shall submit to the Congress a report describing the number of
 23 appeals submitted to it during the prior calendar year, the
 24 number of appeals on which it completed action during the
 25 prior year, and the number of instances during the prior year

1 in which it failed to conclude a proceeding by the date origi-
 9 nally announced, along with an explanation of the reasons
 8 therefor.

4 "(3) The Board shall by rule indicate any other category
 6 of significant Board action which the Board determines should
 6 be subject to the provisions of this subsection.

7 "(4) It shall be the duty of the Board, an administrative
 8 law judge, or an appeals officer to expedite to the greatest
 9 extent possible any proceedings under this section.

10 "(m) The Merit Systems Protection Board may pre-
 11 scribe regulations to carry out the purposes of this section.

12 "§ 7702. Judicial review of decisions of the Merit Systems
 13 Protection Board

14 "(a) Any employee, or applicant for employment, ad-
 15 versely affected or aggrieved by a final order or decision of
 16 the Merit Systems Protection Board may obtain judicial
 17 review of such an order or decision. The Board shall be the
 18 named respondent in any proceeding brought pursuant to this
 19 subsection, unless the employee or applicant for employment
 20 seeks review of a final order or decision issued by the Board
 21 under section 7701. In review of a final order or decision
 22 issued under section 7701, the agency responsible to taking
 23 the action appealed to the Board shall be the named respond-
 24 ent, except that the Board shall have the right to appear in the
 25 court proceeding if the Board, in its sole discretion, deter-

1 mines that the appeal may raise questions of substantial inter-
 2 est to it.

8 "(b) A petition to review a final order or decision
 4 of the Board shall be filed in the Court of Claims or a
 5 United States Court of Appeals as provided in chapters 91
 6 and 158, respectively, of title 28, except for actions filed in
 7 the United States district courts pursuant to the anti-dis-
 8 crimination laws referred to in section 7701(h) of this title,
 9 or under section 8715 or 8912 of this title. Notwithstanding
 10 any other provision of law any petition for review must be
 12 filed within 30 days after the date the petitioner received notice
 13 of the final order or decision of the Board. In the case of any
 13 action brought pursuant to section 717(c) of the Civil Rights
 14 Act of 1964 (42 U.S.C. 2000e-16(c)) or under section 15
 15 of the Age Discrimination in Employment Act of 1967 (29
 16 U.S.C. 633a(c)) the employee shall have 30 days after
 17 the decision and order of the Board issued pursuant to sec-
 18 tion 7701(i)(2) or, if applicable, section 7701(i)(4) or
 19 section 7701(i)(5) (A), (B), or (C) to file such action.
 20 If an employee files an action in district court concerning such
 21 matter, the jurisdiction of the Court of Appeals over the mat-
 22 ter pursuant to section 7701(i)(5), and any interim relief
 23 afforded the employee by the Equal Employment Opportunity
 24 Commission pursuant to section 7701(i)(5), shall terminate.

25 "(c) In cases filed in the United States Court of Claims

1 or a United States Court of Appeals, the court shall review
 2 the administrative record for the purpose of determining
 3 whether the findings were arbitrary or capricious, and not in
 4 accordance with law, and whether the procedures required by
 5 statute and regulations were followed. The administrative
 6 findings of the Board are conclusive if supported by substan-
 7 tial evidence in the administrative record. If the court deter-
 8 mines that further evidence is necessary, it shall remand the
 9 case to the Board. The Board, after such further proceedings
 10 as may be required, may modify its findings, and shall file
 11 with the court the record of such proceedings. The findings of
 12 the Board are conclusive if supported by substantial evidence
 13 in the administrative record as supplemented.

14 "(d) The Director of the Office of Personnel Manage-
 15 ment may obtain review of any final order or decision of the
 16 Board by filing a petition for judicial review in the United
 17 States Court of Appeals for the District of Columbia if the
 18 Director determines, in his sole discretion, that the Board
 19 erred in interpreting a civil service law, rule, regulation, or
 20 policy directive affecting personnel management and that the
 21 Board's decision will have a substantial impact on a civil
 22 service law, rule, regulation, or policy directive. Where the
 23 Director did not intervene in a matter before the Board, the
 24 Director may not petition for review of a Board decision
 25 under this section unless the Director first petitions the Board

1 for a reconsideration of its decision, and such petition is
 2 denied. In addition to the named respondent, the Board and
 3 all other parties to the proceedings before the Board shall have
 4 the right to appear in the proceeding before the Court of
 5 Appeals. The granting of the petition for judicial review shall
 6 be at the discretion of the Court of Appeals."

7 TECHNICAL AND CONFORMING AMENDMENTS

8 SEC. 206. Section 2342 of title 28, United States Code,
 9 is amended—

10 (1) by striking out "and" at the end of paragraph
 11 (4),

12 (2) by striking out the period at the end of para-
 13 graph (5) and inserting in lieu thereof "; and", and

14 (3) by adding at the end thereof the following new
 15 paragraph:

16 "(6) all final orders of the Merit Systems Protec-
 17 tion Board except as provided for in section 7702(b)
 18 of title 5."

19 TITLE III—STAFFING

20 VOLUNTEER SERVICES

21 SEC. 301. (a) Chapter 51 of title 5, United States
 22 Code, is amended by adding at the end thereof the following
 23 new section:

24 "§ 3111. Acceptance of volunteer service

25 "(a) For the purpose of this section, 'student' means

1 an individual who is enrolled, not less than half-time, in
 2 a high school, trade school, technical or vocational institute,
 3 junior college, college, university, or comparable recognized
 4 educational institution. An individual who is a student is
 5 deemed not to have ceased to be a student during an interim
 6 between school years if the interim is not more than 5
 7 months and if such individual shows to the satisfaction of
 8 the Office of Personnel Management that such individual has
 9 a bona fide intention of continuing to pursue a course of
 10 study or training in the same or different educational in-
 11 stitution during the school semester (or other period into
 12 which the school year is divided) immediately after the in-
 13 term.

14 "(b) Notwithstanding section 665(b) of title 51, the
 15 head of an agency may accept, subject to regulations issued
 16 by the Office of Personnel Management, voluntary service
 17 for the United States if the service—

18 "(1) is performed by a student, with the permission
 19 of the institution at which the student is enrolled, as
 20 part of an agency program established for the purpose
 21 of providing educational experiences for such students;

22 "(2) is to be uncompensated; and

23 "(3) will not be used to displace any employee.

24 "(c) An individual who provides voluntary service
 25 under subsection (b) of this section shall not be considered

1 a Federal employee for any purpose other than for pur-
 2 poses of chapter 81 of this title (relating to compensation
 3 for injury) and sections 2671 through 2680 of title 28
 4 (relating to tort claims)."

5 (b) The analysis of chapter 31 of title 5, United States
 6 Code, is amended by adding at the end thereof the following
 7 new item:

"§111. Acceptance of volunteer service."

8 (c) Section 3321 of title 5, United States Code, is
 9 amended to read as follows:

10 "§ 3321. Competitive service; probation; period of

11 "(a) The President may take such action, including
 12 the issuance of rules, regulations, and directives, as shall
 13 provide as nearly as conditions of good administration war-
 14 rant, for a period of probation—

15 "(1) before an appointment in the competitive ser-
 16 vice becomes final; and

17 "(2) before initial appointment to a supervisory or
 18 managerial position becomes final.

19 "(b) An individual—

20 "(1) who has been transferred, assigned, or pro-
 21 moted from a position to a supervisory or managerial
 22 position, and

23 "(2) who does not satisfactorily complete the pro-

1 *probationary period under subsection (a)(2) of this*
 2 *section,*

3 *shall be returned to a position of no lower grade and pay*
 4 *than the position formerly occupied by the individual. Nothing*
 5 *in this section prohibits an agency from instituting an adverse*
 6 *action against an individual serving a probationary period*
 7 *under subsection (a)(2) for cause unrelated to supervisory*
 8 *or managerial performance.”.*

9 *(d) Section 3319 of chapter 33 of title 5, United States*
 10 *Code, is repealed.*

11 *(e) The analysis for chapter 33 of title 5, United States*
 12 *Code, is amended by striking out the item relating to section*
 13 *3319.*

14 *TRAINING*

15 *Sec. 302. Section 4103 of title 5, United States Code,*
 16 *is amended by inserting “(a)” before “In order to increase”*
 17 *and by adding at the end thereof the following new subsection:*

18 *“(b)(1) Notwithstanding any other provision of this*
 19 *chapter, an agency may train any of its employees to pre-*
 20 *pare such employee for placement in another agency if the*
 21 *head of the agency determines that such employee will other-*
 22 *wise be separated under conditions which would entitle such*
 23 *employee to severance pay under section 5595 of this title.*

24 *“(2) Before undertaking any training under this sub-*
 25 *section, the head of the agency shall obtain verification from*

1 *the Office of Personnel Management that there exists a rea-*
 2 *sonable expectation of placement in another agency.*

3 *“(3) In selecting an employee for training under this*
 4 *subsection, the head of the agency shall consider—*

5 *“(A) the extent to which the current skills, knowl-*
 6 *edge, and abilities of the employee may be utilized in*
 7 *the new position;*

8 *“(B) the employee’s capability to learn new skills*
 9 *and acquire new knowledge and abilities needed in the*
 10 *new position; and*

11 *“(C) the benefits to the Government which would*
 12 *result from retaining competent employees in the Fed-*
 13 *eral service.”.*

14 *TRAVEL, TRANSPORTATION, AND SUBSISTENCE*

15 *Sec. 303. Section 5723(d) of title 5, United States*
 16 *Code, is amended by striking out “not”.*

17 *RETIREMENT*

18 *Sec. 304. Section 8336(d)(2) of title 5, United States*
 19 *Code, is amended to read as follows:*

20 *“(2) voluntarily, during a period when the agency*
 21 *in which the employee is serving is undergoing a major*
 22 *reorganization, a major reduction-in-force, or a major*
 23 *transfer of function, as determined by the Office of Per-*
 24 *sonnel Management, and such employee is serving in a*
 25 *geographic area designated by the Office.”.*

1 TITLE IV—SENIOR EXECUTIVE SERVICE

2 COVERAGE

3 SEC. 401. (a) Chapter 21 of title 5, United States
4 Code, is amended by inserting after section 2101 the follow-
5 ing new section:

6 "§ 2101a. The Senior Executive Service

7 "The 'Senior Executive Service' consists of Senior
8 Executive Service positions."

9 (b) Section 2102(a)(1) of title 5, United States Code,
10 is amended by striking out the "and" at the end of subpara-
11 graph (A); by inserting an "and" at the end of sub-
12 paragraph (B); and by adding at the end thereof the fol-
13 lowing new subparagraph:

14 "(C) positions in the Senior Executive Service;"

15 (c) Section 2103(a) of title 5, United States Code, is
16 amended by inserting before the period at the end thereof the
17 following: "or the Senior Executive Service".

18 (d) Section 2108(3) of title 5, United States Code, is
19 amended—

20 (1) in subparagraph (G)(iii), by striking out the
21 period and inserting in lieu thereof a semicolon; and

22 (2) by inserting at the end thereof the following:
23 "but does not include applicants for, or members of, the
24 Senior Executive Service."

1 (e) The analysis for such chapter 21 is amended by
2 inserting after the item relating to section 2101 the follow-
3 ing new item:

"§101a. The Senior Executive Service."

4 AUTHORITY FOR EMPLOYMENT

5 SEC. 402. (a)(1) Chapter 31 of title 5, United States
6 Code, is amended by adding at the end thereof the following
7 new subchapter:

8 "SUBCHAPTER II—THE SENIOR EXECUTIVE
9 SERVICE

10 "§ 3131. The Senior Executive Service

11 "(a) It is the purpose of this subchapter to establish
12 and provide for a Senior Executive Service in order to
13 insure that the executive management of the Government of
14 the United States is of the highest quality and is responsive
15 to the needs, policies, and goals of the Nation. The Senior
16 Executive Service shall be administered in such a manner
17 so as to—

18 "(1) provide for a compensation system, including
19 salary, benefits, incentives, and other conditions of em-
20 ployment, designed to attract, reinforce, and retain ex-
21 cellent Government executives;

22 "(2) establish a positive correlation between execu-
23 tive success and compensation and retention, with
24 executive success to be measured on the basis of in-

1 *dividual performance and organizational accomplish-*
 2 *ment (including such factors as improvements in efficien-*
 3 *cy, productivity, success in meeting equal employment*
 4 *opportunity goals, quality of work or service, cost sav-*
 5 *ings, and timeliness of performance);*

6 *“(3) assure that executives are accountable and*
 7 *responsible for the effectiveness and productivity of em-*
 8 *ployees under them;*

9 *“(4) make tenure as an executive contingent on*
 10 *successful performance;*

11 *“(5) recognize exceptional accomplishment;*

12 *“(6) enable the head of an agency to reassign*
 13 *and transfer Senior Executive Service employees to best*
 14 *accomplish the agency’s mission;*

15 *“(7) provide for severance pay and placement*
 16 *assistance for those who are removed from the Senior*
 17 *Executive Service for nondisciplinary reasons;*

18 *“(8) protect Senior Executive Service employees*
 19 *from arbitrary or capricious actions;*

20 *“(9) provide for both program continuity and*
 21 *policy advocacy in the management of public programs;*

22 *“(10) maintain a merit personnel system free of*
 23 *improper political interference;*

24 *“(11) assure accountability for honest, economical,*
 25 *and efficient Government;*

1 *“(12) assure faithful adherence to the law, rules,*
 2 *and regulations relating to equal employment oppor-*
 3 *tunity, political activity, and conflicts of interests; and*

4 *“(13) provide for the systematic development of*
 5 *talented and effective executives and for the continuing*
 6 *development of incumbents.*

7 *“§ 3132. Definitions and exclusions*

8 *“(a) For the purpose of this subchapter—*

9 *“(1) ‘agency’ means an Executive agency, except*
 10 *a Government corporation and the General Accounting*
 11 *Office, but does not include—*

12 *“(A) any agency or unit thereof excluded from*
 13 *coverage by the President under subsection (c) of*
 14 *this section; or*

15 *“(B) the Federal Bureau of Investigation, the*
 16 *Central Intelligence Agency, the Defense Intelli-*
 17 *gence Agency, the National Security Agency any*
 18 *positions in the Drug Enforcement Administration*
 19 *which are excluded from the competitive service*
 20 *under section 201 of the Crime Control Act of 1976*
 21 *(90 Stat. 2425), and, as determined by the Presi-*
 22 *dent, an Executive agency, or unit thereof, whose*
 23 *principal function is the conduct of foreign intelli-*
 24 *gence or counterintelligence activities;*

1 “(2) ‘Senior Executive Service position’ means a
2 position in an agency, as defined by this section, which
3 is properly classifiable above grade GS-15 of the General
4 Schedule and below level III of the Executive Schedule,
5 or their equivalents, in which an employee—

6 “(A) directs the work of an organizational
7 unit;

8 “(B) is held accountable for the success of
9 specific line or staff programs or projects;

10 “(C) monitors the progress of the organization
11 toward goals and periodically evaluates and makes
12 appropriate adjustments to such goals;

13 “(D) supervises the work of employees other
14 than personal assistants; or

15 “(E) exercises other important policymaking
16 or executive functions;

17 Except for a position in the Foreign Service the term
18 shall not include any position to which an individual is
19 appointed by the President, by and with the advice and
20 consent of the Senate;

21 “(3) ‘executive’ means a member of the Senior
22 Executive Service;

23 “(4) ‘career reserved position’ means a position
24 which can only be filled by a career appointee and to
25 which it is justifiable to restrict appointment to career

1 employees in order to insure impartiality, or the public’s
2 confidence in the impartiality, of the Government;

3 “(5) ‘general position’ means any position, other
4 than those identified as career reserved positions, which
5 may be filled by either a career or noncareer appointee
6 or by a limited emergency or term appointee;

7 “(6) ‘career appointee’ means an individual ap-
8 pointed to a Senior Executive Service position based on
9 selection through a competitive staffing process con-
10 sistent with Office of Personnel Management regulations
11 and, in the case of initial appointment, approval of
12 executive qualifications by the Office of Personnel
13 Management;

14 “(7) ‘noncareer appointee’ means an individual ap-
15 pointed to a Senior Executive Service position without
16 approval of executive qualifications by the Office of Per-
17 sonnel Management;

18 “(8) ‘limited emergency appointment’ means a non-
19 renewable appointment, not to exceed 18 months, to a
20 position established to meet a bona fide, unanticipated,
21 urgent need; and

22 “(9) ‘limited term appointment’ means a nonrenew-
23 able appointment for a term of three years or less to a
24 position the duties of which will expire during that time
25 period.

1 “(b) Each agency request submitted under subsection
2 (a) of this section shall be based on—

8 “(1) the anticipated program activity and budget
4 requests of the agency for the two fiscal years involved;

5 “(2) the anticipated level of work to be performed
6 by the agency in such fiscal years; and

7 “(3) such other factors as may be prescribed from
8 time to time by the Office of Personnel Management.

9 “(c) The Office of Personnel Management, upon con-
10 sultation with the Office of Management and Budget, shall
11 review the request of each agency and, subject to section
12 3135 of this title, shall authorize for each fiscal year—

13 “(1) the establishment of a specific number of
14 Senior Executive Service positions in each agency; and

15 “(2) the number of positions in the entire Senior
16 Executive Service together with an unallocated pool of
17 not more than 5 percent of the number of allocated
18 positions.

19 “(d) Authorizations made under subsection (c) of this
20 section shall remain in effect until changed in accordance
21 with subsection (e), (f), or (g) of this section.

22 “(e) (1) Each agency may submit to the Office of Per-
23 sonnel Management, in accordance with regulations pre-
24 scribed by the Office, a written request for adjustments to its
25 authorized number of Senior Executive Service positions.

1 The Office may, on its own initiative, make reductions in the
2 number of positions assigned to particular agencies.

8 “(2) Each agency adjustment request submitted under
4 paragraph (1) shall be submitted in such form as the Office
6 of Personnel Management shall prescribe and be based on
6 the then current budget and program activity in the agency.

7 “(f) Subject to subsections (e) and (g) of this sec-
8 tion, the Office of Personnel Management may adjust the
9 allocations made under subsection (e) of this section. The
10 total of all adjustments made during a fiscal year under this
11 subsection may not enlarge the Senior Executive Service
12 beyond the number authorized under subsection (c)(2) of
13 this section.

14 “(g) The numbers of positions recommended in the
15 report from the Office of Personnel Management to the Con-
16 gress, under section 3135 of this title, relating to the pro-
17 jected number of positions in the total Senior Executive
18 Service and in each agency, shall be the authorized number
19 effective beginning on October 1 following submission of the
20 report.

21 “§ 3134. Limitations on noncareer Senior Executive Service
22 appointments

23 “(a) On or before December 31 of each year, each
24 agency shall—

25 “(1) examine its needs for employment of non-

1 career appointees for the fiscal year beginning in the
2 following year; and

3 "(2) submit to the Office of Personnel Manage-
4 ment, in accordance with regulations prescribed by the
5 Office, a written request for authority to employ a specific
6 number of noncareer appointees for such fiscal year.

7 "(b) The number of noncareer appointments for each
8 agency shall be determined annually by the Office of Personnel
9 Management on the basis of the demonstrated need of the
10 agency for such positions, except that—

11 "(1) the total number of noncareer appointees to the
12 Senior Executive Service in all agencies shall not
13 exceed 10 percent of the total number of Senior Execu-
14 tive Service positions authorized for all agencies under
15 sections 5133 of this title, and

16 "(2) an agency with four or more Senior Executive
17 Service positions shall be authorized to fill such positions
18 only to the extent the proportion of positions filled as
19 noncareer does not exceed 25 percent, or that proportion
20 which was authorized in the agency on the date of enact-
21 ment of the Civil Service Reform Act of 1978, whichever
22 is greater.

23 "(c) Subject to the 10 percent limitation of subsection (b),
24 of this section, the Office of Personnel Management may
25 adjust the number of noncareer positions authorized for any

1 agency under subsections (a) and (b) of this section if emer-
2 gency needs arise that were not anticipated when the original
3 authorizations were made.

4 "§ 5135. Biennial report

5 "(a) The Office of Personnel Management shall submit
6 to each House of the Congress, at the time the budget is sub-
7 mitted by the President to the first session of each Congress,
8 a report on the Senior Executive Service. The report shall
9 include—

10 "(1) the authorized number of positions prescribed
11 in the Senior Executive Service for the fiscal year prior
12 to the fiscal year for which the budget is submitted, the
13 number of such positions allocated to each agency before
14 such fiscal year, the title and job description of all Senior
15 Executive Service positions in each agency, the pro-
16 jected number of positions to be authorized for each
17 agency and the total projected number of positions for
18 all agencies for the next two fiscal years, and an agency-
19 by-agency projection of planned changes of Senior Execu-
20 tive Service appointment from career to noncareer and
21 from noncareer to career over the next two fiscal years;

22 "(2) each exclusion in such fiscal year from this
23 subchapter of any employee or group of employees under
24 section 5132(c) of this title; and

1 “(3) the percentage of agency executives at each pay
2 rate, statistical data on the distribution and amount of
3 performance awards in the agency, the proportion of
4 career and noncareer executives employed by each agency,
5 and such other information on the overall program for
6 the management of the Senior Executive Service as the
7 Office of Personnel Management considers appropriate.

8 “(b) The Office of Personnel Management shall submit
9 to each House of the Congress, at the time the budget is sub-
10 mitted to the second session of each Congress, an interim re-
11 port showing adjustments to the biennial report authorized
12 under section 3133 (e) and (f), of this title.

13 “§ 3136. Regulations

14 “(1) The Office of Personnel Management shall prescribe
15 regulations necessary to carry out the purpose of this sub-
16 chapter.”.

17 “(2) The table of sections for chapter 31 of title 5, United
18 States Code, is amended—

19 (A) by striking out the heading for chapter 31 and
20 inserting in lieu thereof the following:

21 “CHAPTER 31—AUTHORITY FOR EMPLOYMENT

22 “SUBCHAPTER I—EMPLOYMENT AUTHORITIES”;

23 and

24 (B) by inserting at the end thereof the following:

1 “SUBCHAPTER II—THE SENIOR EXECUTIVE SERVICE

“Sec.

“§131. The Senior Executive Service.

“§132. Definitions and exclusions.

“§133. Authorization for number of Senior Executive Service positions.

“§134. Limitations on noncareer Senior Executive Service appointments.

“§135. Biennial report.

“§136. Regulations.”.

2 (b) Section 3104(a) of title 5, United States Code, is
3 amended by inserting “nonexecutives” after “establish”.

4 (c) Section 3109 of title 5, United States Code, is
5 amended by inserting at the end thereof the following new
6 subsection:

7 “(e) Positions in the Senior Executive Service may not
8 be filled under the authority of subsection (b) of this
9 section.”.

10 EXAMINATION, CERTIFICATION, AND APPOINTMENT

11 SEC. 403. (a) Chapter 33 of title 5, United States
12 Code, is amended by adding at the end thereof the following
13 new subchapter:

14 “SUBCHAPTER VIII—APPOINTMENT, PLACE-
15 MENT, TRANSFER, AND DEVELOPMENT IN
16 THE SENIOR EXECUTIVE SERVICE

17 “§ 3391. General provisions applicable to career executives

18 “(a) The appointing authority shall adopt qualification
19 standards for all career reserved positions which shall meet
20 the requirements established by the Office of Personnel
21 Management.

1 “(2) successful participation in a centrally sponsored or agency career executive development program approved by the Office of Personnel Management; or

4 “(3) unique or special individual qualities predictive of success to apply in those cases in which an outstanding candidate would otherwise be excluded from appointment.

8 “(e) Employees with career status from other Government personnel systems shall have their executive qualifications approved by the Office of Personnel Management for career appointment.

13 “(f) Discrimination on account of political affiliation is prohibited.

13 “(g) Employees entering the Senior Executive Service under career appointments shall serve a 1-year probationary period.

17 “(h) The title of each career reserved position shall be published in the Federal Register.

19 “§ 3393. Appointments to general positions in the Senior Executive Service

21 “(a) Each agency shall, after consultation with the Office of Personnel Management, establish qualification standards for all general positions. Such standards shall, to the maximum extent practicable, conform to qualification requirements established by the Office of Personnel Management for

1 comparable career reserved positions. The appointing authority is responsible for determining that an individual appointed to a general position meets the qualifications established for that position.

5 “(b) Employees given noncareer appointments do not acquire credit toward career status and may be removed at any time by the appointing authority.

8 “(c) Noncareer appointments cannot be made to career reserved positions as defined in section 3153(b) (d) of this title.

11 “(d) Appointment or removal of a person to or from a general position in the Senior Executive Service in an independent regulatory commission shall not be subject, directly or indirectly, to review or approval by any officer or entity within the Executive Office of the President.

16 “§ 3394. Limited appointments to the Senior Executive Service

18 “(a) Limited emergency appointments to the Senior Executive Service—

20 “(1) may only be made when filling new positions established under a bona fide emergency as defined in the regulations of the Office of Personnel Management;

23 “(2) may not exceed 18 months and are not renewable; and

1 “(3) may be filled by the agency without regard to
2 the competitive merit staffing process.

3 “(b) Limited term appointments—

4 “(1) may only be made for positions the duties of
5 which will expire in three years or less;

6 “(2) are not renewable; and

7 “(3) may be filled by the agency without regard to
8 the competitive merit staffing process.

9 “(c) Service under a limited appointment is not creditable
10 toward the probationary service requirements of section 3398
11 of this title for a career appointment in the Senior Executive
12 Service.

13 “(d) The Office of Personnel Management shall approve
14 use of limited appointment authority before an appointment
15 under this authority may be made.

16 “§ 3395. Placement and transfer within the Senior Execu-
17 tive Service

18 “(a) An executive with a career appointment—

19 “(1) may be reassigned to a Senior Executive
20 Service position in the same agency;

21 “(2) may transfer to a Senior Executive Service
22 position in another agency; and

23 “(3) may request assignment outside the Senior
24 Executive Service.

1 The agency shall furnish to the executive at least 15 days
2 before the reassignment a written notification of the impending
3 action.

4 “(b) An executive with a limited appointment—

5 “(1) may be reassigned to another Senior Execu-
6 tive Service position which meets the criteria under
7 which the executive was appointed, except that con-
8 tinuous service in any one agency under a limited emer-
9 gency appointment may not exceed 18 months and
10 under a limited term appointment may not exceed three
11 years;

12 “(2) may not be given a career appointment in the
13 Senior Executive Service except under the competitive
14 merit staffing process; and

15 “(3) may not, within twelve months of the expiration
16 of a limited appointment, be given another limited
17 appointment in the same agency if the executive completed
18 the maximum period of service authorized for such
19 original appointment.

20 “(c) An executive with a noncareer appointment—

21 “(1) may be reassigned to any general position in
22 the same agency;

23 “(2) may transfer to a general position in another
24 agency;

1 “(3) may be appointed to a noncareer position outside the Senior Executive Service; and

2
3 “(4) may not be given a career appointment except under the competitive staffing process.

4
5 “(d) A career executive may not be involuntarily reassigned or removed from the Senior Executive Service within

6
7 120 days after the appointment of an agency head or after

8 the appointment of a noncareer employee who is closest to the

9 career executive in the supervisory chain of command, except

10 in those cases where the reassignment or removal is the result

11 of an action initiated under section 4313(b)(4)(B) or (C)

12 of this title following an unsatisfactory performance rating

13 given the career executive prior to such appointment.

14 “§ 3396. Development for and within the Senior Executive

15 Service

16 “(a) The Office of Personnel Management shall establish programs for the systematic development of candidates

17 for the Senior Executive Service, and for the continuing development of executives in the Senior Executive Service, or

18 require the establishment of such programs by agencies which

19 meet criteria prescribed by the Office of Personnel Management.

20
21
22
23 “(b) The Office of Personnel Management shall assist

24 agencies in the establishment of programs required under

1 subsection (a) of this section and shall monitor the implementation of such programs. The Office of Personnel Management shall direct agencies to take corrective action if

2
3 required to bring such programs into compliance with such

4
5 criteria.

6 “(c) It shall be the duty of the Office of Personnel Management to encourage and assist individuals to improve their

7
8 skills and increase their contribution by service in a variety

9 of agencies as well as by accepting temporary placements in

10 State or local governments or in the private sector.

11 “(d) An agency head may grant leave with full pay and

12 benefits to a career executive for a sabbatical period not exceeding eleven months to permit such person to engage in

13
14 study or uncompensated work experience which will contribute

15 to the individual's development and effectiveness. The agency

16 head may authorize travel and per diem costs where essential

17 to the developmental period. A sabbatical leave may not be

18 granted more than once in a ten-year period. An individual,

19 to be eligible for a sabbatical leave, must have completed at

20 least seven years of Federal service in a position with a level

21 of duties and responsibilities equivalent to the Senior Executive Service and at least two of which were as a member of

22 the Senior Executive Service.

23
24 “§ 3397. Definitions

25 “For purposes of this subchapter, the terms ‘career

1 reserved position', 'career appointee', 'general position', 'lim-
 2 ited emergency appointment', 'limited term appointment', and
 3 'executive' have the same meaning as such terms are given
 4 in section 3132 of this title.

5 "§ 3398. Regulations

6 "The Office of Personnel Management shall prescribe
 7 regulations necessary to carry out the purpose of this sub-
 8 chapter."

9 (b) The table of sections for chapter 33 of title 5, United
 10 States Code, is amended by adding at the end thereof the
 11 following:

"SUBCHAPTER VIII—APPOINTMENT, PLACEMENT, TRANS-
 FER, AND DEVELOPMENT IN THE SENIOR EXECUTIVE
 SERVICE

"Sec.

"3391. General provisions applicable to career positions.

"3392. Career appointments to the Senior Executive Service.

"3393. Appointments to general positions in the Senior Executive Service.

"3394. Limited appointments to the Senior Executive Service.

"3395. Placement and transfer within the Senior Executive Service.

"3396. Development for and within the Senior Executive Service.

"3397. Definitions.

"3398. Regulations."

11 REMOVAL AND PLACEMENT RIGHTS

12 SEC. 404. (a) Chapter 35 of title 5, United States
 13 Code, is amended by adding at the end of subsection (b) of
 14 section 3501 the following new sentence: "This subchapter
 15 does not apply to employees in the Senior Executive Service."

16 (b) Chapter 35 of title 5, United States Code, is amended
 17 by adding at the end thereof the following new subchapter:

1 "SUBCHAPTER V—REMOVAL, REINSTATE-
 2 MENT, AND GUARANTEED PLACEMENT
 3 PROVISIONS IN THE SENIOR EXECUTIVE
 4 SERVICE

5 "§ 3591. Removal from the Senior Executive Service

6 "(a) Career appointees may be removed from the Senior
 7 Executive Service—

8 "(1) during the one-year period of probation in the
 9 Senior Executive Service;

10 "(2) for less than fully successful executive per-
 11 formance appraisals determined under the provisions of
 12 subchapter II of chapter 43 of this title; or

13 "(3) for misconduct, neglect of duty, or mal-
 14 feasant,

15 Except that in the case of a removal under paragraph (2)
 16 the career appointee shall, at least 15 days prior to such
 17 removal, be entitled, upon request, to an informal public
 18 hearing before an official designated by the Merit Systems
 19 Protection Board at which the executive may appear and
 20 present arguments, but such hearing shall not give the execu-
 21 tive the right to initiate an action with the Board under
 22 section 7701 of this title, nor need the removal action be
 23 delayed as a result of the granting of such hearing.

1 “(b) Limited emergency appointees may be removed at
2 any time from the Federal service by the appointing author-
3 ity and shall be separated after 18 months.

4 “(c) Limited term appointees may be removed at any
5 time from the Federal service by the appointing authority
6 before the expiration of that period and shall be separated
7 after 3 years.

8 “(d) Noncareer employees may be removed at any time
9 from the Federal service by the appointing authority.

10 “§ 3592. Reinstatement in the Senior Executive Service

11 “A former Senior Executive Service employee with ca-
12 reer status may be reinstated to any Senior Executive Serv-
13 ice position if—

14 “(1) the individual has successfully completed the
15 probationary period in the Senior Executive Service;
16 and

17 “(2) the reasons for leaving the Senior Executive
18 Service were not for misconduct, neglect of duty, mal-
19 feasance, or less than fully successful performance.

20 “§ 3593. Guaranteed placement in other personnel systems

21 “(a) Career appointees who are—

22 “(1) appointed from a career or career-type posi-
23 tion within the Civil Service (as determined by the
24 Office of Personnel Management), and

1 “(2) removed from the Senior Executive Service—

2 “(A) during the one-year probationary pe-
3 riod for reasons other than misconduct, neglect of
4 duty, or malfeasance, or

5 “(B) for less than fully successful perform-
6 ance

7 shall be entitled to placement in a position as provided in sub-
8 section (c).

9 “(b) Career appointees in the Senior Executive Serv-
10 ice who accept Presidential appointments outside the Senior
11 Executive Service and who leave these appointments for
12 reasons other than misconduct, neglect of duty, or malfea-
13 sance shall have the right to placement in the Senior Execu-
14 tive Service if the appointee applies within 90 days after the
15 separation from the Presidential appointment.

16 “(c)(1) A career appointee described in subsection (a)
17 shall be placed in a continuing career position in at least
18 grade GS-15, or its equivalent, and shall receive an annual
19 rate of basic pay in such position equal to the higher of—

20 “(A) the rate of basic pay such appointee received
21 prior to his appointment to the Senior Executive Service,
22 or

23 “(B) the rate of basic pay which such appointee

1 received in the Senior Executive Service immediately be-
2 fore his removal.

8 "(2) No employee in any agency in which an appointee
4 is placed under paragraph (1) shall be separated or reduced
5 in grade as a result of such placement.

6 "(3) If the rate of basic pay to which an appointee is
7 entitled to under paragraph (1) exceeds the maximum rate
8 of basic pay for the position in which such appointee was
9 placed, the employee shall continue to receive the rate of basic
10 pay to which he is entitled under paragraph (1), except that
11 such appointee shall receive only one-half of any comparabil-
12 ity increase under section 5305 of this title until such time as
13 his rate of basic pay equals such maximum rate.

14 "§ 3594. Definitions.

15 "For purposes of this subchapter, the terms 'career
16 appointee' and 'Senior Executive Service position' have the
17 same meaning as such terms are used in section 3132 of this
18 title.

19 "§ 3595. Regulations

20 "The Office of Personnel Management shall prescribe
21 regulations necessary to the administration of this
22 subchapter."

1 (c) The table of sections for chapter 35 of title 5, United
2 State Code, is amended by adding at the end thereof the
3 following:

"**EUROCHAPTER V—REMOVAL, REINSTATEMENT, AND
GUARANTEED PLACEMENT PROVISIONS IN THE SEN-
IOR EXECUTIVE SERVICE**

"Sec.

"3591. Removal from the Senior Executive Service.

"3592. Reinstatement in the Senior Executive Service.

"3593. Guaranteed placement in other personnel systems.

"3594. Definitions.

"3595. Regulations."

PERFORMANCE RATING

4
5 **SEC. 405. (a)** Chapter 43 of title 5, United State Code,
6 is amended by adding at the end thereof the following new
7 subchapter:

8 "**SUBCHAPTER II—PERFORMANCE APPRAISAL**
9 **IN THE SENIOR EXECUTIVE SERVICE**

10 "§ 4311. Senior Executive Service performance appraisal
11 systems

12 "(a) Each agency shall, in accordance with standards
13 established by the Office of Personnel Management, develop
14 one or more performance appraisal systems designed to—

15 "(1) provide for systematic appraisals of job per-
16 formance of individuals in the Senior Executive Service;

17 "(2) encourage excellence in performance for in-
18 dividuals in the Senior Executive Service; and

19 "(3) link the performance of each individual in

1 the Senior Executive Service with eligibility for re-
2 tention and performance awards.

3 "(b) Each performance appraisal system for individuals
4 in the Senior Executive Service shall provide—

5 "(1) that performance requirements for each in-
6 dividual be established in consultation with the indi-
7 vidual at the beginning of the rating period and
8 communicated to the individual;

9 "(2) for written appraisals of performance based
10 on the accomplishment of the previously established
11 personal and organizational performance requirements;
12 and

13 "(3) that each individual be shown the appraisal
14 and rating and given an opportunity to respond in writ-
15 ing and have the rating reviewed by an employee in a
16 higher managerial level in the agency prior to final
17 action by the agency head.

18 "(c) Upon determination by the Office of Personnel
19 Management that an agency performance appraisal system
20 does not meet the requirements of this subchapter and the
21 regulations prescribed thereunder, the Office of Personnel
22 Management shall order corrective action.

23 "§ 4312. Criteria for performance appraisals

24 "Appraisals of managerial success in the Senior Execu-
25 tive Service shall—

1 "(1) take into account both individual performance
2 and organizational accomplishment, and

3 "(2) be based on factors such as—

4 "(A) improvements in efficiency, productivity,
5 and quality of work or service;

6 "(B) the effectiveness and productivity of the
7 employees for whom the executive is responsible;

8 "(C) cost savings or cost efficiency;

9 "(D) timeliness of performance; and

10 "(E) the meeting of affirmative action goals
11 and the achievement of equal employment oppor-
12 tunity requirements.

13 "§ 4313. Ratings for executive performance appraisal

14 "(a) Each performance appraisal system shall provide
15 for annual summary ratings representing a number of levels
16 of performance including one or more fully successful levels,
17 a level of performance which is minimally satisfactory, and
18 an unsatisfactory level.

19 "(b) The head of each agency shall establish a system
20 to appraise the performance of members of the Senior Execu-
21 tive Service. The system shall provide that the appraisal
22 will—

23 "(1) include a review and appraisal of requirements
24 and accomplishments by an agency performance review
25 board established under regulations of the Office of Per-
26 sonnel Management.

1 “(2) take place at least annually, except that no
2 evaluation of a career employee shall be initiated within
3 120 days after the beginning of a new administration,
4 and permit the assignment of an unsatisfactory rating
5 at any time during the performance appraisal period;

6 “(3) not be appealable to the Merit Systems Pro-
7 tection Board, and

8 “(4) have the following results—

9 “(A) career appointees receiving ratings at
10 any of the fully successful levels may be given per-
11 formance awards as prescribed in section 5384 of
12 this title,

13 “(B) an unsatisfactory rating requires correc-
14 tive action by removal of the employee from the
15 current position through reassignment, transfer, or
16 separation from the Senior Executive Service except
17 that employees who receive 2 unsatisfactory annual
18 ratings in 5 consecutive years shall be separated
19 from the Senior Executive Service, and

20 “(C) employees who twice in any 3-year period
21 receive a less than fully successful annual rating
22 shall be separated from the Senior Executive Service.

23 “(c)(1) In conducting an appraisal of an executive
24 under this section, a performance review board shall receive

1 from the supervising official an initial appraisal. The execu-
2 tive may respond in writing to such appraisal. The board
3 shall review the initial appraisal and the executive's response,
4 conduct such further review as it finds necessary, and advise
5 the appointing authority in writing of its appraisal of the
6 executive.

7 “(2) Members of performance review boards shall be
8 appointed in such a manner as to assure consistency, stability
9 and objectivity in performance appraisal and the appointment
10 of an individual to serve as such a member shall be published
11 in the Federal Register.

12 “(3) In the case of an appraisal of a career executive
13 a majority of the members of the performance review board
14 shall consist of career executives.

15 “(d) The Office of Personnel Management shall each
16 year report to Congress on the performance of the perform-
17 ance review boards established under subsection (b) of this
18 section, the number of individuals removed from the Senior
19 Executive Service under subchapter V of chapter 35 of this
20 title for unsuccessful performance ratings, and the number
21 of performance awards under section 5384 of this title.

22 “§ 4314. Definitions

23 “For purposes of this subchapter, the terms ‘agency’,
24 ‘executive,’ and ‘career appointee’ shall have the same mean-
25 ing as such terms are used in section 5152 of this title.

1 "§ 4315. Regulations

2 "The Office of Personnel Management may prescribe
3 regulations necessary for the administration of this sub-
4 chapter."

5 (b) The table of sections for chapter 43 of title 5, United
6 States Code, is amended by adding at the end thereof the
7 following:

"SUBCHAPTER II—PERFORMANCE APPRAISAL IN THE
SENIOR EXECUTIVE SERVICE

"Sec.
"§111. Senior Executive Service performance appraisal systems.
"§112. Criteria for performance appraisals.
"§113. Ratings for managerial performance appraisal.
"§114. Definitions.
"§115. Regulations."

8 INCENTIVE AWARDS AND RANKS

9 SEC. 406. (a) Chapter 45 of title 5, United States Code,
10 is amended by adding at the end thereof the following new
11 section:

12 "§ 4507. Incentive awards and ranks in the Senior Executive
13 Service

14 "(a)(1) The head of each agency shall annually sub-
15 mit to the Office of Personnel Management a list of career
16 executives he believes should be appointed a Meritorious
17 or Distinguished Executive.

18 "(2) The Office of Personnel Management shall review
19 such list and submit to the President a list of executives it
20 believes should be so appointed.

1 "(3) Subject to subsections (b) and (c) of this section,
2 the President shall confer the rank of—

3 "(A) Meritorious Executive on any such executive
4 who has demonstrated sustained excellence in his posi-
5 tion, and

6 "(B) Distinguished Executive on any such executive
7 who has demonstrated sustained extraordinary accom-
8 plishment.

9 "(b) No more than 5 percent of the members of the
10 Senior Executive Service may be appointed to the rank of
11 Meritorious Executive in a calendar year. No more than 15
12 percent of the active duty members of the Senior Executive
13 Service may hold the rank of Meritorious Executive.

14 "(c) No more than 1 percent of the active duty members
15 of the Senior Executive Service may hold the rank of
16 Distinguished Executive.

17 "(d) Receipt of a meritorious rank shall entitle the
18 individual to an annual award of \$2,500 for a period of
19 five years of active service in the Senior Executive Service.

20 "(e) Distinguished Executives shall receive an annual
21 award of \$5,000 for a period of five years of active service
22 in the Senior Executive Service.

23 "(f) An employee in the Senior Executive Service ap-
24 pointed by the President to another position outside the
25 Senior Executive Service shall be entitled to continue to

1 receive any incentive award granted for service before such
2 appointment.”.

3 (b) The analysis for such chapter 45 is amended by
4 adding at the end thereof the following new item:

“4607. Incentive awards and ranks in the Senior Executive Service.”.

5 **PAY RATES AND SYSTEMS**

6 **SEC. 407.** (a) Section 5308 of title 5, United States
7 Code, is amended to read as follows:

8 “§ 5308. Pay limitation

9 “An employee may not be paid, by reasons of any pro-
10 vision of this subchapter, at a rate in excess of the rate of
11 basic pay for Level V of the Executive Schedule, except that
12 executives in the Senior Executive Service may be paid at a
13 rate of basic pay not in excess of the rate provided for Ex-
14 ecutive Level-IV.”.

15 (b) Chapter 53 of title 5, United States Code, is
16 amended by adding at the end thereof the following new
17 subchapter:

18 **“SUBCHAPTER VIII—PAY FOR THE SENIOR**
19 **EXECUTIVE SERVICE**

20 “§ 5381. Purpose; definitions

21 “(a) It is the purpose of this subchapter to provide a
22 pay system for the Senior Executive Service, established
23 under subchapter II of chapter 31 of this title, that shall

1 facilitate the accomplishment of the goals of that service,
2 as set forth in section 3131 of this title.

3 “(b) For the purpose of this subchapter, ‘agency’,
4 ‘Senior Executive Service position’ and ‘executive’ have the
5 meanings given such terms by section 3132 of this title.

6 “§ 5382. Establishment and adjustment of rates of pay for
7 the Senior Executive Service

8 “(a) There shall be 5 or more rates of basic pay for
9 the Senior Executive Service, and any individual serving
10 in a Senior Executive Service position shall be paid at one
11 of these rates. The rates of basic pay shall be initially estab-
12 lished and thereafter adjusted by the President in accord-
13 ance with the provisions of this section.

14 “(b) In setting rates of basic pay, the lowest rate for the
15 Senior Executive Service shall not be less than the rate
16 for the sixth step of grade GS-15 of the General Schedule
17 and the highest rate shall not exceed the rate for level IV of
18 the Executive Schedule.

19 “(c) The minimum and maximum rates of basic pay
20 for the Senior Executive Service shall be adjusted by the
21 President at the same time he adjusts the rates of pay under
22 section 5305 of this title, and the adjusted minimum and
23 maximum rates of basic pay for the Senior Executive Service
24 shall be included in the report transmitted to the Congress by

1 the President under section 5305 (a)(3) or (c)(1) of this
2 title.

3 "(d) The rates of basic pay that are established and
4 adjusted under this section shall be printed in the Federal
5 Register and shall supersede any prior rates of basic pay
6 for the Senior Executive Service.

7 "§ 5383. Setting individual executive pay

8 "(a) The pay rate for each executive shall be set by the
9 appointing authority according to criteria established by the
10 Office of Personnel Management.

11 "(b) Except for pay adjustments provided for in sec-
12 tion 5382 of this title, the rate of basic pay of a member of
13 the Senior Executive Service may only be adjusted once
14 during any 12-month period. In the case of a reduction in
15 the basic rate of pay for an executive, the agency shall furnish
16 to the executive at least 15 days before the first day of the pay
17 period for which the reduction is to take effect a written
18 notification of the impending action.

19 "§ 5384. Performance awards for the Senior Executive
20 Service

21 "(a) To encourage excellence in performance by exec-
22 utives under the Senior Executive Service, performance
23 awards shall be paid to executives in accordance with the
24 provisions of this section, and shall be in addition to the rate
25 of basic pay paid under section 5382 of this title and shall

1 not be subject to the limit placed on salaries under section
2 5308. It shall be the responsibility of each agency head to
3 see that the provisions of this section are administered in
4 the agency in such a way that excellence is encouraged in
5 the performance of the agency's executives. A performance
6 review board established under section 4313 of this title shall
7 make recommendations to the appointing authority with re-
8 spect to whether or not such authority should make a per-
9 formance award to an executive and the amount of the award.

10 "(b) Each career executive shall annually be eligible
11 to receive a performance award subject to the following
12 criteria:

13 "(1) No performance award is to be paid to an
14 executive whose performance was determined to be less
15 than fully successful at the time of the executive's most
16 recent performance evaluation under subchapter II of
17 chapter 43 of this title.

18 "(2) The amount of a performance award is to be
19 determined by the agency head but shall not exceed 20
20 percent of the executive's rate of basic pay.

21 "(3) Performance awards may not be paid in any
22 fiscal year to more than 50 percent of the executives in
23 an agency which employs 4 or more members of the
24 Senior Executive Service.

25 "(c) After annual review as provided for in section
26 3135 (a) and (b) of this title, the Office of Personnel Man-

1 agement is authorized to issue guidance to agencies concern-
2 ing the proportion of Senior Executive Service salary
3 expenses that may be appropriately applied to payment of
4 performance awards and the distribution of awards of each
5 amount.

6 "§ 5385. Regulations

7 "Subject to such policies and procedures as the Presi-
8 dent may prescribe, the Office of Personnel Management
9 shall issue regulations necessary for the administration of
10 this subchapter."

11 (c) (1) Section 8331(3) of title 5, United States Code,
12 is amended by inserting "any performance award under
13 subchapter VIII of chapter 53 of this title," after "deceased
14 employee".

15 (2) Section 8704(c) of title 5, United States Code, is
16 amended by inserting ", but does not include any performance
17 award under subchapter VIII of chapter 53 of this title"
18 before the period at the end thereof.

19 (d) The analysis of chapter 53 of title 5, United States
20 Code, is amended by adding at the end thereof the following
21 new items:

"SUBCHAPTER VIII—PAY FOR THE SENIOR EXECUTIVE
SERVICE

"Sec.

"5381. Purpose; definitions.

"5382. Establishment and adjustment of rates of pay for the Senior
Executive Service.

"5383. Setting individual executive pay.

"5384. Performance awards for the Senior Executive Service.

"5385. Regulations."

PAY ADMINISTRATION

1
2 SEC. 408. Chapter 55 of title 5, United States Code,
3 is amended—

4 (1) by inserting "other than an employee or in-
5 dividual excluded by section 5541(2)(zvi) of this
6 section" immediately before the period at the end of
7 section 5504(a)(B);

8 (2) by amending section 5541(2) by striking out
9 "or" after paragraph (zvi), by striking out the period
10 after paragraph (zv) and inserting "; or" in lieu thereof,
11 and by adding the following paragraph at the end
12 thereof:

13 "(zvi) executives in the Senior Executive Service
14 established under subchapter II of chapter 31 of this
15 title."; and

16 (3) by inserting "other than a member of the
17 Senior Executive Service" after "employee" in section
18 5595(a)(2)(i).

19 TRAVEL, TRANSPORTATION, AND SUBSISTENCE

20 SEC. 409. Chapter 57 of title 5, United States Code,
21 is amended—

22 (1) in section 5723(a)(1) by striking out "; and"
23 and adding in lieu thereof "or of a new member of the
24 Senior Executive Service; and";

1 (2) by adding at the end of subchapter IV the
2 following section:

3 "§ 5752. Travel expenses of Senior Executive Service can-
4 didates

5 "Employing agencies may pay candidates for Senior
6 Executive Service positions travel expenses incurred incident
7 to preemployment interviews requested by the employing
8 agency."; and

9 (3) by adding at the end of the analysis of sub-
10 chapter IV the following new item:

"6768. Travel expenses of Senior Executive Service candidates."

11 LEAVE

12 SEC. 410. Chapter 63 of title 5, United States Code,
13 is amended by inserting in subsection (a) of section 6304
14 "(e), and (f)" in lieu of "and (e)," and by adding at the
15 end of such section the following new subsection:

16 "(f) Annual leave accrued by an individual serving in a
17 position under the Senior Executive Service shall not be
18 subject to the limitation on accumulation otherwise imposed
19 by this section."

20 DISCIPLINARY ACTIONS

21 SEC. 411. (a) Chapter 75 of title 5, United States Code,
22 is amended by adding at the end thereof the following:

1 "SUBCHAPTER V—SENIOR EXECUTIVE
2 SERVICE

3 "§ 7541. Definitions

4 "For the purpose of this subchapter—

5 "(1) 'employee' means a career executive in the
6 Senior Executive Service who—

7 "(A) has completed a year of current continu-
8 ous service in the Senior Executive Service; or

9 "(B) at the time of appointment to a position
10 in the Senior Executive Service was covered by the
11 provisions of subchapter II of this chapter;

12 "(2) 'disciplinary action' means an action based
13 on the conduct of the employee which results in in-
14 voluntary removal or suspension for more than 30 days
15 of the employee, including misconduct, neglect of duty,
16 or malfeasance, and not including less than fully success-
17 ful performance;

18 "(3) 'removal' means separation from the Federal
19 service; and

20 "(4) 'suspension' means the placing of an employee
21 in a temporary nonduty nonpay status for disciplinary
22 reasons.

23 "§ 7542. Actions covered

24 "This subchapter applies to a disciplinary removal or

1 suspension for more than 30 days, but does not apply to a
2 suspension or removal under section 7532 of this title.

3 "§ 7543. Cause and procedure

4 "(a) Under regulations prescribed by the Office of Per-
5 sonnel Management, an agency may take disciplinary action
6 against any employee only for such cause as shall promote the
7 efficiency of the service. Removal from the Senior Executive
8 Service for less than fully successful performance is not a dis-
9 ciplinary action within the meaning of this provision.

10 "(b) An employee against whom a disciplinary action is
11 proposed is entitled to—

12 "(1) at least 30 days' advance written notice, un-
13 less there is reasonable cause to believe that the employee
14 is guilty of a crime for which a sentence of imprisonment
15 can be imposed, stating specific reasons for the proposed
16 action;

17 "(2) a reasonable time to answer orally and in writ-
18 ing and to furnish affidavits and other documentary evi-
19 dence in support of the answer;

20 "(3) be accompanied by an attorney or other
21 representative; and

22 "(4) a written decision and reasons therefor at the
23 earliest practicable date.

24 "(c) An agency may in its discretion provide, by
25 regulation, for a hearing which may be in lieu of or in

1 addition to the opportunity to answer provided under sub-
2 section (b) (2) of this section.

3 "(d) Copies of the notice of proposed action, the answer
4 of the employee if written and a summary thereof if made
5 orally, the notice of decision and reasons therefor, and any
6 order effecting a disciplinary action shall be made a part
7 of the records of the agency and, on request, shall be fur-
8 nished to the Merit Systems Protection Board or the Office
9 of Personnel Management.

10 "(e) An employee in the Senior Executive Service
11 against whom a disciplinary action is taken is entitled to
12 appeal to the Merit Systems Protection Board under section
13 7701 of this title and the decision of the agency shall be
14 sustained on appeal except as provided in such section."

15 (b) The table of sections of chapter 75 of title 5, United
16 States Code is amended by adding at the end thereof the
17 following:

"SUBCHAPTER V—SENIOR EXECUTIVE SERVICE

"Sec.
"7541. Definitions.
"7542. Actions covered.
"7543. Cause and procedure."

19 CONVERSION TO THE SENIOR EXECUTIVE SERVICE

20 SEC. 412. (a) During the period beginning on the date
21 of the enactment of this Act and ending on the effective date
22 of this title, each agency under the guidance and review of
23 the Office of Personnel Management and the definitions in

1 chapter 31 of title 5, United States Code, as amended by this
 2 title, shall designate those positions which are to be incor-
 3 porated into the Senior Executive Service and shall designate
 4 those positions which are career reserved. These designations
 5 shall be published in the Federal Register.

6 (b) Each agency shall also submit a request for total
 7 Senior Executive Service space allocations and for the
 8 number of noncareer appointments needed. The Office of
 9 Personnel Management shall establish interim authoriza-
 10 tions within the limits defined in sections 3133 and 3134
 11 of title 5, United States Code, as amended by this Act.

12 (c) Each employee serving in a position at the time
 13 it is officially designated as a position in the Senior Execu-
 14 tive Service shall have the option to—

15 (1) decline conversion and remain in the current
 16 appointment system and pay system, retaining the grade,
 17 seniority, and other rights and benefits associated with
 18 career and career-conditional appointment, and election
 19 of such option shall not cause the separation, displace-
 20 ment, or reduction in grade of any other employee in the
 21 agency; or

22 (2) convert to a Senior Executive Service appoint-
 23 ment according to the automatic appointment conversion
 24 provisions of subsections (d), (e), (f), (g), and (h)
 25 of this section.

1 The employee shall be notified in writing that his position
 2 has been brought into the Senior Executive Service and
 3 what the employee's options are under subsections (d),
 4 (e), (f), (g), and (h) of this section. The employee shall
 5 be given 90 days from the date of such notification to elect
 6 one of the options.

7 (d) Each employee who has elected an automatic
 8 appointment conversion, is serving immediately before the
 9 effective date in a position designated as a Senior Executive
 10 Service position, and is currently under (1) a career or
 11 career-conditional appointment; or (2) a similar type of
 12 appointment in an excepted service as determined by the Office
 13 of Personnel Management, shall receive a career appointment
 14 to that position in the Senior Executive Service not subject
 15 to section 3392 (e) and (g) of title 5, United States Code.

16 (e) Each employee who has elected an automatic
 17 appointment conversion and is currently under an excepted
 18 appointment in a position which is not designated a career
 19 reserved position in the Senior Executive Service, but is—

20 (1) a position in schedule C of subpart C of part
 21 213 of title 5, Code of Federal Regulations;

22 (2) a position filled by noncareer executive assign-
 23 ment under subpart F of part 305 of title 5, Code of
 24 Federal Regulations;

1 (3) a position in the Executive Schedule under
2 subchapter II of chapter 53 of title 5, United States
3 Code, except career Executive Schedule positions; or

4 (4) a similar type of appointment in an excepted
5 service as determined by the Office of Personnel Manage-
6 ment;

7 shall receive a noncareer appointment in the Senior Execu-
8 tive Service.

9 (f) Each employee described in subsection (e) of this
10 section who is serving immediately before the effective date
11 in a position designated as a Senior Executive Service career
12 reserved position shall be reassigned to an appropriate Senior
13 Executive Service general position or terminated.

14 (g) Each employee described in subsection (e) of this
15 section who is serving immediately before the effective date,
16 in a position designated as a Senior Executive Service posi-
17 tion and who has reinstatement eligibility to a position in the
18 competitive service, may request the reinstatement of the
19 employee's career status from the Office of Personnel Man-
20 agement and be converted to a career appointment in the
21 Senior Executive Service. The names and grounds for status
22 of all such employees who are so reinstated and converted
23 shall be published in the Federal Register.

24 (h) Each employee who has elected an automatic ap-
25 pointment conversion and is under a limited executive assign-

1 ment under subpart F of part 305 of title 5, Code of Federal
2 Regulations, shall—

3 (1) be converted to a Senior Executive Service
4 limited term appointment if the position encumbered
5 immediately before the effective date will terminate
6 within 3 years of the effective date;

7 (2) be converted to a Senior Executive Service
8 noncareer appointment if the position encumbered im-
9 mediately before the effective date is designated as a
10 Senior Executive Service general position; or

11 (3) be converted to a Senior Executive Service
12 noncareer appointment and reassigned to a Senior Ex-
13 ecutive Service general position if the encumbered posi-
14 tion immediately before the effective date is designated as
15 a Senior Executive Service career reserved position.

16 (i) Employees whose actual base pay at the time of
17 conversion exceeds the pay of the rate to which they are
18 converted shall retain their pay.

19 (j) The Office of Personnel Management shall prescribe
20 regulations to carry out the purpose of this section. There
21 shall be a right of appeal to the Merit Systems Protection
22 Board for an employee who believes such employee's agency
23 has violated the employee's rights under this section, section
24 3395(d), or section 3593, or who believes that the agency's

1 action has not been timely under section 4313(b)(2) of this
2 title.

3 REPEALER

4 SEC. 413. Except for the Presidential authority pro-
5 vided in section 5317 of title 5, United States Code, all au-
6 thority in effect immediately before the effective date of this
7 section for the establishment or the pay, or both, as the case
8 may be, of each position subject to section 401 of this Act
9 is repealed.

10 SAVINGS PROVISION

11 SEC. 414. The enactment of this title shall not decrease
12 the present pay, allowances, or compensation, or future an-
13 nuity of any person.

14 EFFECTIVE DATE

15 SEC. 415. The provisions of this title shall take effect 9
16 months after the date of the enactment of the Act with the
17 exception of section 412, regarding conversion procedures,
18 which shall take effect on such date of enactment.

19 TITLE V—MERIT PAY

20 PAY FOR PERFORMANCE AMENDMENTS

21 SEC. 501. (a) Part III of title 5, United States Code,
22 is amended by inserting after chapter 53 the following new
23 chapter:

1 "CHAPTER 54—MERIT PAY

2 ^{"Sec.}
3 ^{"5403. Purpose.}
4 ^{"5403. Merit pay system.}
5 ^{"5403. Reports.}
6 ^{"5404. Regulations.}

7 "§ 5401. Purpose

8 "It is the purpose of this chapter to provide for a merit
9 pay system which shall—

10 "(1) within available funds, recognize and reward
11 quality performance by varying merit pay adjustments;

12 "(2) use performance appraisals as the basis for
13 determining merit pay adjustments;

14 "(3) within available funds, provide for training
15 to improve objectivity and fairness in the evaluation of
16 performance; and

17 "(4) regulate the costs of merit pay by establishing
18 appropriate control techniques.

19 "§ 5402. Merit pay system

20 "(a) In accordance with the purposes set forth in section
21 5401 of this title, the Office of Personnel Management shall
22 establish a merit pay system which shall cover any employee
in a position which regularly requires the exercise of man-
agerial or supervisory responsibilities and which is in GS-13
through OS-15 as established under chapters 51 and 53 of
this title.

"(b)(1) An agency may file with the Office of Personnel

1 *Management an application, setting forth reasons why it, or*
 2 *a unit thereof, should be excluded from placing positions un-*
 3 *der the merit pay system. The Office of Personnel Management*
 4 *shall review the application and reasons, undertake such other*
 5 *investigation as it considers appropriate to determine whether*
 6 *the agency or unit should be excluded from coverage of this*
 7 *subchapter, and upon completion of its review, recommend to*
 8 *the President whether the agency or unit should be so ex-*
 9 *cluded. The President may, in writing, exclude an agency or*
 10 *unit from such coverage.*

11 *“(2) Any agency or unit which is excluded from cov-*
 12 *erage under this subsection shall make a sustained effort to*
 13 *bring its personnel system into conformity with the merit pay*
 14 *system insofar as is practicable.*

15 *“(3) The Office of Personnel Management may at any*
 16 *time recommend to the President that the exclusion from*
 17 *coverage previously granted to an agency or unit under this*
 18 *subsection be revoked. The revocation of the exclusion shall be*
 19 *effected upon written determination of the President.*

20 *“(c) The merit pay system established under subsection*
 21 *(a) of this section shall provide for a range of basic pay for*
 22 *each grade to which it applies, which range shall be limited*
 23 *by the minimum and maximum rate of basic pay payable*
 24 *for each such grade.*

1 *“(d)(1) Concurrent with each adjustment under section*
 2 *5305 of this title, the Office of Personnel Management in*
 3 *consultation with the Office of Management and Budget shall*
 4 *determine the extent to which such adjustment shall be made in*
 5 *rates of basic pay for all employees covered by the merit pay*
 6 *system.*

7 *“(2) An increase in pay under this subsection is not an*
 8 *equivalent increase in pay within the meaning of section 5335*
 9 *of this title.*

10 *“(3) No employee may be paid less than the minimum*
 11 *rate of basic pay of the grade of such employee's position. No*
 12 *employees shall suffer a reduction in the rate of basic pay as*
 13 *a result of the employee's initial coverage by, or subsequent*
 14 *conversion to, the merit pay system.*

15 *“(e)(1) Under regulations prescribed by the Office of*
 16 *Personnel Management, the head of each agency may pro-*
 17 *vide for increases within the range of basic pay for any*
 18 *employee covered by a merit pay system.*

19 *“(2) Determinations to provide pay increases under this*
 20 *subsection to an employee—*

21 *“(A) may take into account both individual perform-*
 22 *ance and organizational accomplishment, and*

23 *“(B) shall be based on factors such as—*

24 *“(i) improvements in efficiency, productivity,*
 25 *and quality of work or service;*

1 “(ii) cost savings or cost efficiency;

2 “(iii) timeliness of performance; and

3 “(iv) the quality of performance by the em-
4 ployees for whom the manager or supervisor is
5 responsible;

6 “(C) shall be subject to review only in accordance
7 with and to the extent provided by procedures estab-
8 lished by the agency head; and

9 “(D) shall be made in accordance with guidelines
10 issued by the Office of Personnel Management which
11 relate to the distribution of increases available under
12 this subsection.

13 “(B) For any fiscal year, the head of any agency may
14 exercise authority under paragraph (1) of this subsection
15 only to the extent of the funds available for purposes of
16 this subsection.

17 “(A) The funds available for purposes of this subsection
18 to the head of an agency for any fiscal year shall be deter-
19 mined by the Office of Personnel Management on an annual
20 basis, after consultation with the Office of Management and
21 Budget, before the beginning of such fiscal year. The amount
22 so available for any such agency shall be determined by
23 the Office on the basis of—

24 “(A) the additional amount of the adjustments
25 under section 5305 of this title, and

1 “(B) the amount estimated by the Office to reflect
2 within-grade step increases and quality step increases,
3 which would have occurred if the employees covered by
4 the merit pay system in such agency were not so covered.

5 “(f)(1) The head of an agency may pay a cash award
6 to, and incur necessary expenses for the honorary recogni-
7 tion of, any employee covered by a merit pay system who—

8 “(A) by such employee's suggestion, incention,
9 superior accomplishment, or other personal effort con-
10 tributes to the efficiency, economy, or other improve-
11 ment of Government operations; or

12 “(B) performs a special act or service in the pub-
13 lic interest in connection with or related to such em-
14 ployee's official employment.

15 “(2) The President may pay a cash award to, and
16 incur necessary expenses for the honorary recognition of,
17 any employee covered by a merit pay system who—

18 “(A) by such employee's suggestion, incention,
19 superior accomplishment, or other personal effort con-
20 tributes to the efficiency, economy, or other improvement
21 of Government operations; or

22 “(B) performs an exceptionally meritorious special
23 act or service in the public interest in connection with or
24 related to such employee's official employment.

1 A Presidential award may be in addition to an agency award
2 under paragraph (1) of this subsection.

3 "(3) A cash award under this subsection is in addition
4 to the basic pay and any merit increase to basic pay of the
5 employee receiving the award. Acceptance of a cash award
6 under this subsection constitutes an agreement that the use by
7 the Government of an idea, method, or device for which the
8 award is made does not form the basis of a further claim of
9 any nature against the Government by the employee, his
10 heirs, or assigns.

11 "(4) A cash award to, and expenses for the honorary
12 recognition of, any employee covered by a merit pay system
13 may be paid from the fund or appropriation available to the
14 activity primarily benefiting or the various activities bene-
15 fitting. The head of the agency concerned shall determine the
16 amount to be paid by each activity for an agency award
17 under paragraph (1) of this subsection. The President shall
18 determine the amount to be paid by each activity for a Presi-
19 dential award under paragraph (2) of this subsection.

20 "(5) Except as provided by paragraph (6) of this
21 subsection, a cash award under this subsection may not ex-
22 ceed \$10,000.

23 "(6) If the head of an agency certifies to the Office
24 of Personnel Management that the suggestion, invention,
25 superior accomplishment, or other meritorious effort for

1 which the award is proposed is highly exceptional and un-
2 usually outstanding, a cash award in excess of \$10,000 but
3 not in excess of \$25,000 may be granted with the approval
4 of such office.

5 "(7) An agency may pay or grant an award under
6 this subsection notwithstanding the death or separation from
7 the service of the employee concerned, if the suggestion,
8 invention, superior accomplishment, other meritorious effort
9 for which the award is proposed was made or performed
10 while the employee was in the employ of the Government.

11 "(g) Under regulations prescribed by the Office of Per-
12 sonnel Management, the benefit of advancement through the
13 range of basic pay shall be preserved for an employee cov-
14 ered by the merit pay system, whose continuous service is
15 interrupted in the public interest by service with the armed
16 forces, or by service in essential non-Government civilian
17 employment during a period of war or national emergency.

18 "(h) For purposes of section 5341 of this title, rates
19 of basic pay subject to increases under the merit pay system
20 are considered pay fixed by statute.

21 "§ 5403. Reports

22 "Until such time as the merit pay system is fully im-
23 plemented, the Office of Personnel Management shall submit
24 to the Congress annual reports on the operation of the merit
25 pay system and the proposed schedule for completing the

1 implementation of the system, and the costs associated with
 2 implementing it. Thereafter the Office of Personnel Manage-
 3 ment shall periodically submit reports to Congress on the
 4 effectiveness of the system and the costs associated with it.

5 "§ 5404. Regulations

6 "The Office of Personnel Management shall prescribe
 7 regulations necessary for the administration of this chapter."

8 CONFORMING AND TECHNICAL AMENDMENTS

9 SEC. 502. (a) Section 4501(2)(A) of title 5, United
 10 State Code, is amended by striking out "; and" and inserting
 11 in lieu thereof "but does not include an individual paid under
 12 the merit pay system established under section 5402 of this
 13 title; and".

14 (b) Section 4502(a) of title 5, United States Code,
 15 is amended by striking out "\$5,000" and inserting in lieu
 16 thereof "\$10,000".

17 (c) Section 4502(b) of title 5, United States Code, is
 18 amended—

19 (1) by striking out "Civil Service Commission"
 20 and inserting in lieu thereof "Office of Personnel
 21 Management";

22 (2) by striking out "\$5,000" and inserting in lieu
 23 thereof "\$10,000"; and

24 (3) by striking out "the Commission" and inserting
 25 in lieu thereof "the Office".

1 (d) Section 4506 of title 5, United States Code, is
 2 amended by striking out "Civil Service Commission may"
 3 and inserting in lieu thereof "Office of Personnel Manage-
 4 ment shall".

5 (e) Section 5332(a) of title 5, United States Code, is
 6 amended by inserting after "applies" the second time it
 7 appears the following: ", except an employee covered by
 8 chapter 54 of this title."

9 (f) Section 5334 of title 5, United States Code, is
 10 amended—

11 (1) in paragraph (2) of subsection (c) by insert-
 12 ing ", or for an employee appointed to a position covered
 13 by the merit pay system, any dollar amount," after
 14 "step"; and

15 (2) by adding at the end thereof the following new
 16 subsection:

17 "(g) In applying this section to an employee covered
 18 by the merit pay system, the term '6 percent' shall be substi-
 19 tuted for the terms 'two steps' and 'two step-increases' each
 20 place they appear."

21 (g) Section 5335(e) of title 5, United States Code, is
 22 amended by inserting after "individual" the following: "cov-
 23 ered by chapter 54 of this title, or".

24 (h) Section 5336(c) of title 5, United States Code, is
 25 amended by inserting after "individual" the following: "cov-
 26 ered by chapter 54 of this title, or".

1 (i) The table of chapters for part III of title 5, United
 2 States Code, is amended by inserting after the item relating
 3 to chapter 53 the following new item:

"4. Merit Pay----- 600F."

3 EFFECTIVE DATE

4 SEC. 503. The provisions of this title shall take effect
 5 on the date of the enactment of this Act, except that such
 6 provisions shall be applied to positions in accordance with
 7 such schedule as the Office of Personnel Management
 8 determines.

9 TITLE VI—RESEARCH, DEMONSTRATION, AND
 10 OTHER PROGRAMS

11 RESEARCH AND DEMONSTRATION PROJECTS

12 SEC. 601. (a) Part III of title 5, United States Code,
 13 is amended by adding at the end of subpart C thereof the fol-
 14 lowing new chapter:

15 "CHAPTER 47—PERSONNEL RESEARCH AND
 16 DEMONSTRATION PROJECTS

"Sec.

"4701. Definitions.

"4702. Research and development functions.

"4703. Demonstration projects.

"4704. Allocation of funds.

"4705. Reports.

"4706. Regulations.

17 "§ 4701. Definitions

18 "For the purpose of this chapter—

19 "(1) 'agency' means an agency as defined in sec-

1 tion 2301(a) (without regard to paragraph (2)(D)
 2 thereof);

3 "(2) 'agency' does not include the Federal Bureau of
 4 Investigation, the Central Intelligence Agency, the De-
 5 fense Intelligence Agency, the National Security Agency,
 6 any positions in the Drug Enforcement Administration
 7 which are excluded from the competitive service under
 8 section 201 of the Crime Control Act of 1976 (90 Stat.
 9 2425), and, as determined by the President, an execu-
 10 tive agency or unit thereof whose principal function is
 11 the conduct of foreign intelligence or counterintelligence
 12 activities;

13 "(3) 'employee' means an individual employed in
 14 or under an agency;

15 "(4) 'eligible' means an individual who has quali-
 16 fied for appointment in an agency and whose name has
 17 been entered on the appropriate register or list of
 18 eligibles;

19 "(5) 'demonstration project' means a project con-
 20 ducted by the Office of Personnel Management, or un-
 21 der its supervision, to determine whether a specified
 22 change in personnel management policies or procedures
 23 would result in improved Federal personnel manage-
 24 ment; and

1 “(6) ‘research program’ means a planned study of
2 the manner in which public management policies and
3 systems are operating, the effects of those policies and
4 systems, the possibilities for change, and comparisons
5 among policies and systems.

6 “§ 4702. Research and development functions

7 “The Office of Personnel Management shall—

8 “(1) establish and maintain (and assist in the es-
9 tablishment and maintenance of) research and develop-
10 ment projects of improved methods and technologies in
11 Federal personnel management;

12 “(2) evaluate projects, and proposed projects,
13 described in paragraph (1);

14 “(3) establish and maintain a program for the
15 collection and public dissemination of information relat-
16 ing to personnel management research and for encour-
17 aging and facilitating the exchange of information among
18 interested persons and entities; and

19 “(4) carry out the preceding functions directly or
20 through agreement or contract.

21 “§ 4703. Demonstration projects

22 “(a) Except as provided in this section, the Office of
23 Personnel Management may directly, or through agreement
24 or contract with one or more Federal agencies and other
25 public and private organizations, conduct and evaluate dem-

1 onstration projects, except that there may be no more than 10
2 active demonstration projects in effect at any one time. The
3 conduct of demonstration projects shall not be limited by any
4 lack of specific authority in this title to take the action con-
5 templated, or by any provision of this title, or any regulation
6 issued thereunder, which is inconsistent with such action, in-
7 cluding laws or regulations relating to—

8 “(1) the methods of establishing qualification re-
9 quirements for, recruitment for, and appointment to
10 positions;

11 “(2) the methods of classifying positions and com-
12 pensating employees, except that no variation is hereby
13 authorized in employee benefits provided by chapter 63
14 or subpart O of part III of this title;

15 “(3) the methods of assigning, reassigning, or
16 promoting employees;

17 “(4) the methods of disciplining employees;

18 “(5) the methods of providing incentives to em-
19 ployees, including the provision of group or individual
20 incentive bonuses or pay;

21 “(6) hours of work per day or per week;

22 “(7) the methods of involving employees, unions,
23 and employee organizations in personnel decisions; and

24 “(8) the methods of reducing overall agency staff
25 and grade levels.

1 *Notwithstanding the provisions of this subsection, no dem-*
 2 *onstration project shall (A) affect leave under chapter 63 of*
 3 *this title or insurance or annuities under subpart G of part*
 4 *III of this title, or (B) be inconsistent with any merit sys-*
 5 *tem principles established, or personnel practices prohibited,*
 6 *under chapter 23 of this title.*

7 *“(b) Before conducting or entering into any agreement*
 8 *to conduct a demonstration project, the Office of Personnel*
 9 *Management shall—*

10 *“(1) develop a plan for such project which iden-*
 11 *tifies—*

12 *“(A) purposes;*

13 *“(B) the types of employees or eligibles, cate-*
 14 *gorized by organizational series, grade, or organi-*
 15 *zational unit;*

16 *“(C) the number of employees or eligibles to be*
 17 *included, in total amount or by category;*

18 *“(D) the methodology;*

19 *“(E) the duration;*

20 *“(F) the training to be provided;*

21 *“(G) the anticipated costs; and*

22 *“(H) the methodology and criteria for*
 23 *evaluation;*

24 *“(2) publish such plan in the Federal Register and*
 25 *submit such plan so published to public hearing;*

1 *“(3) notify, at least 6 months in advance of the date*
 2 *any project proposed under this section is to take effect,*
 3 *any employees who may be affected by the project, and*
 4 *consult with such employees in accordance with subsections*
 5 *(e) and (f); and*

6 *“(4) provide Congress with a report at least 3*
 7 *months in advance of the date any project proposed under*
 8 *this section is to take effect detailing the nature and pur-*
 9 *pose of the project, and the extent, if any, to which the*
 10 *project is inconsistent with existing law.*

11 *Any such plan shall not be implemented until it is approved*
 12 *by each agency involved.*

13 *“(e) Each demonstration project shall—*

14 *“(1) involve no more than 5,000 individuals other*
 15 *than individuals in any control groups necessary to*
 16 *validate the results of the project; and*

17 *“(2) terminate before the end of the 5-year period*
 18 *beginning on the date of approval by the Office of Per-*
 19 *sonnel Management except that research may continue*
 20 *beyond such date to the extent necessary to validate the*
 21 *results of the project.*

22 *“(d) Subject to the terms of any written agreement*
 23 *between the Office of Personnel Management and an agency,*
 24 *a demonstration project involving an agency may be termi-*
 25 *nated by the Office of Personnel Management, or such*

1 agency, if either determines that the project creates a sub-
 2 stantial hardship on, or is not in the best interest of, the
 8 public, the Federal Government, employees, or eligibles.

4 "(e) Employees within a unit with respect to which
 5 an organization of Government employees has been ac-
 6 corded exclusive recognition shall not be included within
 7 any project under subsection (b) of this section—

8 "(1) if such project would violate a negotiated
 9 agreement between such agency and such organization,
 10 unless there is a written agreement with respect to such
 11 project between such agency and such organization; or

12 "(2) if such project is not covered by a negotiated
 13 agreement, until there has been consultation or negotia-
 14 tion, as appropriate, with such organization.

15 "(f) Employees within any unit with respect to which
 16 an organization of Government employees has not been
 17 accorded exclusive recognition shall not be included within
 18 any project under subsection (b) of this section unless there
 19 has been agency consultation regarding the project with the
 20 employees in such unit.

21 "(g) Evaluation of the results of the project and its im-
 22 pact on improving public management shall be undertaken
 23 for each project.

24 "(h) Upon the request of the Director of the Office of
 25 Personnel Management, agencies shall cooperate with and

1 assist the Office as far as practical in the performance of this
 2 function and provide the Office with requested information
 3 and reports relating to the conduct of demonstration projects
 4 in their respective agencies.

5 "§ 4704. Allocation of funds

6 "Funds appropriated to the Office of Personnel Manage-
 7 ment for the purposes of this chapter may be allocated by
 8 the Office of Personnel Management to any agency conduct-
 9 ing demonstration or research projects or assisting the Office
 10 of Personnel Management in conducting such projects. Funds
 11 so allocated shall remain available for such period as may be
 12 specified in appropriation Acts. No contract shall be entered
 13 into under this section unless such contract has been provided
 14 for in advance in appropriation Acts.

15 "§ 4705. Reports

16 "The Office of Personnel Management shall include in
 17 the annual report required by section 1308 of this title a
 18 summary of research and demonstration projects conducted
 19 during the year, the effect of that research on improving
 20 public management and increasing efficiency, and recom-
 21 mendations of policies and procedures which will improve
 22 the attainment of general research objectives.

23 "§ 4706. Regulations

24 "The Office of Personnel Management shall prescribe
 25 regulations for the administration of this chapter."

1 (b) The table of chapters for subpart C of part III of
2 title 5, United States Code, is amended by adding at the end
3 thereof the following new item:

"47. Personnel Research and Demonstration Projects..... 4701".

4 INTERGOVERNMENTAL PERSONNEL ACT AMENDMENTS

5 SEC. 602. (a) Section 208 of the Intergovernmental
6 Personnel Act of 1970 is amended—

7 (1) by striking out the section heading and insert-
8 ing in lieu thereof the following:

9 "TRANSFER OF FUNCTIONS AND ADMINISTRATION OF
10 MERIT POLICIES";

11 (2) by redesignating subsections (b), (c), (d),
12 (e), (f), and (g) as subsections (c), (d), (e), (f),
13 (g), and (i), respectively, and by inserting after sub-
14 section (a) the following new subsection:

15 "(b) In accordance with regulations of the Office of
16 Personnel Management, Federal agencies may require as a
17 condition of participation in assistance programs, systems of
18 personnel administration consistent with personnel standards
19 prescribed by the Office of Personnel Management for posi-
20 tions engaged in carrying out such programs. Such standards
21 shall include the merit principles in section 2 of this Act.";
22 and

23 (3) by inserting after subsection (g), as redesi-
24 gnated by this section, the following new subsection:

1 "(h) Effective one year after the date of the enactment
2 of this subsection, all statutory personnel requirements estab-
3 lished as a condition of the receipt of Federal grants-in-aid
4 by State and local governments are hereby abolished,
5 except—

6 "(1) those requirements listed in subsection (a)
7 of this section,

8 "(2) those that generally prohibit discrimination
9 in employment or require equal employment opportunity,

10 "(3) the Davis-Bacon Act (40 U.S.C. 276 et
11 seq.), and

12 "(4) chapter 15 of title 5, United States Code relat-
13 ing to political activities of certain State and local
14 employees."

15 (b) Section 401 of such Act is amended by striking the
16 period after "institutions of higher education" and inserting
17 in lieu thereof "and other organizations."

18 (c) Section 403 of such Act is amended by striking
19 out "(less applicability to commissioned officers of the Pub-
20 lic Health Service)".

21 (d) Section 502 of such Act is amended in paragraph
22 (3) by inserting "the Trust Territory of the Pacific Islands,"
23 before "and a territory or possession of the United States."

24 (e) Section 506 of such Act is amended—

1 (1) by inserting in subsection (b)(2) "the Com-
2 monwealth of Puerto Rico, Ouam, American Samoa, and
3 the Virgin Islands)" after "(Other than the District of
4 Columbia,;" and

5 (2) by striking out of subsection (b)(5) "and the
6 District of Columbia," and by inserting in lieu thereof
7 "the District of Columbia, the Commonwealth of Puerto
8 Rico, Ouam, American Samoa, and the Virgin Islands."

9 AMENDMENTS TO THE MOBILITY PROGRAM

10 SEC. 603. (a) Section 3371 of title 5, United States
11 Code, is amended—

12 (1) by inserting "the Trust Territory of the Pacific
13 Islands," after "Puerto Rico," in paragraph (1)(A);
14 and

15 (2) by striking out "and" at the end of paragraph
16 (1), by striking out the period at the end of paragraph
17 (2) and inserting a semicolon in lieu thereof, and by
18 adding at the end thereof the following:

19 "(3) 'Federal agency' means an executive agency,
20 a military department, a court of the United States, the
21 Administrative Office of the United States Courts, the
22 Library of Congress, the Botanic Garden, the Govern-
23 ment Printing Office, the Congressional Budget Office,
24 the United States Postal Service, the Postal Rate Com-
25 mission, the Office of the Architect of the Capitol, the

1 Office of Technology Assessment, and such other ap-
2 propriate agencies of the legislative and judicial branches
3 as determined by the Office of Personnel Management;
4 and

5 "(4) 'other organizations' means—

6 "(A) a national, regional, State-wide, area-
7 wide or metropolitan organization representing mem-
8 ber State or local governments;

9 "(B) an association of State or local public
10 officials; or

11 "(C) a nonprofit organization, one of whose
12 principal functions is to offer professional advisory,
13 research, development, educational, or related ser-
14 vices to governments or universities concerned with
15 public management."

16 (b) Sections 3372 through 3375 of title 5, United
17 States Code, are amended by striking out "executive
18 agency" and "an executive agency" each place they appear
19 and by inserting in lieu thereof, respectively, "Federal
20 agency" and "a Federal agency".

21 (c) Section 3372(a)(1) of title 5, United States
22 Code, is further amended by inserting immediately before
23 the semicolon the following: " , except that an employee
24 in a Federal agency does not include an employee in the

1 Senior Executive Service serving under a non-career appoint-
 2 ment and an employee in the excepted service who is serving
 3 in a confidential or policy-determining or policy-advocating
 4 position”.

5 (d) Section 3372 of title 5, United States Code, is
 6 amended—

7 (1) in subsection (b)(1), by striking out “and”
 8 after “higher education”;

9 (2) in subsection (b)(2), by striking out the
 10 period after “executive agency” and inserting in lieu
 11 thereof a semicolon; and

12 (3) by adding at the end thereof the following:

13 “(3) an employee of a Federal agency to another
 14 organization; and

15 “(4) an employee of another organization to a
 16 Federal agency.”.

17 (e) Section 3374 of title 5, United States Code, is
 18 amended—

19 (1) by adding the following new sentence at the
 20 end of subsection (b):

21 “The above exceptions shall not apply to non-Federal em-
 22 ployees who are covered by chapters 83, 87, and 89 of this
 23 title by virtue of their non-Federal employment immediately
 24 before assignment and appointment under this section.”;

1 (2) in subsection (c)(1), by striking out the semi-
 2 colon at the end thereof and by inserting in lieu thereof
 3 the following: “, except to the extent that the compen-
 4 sation received from the State or local government is
 5 less than the appropriate rate of pay which the duties
 6 would warrant under the applicable pay provisions of
 7 this title or other applicable authority;”; and

8 (3) by striking out the period at the end of sub-
 9 section (c) and adding the following: “, or for the
 10 contribution of the State or local government, or a part
 11 thereof, to employee benefit systems.”.

12 (f) Section 3375(a) of title 5, United States Code, is
 13 amended by striking out “and” at the end of paragraph (4),
 14 by redesignating paragraph (5) as paragraph (6), and by
 15 inserting after paragraph (4) thereof the following:

16 “(5) section 5724a(b) of this title, to be used by
 17 the employee for miscellaneous expenses related to
 18 change of station where movement or storage of house-
 19 hold goods is involved; and”.

20 TITLE VII—LABOR-MANAGEMENT RELATIONS

21 LABOR-MANAGEMENT RELATIONS

22 SEC. 701. (a) Subpart F of part III of title 5, United
 23 States Code, is amended by adding after chapter 71 the follow-
 24 ing new chapter:

1 "CHAPTER 72—FEDERAL SERVICE LABOR-
2 MANAGEMENT RELATIONS

"SUBCHAPTER I—GENERAL PROVISIONS

"Sec.

"7801. Findings and purpose.

"7802. Definitions; application.

"7803. Federal Labor Relations Authority; General Counsel.

"7804. Powers and duties of the Authority and of the General Counsel.

"SUBCHAPTER II—RIGHTS AND DUTIES OF EMPLOYEES,
AGENCIES AND LABOR ORGANIZATIONS

"7811. Employees rights.

"7812. Recognition of labor organizations.

"7813. National consultation rights.

"7814. Exclusive recognition.

"7815. Representation rights and duties.

"7816. Unfair labor practices.

"7817. Standards of conduct for labor organizations.

"7818. Agreement requirements.

"7819. Approval of agreements.

"SUBCHAPTER III—GRIEVANCES AND IMPASSES

"7821. Grievance procedures.

"7822. Federal Service Impasses Panel; negotiation impasses.

"SUBCHAPTER IV—ADMINISTRATIVE AND OTHER
PROVISIONS

"7831. Allotments to representatives.

"7832. Use of official time.

"7833. Remedial action.

"7834. Subpenas.

"7835. Regulations.

3 "SUBCHAPTER I—GENERAL PROVISIONS

4 "§ 7201. Findings and purpose

5 "(a) The Congress finds that the public interest de-
6 mands the highest standards of employee performance and
7 the continued development and implementation of modern
8 and progressive work practices to facilitate and improve
9 employee performance and the efficient accomplishment of
10 the operations of the Government.

1 "(b) The Congress also finds that, while significant
2 differences exist between Federal and private employment,
3 experience under Executive Order Numbered 11491 indicates
4 that the statutory protection of the right of employees to or-
5 ganize, to bargain collectively within prescribed limits, and
6 to participate through labor organizations of their own
7 choosing in decisions which affect them—

8 "(1) may be accomplished with full regard for the
9 public interest,

10 "(2) contributes to the effective conduct of public
11 business, and

12 "(3) facilitates and encourages the amicable settle-
13 ment between employees and their employers of disputes
14 involving personnel policies and practices and matters
15 affecting working conditions.

16 "(c) It is the purpose of this chapter to prescribe cer-
17 tain rights and obligations of the employees of the Federal
18 government subject to the paramount interest of the public
19 and to establish procedures which are designed to meet the
20 special requirements and needs of the Federal government
21 in matters relating to labor-management relations.

22 "§ 7202. Definitions; application

23 "(a) For purposes of this chapter—

24 "(1) 'agency' means an Executive agency other
25 than the General Accounting Office;

1 “(B) ‘employee’ means an individual who—
 2 “(A) is employed in an agency;
 3 “(B) is employed in a nonappropriated fund
 4 instrumentality described in section 3105(o) of this
 5 title;
 6 “(C) is employed in the Veterans’ Canteen
 7 Service, Veterans’ Administration, and who is de-
 8 scribed in section 5103(c)(14) of this title; or
 9 “(D) is an employee (within the meaning of
 10 subparagraph (A), (B), or (C)) who was sepa-
 11 rated from the service as a consequence of, or in con-
 12 nection with, an unfair labor practice described in
 13 section 7216 of this title;
 14 but does not include—
 15 “(i) an alien or noncitizen of the United States
 16 who occupies a position outside the United States;
 17 “(ii) a member of the uniformed services (with-
 18 in the meaning of section 3101(3) of this title);
 19 “(iii) for purposes of exclusive recognition or
 20 national consultation rights unless authorized under
 21 the provisions of this chapter, a supervisor, a man-
 22 agement official, or a confidential employee;
 23 “(3) ‘labor organization’ means any lawful organi-
 24 zation of employees which was established for the
 25 purpose, in whole or in part, of dealing with agencies

1 in matters relating to grievances and personnel policies
 2 and practices or in other matters affecting the working
 3 conditions of the employees, but does not include an or-
 4 ganization which—
 5 “(A) except as authorized under this chapter,
 6 consists of, or includes, management officials, con-
 7 fidential employees, or supervisors;
 8 “(B) assists, or participates, in the conduct of a
 9 strike against the Government of the United States
 10 or any agency thereof or imposes a duty or obligation
 11 to conduct, assist, or participate in such a strike;
 12 “(C) advocates the overthrow of the constitu-
 13 tional form of government of the United States; or
 14 “(D) discriminates with regard to the terms or
 15 conditions of membership because of race, color,
 16 religion, national origin, sex, age, or handicapping
 17 condition;
 18 “(4) ‘agency management’ means the agency head
 19 and all management officials, supervisors, and other rep-
 20 resentatives of management having authority to act for
 21 the agency on any matters relating to the implementation
 22 of the agency labor-management relations program estab-
 23 lished under this chapter;
 24 “(5) ‘Authority’ means the Federal Labor Relations
 25 Authority established under section 7203 of this title;

1 “(6) ‘General Counsel’ means the General Counsel
2 of the Federal Labor Relations Authority;

3 “(7) ‘Panel’ means the Federal Service Impasses
4 Panel established under section 7223 of this title;

5 “(8) ‘Assistant Secretary’ means the Assistant Sec-
6 retary of Labor for Labor-Management Relations;

7 “(9) ‘confidential employee’ means an employee who
8 assists, and acts in a confidential capacity to, individuals
9 who formulate and carry out management policies in the
10 field of labor relations;

11 “(10) ‘management official’ means an employee
12 having authority to make, or to influence effectively the
13 making of, policy with respect to personnel procedures
14 or programs which is necessary to an agency or an
15 activity;

16 “(11) ‘supervisor’ means an employee having au-
17 thority, in the interest of an agency, to hire, transfer,
18 suspend, lay off, recall, promote, discharge, assign, re-
19 ward, or discipline other employees or responsibly to di-
20 rect them, or to adjust their grievances, or effectively to
21 recommend such action, if in connection with the fore-
22 going the exercise of authority is not of a merely routine
23 or clerical nature, but requires the use of independent
24 judgment;

1 “(12) ‘professional employee’ means—

2 “(A) any employee engaged in the perform-
3 ance of work—

4 “(i) requiring knowledge of an advanced
5 type in a field of science or learning customarily
6 acquired by a prolonged course of specialized
7 intellectual instruction and study in an institu-
8 tion of higher learning or in a hospital, as
9 distinguished from work requiring knowledge
10 acquired from a general academic education,
11 an apprenticeship, or training in the perform-
12 ance of routine mental, manual, or physical
13 processes;

14 “(ii) requiring the consistent exercise of dis-
15 cretion and judgment in its performance;

16 “(iii) which is predominantly intellectual
17 and varied in character and not routine mental,
18 manual, mechanical or physical work; and

19 “(iv) which is of such a character that the
20 measurement of the output produced, or of the
21 result accomplished, cannot be standardized by
22 relating it to a given period of time; or

23 “(B) any employee who has completed the
24 course of specialized intellectual instruction and
25 study described in subparagraph (A) and who is

1 performing related work under the direction or
2 guidance of a professional employee to qualify the
3 employee to become a professional employee.

4 "(13) 'agreement' means an agreement entered into
5 as a result of collective bargaining pursuant to the pro-
6 visions of this chapter;

7 "(14) 'collective bargaining', 'bargaining', or 'ne-
8 gotiating' means the performance of the mutual obliga-
9 tion of the representatives of the agency and the exclusive
10 representative as provided in section 7815 of this title;

11 "(15) 'exclusive representative' includes any labor
12 organization which has been—

13 "(A) selected pursuant to the provisions of
14 section 7814 of this title as the representative of
15 the employees in an appropriate collective bargain-
16 ing unit; or

17 "(B) certified or recognized prior to the effec-
18 tive date of this chapter as the exclusive representa-
19 tive of the employees in an appropriate collective
20 bargaining unit;

21 "(16) 'person' means an individual, labor organi-
22 zation, or agency covered by this chapter; and

23 "(17) 'grievance' means any complaint by any
24 person concerning any matter which falls within the
25 coverage of a grievance procedure.

1 "(b) Except as provided in subsections (c), (d), and
2 (e) of this section, this chapter applies to all employees of
3 an agency.

4 "(c) This chapter shall not apply to—

5 "(1) the Federal Bureau of Investigation;

6 "(2) the Central Intelligence Agency;

7 "(3) the National Security Agency;

8 "(4) any agency not described in paragraph (1),
9 (2), or (3), or any unit within any agency, which has
10 as a primary function intelligence, investigative, or na-
11 tional security work, if the head of the agency determines,
12 in the agency head's sole judgment, that this chapter can-
13 not be applied in a manner consistent with national se-
14 curity requirements and considerations;

15 "(5) any unit of an agency which has as a primary
16 function investigation or audit of the conduct or work
17 of officers or employees of the agency for the purpose of
18 insuring honesty and integrity in the discharge of official
19 duties, if the head of the agency determines, in the agency
20 head's sole judgment, that this chapter cannot be applied
21 in a manner consistent with the internal security of the
22 agency;

23 "(6) the United States Postal Service;

24 "(7) the Foreign Service of the United States;

25 "(8) the Tennessee Valley Authority; or

1 one or more of its members or by such agents as it may de-
 2 termine, make any inquiry necessary to carry out its duties
 3 whenever persons subject to this chapter are located. A mem-
 4 ber who participates in such inquiry shall not be disqualified
 5 from later participating in a decision of the Authority in the
 6 same case.

7 "(f) The Authority shall appoint an Executive Direc-
 8 tor, such attorney, regional director, administrative law
 9 judge, and other officers and employees as it may from time to
 10 time find necessary for the proper performance of its duties
 11 and may delegate to such officers and employees authority to
 12 perform such duties and make such expenditures as may be
 13 necessary.

14 "(g) All of the expenses of the Authority, including all
 15 necessary traveling and subsistence expenses outside the Dis-
 16 trict of Columbia, incurred by members, employees, or agents
 17 of the Authority under its orders, shall be allowed and paid
 18 on the presentation of itemized vouchers therefor approved by
 19 the Authority or by an individual it designates for that pur-
 20 pose and in accordance with applicable law.

21 "(h)(1) The Authority is expressly empowered and di-
 22 rected to prevent any person from engaging in conduct found
 23 to be a violation of this chapter. In order to carry out its functions
 24 under this chapter, the Authority is authorized to hold hear-
 25 ings; subpoena witnesses, administrators, and take the testi-

1 money or disposition of any person under oath, and in connec-
 2 tion therewith, to issue subpoenas requiring the production and
 3 examination of evidence as provided in section 7524 of this
 4 title relating to any matter pending before it and to take such
 5 other action as may be necessary. In the exercise of the func-
 6 tions of the Authority under this title, the Authority may re-
 7 quest from the Director of the Office of Personnel Manage-
 8 ment an advisory opinion concerning the proper interpretation
 9 of regulations or other policy directives promulgated by the
 10 Office of Personnel Management in connection with a matter
 11 before the Authority for adjudication.

12 "(3) If a regulation or other policy directive issued by
 13 the Office of Personnel Management is at issue in an appeal
 14 before the Authority, the Authority shall timely notify the
 15 Director, and the Director shall have standing to intervene
 16 in the proceeding and shall have all the rights of a party to
 17 the proceeding.

18 "(2) The Director may request that the Authority re-
 19 open an appeal and reconsider its decision on the ground
 20 that the decision was based on an erroneous interpretation of
 21 law or of a controlling regulation or other policy directive
 22 issued by the Office of Personnel Management.

23 "(4) In any matter arising under subsection (b) of this
 24 section, the Authority may require an agency or a labor or-
 25 ganization to cease and desist from violations of this chapter

1 and require it to take such remedial action as it considers
2 appropriate to carry out the policies of this chapter.

3 “(j)(1) The Authority shall maintain a record of its
4 proceedings and make public any decision made by it or any
5 action taken by the Panel under section 7222 of this title.

6 “(2) The provisions of section 553 of this title shall
7 apply with respect to any record maintained under para-
8 graph (1).

9 “(k) The General Counsel is authorized to—

10 “(1) investigate complaints of violations of section
11 7216 of this title;

12 “(2) make final decisions as to whether to issue
13 notices of hearing on unfair labor practice complaints
14 and to prosecute such complaints before the Authority;

15 “(3) direct and supervise all field employees of the
16 General Counsel in the field offices of the Authority; and

17 “(4) perform such other functions as the Authority
18 prescribes.

19 “(l) Notwithstanding any other provision of law, in-
20 cluding chapter 7 of this title, the decision of the Authority
21 on any matter within its jurisdiction shall be final and con-
22 clusive, and no other official or any court of the United
23 States shall have power or jurisdiction to review any such
24 decision by an action in the nature of mandamus on appeal
25 of that decision or by any other means, except that nothing in

1 this section shall limit the right of persons to judicial review
2 of questions arising under the Constitution of the United
3 States.

4 “SUECHAPTER II—RIGHTS AND DUTIES OF
5 EMPLOYEES, AGENCIES AND LABOR OR-
6 GANIZATIONS

7 “§ 7211. Employees' rights

8 “(a) Each employee shall have the right freely and
9 without fear of penalty or reprisal to form, join, or assist
10 any labor organization, or to refrain from such activity, and
11 each employee shall be protected in exercising such rights.
12 Except as otherwise provided under this chapter, such rights
13 include the right to—

14 “(1) participate in the management of a labor or-
15 ganization,

16 “(2) act for the organization in the capacity of a
17 representative,

18 “(3) present, in such representative capacity, the
19 views of the organization to agency heads and other
20 officials of the executive branch of the Government, the
21 Congress, or other appropriate authorities, and

22 “(4) bargain collectively, subject to the limits pre-
23 scribed in section 7215(c) of this title, through represent-
24 atives of their own choosing.

25 “(b) This chapter does not authorize—

1 “(1) a management official, a confidential employee,
2 or a supervisor to participate in the management of a
3 labor organization or to act as a representative of such
4 an organization, unless such participation or activity
5 is specifically authorized by this chapter, or

6 “(2) any employee to so participate or act if such
7 participation or activity would result in any conflict of
8 interest, or appearance thereof, or would otherwise be
9 inconsistent with any law or the official duties of the
10 employee.

11 “§ 7212. Recognition of labor organizations

12 “(a) An agency shall accord exclusive recognition or
13 national consultation rights at the request of a labor orga-
14 nization which meets the requirements for such recognition or
15 consultation rights under this chapter.

16 “(b) Recognition of a labor organization, once accorded,
17 shall continue as long as the organization meets the require-
18 ments of this chapter for recognition.

19 “(c) Recognition of a labor organization shall not—

20 “(1) preclude an employee, regardless of whether
21 the employee is in a unit of exclusive recognition, from
22 exercising grievance or appellate rights established by
23 law or regulation or from choosing the employee's own
24 representative in a grievance or appellate action, ex-
25 cept when the grievance or appeal is covered by and

1 pursued under a negotiated procedure as provided in
2 section 7221 of this title;

3 “(2) preclude or restrict consultations and dealings
4 between an agency and a veterans organization with re-
5 spect to matters of particular interest to employees in
6 connection with veterans preference; or

7 “(3) preclude an agency from consulting or deal-
8 ing with a religious, social, fraternal, professional, or
9 other lawful association not qualified as a labor orga-
10 nization with respect to matters or policies which involve
11 individual members of the association or are of particu-
12 lar applicability to it or its members.

13 Consultations and dealings under paragraph (3) shall not
14 assume the character of formal consultation on matters of
15 general employee-management policy covering employees in
16 that unit or extend to areas where recognition of the interests
17 of one employee group may result in discrimination against
18 or injury to the interest of other employees.

19 “§ 7213. National consultation rights

20 “(a) An agency shall accord national consultation
21 rights to a labor organization which qualifies under criteria
22 established by the Authority as the representative of a
23 substantial number of employees of the agency. National
24 consultation rights shall not be accorded for any unit if a

1 labor organization already holds exclusive recognition at
 2 the national level for that unit. The granting of national
 3 consultation rights shall not preclude an agency from appro-
 4 priate dealings at the national level with other organizations
 5 on matters affecting their members. An agency shall terminate
 6 national consultation rights if the labor organization ceases
 7 to qualify under the established criteria.

8 “(b) If a labor organization has been accorded national
 9 consultation rights, the agency shall notify representatives of
 10 such organization of proposed substantive changes in person-
 11 nel policies that affect employees such organization represents
 12 and provide an opportunity for such organization to comment
 13 on the proposed changes. Such organization may suggest
 14 changes in the agency's personnel policies and have its views
 15 carefully considered. Representatives of such organization
 16 may consult, at reasonable times, with appropriate officials
 17 on personnel policy matters and may, at all times, present in
 18 writing the organization's views on such matters. An agency
 19 is not required to consult with any such organization on any
 20 matter on which it would not be required to negotiate if the
 21 organization were entitled to exclusive recognition.

22 “(c) Any question with respect to the eligibility of a
 23 labor organization for national consultation rights may be
 24 referred to the Authority for decision.

1 “§ 7214. Exclusive recognition

2 “(a) An agency shall accord exclusive recognition to
 3 a labor organization if the organization has been selected
 4 as the representative, in a secret ballot election, by a major-
 5 ity of the employees in an appropriate unit who cast valid
 6 ballots in the election.

7 “(b) A unit may be established on an agency, plant,
 8 installation, craft, functional, or other basis which will as-
 9 sure a clear and identifiable community of interest among
 10 the employees concerned and will promote effective dealings
 11 and efficiency in the agency's operations. A unit shall not
 12 be established solely on the basis of the extent to which em-
 13 ployees in the proposed unit have organized, nor shall a unit
 14 be established if it includes—

15 “(1) except as provided in section 701(b)(1) of
 16 the Civil Service Reform Act of 1978, any management
 17 official, confidential employee, or supervisor;

18 “(2) an employee engaged in Federal personnel
 19 work in other than a purely clerical capacity; or

20 “(3) both professional and nonprofessional em-
 21 ployees, unless a majority of the professional employees
 22 vote for inclusion in the unit.

23 Any question with respect to the appropriate unit may be
 24 referred to the Authority for decision.

1 “(e) All elections shall be conducted under the super-
2 sion of the Authority or persons designated by the Author-
3 ity and shall be by secret ballot. Employees eligible to vote
4 shall be provided the opportunity to choose the labor organi-
5 zation they wish to represent them from among those on the
6 ballot and, except in the case of an election described in para-
7 graph (4), the opportunity to choose not to be represented by
8 a labor organization. Elections may be held to determine
9 whether a labor organization should—

10 “(1) be recognized as the exclusive representative
11 of employees in a unit;

12 “(2) replace another labor organization as the ex-
13 clusive representative;

14 “(3) cease to be the exclusive representative;

15 “(4) be recognized as the exclusive representative
16 of employees in a unit composed of employees in units
17 currently represented by that labor organization or con-
18 tinue to be recognized in the existing separate units.

19 An election need not be held to determine whether an organi-
20 zation should become, or continue to be recognized as, the
21 exclusive representative of the employees in any unit, or
22 subdivision thereof, during the 12-month period after a valid
23 election has been held under this chapter with respect to such
24 unit.

1 “§ 7215. Representation rights and duties

2 “(a) If a labor organization has been accorded exclusive
3 recognition, such organization shall be—

4 “(1) the exclusive representative of employees in the
5 unit and is entitled to act for and negotiate agreements
6 covering all employees in the unit;

7 “(2) responsible for representing the interests of all
8 employees in the unit without discrimination and without
9 regard to labor organization membership; and

10 “(3) given the opportunity to be represented at for-
11 mal discussions between management and employees or
12 employee representatives concerning grievances, person-
13 nel policies and practices, or other matters affecting gen-
14 eral working conditions of employees in the unit.

15 “(b) An agency and an exclusive representative shall
16 have a duty to negotiate in good faith and in exercising such
17 duty shall—

18 “(1) approach the negotiations with a sincere re-
19 solve to reach an agreement;

20 “(2) be represented at the negotiations by appro-
21 priate representatives prepared to discuss and negotiate
22 on all negotiable matters;

23 “(3) meet at such reasonable times and places as
24 may be necessary; and

25 “(4) execute upon request of the agency or the

1 organization a written document embodying the terms of,
2 and take such steps as are necessary to implement, any
3 agreement which is reached.

4 "(c) An agency and an exclusive representative shall,
5 through appropriate representatives, negotiate in good faith as
6 prescribed under subsection (b) of this section with respect to
7 personnel policies and practices and matters affecting work-
8 ing conditions but only to the extent appropriate under laws
9 and regulations, including policies which—

10 "(1) are set forth in the Federal Personnel Manual,

11 "(2) consist of published agency policies and regula-
12 tions for which a compelling need exists (as determined
13 under criteria established by the Authority) and which
14 are issued at the agency headquarters level or at the
15 level of a primary national subdivision, or

16 "(3) are set forth in a national or other controlling
17 agreement entered into by a higher unit of the agency.

18 In addition, such organization and the agency may determine
19 appropriate techniques, consistent with section 7222 of this
20 title, to assist in any negotiation.

21 "(d) In prescribing regulations relating to personnel
22 policies and practices and working conditions, an agency shall
23 give due regard to the obligation to negotiate imposed by this
24 section, except that such obligation does not include an obliga-
25 tion to negotiate with respect to matters concerning the num-

1 ber of employees in an agency, the numbers, types, and grades
2 of positions or employees assigned to an organizational unit,
3 work project or tour of duty, or the technology of performing
4 the agency's work. The preceding sentence shall not preclude
5 the parties from negotiating agreements providing appro-
6 priate arrangements for employees adversely affected by the
7 impact of realignment of work forces or technological change.

8 "(e)(1) If, in connection with negotiations, an issue
9 develops as to whether a proposal is negotiable under this
10 chapter or any other applicable law, regulation, or controlling
11 agreement, it shall be resolved as follows:

12 "(A) An issue which involves interpretation of a
13 controlling agreement at a higher agency level is resolved
14 under the procedures of the controlling agreement, or,
15 if none, under regulations prescribed by the agency.

16 "(B) An issue not described in paragraph (1)
17 which arises at a local level may be referred by either
18 party to the head of the agency for determination.

19 "(2) An agency head's determination under paragraph
20 (1) concerning the interpretation of the agency's regulations
21 with respect to a proposal shall be final.

22 "(3) A labor organization may appeal to the Authority
23 from a decision under paragraph (1) if it—

24 "(A) disagrees with an agency head's determination

1 that a proposal is not negotiable under this chapter or
2 any other applicable law or regulation of appropriate
3 authority outside the agency, or

4 "(B) believes that an agency's regulations, as inter-
5 preted by the agency head, are in violation of this chapter
6 or any other applicable law or regulation of appro-
7 priate authority outside the agency, or are not otherwise
8 applicable to bar negotiations under subsection (c) of this
9 section.

10 "§ 7216. Unfair labor practices

11 "(a) It shall be an unfair labor practice for an agency—

12 "(1) to interfere with, restrain, or coerce an em-
13 ployee in connection with the exercise of rights assured
14 by this chapter;

15 "(2) to encourage or discourage membership in any
16 labor organization by discrimination in regard to hiring,
17 tenure, promotion, or other conditions of employment;

18 "(3) to sponsor, control, or otherwise assist any
19 labor organization, unless such assistance consists of
20 furnishing customary and routine services and facilities—

21 "(A) in a manner consistent with the best inter-
22 est of the agency, its employees, and the organiza-
23 tion, and

24 "(B) on an impartial basis to organizations (if
25 any) having equivalent status;

1 "(4) to discipline or otherwise discriminate against
2 an employee because the employee has filed a complaint,
3 affidavit, petition, or given any information or testimony,
4 under the provisions of this chapter;

5 "(5) to refuse to accord appropriate recognition to
6 a labor organization qualified for such recognition; or

7 "(6) to refuse to consult or negotiate in good faith
8 with a labor organization as required by this chapter.

9 "(b) It shall be an unfair labor practice for a labor
10 organization—

11 "(1) to interfere with, restrain, or coerce an em-
12 ployee in connection with the exercise of the rights assured
13 by this chapter;

14 "(2) to cause or attempt to cause an agency to
15 coerce an employee in the exercise of rights under this
16 chapter;

17 "(3) to coerce or attempt to coerce an employee, or
18 to discipline, fine or take other economic sanction against
19 a member of the labor organization, as punishment or re-
20 prial or for the purpose of hindering or impeding work
21 performance, productivity, or the discharge of duties of
22 such employee;

23 "(4) to—

24 "(A) call, or participate in, a strike, work
25 stoppage, slowdown, or picketing of an agency in

1 a labor-management dispute if such picketing inter-
 2 feres or reasonably threatens to interfere with an
 8 agency's operations, or

4 "(B) condone any activity described in sub-
 5 paragraph (A) by failing to take action to prevent
 6 or stop it;

7 "(5) to discriminate against an employee with re-
 8 gard to the terms or conditions of membership in the or-
 9 ganization because of race, color, religion, national ori-
 10 gin, sex, age, or handicapping condition; or

11 "(6) to refuse to consult or negotiate in good faith
 12 with an agency as required by this chapter.

13 "(c) It shall be an unfair labor practice for a labor or-
 14 ganization which is accorded exclusive recognition to deny
 15 membership to an employee in an appropriate unit unless
 16 such denial is for failure to meet reasonable occupational
 17 standards uniformly required for admission or for failure
 18 to tender initiation fees and dues uniformly required as a
 19 condition of acquiring and retaining membership. This sub-
 20 section shall not preclude a labor organization from enforcing
 21 discipline in accordance with procedures under its constitu-
 22 tion or bylaws which conform to the requirements of this
 23 chapter.

24 "(d) Issues which can properly be raised under an op-
 25 peals procedure may not be raised as unfair labor practices

1 prohibited under this section. Except for matters wherein,
 2 under sections 7221 (e) and (f) of this title, an employee has
 8 an option of using the negotiated grievance procedure or an
 4 appeals procedure, issues which can be raised under a grievance
 5 procedure may, in the discretion of the aggrieved party,
 8 be raised under that procedure or as an unfair labor practice
 7 under this section, but not under both procedures. Appeals or
 8 grievance decisions shall not be construed as unfair labor
 9 practice decisions under this chapter nor as a precedent
 10 for such decisions. All complaints of unfair labor practices
 11 prohibited under this section that cannot be resolved by the
 12 parties shall be filed with the Authority.

16 "(e) Any question with respect to whether an issue can
 14 properly be raised under an appeals procedure shall be re-
 15 ferred for resolution to the agency responsible for final de-
 16 cisions relating to those issues.

17 "§ 7217. Standards of conduct for labor organizations

18 "(a) An agency shall only accord recognition to a labor
 19 organization that is free from corrupt influences and influ-
 20 ences opposed to basic democratic principles. Except as pro-
 21 vided in subsection (b) of this section, an organization is not
 22 required to prove that it is free from such influences if it is
 23 subject to governing requirements adopted by the organiza-
 24 tion or by a national or international labor organization or
 25 federation of labor organizations with which it is affiliated,

1 or in which it participates, containing explicit and detailed
2 provisions to which it subscribes calling for—

8 “(1) the maintenance of democratic procedures and
4 practices, including provisions for periodic elections to
5 be conducted subject to recognized safeguards and pro-
6 visions defining and securing the right of individual mem-
7 bers to participate in the affairs of the organization, to
8 receive fair and equal treatment under the governing
9 rules of the organization, and to receive fair process in
10 disciplinary proceedings;

11 “(2) the exclusion from office in the organization of
12 persons affiliated with communist or other totalitarian
13 movements and persons identified with corrupt influences;

14 “(3) the prohibition of business or financial inter-
15 ests on the part of organization officers and agents which
16 conflict with their duty to the organization and its mem-
17 bers; and

18 “(4) the maintenance of fiscal integrity in the con-
19 duct of the affairs of the organization, including provi-
20 sions for accounting and financial controls and regular
21 financial reports or summaries to be made available to
22 members.

23 “(b) Notwithstanding the fact that a labor organization
24 has adopted or subscribed to standards of conduct as provided
25 in subsection (a) of this section, the organization is required

1 to furnish evidence of its freedom from corrupt influences or
2 influences opposed to basic democratic principles if there is
8 reasonable cause to believe that—

4 “(1) the organization has been suspended or ex-
5 pelled from, or is subject to other sanction, by a parent
6 labor organization, or federation of organizations with
7 which it had been affiliated, because it has demonstrated
8 an unwillingness or inability to comply with governing
9 requirements comparable in purpose to those required by
10 subsection (a) of this section; or

11 “(2) the organization is in fact subject to influences
12 that would preclude recognition under this chapter.

13 “(c) A labor organization which has or seeks recognition
14 as a representative of employees under this chapter shall file
15 financial and other reports with the Assistant Secretary, pro-
16 vide for bonding of officials and employees of the organiza-
17 tion, and comply with trusteeship and election standards.

18 “(d) The Assistant Secretary shall prescribe such regu-
19 lations as are necessary to carry out the purposes of this
20 section. Such regulations shall conform generally to the
21 principles applied to labor organizations in the private sec-
22 tor. Complaints of violations of this section shall be filed
23 with the Assistant Secretary. In any matter arising under
24 this section, the Assistant Secretary may require a labor
25 organization to cease and desist from violations of this section

1 and require it to take such action as he considers appropri-
2 ate to carry out the policies of this section.

3 "§ 7218. Basic provisions of agreements

4 "(a) Each agreement between an agency and a labor
5 organization shall provide the following:

6 "(1) In the administration of all matters covered
7 by the agreement, officials and employees shall be gov-
8 erned by—

9 "(A) existing or future laws and the regula-
10 tions of appropriate authorities, including policies
11 which are set forth in the Federal Personnel
12 Manual,

13 "(B) published agency policies and regula-
14 tions in existence at the time the agreement was ap-
15 proved, and

16 "(C) subsequently published agency policies
17 and regulations required by law or by the regula-
18 tions of appropriate authorities, or authorized by
19 the terms of a controlling agreement at a higher
20 agency level.

21 "(2) Management officials of the agency shall re-
22 tain the right to determine the mission, budget, organi-
23 zation, and internal security practices of the agency,
24 and the right, in accordance with applicable laws and
25 regulations, to—

1 "(A) direct employees of the agency;

2 "(B) hire, promote, transfer, assign, and re-
3 tain employees in positions within the agency, and
4 to suspend, demote, discharge, or take other dis-
5 ciplinary action against employees;

6 "(C) relieve employees from duties because of
7 lack of work or for other legitimate reasons;

8 "(D) maintain the efficiency of the Government
9 operations entrusted to such officials;

10 "(E) determine the methods, means, and per-
11 sonnel by which such operations are to be conducted;
12 and

13 "(F) take such actions as may be necessary
14 to carry out the mission of the agency in situations
15 of emergency.

16 "(b) Nothing in subsection (a) of this section shall
17 preclude the parties from negotiating—

18 "(1) procedures which management will observe in
19 exercising its authority to decide or act in matters re-
20 served under such subsection; or

21 "(2) appropriate arrangements for employees ad-
22 versely affected by the impact of management's exercis-
23 ing its authority to decide or act in matters reserved under
24 such subsection,

25 except that such negotiations shall not unreasonably delay

1 the exercise by management of its authority to decide or act,
2 and such procedures and arrangements shall be consistent
3 with the provisions of any law or regulation described in
4 7215(c) of this title, and shall not have the effect of negating
5 the authority reserved under subsection (a).

6 "(c) Nothing in the agreement shall require an employee
7 to become or to remain a member of a labor organization or to
8 pay money to the organization except pursuant to a voluntary,
9 written authorization by a member for the payment of dues
10 through payroll deductions.

11 "(d) The requirements of this section shall be expressly
12 stated in the initial or basic agreement and apply to all supple-
13 mental, implementing, subsidiary, or informal agreements
14 between the agency and the organization.

15 "§ 7219. Approval of agreements

16 "An agreement with a labor organization as the exclusive
17 representative of employees in a unit is subject to the approval
18 of the head of the agency or his designee. An agreement shall
19 be approved within 45 days from the date of its execution if it
20 conforms to this chapter and other applicable laws, existing
21 published agency policies and regulations (unless the agency
22 has granted an exception to a policy or regulation), and regu-
23 lations of other appropriate authorities. An agreement which
24 has not been approved or disapproved within 45 days from the
25 date of its execution shall go into effect without the required

1 approval of the agency head and shall be binding on the
2 parties subject to the provisions of this chapter, other applica-
3 ble laws, and the regulations of appropriate authorities out-
4 side the agency. A local agreement subject to a national or
5 other controlling agreement at a higher level shall be approved
6 under the procedures of the controlling agreement, or, if
7 none, under agency regulations.

8 "SUBCHAPTER III—GRIEVANCES AND

9 IMPASSES

10 § 7221. Grievance procedures

11 "(a) An agreement between an agency and a labor or-
12 ganization which has been accorded exclusive recognition shall
13 provide a procedure, applicable only to the unit, for the com-
14 sideration of grievances. Subject to the provisions of subsec-
15 tion (d) of this section and to the extent not contrary to any
16 law, the coverage and scope of the procedure shall be nego-
17 tiated by the parties to the agreement. Except as otherwise
18 provided in this section, such procedure shall be the exclusive
19 procedure available to the parties and the employees in the
20 unit for resolving grievances which fall within its coverage.

21 "(b) Any employee or group of employees in the unit
22 may present grievances falling within the coverage of the
23 negotiated grievance procedure to the agency and have them
24 adjusted without the intervention of the exclusive represent-
25 ative if the adjustment is not inconsistent with the terms of the

1 agreement and the exclusive representative has been given an
2 opportunity to be present at the adjustment.

8 “(o) A negotiated grievance procedure shall provide for
4 arbitration as the final step of the procedure. Arbitration may
5 be invoked only by the agency or the exclusive representative.
6 Except as provided in subsection (g) of this section, the pro-
7 cedure must also provide that the arbitrator is empowered to
8 resolve questions as to whether or not any grievance is on a
9 matter subject to arbitration under the agreement.

10 “(d) A negotiated grievance procedure may cover any
11 matter within the authority of an agency if not inconsistent
12 with the provisions of this chapter, except that it may not
13 include matters involving examination, certification and ap-
14 pointment, suitability, classification, political activities, retire-
15 ment, life and health insurance, national security, or the Fair
16 Labor Standards Act of 1938 (29 U.S.C. 301 et seq.).

17 “(e) Matters covered under sections 4303 and 7513 of
18 this title which also fall within the coverage of the negotiated
19 grievance procedure may, in the discretion of the aggrieved
20 employee, be raised either under the appellate procedures of
21 section 7701 of this title or under the negotiated grievance
22 procedure, but not both. Similar matters which arise under
23 other personnel systems applicable to employees covered by
24 this chapter may, in the discretion of the aggrieved employee,
25 be raised either under the appellate procedures, if any, appli-

1 cable to those matters, or under the negotiated grievance pro-
2 cedure, but not both. An employee shall be deemed to have
8 exercised his option under this subsection to raise a matter
4 either under the applicable appellate procedures or under the
6 negotiated grievance procedure at such time as the employee
6 timely files a notice of appeal under the applicable appellate
7 procedures or timely files a grievance in writing in accord-
8 ance with the provisions of the parties' negotiated grievance
9 procedure, whichever event occurs first.

10 “(f) An aggrieved employee affected by a prohibited per-
11 sonnel practice under section 2303(b)(1) of this title which
12 also falls under the coverage of the negotiated grievance pro-
13 cedure may raise the matter under a statutory procedure or
14 the negotiated procedure, but not both. An employee shall be
16 deemed to have exercised his option under this subsection to
16 raise the matter under either a statutory procedure or the
17 negotiated procedure at such time as the employee timely
18 initiates an action under the applicable statutory procedure or
19 timely files a grievance in writing, in accordance with the
20 provisions of the parties' negotiated procedure, whichever
21 event occurs first. Selection of the negotiated procedure in
22 no manner prejudices the right of an aggrieved employee to
23 request the Merit Systems Protection Board to review the
24 final decision pursuant to subsections (h) and (i) of sec-
25 tion 7701 of this title in the case of any personnel action

1 that could have been appealed to the Board, or, where ap-
 2 plicable, to request the Equal Employment Opportunity
 3 Commission to review a final decision in any other matter
 4 involving a complaint of discrimination of the type prohibited
 5 by any law administered by the Equal Employment Oppor-
 6 tunity Commission.

7 "(g) Any question that cannot be resolved by the parties
 8 as to whether or not a grievance is on a matter excepted by
 9 subsection (d) of this section shall be referred for resolution
 10 to the agency responsible for final decisions relating to those
 11 matters.

12 "(h) In matters covered under sections 4303 and 7512
 13 of this title which have been raised under the negotiated griev-
 14 ance procedure in accordance with the provisions of subsection
 15 (e) of this section, an arbitrator shall be governed by the
 16 provisions of section 4303(f) or 7701(d) of this title, as
 17 applicable.

18 "(i) Allocation of the costs of the arbitration shall be
 19 governed by the collective-bargaining agreement. An arbitra-
 20 tor shall have no authority to award attorney or other repre-
 21 sentative fees, except that in matters where an employee is
 22 the prevailing party and the arbitrator's decision is based
 23 on a finding of discrimination prohibited by any law re-
 24 ferred to in section 7701(h) of this title attorney fees may
 25 be awarded and shall be governed by the standards applicable

1 under the Civil Rights Act of 1964, as amended (42 U.S.C.
 3 2000e-5(k)).

8 "(j) Either party may file exceptions to any arbitrator's
 4 award with the Authority, except that no exceptions may be
 5 filed to awards concerning matters covered under subsection
 6 (e) of this section. The Authority shall sustain a challenge
 7 to an arbitrator's award only on grounds that the award
 8 violates applicable law, appropriate regulation, or other
 9 grounds similar to those applied by Federal courts in private
 10 sector labor-management relations. Decisions of the Author-
 11 ity on exceptions to arbitration awards shall be final, except
 12 for the right of an aggrieved employee under subsection (f)
 13 of this section.

14 "(k) In matters covered under sections 4303 and 7512
 15 of this title which have been raised under the provisions of
 16 the negotiated grievance procedure in accordance with the
 17 provisions of subsection (e) of this section, the provisions of
 18 section 7702 of this title pertaining to judicial review shall
 19 apply to the award of an arbitrator in the same manner and
 20 under the same conditions as if the matter had been decided
 21 by the Merit Systems Protection Board. In matters similar
 22 to those covered under sections 4303 and 7512 which arise
 23 under other personnel systems and which an aggrieved em-
 24 ployee has raised under the negotiated grievance procedure,
 25 judicial review of an arbitrator's award may be obtained in

1 *the same manner and on the same basis as could be obtained*
 2 *of a final decision in such matters raised under applicable*
 3 *appellate procedures.*

4 "§ 7222. Federal Service Impasses Panel; negotiation im-
 5 passes

6 "(a) (1) *There is established within the Authority, as*
 7 *a distinct organizational entity, the Federal Service Impasses*
 8 *Panel. The Panel is composed of the Chairman, and an even*
 9 *number of other members, appointed by the President solely*
 10 *on the basis of fitness to perform the duties and functions of*
 11 *the Office, from among individuals who are familiar with*
 12 *Government operations and knowledgeable in labor-manage-*
 13 *ment relations. No employee (as defined under section 2105*
 14 *of this title) shall be appointed to serve as a member of the*
 15 *Panel.*

16 "(2) *At the time the members of the Panel (other than*
 17 *the Chairman) are first appointed, half shall be appointed for*
 18 *a term of 1 year and half for the term of 3 years. An individual*
 19 *appointed to serve as the Chairman shall serve for a term of 5*
 20 *years. A successor of any member shall be appointed for terms*
 21 *of 5 years, except that an individual chosen to fill a vacancy*
 22 *shall be appointed for the unexpired term of the member whom*
 23 *such individual replaces. Any member of the Panel may be*
 24 *removed by the President.*

1 "(3) *The Panel may appoint an executive secretary and*
 2 *such other employees as it may from time to time find necessary*
 3 *for the proper performance of its duties. Each member of the*
 4 *Panel is entitled to pay at a rate equal to the daily equivalent of*
 5 *the maximum annual rate of basic pay currently paid, from time*
 6 *to time, under the General Schedule for each day the member is*
 7 *engaged in the performance of official business on the work of*
 8 *the Panel, including traveltime, and is entitled to travel ex-*
 9 *penses and a per diem allowance under section 5703 of this title.*

10 "(b) *Upon request, the Federal Mediation and Concilia-*
 11 *tion Service shall provide services and assistance to agencies*
 12 *and labor organizations in the resolution of negotiation*
 13 *impasses.*

14 "(c) *If voluntary arrangements, including the services of*
 15 *the Federal Mediation and Conciliation Service or other third-*
 16 *party mediation fail to resolve a negotiation impasse, either*
 17 *party may request the Panel to consider the matter.*

18 "(d) *The Panel or its designee shall promptly investigate*
 19 *any impasse presented to it under subsection (c) of this section.*
 20 *The Panel shall consider the matter and shall either recommend*
 21 *procedures to the parties for the resolution of the impasse or as-*
 22 *ist the parties in arriving at a settlement through such methods*
 23 *and procedures, including fact finding and recommendations, as*
 24 *it may find appropriate to accomplish the purposes of this sec-*
 25 *tion. Arbitration, or third-party fact finding with recommenda-*

1 tions to assist in the resolution of an impasse, may be used by
 2 the parties only when authorized or directed by the Panel. If the
 8 parties do not arrive at a settlement, the Panel may hold hear-
 4 ings, compel under section 7234 of this title the attendance of
 5 witnesses and the production of documents, and take whatever
 6 action is necessary and not inconsistent with the provisions of
 7 this chapter to resolve the impasse. Notice of any final action of
 8 the Panel shall be promptly served upon the parties and such ac-
 9 tion shall be binding upon them during the term of the agree-
 10 ment unless the parties mutually agree otherwise.

11 "SUBCHAPTER IV—ADMINISTRATIVE AND
 12 OTHER PROVISIONS

13 "§ 7231. Allotments to representatives

14 "(a) If, pursuant to an agreement negotiated in accord-
 15 ance with the provisions of this chapter, an agency has received
 16 from an employee in a unit of exclusive recognition a written
 17 assignment which authorizes the agency to deduct from the
 18 wages of such employee amounts for the payment of regular
 19 and periodic dues of the exclusive representative for such unit,
 20 such assignment shall be honored. Except as required under
 21 subsection (b) of this section, any such assignment shall be
 22 revocable at stated intervals of not more than 6 months.

23 "(b) An allotment for the deduction of labor organiza-
 24 tion dues terminates when—

1 "(1) the dues withholding agreement between the
 2 agency and the exclusive representative is terminated
 3 or ceases to be applicable to the employee; or

4 "(2) the employee has been suspended or expelled
 5 from the labor organization which is the exclusive
 6 representative.

7 "§ 7232. Use of official time

8 "Solicitation of membership or dues and other internal
 9 business of a labor organization shall be conducted during
 10 the nonduty hours of the employees concerned. Employees
 11 who represent a recognized labor organization shall not be
 12 on official time when negotiating an agreement with agency
 13 management, except that the negotiating parties may agree
 14 to arrangements which provide that the agency will author-
 15 ize a reasonable number of such employees (not normally
 16 in excess of the number of management representatives) to
 17 negotiate on official time for up to 40 hours, or up to one-half
 18 the time spent in negotiations during regular working hours.

19 "§ 7233. Remedial actions

20 "If it is determined by appropriate authority, includ-
 21 ing an arbitrator, that certain action will carry out the poli-
 22 cies of this chapter, such action may be directed by the ap-
 23 propriate authority if consistent with law, including section
 24 5596 of this title.

1 "§ 7234. Subpenas

2 "(a) Any member of the Authority, including the Gen-
3 eral Counsel, any member of the Panel, and any employee
4 of the Authority designated by the Authority may—

5 "(1) issue subpenas requiring the attendance and
6 testimony of witnesses and the production of document-
7 ary or other evidence from any place in the United
8 States or any territory or possession thereof, the Com-
9 monwealth of Puerto Rico, or the District of Columbia,
10 except that no subpoena shall be issued under this sec-
11 tion which requires the disclosure of intramanagement
12 guidance, advice, counsel, or training within an agency
13 or between an agency and the Office of Personnel Man-
14 agement; and

15 "(2) administer oaths, take or order the taking of
16 depositions, order responses to written interrogatories,
17 examine witnesses, and receive evidence.

18 "(b) In the case of contumacy or failure to obey a sub-
19 pena issued under subsection (a)(1), the United States
20 district court for the judicial district in which the person to
21 whom the subpoena is addressed resides or is served may issue
22 an order requiring such person to appear at any designated
23 place to testify or to produce documentary or other evidence.
24 Any failure to obey the order of the court may be punished
25 by the court as a contempt thereof.

1 "(c) Witnesses (whether appearing voluntarily or un-
2 der subpoena) shall be paid the same fee and mileage allow-
3 ances which are paid subpoenaed witnesses in the courts of
4 the United States.

5 "§ 7235. Regulations

6 "The Authority, including the General Counsel and the
7 Panel, and the Federal Mediation and Conciliation Service
8 shall each prescribe rules and regulations to carry out the
9 provisions of this chapter applicable to them. Unless other-
10 wise specifically provided in this chapter, the provisions of
11 subchapter II of chapter 5 of this title shall be applicable to
12 the issuance, revision, or repeal of any such rule or regula-
13 tion."

14 (b)(1) The amendments made by subsection (a) shall
15 not preclude—

16 (A) the renewal or continuation of an exclusive
17 recognition, certification of a representative, or a lawful
18 agreement between an agency and a representative of its
19 employees entered into before the effective date of this sec-
20 tion; or

21 (B) the renewal, continuation, or initial according
22 of recognition for units of management officials or super-
23 visors represented by labor organizations which his-
24 torically or traditionally represent management officials

1 or supervisors in private industry and which hold ex-
 2 clusive recognition for units of such officials or super-
 3 visors in any agency on the effective date of this section.

4 (2) Policies, regulations, and procedures established, and
 5 decisions issued, under Executive Order Numbered 11491,
 6 or under the provision of any related Executive order in effect
 7 on the effective date of this section, shall remain in full force
 8 and effect until revised or revoked by Executive order or
 9 statute, or unless superseded by appropriate decision or regu-
 10 lation of the Federal Labor Relations Authority.

11 (e) Any term of office of any member of the Federal
 12 Labor Relations Authority and the General Counsel of the
 13 Federal Labor Relations Authority serving on the effective
 14 date of this section shall continue in effect until such time as
 15 such term would expire under Reorganization Plan Num-
 16 bered 2 of 1978, and upon expiration of such term, appoint-
 17 ments to such office shall be made under section 7203 of title
 18 5, United States Code. Any term of office of any member of
 19 the Federal Service Impasses Panel serving on the effective
 20 date of this section shall continue in effect until such time as
 21 members of the Panel are appointed pursuant to section 7222
 22 of title 5, United States Code.

23 (d) There are hereby authorized to be appropriated such
 24 sums as may be necessary to carry out the functions and pur-
 25 poses of this section.

1 (e) The table of chapters for subpart F of part III of
 2 title 5, United States Code, is amended by adding after the
 3 item relating to chapter 71 the following new item:

4 "78. Federal Service Labor-Management Relations..... 7801".

4 (f) Section 5314 of title 5, United States Code, is
 5 amended by adding at the end thereof:

6 "(68) Chairman, Federal Labor Relations Au-
 7 thority."

8 (g) Section 5316 of title 5, United States Code, is
 9 amended by adding at the end thereof:

10 "(124) Members (2), Federal Labor Relations
 11 Authority."

12 (h) Section 5316 of title 5, United States Code, is
 13 amended by adding at the end thereof:

14 "(144) General Counsel, Federal Labor Relations
 15 Authority."

16 REMEDIAL AUTHORITY

17 SEC. 702. Section 5596 of title 5, United States Code,
 18 is amended by striking out subsections (b) and (c) and in-
 19 serting in lieu thereof the following:

20 "(b) An employee of an agency who, on the basis of an
 21 administrative determination or a timely appeal, is found by
 22 appropriate authority to have suffered a withdrawal, reduc-
 23 tion, or denial of all or part of the employee's pay, allow-
 24 ances, differentials, or other monetary or employment benefits,

1 or a denial of an increase in such pay, allowances, differen-
 2 tials, or other monetary or employment benefits, which would
 8 not have occurred but for unjustified or unwarranted action
 4 taken by the agency—

5 “(1) is entitled, on correction of the action, to be
 6 made whole for—

7 “(A) all losses suffered less, in applicable cir-
 8 cumstances, interim earnings, and

9 “(B) if appropriate, to reinstatement or restor-
 10 ation to the same or a substantially similar position,
 11 or promotion to a higher level position; and

12 “(2) for all purposes is deemed to have performed
 13 service for the agency during the period of the unjustified
 14 or unwarranted action except that—

15 “(A) annual leave restored under this para-
 16 graph which is in excess of the maximum leave ac-
 17 cumulation permitted by law shall be credited to a
 18 separate leave account for the employee and shall be
 19 available for use by the employee within the time
 20 limits prescribed by regulations of the Office of
 21 Personnel Management, and

22 “(B) annual leave credited under subpara-
 23 graph (A) of this paragraph but unused and still
 24 available to the employee under regulations pre-

1 scribed by the Office of Personnel Management shall
 2 be included in the lump-sum payment under sec-
 3 tion 5551 or 5552(1) of this title but may not be
 4 retained to the credit of the employee under section
 5 5552(2) of this title.

6 “(c) For the purposes of this section—

7 “(1) ‘unjustified or unwarranted action’ includes—

8 “(A) any act of commission, either substan-
 9 tive or procedural, which violates or improperly
 10 applies a provision of law, Executive order, regu-
 11 lation, or collective bargaining agreement; and

12 “(B) any act of omission, or failure to take
 13 an action, or confer a benefit, which must be taken
 14 or conferred under a nondiscretionary provision of
 15 law, Executive order, regulation, or collective-bar-
 16 gaining agreement;

17 “(2) ‘administrative determination’ includes, but is
 18 not limited to, a decision, award, or order issued by—

19 “(A) a court having jurisdiction over the matter
 20 involved;

21 “(B) the Office of Personnel Management;

22 “(C) the Merit Systems Protection Board;

23 “(D) the Federal Labor Relations Authority;

24 “(E) the Comptroller General of the United
 25 States;

1 “(F) the head of the employing agency or an
2 agency official to whom corrective action authority is
3 delegated; or

4 “(G) an arbitrator under a negotiated binding
5 arbitration agreement between a labor organization
6 and agency management;

7 “(S) ‘appropriate authority’ includes, but is not
8 limited to—

9 “(A) a court having jurisdiction;

10 “(B) the Office of Personnel Management;

11 “(C) the Merit Systems Protection Board;

12 “(D) the Federal Labor Relations Authority;

13 “(E) the Comptroller General of the United
14 States;

15 “(F) the head of the employing agency or
16 agency official to whom corrective action authority
17 is delegated; or

18 “(G) an arbitrator under a negotiated binding
19 arbitration agreement between a labor organization
20 and agency management.

21 “(d) The provisions of this section shall not apply to
22 reclassification actions nor shall they authorize the setting
23 aside of an otherwise proper promotion by a selecting official
24 from a group of properly ranked and certified candidates.

1 “(e) The Office of Personnel Management shall prescribe
2 regulations to carry out this section. However, the regulations
3 are not applicable to the Tennessee Valley Authority and its
4 employees.”.

5 TITLE VIII—MISCELLANEOUS

6 SAVINGS PROVISIONS

7 SEC. 801. (a) Except as provisions of this Act may
8 govern, all Executive orders, rules, and regulations affecting
9 the Federal service shall continue in effect, according to their
10 terms, until modified, terminated, superseded, or repealed by
11 the President, the Office of Personnel Management, the
12 Merit Systems Protection Board, the Equal Employment
13 Opportunity Commission, or the Federal Labor Relations
14 Authority as to matters within their respective jurisdictions.

15 (b) No provision of this Act shall affect any adminis-
16 trative proceedings pending at the time such provision takes
17 effect. Orders shall be issued in such proceedings and appeals
18 shall be taken therefrom as if this Act had not been enacted.

19 (c) No suit, action, or other proceeding lawfully com-
20 menced by or against the Director of the Office of Personnel
21 Management or the board members of the Merit Systems
22 Protection Board, or officers or employees thereof in their
23 official capacity or in relation to the discharge of their official
24 duties, as in effect immediately before the effective date of
25 this Act, shall abate by reason of enactment of this Act. Such

1 suits, actions, or other proceedings shall be determined as if
2 this Act had not been enacted.

8 **AUTHORIZATION OF APPROPRIATIONS**

4 **SEC. 802.** There are authorized to be appropriated, out
5 of any moneys in the Treasury not otherwise appropriated,
6 such sums as may be necessary to carry out the provisions of
7 this Act.

8 **POWERS OF PRESIDENT UNAFFECTED EXCEPT BY EXPRESS**
9 **PROVISIONS**

10 **SEC. 803.** Except as expressly provided in this Act,
11 nothing contained herein shall be construed to limit, curtail,
12 abolish, or terminate any function of, or authority available
13 to, the President which the President had immediately before
14 the effective date of this Act; or to limit, curtail, or terminate
15 the President's authority to delegate, redelegate, or terminate
16 any delegation of functions.

17 **TECHNICAL AND CONFORMING AMENDMENTS**

18 **SEC. 804. (a)** Any provision in either Reorganization
19 Plan Numbered 1 or 2 of 1978 inconsistent with any pro-
20 vision in this Act is hereby superseded.

21 **(b)** The President or his designee shall, as soon as
22 practicable but in any event not later than 30 days after the
23 date of the enactment of this Act, submit to the Committee on
24 Post Office and Civil Service of the House of Representatives
25 and the Committee on Governmental Affairs of the Senate a

1 draft of any technical and conforming amendments to title 5,
2 United States Code, which have not been made by the pro-
3 visions of this Act and which are necessary to reflect through-
4 out such title the amendments to the substantive provisions of
5 law made by this Act and by Reorganization Plan Numbered
6 2 of 1978.

7 **EFFECTIVE DATES**

8 **SEC. 805.** Except as otherwise expressly provided in this
9 Act, the provisions of this Act shall take effect 90 days after the
10 date of the enactment of this Act.

95TH CONGRESS }
2d Session }

SENATE

{ REPORT
No. 95-989

CIVIL SERVICE REFORM ACT OF 1978

R E P O R T

OF THE

**COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE**

TO ACCOMPANY

S. 2640

TO REFORM THE CIVIL SERVICE LAWS

together with

ADDITIONAL AND MINORITY VIEWS



JULY 10 (legislative day, MAY 17), 1978.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1978

COMMITTEE ON GOVERNMENTAL AFFAIRS

ABRAHAM RIBICOFF, Connecticut, *Chairman*

HENRY M. JACKSON, Washington

EDMUND S. MUSKIE, Maine

THOMAS F. EAOLETON, Missouri

LAWTON CHILES, Florida

SAM NUNN, Georgia

JOHN OLENN, Ohio

JIM SASSER, Tennessee

MURIEL HUMPHREY, Minnesota

CHARLES H. PERCY, Illinois

JACOB K. JAVITS, New York

WILLIAM V. ROTH, Jr., Delaware

TED STEVENS, Alaska

CHARLES McC. MATHIAS, Jr., Maryland

JOHN C. DANFORTH, Missouri

H. JOHN HEINZ III, Pennsylvania

RICHARD A. WEOMAN, *Chief Counsel and Staff Director*

JOHN B. CHILDERS, *Minority Staff Director*

ELIZABETH A. PREAST, *Chief Clerk*

(II)

CONTENTS

	Page
I. Background.....	1
II. Brief summary of bill.....	2
III. The need for reform.....	2
IV. Major provisions.....	4
V. History of legislation.....	13
VI. Section-by-section analysis.....	17
Title I—Merit system principles.....	18
Title II—Civil service functions; performance appraisals; ad- verse actions.....	24
Title III—Staffing.....	65
Title IV—Senior executive service.....	67
Title V—Merit pay.....	88
Title VI—Research, demonstration, and other programs.....	92
Title VII—Labor-management relations.....	96
Title VIII—Miscellaneous.....	115
VII. Evaluation of Regulatory impact.....	117
VIII. Cost estimate.....	117
IX. Record vote of committee.....	124
X. Additional and minority views.....	126
XI. Changes in existing law.....	139

l
s
e

m
t
h
p
l
t
g
l
g
t
re

P
t
p
st

Calendar No. 90095TH CONGRESS }
2d Session

SENATE

} REPORT
No. 95-969**CIVIL SERVICE REFORM ACT OF 1978**

JULY 10 (legislative day MAY 17), 1978.—Ordered to be printed

Mr. RIBICOFF, from the Committee on Governmental Affairs,
submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS**[To accompany S. 2640]**

The Committee on Governmental Affairs, to which was referred the bill (S. 2640) to reform the civil service laws, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

I. BACKGROUND

The changes in law which are proposed in S. 2640 will constitute the most comprehensive reform of the Federal work force since passage of the Pendleton Act in 1883. Since that time total civilian employment has increased from approximately 131,000 to almost 2.9 million employees, of whom almost 93 percent work under a merit system. In 1977, the Federal civilian payroll amounted to over \$46 billion, more than 11 percent of Federal outlays for that year. Despite the enormous growth in Federal employment and the accompanying increase in the laws and regulations governing the civil service, no systematic congressional review or revision of the system has been attempted in close to 100 years. S. 2640, as amended, is that long overdue, comprehensive reform.

S. 2640 is based on many of the recommendations by the President's Personnel Management Project. That exhaustive study took 5 months to complete and involved thousands of experts and members of the public. Building on the comprehensive work of the President and his staff, the Governmental Affairs Committee held 12 days of public

hearings and heard from 86 witnesses, representing 55 organizations. The committee held seven markup sessions before ordering the bill reported. S. 2640 is the centerpiece of the President's efforts to make the Government more efficient and accountable. The committee believes that, as amended, S. 2640 will promote a more efficient civil service while preserving the merit principle in Federal employment.

II. BRIEF SUMMARY OF THE BILL

The following is a brief listing of the principal changes that S. 2640 makes in the civil service system.¹ The bill:

Codifies merit system principles and subjects employees who commit prohibited personnel practices to disciplinary action;

Provides for an independent Merit Systems Protection Board and Special Counsel to adjudicate employee appeals and protect the merit system;

Provides new protections for employees who disclose illegal or improper Government conduct;

Empowers a new Office of Personnel Management to supervise personnel management in the executive branch and delegate certain personnel authority to the agencies;

Establishes a new performance appraisal system and new standard for dismissal based on unacceptable performance;

Streamlines the processes for dismissing and disciplining Federal employees;

Creates a Senior Executive Service which embodies a new structure for selecting, developing, and managing top-level Federal executives;

Provides a merit pay system for GS-13 to 15 managers, so that increases in pay are linked to the quality of the employees' performance;

Authorizes the Office of Personnel Management to conduct research in public management and carry out demonstration projects that test new approaches to Federal personnel administration; and

Creates a statutory base for the improvement of labor-management relations, including the establishment in law of the Federal Labor Relations Authority.

III. THE NEED FOR REFORM

Both the public and those in government have a right to the most effective possible civil service; that is, one in which employees are hired and removed on the basis of merit and one which is accountable to the public through its elected leaders.

The civil service system is the product of an earlier reform, which, in protest against the 19th century spoils system, promised a work force in which employees were selected and advanced on the basis of

¹ During its consideration of S. 2640, the committee has also had under consideration Reorganization Plan No. 2 of 1978, which provides for the creation of the Office of Personnel Management, the Merit Systems Protection Board, the Office of Special Counsel, and the Federal Labor Relations Authority. The plan, which was submitted to Congress on May 23, 1978, is scheduled to become effective 60 days after submission, if not disapproved by either House of Congress during the interim.

competence rather than political or personal favoritism. Protection of the merit principle in Federal employment has been accomplished through the enactment of numerous laws, rules, and regulations. Although the civil service system has largely succeeded in safeguarding merit principles, there have been frequent attempts to circumvent them, some of which have been successful.

Assaults on the merit system have taken place despite, and in some instances because of, the complicated rules and procedures that have developed over the last century. The welter of inflexible strictures that have developed over the years threatens to asphyxiate the merit principle itself.

The complex rules and procedures have, with their resultant delays and paperwork, undermined confidence in the merit system. Many managers and personnel officers complain that the existing procedures intended to assure merit and protect employees from arbitrary management actions have too often become the refuge of the incompetent employee. When incompetent and inefficient employees are allowed to stay on the work rolls, it is the dedicated and competent employee who must increase his workload so that the public may be benefited. The morale of even the best motivated employee is bound to suffer under such a system. Moreover, the system's rigid procedures—providing almost automatic pay increases for all employees—makes it as difficult to reward the outstanding public servant as it is to remove an incompetent employee.

The committee agrees with President Carter that "most civil service employees perform with spirit and integrity." Unfortunately, the existing civil service system is more of a hindrance than a help to dedicated Federal employees.

The civil service system is an outdated patchwork of statutes and rules built up over almost a century. Federal management practices are antiquated in comparison with the current state of the managerial art. Research and experimentation concerning management practices is virtually nonexistent.

The public is ill served by the existing civil service system. As the President's Personnel Management Project put it:

It is the public which suffers from a system which neither permits managers to manage nor which provides assurance against political abuse. Valuable resources are lost to the public service by a system increasingly too cumbersome to compete for talent. The opportunity for more effective . . . service to the public is denied by a system so tortuous that managers regard it as almost impossible to remove those who are not performing. (Final Staff Report, Vol. 1, p. vi.)

When programs fail or are damaged by mismanagement and incompetence, both the taxpayer and the program beneficiary suffer.

For this reason, civil service reform has been described as a "paramount consumer issue."

. . . millions of consumers look to federal civil servants to protect them from cancerous additives in food, filth in meat products, defects in cars, radiation in television sets, flammability in clothes, poisons in air and water, and monopoly

prices in all goods and services. Consumers look to federal civil servants to wisely spend the twenty or thirty percent of their income which they pay to the federal government in taxes. Consumers look to federal civil servants to see that their mail is promptly delivered, their bank deposits insured, their energy needs met. In short, effective, efficient, honest, patriotic, committed and hard-working federal employees are a basic consumer interest. (Testimony of Ralph Nader before Senate Governmental Affairs Committee, April 10, 1978.)

Government executives and managers are vital to the success of public programs. The existing civil service system, however, has failed to adequately recruit and develop government managers. Too little emphasis has been placed on training and experience when hiring or promoting executives who will run programs worth billions of dollars and have a tremendous impact on the lives of millions of people.

Throughout this country's history—and especially since 1883—there has been a tension between protections established to insure that employees are hired and fired solely on the basis of their ability, and the need of managers and policymakers to have flexibility to perform their jobs. Frequently, this tension is characterized as the “rights of employees” versus the “need for management flexibility.” Although it has recognized this tension, the Committee has viewed civil service reform from the standpoint of the public, rather than the more limited perspective of either the employee or manager. The “rights of employees” to be selected and removed only on the basis of their competence are concomitant with the public's need to have its business conducted competently. Similarly, the need for Federal executives to manage their personnel responsibilities effectively can only be justified by the benefit derived by the public from such management flexibility. An employee has no right to be incompetent; a manager has no right to hire political bed fellows.

The public has a right to an efficient and effective Government, which is responsive to their needs as perceived by elected officials. At the same time, the public has a right to a Government which is impartially administered. One of the central tasks of the civil service reform bill is simple to express but difficult to achieve: Allow civil servants to be able to be hired and fired more easily, but for the right reasons. This balanced bill should help to accomplish that objective. It is an important step toward making the Government more efficient and more accountable to the American people.

IV. MAJOR PROVISIONS IN S. 2640

Separation of Civil Service Commission functions

When the Civil Service Commission was created in 1883, Congress did not intend to create a central personnel agency, but rather to police patronage. The President was authorized to appoint, with the advice and consent of the Senate, a Commission to be composed of three members, not more than two of whom were from the same party, removable at the will of the President. The Commission's job was to screen, examine, and present a choice of applicants to fill jobs in the agencies in the competitive service. General issues of personnel man-

agement and employee concerns played a minimal role in Commission duties until the early 1900's. It was not until 1932, when the Commission assumed full responsibility for position classification, supervision of efficiency ratings, and operations created by the Retirement Act, that the CSC moved beyond patronage control to modern personnel administration in the Federal Government.

At the present time the Civil Service Commission has a variety of functions. Many of the studies of the civil service, as well as many of the witnesses who testified before the Governmental Affairs Committee, have pointed out the role conflicts inherent in the responsibilities and authority assigned to the Civil Service Commission. The CSC must now simultaneously serve as a management agent for a President elected through a partisan political process as well as the protection of the merit system from partisan abuse. The Commission serves, too, as the provider of services to agency management in implementing personnel programs, while maintaining sufficient neutrality to adjudicate disputes between agency managers and their employees. As a result, the Commission's performance of its conflicting functions has suffered. "Expected to be all things to all parties—Presidential counsellor, merit "watchdog," employee protector, and agency advisory—the Commission has become progressively less credible in all of its roles." (Personnel Management Project, Final Staff Report, vol. I, p. 233.)

S. 2640, along with Reorganization Plan No. 2 of 1978, would abolish the Civil Service Commission. In its place two new agencies would be created: (1) The Office of Personnel Management, charged with personnel management and agency advisory functions, and (2) the Merit Systems Protection Board, charged with insuring adherence to merit system principles and laws.

Leadership in personnel management

The multimember bipartisan Commission structure, adopted when the Civil Service Commission's only role was to prevent improper selection of employees, has not served particularly well as the Federal Government's need for a personnel management agency has emerged. There has been a lack of an appropriate staff organization to assist the President in managing the executive branch. Numerous efforts to supply the President with a personnel advisor have been short lived and generally unsuccessful.

S. 2640 provides that an Office of Personnel Management (OPM), as an agency within the executive branch, will have central responsibility for executing, administering, and enforcing civil service rules and regulations other than those under the jurisdiction of the Merit Systems Protection Board. The Director of OPM will be the President's chief lieutenant in matters of personnel administration. S. 2640 provides that the Director will have the power to delegate any functions vested in that office, including the authority to conduct competitive examinations, to individual agencies that employ persons in the competitive service. In cases of delegation, agencies will be prohibited from taking personnel actions that are contrary to any law or OPM regulations.

Delegation of individual personnel actions to the affected departments and agencies will serve to make the system more effective. For

example, examining for jobs in the career service is now carried out almost exclusively by the CSC. Although centralization is the most economical way to handle many examinations, it results in an inability to meet highly varied staffing needs. Further, the Commission staff has limited knowledge of agency programs and occupations.

Decentralization will eliminate unnecessary bureaucratic procedures. Individual agencies will be more efficient and speedy at performing functions now shared with the Civil Service Commission. The specific needs of the Government's diverse agencies will be met under general OPM guidance. Decentralization is in keeping with the delegation practices that private companies use, allowing the decisionmaking process to work at the level where decisions are most effectively made. Authority for personnel management will be fixed at the level responsible for the effectiveness of programs and accomplishment of missions. OPM will monitor and evaluate the agencies' performance in personnel administration.

The civil service system envisaged in S. 2640 gives the Office of Personnel Management the opportunity to exercise leadership in Federal personnel administration. The Merit Systems Protection Board will assume principal responsibility for safeguarding merit principles and employee rights; individual personnel actions will be delegated to the departments and agencies. As a result, OPM will be able to concentrate its efforts on planning and administering an effective Government-wide program of personnel management. This includes a responsibility to see that agencies are performing properly under civil service laws, regulations, and delegated authorities. OPM will have the opportunity for innovative planning for the future needs of the Federal work force, executive and employee development, and pilot projects to test the efficacy of various administrative practices. Without the demands generated by a heavy day-to-day workload of individual personnel actions, OPM should provide the President, the civil service, and the Nation with imaginative public personnel administration.

Protection of merit system principles

S. 2640 codifies for the first time merit system principles, and requires agencies and employees to adhere to those principles. Violation of a merit system principle or commission of a prohibited personnel practice will subject an employee to disciplinary action.

The Merit Systems Protection Board, along with its Special Counsel, is made responsible for safeguarding the effective operation of the merit principles in practice. Composed of three members nominated by the President and confirmed by the Senate for single nonrenewable terms and removable only for cause, the bipartisan Board will adjudicate cases of alleged violation of the merit system, enforce compliance with its decisions and orders, order stays of personnel actions in cases where it determines that such relief is justified, and conduct studies of the civil service and other merit systems. The Special Counsel, nominated by the President subject to Senate approval and removable only for cause, will receive and investigate allegations of prohibited personnel practices in violation of the merit system, and bring violators before the Board for appropriate remedial action.

There is little doubt that a vigorous protector of the merit system is needed. The lack of adequate protection was painfully obvious dur-

ing the civil service abuses only a few years ago. Establishment of a strong and independent Board and Special Counsel will discourage subversions of merit principles. Dwight Ink, Executive Director of the President's Personnel Management Study, called the independent and strong Merit Board "the cornerstone" of civil service reform.

The bill provides for an independent Board and Special Counsel. By statute, no more than two members of the Board will be of the same political party. Its members' terms will last 7 years, with removal only for cause. The Special Counsel will serve a term coterminous with that of the President. Board Members will not be eligible to serve more than one term. As a result of this structure, the Board should be insulated from the kind of political pressures that have led to violations of merit principles in the past. Both the Board and the Special Counsel will exercise statutory responsibilities independent of any Presidential directives. Absent such a mandate for independence for the Merit Board, it is unlikely that the committee would have granted the Office of Personnel Management the power it has or the latitude to delegate personnel authority to the agencies.

In addition, S. 2640 gives the Board and the Special Counsel new powers to protect the merit system more effectively. Unlike the Civil Service Commission, the Board will have subpoena authority for obtaining evidence that is essential in conducting investigations and adjudicating appeals by Federal workers. The Special Counsel will have power to initiate disciplinary action against those who knowingly and willfully violate the merit principles by engaging in prohibited personnel practices. In addition to simple reprimand, these sanctions include removal, suspension, demotion, exclusion from Federal employment for up to 5 years, and fines up to \$1,000. S. 2640 requires the Board to direct agencies, in certain cases, to pay employees' attorneys' fees.

Creation of statutory labor-management relations authority

A major aspect of Federal personnel management under S. 2640 will be carried out by a new Federal Labor Relations Authority. At present, this responsibility is shared by the Assistant Secretary of Labor for Labor-Management Relations and the part-time Federal Labor-Relations Council. The Assistant Secretary is charged with decisionmaking regarding unfair labor practices, and the Council serves as an appellate body. S. 2640 provides for consolidation of this authority in a single administrative organization, which is impartial by virtue of its independence from any direct responsibility to the incumbent administration, and which has a statutory mandate to govern Federal labor-management activities and procedures.

Consolidating responsibility in FLRA should eliminate what is perceived by Federal employee unions and others as a conflict of interest in the existing Council. Its members consist of the Chairman of the Civil Service Commission, the Director of the Office of Management and Budget, and the Secretary of Labor—policymakers who are responsible primarily as top managers in the incumbent administration. S. 2640 will assure impartial adjudication of labor-management cases by providing for a new Board whose members are selected independently—nominated by the President and confirmed by the

Senate—rather than by virtue of their service as Federal managers.

Creation of the FLRA also will eliminate the existing fragmentation of authority between the Assistant Secretary of Labor for Labor-Management Relations and the Federal Labor Relations Council. The FLRA will have comprehensive jurisdiction in Federal labor-management relations. Merging the responsibility into a single agency will eliminate the need for continuous coordination between two separate agencies with differing and at least potentially conflicting mandates. This change should result in more effective policymaking and administration in this area of vital importance to both Federal employees and Federal managers, as well as the public at large.

S. 2640 also provides explicit statutory responsibilities for FLRA. The part-time Federal Labor Relations Council was established by Executive order. With approval of S. 2640, the intent of Congress regarding the functions and operations of Federal labor-management relations will be clearly established.

Whistle blowers

S. 2640 gives the Merit Systems Protection Board and the Special Counsel explicit authority to protect whistle blowers—Federal employees who disclose illegal or improper government activities. Often, the whistle blower's reward for dedication to the highest moral principles is harassment and abuse. Whistle blowers frequently encounter severe damage to their careers and substantial economic loss.

Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a Federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.

S. 2640 will establish significant protections for whistle blowers. For the first time, and by statute, the Federal Government is given the mandate—through the Special Counsel of the Merit Systems Protection Board—to protect whistle blowers from improper reprisals. The Special Counsel may petition the Merit Board to suspend retaliatory actions against whistle blowers. Disciplinary action against violators of whistle blowers' rights also may be initiated by the Special Counsel. In addition, S. 2640 establishes a mechanism by which the allegations made by whistle blowers can be reviewed by responsible government officials. At the same time, S. 2640 will not protect employees who disclose information which is classified or prohibited by statute from disclosure. Nor would the bill protect employees who claim to be whistle blowers in order to avoid adverse action based on inadequate performance.

Dismissals

A widely held impression is that a government employee cannot be fired, regardless of unacceptable conduct or work performance. Although this is untrue enough bad examples are available to give it credibility. But while it is technically possible to fire unsatisfactory employees, appeals processes are so lengthy and complicated that managers often avoid taking disciplinary action. An employee may be taken off an agency's rolls 30 days after he has been notified of his supervisor's intent to remove him, yet if the employee decides to appeal the action the process may take much longer. For example, removal actions appealed by employees of 18 surveyed agencies took 48 days to process within the agency. Delays of over one year are not unknown, though. In addition, the Federal Employees Appeals Authority (FEAA) took 152 days on average to reach decisions on removal actions. Thus, an average of 6½ months are required to complete an action for removal which an employee appeals. If the appeal is taken beyond the FEAA, the process may take much longer.

It is relatively easy to discharge an unsatisfactory employee during the first year of service (probationary period). After an employee has completed the first year of service, though, existing law provides that an individual may be removed only for such cause as will promote the efficiency of the service; 17,157 Federal employees were dismissed in calendar year 1976. This figure includes:

Separated for inefficiency based on unsatisfactory performance of duties...	226
Resigned in lieu of adverse action, some of whom may have done so because of poor performance.....	2, 287
Terminated during their probationary periods.....	4, 261
Removed because of some condition that existed before they were hired...	240
Dismissed for some form of misconduct.....	3, 164
Separated for suitability reasons.....	418
Separated under the Foreign Service system.....	4
Discharged for a variety of additional reasons that the data do not differentiate. (These were not subject to appeal to the Civil Service Commission.)	6, 557

As the figures indicate, the number of employees actually removed because of unsatisfactory job performance as distinguished from misconduct is relatively small, even when one considers those who resigned in lieu of adverse action or were terminated during their probationary periods. Although it is difficult to pinpoint the reasons why these figures are low, given the size of the Federal work force, among the reasons are:

Performance evaluation procedures do not work well enough to distinguish employees whose performance is below an acceptable level to make the charges stick.

Fear of employee appeals, grievances and the protracted problems they create for the employee, the manager and the work unit involved.

Natural reluctance on the part of managers to fire an employee, especially when the manager's performance is not directly linked to that of his subordinates.

The lengthy and complex appeals processes adversely affect employees and managers alike. The procedures are so confusing they

often discourage the proper exercise of employee rights. The manager in an appeal may come under severe attack, no matter how fairly the manager has proceeded. Managers embroiled in appeals often find that these processes consume all of their time and attention. Some managers simply avoid taking necessary steps to discipline or discharge employees in the first place. They find ways to work around unsatisfactory employees, or they hope the employees will go elsewhere to work.

S. 2640 will accelerate the personnel action process while protecting employees' rights to fair treatment. The bill will simplify and expedite procedures for dismissals of Federal employees whose performance is below the acceptable level within a comprehensive framework for performance evaluation. The bill requires that performance evaluation be used as a basis for all decisions about rewarding, promoting, and retaining Federal employees. Statutory adverse action procedures and rights will be extended to additional categories of workers.

S. 2640 will streamline the appeals process, eliminating unnecessary layers of appeal. It will also for the first time specify the standards to be used in deciding whether an agency action against an employee is justified. As an alternative to the appeals process the bill provides for bargaining by members of bargaining units to establish arbitration procedures for the handling of adverse actions.

The appeals procedures outlined in S. 2640 should also improve the handling of discrimination complaints by Federal employees. The bill provides for a cooperative arrangement between the Equal Employment Opportunity Commission and the Merit Systems Protection Board on questions involving merit principles and discrimination, with disagreements between the two agencies being certified to the Federal courts.

Senior Executive Service

Despite the critical need to recruit and develop the highest quality Federal executive, no fully effective governmentwide system exists today for selecting, preparing, advancing, and managing the men and women who administer the programs that affect every person in the Nation. At present neither the Congress nor the President has effective control over the size and distribution of executive level employees. In addition, the existing system for designating career and noncareer positions fails to provide adequate protection against politicization of the career service, yet it is so rigid that it fails to provide agency heads with sufficient flexibility to fill critical positions with executives of their own choosing. The current rank-in-position system of classifying jobs limits rotation and reassignment opportunities for career employees and prevents the best use of executive talent. Moreover, it is difficult to reward executives whose work is outstanding, and to reassign or remove executives whose performance is unacceptable. Finally, even with the rigid strictures governing executive employees, there is inadequate protection against political abuse and incompetence.

S. 2640 addresses these and other problems in the staffing and management of senior executive positions by creating a new Senior Executive Service (SES). Most senior positions in grades GS-16 through

Executive Level IV will be assigned to SES. They will be subject to removal for inadequate performance, with a guaranteed right to a career position as at least a GS-15 without a loss in pay unless they were removed for misconduct, neglect of duty, or malfeasance. By statute, no more than 10 percent of the positions in the SES may be filled by noncareer executives. This statutory cap on noncareer appointments is an important check against politicization of the SES. Career appointments will be made by the agencies strictly on the basis of managerial merit. Newly appointed SES executives will serve a probationary appointment of one year. Each agency will develop annual performance appraisal systems for SES executives, with written appraisals based on established requirements. Executives will be shown the performance appraisal and rating and given an opportunity to respond in writing and have the rating reviewed at a higher managerial level. SES executives will be eligible for annual cash performance awards not to exceed 20 percent of their base pay, as well as awards for sustained excellence or sustained extraordinary accomplishments.

In the SES, rank will be based on an executive's individual talents and performance, not the position. Assignments in the SES will be made according to the overall needs of the government, thereby promoting its efficiency. This pattern also will permit more lateral mobility for executives than most presently enjoy. Increased mobility among Federal, State and local agencies and the private sector in turn, will mean decreased parochialism of outlook in the government's top managers.

Evaluation of executives in the SES will be based on their actual performance. Those whose work is exceptional will be eligible for performance awards. In addition, the psychic rewards will be considerable; serving in the SES will be an honor because it will be earned on merit. Those executives who cannot or do not live up to its standards will be removed, but their rights will be protected in a variety of ways. In a removal for misconduct they may appeal to the Merit Systems Protection Board. In unacceptable performance cases there is a detailed process required in the agency. In performance cases they can revert to the regular civil service as a GS-15.

This provision of S. 2640 should foster the development and effective use of senior executives in the Federal service. It is the kind of system that has been highly successful in the private sector, as well. It is an idea that public administrators have been advocating for decades, most notably in the second Hoover Commission report in 1955.

Pay for performance

Rewarding excellence and discouraging lackluster performance is very difficult under the present system. Performance appraisals now are virtually meaningless, with almost every employee receiving a "satisfactory" rating. Pay increases are awarded almost automatically.

In addition to the Senior Executive Service provisions, the bill contains a merit pay system for managers in grades GS-13 through GS-15. Under the bill, meaningful performance appraisals would be required, with an employee's pay tied to the result of the appraisal. Rather than granting automatic entitlement to progress through the pay

range, advancement would, at least in part, be based on the quality of the work of the employees covered by this provision. Full comparability adjustments would not be given to all employees covered by the provision. The money saved would be used to compensate employees whose performance merited an additional pay increase.

Research and demonstration projects

In recognition of changing public needs. Title VI of S. 2640 authorizes the Office of Personnel Management to conduct research in public management and carry out demonstration projects that test new approaches to Federal personnel administration. Certain sections of the Federal personnel laws would be waived for purposes of small-scale experiments. Among the subjects of possible projects are appeals mechanisms, alternative forms of discipline, security and suitability investigations, labor-management relations, pay systems, productivity, performance evaluation, and employee development and training.

Expanded knowledge in organizational management is always useful, and pilot projects provide one of the best sources of information. Through experimentation, it is possible to avoid both excessive rigidification in the personnel system and comprehensive change with extensive unanticipated consequences. Researchers are able to get the facts about the likely results of proposed new procedures by applying them on a small scale rather than throughout the entire organization. If successful, a proposed change can then be extended; if not, it can be eliminated more easily; if the results are mixed, the new system can be adjusted.

Experimentation of this kind should permit responsiveness to changing public needs as reflected in the Federal personnel system. It may mean less need for reform in future years. It permits flexibility and the foresight to meet emerging issues.

This provision of S. 2640 also will provide a statutory basis for the Office of Personnel Management to conduct demonstration projects. It embodies the intent of Congress that continuing review of personnel techniques and systems is a vital aspect of civil service reform.

Labor management relations

S. 2640 incorporates into law the existing Federal employee relations program. At the same time, S. 2640 recognizes the special requirements of the Federal government and the paramount public interest in the effective conduct of the public's business. It insures to Federal agencies the right to manage government operations efficiently and effectively.

The basic, well-tested provisions, policies and approaches of Executive Order 11491, as amended, have provided a sound and balanced basis for cooperative and constructive relationships between labor organizations and management officials. Supplemented by the Federal Labor Relations Authority to administer the program, and expanded arbitration procedures for resolving individual appeals, these measures will promote effective labor-management relationships in Federal operations.

The bill permits unions to bargain collectively on personnel policies and practices, and other matters affecting working conditions within the authority of agency managers. It specifies areas for decision which are reserved to the President and heads of agencies, which are not sub-

ject to the collective bargaining process. It excludes bargaining on economic matters and on nonvoluntary payments to unions by employees. Strikes by Federal employees are prohibited; bargaining impasses are resolved through the Federal Mediation and Conciliation Service and the Federal Service Impasses Panel; and employees are protected in their rights to join, or refrain from joining, labor organizations.

Intergovernmental Personnel Act Amendments

Title VI also provides for the use of a single set of merit system standards to be applied to state and local governments in those programs which receive Federal funding. This change is designed to aid state and local officials who now must meet several sometimes conflicting requirements.

V. HISTORY OF LEGISLATION

S. 2640 had its genesis early in 1977 when officials of the Civil Service Commission, the Office of Management and Budget and other executive branch agencies met in preparation for the President's Personnel Management Project. The Project was officially begun in June 1977, and took 5 months to complete.

The Project involved 110 staff members, the great majority of whom were career employees, assigned to 9 different task forces. These 110 people were from numerous agencies and commissions within the executive branch, as well as Congress and the private sector. Alan H. Campbell, Chairman of the Civil Service Commission, served as Chairman of the Project, and Wayne G. Granquist, Associate Director of OMB, as Vice Chairman.

The project staff held 17 public hearings throughout the United States in which approximately 7,000 individuals participated as part of the consultation process. Also, 800 organizations were contacted for comments on option papers. Although the staff carrying out the project were largely from the public service, people were drawn from outside Government into the study process on an extensive scale. Each of the project task forces studying separate aspects of the personnel system developed detailed option papers which discussed the problems and suggested a wide range of recommendations.

After completion of the three volume report, the Carter administration developed S. 2640, which embodies many of the recommendations contained in the President's study. In March of 1978, the President submitted S. 2640 to Congress.

In March of 1978, the President submitted S. 2640 to Congress.

The Governmental Affairs Committee held 12 days of hearings during which 86 individuals, representing 55 organizations, testified. In addition, Senators Ribicoff and Percy wrote to almost 90 experts in public administration and personnel management requesting their views on this legislation and the proposed Civil Service Reorganization Plan. The vast majority of the respondents expressed support for the reforms. Most of the witnesses who testified also voiced support for S. 2640.

The following is a list of the witnesses who testified at the hearings, in order of their appearance:

April 6, 1978

Mr. James T. McIntyre, Jr., Director, Office of Management and Budget.

Mr. Wayne Granquist, Associate Director OMB.

Mr. Alan Campbell, Chairman, Civil Service Commission.

Mr. Jule Sugarman, Commissioner, CSC.

Mrs. Ersa Poston, Commissioner, CSC.

April 7, 1978

Mr. David Cohen, President of Common Cause.

Mr. Rocco Siciliano, Chairman, Ticor and Vice-Chairman, Committee for Economic Development.

Panel: National Academy of Public Administration:

Mr. James L. Sundquist.

Mr. Bernard L. Gladieux.

Mr. Richard L. Chapman.

Mr. George S. Maharay.

April 10, 1978

Mr. Ralph Nader.

Mr. Bertrand Harding—National Civil Service League.

Mr. Norman B. Hartnett—National Service Director, Disabled American Veterans.

Mr. Donald H. Schwab—Director, National Legislative Service Veterans of Foreign Wars.

Mr. Austin E. Kerby—Director for Economics, the American Legion.

Mr. Edward J. Lord—Assistant Director for Legislative Commission.

April 12, 1978

Mr. Elmer B. Staats—Comptroller General of the United States.

Mr. Clifford Gould—Deputy Director, Federal Personnel and Compensation Division.

Mr. Henry Barclay—Attorney, Office of General Counsel.

Mr. Jack Carlson—Vice President and Chief Economist for the Chamber of Commerce.

Mr. Robert T. Thompson—of Thompson, Mann and Hutson, Atlanta, Ga.

April 13, 1978

Mr. Gene Raymond—Executive Director, National Federation of Federal Employees.

Mr. Ervin Geller—General Counsel.

Mr. Tom Trabucco—Legislative Assistant.

Mr. Robert L. White—National President—National Alliance of Postal and Federal Employees.

Mr. Johnnie Landon—Special Counsel to the The National President.

Ms. Mae M. Walterhouse—National President, Federally Employed Women.

Ms. Marylouise Uhlig—Regional Coordinator, D.C. Metropolitan Region, Federally Employed Women.

Ms. Clelia Steele—Member, Coordinating Commission, Coalition for Women's Appointments.

Ms. Christine Candela—Vice President, Women's Equity Action League.

Ms. Leslie Gladstone—W.E.A.L., Legislative Coordinator.

Ms. Daisy B. Fields—Commission for Women in Public Administration of the American Society for Public Administration.

Ms. Joanne Hayes—Vice President—League of Women Voters.

Mr. Richard Snelling—Governor of Vermont.

April 19, 1978

Mr. William A. Hammill—International Personnel Management Association.

Mr. Donald K. Tischner—Executive Director.

Mr. Rod Murray—National President, National Association of Supervisors.

Mr. Bun B. Bray, Jr.—Executive Director.

Mr. James L. Hatcher—Assistant Executive Director.

Mr. Ralph Stavins—Institute for Policy Studies.

Mr. Louis Clark—Staff Counsel.

April 20, 1978

Ms. Florence Isbell—Chairperson, Government Employees Rights Commission, A.C.L.U.

Mr. Patrick J. Leahy—U.S. Senator from Vermont.

Mr. Ernest Firzgerald.

Mr. Robert Sullivan.

Mr. Anthony Morris.

Mr. Frank Snapp.

April 27, 1978

Mr. Kenneth A. Meikeljohn—Legislative Representative, AFL-CIO.

Mr. John A. McCart—Executive Director, Public Employee Department AFL-CIO.

Mr. Sol Stein—Metal Trades Department AFL-CIO.

Mr. Kenneth Blaylock—President American Federation of Government Employees.

Mr. Lou Pellerzi—General Counsel, American Federation of Government Employees.

May 3, 1978

Mr. Dwight A. Ink—Executive Director, Federal Personnel Management Project, U.S.C.S.C.

Mr. Benjamin Neufeld—American Veterans Committee Chairman, National Affairs Commission.

Mr. Otto Lukert—Vice President, National Association of Concerned Veterans.

Mr. George Frederickson—Immediate Past President American Society of Public Administration.

Ms. Judith Vandergriff—Chairman Permanent Standing Committee of Legislation, National Association of Commissions for Women.

May 4, 1978

Mr. Michael Pertschuk—Chairman, Federal Trade Commission.
 Mr. Harry Kefauver—Director of Personnel.
 Ms. Barbara Blum—Deputy Administrator, Environmental Protection Agency.
 Mr. William Drayton—Associate Administrator for Planning and Management, Environmental Protection Agency.
 Mr. William Carter—Senior Project Manager.
 Mr. Kenneth T. Lyons—President National Association of Government Employees.
 Mr. Alan J. Whitney—Executive Vice President, N.A.G.E.
 Ms. Anne Sullivan—Legislative Director.
 Mr. Edward Gildea—Assistant General Counsel.
 Mr. Albert A. Grant—Chairman, Commission on Civil Engineers in Government.
 Mr. Louis L. Meier—Assistant Secretary and Washington Counsel, Society of Civil Engineers.
 Mr. Steve Ralston—Representing the NAACP Legal Defense and Educational Fund, Inc.
 Mr. George Perry—President, Ethnic Employees of the Library of Congress.
 Mr. Howard Cook—Executive Director, Black Employees of the Library of Congress.

May 5, 1978

Mr. Vincent L. Connery—National President, National Treasury Employees Union.
 Mr. Jerry D. Klepner—Director of Communications.
 Mr. Robert M. Tobias—General Counsel.
 Mr. Rudolph H. Weber—Immediate Past President, The American Society for Personnel Administrators.
 Mr. Leonard R. Brice—Executive Vice President.
 Mr. James Ferguson—Vice President, Government Affairs.
 Mr. Raymond Nathan—Washington Representative, American Ethical Union.

May 9, 1978

Mr. James D. Hill—Executive Director, National Federation of Professional Organizations.
 Mr. Wayne A. Nagee—Association of Scientists and Engineers.
 Mr. William Pryor—National Association of Government Engineers.
 Mr. Thomas Bruderls—National Society of Professional Engineers.
 Mr. Walter W. John—Organization of Professional Employees of the Department of Agriculture.
 Mr. Vincent J. Paterno—National President, Association of Civilian Technicians.
 Mr. John Chapman—Executive Assistant.

Mr. George Auman—President, Federated Professional Association.

Mr. Ed MacCutchen—Member, Executive Committee.

Mr. Lionel Murphy—Member, Executive Committee and Legislative Research Director.

Following the completion of these hearings the Committee met on May 22, June 7, June 8, June 12, June 13, June 14, and June 29 to consider this legislation. On June 29 the Committee voted 11-2 to report favorably S. 2640, as amended.

VI. SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

This section provides that the Act is to be known as the "Civil Service Reform Act of 1978."

SECTION 2. TABLE OF CONTENTS

This section sets forth the table of contents for the eight titles of the statute. They are: Title I—Merit System Principles; Title II—Civil Service Functions, Performance Appraisal, Adverse Actions; Title III—Staffing; Title IV—Senior Executive Service; Title V—Merit Pay; Title VI—Research, Demonstration, and Other Programs; Title VII—Labor-Management Relations; and Title VIII—Miscellaneous.

SECTION 3. FINDINGS AND STATEMENT OF PURPOSE

This section establishes as policy of the United States that the merit system principles governing the Federal civil service be expressly stated, and that the personnel practices which are prohibited in the Federal service be statutorily defined. It provides that the authority and powers of the independent Merit Systems Protection Board and Special Counsel to enable the Board to handle hearings and appeals involving Federal employees, to enable the Special Counsel to investigate prohibited personnel practices and protect Federal employees from reprisals arising out of the disclosure of information, exercise of an appeal right, or conduct involving political activity. It provides that certain personnel functions, including the function of filling positions in the competitive service, may be delegated from the Office of Personnel Management to agencies, with oversight of the delegation retained by the Office of Personnel Management. It calls for the establishment of a Senior Executive Service to provide additional flexibility for executive agencies in recruitment and management efforts, and provides that pay increases should be based on quality of performance rather than length of service. It provides that a research and demonstration program should be authorized to enable Federal agencies to utilize new and different personnel management concepts and to provide for greater productivity in the Federal civil service. Finally, it codifies in statute the rights previously granted by Executive Order 11491 to Federal employees to organize, bargain collectively, and participate through labor organizations in decisions which affect their working conditions.

TITLE I—MERIT SYSTEM PRINCIPLES

Title I establishes in law the merit principles of the Federal personnel system and the specific personnel practices prohibited in the system. The title establishes the President's responsibility to ensure that personnel management in the Executive Branch is based upon merit system principles. The title specifies that agency heads, and those to whom personnel management authority is delegated, are responsible for preventing prohibited personnel practices.

As far as the Committee is aware, this represents the first across-the-board codification of merit system principles, and of prohibited personnel practices, for the Federal civil service system. Unlike the Code of Ethics for Government Service, the merit principles in S. 2640 will become part of the statutory law. The Code, however, is in no way affected by the enactment of S. 2640.

The merit system principles are designed to protect career employees against improper political influences or personal favoritism in the recruiting, hiring, promotion, or dismissal processes, to assure that personnel management is conducted without discrimination, and to protect individuals who speak out about government wrongdoing from reprisals. Managers who commit prohibited personnel practices are made specifically accountable for their actions, and are subject to disciplinary actions ranging from reprimand and fine through dismissal.

SECTION 101

Section 101(a) of this title provides that a new Chapter 23, entitled "Merit System Principles," is added to Title V of the United States Code. Chapter 23 is subdivided as follows: Section 2301—Merit System Principles; Section 2302—Prohibited Personnel Practices; Section 2303—Responsibility of the General Accounting Office.

Section 2301. Merit system principles

Subsection (a) (1) provides that the merit system principles, and the prohibitions against certain personnel practices set forth in Section 2302, apply to departments and agencies in the Executive branch, including independent regulatory agencies and the Smithsonian Institution. The chapter also applies to the Administrative Office of the United States Courts, and to the Government Printing Office.

Subsection (a) (2) excludes from the coverage of the chapter a government corporation, the General Accounting Office, the Central Intelligence Agency, the Defense Intelligence Agency and the National Security Agency, and any agency or unit which the President finds is principally engaged in foreign intelligence or counterintelligence activities. In addition, an amendment adopted by the Committee added the Federal Bureau of Investigation and individuals in the Drug Enforcement Agency at grade levels of GS-16 and above to the list of exclusions. Such exclusions from this chapter are not intended to limit in any way any other obligation or responsibility imposed on these agencies, or on agency officials, by any other law, rule, or regulation. Nor is the approval by the committee of these exclusions intended to prejudice the comprehensive review of the laws governing the intelligence agencies now being conducted by the Senate Se-

lect Committee on Intelligence. That committee may have further recommendations for changes in the way the personnel laws apply to the intelligence agencies.

In addition, the President is authorized to exclude specific confidential, policy-making, policy-determining or policy-advocating positions from the coverage of the chapter, or any other position if he finds that such an exclusion is necessary and warranted by conditions of good administration. In the case of such Presidential exclusions, however, the exclusion applies only to the position-holder's rights as an employee; the prohibitions in Section 2302 against committing certain personnel practices apply to individuals who hold such positions, and the exclusion does not affect these prohibitions.

Subsection (b) sets forth the merit system principles which govern Federal personnel management. The committee revised the introductory wording to subsection (b) to specifically require Federal agencies to adhere to merit system principles. This places on Federal agencies for the first time an affirmative mandate to adhere to merit system principles.

The merit system principles set forth by this subsection are as follows:

Recruitment of the Federal work force is to be from qualified candidates. Selection and advancement of employees is to be based solely on the relative ability, knowledge, and skills of the individual, after fair and open competition which assures equal opportunity.

Discrimination against applicants or employees, based on political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, is to be eliminated from Federal personnel administration.

The privacy and constitutional rights of applicants and employees are to be protected. Thus, applicants and employees are to be protected against inquiries into, or actions based upon, non-job-related conduct. An applicant or employee is also to be protected against any infringement of due process, self-incrimination, or other constitutional rights.

Employees are to be compensated equitably, with consideration given to both national and local rates paid by employers outside the Federal Government. No change in current law in this regard is intended. Appropriate incentives and recognition for outstanding performance are to be provided. Employees are to maintain high standards of integrity and conduct, including the avoidance of conflicts of interest. The workforce is to be efficiently used.

Employees are to be retained on the basis of their performance, and those who cannot or do not meet the required standards should be separated. Training is to be provided to employees to improve organizational and individual performance.

Employees are to be protected against arbitrary action, personal favoritism, and from partisan political coercion. Employees are prohibited from using official authority to interfere with or affect the result of an election or nomination.

Subsection (c) provides the President broad authority to issue rules, regulations, or directives in order to assure that Federal personnel management in the Executive Branch is conducted according to the merit system principles set forth in this section.

Section 2302. Prohibited personnel practices

This section sets forth the list of prohibited personnel practices. A prohibited personnel practice is a personnel action which is taken for a prohibited purpose. Employees who commit a prohibited personnel practice are subject to disciplinary action by the Merit Systems Protection Board or, in certain cases, by the President.

Subsection (a) defines the term "personnel action." The term includes—an appointment or promotion; a removal, suspension of pay, or any other adverse action falling within Chapter 75; any other disciplinary or corrective action; a detail, transfer, or reassignment; a reinstatement, restoration, or re-employment; a performance evaluation issued under a performance rating plan; a decision concerning pay, benefits, or awards; a decision concerning education or training if it may lead to some other personnel action.

In addition, the committee added as an additional category of personnel action any other significant change in duties or responsibilities inconsistent with the employee's salary or grade level. Thus, for example, if an individual with professional training or qualifications is employed and assigned duties or responsibilities consistent with the individual's training or qualifications, it would constitute a personnel action if the individual were detailed, transferred, or reassigned so that the employee's overall duties or responsibilities are inconsistent with the individual's professional training or qualifications. Or, if an individual holding decision-making responsibilities or supervisory authority found that such responsibilities or authority were significantly reduced, such an action could constitute a personnel action within the meaning of this subsection.

However, it is the overall nature of the individual's responsibilities and duties that is the critical factor. The mere fact that a particular aspect of an individual's job assignment has been changed would not constitute a personnel action, without some showing that there has been a significant impact on the overall nature or quality of his job.

An action which would otherwise constitute a personnel action within the meaning of this section, that is taken against an individual holding a position which has been excepted from the competitive service because of its confidential, policy-making or policy advocacy character, is exempt from the coverage of this section.

Subparagraph (b) sets forth certain personnel practices, and makes them unlawful.

Paragraph (1) makes it unlawful to discriminate, either in favor of any employee or applicant, or against any employee or applicant, based on race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation, as set forth in applicable statutes, civil service rules, and Executive Orders.

Paragraph (2) restates and expands 5 U.S.C. 3303, which currently prohibits consideration of recommendations submitted by senators or representatives, except as to character or residence. The paragraph adds a prohibition against soliciting any such recommendation. An exception is made for recommendations based on personal knowledge or personal records, where it consists of an evaluation of work performance, ability, aptitude, character, loyalty, or suitability.

Paragraph (3) summarizes the Hatch Act prohibitions. Essentially, it prohibits the use of official authority to coerce political activity or to obligate any political contribution or political service. It also prohibits any reprisal against an individual who refuses to engage in political activities.

Paragraphs (4) and (5) prohibit deliberate deceit or obstruction with respect to an individual's right to compete for Federal employment, and prohibit influencing a person to withdraw from competition in order to assist or injure another's prospects.

Paragraph (6) prohibits the granting of any unauthorized preference or advantage to an employee or applicant for the purpose of improving or injuring the prospects of any particular individual, or any category of individuals. This paragraph should be read in conjunction with the provisions of subsection (d) regarding equal employment opportunity efforts.

Paragraph (7) prohibits nepotism in appointments or promotions. This paragraph is a restatement of the restriction contained in 5 U.S.C. 3110.

Paragraph (8) prohibits reprisals against "whistle blowers."

S. 2640, as originally introduced, made it a prohibited personnel practice to take any reprisal action against an employee who publicly disclosed a violation of a law, rule, or regulation, as long as the disclosure itself was not prohibited by any law, rule, or regulation.

The committee broadened the whistle blower protection in three significant respects. First, the categories of protected disclosures are broadened. In addition to violations of law, rule, or regulation, an employee or applicant is protected against the disclosure of any information which he reasonably believes constitutes mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to the public health or safety. With respect to the latter category, the committee intends that only disclosures of public health or safety dangers which are both *substantial* and *specific* are to be protected. Thus, for example, general criticism by an employee of the Environmental Protection Agency that the agency is not doing enough to protect the environment would not be protected under this subsection. However, an allegation by a Nuclear Regulatory Commission engineer that the cooling system of a nuclear reactor is inadequate would fall within the whistle blower protections.

Second, the committee narrowed the proviso for those disclosures not protected. There was concern that the limitation of protection in S. 2640 to those disclosures "not prohibited by law, rule, or regulation," would encourage the adoption of internal procedural regulations against disclosure, and thereby enable an agency to discourage an employee from coming forward with allegations of wrongdoing. As modified, the limitation has been narrowed. Those disclosures which are specifically exempted from disclosure by a statute which requires that matters be withheld from the public in such a manner as to leave no discretion on the issue, or by a statute which establishes particular criteria for withholding or refers to particular types of matters to be withheld, are not subject to the protections of this section. It is the Committee's understanding that section 102(d)(3) of the National Security Act of 1947, which authorizes protection of national intel-

ligence sources and methods, has been held to be such a statute. In addition, disclosures which are specifically prohibited by Executive Order 11652 (relating to classified material) are exempted from the coverage of this section.

Third, the committee included threatened reprisals, as well as actual reprisals, within the coverage of this section. The purpose of the section is to encourage employees to disclose agency wrongdoing or abuse, and threatened reprisals can be just as effective in frustrating this purpose.

An employee should not be protected, however, for making a disclosure which he knows to be false. The criminal code, 18 U.S.C. 1001, makes it unlawful to make false statements to an agency on a government matter. In addition, it would be within the Office of Personnel Management's authority to specify by regulation that deliberately making such false charges could constitute grounds for disciplinary action.

Nor should the provisions of this section be construed to override any protections against disclosure of confidential communications between political appointees and the President accorded by current law. This section does not constitute authority for the employee who makes such a communication, or for any other employee, to disclose the content of such a communication. If, however, a report containing evidence of violation of law, or gross waste of funds, or other information falling within the section, is prepared by or for an agency, the fact that the report is transmitted to the President along with a confidential communication would not make the substance of the report immune from disclosure.

Finally, it should be noted that this section is a prohibition against reprisals. The section should not be construed as protecting an employee who is otherwise engaged in misconduct, or who is incompetent, from appropriate disciplinary action. If, for example, an employee has had several years of inadequate performance, or unsatisfactory performance ratings, or if an employee has engaged in action which would constitute dismissal for cause, the fact that the employee "blows the whistle" on his agency after the agency has begun to initiate disciplinary action against the employee will not protect the employee against such disciplinary action. Whether the disciplinary action is a result of the individual's performance on the job, or whether it is a reprisal because the employee chose to criticize the agency, is a matter for judgment to be determined in the first instance by the agency, and ultimately by the Special Counsel and the Merit Systems Protection Board.

Paragraph (9) prohibits a reprisal against any employee or applicant who exercises any legitimate appeal right. As with whistle blowing reprisals under paragraph (8), the prohibited action is the reprisal itself; the mere fact that an employee, who is otherwise incompetent or guilty of misconduct, exercises an appeal right, does not automatically protect the employee against appropriate disciplinary action.

Paragraph (10) states that any other action which violates any law rule, or regulation implementing, or relating to, the merit system principles constitutes a prohibited personnel practice. This provision was added by the committee in order to make unlawful

those actions which are inconsistent with merit system principles, but which do not fall within the first 9 categories of personnel practices. Such actions may lead to appropriate discipline. For example, should a supervisor take action against an employee or applicant, without having proper regard for the individual's privacy or constitutional rights, such an action could result in dismissal, fine, reprimand, or other discipline for the supervisor.

At the conclusion of subsection (b), the committee added a provision to ensure that nothing in the section will authorize the withholding of any information from Congress, or will sanction any personnel action against an employee who discloses any information to a Member of Congress or its staff, either in public session or through private communications. Neither Title I nor any other provision if this bill should not be construed as limiting in any way the rights of employees to communicate with or testify before Congress, such as is provided in 5 U.S.C. 7102 (right to furnish information protected), or in 18 U.S.C. 1505 (right to testify protected).

Subsection (c) specifically designates the head of each Executive Agency as the individual responsible for preventing prohibited personnel practices, and for insuring that applicable civil service laws, rules, and regulations, including the merit system principles, are complied with. The same duty and responsibility is placed on any individual within the agency who is given authority for personnel management. Thus, to the extent that managerial or supervisory authority is delegated, this section means that responsibility for insuring compliance with the merit system, and potential disciplinary liability for failing to ensure compliance, will follow such a delegation. The delegation will not, however, relieve the head of the executive agency or other top officials for ultimate responsibility for personnel actions and policies within the agency, to the extent that such officials have knowledge or should have knowledge of the actions taken or policies implemented.

Subsection (d) states that nothing in this section is to be construed as extinguishing or lessening any effort to bring about equal employment opportunity through lawful affirmative action or programs, through the exercise of any right or remedy available under the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1976, section 501 of the Rehabilitation Act of 1973, the Equal Pay Act, or under any other statute or regulations prohibiting discrimination on the basis of marital status or political affiliation.

Section 2303. Responsibility of the General Accounting Office

This section provides express authority to the General Accounting Office to conduct audits and reviews in order to determine compliance with laws and regulations governing employment in Federal agencies, and to assess the effectiveness of Federal personnel management. The audits and reviews may be in response to a request from Congress or a committee thereof, or on GAO's own initiative. The provision authorizes broad scale reviews of the personnel system, as well as discrete functional audits, and is designed to improve the ability of Congress to carry out its oversight responsibilities with respect to the Federal personnel system.

Subsection 101(b) contains the conforming amendments to Title V, United States Code.

TITLE II—CIVIL SERVICE FUNCTIONS: PERFORMANCE APPRAISAL; ADVERSE ACTIONS

The first part of Title II sets forth the authority and functions of the three new agencies and units which form the cornerstone of Civil Service reform, the Office of Personnel Management, the Merit Systems Protection Board, and the Special Counsel.

Under current law, the responsibility for personnel management is combined with the responsibility for overseeing and protecting the merit system; both responsibilities are vested in the Civil Service Commission. This legislation provides for the separation of functions now administered by the Civil Service Commission into two agencies, the Office of Personnel Management and the Merit Systems Protection Board, in order to insure that those who are responsible for administering the civil service system will not have the primary responsibility of determining whether that system is free from abuse.

The Office of Personnel Management is the arm of the President in matters of personnel administration. The Office will have central responsibility for adopting and administering civil service rules for the Executive branch. The Office will have broad power to delegate to Executive branch agencies any functions vested in the Office, including the authority to conduct competitive examinations. However, the Office will retain overall responsibility for management of the civil service system.

The Merit Systems Protection Board is charged with protecting the merit system. It will act in most respects as a quasi-judicial body, empowered to determine when abuses or violations of law have occurred, and to order corrective action. It will also be empowered to discipline employees who commit abuses. The Board is to be a three-member bipartisan body, and is to be independent of the President.

The Special Counsel will receive and investigate allegations of prohibited personnel practices in violation of the merit system. The Counsel will also have a particular mandate to investigate and take action to prevent reprisals against government "whistle blowers"—individuals who disclose agency wrongdoing or improper activities. The Special Counsel is authorized to seek remedial action from the Board to prevent abuses of the merit system, and to initiate disciplinary action against government officials who commit prohibited personnel practices. As with the Board, the Special Counsel is independent of any control or direction by the President.

Title II also establishes new procedures to govern the process of personnel actions and to protect employees' rights to fair treatment. The procedures are designed to expedite dismissals of Federal employees whose performance is below an acceptable level established by a comprehensive framework of performance evaluation, while at the same time fully protecting the due process rights of employees. The performance evaluation framework is designed to insure that employees will not be downgraded or dismissed from the Civil Service for reasons other than actual performance.

SECTION 201

This section strikes the existing language of Chapter 11, Title V, United States Code (pertaining to establishment and structure of the Civil Service Commission), and substitutes a new Chapter 11 setting forth the organization, structure, and functions of the Office of Personnel Management. Chapter 11 is subdivided as follows: Section 1101—Office of Personnel Management; Section 1102—Director; Deputy Director; Associate Directors; Section 1103—Functions of the Director; Section 1104—Delegation of Authority for Personnel Management.

Section 1101. Office of Personnel Management

This section provides that the Office of Personnel Management is to be an independent establishment in the Executive branch. It provides for an official seal for the office which is to be judicially noticed. The principal office of the Office of Personnel Management is to be in the District of Columbia, but it may have field offices in other locations.

Section 1102. Director; Deputy Director; Associate Directors

Subsection (a) provides that there is to be a Director at the head of the Office of Personnel Management, appointed by the President and confirmed by the Senate. The Director is to have a term of four years, coterminous with the term of the President, and is to be subject to removal by the President only for cause.

Subsection (b) provides for a Deputy Director for the Office of Personnel Management, appointed by the President and confirmed by the Senate. The Deputy Director is authorized to perform such functions as the Director determines, and is authorized to act for the Director during his absence or disability or in the event of a vacancy in the Director's position.

Subsection (c) provides that neither the Director nor the Deputy Director may serve in any other position in the government of the United States during their incumbency, except as provided by law or by the President. In order to insure that they administer the Civil Service system in as fair and as evenhanded a manner as possible, and not become involved in recommending particular individuals for particular appointments in Executive branch agencies, the Committee added a provision prohibiting the Director or Deputy Director from advising the President, directly or indirectly on any specific political appointment. This proviso is not intended to prohibit the Director from consulting with the President about the selection of an individual to serve as Deputy Director of OPM.

Subsection (d) provides for the Director to appoint up to five Associate Directors. The Associate Directors are to be in the Senior Executive Service.

Section 1103. Functions of the Director

Subsection (a) enumerates functions of the Director. The functions are to be performed by the Director or by his designees within the Office. They are: (1) assisting the President in preparing civil

service rules, and advising the President in promoting an efficient civil service and providing protection for merit system principles; (2) executing, administering, and enforcing the civil service statutes and regulations (including classification and retirement activities), except to the extent that the Merit Systems Protection Board or the Special Counsel is responsible for exercising these functions; (3) securing accuracy, uniformity and justice in the functions of the Office; (4) appointing employees of the Office; (5) directing and supervising employees of the Office, assigning work to employees and organizational units, and directing the internal management of the Office; (6) directing the preparation of Office budget requests and the use of funds; (7) reviewing operations under the insurance provisions of this title; and (8) conducting or arranging for research into improved methods of personnel management.

Subsection (b) provides that the Director of the Office of Personnel Management, in issuing rules and regulations, is subject to the provisions of the Administrative Procedure Act, which provide for notice and comment rule-making, with full opportunity for interested persons to participate in the process. Subsection (b) was adopted by the committee in response to concern expressed that the Office of Personnel Management might not be subject to the procedural safeguards of the Administrative Procedure Act that currently apply to administrative agencies. It does not require OPM to follow the notice and comment provisions of section 553 of the Administrative Procedure Act when it is issuing internal personnel rules or procedures applicable just to OPM employees.

Subsection (c) provides the Director with the right to intervene in any proceeding before the Equal Employment Opportunity Commission (other than those heard by the Merit Board), whenever the Director finds that the matter at issue may substantially affect the interpretation or administration of the civil service laws, or if he has relevant information which he wishes to present to the Commission. Thus, in any grievance proceeding brought under Title VII of the Civil Rights Act of 1964 before the Equal Employment Opportunity Commission, the Director will have the opportunity to become a full party if he determines that the case may have an impact on the administration of the civil service merit system.

Section 1104. Delegation of authority for personnel and management

Subsection (a) authorizes the President to delegate authority for personnel management functions to the Director of the Office of Personnel Management, and provides that the Director may delegate any functions vested in him to the heads of Executive branch agencies and to other agencies employing individuals in the competitive service. The delegation includes authority to conduct competitive examinations.

Under present law, examining authority is vested in the Civil Service Commission. This provision will permit the Director to delegate examining authority directly to employing agencies, thereby creating greater flexibility in the examining process.

The committee added subsections (b), (c), and (d) to this section to provide safeguards against abuse by the individual agencies of delegated authority.

Subsection (b) provides that the delegated authority to conduct competitive examinations must be in accord with any standards issued by the Office of Personnel Management, to insure that the merit system principles apply fully to such examinations and any subsequent selections of employees.

Subsection (c) provides that any personnel action taken by an agency pursuant to delegated authority is subject to cancellation by the Office of Personnel Management if contrary to any law, regulation, or standard issued by the Office.

Subsection (d) specifies that any delegation by the Office does not relieve the Director of his responsibility to assure compliance with civil service laws and regulations.

Subsection 201(b) amends pertinent sections of Title V, United States Code, to provide that the Director of the Office of Personnel Management is to be compensated at Level II of the Executive Schedule, the Deputy Director at Level III, and Associate Directors at Level IV.

Subsection 201(c) conforms the provisions of Title V, United States Code, to the provisions of this section.

SECTION 202

This section adds a new Chapter 12 to Title V, United States Code, entitled "Merit Systems Protection Board and Special Counsel." Chapter 12 is subdivided as follows: Section 1201—Appointment of Members of the Merit Systems Protection Board; Section 1202—Term of Office; Filling Vacancies; Removal; Section 1203—Chairman; Vice Chairman; Section 1204—Special Counsel; Appointment and Removal; Section 1205—Powers and Functions of the Merit Systems Protection Board; Subpenas; Section 1206—Authority and Responsibilities of the Special Counsel; Section 1207—Hearings and Decisions on Complaints Filed by the Special Counsel.

Section 1201. Appointment of members of the Merit System Protection Board

This section provides that the Merit System Protection Board is to be a bipartisan body, consisting of three members appointed by the President and confirmed by the Senate. To assure their independence, the section prohibits the members of the Board from holding other offices or position in the U.S. Government. This prohibition is intended to apply only to civilian offices. It does not bar a Board member from retaining positions in the military reserves. The Board is to have an official seal, and have its principal office in the District of Columbia metropolitan area, with field offices in other appropriate locations.

In order to insure that the members of the Board are fully qualified to carry out the functions and duties of the Board, the Committee added a provision requiring that persons appointed to the Board be individuals having background, training, experience, or demonstrated ability that makes them particularly qualified to carry out the Board's function of protecting the civil service merit system from abuse. This requirement that Board members be affirmatively qualified for their positions is consistent with recent actions by Congress with respect

to independent agencies. A similar provision was adopted last year by Congress for the newly-created Federal Energy Regulatory Commission (PL 95-91).

Section 1202. Term of office; filling vacancies; removal

Subsection (a) provides for a seven year term for members of the Merit Systems Protection Board.

Subsection (b) provides that in the event of any vacancy on the Board, a member appointed to fill the vacancy serves only until the expiration of the term remaining. Any appointment to fill a vacancy is subject to the provisions of section 1201.

Subsection (c) provides that Board members may not be reappointed if they have been appointed to a full term, but may serve for up to one year beyond the expiration of the term if a successor has not been appointed and qualified.

Subsection (d) provides that a board member may only be removed by the President for inefficiency, neglect of duty, or malfeasance in office. This provision, which applies to membership on most independent regulatory agencies, ensures that the Merit Systems Protection Board will be independent of the direction and control of the President.

Subsection (e) provides that individuals currently serving on the Civil Service Commission, who will become members of the Merit Systems Protection Board by virtue of Reorganization Plan No. 2 of 1978, will continue to hold their positions on the Board until their terms would otherwise have expired as members of the Civil Service Commission (commissioners currently serve for six-year terms). If an individual now serving as a Civil Service Commissioner does not serve out the remainder of his present term, an individual appointed to fill the vacancy will only serve for the remainder of the six-year term established under the old law. Since the present terms of the Commission are staggered, this procedure will assure that the new terms of the members of the Board will continue to be staggered.

Section 1203. Chairman; Vice Chairman

Subsection (a) authorizes the President to appoint one of the members of the Board as Chairman. Appointment as Chairman is subject to Senate confirmation.

The Chairman is to be the chief executive and administrative officer of the Board, and may continue to serve as Chairman until a successor is appointed and qualified.

Subsection (b) authorizes the President to designate one of the Board members as Vice Chairman. The Vice Chairman is authorized to perform the functions of the Chairman whenever the Chairman is absent or disabled, or whenever the office of Chairman is vacant.

Subsection (c) authorizes the remaining Board member to perform the functions of the Chairman whenever both the Chairman and Vice Chairman are absent or disabled, or whenever both offices are vacant.

Section 1204. Special Counsel; appointment and removal

Subsection (a) provides that the Special Counsel of the Merit Systems Protection Board is to be appointed by the President, subject to Senate confirmation. The Special Counsel is to be an attorney.

Because the Special Counsel may be called upon to investigate prohibited personnel practices in the Executive branch, and to bring disciplinary actions against Executive branch officials, the Committee believed it is essential that the Special Counsel be independent of Presidential direction and control. Accordingly, subsection (b) was added by the Committee to provide that the Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

The Committee believed, however, that a term of seven years for the Special Counsel, as provided in the original version of S. 2640, was too long. Accordingly, subsection (a) has been amended to provide that the term of the Special Counsel is to be four years, and is to be coterminous with that of the President.

It is expected that the Special Counsel will have regional representatives to enable him to carry out his function.

Section 1205. Powers and functions of the Merit Systems Protection Board; subpoenas

Subsection (a) sets forth the general authority of the Merit Systems Protection Board to hear and adjudicate matters within its jurisdiction, to enforce its orders, to conduct special studies, and to issue stays.

Paragraph (1) of the subsection authorizes the Board to hear and adjudicate all matters within the jurisdiction of the Board, including matters falling under this title, under Section 2023 of Title 38 (relating to veterans' reemployment rights), and under any other law, rule, or regulation. Action by the Merit Systems Protection Board, following any hearing or adjudication on any matter falling within its jurisdiction, constitutes final agency action for the purposes of judicial review.

The committee included a provision (in subparagraph (B) of this subsection) making explicit the Board's enforcement authority. The Board is authorized to order any Federal agency or employee to comply with any order or decision issued by the Board pursuant to any matter within its jurisdiction, and to take appropriate steps to enforce compliance with its order.

The Board is also authorized to conduct special studies relating to the civil service and other merit systems in the Executive Branch, and to report to the President and the Congress on the conduct of the merit system, and on whether the civil service is being adequately protected against prohibited personnel practices.

In paragraph (a) (2), the Committee adopted a provision authorizing the Board to stay certain agency personnel actions. The stay is authorized whenever an employee complains of a reprisal arising out of whistle blowing, exercise of an appeal right or political activity (under Section 2302(b) (8) or (3)), or arising out of the exercise of a legitimate appeal right (under Section 2302(b) (9)), and the Special Counsel demonstrates that there is a reasonable basis for the complaint. Under subparagraph (a) (2) (A), the stay may be issued by a member of the Board for up to 15 days. The proceeding may take place on an ex parte basis, and the agency is not required to either be notified or given an opportunity to present its views.

The Board is further authorized to extend the stay for an additional 30 days whenever the Special Counsel asks it to do so and demonstrates that a reprisal arising out of whistleblowing or political activity, or the exercise of an appeal right, has probably occurred or probably will occur. Before the extension may be issued, however, the agency must be given an opportunity to oppose the extension. If the agency demands a hearing, the Board is required to provide one.

The Board is authorized to issue a permanent stay of the agency personnel action when requested to do so by the Special Counsel, after a hearing in which the Special Counsel, the employee involved, and the agency have an opportunity to present all relevant and material evidence. The hearing may take place before the Board, or before an employee whom the Board designates to conduct the hearing. On a showing that the personnel action resulted from a reprisal arising out of whistleblowing or political activity, or the exercise of an appeal right, the Board is authorized to grant a permanent stay of the agency personnel action.

The Board is also authorized to grant appropriate interim relief during the period of time that the request for a permanent stay is pending.

S. 2640, as introduced, had provided that the Special Counsel would have the authority to issue a stay of agency personnel actions in whistleblowing cases. The Committee believes that this function is inappropriate for the Special Counsel, since the Special Counsel is primarily an investigative and enforcement officer. The power to issue a stay is more appropriately vested in the Board, since this power is consistent with the Board's quasi-judicial role. It is expected, however, that the Board will give great weight to the decision by the Special Counsel, after conducting whatever preliminary investigation the Special Counsel determines is appropriate, to apply to the Board for a stay in such cases.

Paragraph (a) (3) provides that in conducting any hearing or adjudication on any matter falling within its jurisdiction, or in the course of rendering any decision on any matter falling within its jurisdiction, any member of the Board may request from the Director of the Office of Personnel Management an advisory opinion on the interpretation of any OPM rule, regulation, or policy directive. Whenever an Office rule, regulation, or policy directive is an issue in such a proceeding, the Board is required to notify promptly the Director, and he is authorized to intervene in such a proceeding, as long as he does so as early in the proceeding as practicable.

Paragraph (a) (4) provides that as one means of enforcing its orders, the Board is authorized to designate an employee to be responsible for carrying out the order, and to direct where an employee (other than a Presidential appointee as described in Section 1206(i)) is in noncompliance with an order of the Board, he is not entitled to receive any salary until the order is complied with. The Board is authorized to certify its order to the Comptroller General. Once such a certification is made, no payment may be made from the Treasury to the employee while the order is pending. Before certifying the matter to the Comptroller General the Board should provide the employee some oppor-

tunity to be heard on whether he has failed to comply with the order of the Board.

Paragraph (a) (5) provides that in conducting any studies on the merit system or on the protections against prohibited personnel practices, the Board will determine which inquiries are necessary and shall have full access, unless otherwise prohibited by law, to the personnel records, or information collected by the Office of Personnel Management. In addition, the Board may require whatever additional reports from Executive Branch agencies it determines are needed.

Subsection (b) authorizes the Chairman of the Merit Systems Protection Board to designate individuals to chair boards of review established under Section 3383(b) of this title (relating to involuntary separation of air traffic controllers).

Subsection (c) authorizes the Board to delegate performance of any of its administrative functions to any officer or employee of the Board.

Subsection (d) authorizes the Board to issue whatever rules and regulations it deems necessary to perform its functions. The regulations may include rules which define the Board's review procedures, may set time limits during which an appeal may be filed, and may define the rights and responsibilities of parties to an appeal. Any such regulations issued under this subsection are required to be published in the Federal Register. The Board is not authorized to issue advisory opinions.

Subsection (e) provides that the Board is to be represented by its own attorneys whenever the Board is a party to any proceeding in court, except that the Board is to be represented by the Solicitor General of the United States in any proceeding before the Supreme Court. This will include instances where the Board is involved in court proceeding under any provision of this title, including defending disciplinary actions it has taken under section 1207, intervening in appellate proceedings brought by the Board or other parties pursuant to section 7702, or any enforcement actions it brings under sections 1205 (a) (1) or 1205 (i).

This subsection is consistent with similar provisions adopted for other recently-created independent commissions, such as the Federal Energy Regulatory Commission (Public Law 95-91).

Subsection (f) authorizes the Chairman to appoint whatever personnel are necessary to perform the Board's functions. Any appointment to a position in the Senior Executive Service, or to a confidential or policy-making position, must comply with the provisions of this title. However, such appointments are not subject to the specific approval or general supervision of the Office of Personnel Management or the Executive Office of the President.

Subsection (g) requires the Board to prepare an annual budget, which is to be submitted simultaneously to the President and to the appropriate committees of Congress. In any subsequent budget submitted by the President to the Congress, the President is required to list as a separate item the proposed budget for the Board as a separate item.

Subsection (h) provides that any recommendation on legislation that the Board may have shall be simultaneously transmitted to the appropriate committees of Congress and to the President.

The Board is also required to submit an annual report to the President and to Congress on its activities, including a description of all significant actions taken by the Board in connection with carrying out its functions. The annual report will also include a review and analysis of the actions of the Office of Personnel Management, as to whether or not the actions taken by the Office during the year covered by the report are in accord with merit system principles, and whether the Office is adequately preventing prohibited personnel practices. The type of report on OPM activities intended by this subsection is a general review of the policies and effectiveness of OPM. It is not expected that the Board will, in connection with each annual report, conduct an investigation of the internal operation of the OPM and its employees.

Subsection (i) authorizes the Board, the Special Counsel, an Administrative Law Judge appointed to the Board, or any member or employee of the Board designated by the Board, to issue subpoenas, administer oaths, take or order the taking of depositions, issue interrogatories, examine witnesses, and receive evidence, in connection with any matter within the Board's jurisdiction. In the event that the Board or Special Counsel finds it necessary to issue a subpoena to a cabinet officer or other high-ranking Executive Branch official, the Board or Counsel should make every effort to minimize any potential disruption to the functioning of the agency which is involved.

Subpoenas are to be enforced by the Board or the Special Counsel in the United States District Court for the judicial district in which the person to whom the subpoena is addressed either resides or is served. Any failure to obey an order of the court is punishable by contempt. Any witnesses appearing under this subsection are to be paid the same fee and mileage allowances paid to subpoenaed witnesses in the Federal courts.

Section 1206. Authority and responsibilities of the Special Counsel

Section 1206 specifies the authority and responsibilities of the Special Counsel. Subsection (a) authorizes the Special Counsel to receive and investigate allegations of prohibited personnel practices. The Special Counsel may, on his own, initiate such investigations as well. The Special Counsel should not passively await employee complaints, but rather, vigorously pursue merit system abuses on a systematic basis. He should seek action by the Merit Board to eliminate both individual instances of merit abuse and patterns of prohibited personnel practices.

Subsection (b) requires the Special Counsel to conduct an investigation requested by any person if the Special Counsel has reason to believe that a personnel action was taken, or is to be taken, as a result of a prohibited personnel practice. The Special Counsel need not conduct an investigation of a charge which appears groundless or frivolous on its face. Some preliminary inquiry will likely be necessary, though, to determine whether a charge warrants a thorough inquiry. The Special Counsel would not require information amounting to "probable cause" to conduct an investigation. Only a reasonable belief that a violation has occurred or will occur is sufficient basis for an investigation.

It is expected that the Special Counsel will develop a systematic means of screening employee complaints and allegations. Investigation and resolution of these complaints should be made on a timely basis.

Subsection (c) specifies certain procedures for the Special Counsel to follow in cases involving alleged reprisal or threat of reprisal for the disclosure of information described in section 2302(b) (8) or exercise of an appeal right under 2302(b) (9) of the title. In addition, an amendment by the Committee makes this subsection applicable to Hatch Act-type violations prohibited under section 2302(b) (3). Paragraph (1) prohibits the Special Counsel from disclosing the identity of the complainant without the consent of the complainant. Protection of the complainant's identity is essential not only to prevent retaliation against the employee, but to assure a free flow of information to the Special Counsel. The Special Counsel may only disclose the identity of the complainant without the complainant's consent if such disclosure is unavoidable. It is expected that disclosure of a complainant's identity will be necessary only in the rarest of circumstances.

Paragraph (2) authorizes the Special Counsel to seek a stay of a personnel action. As discussed earlier, this is a change from S. 2640, as introduced, which would have permitted the Special Counsel to issue a stay on his own initiative. The duration of the stay and the conditions for obtaining a stay are set forth in section 1205(a) (2) of this title. This subsection makes it clear that refusal by an agency official to comply with any stay ordered by the Board or a member of the Board is cause for disciplinary action under subsection (j).

Subsection (d) requires a report by the Special Counsel, containing findings and recommendations, based on his determination that there are prohibited personnel practices which require corrective action. The report must be made to the Merit Systems Protection Board, the agency affected, and the Office of Personnel Management. The Special Counsel may, at his discretion, report his findings to the President and Congress. The reports outlined in this subsection are not required where the Special Counsel initiates an action before the Board to correct or remedy the prohibited personnel practice since the Special Counsel's findings and recommendations would presumably be contained in any complaint the Special Counsel pursued before the Board. Even in these cases, however, the Special Counsel would still be authorized to report to the Office of Personnel Management, the agency affected, the President, and Congress.

Although the Special Counsel may include suggestions as to what corrective action should be taken, the final decision on the corrective action to be taken in those cases which are not before the Merit Board will be made by the agency involved, subject to guidance and instruction from the Office of Personnel Management. It is expected that the agency decision on what corrective action to be taken will be made on a timely basis with notification to all interested parties, including the Special Counsel.

Subsection (e) sets forth the procedures to be followed if, during the course of an investigation authorized by the bill or transferred to the Board or Special Counsel by Reorganization Plan No. 2 of 1978, the Special Counsel determines that there is reasonable cause to believe a

law has been violated. If the Special Counsel determines that there is reasonable cause to believe a criminal law has been violated, he must report that determination to the Attorney General and to the head of the agency involved. The Special Counsel must also submit a copy of such report to the Director of the Office of Personnel Management and the Director of the Office of Management and Budget.

If the Special Counsel determines that there is reason to believe a violation of a civil statute, or a rule or regulation has occurred, the Special Counsel must report that determination to the head of the agency involved.

This subsection differs from subsection (f) because the latter subsection is specifically intended to provide a channel for allegations concerning improper government activity. Referral of a report under subsection (e) is at the Special Counsel's initiative, based on a determination made by the Special Counsel. Subsection (e) differs from subsection (d) in that reports made under subsection (d) involve only personnel matters. Reports under subsection (e) may involve violations of any criminal or civil law. This provision does not authorize the Special Counsel to conduct investigations of non-personnel related laws. It provides for an appropriate referral System for further investigation of possible non-personnel or criminal violations which the Special Counsel may discover during the course of his authorized investigations.

The Special Counsel may require an agency head who receives a report by the Special Counsel to certify in writing that (1) the agency head has personally reviewed the report, and (2) what action has been, or is to be taken, and when such action will be completed. Only a good faith estimate of when the action will be completed is required, but some estimate should be made. The certification should be in writing and must be completed and referred to the Special Counsel within 30 days of receipt of the Special Counsel's report.

This subsection requires the Special Counsel to maintain and make available to the public a list of noncriminal matters referred to agency heads under the subsection as well as the agency head's certifications of actions taken. The requirement that the Special Counsel maintain a public list of noncriminal matters referred to him is not intended to authorize the Special Counsel to disclose information that is classified or protected against disclosure by statute. If the Special Counsel has reason to believe that information that could be contained in a public list might be classified or protected against disclosure by statute, the Special Counsel, prior to including such information in a public list, should consult with the head of the agency involved to determine if any classified or protected information is involved. He shall accept the determination of the agency head as to whether the information is classified. In exercising his responsibilities under this subsection, the Special Counsel should also consider the extent to which it is necessary in the public interest to disclose the name of any individual employee involved.

Subsection (f) is an amendment adopted by the Committee to address another problem faced by whistleblowers. Often, after an employee discloses an illegal or improper activity he becomes enmeshed in a personnel controversy: what should be done about him? The

underlying substantive allegation made by the employee, however, is frequently ignored or forgotten. This subsection is intended to provide a mechanism to ensure that responsible government officials are made aware of, and given the opportunity to act upon, the employee's allegation of government misconduct.

Paragraph (1) requires the Special Counsel to transmit information concerning any improper or illegal conduct as described in subsection 2302(b)(2) of this title to the appropriate agency head. It is assumed, however that before such allegations are brought to the attention of the Special Counsel, an employee will first exhaust whatever internal procedures are available for bringing such allegations to the attention of agency officials. In addition, the Special Counsel is not authorized to receive information which is protected from disclosure by subsection 2302(b)(8), and he need not transmit such information if he does come into possession of such information.

The Special Counsel is required to transmit all related matters to the agency head, such as documents supporting the allegation. In contrast to subsection (e), the information received by the Special Counsel under this subsection need not be obtained during the course of an investigation into a personnel matter. Moreover, in referring the information, the Special Counsel is to make no determination concerning the substance of the charge. The Special Counsel must refer the information to the appropriate agency head, who will in most cases be the head of the agency which the information involves.

An agency head who receives information referred to him by the Special Counsel is not required to fully investigate the allegations. Nevertheless, if the agency head determines that the allegations are clearly substantial and he, or another appropriate official in the agency, conducts an investigation, the agency head must report the findings of the investigation along with the reasons supporting those findings to the Comptroller General. The subsection makes clear that the agency head is under no obligation to conduct an investigation concerning allegations made by an employee of another agency. Of course, the agency head has the discretion to conduct such an investigation if it is deemed desirable. The special obligation of an agency to consider allegations made by its own employees is intended to include allegations made by any one who has been an employee of the agency at some time within the past several years, but who subsequently resigned or left the agency for any reason.

Paragraph (2) requires the agency head to provide a summary of his activities in connection with the allegations to the Special Counsel. The summary, which should be transmitted on a periodic basis, should provide sufficient detail to enable the Special Counsel to inform the individual who brought the matter to the Special Counsel about the disposition of his allegation.

Paragraph (3) authorizes the Comptroller General to examine the agency's findings to determine whether the agency investigation is adequate and whether any corrective action taken by the agency is adequate. The Comptroller General has discretion to make as complete an investigation as he deems necessary to determine the adequacy of the agency action. The Comptroller General may report his exami-

nation of the agency action to the Congress if the agency investigation or its proposed corrective action is inadequate. That the Comptroller General may also inform Congress when an agency investigation or corrective action is inadequate.

Paragraph (4) requires the Special Counsel to keep confidential the identity of the person who discloses information under this subsection, in accordance with the provision in subsection (c) (1).

Under paragraph (5), the General Accounting Office and the Special Counsel are required to report to Congress on their experience in handling disclosures under section 2302(b) (8) and investigations authorized by this subsection. The reports should include but not be limited to, an evaluation of the procedures established in this section.

In addition to the Special Counsel's power to conduct investigations under subsections (a) and (b), to bring disciplinary actions under subsection (i), and to institute corrective actions under subsection (j), subsection (g) (1) provides authority to conduct investigations in other areas. The Special Counsel is specifically authorized to investigate certain other practices as specified below:

(A) Political activity which is prohibited under subchapter III of Chapter 73 of this title (Hatch Act violations);

(B) Political activity by any state or local officer or employee which is prohibited under chapter 15 of this title;

(C) Arbitrary or capricious withholding of information under section 552 of this title (the Freedom of Information Act); and

(D) Involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action.

Clause (C) refers to 5 U.S.C. 552(a) (4) (F) which relates to court findings that information may have been withheld arbitrarily or capriciously. The Special Counsel may investigate on the basis of such findings, and make recommendations to the opening involved, but it not given independent authority under this subparagraph to review the basis for withholding information from disclosure under the Freedom of Information Act. The Special Counsel has the authority under section 552(a) (4) (f) to investigate and enforce the law against an employee who has withheld information arbitrarily or capriciously.

Clause (D) authorizes the Special Counsel to investigate, preliminary to bringing disciplinary action, employees who have been found to be involved in any prohibited discrimination. In acting under this provision, disciplinary action against an individual employee should not take place until there has been an appropriate finding by an administrative agency or court.

Paragraph (2) provides that the Special Counsel shall not make an investigation of any allegation involving Hatch Act violations, or discrimination under paragraph (1) if the Special Counsel determines that the allegation may be more appropriately resolved under an administrative appeals procedure.

Subsection (h) provides that no disciplinary action may be taken by an agency against any employee for any alleged prohibited activity when that activity or related activity is under investigation by the Special Counsel, unless the Special Counsel approves such disciplinary action. This subsection will assure that the Special Counsel's investi-

gations may not be short-circuited by agency disciplinary action, and that the employee will be afforded all rights available through a complete investigation by the Special Counsel.

Subsection (i) authorizes the Special Counsel to bring a disciplinary action against an employee who commits a prohibited personnel practice. If the Special Counsel determines, after an investigation under this section, that disciplinary action should be taken against an employee because the employee has allegedly committed a prohibited personnel practice, the Special Counsel must prepare a written complaint against the employee. The complaint must contain a determination by the Special Counsel that the employee may have committed a prohibited personnel practice. The Special Counsel must present the complaint containing the determination, together with a statement of supporting facts, to the Merit Systems Protection Board or to an administrative law judge appointed under section 3105 of this title, and designated by the Board, for hearing and decision pursuant to section 1207. Under subsection (i) (2), this provision does not apply to an employee in a confidential, policy-making, policy-determining, or policy advocating position who was appointed by the President by and with the advice and consent of the Senate. If the Special Counsel makes a determination that disciplinary action should be taken against such a presidential appointee because of a prohibited personnel practice by the employee, the Special Counsel must present a complaint and statement, including the Special Counsel's determination that disciplinary action should be taken, to the President in lieu of the Board or administrative law judge. This statement and complaint should also include any response by the employee who is the subject of such complaint.

Subsection (j), paragraph (1), authorizes the Special Counsel to bring disciplinary action against any employee who knowingly and willfully refuses or fails to comply with an order of the Merit Systems Protection Board. In a case involving an employee described in subsection (i) (2), the Special Counsel must submit to the President, in lieu of the Board a report on the actions of the employee which must include the information described in subsection (i) (2). Any disciplinary action taken under this subsection must be in accordance with the procedures set forth in section 1207 of this title.

Paragraph (2) of subsection (j) is a Committee amendment which authorizes the Special Counsel to seek corrective action of any pattern of prohibited personnel practice arising out of any of the subparagraphs under section 2302(b), which is committed by an agency or employee or permitted by an agency or employee to occur. Such corrective action would be initiated by filing a written complaint with the Board against the agency or such employee. Typically, this kind of complaint would be made if the practice involved matters which are not otherwise appealable to the Board under this title. For example, there may be hiring or promotion practices which violate merit system principles but which may not give rise to an appealable action under this title. Similarly, competitive examinations may be administered in such a way as to constitute a violation of section 2302. Under this paragraph, the Special Counsel would have authority to seek corrective action, and the Board is empowered to order such corrective action as it finds necessary.

An amendment in Committee added subsection (k) which authorizes the Special Counsel to intervene as a matter of right or otherwise participate in any proceeding before the Merit Systems Protection Board. In doing so, the Special Counsel is required to comply with the rules of the Board. The Special Counsel will not have any right of appeal to the courts in connection with his intervention before the Board.

Under subsection (1), the Special Counsel is authorized to appoint legal, administrative and support personnel to perform the functions of the Special Counsel. The Committee added a provision excluding the qualifications of a particular individual for any appointment made under this subsection from the approval or supervision of the Office of Personnel Management or the Executive Office of the President.

Subsection (m) authorizes the Special Counsel to prescribe such regulations as may be necessary for investigations under this section. Those regulations must be published in the Federal Register.

Subsection (n) prohibits the Special Counsel from issuing any advisory opinion concerning any law, rule or regulation. The prohibition does not apply to chapter 15 and subchapter 3 of chapter 73 of this title (political activity provisions) or any rule or regulation issued under those provisions.

Subsection (o) requires the Special Counsel to submit an annual report to Congress concerning his activities. The annual report must describe the work of the Special Counsel, including the number, types, and disposition of allegations of prohibited personnel practices filed with him, investigations conducted by him, and actions initiated by him before the Board. The report must also describe the recommendations and reports made by the Special Counsel to other agencies pursuant to subsections (d) and (e) of this section, and the actions taken by the agencies as a result of the reports or recommendations. It will similarly include a discussion of reports and recommendations concerning presidential appointees under subsections (i) and (j). The report will also include recommendations for legislation or other action by Congress the Special Counsel deems appropriate.

Section 1207. Hearings and decisions on complaints filed by the special counsel

Section 1207 sets forth the hearing procedures for complaints presented under section 1206 of this title. It provides that any employee against whom a complaint has been presented to the Merit Systems Protection Board or to an administrative law judge under section 1206 is entitled to a hearing. That hearing will be on the record before the Board or before an administrative law judge appointed under section 3105 and designated by the Board. Hearings involving a state or local officer or employee under chapter 15 of this title (political activity provisions) must be conducted in accordance with section 1505. There may be no administrative appeal from a final order of the Board.

A final order of the Board may impose disciplinary action including removal, demotion, debarment from Federal employment for not to exceed 5 years, reprimand, suspension, or a civil penalty not to exceed \$1,000. In the case of a state or local officer or employee under chapter 15 of this title, the Board is required to act in accordance with section 1506. An employee subject to a final disciplinary order may obtain

judicial review in the United States Court of Appeals for the circuit in which the employee was employed at the time the disciplinary action was initiated.

Section 201(b) of the bill contains various conforming and technical amendments. Paragraph (1) amends section 5314 of title 5 of the United States Code to include the Chairman of the Merit Systems Protection Board in the list of positions at level III of the Executive Schedule. Paragraph (2) similarly sets the members of the MSPB at level IV of the Executive Schedule. The positions of Chairman and Commissioners of the Civil Service Commission are deleted from the Executive Schedule. The Special Counsel of the MSPB also is to be compensated at level IV of the Executive Schedule. Paragraph (4) deletes the position of Executive Director of the Civil Service Commission from the Executive Schedule.

Section 201(c) of the bill provides that the term of office of the first individual appointed and confirmed as the Special Counsel shall expire on the last day of the term of the President during which he was appointed. This section will allow each subsequent term of a Special Counsel to be coterminous with that of the President, in keeping with the Committee's amendment to section 1204(a) of this title.

Section 201(d) conforms the table of chapters to include a provision for the Merit Systems Protection Board and the Special Counsel.

SECTION 203. PERFORMANCE APPRAISAL AND ACTIONS BASED ON UNACCEPTABLE PERFORMANCE

The purpose of section 203 is to provide for new systems of appraising employee work performance. The principal changes it makes in chapter 43 of title 5, United States Code, are the following:

- Abolishment of present requirements for summary adjective ratings and appeals for performance ratings;
- Establishment of revised performance appraisal system to be used as a basis for developing, rewarding, reassigning, demoting, promoting, retaining and removing employees; and
- Establishment of new procedures for taking actions based on unacceptable performance.

Under present law, all employees are rated under plans which provide for at least three summary adjective ratings—satisfactory, unsatisfactory, and outstanding. The present performance appraisal system is the source of frequent complaints by both managers and employees. The complaints concern 1) the requirement for assignment of summary adjective ratings, 2) the procedures for appeal of ratings, and 3) the lack of importance attached to the ratings since they are not used as the basis for administrative action.

Since 1950, a number of changes have occurred which have diminished the importance of the summary adjective performance rating. Entitlement to within-grade increases for General Schedule employees is now based on a separate acceptable level of competence determination. As a result of court decisions, an agency must follow adverse action procedures if an employee with an unsatisfactory rating is to be reduced in grade, rank, or pay, or removed from the service.

These two changes greatly diminished the importance of the summary adjective rating.

In addition, few outstanding ratings are assigned because the statutory criterion requires outstanding performance in all aspects of the job, a criterion that extremely few individuals can meet. The unsatisfactory rating is little-used because the assignment of such a rating can have a useful purpose only with follow-on action which is usually time-consuming, expensive, and aggravating for all parties concerned. Under the provisions of 5 U.S.C. 4305, an employee is now entitled to an impartial review of the rating within the agency as well as a hearing before a board of review chaired by a member designated by the Civil Service Commission. This review and hearing process relates only to the rating itself. If an unsatisfactory rating is sustained through this process, and it is decided to remove the employee, such action must then be initiated and processed under the adverse action procedures. Thus, the entire process for taking action on the basis of unsatisfactory performance is slow. It serves as a deterrent to taking action that might otherwise be appropriate.

The bill repeals the requirement for assignment of summary adjective ratings and the provision for appeals of ratings.

The bill provides that appraisals of performance for all purposes shall be made within a single, interrelated system.

Finally, the bill makes the performance ratings given under the system more meaningful than in the past. The rating an employee receives should be a consideration in rewarding or promoting an employee and in decisions about demotion or removal from the Federal service. Salary increases under the merit pay system proposed by title V of the bill will be based on the performance ratings system provided by this section.

Section 203 of the bill also establishes new procedures to govern personnel action taken against an employee by an agency because of unacceptable performance, and for the appeal of these actions to the Merit System Protection Board. The provisions are designed to remedy the widespread criticism of the present system. Inordinate procedural requirements and unreasonable standards have been repeatedly identified as some of the chief reasons why managers currently are reluctant to take action against employees on the grounds of unacceptable performance. Figures supplied the Committee by the Civil Service Commission illustrate the problem. In 1976, the Civil Service Commission remanded 41% of all the cases appealed to it where an agency sought to remove an employee for incompetence.

The prospect of successfully dealing with the appeals process, to ensure that the person is not returned to the rolls, causes managers to go through a long process of preparation that can take months or longer. Often the manager's conclusion is that the task is too formidable and he abandons the effort. At the least, the process is excessively delayed, and far more time of the managers must be devoted to the process than is justified.

The bill adopts new procedures to remedy this problem.

These new procedures will make it possible to act against ineffective employees with reasonable dispatch, while still providing the employee his due process rights.

Section 4301. Definitions

Section 4301 defines the coverage of this subchapter. It provides that this subchapter applies to executive agencies as well as the Administrative Office of the United States Courts and the Government Printing Office. This continues existing coverage. Section 4301 terminates current statutory exclusions of the Nuclear Regulatory Commission and a civilian officer or member of a crew of a vessel operated by the Department of the Army or the Department of the Navy.

This section specifically excludes a government corporation and the General Accounting Office. It also excludes the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and such other agencies or units thereof whose principal function is the conduct of foreign intelligence or counter-intelligence if the President, in his discretion, determines such exemption is required.

Certain employees of other specified agencies are expressly excluded from the subchapter, in large part because they are already governed by other appraisal systems or because they are in a special status. This includes Foreign Service officers, members of the Senior Executive Service established by title V of the bill, presidential appointees, and administrative law judges. This section also authorizes the Office of Personnel Management to exclude an agency or positions not in the competitive service from this subchapter. This authorization gives OPM the flexibility to make exceptions to the coverage of this subchapter whenever it determines that an exception is in the interest of good administration, and to revoke an administrative exception when no longer warranted. It is expected that this authority to exempt agencies or positions will be used sparingly.

Finally, "unacceptable performance" is defined as performance which fails to meet established requirements in one or more critical elements of this job. This definition is currently contained in regulation.

Section 4302. Establishment of Performance Appraisal Systems

Section 4302(a) details the objectives of the performance appraisal systems, and requires agencies to develop and establish one or more performance appraisal systems which will encourage superior performance. Any system established by an agency must meet the criteria established by this section. The provision requires "periodic appraisals" of job performance. Under current regulations, ratings are required at least annually. The Civil Service Commission has informed the Committee that it anticipates that a similar requirement will be established under this provision.

The section specifically encourages employee participation in establishing performance objectives. Experience has shown that doing so motivates employees to accomplish the objectives. Management will have the ultimate responsibility under this section, however, to establish the performance standards.

Section 4302(a) specifically provides that the ratings derived from the performance appraisal system will be used as a basis for a wide variety of personnel actions.

Section 4302(b) sets forth the basic requirement that performance appraisal systems conform to regulations issued by the Office of Per-

sonnel Management and the basic requirements for appraisal systems. The Office of Personnel Management will issue guidelines and make technical assistance available for performance appraisal, but agencies will have great flexibility to choose or develop their own systems. Agencies should determine what type of performance appraisal methods best suit their needs. This may range from a traditional system to a management by objectives type of system, with more than one system used for different groups of employees. For example, within the same agency, a management-by-objectives system might be used for professional and managerial employees and a traditional system might be used for clerical or wage employees.

Any performance appraisal system should put primary emphasis on the quality of the employee's work. Moreover, a performance evaluation of a supervisor or manager should consider the performance of that employee's subordinates. These tailored systems should not be more complex than necessary to meet an agency's particular needs. Unnecessary paperwork burdens should be avoided. Performance appraisal is an integral part of management, however, and any time which may be required to implement the system should be more than fully justified by improved employee performance.

Agencies are required to establish performance requirements and standards of performance at the beginning of the rating period and to communicate them—though not necessarily in written form—to employees. Employees' performance appraisals must be based on these previously established performance standards.

Agencies are required to take action, based on performance appraisals, to:

- (1) recognize and reward employees whose performance warrants it;
- (2) assist employees whose performance is unacceptable to improve; and
- (3) reassign, demote, or separate employees whose performance continues to be unacceptable.

Section 4302(b) (4) specifies that an adverse action should be taken against an employee with an unacceptable performance rating only after the employee has had an adequate opportunity to improve his job performance. The bill does not require, however, that the agency's decision whether to take action against an employee must, in each instance, be governed by the performance of an employee during the specific 30- or 60-day notice period afforded him under section 4303.

Section 4303(a)-(e). Actions Based on Unacceptable Performance

The section specifies the specific procedures applicable at both the agency level and on appeal to the Merit Systems Protection Board.

An employee may be removed or demoted at any time during the performance appraisal cycle that performance becomes unacceptable. The actions primarily contemplated are reduction in grade or dismissal from the service. In accordance with current practice, it is not intended that the term "demote" entitles an employee to the bill's procedural protection when the employee is reduced in rank.

Under the procedures specified by section 4303(b) an employee is entitled at the agency level to:

1. At least 30 days written advance warning of the action proposed which states the expected standard of performance, and the areas in which the employee's performance is not acceptable;
 2. Be accompanied by an attorney or other representative;
 3. Reply orally and in writing to the proposed action;
 4. A written decision which states the reasons for the decision.
- The decision must be concurred in by a higher level official than the official who proposed the action, except when the action was proposed by the head of the agency.

The purpose of this procedure is to provide the employee with notice that his performance is not acceptable, to permit the employee to reply to the proposed action and the reasons for the action, and to give a decision, whether favorable or unfavorable, to the employee. The employee may not be represented by an individual whose activities as representative would cause a conflict of interest. The requirement for concurrence in the decision by a higher level official is a safeguard against taking unwarranted or ill-considered actions.

The provisions do not authorize an agency to conduct a full pre-termination hearing in lieu of the procedures outlined in the bill. Such hearings are not permitted by this section.

The Committee added to section 4303(b), as proposed in the original bill, the requirement that the advance notice to the employee must specifically cite any failure by the employee during the past year which the agency may consider when making a decision on the proposed action. An agency may consider, for example, a previous proposal to remove that was not carried out because of short-term improvement in performance. Unless the particular failure to perform acceptably is cited in the advance notice, the agency may not rely upon it as a grounds for demoting or removing the employee.

One of the chief differences between the procedures currently applicable at the agency level and the proposed procedures concerns the standard governing the agency's action. Under current law, an employee may be dismissed for unacceptable performance only if dismissal would improve the efficiency of the service. As a practical matter, agencies have found it very difficult to prove this to the degree required by courts through a series of judicial decisions. Section 4303 (a) imposes a new standard. It is "performance which fails to meet established requirements in one or more critical elements of the job." The Committee intends that this new standard should not be governed by the existing case law defining the present standard, "such cause as will promote the efficiency of the service."

Section 4303 places two restrictions on agencies to assure prompt decisions on proposed demotions and removals. First, subsection (c) states that an agency may provide the employee with a notice period of more than 60 days only in accordance with regulations issued by the Office of Personnel Management. Second, an agency has a maximum of 30 days from the date the notice period expires in which to issue a decision to retain, remove, or demote an employee.

Subsection (d) provides that when no action is taken against the employee following the notice, and the employee's performance continues to be acceptable for one year from the date of the advance warning, any record of the unacceptable performance must be removed

from the employee's official records. The purpose of this subsection is to provide that when an employee improves his performance to an acceptable level and maintains that improved level of performance, he not be adversely affected by a record of previously unacceptable performance.

Subsection (e) grants a right of appeal to the Merit Systems Protection Board to employees who are preference eligibles or in the competitive service and who are demoted or removed for unacceptable performance. Up until now, non-preference eligibles have been afforded the right to appeal adverse actions only through Executive Order. This provision establishes this statutory right of appeal for the first time.

Section 4303(f). Appellate procedures

Subsection (f) specifies that before the Board such appeal will be governed in part by the same procedures as employee appeals filed with the Merit Systems Protection Board from agency actions taken on other grounds. However, there are some important differences mandated by the special nature of actions taken for unacceptable performance. An agency's assessment of an employee's overall performance in light of its needs and standards may be the most important part of the case. Yet it may be less susceptible to proof through traditional trial-type procedure than when the agency takes an adverse action on the basis of employee misconduct which is linked to specific, provable offenses.

As a result, the provision adopts procedures which will protect the right of employees, while also taking into account the needs of the agency to assure an efficient and productive work force. The provision was adopted only after the original wording was amended to assure that these goals were in fact achieved.

The most important part of the procedure is the way it allocates the burden of proof, and the standard of proof it adopts.

Under the provision, as amended, the agency will have the initial burden before the Board of going forward with its case. The bill, as introduced, did not put this initial burden expressly on the agency. The agency action cannot be ultimately upheld under any circumstances unless the agency first makes a prima facie case justifying its action. Once the agency meets this initial burden, the employee will be expected to introduce his own evidence, discredit the record made by the agency, or present whatever arguments he wishes. Following the submissions by both the employee and the agency, the Board will decide the case. At such point, the burden of persuasion, or the risk of nonpersuasion, will be on the employee.

When deciding the case on appeal, the agency will be upheld by the Board unless—

“(A) the agency's procedures contained error that substantially impaired the rights of the employee;

“(B) the agency's decision was based on discrimination . . . ;

“(C) there is no reasonable basis on the record for the agency's decision; or

“(D) the agency’s decision involved a prohibited personnel practice, or was otherwise contrary to law.”

Under this standard the Board must find that there is reasonable basis for the agency’s decision whenever it concludes that a reasonable man could—on the basis of the record—have acted as the agency did, even if it is also possible to conclude that another course of action would also have been reasonable. In reviewing agency action taken under this section, both the Board and the courts should give deference to the judgment by each agency of the employee’s performance in light of the agency’s assessment of its own personnel needs and standards.

The additional procedures governing appeals to the Board from actions taken for unacceptable performance, such as the availability of summary judgment procedures, are otherwise identical to those applicable to other Board appeals. The provisions are discussed below in connection with the bill’s amendments to section 7701.

Under the provisions of Section 1206 (b) the Special Counsel will be free to participate in any appeals proceeding involving the demotion or removal of an employee. The Special Counsel will be able to present such evidence, and make such points, that he considers desirable to further the elimination of prohibited personnel procedures and compliance with the civil service laws.

Section 4303 (g)—Coverage of procedures

New section 4303 (g) provides that the procedural protections governing actions based on unacceptable performance do not apply in certain probationary periods. Consistent with the bill’s amendments to section 3321 (a) (2) of title V (section 301 of the bill), the provisions do not apply to an employee serving a probationary period in an initial supervisory or managerial position, even if he had previously completed his probationary period of service in connection with another position which was not supervisory or managerial in nature.

Subsection (g) further provides that the procedures in this section do not apply generally to the separation or demotion of an individual in the competitive service who has not completed either a probationary or trial period, or if there is no formal probationary period, one year of current continuous service (other than under a temporary appointment limited to one year or less). Nor does it apply to an individual in the excepted service who has not completed one year of current continuous employment in the same or similar positions. The language of this provision is parallel to that for adverse action coverage under chapter 75 of title 5, U.S.C. The probationary or trial period, or the first year of service under an appointment for which there is no probationary or trial period, is an extension of the examining process to determine an employee’s ability to actually perform the duties of the position. It is inappropriate to restrict an agency’s authority to separate an employee who does not perform acceptably during this period.

Section 4304. Responsibilities of the Office of Personnel Management

This section identifies the responsibilities of the Office of Personnel Management in providing technical assistance to agencies in develop-

ing performance appraisal systems and requiring corrective action when a system does not meet the requirements of law and implementing regulations. The present requirement for prior approval of plans is not continued in this proposed revision. This is consistent with the intent of the bill to avoid excessive centralization in a personnel agency of the responsibility for implementing the personnel laws.

Section 4305. Regulations

This section authorizes the Office of Personnel Management to issue regulations to carry out the purposes of this subchapter on performance appraisal systems. The bill specifically provides, however, that in doing so the OPM does not have the authority to issue regulations which directly or indirectly undercut the authority and jurisdiction of the Board to regulate the procedures governing appeals from an agency's action based on unacceptable performance, or the responsibility of the Board to decide such cases on the basis of its own interpretation of applicable law.

SECTION 204. ADVERSE ACTIONS

The first part of section 204 amends the current provisions in chapter 75 of title V governing adverse actions not appealable from the agency to the Board. In addition to conforming changes, the amendments add several additional procedural protections, such as the right of an employee to submit additional kinds of documentary evidence to the agency, and to reply orally as well as in writing to the charges. The bill does not substantially alter, however, the basic nature of the procedures applicable to adverse actions not appealable to the Board.

Section 204 (a) of the bill also substantially amends subchapter II of chapter 75, governing personnel actions that result in removals, suspensions for more than 30 days, reductions in grade or pay, and furloughs without pay. The actions covered in subchapter II may be appealed by the employee to the Board. These provisions govern any such action where the basis of the agency action is misconduct or any other cause besides unacceptable performance. Actions based on unacceptable performance are governed by chapter 43, as added by section 203 of the bill.

The bill amends the subchapter in a number of different ways which increase the procedural protections afforded employees, while also protecting the right of agencies to be able to maintain the most efficient workforce possible.

Among the more important procedural changes made by this portion of the bill are the following:

- Statutory due process rights in adverse actions are extended to all competitive service employees, not just veteran preference eligibles;
- OPM is authorized to extend adverse action and appeals coverage to positions excepted from the competitive service;
- Reduction in rank is eliminated as an appealable adverse action;
- The procedural protections afforded employees at the agency level are increased or codified in statute for the first time.

SUBCHAPTER I—SUSPENSION FOR 30 DAYS OR LESS

Section 7501. Definitions

Section 7501 defines the employee coverage of this subchapter and the term "suspension." This subchapter applies to competitive service employees who are serving under career, career-conditional, and other non-temporary appointments, and who have completed a probationary or trial period. This definition of employee would include all competitive service employees who are currently covered by these procedural protections. It does not apply to members of the Senior Executive Service, employees not in the competitive service who are excluded from coverage by OPM regulation, or an employee in an agency or unit of an agency engaged in foreign intelligence or counter-intelligence excluded from the application of the merit systems principles by section 2301.

For the first time, the term *suspension* is defined in statutory language as a disciplinary action temporarily denying an employee his duties or pay. The bill follows the definition of the term previously adopted by the Civil Service Commission in its policy issuances.

Section 7502. Actions Covered

Section 7502 specifies that this subchapter covers suspensions of 30 days or less.

The provisions of this subchapter do not apply to the suspension of an employee under present section 7532 of this title, which outlines the procedures to be followed when such an action is taken in the interest of national security; nor do they apply to disciplinary actions taken by the Board under section 1207 upon a complaint filed with it by the Special Counsel pursuant to section 1206.

Section 7503. Cause and Procedure

Subsection (a) provides that an action to suspend an employee must be taken in accordance with regulations prescribed by the Office of Personnel Management. As in current law the agency may take such action only "for such cause as will promote the efficiency of the service."

Subsection (b) defines the rights of an employee against whom a suspension of 30 days or less is proposed. These include the rights currently provided by statute. In addition, the right to furnish material in support of the answer is expanded to include, in addition to affidavits, other documentary evidence which the employee may wish to submit. The employee is also accorded the right to reply orally and to be accompanied by an attorney or other representative. It is expected that, by regulation, OPM will provide employees the right to review material on which the agency has relied in proposing an action. An employee who is suspended for 30 days or less is entitled to have the action reviewed by the employing agency, but has no right of appeal to the Merit Systems Protection Board. In the alternative, this type of action may be the subject of grievance procedures established by labor-management agreements under title VII of this bill.

Section 7504. Regulations

Section 7504 authorizes the Office of Personnel Management to issue regulations to carry out the purposes of this subchapter.

**SUBCHAPTER II—REMOVAL, SUSPENSION FOR MORE THAN 30 DAYS,
REDUCTION IN GRADE OR PAY, OR FURLOUGH FOR 30 DAYS OR LESS**

Section 7511. Definitions; application.

Subsection (a) provides a statutory basis for the procedural protections and appeal rights now granted employees in the competitive service who are serving under career, career-conditional, or certain other non-temporary appointments, and who have completed a probationary or trial period. Protections against arbitrary or capricious actions have become established by practice and Executive Order—but not by statute—as a basic right of competitive service employees. It is appropriate that the rights extended to nonpreference eligibles be made statutory rights. It also continues the present coverage of employees serving under certain other appointments, for which there is no probationary or trial period, after they complete one year of current continuous employment. The changes in the wording of this subsection from existing law provide coverage to employees serving under several kinds of appointments not in existence at the time the present law was enacted.

Subparagraph (1)(B) of subsection (a) reaffirms procedural protections and appeals rights of preference eligibles in the excepted service. This subsection does not, however, repeal specific exceptions to the provisions of this subchapter which are contained in the organic legislation of certain agencies, such as the Central Intelligence Agency, whose employees are excepted from the competitive service by statute.

The phrase “one year of current continuous service in the same or similar positions,” which defines the extent of coverage of employees in the excepted service, is intended to be the same as that currently used in civil service regulations.

Definitions (2), (3), (4) and (5) are defined elsewhere in title 5 or in civil service regulations or policy issuances and are added for uniformity and clarity.

Subsection (b) identifies the three groups of positions to which this subchapter does not apply. The first exception is for positions which require Senate confirmation. The exception is continued from current law.

The second, a new exception for positions of a confidential, policy-determining, policy-making or policy advocating character, is an extension of the exception for appointments confirmed by the Senate. These positions are currently placed in Schedule C (positions at GS-15 and below), or filled by Non-Career Executive Assignment (GS-16, -17, and -18). The concept of tenure and protection against dismissal is contrary to the confidential relationship between incumbent and supervising official, and the commitment to Administration policy objectives, required by those filling such positions.

Positions excepted from the competitive service will not automatically be exempted from the procedures governing adverse actions. A further determination must be made that a position meets the confi-

dential or policy-making criteria established by the section. This exclusionary authority must be read in conjunction with section 7511(c), discussed below, which authorizes OPM to include within the subchapter's procedural protections other employees outside the competitive service who are not in such confidential or policy-making jobs. In the case of a position excepted from the competitive service by administrative action rather than statute, the determination to exclude the position shall be made by the Office of Personnel Management. A determination that a position in the statutorily excepted service is of comparable confidential, policy-determining, policy advocacy or policy-making character shall be primarily made by the head of the agency, under criteria established by OPM regulation.

The third exception is for positions in the Senior Executive Service. Procedures for taking disciplinary action against an individual in the SES are contained in title IV of this bill.

The fourth exception tracks the exemption for foreign intelligence and counterintelligence agencies, similarly provided for in section 2301.

Subsection (c) provides that the Office of Personnel Management may by regulation extend the provisions which it administratively excepted from the competitive service. These positions are now excepted under Schedules A and B because competitive examinations cannot be administered. Although many positions in the administratively excepted service are career positions in the sense that employees spend their careers in the positions, only preference eligibles are currently entitled to adverse action coverage. This subsection permits the Office of Personnel Management, in its discretion, to extend adverse action and appeal coverage to positions or groups of positions which meet criteria it establishes for granting these rights.

Section 7512. Actions covered

This section identifies the actions covered by this subchapter: removals, suspensions for more than 30 days, reductions in grade; reductions in pay of an amount exceeding one step of the employee's grade or 3 percent of the employee's basic pay; and furloughs for 30 days or less. Furloughs for more than a total of 30 days shall continue to be reduction-in-force actions taken under section 3502 of this title.

The present statutory language includes a reference to "reduction in rank." This reference is deleted so as to eliminate reduction in rank as an appealable action. In 1944, when the procedural rights were first extended employees, thousands of positions were not covered by any position classification system. Consequently, where there was no reduction in compensation, it was necessary to look to something else, for example, the individual's relative standing in the agency's organizational structure, to determine whether an adverse action had been taken. However, all or most positions in the competitive service, with rare exception, are now covered by position classification or job-grading systems, with pay related directly to the grade of the position as determined under those systems. The concept of "rank" as a separate category of appealable actions is no longer necessary. This change will also more closely relate the protections afforded to the severity of the action taken. It will increase the flexibility of agencies to assign employees to positions

and duties where they are needed without having to take an adverse action against an employee when the job title or duties have changed, but the grade has not.

The provision also excludes reductions in pay of less than 3% of the employee's basic pay, or one step of the employee's grade.

Finally, this subchapter does not apply to a disciplinary action initiated by the Special Counsel against a Federal, state or local employee. The specific procedural protections contained in the new section 1207 will instead govern.

Additional exceptions conforming this section to other provisions in title V cover employees subject to section 7532 (national security), supervisors or managers who have not completed their probationary period, and employees who are subject to adverse actions on the basis of unacceptable performance. Section 4303 of title V, as amended by this bill, covers employees demoted or removed for unacceptable performance. As under current law, appeals arising out of reduction in force actions will be governed by section 3502 rather than this subchapter.

Section 7513. Cause and procedure

Subsection (a) provides that an agency may take an adverse action of the kind described in section 7512 against an employee for such cause as will promote the efficiency of the service. Any action taken must comply with regulations prescribed by the Office of Personnel Management. These are identical to current statutory provisions relating to adverse actions.

Subsection (b) specifies the minimum rights of an employee against whom an adverse action is proposed. These are:

1. At least thirty days' advance written notice of the proposed action. The thirty day period may be reduced only when there is reasonable cause to believe the employee is guilty of a crime for which a sentence of imprisonment can be imposed. The notice must state "specific reasons" for the proposed action. The latter is a change from the current statutory provision which requires that the notice of proposed adverse action state "any and all reasons, specifically and in detail." The change is intended to reduce the degree of detail now sometimes required in order to avoid reversal on procedural grounds. The agency must still tell the employee the reasons for the proposed action in sufficient detail to allow the employee to make an informed reply.

2. A reasonable time to answer orally and in writing and to furnish material to support the answer. Under this provision, the employee's rights are expanded to permit the employee to submit other documentary evidence in addition to affidavits. The term "answer orally" is substituted for "answer personally." The intent, however is still that the employee have the opportunity to make an oral reply, in person, to an individual authorized to make or recommend a decision on the proposed action. The right of the employee to review material on which an agency has relied in proposing an action is now provided by regulation. It is expected the right will be continued by regulations issued by OPM.

3. To be accompanied by an attorney or other representative. This provides a new statutory right. The right to be accompanied by a representative at the pre-decision stage is currently authorized by a

number of agencies, but the statutory right to representation is restricted to the appellate stage of the action. It is appropriate that the right be extended by statute to the predecision stage. The employee may not, however, be represented by an individual whose activities as representative would cause a conflict of interest. The provision does not authorize an employing agency to pay the cost of an employee's representative, but does not disturb existing provisions relating to use of official time to represent another employee.

4. A written decision, including a statement of those reasons in the notice of proposed adverse action which have been found sustained, and those which have not been sustained, must be furnished the employee at the earliest practicable date.

Subsection (c) retains with the agency head the discretionary authority he now possesses to provide the opportunity for a hearing, at the reply stage, which would include the right to examine witnesses, prior to the final agency decision in proposed actions. Only two agencies, according to the Civil Service Commission, now provide pretermination hearings for all employees, HEW and NLRB. The specific inclusion of this provision is intended to preserve, not to alter, the full discretion the agency now has to decide whether to grant such pretermination hearings.

Subsection (d) establishes an employee's right to appeal an adverse action effected under this subchapter to the Merit Systems Protection Board. The procedures governing such appeals are contained in section 7701, discussed below.

Subsection (e) requires that certain documents, all of which are provided by or furnished to the employee, relating to adverse actions be made a part of the agency's records, and furnished, on request, to the Merit Systems Protection Board to insure that a record of the action is retained and available if the action is appealed.

Section 7514. Regulations

This section authorizes the Office of Personnel Management to issue regulations to carry out the purposes of this subchapter. OPM does not have authority, however, to issue regulations which would undermine the authority of the Board directly or indirectly to regulate the procedures under which it reviews matters appealed to it, or the authority of the Board to decide matters in accordance with its interpretation of applicable law. The provision so specifies.

SECTION 205. APPEALS

Section 205 reenacts chapter 77 of title V with a number of amendments. This section makes important changes in the procedures governing review by the Board and the courts of adverse actions, such as removals, and other appealable actions taken by an agency. The changes protect the right of employees, recognized by the Supreme Court in *Arnett v. Kennedy*, 416 U.S. 134 (1974), to a full and fair consideration of their case. At the same time, they are intended to give agencies greater ability to remove or discipline expeditiously employees who engage in misconduct, or whose work performance is unacceptable. Henceforth, the Board and the courts should only reverse agency actions under the new procedures where the employee's rights under this title have been substantially prejudiced.

Section 205 makes a number of important changes in current law. Among other changes, it

- Guarantees the employee the right to an evidentiary hearing whenever questions of fact are in dispute;
- Directs the Board to consider appeals in an expeditious manner and establishes procedures to assure that this is achieved;
- Provides for the award of attorney fees to employees in certain cases;
- Alters the standards governing appellate review of an agency action to eliminate unwarranted reversals of agency actions;
- Eliminates evidentiary hearings in appellate cases where there are no genuine and material issues of fact in dispute;
- Authorizes the Board to combine cases on appeal before it, and to take other action to expedite appellate review where to do so would not prejudice the rights of employees;
- Encourages more consistent judicial decisions on review by providing for judicial review by the Court of Claims or the U.S. Court of Appeals rather than by U.S. District Courts in most cases and merely eliminates an unnecessary layer of judicial review; and
- Avoids burdening the courts with unnecessarily detailed review of agency actions by establishing as the scope of review the traditionally limited appellate review the courts provide agency actions in other areas.

In addition, the provisions provide a procedure for the appellate consideration of adverse actions involving charges of discrimination. They take account of the intended role of the new independent Merit Systems Protection Board, as well as the expanded role that Reorganization Plan No. 1 of 1978 anticipates for the Equal Employment Opportunity Commission in the area of Federal personnel policies.

The Committee first considered this issue in connection with Reorganization Plan No. 1 of 1978, which in part transferred responsibility for various aspects of equal employment opportunity from three different agencies to the Equal Employment Opportunity Commission. The plan proposed to transfer responsibility for preventing discrimination in the federal workforce from the Civil Service Commission to the Commission. When the Committee considered Reorganization Plan No. 1, it expressed serious reservations about the consistency of the proposed plan with the overall civil service reform proposed in this bill. The Committee report on Reorganization Plan No. 1 describes in detail the concerns it had with the original proposal. (Senate Report No. 95-750, April 20, 1978, pages 9-14) At the time the President agreed in a letter to the Committee, printed as Appendix 2 to the Committee Report on Reorganization Plan No. 1, that there were problems raised by the reorganization plan which should be resolved in connection with the consideration by Congress of this bill.

The procedures adopted by the committee resolve these problems. The chief purpose of the committee amendment is to make sure that neither the Merit Systems Protection Board, nor the Equal Employment Opportunity Commission, will be able to overrule the other. Instead, the powers of the Board and the Commission are carefully balanced one against the other. The committee felt that it was abso-

lutely essential to the success of the overall civil service reform effort that there be this creative balance between the authority of the Board and the Commission because of the unique nature of the issues involved. In addition, the procedures are designed to protect against inconsistent decisions by the Board and Commission, to prevent forum shopping, and to make the procedures for consideration of the same matter by both agencies as streamlined as possible.

Under the procedures adopted by the committee, the Board will continue to consider all actions appealable under the other provisions of this bill, even if the appeal also involves issues of discrimination. This will allow the Board to consider, as related aspects of the same case, allegations that there had been violations of the merit system principles implemented by title V, as well as the anti-discrimination laws. In such cases, questions of the employee's inefficiency or misconduct, and discrimination by the employer, will be two sides of the same question which must be considered together. Any provision denying the Board jurisdiction to decide certain adverse action appeals because discrimination is raised as an issue would make it impossible for the government to have a single unified personnel policy which took into account the requirements of all the various laws and goals governing Federal personnel management. In the absence of full Board jurisdiction, forum shopping and inconsistent decisions, perhaps arising out of the same set of facts, would result.

At the same time the provisions provide for an active role in the process by the Equal Employment Opportunity Commission where questions of discrimination are involved. The Commission will be responsible for issuing general policy rules and directions. In the case of discrimination complaints involving personnel actions not otherwise appealable to the Board, the Commission will have full responsibility for deciding the matter. In adjudications of dismissals, or similar types of actions appealable to the Board the amendment establishes procedures to assure the Board and the Commission work together to resolve any differences between them at the agency level. So that neither agency has the ultimate authority to override the views of the other, it provides for automatic review by the Court of Appeals where the two agencies cannot resolve their differences in a particular case.

In a similar vein, the section establishes an orderly and workable method for assuring OPM participation in Board proceedings and a means for OPM to appeal Board decisions to court where the Board and the Director have substantial disagreements about the proper interpretation or direction of the government's personnel laws.

Section 7701 (a) - (f). Appellate procedures

Section 7701 provides for the processing of adverse actions and other appeals within the jurisdiction of the Merit Systems Protection Board. The Board may refer any case appealable to it for adjudication to an appeals officer or to an administrative law judge who would have the authority to decide the case.

Sections 7701 (b) and (c) govern the type of hearing an employee must receive before the Board. The Committee amended this provision

of the bill to make it absolutely clear that an employee would receive a full evidentiary hearing in any case where there is a dispute as to any genuine and material issue of fact—that is, a dispute as to facts which must be resolved before a decision can be reached, and which may be most appropriately considered and resolved through the traditional adjudicatory methods used in evidentiary hearings. This would include instances, for example, where oral testimony and cross-examination is the best way to test the credibility of the witnesses. The bill was amended by the Committee to specifically provide that in such cases an evidentiary hearing should include the traditional right of cross-examination. In any case involving removal of an employee from the Federal service, the Board, because of the importance of the case, must provide that the case be heard by an administrative law judge selected according to the especially demanding procedures specified in the Administrative Procedure Act, or the Board must assign the case to one of its more qualified and experienced appeals officers.

Where there is no dispute about the facts, the presiding officer may avoid holding an evidentiary hearing since in these cases a full hearing is unnecessary. The Committee amendment specifies the procedure either party must follow if it requests summary judgment on the grounds there are no factual disputes in the case. The wording adopted by the Committee assures the employee a full opportunity to present his case before a decision is made. The presiding officer may authorize the conduct of discovery procedures so that the employee has a chance to assemble his case before a decision on the summary judgment motion is rendered. This is especially important because often the agency alone will possess the records the employee needs to successfully argue his case. The administrative law judge or appeals officer may afford the parties the right to an oral argument before a decision is reached on the summary judgment motion.

Subsection (d) establishes the standards that govern Board review of an adverse action.

As in the case of the standards governing appeals from actions based on unacceptable performance, the bill changes the applicable standards to avoid unnecessary reversal of agency actions because of technical procedural oversights, or because the judgment of the agency is not given sufficient weight. However, the Committee felt that the agency should have to meet a heavier burden of proof when it sought to take an adverse action against an employee for misconduct than when the action was based on unacceptable performance. In the case of misconduct, the case is more susceptible to the normal kind of evidentiary proof, and the nature of the proceeding is more disciplinary in nature.

Currently, when an agency takes adverse action against one of its employees, it must prove by a preponderance of the evidence that the action will promote the efficiency of the service. Under the legislation, the Board would sustain an agency decision unless there was—

- (1) Procedural error which substantially impaired his rights;
- (2) Prohibited discrimination;
- (3) The agency decision is unsupported by substantial evidence on the record taken as a whole; or

(4) The agency action involved a prohibited personnel practice or was otherwise contrary to law.

As under current law, the agency would continue to have the burden of going forward with its case first, and the burden of convincing the decision maker in the end that its action was lawful. There must be substantial evidence in the record supporting the agency action. In these two respects S. 2640 as reported differs from the original bill, which placed the burden on the employee, and only required that the agency action not be arbitrary or capricious.

It is intended that the standards adopted by the Committee impose upon an agency a higher standard of proof than will be applicable when an agency action is based on unacceptable performance. However, it is intended that the overall effect of the new standards will be fewer reversals by the Board or the courts of adverse actions taken by the agencies.

Under section 7701(e), the decision of the appeal by the presiding officer shall be final unless a party to the appeal, or the Office of Personnel Management, petitions the Board to reopen the case not later than 30 days after receiving notice of the decision, or unless the Board reconsiders a case on its own motion. The 30-day limit may be extended by the Board for good cause shown. A case may be reopened by a single member. The section eliminates the intermediate appeals stage now provided parties through the Civil Service Commission's Appeals Review Board. This change should help expedite final Board action, while assuring that more cases will be reviewed by the Board itself than currently are reviewed by the members of the Civil Service Commission.

A Committee amendment to this subsection limits the occasions on which the OPM could petition the Board for review to only those instances where the OPM director first determines that the decision is erroneous and that, if allowed to stand, the decision would have a substantial impact on the administration of the civil service laws within OPM's jurisdiction. The OPM should limit the cases in which it seeks the review by the Board to those that are exceptionally important.

Section 7701(g). Consolidation of appeals

Subsection (g) authorizes Board officials to consolidate appeals filed by two or more appellants, and to join two or more appeals filed by the appellant. Under the present system, Commission appellate officers process as separate cases similar appeals or complaints which are filed by different individuals, except when those individuals consent to combining the appeals and complaints for processing. Appellate offices also process separately more than one appeal or complaint received from the same individual. It is apparent, however, that cases involving the same or very similar facts or circumstances or issues can be processed more expeditiously and efficiently if they are combined. The legislation provides the Board and its appeals officers with clear authority to do so. However, this action may not be taken if it would prejudice the rights of parties. Before any action is taken under this authority, the parties should be given notice and an opportunity to present their views in some form.

Sections 7701(f), (h), and (i). Procedures in appeals involving issues of discrimination

Subsections (f), (h) and (i) contain the provisions in section 7701 chiefly governing Board consideration of adverse actions involving charges of discrimination. The procedure will work as follows:

1. Whenever an agency takes an action which involves the kind of action that the employee could appeal to the Board, such as removal or reduction in grade, the employee must appeal the action to the Board if it wishes any administrative review of the agency action. (Subsection (h)) The appeal must be to the Board whether the employee alleges only that the agency action was unlawful under the laws prohibiting discrimination, or the employee alleges only that the procedural and substantive protection afforded him under the personnel laws in title V were violated, or he alleges a violation of any combination of these different laws. The Board has jurisdiction whether the employee raises the discrimination laws as a defense or answer to the agency action, or whether the employee files a separate complaint against his employer under the anti-discrimination laws for proposing to take the appealable action against him. If the employee does file a separate discrimination complaint, subsection (f)(2) specifies that the agency shall have no more than 60 days to resolve the complaint. At the end of that time both the adverse action and the discrimination complaint must be appealed as a single action to the Board.

The jurisdiction of the Board is determined entirely by the nature of the personnel action taken, not by the kind of legal or factual arguments raised or the procedures used to raise the discrimination issue. Similarly, an employee may file a discrimination grievance with the agency on the basis of an action by the agency which is not itself appealable to the Board. Separately, the agency may propose to take an action against the employee of the kind appealable to the Board. Proceedings under both actions should be a part of the record considered by the Board. The Equal Employment Opportunity Commission should defer any action on the separate grievance not involving an appealable action until the agency action in the appealable matter has been finally resolved.

Class actions, as well as individual complaints, involving discrimination issues are equally subject to the Board's jurisdiction.

The procedures specified in this bill do not alter the right of any employee to file a case in Federal district court after 180 days now provided by title VI of the Civil Rights Act of 1964, as amended. This alternative route will be available to the employee at any point during the procedure in accordance with the time requirements in title VII.

2. If the employee wishes to appeal the agency action the matter must be appealed to the Board. The Board will be the sole place where the factual record in the case is made. (See subsections (h) and (i)(3)).

3. If the matter is appealed to the Board, the Board must notify the Equal Employment Opportunity Commission as soon as it becomes apparent that there will be involved, or may be in-

involved, the application to Federal employees of any anti-discrimination law for which the Commission is in part responsible. (Subsection (i) (1)). Subsection (h) spells out the anti-discrimination laws involved. They are Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the Age Discrimination in Employment Act of 1967, and the Rehabilitation Act of 1973 prohibiting discrimination on the basis of handicapping condition. Upon receipt of the notice, the Commission will be able to participate fully in the consideration of the case before the Board. During the initial consideration of the issue before an appeals officer, it may present what facts it wishes through calling witnesses of its own or other means. It may cross-examine witnesses, and raise legal arguments. Through this procedure the Commission may make sure that from the beginning the record reflects its concerns and views.

Subsection (f) will govern the conduct of an appeal involving discrimination. This subsection specifies that the appeals officer of the Board will be the one responsible for making the decision, either on the basis of the written record, or after conducting an evidentiary hearing in those cases where the appeals officer determines an evidentiary hearing is required by Board regulations. The appeals officer appointed under subsection (f) to hear the case will be the same kind of appeals officer used by the Commission to consider other kinds of appealable actions. The other procedures in section 7701 governing appealable actions generally, such as those governing the conduct of evidentiary hearings and the granting of summary judgments, will also continue to govern whether or not violation of the anti-discrimination laws is alleged.

4. Following a decision by the appeals officer, the Commission may petition the Board to reconsider the decision. (Subsection (e)). In order to assure resolution of any differences between the Board and the Commission as early in the process as possible, the Commission should seek full Board review whenever it has important differences with the way the appeals officer decided the case, rather than waiting until the matter is finally decided by the Board, and then requiring subsequent referral to the Commission. For the same reasons, the Board should consider carefully any Commission request under subsection (e). The Commission may request Board reconsideration of an appeals officer decision even if the Commission did not participate in the proceeding before the appeals officer. If the Commission believes that the factual record in the proceeding is inadequate, it may urge the Board to remand the proceeding to the appeals officer for such further development of the record as may be required.

5. Only after the Board completes action on the matter by issuing a final administrative decision does the Commission have an opportunity to reconsider the decision and order the Board (subsection (i) (3)). The Commission may reconsider such decision and order either upon a petition by the employee who brought the proceeding before the Board in the first place, or on its own initiatives. In order for the Commission to reconsider the Board's action, however, the Board's decision and order must have a sub-

stantial impact on the general responsibilities of the Commission for implementing the anti-discrimination laws in the federal work sector as a whole. Thus, decisions and orders which propel case law in a new direction, or which raise significant conflicts with the policies or interpretations of the Commission, may be considered by the Commission. Board actions in individual cases where the significance of the case is limited to its particular facts—so that the decision and order does not have general applicability—should not be considered. The Commission has 30 days from the date of the Board's final decision and order to decide whether to consider it. The Commission may invoke jurisdiction under this subsection only if it first explains in a written finding how the decision and order of the Board may have a substantial impact on its administration of the anti-discrimination laws. If, after 30 days, the Commission has not decided to reconsider the case, the original decision and order of the Board becomes the final agency action in the matter. (Subsection (i) (2))

6. Upon reconsidering the decision and order of the Board, the Commission may review the entire record in the case developed by the Board. It may receive additional legal arguments from the parties if it wishes. It may not, however, reopen the factual record and take additional evidence. Nor may it supplement the factual record in the case by receiving affidavits or the like. The Commission has a total of sixty days from the time the Board issued its decision and order to review the record, and act. The Commission may take one of two actions. It may concur in the decision and order of the Board; or issue another decision and order.

If the Commission concurs in the Board's decision and order, that concludes the matter at the agency level. The decision and order of the Board becomes the final agency action in the matter not subject to any further consideration at the administrative level. ((subsection (i) (3) (A) and (i) (4))

The extent of the authority of the Commission to issue, in the alternative, a different decision and order is spelled out in subsection (i) (3) (B). The Commission may propose a difference order and decision only to the extent that such differences are supported by, a written finding that in its view the Board decision was wrong in one of two ways. Either the Commission may conclude that the Board's interpretation of the meaning of any anti-discrimination statute, or any rule, regulation, or policy direction issued thereunder, was wrong as a matter of law. Or the Commission may conclude that taking all the evidence in the record, as a whole, the Board's application of such laws to the evidence in the record on the issue of discrimination can not be supported as a matter of law.

7. When the Commission does issue a different proposed order and decision the matter must go back to the Board. (Subsection (i) (5)). The Board must reconsider its earlier decision and order in light of the Commission's differing interpretation of the law and—within 30 days—take final agency action on the matter. In those 30 days the Board may—if it finds it necessary because of the decision and order of the Commission—reopen the record and

take further evidence. This should happen only in the most extraordinary circumstances. The Board and the Commission should cooperate in developing the factual record at the time the matter is initially considered by the Board. The burden and delay imposed on the parties by reopening the record at this stage of the proceeding should dictate against it except for the most compelling reasons. The decision of the Board whether or not to reopen the case and take additional evidence on the case is a matter entirely within its discretion. It need not do so unless it concludes it is the best course to follow.

Upon reconsidering its decision, the Board may either

- (1) Adopt the order of the Commission ;
- (2) Reaffirm its original decision and order ; or
- (3) Issue another decision and order which does not follow either the Commission's proposed order and decision, or its own original decision and order.

If, under the first option, the Board adopts the proposed order of the Commission, the Board's action constitutes final agency action in the matter. The first option applies in any instance where the Board adopts the relief, or otherwise issues a final order, that is the same as what the Commission proposed. For this first option to be applicable, the Board need not endorse every part of the Commission's legal reasoning, as reflected in its proposed decision. What is determinative is whether the Board orders the same action as the Commission. If so, that is the end of the matter under this subsection.

8. If the Board concludes against adopting the proposed Commission order, it means there still exists an unresolved dispute on a question of law between the two agencies. The Committee felt that in such instances neither agency should have the authority to overrule the view of the other. Where such a dispute persists after the repeated procedures available to both agencies to resolve their differences at an earlier stage, the Committee felt that the matter was of sufficient importance, and the legal issues well enough drawn, that the Court of Appeals should consider the matter and resolve the differences.

Accordingly, in these cases the matter must be immediately certified to the Court of Appeals for the District of Columbia. (subsection (i) (5)). The appeal follows automatically. Neither agency has the right or obligation to decide whether the appeal should be brought. Neither agency should be considered as appealing the action of the other. Since the Board will be the last agency to have the record before it, it will have the ministerial duty of deciding what should be a part of the record and seeing to it that the record is actually forwarded to the Court.

If a matter is certified under this section it may be several months before the Court of Appeals may act. The Committee therefore felt some interim relief at the administrative level should be authorized so that the employee is not unduly burdened by the inability of the two agencies to resolve their differences. Subsection (i) (5) therefore authorized one of the agencies—the Commission—to grant certain interim relief in its discretion upon

petition by the employee, where it is necessary to reduce exceptional hardship the employee might otherwise incur. The provision specifies that the Commission may not issue interim relief which prejudices the final resolution of the matter by awarding backpay, reinstating the employee, or otherwise reversing or staying the agency action under consideration by the Court. Where an agency has dismissed an employee on the grounds of unacceptable performance, however, the Commission may prohibit the agency from disclosing to future employers the agency's findings about the employee's performance.

9. Upon appeal, the Court should review the entire record. (Subsection (i) (5)). It must decide the proper interpretation of the applicable statute and related law. It must decide whether the Board's application of the law to the evidence in the case was in fact reasonable, or whether the Commission was correct in concluding that the Board's conclusion in such matters was unsupported as a matter of law. In applying the law, the Court should pay due deference to the respective expertise of each agency. For example, the Commission's interpretation of the meaning of policy directives issued by it under title VII of the Civil Rights Act of 1964, as amended, or other antidiscrimination statutes is entitled to appropriate weight, just as is the Board's interpretation of the civil service laws under title V of the U.S. Code. In deciding, however, how to resolve any conflicting goals or standards caused by applying both the personnel rules and principles, and the anti-discrimination rules and principles to the same case, the Court will have to reach a decision on its own, without prejudicing the matter by according greater presumptive weight to how one agency or the other would resolve the conflicts.

The Court of Appeals should reach a decision, and remand the matter to the Board to take such further action as required by the Court.

The procedures described above governing discrimination cases is different from those originally proposed in Reorganization Plan No. 1 of 1978. Upon enactment the procedures outlined in this bill shall supercede anything in the Reorganization Plan that conflicts directly or indirectly with the procedures established by this bill. Section 804 (a) of the bill so specifies. This will cause no added difficulties since the President, at the request of this Committee, has delayed implementing the applicable parts of Reorganization Plan No. 1 until the Committee has had an opportunity to act on this legislation.

Section 7701 (j)-(m). Miscellaneous matters concerning appeal

Section 7701(j) requires an agency to pay an employee's reasonable attorney fees in proceedings before the Board if the employee is the prevailing party, and the Board determines that the agency's action was taken in bad faith. The Civil Service Commission currently does not have the authority to require agencies to pay the attorney fees of employees who prevail in their appeals. Employees whose agencies have taken unfounded actions against them may spend a considerable amount of money defending themselves against these actions, they cannot be reimbursed for attorney fees upon prevailing in their appeals to the Commission. Instead, they must file civil actions against the

Government in order to obtain a review of their requests for reimbursement.

The legislation remedies this problem by authorizing the Board members and hearing officials to require payment, by agencies which are losing parties to proceedings before the Board, of attorney fees to the employees who prevailed. Payment is only required when it is warranted on the grounds that the agency's action was taken in bad faith. This may occur, for example, when the action brought is wholly unfounded. Or when there is evidence the agency brought the action to harass the employee or to exert improper pressure on the employee to act in certain ways. The circumstances justifying the award of attorney's fees is left to the discretion of the Board to develop in light of its experience. The award of attorney's fees should not become, however, the ordinary practice in cases which the employee wins.

On the other hand, statutory law already provides for the award of attorney fees whenever a party in a discrimination suit prevails. The section preserves the right of the Board to award attorney fees under this different standard whenever it finds the employee's rights under the laws prohibiting discrimination have been violated.

Section 7701(k) provides that matters subject to the Board's appellate jurisdiction could be settled instead by methods provided for by the Board under its regulations. Suitable forms of conciliation, mediation, arbitration, and other methods mutually agreeable to the parties could be used. This would give the Board the opportunity to experiment with, and develop, efficient and effective alternatives for resolving disputes concerning appealable matters.

The Committee added a new subsection (1) requiring the Board to establish and announce publicly the deadline for completing action on each appeal filed with it. The Committee study of Delay in the Regulatory Process, published as Volume IV of its Study on Federal Regulation, identified better agency management and planning as one of the prime ways regulatory delay could be reduced. The Committee unanimously adopted a recommendation that agencies make greater use of deadlines as a way to help eliminate delay. Experience at such agencies as the NLRB has shown that this is an effective way of reducing delay.

Administrative delay of cases before the Board is especially troublesome because it directly affects in significant ways employees who may not even have a job while the appeal is pending. At the least, the future course of the career of the employee is subject to great uncertainty for as long as the appeal is pending. In discrimination cases, the employee is entitled to start a de novo hearing in district court if agency proceedings are not completed in 180 days. Consequently the subsection contains, in addition to the requirement for the establishment of deadlines, a general direction to the Board to expedite, to the greatest extent possible, its proceedings. The procedures established by this subsection, and the section generally, should be administered consistent with this policy.

In addition to establishing a target for completing action on each appeal, the Board should also adopt procedures and staff to track the progress of each appeal to help assure that action on it will be completed by the announced deadline, and to act where delays do appear.

In setting deadlines the Board may be able to use categories established on the basis of its past experience as an aid in predicting how quickly any particular case may be completed. The deadline set for each individual case should be a realistic one, however, that accurately reflects the amount of time needed to complete the particular case. In establishing deadlines in any particular case the Board should also consider the extent of hardship the employee may suffer pending resolution of the case. Those cases where there is exceptional hardship should receive greater priority and a shorter deadline for completing action.

The subsection requires the Board to report to Congress on the success it has had in meeting both the original deadlines established for each case, and any revised deadlines it was necessary to adopt for particular cases.

Finally, section 7701(m) authorizes the Board to issue any regulations necessary to carry out the purpose of the section. The Board will determine, for example, how it will receive and process appeals and complaints, how much weight it will accord certain types of evidence, or the like.

Section 7702. Judicial review of decisions of the Board

Section 205 also adds to Title V a new Section 7702 detailing procedures for judicial review of the decisions of the Merit Systems Protection Board.

The Procedures:

- Eliminate unnecessarily detailed judicial reviews of cases handled by the Board;
- Encourage more uniform judicial decisions in the Federal personnel area;
- Place responsibility for supplementing inadequate case records on the Board rather than on the courts; and
- Recognize the finality of the Board's administrative decisions in a way that is characteristic of decisions of other independent agencies.

Section 7702(a) authorizes an employee or applicant adversely affected by a final order or decision of the Board to seek judicial review. The section applies to judicial review of all final orders or decisions of the Board, including discrimination and other appeals acted on by the Board under section 7701 and disciplinary actions taken by the Board against employees under section 1207. The wording is similar to the general provisions governing the right of review from agency actions found in Section 702 of the Administration Procedure Act. In the interest of clarity, the subsection specifies that when judicial review is sought of an agency action appealed to the Board under Section 7701, the aggrieved employee or applicant should bring the suit against the agency that took the personnel action in question, not the Board. This is consistent with present practice governing judicial review of agency actions first appealed to the Civil Service Commission. When the Board orders actions under any other sections, such as the imposition of a fine in a disciplinary action, under Section 1207, or declines to issue a permanent stay under Section 1205(a)(2), the suit would, of course, be against the Board itself. If an employee does seek judicial review of an agency action reviewed by the Board,

the Board has the right to intervene in the proceeding. This will be particularly useful where the appeal raises questions of particular significance to the Board, such as the validity of the procedures followed by the Board in the case. Participation by the Board in the court proceedings would not involve the Board, except in the most exceptional cases, in the introduction of evidence of its own.

Subsection (b) specifies the forum in which an employee or applicant may bring the review proceeding. Currently employees who wish to challenge Commission decisions generally file their claims with U.S. District Courts. The large number of these courts has caused wide variations in the kinds of decisions which have been issued on the same or similar matters. The section remedies the problem by providing that Board decisions and orders (other than those involving discrimination complaints and determinations concerning life and health insurance) be reviewable by the Court of Claims and U.S. Courts of Appeals, rather than by U.S. District Courts.

Under the anti-discrimination laws an employee has 30 days from the final agency action to initiate a de novo district court proceeding. District court is a more appropriate place than the Court of Appeals for these cases since they may involve additional fact-finding. Furthermore, discrimination complaints involving employees outside the Federal government are now considered by U.S. District Courts. To encourage uniformity in judicial decisions in this area both kinds of cases should continue to be considered by the U.S. District Court. The section therefore exempts from the general requirement that employees appeal to the Court of Appeals or Court of Claims those suits brought pursuant to the anti-discrimination laws. This includes any type of anti-discrimination statute, even if not specifically cited in the section, if its judicial review provisions incorporate by reference, or otherwise follow, one of the statutes actually cited. Since U.S. District Courts are specifically given jurisdiction over life and health insurance cases under sections 8715 and 8912 of Title V, these special provisions are not amended either.

In the case of actions appealed to the Board involving allegations of discrimination, final agency action for purposes of obtaining judicial review does not occur until completion of the procedures permitting the Equal Employment Opportunity Commission, as well as the Board, to consider the matter. Thus, the thirty day period the employee has in discrimination cases to go to District Court after final agency action will only begin to run after both agencies have considered the matter according to the procedures in subsection (i), or it is apparent that the Equal Employment Opportunity Commission will not consider the case. The latter result will occur only after the Commission has specifically declined to review the case, or thirty days from the date of the Board's original decision and order have elapsed, and the Commission has not decided to consider the case under subsection (i) (3). The bill specifies that if an employee decides to resort to district court after the Board issues a new decision and order, or reaffirms its original decision, after consideration by the Commission, the otherwise automatic certification of the case to the Court of Appeals under section 7701 (i) (5) may not go forward.

The Court of Claims and U.S. Court of Appeals shall review cases filed with them under this section to determine whether the decision

was arbitrary or capricious and not in accordance with the law, and whether the procedures required by law or regulations were followed. If the court determines that further evidence is necessary, it shall remand the case to the Board for further processing as appropriate. The Board shall file with the court a record of its proceedings following the remand. The Board's findings of fact shall be conclusive when supported by substantial evidence in the administrative record. In reviewing the Board's factual findings, the Court must determine whether the findings satisfy the particular standards of proof applicable to the agency action in question. Court review of the factual findings will be less vigorous therefore in the case of an action based on unacceptable performance (Section 4303(f)) than an action based on misconduct (Section 7701(d)). Likewise, agency actions should be reversed because the agency's procedures were in error only if the procedures followed substantially impaired the rights of the employees.

Finally, subsection (d) provides that the Director of the Office of Personnel Management may request a review of any final decision or order of the Board involving personnel management laws, rules, and regulations for which the Office of Personnel Management is responsible by filing a petition for judicial review with the U.S. Court of Appeals for the District of Columbia.

Where there is involved Board action under its Section 7701 appellate jurisdiction, the suit by OPM would not be against the Board, but the Board would have the right to appear in the proceedings.

The Committee amended this section to emphasize that the OPM should seek judicial review only in those exceptional cases where it finds that the Board erred, as a matter of law, in interpreting the civil service laws, and that the erroneous decision will have a substantial impact on how aspects of the civil service rules are interpreted in the future. The Director of OPM should not seek judicial review if the potential effect of the decision will be limited to the facts of the case. In order to avoid unnecessary appeals by the Director, the provision also requires the Director to petition the Board for reconsideration of its decision in those cases where the Director was not involved in the case at the Board level. This will make sure the Board has an opportunity to consider the concerns of OPM before suit is brought. The Director, like any other petitioner, is required to seek review within 30 days of the decision of the Board. While an employee or applicant aggrieved by the agency action is entitled as a matter of right to judicial review, this will not be the case when the Director seeks review. The subsection specifies that judicial review shall be at the discretion of the court. If it determines, for example, that the issues raised will not have a substantial impact on the administration of civil service laws, or if a separate review proceeding in the same case has been brought by the employee in a different circuit, the court may decline to accept the petition for review.

SECTION 206. TECHNICAL AND CONFORMING AMENDMENTS

Section 206 of the bill amends section 2342 of title 28, by adding final orders of the Board to the list of matters over which the Court of Appeals has exclusive jurisdiction.

TITLE III—STAFFING

This title authorizes (a) Federal agencies to establish programs for student volunteer employment as part of an educational program where student volunteers would not displace other Federal employees, (b) the President to establish periods of probation for new appointments to the competitive service or individuals appointed to supervisory or managerial positions, (c) agencies to establish training programs for employees to prepare such employees for placement in other Federal agencies, and (d) voluntary immediate retirement for employees affected by major reorganizations in their agencies.

SECTION 301. VOLUNTEER SERVICES

Section 301(a) establishes agency authority for student volunteer services by adding a new Section 3111 to Title 5.

Section 3111. Acceptance of Volunteer Service

Subsection 3111(a) of the new section defines student as an individual who is enrolled, not less than half-time, in a high school, trade school, technical or vocational institute, junior college, college, university, or comparable recognized educational institution. An individual who satisfies this definition is not deemed to lose status as a student during the interim between school years if this interim is not more than 5 months and if the Office of Personnel Management is satisfied that the individual has a bonafide intention of continuing to pursue a course of study or training immediately after the interim.

Subsection 3111(b) explains the conditions under which the head of an agency may accept voluntary services. The service must be performed by a student, as defined in subsection (a), with the permission of his or her school, as part of an agency program to provide meaningful educational experience for the student volunteer. Voluntary services must be uncompensated and cannot be accepted if they will displace Federal employees.

Subsection 3111(c) explains that a volunteer is not considered a Federal employee for the purposes of any Federal law except for injury compensation and tort claims. The exclusionary language of subsection (c), when read with subsection (b), precludes payment for voluntary services under the Fair Labor Standards Act of 1938, as amended, or any other statute providing for the compensation of Federal employees.

Subsection 301(b) provides the conforming amendment to Title V, United States Code.

Subsection 301(c) provides for probationary periods for Federal employees by amending Section 3312 of Title V, United States Code.

Subsection (a) (1) of Section 3321 continues present law concerning initial probationary periods before appointment to the competitive service becomes final. Subsection (a) (2) authorizes the President to issue orders and directives which provide for a period of probation before an initial appointment to a supervisory or managerial position becomes final. Subsection (b) explains the action to be taken if an individual in a supervisory or managerial position does not satisfactorily complete this probationary period.

Under present law, persons initially transferred, assigned, or promoted to supervisory or managerial position may be removed only through the application of formal adversary proceedings. The effect of this amendment is to allow the removal of an individual transferred, assigned, or promoted to a supervisory or managerial position for the first time, if he or she does not satisfactorily complete the period of probation. The individual will be returned to a position of no lower pay and grade than the position occupied by the individual prior to the supervisory or managerial assignment. Although an individual may be serving subject to a probationary period under subsection (a) (2), an agency may still institute adverse action proceedings for cause unrelated to supervisory or managerial performance and the individual will have full appellate rights in those circumstances.

Subsection (a) (2) of Section 3321 applies only to persons who are appointed to supervisory or managerial positions after completing the probationary period now required by law. Thus, an individual who enters Federal employment in a supervisory or managerial position will be subject to the probationary period specified in subsection (a) (1).

Sections 301 (d) and (e) repeal Section 3319 of Title 5, United States Code, concerning the eligibility of more than two members of any one family to obtain jobs in the Federal competitive service. Enacted principally as a measure to prohibit nepotism in 1883, the members of family restriction has become obsolete. Now, in addition to the safeguard provided by the merit system itself, a strong antinepotism law (5 U.S.C. 3110) specifically prohibits what the members of family legislation attempted to do indirectly. Nepotism is also specified as a prohibited personnel practice in Title I of this bill.

SECTION 302. TRAINING

Section 302 amends Section 4103 of Title 5, United States Code, concerning training programs for Federal employees by allowing an agency to train its employees for placement in another agency if the employees are slated for separation under conditions which would entitle them to severance pay under Section 5595 of Title 5. Before authorizing such training, the agency is required to obtain verification from the Office of Personnel Management that there is a reasonable expectation of placement in another agency. The agency is required to consider, when selecting an employee for such training, the present skills, knowledge, and abilities of the employee, the employee's capability to learn new skills and acquire new knowledge and abilities, and the benefits to the Government resulting from the retention of competent employees.

SECTION 303. TRAVEL, TRANSPORTATION AND SUBSISTENCE

Section 303 amends Section 5723 (d) of Title 5, United States Code, to allow the Office of Personnel Management to delegate its authority to determine positions for which a manpower shortage exists for purposes of determining if travel expenses may be paid pursuant to that Section.

SECTION 304. RETIREMENT

Section 304 amends Section 8336(d) (2) of Title 5, United States Code, concerning immediate retirement of employees in reduction of force situations.

Under present law an employee may voluntarily apply for an annuity under this section if: (1) his or her agency is involved in a major reduction in force as determined by the Civil Service Commission; (2) the employee is working in an agency or agency installation within which the Commission has designated the major reduction in force retirement provisions to be applicable; and (3) the employee meets the minimum age and service requirements required for a regular discontinued service annuity (i.e., 20 years of creditable Federal service and minimum age 50, or 25 years of creditable Federal service with no minimum age requirement). This bill would expand the coverage of the major reduction in force retirement provisions to cover all situations included in the definition of "reorganization", as determined by the Office of Personnel Management. In effect, this proposed amendment would permit an employee to retire if his or her agency was engaged in a major reduction in force, a reorganization or a major transfer of function, provided that the Office of Personnel Management approved the use of this special retirement authority. A "major transfer of function" is added as a concept meaning the movement of a continuing function, for example, the work of an office from one place to another, even though the function might remain within the same agency.

TITLE IV—SENIOR EXECUTIVE SERVICE

Title IV contains one of the most significant elements of the Civil Service Reform Act: Provision for the creation of a corps of top management leaders in a Senior Executive Service. The greatest asset and strength of any government is its top leadership. This is particularly true for the U.S. Government, which is the largest employer in the Nation. Its programs are far-reaching and complex, and they must be conducted with great sensitivity to conflicting public and private interests and with impartiality and compassion. Meeting this great responsibility requires strong executive leadership, which can respond to rapidly changing conditions and circumstances surrounding Federal programs and still chart a course which takes into account the national interest, the achievement of presidential and congressional goals, and simultaneously maintains the soundest management techniques.

The committee believes that the establishment of a Senior Executive Service represents a major step toward the achievement of a goal of the most highly motivated and highly competent Federal service leadership possible.

Title IV provides for the establishment of a new Senior Executive Service to include most of the top executive positions in the Federal service. There are about 9,200 of these positions in the Federal Government. It contains provisions regarding various types of appointments in the Senior Executive Service, development programs for the Senior Executive Service, removal and reinstatement, performance

appraisal systems, establishment and adjustment of pay rates, performance awards, and provisions necessary for the transition to the Senior Executive Service.

Title IV will

- allow agencies to reward executives through cash bonuses and awards for especially meritorious service;
- make tenure as executives contingent upon successful performance;
- permit reassignment of executives more expeditiously to meet shifting agency priorities;
- make it possible for career employees to serve in top-level policy jobs outside the competitive service without losing their status as career employees;
- place for the first time a cap on the total number of political appointments that can be made to top-level executive positions;
- permit more readily the movement among agencies of senior executives.
- guarantee career employees who do not remain in the executive service other positions in the Federal service;
- establish appraisal systems and procedures to protect members of the executive service from arbitrary personnel actions.

Title IV contains 15 sections. Sections 401 through 411 amend title 5 of the United States Code and govern the Senior Executive Service. Sections 412 through 415 contain provisions relating to the transition to the Senior Executive Service.

SECTION 401. COVERAGE

Section 401(a) amends chapter 21 of title 5, United States Code, by inserting after section 2101, a new subsection 2101(a), entitled the "Senior Executive Service." Section 401(a) also states that the "Senior Executive Service" consists of Senior Executive positions.

Section 401(b) excludes the Senior Executive Service from the definition of "competitive service" in subsection 2102(a) of title 5, United States Code.

Section 401(c) excludes the Senior Executive Service from the definition of "excepted service" in section 2103(a) of the United States Code. The purpose of subsections 401(b) and (c) is to make clear that the Senior Executive Service is a separate service and not a part of either the competitive or the excepted service.

Section 401(d) provides that the hiring of any individuals from outside the Federal service to serve in the Senior Executive Service shall not be governed by the rules on preference eligibles.

Subsection 401(e) amends the chapter analysis to include the new section 2101(a).

SECTION 402. AUTHORITY FOR EMPLOYMENT

The key provisions for establishing and governing the Senior Executive Service are contained in this section, which adds a new subchapter II to chapter 31 of title 5, United States Code.

Section 3131 formally establishes the Senior Executive Service for the purpose of insuring Federal executive management of the highest

quality and sets forth the following objectives for administering the Service: provide a compensation system to attract and retain excellent Government executives; link quality performance with compensation and retention; assure executive accountability for the effectiveness and productivity of subordinates; make tenure contingent upon successful performance; recognize exceptional accomplishment; provide flexibility in executive assignments to best accomplish the agency mission; provide severance pay and placement assurance for those removed from the Service for nondisciplinary reasons; protect employees from arbitrary actions; provide program continuity and policy advocacy in public programs; maintain a merit system free of improper political interference; ensure accountability for honest and efficient Government; assure faithful adherence to laws relating to equal employment opportunity, political activity, and conflicts of interest; and provide for executive development.

The committee felt that in addition to the purposes included in S. 2640, as introduced, it should be made clear that Senior Executive Service executives were to be held accountable for the performance of those working under them. It, therefore, added subsection 3131(a) (3) which provides that the Senior Executive Service shall be administered in such a manner as to "assure that executives are accountable and responsible for the effectiveness and productivity of employees under them."

The committee expects that agency heads will use this subsection as a means to reward executives whose employees perform effectively and to take appropriate action when executives do not perform adequately.

Section 3132. Definitions and Exclusions

Subsection (a) (1) states that for the purposes of this subchapter "agency" means an executive agency, but does include a Government Corporation and the General Accounting Office or: (1) any agency or unit thereof excluded from coverage by the President under subsection (c) of this section; (2) the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, as determined by the President, an Executive agency, or unit thereof, whose principal function is the conduct of foreign intelligence or counterintelligence activities.

Subsection (a) (2) defines "Senior Executive Service position" as a position properly classifiable above GS-15 of the General Schedule and below Level III of the Executive Schedule, or their equivalents, in which an employee directs the work of an organization, is accountable for the success of specific programs, monitors organizational progress towards goals, supervises the work of employees other than personal assistants, or exercises other important policymaking or executive functions. S. 2640 as introduced included a more restrictive definition of a Senior Executive Service position. The committee added the condition "or exercises other important policymaking or executive functions" in order to allow the Office of Personnel Management the flexibility to include within the Senior Executive Service employees who, while they do not direct organization units or supervise a significant number of employees, do occupy important policymaking or executive positions within an agency.

Subsection (a) (2) also provides that, except for the Foreign Service, the term "Senior Executive Service position" shall not include any position to which an individual is appointed by the President by and with the advice and consent of the Senate.

Subsection (a) (3) provides that for the purposes of this subchapter "executive" means a member of the Senior Executive Service.

Subsection (a) (5) provides that for the purposes of this subchapter, "career reserved position" means any position in the SES which can only be filled by a career appointee.

Subsection (a) (5) provides that for the purposes of this subchapter "general position" means any position in the SES which may be filled by either a career or noncareer appointee or by a limited emergency or term appointment.

Subsection (a) (6) provides that for the purposes of this subchapter "career appointee" means an individual appointed to a Senior Executive Service position based on selection through a competitive staffing process consistent with Office of Personnel Management regulations and, in the case of initial appointment, approval of executive qualifications by the Office of Personnel Management.

Subsection (a) (8) provides that for the purposes of this subchapter "noncareer appointee" means an individual appointed to a Senior Executive Service position without approval of executive qualifications by the Office of Personnel Management.

Subsection (a) (8) provides that for the purposes of this subchapter "limited emergency appointment" means a nonrenewable appointment, not to exceed 18 months, to a position to meet a bona fide, unanticipated urgent need.

Subsection (a) (9) provides that for the purposes of this chapter "limited term appointment" means a nonrenewable appointment for for a term of 3 years to a position the duties of which will expire during that period.

Subsection (b) provides that for the purposes of paragraph (4) of section (a) of the section defining a "career reserved position," the Office of Personnel Management shall prescribe the position criteria and regulations governing the designation of career reserved positions. The designation of a career reserved position shall be made by the agency. The designation of a position as a general position is subject to post audit by the Office of Personnel Management.

Subsection (c) provides that agencies may apply to the Office of Personnel Management for exclusion of the entire agency or part of the agency from being required to place positions in the Senior Executive Service. The reasons justifying the exclusion must be included in the application. After review and investigation, the Office of Personnel Management will recommend to the President inclusion or exclusion of the agency or component. If the President makes a written determination of exclusion, the agency or component will be excluded from being required to place positions in the Senior Executive Service.

Subsection (d) declares that an agency or unit which is excluded from coverage under subsection (c) must make a sustained effort to bring its personnel system into conformity with the Senior Executive Service to the degree practicable.

Subsection (e) provides that the Office of Personnel Management may recommend revocation of such exclusion to the President at any time and that such exclusion may be revoked upon written determination by the President.

Subsection (f) requires the Office of Personnel Management to notify Congress if any agency or unit is excluded from the Senior Executive Service or if any agency exclusion is revoked.

Section 3133. Authorization for number of Senior Executive Service positions

Subsection (a) requires that each agency examine, in each odd numbered calendar year, its total needs for Senior Executive Service positions for the 2 fiscal years, beginning after such calendar year, and submit a written request to the Office of Personnel Management, in accordance with regulations prescribed by that Office, for authority to establish a specific number of Senior Executive Service positions.

Subsection (b) requires that the agency request submitted under subsection (a) shall be at such time and in such form as the Office of Personnel Management prescribes and shall be based on the following factors: (1) the anticipated program activity and budget requests of the agency for the 2 fiscal years; (2) the anticipated level of work to be performed by the agency in the 2 fiscal years; and (3) such other factors as may be prescribed from time to time by the Office of Personnel Management.

Subsection (c) requires that the Office of Personnel Management, after its receipt of each agency's request for a specific number of Senior Executive Service positions, and upon consultation with the Office of Management and Budget, authorize for each agency a specific number of Senior Executive Service positions and the number of positions in the entire Senior Executive Service. The requirement for consultation with the Office of Management and Budget recognizes the fact that executive personnel needs flow from approved programs and budgets. The authorizations are subject to congressional review as provided in section 3135 of title 5 as added by this act. This subsection also authorizes an unallocated pool of 5 percent of the number of allocated positions.

Subsection (d) states that the authorizations made under subsection (c) shall remain in effect until changed under subsections (e), (g) or (h) of section 3133.

Subsection (e) (1) permits agencies to submit a written request for adjustments to its authorized number of Senior Executive Service positions. The Office of Personnel Management may also make reductions in the number of positions assigned to a particular agency.

Subsection (e) (2) requires the adjustment request be submitted in such form as the Office of Personnel Management prescribes and to be based on the current budget and program activity in the agency.

Subsection (f) provides that the Office of Personnel Management may make changes in the allocations made under subsection (c), subject to subsections (e) and (f) of section 3133. Subsection (f) further provides that total adjustments during a fiscal year may not enlarge the Senior Executive Service beyond the number identified under provisions of subsection (c).

Subsection (g) provides that the Office of Personnel Management allocation of the number of Senior Executive Service positions will be effective on the next succeeding October 1 following the submission to the Congress of the report required by section 3135.

Section 3134. Limitations on noncareer Senior Executive Service appointments

Subsection (a) of section 3134 requires each agency to examine its needs for noncareer Senior Executive Service appointees for the next following fiscal year and to submit a written report to the Office of Personnel Management requesting authority to make a specific number of noncareer Senior Executive Service appointments.

Subsection (b)(1) charges the Office of Personnel Management with making an annual determination of the number of noncareer appointments to be made available to each agency with the provision that the number of noncareer appointees to the Senior Executive Service, governmentwide, must not exceed 10 percent of the total number of governmentwide Senior Executive Service positions.

Subsection (b)(2) provides that an agency with four or more Senior Executive Service positions may fill such positions only to the extent that the proportions of positions filled as noncareer does not exceed 25 percent or that proportion which was authorized in the agency as of the date of enactment of the Civil Service Reform Act of 1978, whichever is greater.

The committee added this subsection as a further protection against any possible political abuse of the Federal service. It would preclude any Administration from loading up one key agency or department with political appointments.

Subsection (c) authorizes the Office of Personnel Management to adjust the number of noncareer positions authorized under subsections (a) and (b) for emergency needs provided the number of noncareer executives, governmentwide, does not exceed 10 percent of the total number of Senior Executive Service positions.

Section 3135. Biennial report

Section 3135 (a) provides for a biennial report to each new Congress on the Senior Executive Service. The report will include data on the authorized and projected number of Senior Executive Service positions in each agency; exclusions from the Senior Executive Service of any agency or group of executives; percentages of executives at each pay rate; statistical data on the distribution and amounts of performance in each and such other information as the Office of Personnel Management considers appropriate. In order for Congress to be more fully informed about agency plans regarding Senior Executive Service positions, the committee added two additional requirements to what the biennial report must contain: the job descriptions of Senior Executive Service positions in each agency and an agency-by-agency projection of planned changes of Senior Executive Service appointments from career to noncareer and from noncareer to career status for the two fiscal years after the biennial report. The job descriptions required in the report may be in summary form.

Section (b) provides for an interim report to the second session of each Congress showing adjustments to the biennial report.

Section 3136. Regulations

Subsection (a) authorizes the Office of Personnel Management to prescribe regulations necessary to carry out the purpose of subchapter II of chapter 31 of title 5, United States Code, and amends the table of chapters for chapter 31 to include new sections regarding the Senior Executive Service.

Section 402(b) amends present section 3104(a) of title 5, United States Code, by adding the word "nonmanagerial" after the word "establish" so as to read, when amended, "(a) The head of an agency named below may establish *nonmanagerial* scientific or professional positions . . ." The word "nonmanagerial" has been added to make clear that the agency head's authority under section 3104(a) does not relate to the Senior Executive Service.

Section 402(c) provides that an agency head may not fill Senior Executive Service positions under the authority of section 3109(b) pertaining to temporary or intermittent contracts with experts and consultants.

SECTION 403. EXAMINATION, CERTIFICATION AND APPOINTMENT

Section 403(a) amends chapter 33, title 5, United States Code, entitled "Examination, Selection and Placement," by adding a new subchapter VIII entitled, "Senior Executive Service Appointment, Placement, Transfer and Development." The new subchapter VIII contains seven sections which are discussed separately below.

Section 3391. General provisions applicable to career executives

Subsection (a) provides that qualification standards for career reserved positions shall meet requirements established by the Office of Personnel Management.

Subsection (b) requires appointees to meet the qualifications of the career reserved positions to which they are appointed.

Subsection (c) states that the appointing authority is responsible for determining that a selectee meets the qualification requirements of a particular career reserved position.

The result of subsections (a), (b) and (c) is that the Office of Personnel Management will establish general executive requirements for career reserved Senior Executive Service positions.

The appointing authority will be responsible for determining that a selectee meets executive standards established for the particular position. In so doing, the appointing authority may factor in specific criteria related to knowledge of and experience in the program for which the executive is being recruited.

Subsection (d) prohibits discrimination for nonmerit factors such as age, race, national origin, handicapping conditions, sex, marital status, political affiliation and religion.

This subsection merely repeats for emphasis the prohibition described in section 2302(b) of this bill.

Subsection (e) provides that career appointees in the Senior Executive Service who accept Presidential appointments requiring Senate confirmation shall continue to be covered by the performance award, incentive award, retirement and leave provisions of the Senior Executive Service during the term of their Presidential appointments.

Section 3392. Career appointments to the Senior Executive Service

Section 3392(a) provides that career recruitment may (1) include all current Federal employees or (2) be open to both Federal employees and to persons outside of Government.

Subsection (b) states that the recruitment process must attempt to reach all groups of qualified applicants, including women and minorities.

Subsection (c) charges any agency executive resources board with the conduct of competitive staffing, subject to requirements established by the Office of Personnel Management.

Subsection (d) requires the Office of Personnel Management to appoint members of qualification review boards from within and outside the Federal service to certify the executive qualifications of career candidates for the Senior Executive Service, except that a majority of members of each such board shall consist of career executives. Members of the qualified review boards from outside the Federal service shall be persons knowledgeable about the field of public management and other occupational fields relevant to the type of occupation for which an individual is being considered. Subsection (d) also provides that the Office of Personnel Management shall set criteria for establishing executive qualifications for appointment as a career executive in the Senior Executive Service, which shall include: (1) demonstrated performance in executive work; (2) successful participation in a centrally sponsored or agency career executive development program approved by the Office of Personnel Management; or (3) unique or special individual qualities predictive of success to apply in those cases in which an outstanding candidate would otherwise be excluded from appointment.

S. 2640, as introduced, did not contain a requirement that a majority of any qualification review board be composed of career employees. The committee added this requirement in order to ensure that persons with experience and knowledge regarding the requirements of executive management in the Federal service play a large role in the recruitment of employees into the Senior Executive Service.

Under subsection (d), the recruitment of career appointments to the Senior Executive Service would proceed as follows. A Qualification Review Board, composed of a majority of career executives, would establish a set of general executive qualifications for the position being filled. The criteria would include those set forth in subsection (d). This screening process determines who meets the general executive qualifications test. At this point, an executive resources board from the agency would, in conjunction with the appointing authority, screen the applicants on the basis of criteria more specifically related to the executive position itself. The agency, for instance, might very well add in factors such as substantive knowledge of the program area or years of experience in the particular or similar program areas. The final selection by the appointing authority would be made from an evaluation of the applicants that takes into account these additional agency programmatic factors.

Subsection (e) requires employees with career status from other Government personnel systems to have their executive qualifications

approved by the Office of Personnel Management for a career appointment.

Subsection (f) states that discrimination on account of political affiliation is prohibited.

This subsection merely repeats for emphasis the prohibition described in section 2302(b) as added by title I of this bill.

Subsection (g) requires a 1 year probationary period for employees entering the Senior Executive Service under career appointments.

Subsection (h) requires that the title of each career reserved position be published in the Federal Register.

Section 3393. Appointments to general positions in the Senior Executive Service

Subsection (a) provides that each agency, after consultation with the Office of Personnel Management, shall establish qualification standards for all general positions. Such standards shall, to the maximum extent practicable, conform to qualification requirements established by the Office of Personnel Management for comparable career reserved positions. The appointing authority is responsible for determining that an individual appointed to a general position meets the qualifications established for that position.

Under subsection (a) the recruitment of executives for general positions would proceed as follows if the appointment is open to persons who are not members of the Senior Executive Service. The agency would first consult with the Office of Personnel Management regarding general executive qualification standards. These executive qualifications for the position would, to the maximum extent practicable, conform with such standards for comparable career reserved positions, but the final determination of the general executive qualifications would be the responsibility of the agency. The agency may appoint a noncareer executive to the position after determining that the individual meets any general or specific standards the agency has established for the job. Or the agency may appoint a career executive. In that case, the recruiting process would proceed in a manner similar to that of the recruiting process for career appointments; that is, the Office of Personnel Management would screen a pool of candidates for career appointments to the Senior Executive Service to determine if they met the general executive qualifications test. The agency executive resources board, in conjunction with the appointing authority, would evaluate the applicants on the basis of more specific job-related criteria. The final selection by the appointing authority would be made from an evaluation of the applicants that takes into account these additional agency programmatic factors.

Subsection (b) provides that employees given noncareer appointments do not acquire credit toward career status and may be removed by the appointing authority.

Subsection (c) prohibits noncareer appointments to career reserved positions.

Subsection 3393(d) provides that appointment or removal of a person to a general Senior Executive Service position in an independent regulatory agency shall not be subject to review or approval by an officer or entity within the Executive Office of the President. The com-

mittee added this subsection in order to ensure that independent regulatory agencies are not subject to political control in the appointment of their top noncareer executives. The committee feels that this insulation from the White House in appointments is necessary to maintain the independence of these agencies, as intended by the Congress.

Section 3394. Limited appointments to the Senior Executive Service

Subsection (a) provides that limited emergency appointments to the Senior Executive Service may only be made when filling new positions established in a bona fide emergency as defined by the Office of Personnel Management regulations; may not exceed 18 months; are nonrenewable; and may be recruited for by the agency without regard to the competitive process.

Subsection (b) provides that limited term appointments may be made only for positions the duties of which will expire in three years or less; are nonrenewable; and may be filled by the agency without regard to the competitive process.

Subsection (c) provides that a career Senior Executive Service employee appointed under either type of limited appointment does not satisfy the probationary period requirement for the Senior Executive Service.

Subsection (d) requires Office of Personnel Management approval of use of limited appointment authority before making such an appointment.

Section 3395. Placement and transfer within the Senior Executive Service

Subsection (a) permits career appointees to: (1) be reassigned to a Senior Executive Service position within the same agency; (2) voluntarily transfer to a Senior Executive Service position in another agency; and (3) request assignment outside the Senior Executive Service, provided that the agency shall furnish to the executive at least 15 days before a reassignment under paragraph (h) (1) a written notification of the impending action.

The committee added the provision regarding the 15-day notice in order to give the SES executive ample notice of the impending action. It is the committee's intent that the written notification provided by the agency regarding the assignment include an explanation of the reasons for the transfer in terms of the agency's priorities and management of its executive resources. This provision is not intended to give the employee any new appeal rights.

Subsection (b) permits an executive with a limited appointment (limited emergency or limited term) to be reassigned to a position meeting the criteria under which the employee was originally appointed. However, continuous service in any one agency under a limited emergency appointment may not exceed 18 months, and under a limited term appointment such service may not exceed 3 years. An executive with a limited appointment may not be given a career appointment in the Senior Executive Service except under the competitive merit staffing process and may not be given another limited appointment in the same agency when the maximum period of service authorized for the original appointment has expired, until 1 intervening year has passed.

Subsection (c) states that an executive with a noncareer appointment may be reassigned or transferred to any general Senior Executive Service position in the same agency or in another agency, and may be appointed to a noncareer position outside the Senior Executive Service.

Subsection (d) prohibits involuntary reassignment or removal of a career executive from the Senior Executive Service within 120 days after the appointment of an agency head or after the appointment of the noncareer employee who is closest to the career executive in the supervisory chain of command, except where the reassignment or removal is the result of a corrective action involving misconduct, or an unsatisfactory performance rating given to the career executive prior to the appointment.

S. 2640, as introduced, merely provided for no removal or reassignment within 120 days after the appointment of an agency head. But in most cases it is a lower level noncareer supervisory employee who makes the decision regarding removal or reassignment. In order to carry out the clear intent of this subsection—that is, to protect Senior Executive Service employees from preemptory removal or reassignment during periods of supervisory transition—the committee added the proviso that Senior Executive Service employees could also not be transferred or removed from the Senior Executive Service within 120 days after the appointment of a noncareer employee who is closest to the career executive in the supervisory chain of command.

Section 3396. Development for and within the Senior Executive Service

Subsection 3396 (a) provides for the establishment of programs by the Office of Personnel Management or by agencies under criteria established by the Office of Personnel Management, for the systematic development of candidates for the Senior Executive Service and for the continuing development of members of the Senior Executive Service.

Subsection (b) requires the Office of Personnel Management to assist agencies in the establishment of development programs and to direct them to take corrective action if required to bring such programs into conformity with criteria established by the Office of Personnel Management.

Subsection (c) requires the Office of Personnel Management to encourage temporary service in a variety of agencies, in State or local governments, and in the private sector.

Subsection (d) provides for paid sabbaticals for career executives for up to 11 months plus travel and per diem costs when it will contribute to their career development. The purpose of the sabbatical period is to engage in study or unpaid work experience which will contribute to the individual's development and effectiveness in performing his official duties. An individual may not be granted more than one sabbatical in a 10-year period and must have had a minimum of 7 years prior service in positions with duties and responsibilities equivalent to the Senior Executive Service including at least 2 years of actual membership in the Service.

Section 3397. Definition

Section 3397 provides for the purposes of his subchapter, the terms "career reserved position", "career appointee", "general position", "limited emergency appointment", "limited term appointment", and

“executive” have the same meaning as such terms are given in section 3132 of this title.

Section 3398. Regulations

Section 3398 provides that the Office of Personnel Management may prescribe regulations necessary to carry out the purpose of subchapter VIII of chapter 33 of the United States Code. It also amends the table of sections for chapter 33 of title 5, United States Code.

SECTION 404. REMOVAL AND REPLACEMENT RIGHTS

Section 404 amends chapter 35 of title 5, United States Code, which deals with “Retention Preference, Restoration and Reemployment,” excluding the Senior Executive Service from subchapter I, and by adding a new subchapter V entitled “Removal, Reinstatement and Guaranteed Placement provisions of the Senior Executive Service.”

Section 3591. Removal from the Senior Executive Service

Subsection (a) provides that career employees can be removed from the Senior Executive Service: (1) During the 1-year probationary period; (2) for less than fully successful performance; or (3) for misconduct, neglect of duty, or malfeasance.

During the first probationary year in the SES, a career executive could be removed even though the executive had not been given a less than successful rating. The career executive would have no appeal rights in this circumstance.

Subsection (b) permits removal of limited emergency appointees by the appointing authority prior to the mandatory 18-month separation point.

Subsection (c) permits limited term appointees to be removed by the appointing authority prior to the mandatory 3-year separation point.

Subsection (d) states that noncareer employees may be removed at any time by the appointing authority. Employees covered by subsections (b), (c) and (d) may be removed at any time by the agency.

Section 3592. Reinstatement into the Senior Executive Service

This section permits reinstatement of a former Senior Executive Service employee who has career status to any Senior Executive Service position if the individual has successfully completed the Senior Executive Service probationary period, and the separation from the Senior Executive Service was not for misconduct, neglect of duty, malfeasance, or less than fully successful performance as defined in chapter 43.

Section 3593. Guaranteed placement in other personnel systems

Subsection (a) provides that a right to placement in a Federal service position outside the Senior Executive Service to those career status employees who were appointed to the Senior Executive Service from a career or career-type position within the civil service who, during the one year probationary period are removed from the Senior Executive Service for reasons other than misconduct, neglect of duty or malfeasance, or who, after the probationary period, are removed from the Senior Executive Service for less than fully successful performance.

Subsection (b) states that career executives who accept Presidential appointments outside the Senior Executive Service and then are removed (for reasons other than misconduct, neglect of duty, or malfeasance) are entitled to placement back into the Senior Executive Service, provided they apply to the Office of Personnel Management for such placement within 90 days after the separation from the Presidential appointment.

Subsection (c) states that under subsection (a) the position in which the employee is placed must be a continuing career position at least at the GS-15 level and be at either the salary held prior to appointment to the Senior Executive Service, or at a salary which is equal to the last Senior Executive Service base pay, whichever is higher. It also states that placement in a position outside the Senior Executive Service shall not cause the separation or reduction in grade of any other employee in the agency.

Subsection (d) states that a former Senior Executive Service member receiving retained pay will receive one half of each comparability increase under section 5305 if any until the employee's pay equals the top rate payable to his current position.

Section 3594. Definitions

This section provides that for the purpose of this subchapter, the terms "career appointee" and "Senior Executive Service position" have the same meaning as these terms have in section 3132 of this title.

Section 3595. Regulations

This section provides that the Office of Personnel Management shall prescribe regulations necessary to the administration of this subchapter.

Section 404(b) provides for amending the table of sections for chapter 35 of title 5, United States Code, to conform with the provisions of this chapter.

SECTION 405. PERFORMANCE RATING

Section 405 (a) amends chapter 43 of title 5, United States Code, by adding a new subchapter II entitled, "Performance Appraisal in the Senior Executive Service."

Section 4311. Senior Executive Service performance appraisal systems

Subsection (a) requires each agency to develop one or more performance appraisal systems with respect to Senior Executive Service employees. Such systems should: (1) Provide for systematic appraisals of job performance; (2) encourage excellence in performance; and (3) link performance with eligibility for retention and performance awards.

Subsection (b) states that each such performance appraisal system shall provide: (1) for written appraisals; (2) that the performance requirements be established at the beginning of the rating period and communicated to the employee; and (3) that each employee be shown his performance appraisal and rating, be given an opportunity to respond in writing, and have the rating reviewed by a higher managerial level.

Subsection (c) states that the Office of Personnel Management shall order corrective action if an agency performance appraisal system does not meet the requirements of this subchapter and the regulations prescribed thereunder.

Section 4312. Criteria for performance appraisals

This section states that executive success in the Senior Executive Service shall take into account both individual performance and organizational accomplishment. The criteria are to be based on such factors as: (1) Improvements in efficiency, productivity and quality of work or service; (2) the effectiveness and productivity of the employees for whom the executive is responsible; (3) cost savings or cost efficiency; (4) timeliness of performance and (5) the meeting of affirmative action goal and the achievement of equal employment opportunity requirements. S. 2640 as introduced did not include either the second or the fifth criteria listed above. The committee added criterion number two because of its belief that Senior Executive Service executives should be held responsible for the productivity and efficiency of their employees and that their own performance ratings should therefore include this specific evaluation. The committee added the equal employment opportunity factor to emphasize the importance of this aspect of the manager's responsibilities.

Section 4313. Ratings for managerial performance appraisal

Subsection (a) requires that each performance appraisal system must provide for at least annual ratings reflecting a number of levels of performance including one or more successful levels or ratings, a level which is minimally satisfactory, and an unsatisfactory level.

Subsection (b) requires that the head of each agency shall establish a system to appraise the performance of members of the Senior Executive Service. The system must include an agency performance review board which will evaluate the performance and accomplishments of executives in the agency in light of the specific goals and requirements established for each position. The board will advise the appointing authority who actually assigns the individual's performance rating. The evaluation must take place at least annually, except that no evaluation can be made of a career employee within 120 days following the beginning of a new Administration. Otherwise an unsatisfactory rating may be assigned at any time during the performance appraisal period. The evaluations are not appealable. The result of such evaluation is that: (A) career employees receiving a rating at a fully successful level may be given performance awards as described in section 5384 as added by this act; (B) an unsatisfactory rating requires corrective action such as reassignment, transfer, or separation from the Senior Executive Service. Employees who, twice in 5 years, receive an annual rating of unsatisfactory must be separated from the Senior Executive Service; (C) employees who, twice in 3 years, receive an annual rating reflecting performance which is less than fully successful must be separated from the Senior Executive Service.

Subsection (c) (1) provides that a performance review board, before conducting its own appraisal of an executive, shall receive from the executive's supervisor a preliminary appraisal and from the ex-

ective—if he chooses—a written response. The Board will conduct such further review as it finds necessary and advise the appointing authority in writing of its own appraisal.

Subsection (c) (2) provides that members of performance review boards shall be appointed in a manner to assure consistency and objectivity in performance appraisals and the appointment of members of the boards shall be published in the Federal Register.

Subsection (c) (3) provides that when a career executive is evaluated a majority of the members of the board shall also consist of career executives.

The committee added subsection (c) in order to strengthen and clarify the rights of career Senior Executive Service executives in relation to the Senior Executive Service performance appraisal system. S. 2640, as introduced, did not spell out in detail the process by which the performance review board and appointing authority would operate. Subsection (c) provides that the board would have before it when it undertakes its own appraisal both a preliminary appraisal by the executive's supervisor and a response from the executive. In addition, subsection (c) (3) provides that a career executive be appraised only by boards whose membership consists of a majority of career executives. S. 2640 as introduced had provided only that such boards contain one member in a career position. The committee felt that career SES executives should constitute a majority of the performance review boards when a career executive was being evaluated. In this way persons who are knowledgeable and directly involved in the day-to-day responsibilities of Federal executives will have a large voice in judging their peers. Their status as career executives will protect the appraisal from being unduly influenced by political considerations.

Subsection (d) provides that the Office of Personnel Management shall report annually to Congress on the activities of the performance review boards, on the number of individuals removed from the Senior Executive Service for unsatisfactory performance, and on the number of performance awards granted to Senior Executive Service executives.

Section 4314. Definitions

This section provides that for the purpose of this subchapter the terms "agency," "executive," and "career appointee" shall have the same meaning as such terms have in section 3132 of this title.

Section 4315. Regulations

This section provides that the Office of Personnel Management may prescribe regulations necessary for the administration of this chapter and that the table of sections for chapter 43 of title 5, United States Code, is amended to make it conform with the provisions of this bill.

SECTION 406. INCENTIVE AWARDS AND RANKS

Subsection 406 (a) amends chapter 45 of title 5, United States Code, by adding a new section 4507 entitled, "Incentive Awards and Ranks in the Senior Executive Service."

Section 4507. Incentive awards and ranks in the Senior Executive Service

Subsection (a) requires each agency to forward annually to the Office of Personnel Management information regarding career executives recommended for special rank. The Office of Personnel Management shall recommend to the President appointments to such rank. The President shall commission those selected. The ranks are (1) Meritorious Executive for sustained excellence and (2) Distinguished Executive for sustained extraordinary accomplishment.

Under subsection (b), no more than 5 percent of the members of the Senior Executive Service may be appointed to the rank of Meritorious Executive in a calendar year and no more than 15 percent of the active Senior Executive Service members may hold the rank at any time.

Subsection (c) permits no more than 1 percent of the active Senior Executive Service members to hold the rank of Distinguished Executive.

Subsections (d) and (e) provide for cash awards to Meritorious and Distinguished Executives. Meritorious Executives receive \$2,500 annually for a period of 5 years. Distinguished Executives receive \$5,000 annually for a period of 5 years. The annual payment of these awards are conditioned upon the person continuing in the Government employment in an active status in the Senior Executive Service. The committee decided that awards would not be subject to retirement or life insurance deductions and would not be used in calculating annuity entitlement.

Subsection (f) specifically provides that an employee in the Senior Executive Service, who receives a Presidential appointment outside the Senior Executive Service after receiving such an award, shall continue to receive the annual payments to which he otherwise would be entitled.

Subsection (g) provides that the analysis of chapter 45, title 5, United States Code, is amended at the end by adding the following item: "4507. Incentive awards and ranks in the Senior Executive Service."

SECTION 407. PAY RATES AND SYSTEMS

Section 407(a) amends section 5308 of title 5, United States Code.

Section 5308. Pay limitation

Paragraph (1) states that executives in the Senior Executive Service may be paid up to a base rate equal to Level IV in the Executive Schedule.

Section 407(b) amends chapter 53 of title 5, United States Code, by adding at the end the following new subchapter: "Subchapter VIII—Pay for the Senior Executive Service."

Section 5381. Purpose: Definitions

Subsection (a) states that the purpose of the new subchapter VIII is to provide a pay system for the Senior Executive Service which would be established under amended subchapter II of chapter 31 of title 5, United States Code.

Subsection (b) provides that for the purposes of this subchapter, "agency", "Senior Executive Service position", and "executive" have the same meanings given these terms by section 3132 of this title.

Section 5382. Establishment of rates of pay for the Senior Executive Service

Subsection (a) provides that there shall be five or more rates of basic pay for the Senior Executive Service established and thereafter adjusted by the President.

Subsection (b) provides that the lowest rate shall not be less than the sixth step of GS-15 and the highest rate shall not exceed the rate for level IV of the Executive Schedule.

Subsection (c) provides that the President shall adjust the rates of basic pay for the Senior Executive Service at the same time he adjusts the rate of pay for other elements of the Federal service under title 5, United States Code. Such adjustments are to be included in the President's report to Congress under title 5, United States Code, 5305 (a) (3) or title 5, United States Code, 5035 (c) (1).

S. 2640, as introduced, provided that employees subject to the merit pay system (GS-13 through GS-15 managers) would not be entitled to automatic comparability pay increases. S. 2640, as introduced, however, provided that members of the SES could receive full comparability pay increases. The committee has equalized the treatment of both groups of employees. This subsection provides that members of the SES should not be entitled to comparability pay increase. The only exception to this would be in establishing minimum and maximum rates of pay. At any time the minimum and maximum rates of pay for SES executives was adjusted to reflect comparability increases, the minimum and maximum rates of pay rates for GS-13 through GS-15 managers will likewise be adjusted. The committee, thus, has eliminated any differences between the way SES executives and the GS-13 through GS-15 managers are treated under the provisions for comparability pay increases.

Subsection (d) states that the rates of basic pay referred to in this section shall supersede any prior rates and shall be printed in the Federal Register.

Section 5383. Setting individual executive pay

This section states that the pay for an executive is to be set according to criteria provided by the Office of Personnel Management. Except for adjustments to the whole rate structure made by the President, an executive's pay cannot be adjusted more than once in any 12-month period. Once a year the base pay of the executive may be either increased or decreased by any amount, so long as the new rate of pay stays within the minimum and maximum levels established by section 5382.

S. 2640, as introduced, provided that the sum total of all moneys to an executive for any calendar year for his base pay, performance awards and special incentive awards should not exceed 95 percent of the rate provided for Executive Level II. The effect of this provision would have meant that Senior Executive Service executives who were near or at the top base rate of pay would have received little or no monetary gain from either the performance or incentive awards. The

committee felt that this was inequitable and counter to the purpose of rewarding excellence by instituting performance and incentive awards. It, therefore, deleted this subsection with the intent that Senior Executive Service executives would be able, in the years they received incentive or performance awards, or both, to be paid the full amounts in addition to their base salaries.

In subsection (b), the committee added a provision that if an agency decides to reduce the rate of base pay for a Senior Executive Service executive, it must notify the person 15 days before the first day of the pay period for which the reduction is to take effect. It is the committee's intent that this notification include an explanation of the reasons for the reduction in terms of the salary resources available to the agency for the jobs to be performed by its corps of Senior Executive Service executives. The provision for notification is not intended to give the executive any new right of appeal concerning the action.

Section 5384. Performance awards for the Senior Executive Service

Subsection (a) states that the purpose of such awards is to encourage excellence, and that the cash awards shall be in addition to basic pay and not subject to the ceiling limitations placed on Government salaries. The performance review board will recommend to the appointing authority the amount of award they feel should be given to each executive they recommend rating as fully successful.

Subsection (b) provides no awards may be granted to an executive whose last performance rating was less than fully successful. The amount of the award may not exceed 20 percent of the executive's basic pay. Performance awards may not be paid to more than 50 percent of the executives in any agency employing 4 or more members in the Senior Executive Service in any fiscal year.

Subsection (c) states that the Office of Personnel Management is authorized to issue guidance to agencies on the proportion of salary expenses that may be appropriately applied to payment of performance awards and the distribution of awards of various amounts.

Section 5385. Regulations

Subsection (a) directs the Office of Personnel Management to issue regulations necessary for the administration of pay for the Senior Executive Service, subject to such policies and procedures as the President may prescribe.

Subsection 407(c) contains two confirming amendments regarding retirements to sections 8331(3) and 8704(c) of title 5, United States Code.

Subsection 407(d) amends the chapter analysis of chapter 53 of title 5, United States Code, so that it will properly reflect the content of the chapter after the bill is enacted.

SECTION 408. PAY ADMINISTRATION

Paragraphs (1) and (2) amend chapter 55 of title 5, United States Code. They amend 5, United States Code, 5504(a)(B) so as to include Senior Executive Service employees under the standard Government biweekly pay period.

Paragraph (2) amends section 5595(a)(2)(i) to permit severance pay for members of Senior Executive Service.

SECTION 409. TRAVEL, TRANSPORTATION, AND SUBSISTENCE

This section amends section 5723(a)(1) of title 5, United States Code, to permit an agency to pay the travel expenses of a new member of the Senior Executive Service.

Section 5752. Travel expenses of Senior Executive Service candidates

This section permits an agency to pay the travel expenses for candidates for such positions when the expenses were incurred incident to preemployment interviews requested by the employing agency, by adding a new section 5752 in title 5, United States Code.

SECTION 410. LEAVE

This section amends chapter 63 of title 5, United States Code. This section amends 5, United States Code, 6304, by adding a new subsection (f) to exclude employees in the Senior Executive Service from a limitation on the accumulation of annual leave. Currently, employees may generally not carry over more than 30 days of annual leave from year to year. This exclusion would allow executive managers to spend as much time on the job as the job requires without forfeiting their entitlement to annual leave for later use or to the cash value of that leave upon separation from the Federal service.

SECTION 411. DISCIPLINARY ACTION

Section 411(a) amends chapter 75 of title 5, United States Code.

Section 7541. Definitions

This section sets forth definitions of "employee", "disciplinary action", "removal", and "suspension." An "employee" is defined as an individual in the Senior Executive Service who has either completed one year of continuous service in such Service or was covered by the provisions of subchapter II of this chapter when appointed to a position in the Service. "Disciplinary action" is an action based on the conduct of the employee, including but not limited to, misconduct, neglect of duty, or malfeasance. But it does not include less than full successful performance. Disciplinary action may result in involuntary removal, or suspension for more than 30 days. "Removal" is defined as separation from the Federal service. "Suspension" means the placing of an employee in a temporary nonduty nonpay status for disciplinary reasons.

Section 7542. Actions covered

This section states that this subchapter applies to a disciplinary removal or suspension for more than 30 days of an individual in the Senior Executive Service, but does not apply to a suspension or removal under 5 United States Code 7532 (National Security).

Subsection 7543. Cause and procedure

Subsection (a) provides that agency disciplinary action against an employee may be taken only for such cause as will promote the efficiency of the service. This subsection also provides for regulations by the Office of Personnel Management, and makes clear that removal for less than fully successful performance is not a disciplinary action.

Subsection (b) sets forth procedures for disciplinary actions. The employee is entitled to: At least 30 days written notice stating any and all reasons, specifically and in detail, for the proposed action, except where there is reasonable cause to believe the employee is guilty of a crime for which a sentence of imprisonment can be imposed; a reasonable time to answer, orally and in writing, and to furnish affidavits and documents in support of the answer; be accompanied, represented and advised by a representative; and a written decision, with supporting reasons, at the earliest practicable date.

Subsection (c) permits the agency to give a hearing but specifically does not require a hearing.

Subsection (d) requires that documents pertaining to a disciplinary action be made a part of the agency's records and be furnished to the Merit Systems Protection Board or to the Office of Personnel Management upon request.

Subsection (e) provides for an appeal of disciplinary action to the Merit Systems Protection Board under section 7701 of this bill, and that the decision of the agency shall be sustained except as provided for in section 7701 of the bill.

The procedures discussed in section 7543 are the same as provided for other Federal employees in title II of this bill.

Subsection 411(b) amends the table of sections of chapter 75 of title 5, United States Code, to make it conform to the bill when passed.

SECTION 412

S. 2640, as introduced, contained a section 412 entitled, "Retirement." The original section 412 provided an immediate annuity if an executive in the Senior Executive Service were separated from the Senior Executive Service for less than fully successful performance and had completed 25 years of Federal service or had become 50 years of age and had completed 20 years of Federal service. The annuity in such cases would be reduced 2 percent a year for each year the employee was under age 55. The section also provided for a change in the way retirement annuities were to be calculated for members of the Senior Executive Service who have received performance awards. For every year that an award was received the employee's annuity calculation would have included 2½ percent of his average top 3 salary years in place of any lesser percentage based on years of total service.

Several witnesses, including the Government Accounting Office, questioned the wisdom and equity of providing a subsidy to one or more special groups of employees from the general Federal service retirement fund. The committee chose to delete this section especially in light of this testimony.

SECTION 412. CONVERSION TO THE SENIOR EXECUTIVE SERVICE

This section provides specific guidance for the conversion period following enactment with respect to agency action in converting certain positions to the Senior Executive Service and also with respect to the various options of the employee-incumbents of such positions.

Subsection (a) charges each agency with the responsibility of

designating those positions which are to be incorporated into the Senior Executive Service and those positions which are career reserved. Such designations shall be accomplished under the guidance and review of the Office of Personnel Management during the period between enactment and the effective date of this title. The subsection also indicates that positions which are properly classified above the GS-15 level may be designated as Senior Executive Service positions even if they have hitherto been classified at the GS-15 level.

Subsection (b) provides that each agency will submit a request for total Senior Executive Service space allocations and for the number of noncareer appointments needed. The Office of Personnel Management will then establish interim authorizations for such appointments.

Subsection (c) provides two options to employee-incumbents of positions designated as Senior Executive Service. First, the employee may remain in the current appointment and pay system, retaining the grade, seniority and other rights and benefits associated with career and career-conditional appointment. Furthermore, election of this option shall not cause the separation, displacement, or reduction in grade of any other employee of the agency. In the alternative, the employee may convert to a Senior Executive Service appointment. The conversion of this appointment would be governed by the provisions of subsection (d), (e), (f), (g) or (h) of this section, as appropriate. The employee must elect one of these options within 90 days from the date he is notified in writing that his position has been incorporated into the Senior Executive Service.

Subsection (d) states that employees who elect automatic conversion and who are currently serving under career or career-conditional or similar appointments shall receive a career appointment in the Senior Executive Service.

Subsection (e) states that employees who elect automatic conversion and who are currently serving under an excepted service appointment in a position which is *not* designated a career reserved position in the Senior Executive Service, shall receive a noncareer appointment in the Senior Executive Service.

Subsection (f) provides for excepted employees who are serving in positions designated career reserved in the Senior Executive Service. These employees shall be reassigned to an appropriate Senior Executive Service general position or terminated.

Subsection (g) allows those persons listed in (e) whose position is designated as a Senior Executive Service position, but who have reinstatement eligibility to a position in the competitive service, to request from the Office of Personnel Management reinstatement of career status in order to be converted to a career appointment in the Senior Executive Service. The names and grounds for status of all such employees who are converted to career status must be published in the Federal Register.

Subsection (h) relates to employees who are under a limited executive assignment under subpart F or part 305 of title 5, Code of Federal Regulations, who have elected an automatic appointment conversion, such employees shall be converted to: (1) A Senior Executive Service

limited term appointment if the position encumbered will terminate within 3 years of the effective date; (2) a Senior Executive Service noncareer appointment if the position encumbered is designed as a Senior Executive Service general position; or (3) a Senior Executive Service noncareer appointment and reassigned to Senior Executive Service general position if the encumbered position is designated as a Senior Executive Service career reserved position.

Subsection (i) deals with pay. If the employees' base pay at the time of conversion is more than the base pay of the level to which they are converted, the employees retain their pay.

Subsection (j) authorizes the Office of Personnel Management to prescribe regulations to carry out the purpose of this section and to provide for an employee appeal to the Merit Systems Protection Board from improper agency action under this section, under section 395 (d) or section 3593, or who believes that an agency's action has not been timely under section 4313(b) (2) of this title.

SECTION 413. REPEALER

This section repeals all preexisting authority for the establishment or pay of positions subject to section 401 of this act. Such repeal can involve total deletion of a provision or the modification of a provision.

SECTION 414. SAVINGS PROVISION

This section indicates that enactment of this act shall not decrease the pay, allowances, compensation or annuity of any person. This provision governs the initial appointment of employees in the Senior Executive Service. The subsequent pay and compensation of the executives will be determined by the performance of the executive.

SECTION 415. EFFECTIVE DATE

This section sets an effective date for this title of nine months after enactment. The only exception is section 412 (conversion procedures), which takes effect immediately upon enactment.

TITLE V—MERIT PAY

This title establishes a system of compensation for certain supervisors and managers which would be based, at least in part, on the quality of those employees' work. Under this title, managers would use performance appraisals to document a covered employee's accomplishments during the review period. Instead of granting almost automatic pay increases, as is now the case, this title would require pay increase decisions relative to comparability increases to be based upon the degree to which an individual met or exceeded performance objectives.

The merit pay system would not require additional expenditures of money. The money saved from not awarding full across-the-board comparability increases and automatic step increases would be used to reward those employees who deserve pay raises or bonuses.

SECTION 501. PAY FOR PERFORMANCE AMENDMENTS

Section 501 (a) amends title 5, United States Code, by adding a new chapter 54, entitled "Merit Pay," to provide for the establishment of a merit pay system for certain Federal employees.

Section 5401. Purpose

This section states the purposes of the new chapter 54.

Section 5402. Merit pay system

Subsection (a) directs the OPM to establish a merit pay system covering managerial and supervisory employees in grades GS-13 through GS-15.

Subsection (b) (1) provides that an agency may file with the OPM a request for exclusion from the merit pay system. The OPM shall review the applications and recommend to the President whether the agency or unit should be excluded, and the President may, in writing, exclude an agency or unit from coverage. Subsection (b) (2) provides that any agency or unit so excluded shall make a sustained effort to bring its personnel system into conformity with the merit pay system. Subsection (b) (3) states that the OPM may at any time recommend that the exclusion granted to an agency or unit be revoked and the President may revoke the exclusion.

Subsection (c) provides that the merit pay system established under subsection (a) of this section shall provide for a range of base pay for each grade to which it applies. The minimum and maximum of each grade in which there are employees who are covered by the merit pay system shall be the same as the minimum and maximum for those grades as they apply to employees not covered by the merit pay system. All specific intervening steps in the schedule are eliminated for employees under the merit pay system. Thus, an employee covered by the merit pay system may have a pay rate at any dollar amount from the minimum to the maximum rate for the assigned grade.

Subsection (d) (1) provides that when the size of the comparability adjustment under section 5303 of title 5, United States Code, is determined each year, the OPM, in consultation with the OMB, will make a determination as to what portion of that adjustment will be given as a comparability pay increase to employees covered by this merit pay system. Subsection (d) (2) provides language which corresponds to language contained in section 5305 (p), title 5, United States Code. This language ensures that any portion of the comparability adjustment granted employees in the merit pay system will not require them to start a new waiting period for a within-grade increase should they transfer into a grade or position which is not covered by the merit pay system. Subsection (d) (3) states that no employee may be paid less than the minimum rate of basic pay of the grade of such employee's position and that no employee shall suffer a reduction in the rate of basic pay as a result of the employee's initial coverage by, or subsequent conversion to, the merit pay system.

Subsection (e) provides that the manner in which an employee's pay may be increased within the pay range of the assigned grade will be prescribed in regulations developed by the Office of Personnel Man-

agement. The subsection specifies, however, that a determination to either increase or not increase the pay of an employee: (1) may take into account both individual performance and organizational accomplishment; (2) shall be based on such factors as improvements in efficiency, productivity, quality of work or service, cost savings, and timeliness of performance (among others); (3) shall be reviewable under procedures established by the agency head, but shall not be appealable outside the agency; and (4) shall be subject to guidelines on the distribution of advances issued by the Office of Personnel Management. Subsection (e) also provides that whatever portion is not granted as a general adjustment shall be used to partly fund the pool with the remaining funding to be determined considering what percent of payroll is generally expended for within-grade increases and quality step increases for employees who are not covered by this system.

The Committee added one additional factor to those by which pay increases will be determined: "the quality of performance by the employees for whom the manager or supervisor is responsible." This provision matches similar language for SES executives put into title IV. It emphasizes that employees should be judged in part upon their performance in assuring effective work from employees under them.

Subsection (f) establishes authority to grant incentive awards to managers subject to this chapter. The authorization parallels the present provisions of chapter 45.

The only modification of these basic provisions is the increase from \$5,000 to \$10,000 in the dollar amount which may be granted by the head of any agency. The \$5,000 figure has been in the law since 1954 and, through the passage of time and the attendant inflation, the value of this amount has been seriously eroded. Further, it is considered desirable to give individual agencies increased authority to administer their own programs.

Under subsection (g), the Office of Personnel Management will develop regulations which give employees covered by the merit pay system, whose continuous service is interrupted in the public interest by service with the armed forces or by service in essential non-government civilian employment during a period of war or national emergency, the opportunity to be advanced within the pay range based upon the quality of their past performance in order that they are not penalized as a result of such service.

Subsection (h) provides that increases in basic pay resulting from the merit pay system shall be considered fixed by statute. As such, they are included in the amounts to which cost of living allowances and post differentials under 5 U.S.C. 5941 are applied.

Section 5403. Reports

S. 2640, as introduced, merely provided for periodic reports to Congress on the merit pay system. The Committee changed this section to require annual reports to Congress until such time as the merit pay system is fully implemented and thereafter periodic reports on the effectiveness of the system and the costs associated with it. This change was made to conform the reporting requirement to the Committee's decision that the merit pay system be phased in incrementally (see discussion in section 503 of this title).

Section 5404. Regulations

Section 5404 requires the Office of Personnel Management to issue regulations implementing this subchapter.

SECTION 502. CONFORMING AND TECHNICAL AMENDMENTS

Subsection (a) of section 502 amends section 4501(2) (A) of title 5, United States Code, by inserting "but does not include an individual paid under the merit pay system established under section 5402 of this title; and". This change recognizes the transfer of the operation of incentive awards for employees covered by the merit pay system to section 5402 in order that it might become an integral portion of their direct compensation plan. This is intended to focus the attention of Federal managers on this portion of the compensation program when developing recommendations for pay increases to employees.

Subsection (b) of section 502 amends section 4502(a) of title 5, United States Code, by increasing the maximum cash award from \$5,000 to \$10,000.

The \$5,000 figure has been in law since 1954 and through the passage of time and the attendant inflation, the value of this amount has been seriously eroded.

Subsection (c) of section 502 amends section 4502(b) of title 5, United States Code, by increasing the maximum cash award which may be granted by the head of an agency without the approval of the Office of Personnel Management from \$5,000 to \$10,000.

Subsection (d) of section 502 is an amendment to section 4506 of title 5, United States Code, striking out "Civil Service Commission may" and inserting in lieu thereof "Office of Personnel Management shall" and imposes a duty to prescribe regulations.

Subsection (e) of section 502 amends section 5332(a) of title 5, United States Code, to exclude those employees who will be covered by the merit pay system. This is the section which currently provides that each employee covered by subchapter III of chapter 53 of title 5, United States Code, is entitled to basic pay in accordance with the General Schedule. However, because employees covered by the merit pay system will not automatically receive the full comparability adjustment which will be applied to the General Schedule and since the pay ranges under the merit pay system will not contain any step rates, these employees must be excluded from this provision.

Subsection (f) of section 502 amends section 5334 of title 5, United States Code, by providing that (1) where a reference is made to a 'step' it shall mean any dollar amount within the range for an employee moving to a position covered by the merit pay system and (2) where the reference is made to 'two steps' or 'two step increases' it shall mean six percent for employees covered by the merit pay system since there will be no steps. Six percent is approximately the size of two within-grade step increases.

Subsection (g) of section 502 amends section 5335(e) of title 5, United States Code, to exclude those employees who will be covered by the the merit pay system. Because these employees will receive individually-determined increases to base pay and advance within a range which does not contain steps, they are excluded from this section

which provides for the system of periodic step increases under the General Schedule.

Subsection (h) of section 502 amends section 5336(c) of title 5, United States Code, to exclude employees covered under the merit pay system from the provisions for receiving additional step increases.

Subsection (i) of section 502 amends the analysis of chapter 53 of title 5, United States Code, to conform to the amendments made by section 501 of this bill.

SECTION 503. EFFECTIVE DATE

This section provides that the provisions of this title take effect on the date of enactment of the Act, except that the provision shall be applied to positions in accordance with schedules laid down by the OPM.

S. 2640 provided that the entire merit pay system for all GS-13 through GS-15 managers would go into effect after 90 days. The Committee felt, however, that this very short time period for implementation would place too heavy a burden on the OPM and the agencies, and that it was likely to result in hasty and ill-informed decisionmaking regarding the new system. Thus, it decided to give the OPM leeway to implement the system gradually, for instance, on an agency-by-agency basis or grade-by-grade basis. The Committee understands that full implementation may require three to four years. The Committee believes that incremental implementation will produce a more efficient and equitable system for the Federal employees covered by this title.

TITLE VI—RESEARCH, DEMONSTRATION, AND OTHER PROGRAMS

This title (1) authorizes the OPM to engage in research and demonstration projects aimed at improving personnel management in the Federal government, and to waive certain provisions of law in the conduct of such experiments, and (2) amends the Intergovernmental Personnel Act to simplify personnel requirements as conditions for State and local government participation in Federal grant programs, and to facilitate increased intergovernmental mobility.

SECTION 601. RESEARCH AND DEMONSTRATION PROJECTS

This section adds a new Chapter 47 of Title 5, United States Code, entitled "Personnel Research and Demonstration Projects." This new Chapter establishes Research and Demonstration authority for the Office of Personnel Management as follows:

Section 4701. Definitions

Paragraph (1) defines an "agency" through incorporation by reference of the definition used to include agencies within "merit system principles" and "prohibited personnel practices" under Section 101 of this Act, including (a) an Executive agency, (b) the Administrative Office of the United States Courts, and (c) the Government Printing Office, but excluding (a) a Government Corporation, and (b) the General Accounting Office. Unlike Section 101, however, no general authority is provided the President under this title to exempt positions due to their confidential or policy-making character.

Paragraph (2) specifically exempts certain agencies or positions in agencies from inclusion under this title, including (a) the Federal Bureau of Investigation, (b) the Central Intelligence Agency, (c) the Defense Intelligence Agency, (d) the National Security Agency, (e) the Drug Enforcement Authority, and (f) other Executive agencies or units thereof whose principal function is the conduct of intelligence or counterintelligence activities, as determined by the President.

Paragraph (3) defines an "employee" as an individual employed in or under an agency.

Paragraph (4) defines an "eligible" as an individual who has qualified for an appointment to the competitive service, and whose name has been entered on an appropriate register or list of eligibles.

Paragraph (5) defines "demonstration project" as one aimed at determining whether a specified change in policies or procedures will result in improved Federal personnel management, and is conducted or supervised by the Office of Personnel Management.

Paragraph (6) defines "research program" as a planned study of public management policies and systems, the manner in which they are operating, their effects, comparisons among policies and systems, and possibilities for change.

Section 4702. Research and development functions

Section 4702 authorizes the Office of Personnel Management to establish, maintain, and evaluate research and development projects to find improved methods and technologies in Federal Personnel Management. OPM is also directed to establish and maintain a system for collection and public dissemination of such research and development, and to encourage exchange of information among interested parties. OPM is authorized to carry out these activities directly or through contract or agreement.

Section 4703. Demonstration projects

Section 4703 establishes the scope and limitation of OPM's authority to conduct experimental demonstration projects aimed at improving Federal personnel management. Because this Section permits OPM to waive certain provisions of law in conducting these projects, the Committee was particularly concerned that adequate safeguards be developed to assure that this power not be abused. Any demonstration project that oversteps these limitations, or does not satisfy the essential definitional intent of such projects is prohibited.

Part (a) of this Section authorizes OPM to conduct and evaluate, either directly or through agreement or contract with one or more Federal agencies or other public or private organizations, demonstration projects involving up to 5,000 individuals (not including control groups) and having an active duration of up to 5 years. No more than 10 active demonstration projects may be underway at any one time. The intent of this requirement is to limit to 50,000 the total number of Federal employees that may be involved directly, at any one time, in active demonstration projects. For purposes of this limitation, an "active" project is intended to mean one where the experimental condition remains in effect. A project where the experiment is no longer in effect, but where evaluation study is still underway, would not be considered an "active" project for purposes of this limitation.

In order to provide OPM with the ability to experiment with new and innovative means of improving Federal personnel management, the Committee agreed to a limited allowance for OPM to either (a) act beyond specific authorities granted to it under Title 5, United States Code, or (b) waive inconsistent provisions of Title 5, United States Code, in creating experimental conditions for purposes of demonstration projects.

While the Committee recognized the need to allow OPM adequate flexibility to develop new approaches to Federal personnel management policies and procedures, it was concerned about the dangers inherent whenever any Federal agency is given authority to waive provisions of law. For this reason, a number of provisions were inserted to assure that demonstration project authorities are not used to abridge employee rights, contravene the express will of Congress, or undermine the essential purpose of this Act, that is, to create a fairer, more effective, more merit-oriented Federal civil service. For instance, the Committee decided to insert language forbidding any demonstration project to violate merit system principles or prohibited personnel practices established under Title II of this Act. Any demonstration project which does so would be subject to the full range of disciplinary powers accorded the Merit Systems Protection Board and its Special Counsel. Further, no demonstration project may affect leave, insurance, or annuity provisions established under this Title.

To provide assurance that demonstration projects are proper, rigorous procedural safeguards must be satisfied before any such project may go into effect. A detailed plan must be developed, published in the Federal Register, and submitted to public hearings as a precondition to implementation. The plan must identify the purposes of the proposed demonstration project, the number, types, and categories of employees and eligibles to be affected, the methodology, the duration, the anticipated costs, the training to be provided, and the methodology and criteria for evaluation of the project. Further, employees who might be affected by the project must be notified and consulted with at least 6 months prior to first implementing the project. Congress also must be provided a detailed report on the proposed project at least 3 months in advance of implementation.

No project may be implemented unless the agency involved has approved the proposal.

To insure that employees have an active input into the planning and implementation of demonstration projects and are fully apprised of any change which might affect their status or well-being, parts (e) and (f) of this section establish rules for prior consultation with employees before a project may be initiated. Where employees are within an agency unit where an employee organization holds exclusive recognition rights, no demonstration project may be entered into (a) if the project would violate a negotiated agreement between the employee organization and such agency unless a written agreement provides for such projects, or (b) if the project is not covered by such a written agreement, unless there has been consultation or negotiation, as appropriate, with the employee organization. It is the intent of this provision that the authority to enter into demonstration projects and to waive certain provisions of law not be construed as license to violate any agreement entered into by an agency and its employees, or

to bypass the exclusive recognition rights accorded an employee organization.

Where employees are within a unit where an employee organization has not been accorded exclusive recognition rights, the requirement for prior consultation with employees must still be adhered to, and part (f) forbids the implementation of any project where consultation has not taken place.

Finally, an evaluation is required of all demonstration projects entered into under this section, including an evaluation of results and their impact on improving public management. All agencies are mandated to cooperate with the Director of OPM in the performance of his demonstration project authority, including the providing of information and reports.

Section 4704. Allocation of Funds

Section 4704 allows OPM to allocate funds appropriated to it for the purpose of conducting demonstration or research projects to other agencies, where such other agencies are to be actually conducting or assisting in the conducting of such projects. However, to insure continued Congressional control over such funds, allocated funds may remain available only for so long as specified in appropriation Acts. And no contracts may be entered into under this Section unless specifically provide for in advance by relevant appropriations Acts.

Section 4705. Reports

Section 4705 requires that OPM, as part of its annual report to Congress, include a summary of all research and demonstration projects conducted during the year, the effect of the projects on improving management efficiency, and recommendations of policies and procedures which will improve the attainment of general research objectives.

Section 4706. Regulations

Section 4706 authorizes the OPM to prescribe regulations to administer the provisions of this Chapter.

SECTION 602. INTERGOVERNMENTAL PERSONNEL ACT AMENDMENTS

This Section amends the Intergovernmental Personnel Act as follows:

Subsection 602(a) amends section 208 of the Intergovernmental Personnel Act (IPA) to (1) authorize Federal agencies to require State and local governments, as a condition of participation in Federal assistance programs, to have merit personnel systems for the positions engaged in the administration of such programs; and (2) abolish all statutory personnel requirements established as a condition of the receipt of Federal grants-in-aid by State and local governments, except those listed in Section 208 of the IPA, those that prohibit discrimination in employment or require equal employment opportunity or affirmative action, the Davis-Bacon Act, and the Hatch Political Activities Act.

Subsection 602(b) amends section 401 of the IPA to extend the authority to participate in the mobility program to certain other organizations.

Subsection 602(c) amends section 403 of the IPA to make commissioned Public Health Service Officers eligible to participate in the IPA mobility program.

Subsection 602(d) amends section 502 of the IPA to define the Trust Territory of the Pacific Islands as a jurisdiction which is eligible to participate in all IPA programs.

Subsection 602(e) amends section 506 of the IPA to include the Commonwealth of Puerto Rico, Guam, American Samoa, and the Virgin Islands in the formula allocation of IPA grants and exclude these jurisdictions from the local government allocation.

SECTION 603. AMENDMENTS TO THE MOBILITY PROGRAM

This Section amends Title 5 of the United States Code to expand the Intergovernmental Mobility Program as follows:

Subsections 603 (a) through (d) amend sections 3371 through 3375 of title 5, United States Code, to extend eligibility to participate in the mobility program to the Trust Territory of the Pacific Islands; to a military department; a court of the United States; the Administrative Office of the United States Courts; the Library of Congress; the Botanic Garden; the Government Printing Office; the Congressional Budget Office; the United States Postal Service; the Postal Rate Commission; the Architect of the Capitol; the Office of Technology Assessment; and other organizations such as a national, regional, statewide, or metropolitan organization representing member State or local governments; an association of State or local public officials; or a nonprofit organization, one of whose principal functions is to offer professional advisory, research, development or related services to governments or universities concerned with public management. Federal employees in non-career appointments in the Senior Executive Service and employees in the excepted service who are serving in confidential or policy determining positions are excluded from participation in the mobility program.

Subsection 603(e) amends section 3374 of title 5, United States Code, to provide technical amendments to assure fairness and equity for persons participating in mobility assignments. If enacted, Federal retirement and other benefits, in the rare cases where such programs apply to certain State and D.C. government employees, would not be lost by such employees while they are on mobility assignments. Federal agencies would be authorized to reimburse State and local governments and institutions of higher learning, and other organizations for various fringe benefits (e.g., health and life insurance, retirement, etc.) of employees on detail from such organizations.

Subsection 603(f) amends section 3375 of title 5, United States Code, to authorize an executive agency to reimburse mobility assignees for certain miscellaneous relocation expenses related to a geographic move for purposes of a mobility assignment on the same basis such payments are authorized on a permanent change of station (e.g., automobile registrations, drivers' licenses, etc.).

TITLE VII—LABOR-MANAGEMENT RELATIONS

Title VII establishes a Federal Labor Management Relations Authority and creates a statutory base for the improvements of labor-management relations in the Federal service. The Authority will carry

out the duties and responsibilities now being handled by the part-time Federal Labor Relations Council and Assistant Secretary of Labor for Labor-Management Relations. Title VII permits labor unions to bargain collectively over personnel policies, practices, and matters affecting working conditions within the authority of agency managers. It specifies areas for decision which are reserved to management and may not be subjected to the collective bargaining process.

Title VII also provides statutory base for the establishment of grievance and arbitration procedures for Federal employees organized in collective bargaining units. Through the statutory establishment of a Federal Service Impasses Panel, it provides for the resolution of impasses between agencies and labor unions. Further, it sets out a group of unfair labor practices for both the agencies and the unions.

SECTION 701 (A)

This section provides that subpart F of part III of title 5, United States Code, is amended to add the following chapter.

CHAPTER 72—FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

Section 7201. Findings and purpose

Subsection (a) states findings of Congress that the public interest demands the highest standards of employee performance and the continued development of modern and progressive work practices to facilitate the efficient accomplishment of the operations of the Government.

Subsection (b) states findings of Congress that the protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them can be accomplished with full regard for the public interest and contributes to the effective conduct of public business.

Subsection (c) states that the purpose of this subchapter is to prescribe rights and obligations of employees of the Federal Government and to establish procedures to meet the special requirements and needs of the Federal Government.

Section 7202. Definitions; application

Subsection (a) (1) defines "agency."

Subsection (a) (2) defines "employee." The definition includes a person who was separated from service as a consequence of, or in connection with, an unfair labor practice under section 7174 of this subchapter. This language is an adaptation of language in section 2(3) of the National Labor Relations Act. By its operation under NLRA, and intended by its inclusion in this subchapter, persons determined to have been separated in violation of the unfair labor practice provisions of this subchapter could vote in representation elections and have access to those provisions, e.g., "It shall be an unfair labor practice . . . to interfere with . . . an employee in the exercise of rights assured by this subchapter." The term "uniformed services" used in subsection (a) (2) (D) (ii) is intended to have the same meaning as that given the term by section 2101 (3) of this title which reads as follows:

Sec. 2101. Civil Service; armed forces; uniformed services

For the purpose of this title—

* * * * *

(3) “uniformed services” means the armed forces, the commissioned corps of the Public Health Service, and the commissioned corps of the Environmental Science Services Administration.

Subsection (a) (3) defines “labor organization.” Subsection (a) (4) defines “agency management.” Subsection (a) (5) defines “Authority.” Subsection (a) (6) defines the “General Counsel.” Subsection (a) (7) defines the “Panel.” Subsection (a) (8) defines the “Assistant Secretary.”

Subsections (a) (9), (10) and (12) define “Confidential employee,” “Management official” and “Professional employee,” respectively. Executive Order 11491 referred to but did not define these terms. The Assistant Secretary defined them in case decisions. Such definitions are now codified in sections 7162(a) (9), (10) and (12).

Subsection (a) (11) defines “supervisor.” Subsection (a) (12) defines “professional employee.” Subsection (a) (13) defines “agreement.”

Subsection (a) (14) defines “collective bargaining,” “bargaining” or “negotiating” as synonymous terms with references to the mutual obligation of agency representatives and the exclusive representative set forth in section 7215. Subsection (a) (15) defines “exclusive representative.” Subsection (a) (16) defines “person.”

Subsection (a) (17) defines “grievance.” This term is intended to apply broadly than just to complaints concerning matters covered by a *negotiated* grievance procedure. For example, “grievance” as used in section 7212(c) refers to a procedure which has not been negotiated by the parties, such as an agency grievance procedure, but does not apply to complaints concerning matters not subject to a grievance procedure such as classification and Fair Labor Standards Act matters.

Subsection (b) provides that this subchapter applies to all employees and agencies in the executive branch except for specific exclusions set forth below. This subsection tracks the language of Executive Order 11491, section 3(a).

Subsection (c) specifies the agencies, subdivisions thereof and personnel to which this subchapter does not apply. It reflects current exclusions under Executive Order 11491. For the purpose of clarity, the National Security Agency, the U.S. Postal Service and the personnel of the Authority, General Counsel and Panel are specifically listed as excluded. S. 2640 as introduced included among the exceptions the United States Postal Commission. The Committee decided that there was no reason to exclude the Commission because there are no national security issues involved and by statute it is a government agency.

Subsection (d) provides that an agency head may, as deemed in the national interest, suspend this subchapter with respect to an agency or subdivision located outside the U.S. It tracks the provision of Executive Order 11491, section 3(c).

Subsection (e) provides that employees engaged in administering a labor-management relations law (except for personnel of the Authority, General Counsel and Panel, who are excluded by subsection

(c) of this section) may not be represented by labor organizations which also represent other employees covered by that law. A similar provision is contained in Executive Order 11491, section (3) (d), the purpose of which is to avoid conflicts of interest for the employees administering the labor-management relations law.

Section 7203. Federal Labor Relations Authority; Office of the General Counsel

Subsection (a) establishes the Federal Labor Relations Authority as an independent establishment in the Executive Branch of the Government. This provision conforms with Reorganization Plan No. 2 of 1978.

Subsection (b) provides that the Authority is composed of a Chairperson and two other full-time members, not more than two of whom may be adherents of the same political party, and none of whom, in general, may be employed elsewhere in the Government. The composition of the Authority as an independent, third-party establishment will eliminate the appearance of bias which has inhered in the composition of the Federal Labor Relations Council (consisting of three high-level Government managers) under Executive Order 11491. The full-time nature of membership on the Authority is further responsive to criticism of the Council, the members of which serve on the Council on only a part-time basis.

Subsection (c) provides for the appointment and reappointment of the members, and the designation of the Chairman of the Authority. It further provides for removal of any member of the Authority by the President.

Subsection (d) provides for five-year terms of office of each member of the Authority, for the dates of expiration of such terms, and for the filling of vacancies.

Subsection (e) provides that a vacancy in the Authority shall not impair the right of the remaining members to exercise the Authority's powers.

Subsection (f) provides that the Authority shall make an annual report to the President for transmittal to Congress.

Subsection (g) creates the Office of the General Counsel in the Authority. It also provides for the General Counsel's appointment, term of office, reappointment, removal, and full-time service. It is the intent of the Committee that the Office of the General Counsel will be an independent organizational entity within the Authority, and thereby maintain a separation between the prosecutorial and adjudicatory functions of the Authority.

Section 7204. Powers and duties of the Authority; the General Counsel

Subsection (a) provides for the Authority's powers and duties to administer and interpret this subchapter, decide major policy issues, prescribe regulations needed to administer its functions, and disseminate information relating to its operations. Similar powers and duties are assigned to the Federal Labor Relations Council under Executive Order 11491. Under this provision, the Authority will not advise or issue policy guidance to agencies, which role will rest with the Office of Personnel Management. Likewise, the Authority is not

authorized to advise the President other than the normal role of agencies to suggest necessary and desired changes in legislation. Also, the Authority, like the Council, will not issue advisory opinions.

Subsection (b) provides that the Authority shall decide appropriate unit questions, supervise elections, decide questions concerning eligibility for national consultation rights, and decide unfair labor practice complaints. Similar powers and duties are assigned to the Assistant Secretary of Labor for Labor-Management Relations under Executive Order 11491. Integration of the powers and duties of the Assistant Secretary, except for decisions relating to alleged violations of the standards of conduct for labor organizations, in the Authority will improve coordination and eliminate the fragmented nature of the decision-making under the Executive Order between the Assistant Secretary and the Federal Labor Relations Council. The initial jurisdiction to decide alleged violations of the standards of conduct for labor organizations will be retained by the Assistant Secretary, who administers similar standards in the private sector.

The Committee revised subsection 7204(b)(2) to provide explicitly that a labor organization which receives a majority of the valid ballots cast in a representation election would be accorded exclusive recognition.

Subsection (c) provides for the Authority's powers to decide appeals on negotiability issues, exceptions to arbitration awards, appeals from decisions of the Assistant Secretary, and other matters it deems appropriate to assure the effectuation of the purposes of this subchapter. Similar decisional powers are assigned to the Federal Labor Relations Council under Executive Order 11491. The power of the Authority, like that of the Council, to consider other matters it deems appropriate to assure the effectuation of the purposes of this subchapter is intended to be used sparingly and to permit the Authority to deal with labor-management issues and problems within the overall scope of its authority, but not set forth expressly in this section of the subchapter. The phrase "may consider" as used in subsection (c) is intended to grant the Authority discretion with respect to the manner and extent, not the scope, of its decisional authority. Thus, it is not intended that the Authority be permitted to eliminate all consideration of matters expressly listed in this subsection, but that it be empowered, consistent with this subchapter, to establish by regulation procedural requirements, e.g., timeliness, service, etc., and procedural limitations on the conditions upon which merits decisions will issue. For example, currently the Council will grant a petition for review of an arbitration award only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulations or the Order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations. Initial review of exceptions to an arbitration award is limited to a determination as to whether this condition has been met; if such condition has been met, a decision on the merits will later be issued. It is intended that the Authority, subject to its own regulations, will operate in a similar manner—reviewing all appeals, but limiting the extent of review where warranted.

The provision further expressly sanctions appeals to the Authority from final decisions and orders of the Federal Service Impasses Panel. The broad authority of the Council under Executive Order 11491 to interpret the Order, decide major policy issues and take whatever action is required to effectuate the purposes of the Order implies a right to oversee final decisions and orders of the Panel. This subchapter specifically sets forth the limited power of review by the central authority to assure uniform application of the legal requirements in the program, but it is not anticipated that it would often be necessary to exercise it except in the unlikely event that the legal requirements of the program are misapplied. The Authority would not otherwise review the substance or merits of any final decisions and orders of the Panel.

Subsection (d) provides that the Authority shall adopt an official seal which shall be judicially noticed.

Subsection (e) provides for the location of the Authority's office in or about the District of Columbia, for the exercise of the Authority's powers at any time or place, and for the power of its members or agents to make inquiries necessary to carry out its duties.

Subsection (f) provides that the Authority may appoint officers and employees, and delegate to such officers and employees authority to perform such duties and make such expenditures as may be necessary.

Subsection (g) provides for the allowance and payment of the Authority's expenses.

Subsection (h) provides for the Authority's power and duty to prevent violations of this subchapter; and for the Authority's powers to hold hearings, subpoena witnesses, administer oaths, take testimony or depositions of persons under oath, issue subpoenas requiring the production and examination of evidence, and take such other action as may be necessary. It also provides, under certain conditions, that the Authority may request an advisory opinion from the Director of the Office of Personnel Management; that the Director shall have standing to intervene as a party in Authority proceedings; and that the Director may request that the Authority reopen and reconsider its decision.

Subsection (i) provides that the Authority may require an agency or labor organization to cease and desist from violations of this subchapter and require it to take such remedial action as it considers appropriate to effectuate the policies of the subchapter.

Subsection (j) provides that the Authority shall maintain a record of its proceedings and make public any decision made by it or any action taken by the Panel under section 7222 of this title. Further section 552 (public access to information) shall apply with respect to any record maintained under this subsection of this title.

Subsection (k) provides that the General Counsel is authorized to investigate unfair labor practice complaints; to make final decisions concerning the issuances of notices of hearings on unfair labor practice complaints; to prosecute unfair labor practice complaints before the Authority; to direct and supervise all field employees of the General Counsel; to perform such other functions as the Authority prescribes, which would include participation before the Authority in unfair labor practice proceedings; and to prescribe regulations needed to administer the functions of the General Counsel under this subchapter.

The General Counsel is intended to be autonomous in investigating unfair labor practice complaints, in making "final decisions" as to which cases to prosecute before the Authority in its capacity as decision maker, and in directing and supervising field employees of the General Counsel. Specifically, the Authority would neither direct the General Counsel concerning which unfair labor practice cases to prosecute nor review the General Counsel's determinations not to prosecute, just as the National Labor Relations Board does not exercise such control over its General Counsel.

Subsection (l) provides that the decisions of the authority shall be final and conclusive, and not subject to judicial review except for constitutional questions. Access to judicial review, however, for adverse action and discrimination matters would continue under this chapter.

Section 7211. Employees' rights

Subsection (a) incorporates the policy contained in section 1(a) of Executive Order 11491 concerning the rights of employees to form, join or assist a labor organization and participate in its management or representation; or to refrain from such activity. It further provides that employees have the right to bargain collectively through representatives of their own choosing subject to limits contained in section 7215(c) of this subchapter.

Subsection (b) incorporates the policy contained in section 1(b) of Executive Order 11491 that participation in the management or representation of a labor organization by a supervisor, or by other employees whose participation would create a real or apparent conflict of interest or would be incompatible with law or the employees' official duties, is not authorized. The same policy is specifically extended to management officials and confidential employees for the same reasons.

Section 7212. Recognition of labor organizations

Subsection (a) provides that an agency shall accord exclusive recognition or national consultation rights to a labor organization which meets the requirements of this chapter for such recognition or consultation rights. This tracks section 7(a) of Executive Order 11491.

Subsection (b) provides that recognition, once accorded, shall continue as long as the organization meets the requirements of this chapter for recognition by preventing the disruption caused by repeated elections.

Subsection (c) tracks section 7(d) of Executive Order 11491. Section 7212(c)(1) creates no new employee rights but provides that recognition of a labor organization does not preclude an employee from exercising grievance or appellate rights already established by other laws or regulations or from choosing any personal representative in such proceedings as may be authorized by the law or regulation creating the grievance or appellate rights. However, where the grievance or appeal is covered and pursued under a negotiated grievance procedure as provided in section 7221 of this subchapter, all employees in the bargaining unit—union members and nonmembers alike—must use that procedure to resolve the dispute, and may be represented only by the exclusive representative. Where the negotiated procedure covers adverse action and discrimination complaints, the employee has an option to use the negotiated procedure of the statutory appeal proce-

ture, but not both. If the employee chooses the negotiated procedure, only the exclusive representative of the unit may act as the employee's representative. However, if the employee chooses the statutory appeal procedure, the employee may also choose his/her own representative, and the union (as exclusive representative of the unit) would have neither a right nor an obligation to represent the employee.

Section 7213. National consultation rights

This section provides that an agency shall accord national consultation rights to a labor organization which qualifies under criteria established by the Authority, describes the duties of an agency which has accorded national consultation rights to a labor organization, and provides further that questions as to the eligibility of labor organizations for national consultation rights shall be referred to the Authority for decision. When a labor organization holds national consultation rights, the agency must give the labor organization notice of proposed new substantive personnel policies and proposed changes in established personnel policies and an opportunity to comment on such proposals. The labor organization has a right to suggest changes in personnel policies and to have those suggestions carefully considered. The labor organization also has a right to consult, in person at reasonable times, upon request, with appropriate officials on personnel policy matters and a right to submit its views in writing on personnel policy matters at any time. National consultation rights do not include the right to negotiate. Further, the agency is not required to consult with a labor organization on any matter which would be outside the scope of negotiations if the labor organization held national exclusive recognition in that agency.

Section 7214. Exclusive recognition

Subsection (a) provides that an agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative in a secret ballot, by a majority of the employees as an appropriate unit. The proviso in subsection (a) permits an agency to grant exclusive recognition to a labor organization without an election when the appropriate unit is established by consolidating existing exclusively recognized units of that labor organization.

The Committee revised subsection 7214(a) to make it clear that a labor organization which receives a majority of the valid ballots cast in a representation election would be accorded exclusive recognition.

Subsection (b) defines the bases for determining appropriate units as well as certain conditions which are not appropriate for establishing such units. Any question with respect to the appropriate unit may be referred by the agency or the labor organization to the Authority for a decision.

The Committee clarified the language of subsection 7214(b) to provide that appropriate units may be established on an agency basis.

Subsection (c) provides that all elections conducted under the supervision of the Authority shall be by secret ballot. Elections may be held to determine whether a labor organization should be recognized as the exclusive representative in a unit; replace another labor

organization as the exclusive representative; cease to be the exclusive representative; and be recognized as the exclusive representative of employees in a unit composed of employees in units currently represented by that labor organization or continue to be recognized in existing separate units. Subsection (c) also contains an "election bar" rule under which no election may be held in any unit or part of such unit within 12 months of a valid election. This provision is intended to foster stability and certainty as to labor relations issues by preventing the disruption caused by repeated elections.

Section 7215. Representation rights and duties; good faith bargaining; scope of negotiations; resolution of negotiability disputes

Subsection (a) provides that a labor organization accorded exclusive recognition is the exclusive representative of employees in the unit and is entitled to act for and negotiate agreements covering all employees in the unit and to be represented at formal discussions between management and employees concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit. It also provides that the exclusive representative is responsible for representing the interests of all unit employees without discrimination and without regard to labor organization membership. It further provides that the agency and the labor organization shall negotiate in good faith for the purpose of arriving at an agreement.

The parties have a mutual duty to bargain not only with respect to those changes in established personnel policies proposed by management, but also concerning negotiable proposals initiated by either the agency or the exclusive representative in the context of negotiations leading to a basic collective bargaining agreement. Where agency management proposes to change established personnel policies, the exclusive representative must be given notice of the proposed changes and an opportunity to negotiate over such proposals to the extent they are negotiable. In addition, a union holding exclusive recognition must be given the opportunity to be represented at formal discussions between management and employees concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

Subsection (b) defines the duty to "negotiate in good faith" to include approaching negotiations with a sincere resolve to reach an agreement, being represented at negotiations by appropriate representatives prepared to discuss and negotiate on all negotiable matters, meeting at reasonable times and places, and if an agreement is reached, executing a written document embodying the agreed terms and taking necessary steps to implement the agreement.

Subsection (c) provides that an agency and a labor organization accorded exclusive recognition shall negotiate with respect to personnel policies and practices and matters affecting working conditions so far as may be appropriate under this chapter and other applicable laws and regulations elaborated below. The scope of negotiations under this section is the same as under section 11(a) of Executive Order 11491. That is, under this subchapter a labor organization is

entitled to negotiate on the personnel policies and practices and matters affecting working conditions of employees in the bargaining unit which it represents, but only to the extent appropriate under laws and regulations which are set forth in the Federal Personnel Manual; consist of published agency policies and regulations issued at the agency level or level of primary national subdivision for which a compelling need exists (as determined under criteria established by the Authority); or are set forth in a national or other controlling agreement entered into by a higher unit of the agency.

Subsection (d) excepts certain enumerated matters from the obligation to negotiate under section 7215, in effect rendering bargaining on those matters optional or permissive; and recognize that there is an obligation to negotiate over the impact of realignments of work forces and technological change. Excepted from the obligation to negotiate are matters with respect to the numbers of employees in an agency; the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty (i.e., the agency's staffing patterns, including job content); and the technology of performing agency work.

Subsection (e) provides procedures for the resolution of negotiability issues arising in connection with negotiations. The procedures correspond exactly to those contained in section 11(c) of Executive Order 11491.

Section 7216. Unfair labor practices

Subsection (a) provides that certain enumerated actions are unfair labor practices for agencies. Similar unfair labor practices are contained in section 19(a) of Executive Order 11491. Those unfair labor practices are:

(1) interfering with, restraining, or coercing an employee in connection with the exercise of rights assured by this chapter of the United States Code;

(2) encouraging or discouraging membership in any labor organization by discrimination with regard to hiring, tenure, promotion, or other conditions of employment;

(3) sponsoring, controlling or otherwise assisting any labor organization, unless the assistance consists of furnishing customary and routine services and facilities—

(A) in a manner consistent with the best interests of the agency, its employees, and the organization, and

(B) on an impartial basis to any organization having equivalent status.

In addition, the subsection provides that it is an unfair labor practice for an agency to—

(4) discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, petition, or given any information or testimony under the provisions of the subchapter;

(5) refuse to accord appropriate recognition to a labor organization qualified for such recognition; or

(6) to refuse to consult or negotiate in good faith with a labor organization as required by the chapter.

Subsection (b) provides that certain actions are unfair labor practices for labor organizations. Similar unfair labor practices are contained in section 19(b) of Executive Order 11491 except that section 7216(b)(4) codifies the Federal Labor Relations Council's interpretation of section 19(b)(4) that it is an unfair labor practice for a labor organization to picket an agency in a labor-management dispute where such picketing interferes or reasonably threatens to interfere with an agency's operations. Specifically, this subsection makes it an unfair labor practice for a labor organization to—

(1) interfere with, restrain, or coerce an employee in connection with the exercise of rights assured by this chapter of the United States Code;

(2) cause or attempt to cause an agency to coerce an employee in connection with the exercise of rights under this chapter;

(3) coerce or attempt to coerce an employee, or to discipline, fine or take other economic sanction against a member of a labor organization, as punishment or reprisal or for the purpose of hindering or impeding work performance, productivity or the discharge of duties by the employee;

(4) (A) call, or participate in, a strike, work stoppage, slowdown, or picketing of an agency in a labor-management dispute if the picketing interferes or reasonably threatens to interfere with an agency's operations or (B) condone any activity described in (A) above by failing to take action to prevent or stop it;

(5) discriminate against an employee with regard to the terms or conditions of membership in the organization because of race, color, religion, national origin, sex, age, or handicapping condition; or

(6) to refuse to consult or negotiate in good faith with an agency as required by this chapter.

Subsection (c) provides that it is an unfair labor practice for a labor organization holding exclusive recognition to deny membership to a unit employee except under certain conditions. Those conditions are: (1) the employee's failure to meet reasonable occupational standards uniformly required for admission, or (2) failure by the employee to tender fees and dues uniformly required as a condition of acquiring and retaining membership. Similar language contained in section 19(c) of the Executive Order has been interpreted as an unfair labor practice provision. The subsection does not preclude a labor organization from enforcing discipline in accordance with procedures under its constitution and bylaws as long as such action is consistent with the requirements of this chapter.

It is intended that unfair labor practice complaints will be handled by the General Counsel of the Authority in a manner essentially identical to National Labor Relations Board practices in the private sector. The one deviation from private sector practices is that it is envisioned that there be retained the current Executive Order 11491 requirement that there be first filed a pre-complaint charge which would provide an opportunity for informal resolution of the issues by the parties. If a matter is not resolved informally, a complaint may be filed with the General Counsel, who will conduct such investigation as is necessary to determine whether a reasonable basis for the com-

plaint has been established. If so, the General Counsel shall, in the absence of settlement, issue a notice of hearing. If a reasonable basis for the complaint has not been established, absent withdrawal, the complaint will be dismissed. At the formal hearing before an administrative law judge the General Counsel shall prosecute the unfair labor practice for the complainant. After the close of the hearing, the administrative law judge will issue a report and recommendation. The Authority shall, subject to its regulations, consider any exceptions filed by the parties and decide the unfair labor practice complaint.

Subsection (d) is similar to a provision contained in section 19(d) of Executive Order 11491. Under section 19(d), issues which can be raised under a statutory appeal procedure may not be raised as an unfair labor practice. This prohibition is preserved in section 7216(d). However, section 7221(d) of this chapter permits a negotiated grievance procedure to cover matters for which a statutory appeal procedure exists, except for those matters specifically enumerated. Where a negotiated grievance procedure covers a non-excepted matter for which a statutory appeal procedure exists (other than adverse action and discrimination matters), the otherwise applicable statutory appeal procedure may not be invoked to resolve such matters. Accordingly, the issues involved may be raised either under the negotiated grievance procedure or, where appropriate, in an unfair labor practice proceeding. Those matters specifically enumerated in section 7221(d), which cannot be covered in a negotiated grievance procedure must be resolved exclusively under the applicable statutory appeal procedure. Accordingly, issues which can be raised under such statutory appeal procedure may not be raised in an unfair labor practice proceeding. Finally, where discrimination or adverse action matters (including demotion or removal for unacceptable performance under section 4303 of this title) are covered by a negotiated grievance procedure, an employee has the option of using either the negotiated procedure or statutory procedures. The use of either option will preclude the use of the unfair labor practice procedures.

The subsection also provides that appeals or grievance decisions shall not be construed as unfair labor practice decisions under this chapter nor as precedent for such decisions. All complaints of unfair labor practices prohibited under this section that cannot be resolved by the parties shall be filed with the FLRA.

Subsection (e) provides that questions concerning whether issues can properly be raised under an appeals procedure as described in section 7216(d) shall be referred for resolution to the agency responsible for final decisions relating to those issues. This provision is similar to section 7221(g) of this subchapter in purpose and effect. Under section 7216(e), the question is whether a statutory appeal procedure described in 7221(d) precludes an unfair labor practice proceeding whereas under 7221(g) the question is whether such statutory appeal procedure renders a grievance nongrievable or nonarbitrable.

Section 7217. Standards of conduct for labor organizations

This section provides that labor organizations must subscribe to certain standards of conduct and that the Assistant Secretary shall prescribe regulations to effectuate this section. Subsection (a) sets

forth these standards of conduct, which are the same as contained in Executive Order 11491. An organization does not have to prove that it is free from corrupt influences and influences opposed to basic democratic values if its governing requirements include explicit and detailed provisions requiring it to (1) maintain democratic procedures and practices, (2) exclude persons from office in the organization if they are affiliated with communist or other totalitarian influences, (3) prohibit conflicts of interest by its officers and agents, and (4) maintain fiscal integrity in the organization's affairs.

Under subsection (b), an organization could still be required to furnish evidence of its freedom from corrupt influences or influences opposed to basic democratic principles if there is reasonable cause to believe that the organization is subject to such influences or that the organization has been subject to a sanction by a parent or affiliated organization because of its unwillingness or inability to comply with the requirements of subsection (a).

Subsection (c) requires a labor organization which has or seeks recognition as a representative of employees to file financial and other reports with the Assistant Secretary. It also must provide for bonding of officials and employees of the organization, and comply with trusteeship and election standards.

Subsection (d) requires that complaints of violations of this section be filed with the Assistant Secretary. As noted under section 7204(b), the power and duty to decide alleged violations of the standards of conduct are not being transferred to the Authority because the Assistant Secretary administers similar standards in the private sector. Further, as noted under section 7204(c), the Authority may review the Assistant Secretary standards of conduct decisions as the Federal Labor Relations Council now does under Executive Order 11491.

This subsection also empowers the Assistant Secretary to require a labor organization to cease and desist from violations of this section and requires it to take action that he considers appropriate to carry out this section's policies.

Section 7218. Basic provisions of agreements

This section provides that each agreement between an agency and a labor organization is subject to certain enumerated requirements and mandates that these requirements be expressly stated in any agreement between an agency and a labor organization. Subsection 7218 (a)(1) provides that in the administration of agreements, officials and employees are governed by existing or future laws, the regulations of appropriate authorities, and certain published agency policies and regulations. Subsection (2) enumerates the rights that management officials of an agency must retain, and in effect prohibits negotiating on proposals which would negate management's reserved authority as to the rights involved: to determine the mission, budget, organization, and internal security practices of the agency; to direct employees of the agency; to hire, promote, transfer, assign, and retain employees in positions within the agency; to suspend, demote, discharge, or take other disciplinary action against employees; to relieve employees from duties because of lack of work or for other legitimate reasons; to maintain the efficiency of Government operations entrusted to the

agency; to determine the methods (how), means (with what), and personnel (by whom) by which agency operations will be conducted; and to take whatever actions may be necessary to carry out the agency's mission in emergencies. Section 7218(a)(1) and (2) corresponds to section 12(a) and (b) of Executive Order 11491 except that matters relating to an agency's mission, budget, organization, and internal security practices are prohibited from bargaining under subsection (2); and, further, it is specified in subsection (2) that nothing in that subsection shall preclude parties from negotiating procedures which management will observe in exercising its authority to decide or act or from negotiating arrangements for employees adversely affected provided that such negotiations do not result in certain consequences and are consonant with law and regulations as provided in section 7215(c). These principles with respect to the obligation to negotiate "procedures" and "impact," while not expressly stated in Executive Order 11491, are established in case law thereunder.

Subsection 7218(c) continues the requirement contained in Executive Order 11491 that nothing in the agreement shall require membership in a labor organization or require employees to pay money to a labor organization except pursuant to a voluntary, written authorization for the payment of dues through payroll deductions.

Subsection 7218(d) provides that the requirements of section 7218 must be expressly stated in all agreements between an agency and an organization.

Section 7219. Approval of agreements

This section provides that a negotiated agreement is subject to the approval of the head of the agency involved or other designated official, and provides a time limit (45 days from the date the agreement is signed by the negotiating parties) for the completion of such agency action. The purpose of the provision is to ensure that agreements conform to applicable laws (including this subchapter), existing published agency policies and regulations (unless an agency has granted an exception to them), and regulations of other appropriate authorities (such as the Office of Personnel Management). A substantially identical provision is contained in Executive Order 11491. Experience under that Executive Order in numerous negotiability disputes established that the provision was warranted to accomplish the purpose described, and that the time limit imposed was a reasonable one to expedite the review process without sacrificing the quality of such review.

Section 7221. Grievance procedures

Subsection (a) provides that an agreement must contain a procedure for the consideration of grievances. The coverage and scope of the procedure is left to negotiation between the parties so long as it does not conflict with statute and so long as it does not cover any of the matters specifically excluded from coverage by section 7221(d). Thus, if the parties choose to do so, they may negotiate into coverage under their grievance procedure many of the matters that are covered by statutory appeal procedures, such as appeal from the withholding of within-grade salary increases and appeal from reduction-in-force actions. With the exception of adverse actions and discrimination

complaints, where a grievance falls within the coverage of the negotiated grievance procedure, both union and nonunion members of the bargaining unit must use the negotiated procedure to resolve the grievance. Where the negotiated procedure covers adverse actions or discrimination complaints, under section 7221(e) and 7221(f) the employee will have an option to use the negotiated grievance procedure or the statutory appeal procedure, but not both.

Subsection (b) provides for the adjustment of grievances between an employee or group of employees and the agency without the intervention of the exclusive representative. However, in such cases the adjustment cannot be inconsistent with any of the terms of the argument and the exclusive representative must have been given an opportunity to be present at the adjustment.

Subsection (c) provides that a negotiated grievance procedure must provide for arbitration as the final step of the procedure. This contrasts with the provisions of Executive Order 11491 under which the determination as to whether to provide for arbitration was left to negotiation between the parties. However, arbitration can only be invoked by the agency or the exclusive representative. Thus an aggrieved employee does not have a right to arbitration. This maintains the right of an exclusive representative to refuse to take to arbitration any grievance which it, in good faith, believes should not be processed through to arbitration so long as it meets its representational responsibilities under this subchapter. This section further requires the parties to provide in their grievance procedure that, except as provided in section 7221(g), an arbitrator will be empowered to resolve arbitrability questions.

Subsection (d) provides that a negotiated grievance procedure may cover any matter over which an agency has authority so long as it does not otherwise conflict with the provisions of this subchapter, and so long as it doesn't include any matters involving examination, certification and appointment, suitability, classification, political activities, retirement, life and health insurance, national security or the Fair Labor Standards Act.

Subsection (e) provides employees with an option, in appealing matters covered under 5 U.S.C. section 4303 (demotion or removal for unacceptable performance) or 5 U.S.C. section 7512 (removal, suspension for more than 30 days, reduction in grade, reduction in pay of an amount exceeding one step of an employee's grade or 3 percent of the employee's basic pay, furlough for 30 days or less), of using the statutory appeal procedure under 5 U.S.C. section 7701 or the negotiated grievance procedure if such matters have been negotiated into coverage under the grievance procedure. It also provides that matters similar to those listed above which may arise under other personnel systems applicable to employees covered by this subchapter, such as those provided in title 38, United States Code, may, in the discretion of the aggrieved employee, be raised under either the negotiated grievance procedure or under any appellate procedures which would otherwise be available to the employee if the matter weren't covered by the grievance procedure.

Subsection (f) provides employees with an option on discrimination matters listed in 5 U.S.C. section 2302(b) (1) to use either a sta-

tutory procedure or the negotiated grievance procedure to resolve the matter. Selection by the employee of the negotiated procedure would not prejudice an employee's right to request the Merit Systems Protection Board to review a final decision in the matter as provided for in 5 U.S.C. section 7701.

Subsection (g) provides that questions as to whether a grievance is on a matter excepted from coverage under the grievance procedure by section 7221 (d) shall be referred for resolution to the agency responsible for final decisions in those matters.

Subsection (h) provides that if an employee exercises the option to pursue a matter covered under 5 U.S.C. sections 4303 and 7512 through the negotiated grievance procedure an arbitrator must apply the same standards in deciding the case as would be applied by an administrative law judge or an appeals officer if the case had been appealed through the appellate procedures of 5 U.S.C. section 7701.

Subsection (i) provides that the parties must negotiate the allocation of the costs of arbitration. It also prohibits an arbitrator from awarding attorney or representative fees, except in matters where an employee is the prevailing party and the arbitrator's decision is based on a finding of discrimination, attorneys fees may be awarded and shall be governed by the standards applicable under the Civil Rights Act of 1964.

Subsection (j) provides that challenges to an arbitrator's award may be sustained by the Authority on grounds that the award violates applicable laws, appropriate regulations, or other grounds similar to those applied by Federal Courts in private sector labor-management relations. Challenges are not permitted to the Authority on matters covered by subsection (e). Decisions of the Authority are final, except for the right of an aggrieved employee under subsection (f).

Subsection (k) provides for judicial review of an arbitrator's award in matters covered under 5 U.S.C. sections 4303 and 7512 in the same manner and under the same conditions that apply to matters decided by the Merit Systems Protection Board. In applying the provisions of 5 U.S.C. section 7702 (Judicial review of decisions of the Merit Systems Protection Board) the word "arbitrator" should be read in place of the words "Merit Systems Protection Board". It further provides for judicial review of an arbitrator's award in matters similar to those covered under 5 U.S.C. sections 4303 and 7512 which arise under other personnel systems in the same manner and on the same basis as would be available to an employee who had not used the negotiated grievance procedure to appeal the matter.

The provision for judicial review is intended to assure conformity between the decisions of arbitrators with those of the Merit Systems Protection Board. Under the terms of this subsection, an arbitrator must establish a record that will meet the judicial tests provided for in section 7702 of this title.

Section 7222. Federal Service Impasses Panel; negotiation impasses

Subsection (a)(1) establishes within the Authority the Federal Services Impasses Panel. The Panel is composed of the Chairman and an even number of members, appointed by the President. No Federal employee shall be appointed to serve as a member of the Panel. Sub-

section (a) (2) provides for staggered appointments of Panel members, and that the Chairman shall serve for a five-year term. Any member of the Panel may be removed by the President. Subsection (a) (3) provides that the Panel may appoint an executive secretary. It also provides for the pay rates of members of the Panel.

Subsection (b) provides that the Federal Mediation and Conciliation Service upon request shall provide service and assistance to agencies and labor unions in the resolution of negotiation impasses.

Subsection (c) provides if voluntary arrangements fail either the labor union or the agency may request the Panel to consider the matter.

Subsection (d) provides that the Panel shall promptly investigate any impasse, and recommend procedures for resolving the matter. If the parties do not arrive at a settlement through means of one of the procedures recommended, the Panel may hold hearings and then take whatever action is necessary that is not inconsistent with the provisions of this chapter to resolve the impasse. Notice of the Panel's final action shall be promptly served and shall be binding for the term of the agreement unless the parties mutually agree otherwise.

Section 7231. Allotments to representatives

This section provides for agency payroll deduction of labor organization dues pursuant to written employee assignment and for the right to terminate such assignment at intervals of not more than 6 months. A similar provision is contained in Executive Order 11491 except that the Executive Order's requirement that such a payroll deduction be subject to the regulations of the Civil Service Commission has been deleted. Subsection (b) requires that an allotment for the deduction of dues terminates when the dues withholding agreement between the agency and the exclusive representative is terminated or ceases to be applicable to the employee. The allotment would also be terminated if the employee has been suspended or expelled from the labor organization which is the exclusive representative.

Section 7232. Use of official time.

This section provides for limitations on the use of official time by employees for labor organization activities. The same limitations are contained in Executive Order 11491. The limitations contained in the first part of this provision concern the use of official time for internal labor organization business and are directed toward restricting to nonduty hours activities which are of primary concern and benefit only to the labor organization. The second part of the provision prohibits employees who represent a labor organization from being on official time when negotiating an agreement, except to the extent that the negotiating parties agree otherwise within certain specified limits. Under the second part, the negotiating parties may agree to authorize official time for a reasonable number of labor organization negotiators, normally not to exceed the number of management representatives, for up to 40 hours or one-half the time spent in negotiations relating to the negotiation or renewal of a basic collective bargaining agreement, as opposed to negotiations which arise out of circumstances during the term of the basic agreement (midcontract negotiations). But nothing in the provision prohibits an agency and labor organization from negotiating provisions which provide

for official time for labor organization representatives to engage in contract administration and other representational activities (including negotiations which arise out of circumstances during the term of the basic agreement) which are of mutual interest to both the agency and the labor organization and which relate to the labor-management relationship and not to "internal" labor organization business. Examples of such representational and contract administration activities include the investigation and attempted informal resolution of employee grievances, participation in formal grievance resolution procedures, attending or preparing for meetings of committees on which both the labor organization and management are represented and discussing problems in agreement administration with management officials. The types of representational activities described, when the agency determines that such activities are related to the performance of labor-management functions contributing to the efficient administration of the agency, are consistent with the stated purposes of this chapter and agreement provisions pertaining to the use of official time for such contract administration purposes are of wide application throughout the Federal sector.

Section 7233. Remedial actions

This section provides that remedial action may be directed by appropriate authority, including an arbitrator, in order to effectuate the purposes and policies expressed in this subchapter, so long as such remedial action is consistent with the statute, including the backpay provisions of section 5596 of title 5, United States Code (Back Pay Act of 1966).

Section 7234. Subpenas

This section provides for the issuance of subpenas by any Authority member, the General Counsel, the Panel, or any employee designated by the Authority requiring the attendance and testimony of witnesses and the production of evidence. It provides that no subpoena shall issue requiring disclosure of intra-management guidance, advice or training within an agency or between an agency and the Office of Personnel Management. It also provides for the administration of oaths, the examination of witnesses and the receipt of evidence. In the case of failure to obey a subpoena, a United States district court is authorized by this section to issue an order requiring the appearance of witnesses or the production of evidence. Failure to comply with the court's order could be punished as contempt of court. This section also provides that witnesses be paid the same fees and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

Section 7235. Regulations

This section provides for the issuance of regulations by the Authority, the General Counsel, the Panel, and the Federal Mediation and Conciliation Service, to carry out their respective functions. The requirements of the Administrative Procedure Act shall be applicable to the adoption, amendment or repeal of such regulations. This provision is consistent with the practice which obtained in the issuance of regulations under Executive Order 11491.

Subsection 701(b) of the bill specifies that certain laws, agreements, recognitions, policies, regulations, procedures and decisions would not be precluded by the amendments adopted earlier in section 701.

Paragraph (1) sanctions the maintenance of exclusive recognitions, certifications, or lawful bargaining agreements entered into before the effective date of this subchapter, and the maintenance of recognition for units of management officials or supervisors by labor organizations which traditionally represent such personnel in private industry and which hold recognition in an agency on the effective date of this subchapter. Similar "grandfather" provisions are contained in Executive Order 11491.

Paragraph (2) provides for the continuation of policies, regulations, procedures, and decisions established or issued under Executive Order 11491 or any related Executive order, until revised or revoked by law, or until superseded by action of the Authority. Under this provision, cases which arose under Executive Order 11491 shall continue to be processed after the effective date of this subchapter in the same manner as before such effective date, except to the extent otherwise provided by law or by appropriate decision or regulation of the Authority.

Subsection 701(c) of the bill provides that the terms of office of members of the Authority, and the General Counsel, which terms are fixed under Reorganization Plan No. 2 of 1978, shall continue in effect until those terms would expire under the reorganization plan, and that, upon the expiration of those terms, appointments to office will be made for the respective 5-year terms provided in section 7203 of title 5. It further provides that the terms of office of Impasse Panel members, which terms are not fixed under the reorganization plan, shall continue in effect until members of the Panel are appointed for the respective fixed terms provided in section 7222 of title 5.

Subsection 701(d) authorizes the appropriation of such funds as are necessary to carry out the functions of the Authority, the General Counsel, and the Panel, and the functions of the Assistant Secretary under this section.

The next subsection provides for an amendment of the analysis to add to this chapter.

Subsections 701 (f), (g), and (h) amend sections 5314-5316 of title 5, United States Code, to add the Chairmen, the Members, and the General Counsel of the Federal Labor Relations Authority to positions at levels III, IV, and V (respectively) of the Executive Schedule.

Section 702. Remedial Authority

This section of the Act amends the Back Pay Act of 1966 to reflect the broader interpretation of the statute that has been given the Back Pay Act in recent years by the Comptroller General and the Civil Service Commission through decision and regulations. It also reflects the 1976 decision of the Supreme Court in *United States v. Testan* by explicitly exempting reclassification actions from its provisions.

This provision would strike out subsections (b) and (c) of section 5596 of title 5, United States Code, and add new subsections (b) and

(c). The new subsection (b) provides for coverage under the Back Pay Act for any employee who is found by an appropriate authority to have suffered a withdrawal, reduction, denial, or denial of an increase in, all or part of the employee's pay, allowances, differentials or any other monetary or employment benefits which would not have occurred but for an unjustified or unwarranted action taken by an agency.

Subsection (b) (1) provides that when any of the above-described circumstances are found, the employee is entitled to be made whole for any losses found to have been suffered by the employee, less any interim earnings the employee may have earned and would not have earned if the unjustified or unwarranted action had not been taken. It specifically provides that a make-whole remedy may include reinstatement to the same position that the employee was in before the unjustified or unwarranted action was taken or for restoration to a substantially similar position. It also provides for directing a promotion to a higher level position when such an order would effectuate the make-whole purposes of the Act.

Subsection (b) (2) maintains the current provisions of the Back Pay Act regarding annual leave restoration that were added to the Act by Pub. L. 94-172 section 1(a) Dec. 23, 1975, 89 Stat. 1025. It provides that for all purposes an employee is deemed to have performed service for the agency during the period of the unjustified or unwarranted action.

Subsection (c) (1) defines an "unjustified or unwarranted action" to include acts of commission as well as omission with respect to non-discretionary provision of law, Executive order, regulation or collective bargaining agreement.

Subsection 5596(c) (2) defines administrative determination. The listed agencies and persons are not meant to be all-inclusive.

Subsection (c) (3) lists certain agencies and persons who, for purposes of applying the provisions of the Act, are deemed to be an "appropriate authority." The list is not meant to be all-inclusive.

Subsection (d) provides that the provisions of the section shall not apply to reclassification actions, thus specifically recognizing the Supreme Court decision in *United States v. Testan*. It also provides that in formulating a remedy under the Act an otherwise proper promotion action by a selecting official from a group of properly ranked and certified candidates cannot be set aside.

Subsection (e) provides that the Office of Personnel Management shall prescribe regulations to carry out the section. It specifically provides that the regulations do not apply to the Tennessee Valley Authority.

TITLE VIII—MISCELLANEOUS

SECTION 801. SAVINGS PROVISIONS

Subsection (a) of section 801 provides that all Executive orders, rules, and regulations shall continue in effect except as the provisions of this Act may govern. Such Executive Orders, rules, and regulations, are to continue in effect, according to their terms, until modified, terminated, suspended or repealed by the President, the Office of Personnel Management, the Merit System Protection Board, the Equal Em-

ployment Opportunity Commission, or the Federal Labor Relations Authority as to matters within their respective jurisdictions.

Subsection (b) provides that no provision of the Act shall affect any administrative proceedings pending at the time the provision takes effect. Orders are to be issued in such proceedings and appeals taken from those proceedings as if this Act has not been enacted.

Subsection (c) provides for the continuation of any suit by or against the heads of the Office of Personnel Management and Merit Systems Protection Board or officers or employers of those agencies, as in effect immediately before the effective date of the Act. Such suits, actions, or other proceedings are to be determined as if the Act had not been enacted.

SECTION 802. AUTHORIZATION OF APPROPRIATIONS

This section authorizes to be appropriated out of any moneys in the Treasury not otherwise appropriated, such sums as may be necessary to carry out the provisions of this Act.

It is expected that most of the funds necessary to carry out the provisions of this Act will be derived from appropriations under current law. The moneys needed for the Office of Personnel Management, Merit Systems Protection Board, and Office of Special Counsel are largely to be derived from current Civil Service Commission authorizations. The original estimates supplied by the Administration as to the allocation of resources among the new agencies and units, however, needs to be revised. The Committee has substantially increased the authority and responsibilities of the Merit Systems Protection Board and the Special Counsel. The resources allocated to these bodies should therefore be substantially greater than original Administration estimates.

SECTION 803. POWERS OF PRESIDENT UNAFFECTED EXCEPT BY EXPRESS PROVISIONS

This section makes clear that except as expressly provided in this Act, nothing in it shall be construed to limit, curtail, abolish, or terminate any function of, or authority available to, the President which the President had immediately before the effective date of this Act. Nor is it to be construed to limit, curtail, or terminate the President's authority to delegate, redelegate, or terminate any delegation of functions which he had immediately before the effective date of this Act.

SECTION 804. TECHNICAL AND CONFORMING AMENDMENTS

Subsection (a) of this section provides that any provision in either Reorganization Plan Numbers 1 or 2 of 1978 inconsistent with any provision of this Act is repealed.

Subsection (b) authorizes the President or his designee to submit to the Senate Committee on Governmental Affairs and the House Committee on Post Office and Civil Service a draft of any technical and conforming amendments to title 5 of the United States Code which have not been made by this Act and which are necessary to reflect the amendments to the substantive provisions of law made by this Act and Reorganization Plan Numbered 2 of 1978. Such technical and conforming amendments must be submitted as soon as practicable but not later than 30 days after the date of enactment of this Act.

SECTION 805. EFFECTIVE DATES

This section provides that the provisions of the Act shall take effect 90 days after the date of enactment of this Act, except as otherwise expressly provided in this Act.

VII. EVALUATION OF REGULATORY IMPACT

Paragraph 5(a) of Senate Rule XXXIX requires each report accompanying a bill to evaluate "the regulatory impact which would be incurred in carrying out the bill."

S. 2640 is not a regulatory bill. It does not directly affect private individuals or businesses. The bill will help improve personnel activities within Federal agencies, which, in turn should help agencies regulate more effectively. The economic impact of regulation on such individuals and businesses, likewise, is not changed by anything in S. 2640. The bill will not increase paperwork for the private sector.

VIII. COST ESTIMATE

CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., July 11, 1978.

HON. ABRAHAM RIBICOFF,
*Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for S. 2640, the Civil Service Reform Act of 1978.

Should the committee so desire, we would be pleased to provide further details on the attached cost estimate.

Sincerely,

JAMES BLUM
(For Alice M. Rivlin, Director).

1. Bill number: S. 2640.
2. Bill title: Civil Service Reform Act of 1978.
3. Bill status: As reported by the Senate Committee on Government Affairs on July 10, 1978.
4. Bill purpose: S. 2640 reorganizes the federal personnel system. Title I establishes the basic merit principles of the new personnel system and outlines the authority of the President and agency heads for ensuring that personnel management in the Executive Branch is carried out according to those principles.

Title II establishes the responsibility of the Merit Systems Protection Board (MSPB), the Office of Personnel Management (OPM) and the Special Counsel. This title also revises adverse action procedures; provides a new system of appraising employee performance; establishes new procedures for removal or demotion based on unacceptable performance; and provides for greater delegation of personnel authority to federal agencies.

Title III authorizes agencies to accept the services of unpaid student volunteers and to train employees threatened with separation due to a reduction in force. In addition, early retirement authority is extended to reorganization situations.

Title IV outlines the numbers, distribution, accountability and compensation for members of the newly created Senior Executive Service (SES). A limited number of performance and incentive awards would replace longevity pay increases.

Title V provides authority to establish a merit pay system for supervisors and managers in grades 13 through 15 of the general schedule. Within-grade salary increases will be replaced by merit increases which will be awarded only in recognition of superior performance.

Title VI authorizes OPM to conduct public management research and to carry out demonstration projects to test and evaluate new approaches to personnel management.

Title VII outlines the rights and obligations of federal employees and establishes procedures relating to labor-management relations.

Title VIII offers miscellaneous amendments and authorizes the appropriation of such sums as may be necessary to carry out the provisions of the bill.

5. COST ESTIMATE

[By fiscal years, in millions of dollars]

	1979	1980	1981	1982	1983
Title II.....	4.6	5.1	5.4	5.8	6.1
Title IV.....	3.6	28.5	31.9	35.4	37.7
Title VI.....	3.1	3.4	3.8	3.9	3.8
Title VII.....	.3	.5	.6	.6	.9
Other administrative costs.....	2.0	.4	.4	.5	.5
Total estimated cost.....	13.6	37.9	42.1	46.2	49.0

This estimate does not include the potential costs of the early retirement provisions of Section 304, and the unlimited accrual of leave permitted by Section 410. These costs, which could be substantial, cannot be estimated at the present time. In addition, the net cost of the retraining program authorized in Section 302 (including potential savings in severance pay) could not be estimated in the time available.

6. Basis of estimate: For the purpose of this cost estimate, it is assumed that this bill will be enacted on or after October 1, 1978. All costs have been adjusted for inflation in future years based on CBO economic assumptions. All sections of the bill with a significant cost impact are discussed below.

SECTION 201. OFFICE OF PERSONNEL MANAGEMENT

This section defines the functions of the OPM, and establishes the positions of director, deputy director, and associate directors.

Estimated costs—OPM:

Fiscal year:	Millions
1979	\$0.5
19807
19818
19828
19839

It has been assumed that additional costs will be incurred only for the director, deputy director, and five associate directors, at the au-

thorized salary levels, along with clerical support for each. All other employees of the OPM are assumed to come from the Civil Service Commission (CSC), and the cost of the functions they perform at the OPM would be the same as if performed by the CSC.

SECTION 202. MERIT SYSTEMS PROTECTION BOARD AND SPECIAL COUNSEL

The MSPB, to be composed of three members, a special counsel, and such other employees as deemed necessary, is to be responsible for the investigation, hearing or adjudication of adverse or prohibited personnel actions, for conducting studies relating to the civil service and other merit systems, and for establishing rules and regulations pertaining to its activities.

Estimated costs—MSPB:

Fiscal year:	<i>Millions</i>
1979 -----	\$0.4
1980 -----	.5
1981 -----	.5
1982 -----	.6
1983 -----	.6

The estimated costs for this section are comprised of the difference between the specifically authorized salaries for the members and officers of the CSC and the MSPB. In addition, based on estimates supplied by the CSC, costs for 25 additional persons at an average fiscal year 1978 salary of \$17,500 have been added for investigation of complaints regarding prohibited personnel actions, particularly "whistle blower" complaints. All other personnel are assumed to come from the CSC.

SECTION 203. PERFORMANCE APPRAISAL

Each agency is responsible for developing performance policies and regulations for periodic appraisal of job performance of employees. Based on CSC data, it is estimated that costs will be \$3.4 million in aggregate in 1979. It is projected that the administration of the merit pay plan will continue to be an integral part of personnel operations, with costs increasing to \$4.2 million in fiscal year 1983.

Estimated costs—performance appraisal:

Fiscal year:	<i>Millions</i>
1979 -----	\$3.4
1980 -----	3.6
1981 -----	3.8
1982 -----	4.0
1983 -----	4.2

SECTION 205. APPEALS

The MSPB may require an agency to pay attorney fees incurred by an employee in cases where the Board determines that the agency acted in bad faith, and at all times when the employee is the prevailing party and the decision is based on finding of discrimination. Based on an estimated annual caseload of 4,900, it is projected that there will be approximately 100 cases each year in which the employee prevails and

it is also determined that the agency acted in bad faith, and that each year approximately 300 cases of discrimination will result in the employee prevailing. Assuming a cost of \$750 per case (at 1979 cost levels), the estimated costs for payment of attorney fees are as follows:

Estimated costs—attorney fees:

Fiscal year:	<i>Millions</i>
1979 -----	\$0.3
1980 -----	.3
1981 -----	.3
1982 -----	.4
1983 -----	.4

While this section makes other procedural or definitional changes affecting the appeals process, these are not expected to have a significant cost impact.

SECTION 301. VOLUNTEER SERVICES

This section provides a general authorization to agencies to accept voluntary services performed by students. The volunteers are not to be considered federal employees except for purposes relating to injury compensation and tort claims. Although the Government could incur some costs as a result of claims by volunteers, no additional costs of this kind have been included in this estimate.

Section 301 also changes the regulations governing probation periods in the competitive service and removes the restriction on family members employed in the competitive service. These provisions are not expected to result in any additional costs.

SECTION 302. TRAINING

Under this section, federal employees who face separation from an agency because of a reduction in force would be eligible to be trained for jobs in other agencies. It is likely that training costs would increase as a result of this provision; however, many of these employees would have been eligible for severance pay or unemployment compensation. It is not possible at this time to estimate the net cost or savings that may result from this provision.

SECTION 304. RETIREMENT

The section allows early retirement for employees whose agencies are undergoing a major reorganization, reduction-in-force, or transfer of function. The total number of eligible employees, as well as the number of those who would elect early retirement, cannot be estimated at this time. However, the potential cost of this provision could be significant.

SECTION 403. EXAMINATION, CERTIFICATION, AND APPOINTMENT

This section establishes the procedures and requirements for appointment of personnel in the SES. It provides for skill development programs and authorizes up to 11 months leave with pay, plus travel and per diem expenses for training of eligible persons.

Estimated cost—personnel development :

Fiscal year :	Millions
1979 -----	\$3.5
1980 -----	3.7
1981 -----	3.9
1982 -----	4.1
1983 -----	4.3

Based on information from the CSC, it is assumed that approximately 50–60 persons would take the 11 month sabbatical at an average cost of \$50,000 per employee. An additional \$0.5 million is assumed to be spent by the OPM for setting up training programs and establishing the requirements and procedures for SES personnel.

SECTION 405. PERFORMANCE RATING

Agencies are required to develop senior executive service performance appraisal systems. Costs for developing criteria and ratings for executive performance appraisal have been included in the costs shown for Section 203.

SECTION 406. INCENTIVE AWARDS AND RANKS

CSC estimates that approximately 9,200 federal employees will be eligible for the Senior Executive Service (SES) in fiscal year 1979, and that the number of eligible employees, as well as the amount of the stipend, will remain stable throughout the projection period. It is assumed that the maximum of 15 percent of the SES will be designated as meritorious executives and no more than 5 percent in any one year. This designation provides an annual stipend of \$2,500 for up to five years. It is also assumed that the specified maximum of 1 percent of the SES members will be appointed as distinguished executives, which offers an annual stipend of \$5,000 for up to five years. Estimated costs for these awards are shown below :

Estimated cost—incntive awards :

Fiscal year :	Millions
1979 -----	---
1980 -----	\$1.6
1981 -----	2.8
1982 -----	4.0
1983 -----	4.0

SECTION 407. PAY RATES AND SYSTEMS

Each member of the SES will receive a base rate of pay not less than the rate for the sixth step of grade GS-15 of the general schedule (now \$42,201) and not higher than the rate for level IV of the executive schedule (now \$50,000). In addition, up to 50 percent of the executives in an agency may receive performance awards not to exceed 20 percent of the executive's rate of base pay. Agencies are given considerable flexibility as to how the merit pay awards are to be spread among the executives. It is estimated that when fully operational, approximately 4,000 merit pay awards at an average size of \$6,000, will be distributed in 1980 with the average size increasing with inflation thereafter. The costs of these merit awards would increase if the size of the SES or the average award size were to increase.

The increased cost of merit pay awards will be partially offset by the elimination of the present system of step increases. Assuming that the present \$47,500 pay ceiling is increased with annual comparability adjustments after fiscal year 1979, the estimated savings in normal step increases will be approximately \$1 million per year. (If the ceiling were totally removed, this offset would be substantially larger).

As a result of these performance awards, the unfunded liability of the Civil Service Retirement and Disability Fund will increase. The impact of this provision has been estimated based on CSC projections and the following assumptions: an average of 4,000 SES members receiving performance awards each year; an average salary at retirement of \$50,000; the typical executive receiving five performance awards during his career; annuities calculated at 2½ percent of the average employee's three highest years' salaries; and the present value of the added benefits at the time of retirement equal to 12 times the added benefit. The estimated increase in the unfunded liability will be \$60 million with annual installments derived from annuity tables equal to \$4 million annually. The following table shows estimated outlays, which will continue to increase beyond the projection period.

Estimated net costs :		<i>Millions</i>
Fiscal year 1979 :		
Performance awards.....	-----	
Retirement costs.....	-----	
Fiscal year 1980 :		
Performance awards.....	-----	\$23. 0
Retirement costs.....	-----	
Fiscal year 1981 :		
Performance awards.....	-----	24. 7
Retirement costs.....	-----	0. 3
Fiscal year 1982 :		
Performance awards.....	-----	26. 5
Retirement costs.....	-----	0. 6
Fiscal year 1983 :		
Performance awards.....	-----	28. 3
Retirement costs.....	-----	1. 0

SECTION 409. TRAVEL, TRANSPORTATION AND SUBSISTENCE

This section authorizes the payment of travel expenses for potential SES candidates who interview with the federal government.

Estimated cost—travel		<i>Millions</i>
Fiscal year :		
1979	-----	\$0. 1
1980	-----	. 2
1981	-----	. 2
1982	-----	. 2
1983	-----	. 2

Based on information obtained from the CSC, it is assumed that travel expenses will be approximately \$135,000 a year (at 1979 cost levels).

SECTION 410. LEAVE

This section would remove the current limit of six weeks annual leave carry over for SES personnel, allowing them to accumulate as much leave as they wish. Even though this could result in significant increases in costs when employees leave the Federal Government, it is not possible to estimate how much additional leave would be accrued.

SECTION 501. MERIT PAY

This section establishes a merit pay system for federal employees in grades 13 through 15 of the general schedule. Within-grade salary increases will be replaced by merit increases, which will be awarded only in recognition of superior performance. The amount of money available for merit pay will be determined by the OPM, and set so as to equal those estimated amounts which are not being paid through regular step increases. It is assumed, based on CSC data, that the net effect of these changes is neither an increase nor decrease in total personnel compensation, but rather a redistribution of these resources.

SECTION 601. PERSONNEL RESEARCH AND DEMONSTRATION PROJECTS

Section 601 establishes a program to encourage research and demonstration projects in the area of personnel and public management. It is estimated that approximately four to eight projects, costing approximately \$100,000 to \$300,000 each, will be required to develop these new theories and approaches to personnel management problems.

Estimated cost—research :

Fiscal year :	Millions
1979 -----	\$0.8
1980 -----	1.0
1981 -----	1.2
1982 -----	1.2
1983 -----	1.0

SECTION 603. AMENDMENTS TO THE MOBILITY PROGRAM

This section authorizes the federal government to make up any differences in salary when a federal employee is assigned to a state or local government, or a state or local employee is assigned to the federal government.

Estimated cost—mobility program :

Fiscal year :	Millions
1979 -----	\$2.3
1980 -----	2.4
1981 -----	2.6
1982 -----	2.7
1983 -----	2.9

There are currently approximately 1,100 people in the Mobility Program, divided fairly evenly between federal and state and local employees. The federal employees would receive approximately \$3,000 from the federal government per year in salary as a result of this section, since state and local salaries are generally lower than federal. Although travel costs are already paid, this pay comparability provision is expected to stimulate the transfer of employees, thereby increasing travel costs, estimated to be approximately \$1,500 per person.

SECTION 701. LABOR-MANAGEMENT RELATIONS

Under this section, the Federal Labor Relations Authority and an Office of the General Counsel would be established in order to formulate and implement management policies in the field of management-labor relations. It is estimated that four executives at a GS-18 level, plus support staff, as well as four technical consultants will be re-

quired. This is in addition to existing staff transferred from other agencies to this function. The estimated costs are as follows:

Estimated cost—labor-management relations:

Fiscal year:	<i>Millions</i>
1979 -----	\$0.3
1980 -----	.5
1981 -----	.6
1982 -----	.6
1983 -----	.7

OTHER COSTS

There are a number of sections of this legislation which authorize or require the development of rules and regulations and require the submission of various new reports, but for which no specific costs have been attributed. It has been assumed that these new requirements will cost an additional \$1 million in the first year. Regulation development costs are expected to decrease over the projection period, and reporting costs to remain constant. The actual physical moving costs resulting from the reorganization have been estimated to be \$1 million in fiscal year 1979.

Estimated costs—general:

Fiscal year:	<i>Millions</i>
1979 -----	\$2.0
1980 -----	0.4
1981 -----	.4
1982 -----	.5
1983 -----	.5

7. Estimate comparison: None.
8. Previous CBO estimate: None.
9. Estimate prepared by: Mary Maginniss and Kathy Weiss.
10. Estimate approved by:

C. G. NUCKOLS
For James L. Blum,
Assistant Director for Budget Analysis.

IX. RECORD VOTE IN COMMITTEE

June 14, 1978

In compliance with section 133 of the Legislative Reorganization Act of 1946, as amended, rollcall votes taken during Committee consideration of this legislation are as follows: Vote on Eagleton/Javits Amendment on Veterans Preference: 7 yeas—9 nays.

YEAS	NAYS
Eagleton	Muskie
Sasser	Chiles
Humphrey	Nunn
Percy	Glenn
Javits	Stevens
Danforth	Mathias
Ribicoff	(Proxy)
	Jackson
	Roth
	Heinz

Vote on Study on Veterans Preference: 13 yeas—1 nay:

YEAS	NAYS
Muskie	Eagleton
Chiles	
Nunn	
Glenn	
Sasser	
Humphrey	
Percy	
Javits	
Stevens	
Mathias	
Danforth	
Heinz	
Ribicoff	

June 29, 1978

Vote on Javits/Ribicoff Amendment on appellate procedures in mixed discrimination cases: 7 yeas—4 nays:

YEAS	NAYS
Percy	Glenn
Javits	Sasser
Danforth	Mathias
Ribicoff	Heinz
(Proxy)	
Jackson	
Nunn	
Humphrey	

FINAL PASSAGE: Ordered reported:¹ 8 yeas—2 nays:

YEAS	NAYS
Eagleton	Stevens
Chiles	Mathias
Glenn	
Sasser	
Percy	
Javits	
Danforth	
Ribicoff	
(Proxy)	
Jackson	
Nunn	
Humphrey	

¹ Committee rules provide that on "Final Passage" proxies may be allowed solely for the purpose of recording a member's position on the pending question.

X. ADDITIONAL VIEWS OF MR. PERCY

The Senate Governmental Affairs Committee has acted with both prudence and expedition in favorably reporting S. 2640, the Civil Service Reform Act, to the full Senate. I consider this legislation a significant step forward in making government work better for all Americans who deserve service in return for their tax dollars. I have sponsored this legislative initiative from the start, and believe the Committee has developed a sound and comprehensive bill. Only if we make the machinery of government more efficient and effective, can we expect Federal programs to succeed.

The Federal government currently employs 2.8 million civilian personnel at an annual payroll cost in excess of \$46 billion. More than two million of these employees fall within the Civil Service merit system. For the most part, the Federal government has been able to attract a high caliber of competent, productive and hardworking individuals to staff its agencies and Departments. However, far too many Federal employees are incompetent, inefficient, and low in productivity to a degree that would not be tolerated in the private sector. Competent Federal employees who do their jobs well resent the fact that others who do not are still virtually guaranteed tenure under a system which makes firing for incompetence a near impossibility, and which assures that the incompetent enjoy equal pay with the highly qualified.

The Civil Service Reform Act reported by this Committee will go a long way in correcting these deep-rooted flaws in the Federal bureaucracy.

However, I disagree with two provisions of the legislation as reported by the Committee that I believe warrant further comment.

VETERANS PREFERENCE

A central element in the Administration's original proposal to improve the Federal Civil Service system concerned modifications of Federal veterans preference laws as they affect hiring and retention in Civil Service. Though a number of problems were found in the original Administration proposal on this point, Senators Javits and Eagleton presented the Committee with an amendment which would accomplish three significant goals: (a) better focus veterans preference on those veterans most in need of employment opportunities, that is, disabled veterans and veterans of the Vietnam Era; (b) bring us closer to a pure merit system in hiring of Federal civilian employees; and (c) better enable qualified women and other groups to compete on a more equal basis in obtaining Federal civilian jobs. Unfortunately, the Committee voted 9-7 not to accept the Javits-Eagleton amendment. I believe this was a mistake. The House Committee on Post Office and Civil Service, on other hand, adopted a similar provision by a vote of 16-9.

Veterans comprise some 48 percent of Federal civilian employees. But less than one in ten is a veteran of the Vietnam Era, despite the fact that Vietnam Era veterans number 8.5 million today, almost one third of the total American veteran population. In some large Federal agencies, the proportion of Vietnam Era veterans is well under 5 percent. If the essential purpose of veterans preference is to give veterans tangible assistance in making up for lost time and opportunity resulting from military service, the current system defeats this purpose by allowing the older veteran to use his preference to deny the younger veteran that opportunity.

Currently, of all veterans now being hired by the Federal Government, almost half are pre-Vietnam Era. And, of those Vietnam Era veterans hired by the Federal Government, more than 12 percent are retired military personnel, already receiving full pensions and having served a 20-year military career, rather than the young veterans themselves. Fifty of these so-called "double dippers" receive, on average, in excess of \$80,000 per year and another 60 receive more than \$60,000 per year from the Federal Government, which is often more than their supervisors or agency heads earn.

At the same time, unemployment for Vietnam Era veterans is far greater than that for veterans in the older group.

While I strongly agree with the assertion that veterans, who have taken great risks and have sacrificed productive years of their lives in defense of their country, are deserving of preference in Federal hiring, the current structuring of the veterans preference system has worked against those veterans most in need. Considering the heavy burden that Vietnam Era veterans in particular have had to suffer, both as a result of their actual military service as well as a result of public attitudes toward that war, to leave these veterans shortchanged is grossly unfair.

This same unfairness is present with disabled veterans, who must compete with nondisabled veterans who, in addition to their five preference points, have been able to accrue other job advantages because of their health. Veterans who have been injured during service certainly deserve special treatment.

Veterans preference was established as a means of helping veterans whose lives had been displaced by military service to make up for lost time and sacrifices upon returning to the civilian economy. Preference was not intended as a mere symbol of military service, but rather a practical form of help to veterans in need. The attitude that has grown up over the years that veterans preference is a "lifelong entitlement right" rubs directly against the need of helping veterans return to civilian life. It creates a system of vested interests under which the older veteran competes against the younger veteran, almost always to the detriment of the latter. In an economy of scarce resources, we cannot afford not to focus our assistance efforts where they would be most effective.

The documentation of how veterans preference has affected the opportunities for qualified women in competing on an equal basis in obtaining Federal jobs can be summed up in one statistic: of more than 29 million living American veterans, only about 800,000 are women. What is at stake here is not simply a matter of equal employment op-

portunity but also the ability of the Federal Government to hire the best qualified individuals for positions of responsibility.

What veterans and veterans' organizations must take into account is that the vast majority of American veterans do not share the vested interests of Federal employees (only 4.9 percent out of 29 million American veterans are employed by the Federal Government). But, as taxpayers and consumers of government services, every veteran suffers the brunt of inefficient government and realizes the benefits of improved government service. Veteran and nonveteran taxpayers alike must pick up the tab for a Civil Service system which has resulted in a growing portion of their tax dollars to be squandered by inefficiency and waste. The modification of veterans preference would thus aid veterans, not only by targeting preference toward the most needy veterans, but also by improving the condition of all veterans as citizens.

Veterans, however, can make a special claim that they have proven their patriotism in a manner above and beyond their fellow citizens. As such, they above all understand the meaning of the common good. For this reason, veterans in particular should rally to this proposal for Civil Service reform.

The Javits-Eagleton veterans preference amendment, by limiting preference usage for non-disabled veterans to a single use during a period of 15 years from military discharge, in combination with other changes, is a fair approach to this problem. It would shift the emphasis of preference to where it belongs, on disabled veterans and Vietnam Era veterans, while bringing us closer to a Federal Civil Service based on merit. Hopefully this principle will be established in the course of the legislative process.

PRESIDENTIAL APPOINTEES

A cornerstone of Civil Service reform has been the creation of greater flexibility among Federal managers to help them better to do their jobs, while at the same time creating strong policing mechanisms to assure that the greater flexibility is not abused or misused. A key to this system of merit checks and balances is the ability of the Merit Systems Protection Board to bring disciplinary actions against officials who violate the merit system by committing "prohibited personnel practices." Unfortunately, however, the Committee voted 7-6 to severely weaken this merit enforcement power by exempting Presidential appointees, mainly Federal agency heads, from the disciplinary jurisdiction of the Merit Systems Protection Board, including even the ability of the Board to decide whether the Presidential appointee had, in fact, committed the merit violation. Again, I believe this was a mistake.

The Presidential appointees covered by this exemption are some 800 individuals appointed by the President and confirmed by the Senate. They are generally agency heads or high ranking officials in Federal agencies, such as Assistant Secretaries. As such, they play an enormously influential role in personnel decision-making throughout the government.

The Administration has argued that only the President should have the authority to discipline these appointees. Constitutional precedent exists for this assertion concerning removal of appointees. But as the

bill has been amended by the Committee, not only would the Merit Systems Protection Board not have authority to exact penalties against appointees, it would not even have the authority to determine whether the appointee had, in fact, committed a "prohibited personnel practice." Without such a determination by the MSPB, the President, in the case of a merit violation by one of his appointees, would be presented only the unproven allegations of the MSPB Special Counsel. At no point would the President be presented an independent evaluation of allegations. Such a system could place an unfair burden on the President and appointees who would not have opportunities to clear their names.

A limited approach of authorizing the MSPB to hear charges of merit violations against Presidential appointees, make findings on the validity of those charges and then leaving the actual imposition of penalties to the President, would greatly improve this situation. Under such a system, the inherent political responsibility of the President for appointees would be an adequate check to ensure that justice is done.

The need to establish checks against merit abuse by Presidential appointees is particularly important given the enormous power S. 2640 gives to agency heads and other top officials under the new Senior Executive system.

The SES, a managerial corps consisting of the 8,500 highest Civil Service employees, would be subject to broad supervisory discretion in matters of pay, promotion, transfer, removal and bonuses. Improper influences among this body could have a ripple effect throughout the competitive service. Because this group would be quite limited in any one agency, the agency head himself would be in a pivotal decision-making position with regard to personnel matters among the SES. Most fears of potential politicization of the Federal bureaucracy have focused on the SES.

A strong enforcement mechanism, I believe, would effectively protect this new innovative program from abuse. However, if agency heads themselves are exempted from any enforcement authority, a serious gap exists in that enforcement mechanism.

For this reason, I hope that the exclusion of Presidential appointees from the disciplinary authority of the Merit Systems Protection Board can be corrected in the course of the legislative process.

ADDITIONAL VIEWS OF MR. GLENN

I support and have cosponsored the Civil Service Reform bill as it is reported by the Committee and believe it to be, on the whole, an excellent proposal. I disagree, however, with a major feature of the bill: its apportionment of administrative authority relating to employment discrimination involving federal workers.

The Committee bill would create a procedure under which differences between the Equal Employment Opportunity Commission and the Merit System Protection Board on Employment discrimination questions would be resolved by the Court of Appeals. As the Committee report states, "neither agency should have the authority to overrule the view of the other", and, when the matter is certified to the Court of Appeals, neither "agency should be considered as appealing the action of the other".

An alternative procedure, which I urged the Committee to adopt but which it rejected, would allow both the MSPB and the EEOC to rule on such discrimination questions in a manner similar to that provided by the Committee but would designate the EEOC as the final authority at the administrative level on such questions. Under this procedure, which was originally proposed by the Administration, the EEOC would review the MSPB's actions insofar as they related to discrimination and render a decision which could be implemented immediately and, if reviewed, treated by the court with the deference normally accorded to final agency actions.

The basic difference between the two approaches lies in the respective answers they give to the question: Which agency should be the final administrative authority on issues of alleged employment discrimination in the federal work force? The Committee's answer is that such final authority should be shared—although the extent of the sharing is ambiguous—between the MSPB and the EEOC. My approach would place that authority clearly in the EEOC.

The case for the latter approach rests on the proposition that the EEC is the Federal Government's central repository of sensitivity and expertise on employment discrimination matters. It is the administrative agency that has the responsibility at the federal level for considering employment discrimination disputes arising in the private sector. I see no reason why, where discrimination disputes involve the employment practices of a federal agency, the final administrative authority relating to those disputes ought not also to be centralized in the EEOC.

From the beginning three basic arguments have been made against this approach: that it would damage the independence of the MSPB by subjecting its decisions on certain questions to review by an executive branch agency; that the combination of adjudicatory and advocacy functions within the EEOC would be undesirable; and that such an approach would be administratively unworkable. I am not persuaded by these arguments.

With respect to the first, this Committee and the Congress on several occasions have permitted an executive agency to override an independent regulatory commission on questions which were considered best left to the executive branch. Precedents can be found in the existing Presidential override authority of the Civil Aeronautics Board and the International Trade Commission; and in the Department of Energy Organization Act and the Nuclear Non-Proliferation Act of 1978, both of which were considered earlier in this Congress by this Committee.

It is not the case, as it sometimes has been argued, that the executive branch may exercise these override authorities only in the foreign policy area. Under the DOE Organization Act, the DOE may veto FERC decisions on "energy actions" and other domestic matters specified in the Act.

On the second and third of the arguments put forward, I can see no difference between the Committee's approach and the one I support in the extent to which they are subject to the concerns raised. Apart from that, I believe those concerns to be minor at worst.

It is my hope therefore that the Committee's action on this matter will be reversed and the excellence of the remainder of the bill preserved during further consideration of the legislation this year.

JOHN GLENN.

ADDITIONAL VIEWS OF MR. HEINZ

The plan this legislation embodies is clearly a sound product based on extensive consideration both by the Administration prior to its presentation and in the Governmental Affairs Committee. Overall, reorganization of the Civil Service System will make some needed improvements in the operating of the federal service, based on sound management principles implemented in a generally equitable manner. In my view, however the Committee did make a serious mistake in its failure to adopt the original Glenn Amendment defining the relationship between the Equal Employment Opportunity Commission and the Merit System Protection Board. The compromise that was adopted clearly moves too far away from the original conception that was embodied in the Equal Employment Opportunity Commission Reorganization Plan, which was approved and reported out of the Governmental Affairs Committee on April 20, 1978.

Beyond that specific issue, however, I also fear that in its restructuring of the Civil Service, the Committee may have overlooked what should be one of the most fundamental principles of any substantive reform and what is one of the chief causes of citizen concern and complaint about government. That problem, simply, is size, and the principle—equally simple—is that a responsible reform designed to streamline the bureaucracy and make it more efficient should necessarily make it smaller.

This is no minor matter in a day when citizens are growing increasingly frustrated with the size and reach of their government and are showing their frustrations with growing support for tax and spending cut initiatives. In this climate, caused in part by continual bureaucratic inefficiency, it is incumbent on us to analyze reform from the standpoint of size as well as efficiency, and to act, firmly if necessary, to cut costs.

Unfortunately, nowhere in this legislation is there any meaningful effort to place controls on the overall size of the federal work force.

We are led to believe that the decentralization and increased efficiency created by this restructuring will lead to fewer clerks and "paper pushers," although more trained managers; however, nowhere in the bill is any effort made to require the attainment of this goal. Indeed it is possible, even likely, given the inevitable tendencies of large bureaucracies, that the "reforms" in this legislation will in fact simply add a new layer of management on top of existing layers without reducing the number of employees elsewhere; that "decentralization" will result in hiring increases in other agencies without a corresponding decrease in the Office of Personnel Management; and that the end result will be more people, more bureaucracy, and more cost, rather than the reverse.

(131)

Moreover, the bill actually compounds this problem by increasing the number of top-level employees from 3 to 14, and by increasing the salary level of current executive level employees.

The top level employees in the Office of Personnel Management, for example, have been upgraded over their Civil Service Commission counterparts. The net result of this upgrading at the highest levels is an added cost to the taxpayers of more than \$125,000 per year. This is a small sum compared to the billions in the federal budget, but it is a proper place to begin, particularly if the public is to have any confidence in a reform which through its efficiency should be cutting personnel costs.

Obviously, insuring reductions in personnel costs is a difficult task under the best of circumstances. Decisions to hire, retain, or promote are always easier than personnel freezes, reductions in force or grade. However, if this reform is to have any meaning those hard decisions must be made in a way that is fair and firm without being inflexible, and it is the task of this legislation to see that these decisions are made. This bill, unfortunately, does not yet meet that test.

H. JOHN HEINZ.

MINORITY VIEWS OF MR. MATHIAS AND MR. STEVENS

This legislation must be rejected by the Senate and returned to this Committee for additional consideration, for it clearly fails to meet the central purpose of needed civil service reform. That purpose is to give the President and Federal managers more discretion and flexibility in personnel management while at the same time assuring a civil service system based on merit principles rather than political and personal favoritism. The bill would give the President and his political appointees enormous new power over the civil service. However, it fails to provide prudent safeguards to encourage impartial and effective performance by career employees. The bill does not strike the proper balance between protection of merit principles and management flexibility in at least three major areas: the organizational structure; competitive examinations; and the senior executive service.

I. ORGANIZATIONAL STRUCTURE

The most serious weakness in the Administration's proposals to reform the civil service is that it increases the possibilities for manipulating the civil service for personal or political favoritism. Instead of having personnel policy made by a bipartisan body, it would be made by an administrator serving at the pleasure of the President. Although this change would be accomplished by Reorganization Plan No. 2 of 1978 (which will become effective August 10, 1978, unless disapproved by the Senate or the House of Representatives) it must be discussed here, for many provisions of this bill relate directly to this feature of the Plan.

Daily operations of the central personnel agency do need to be the responsibility of a single individual. This is, in fact, what happens now with the Chairman of the Civil Service Commission. He is designated by law as the Chief Operating Officer of the Agency. Everything the Administration wants a new Office of Personnel Management to do under a single administrator can be done under a bipartisan body with the Chairman serving as the Chief Operating Officer. However, under this bill and the Administration's proposal merit would be seriously endangered, for a single individual would make personnel policy for the entire Federal civil service work force of more than two million employees.

Administration spokesmen point to some states and cities where responsibility for making personnel policy was recently shifted from a multi-headed agency to a single administrator. The analogy, however, is inapt for none is comparable to the size, complexity, diversity, and power of the Federal government. In addition, no one has studied whether the policies made by these administrators are better or worse,

or whether they have resulted in more or less political and personal favoritism in the civil service.

The power to make personnel policy includes the power to interpret the laws; to decide the policies for authorizing exceptions to certain laws; to make the policies which determine how job applicants shall be ranked for employment consideration; to take positions out of the competitive service so they can be filled politically; and to set aside almost all civil service laws in Demonstration Projects that would affect many thousands of individuals. The citizens of the United States would have far greater confidence in the wisdom and impartiality of such policies if they were made by a bipartisan body. This is, of course, the primary reason for having established the bipartisan Civil Service Commission in the first place.

The 95-year-old civil service system is not without faults; it has gone through many changes to overcome weaknesses as they have been identified. But abolishing bipartisan personnel policy-making will not correct any of these weaknesses. Nor will it improve the quality and performance of the civil service or increase the public's confidence in it. None of the civil service problems identified by the Administration would be solved by having personnel policies made by one person. No rational case has been made for abolishing policy-making by a bipartisan body, while the advantages of having a bipartisan policy-making body are obvious.

Another serious weakness relates to the role of the Special Counsel. He would be responsible for investigating prohibited personnel practices and prosecuting those who commit such practices. Appointed by the President with the consent of the Senate to serve during the President's term, he would be, and would be perceived as being, a political appointee serving at the pleasure of the Administration. How then would it be possible for the Special Counsel to initiate, thoroughly investigate, and then take actions which by their very nature could prove embarrassing to the Administration?

To be effective and to enjoy the confidence of the people, the Special Counsel must be insulated from overt and subtle influences of the President and his appointees. Neither S. 2640 nor Reorganization Plan No. 2 provides this insulation.

In addition, the bill denies the Special Counsel the power to discipline Presidential appointees who engage in prohibited personnel practices. Such a Special Counsel would be at best a feeble protector of the civil service merit system.

II. COMPETITIVE EXAMINATIONS

S. 2640 authorizes the Director of the Office of Personnel Management to delegate, in whole or in part, any function vested in the Director, including authority for competitive examinations, to the heads of agencies in the Executive Branch and other agencies employing persons in the competitive service.

This would authorize shifting from the central personnel agency to each agency the authority to examine applicants for jobs in that agency. This was the practice prior to 1965, and there were many complaints from all over the country to members of Congress and others

that applicants for Federal jobs were not examined fairly, properly, or quickly. When Congress and the President centralized examining in sixty-five area offices of the Civil Service Commission the complaints dropped off sharply.

No doubt there are problems in the existing system. The biggest one is that it takes too long to fill jobs. But 85 percent of the time is taken by the agencies, not the area offices of the Commission. Steps can and should be taken to speed the process and make other improvements.

But having applicants for Federal jobs examined by the agencies is the wrong way to go if we want a high quality civil service based on open competition. It is the wrong way to go if we want an impartial civil service, not one selected on the basis of political and personal favoritism. Experience in this decade tells us that honest and able agency officials and staffs need to be insulated from the pressures for patronage—political and personal—in this stage of the employment process.

Another compelling reason to exclude competitive examining from the blanket authority for delegations is the dismal record of agency performance in carrying out the authority given them to establish the proper grade (and therefore pay) for white-collar jobs. A recent report of the Civil Service Commission states that 136,000 white-collar jobs are overgraded, in many cases because of pressures from agency managers.

If competitive examining is shifted to the agencies there will also be internal and external pressures for personal and political patronage during that stage of the employment process. In the face of this extremely poor performance in using the delegated classification powers, it is inconceivable that the Senate would authorize the delegation of the important and sensitive competitive examining responsibility to agencies.

III. SENIOR EXECUTIVE SERVICE.

Some of the provisions of the bill relating to the proposed Senior Executive Service while desirable, are so seriously flawed that, on balance, they are unsatisfactory. Specifically, the bill would give to Presidential appointees wide discretion to reduce significantly the responsibilities and pay of career executives. There is no restraint against ill-considered, arbitrary, or partisan actions. But even more important, this power in the hands of Presidential appointees will have the effect of denying to the American people the kind of responsible sharp criticism from career executives that over the years has been essential to the public interest.

Based on past experience in both Democratic and Republican Administrations, we can expect that the Presidential appointees who would exercise this new power will be for the most part exceptionally able and highly dedicated to the national interest. In our democratic process they are the vital link between the decision of the electorate in choosing a President and the overall direction and management of the agencies. As the pressures and problems test the political-career relationships, it is important for the public interest that political appointees not have suffocating power over career executives: power that

could be used intemperately, or to satisfy a special interest. We should have no doubt that when Presidential appointees have this power, all of them, no matter how well-intentioned and competent, will be subject to pressure from many sides, often irresistible, to use the power to serve special rather than public interests.

Career executives represent an important national resource which the Federal government develops at considerable cost. Their central commitment is to give nonpartisan professional advice and see to the impartial administration of the laws. Both functions would be jeopardized by such a grant of authority to political appointees.

The argument is made that this unrestricted discretion to reassign and reduce pay and responsibilities is needed for management flexibility. But no evidence has been provided as to the widespread existence of the problems that this extraordinary grant of authority would solve. It has also been argued that the unrestricted authority to reassign exists now and that this therefore is no change. This is specious reasoning. Under this bill, five separate grades (GS-16, 17, and 18, and Executive Levels V and IV) would be combined into one Senior Executive Service without grades. Existing law gives Presidential appointees absolute power to reassign from one position to another only if they are in the same grade and rank. The proposed unlimited power would permit a Presidential appointee to reassign a career executive from a position of Deputy Regional Director now at GS-16 and located some hundreds or thousands of miles from Washington. At the same time, the Presidential appointee could reduce the annual pay of the career executive by up to \$8,000.

Advocates for this grant of power argue that top executives in large corporations have it, and that Presidential appointees should too in order to encourage responsiveness. But the analogy fails. No corporation could succeed if it lost its top three levels of executives every two to four years as Federal agencies lose their Presidential appointees. This underscores the need for professionalism, objectivity, competence, and continuity of career executives to assure reasonable stability in the operations of Federal agencies. With rare exceptions, career executives have reached the top by repeatedly proving their ability to perform well under difficult conditions. They are the glue that holds the government together in times of political transition. They are our ancestral memory. We tamper with their status at our peril.

Presidential appointees in the agencies occupy their positions for relatively short periods, and in their eagerness to exercise leadership by making changes in policies and operations, many are often impatient with career executives who disagree with them. Such disagreement is often taken as evidence of unresponsiveness. The proposed new power for Presidential appointees would send a clear signal to many career executives that if they don't want to be shipped out, they should not question or disagree with the views of their bosses. We would substitute a new generation of "agreeable" career executives for the constructively critical and politically neutral professionals who now serve this nation well. Apprehensive silence at the crucial point where political and career appointees should debate proposed policies, programs, and procedures would serve the nation badly.

The public interest would be served far better by including some reasonable statutory restraints, short of full appeal rights for career executives, to prevent arbitrary actions or those based on personal favoritism. For example, personnel actions affecting the thousands of career executives who will be in the Senior Executive Service should be under the jurisdiction of the Special Counsel of the Merit System Protection Board with regard to prohibited personnel practices. Yet Section 2302(a) of the bill specifically limits the Special Counsel in this area by defining "prohibited personnel practices" in terms of personnel actions with respect to "an employee in, or applicant for, a position in the competitive service, a career position in the Senior Executive Service." Thus, the elemental protection against arbitrary action that would help provide a reasonable safeguard for the public's interest is restricted to that small proportion of senior career executives who will be in career reserved positions. Extending this safeguard to all senior career executives would help protect the public's interest in developing and retaining first-rate career executives and would make it possible to begin to hold Presidential appointees accountable for their actions in these respects.

There is a major related danger in the provisions of the bill that create the Senior Executive Service. Currently there are about 9,000 executive positions in the Federal service (aside from those filled by Presidential appointees). About 10 percent, or 900 of these, are designated as specific positions to be filled politically. The Administration proposes to change this so that most of the 9,000 positions could be filled by political appointment, although at one time no more than ten percent of all executive positions could be occupied by political appointees.

Once the impartiality and non-partisanship of a career executive is no longer a requirement for filling these positions, the baser elements of human nature will flourish. Significant numbers of career people in positions in and just below the Senior Executive Service will surely be encouraged to use their official discretion in subtle ways to serve partisan and special interests. Some unfortunately will probably succumb to the temptation in hopes of being looked on favorably as they seek entry into the Senior Executive Service. Of course, with a career appointment, these individuals would not be part of the 10 percent limitation on the number of political appointees. They would remain career appointees—who have demonstrated their political reliability. In other words, it would be relatively easy to politicize far more than 10 percent of the positions in this service, particularly so because career executives could be reassigned and demoted without cause.

To satisfy ourselves that this scenario is not far-fetched, we need only read the House Post Office and Civil Service Committee's "Final Report on Violations and Abuses of Merit Principles in Federal Employment." It reads:

Testifying in closed session before the Senate Select Committee, John Ehrlichman, Counsel to President Nixon for Domestic Policy, was asked if there was an interest to influence the career service in a partisan manner. Ehrlichman responded to Senate committee staff with the following:

Mr. EHRLICHMAN. It was an itch on our part to get friends in the departments rather than the people that we found there, but that was just a general ongoing desire on our part.

COMMITTEE COUNSEL. Was this in career positions as well as other positions?

Mr. EHRLICHMAN. Sure. Just like—the Democrats did that.

COMMITTEE COUNSEL. And how would something like that be carried out?

Mr. EHRLICHMAN. By attrition essentially. You'd get replacements and the people you get in the replacements would be hopefully sympathetic with the politics.

It takes very little imagination to predict what would happen if Presidential appointees had the power to create attrition at will.

The Bill should be revised so that the only specific positions in the Senior Executive Service designated by the central personnel agency could be filled by political appointment, and, as provided in the bill, the total number of such positions should not at any time exceed 10 percent of the total positions in the Senior Executive Service. In addition, the criteria for designating positions in the Senior Executive Service as appropriate for political appointment need to be prescribed in law. Despite occasional problems and criticisms, the criteria established by Executive Order during the Eisenhower Administration, and modified during the Johnson Administration, appear to provide a reasonable balance for management flexibility, protection against political and personal favoritism, and most important, the effective continuity of government. Therefore, the bill should also be revised to include the following criteria for designating positions in the Senior Executive Service which may be filled by other than career executives:

(1) Incumbents who are deeply involved in the advocacy of Administration programs and support of their controversial aspects;

(2) Incumbents who participate significantly in the determination of major political policies of the Administration; or

(3) Incumbents who serve principally as personal assistant to or advisor of a Presidential appointee or other key political figure.

An additional criterion was added by Executive Order in the previous Administration to permit taking Regional Director positions out of the competitive service based on a possible future policy-advocacy role. This addition is not included because, as it has been applied, the national interest has been served poorly by permitting the appointment of politically partisan, minimally qualified individuals as top field managers of Federal programs that are intended to provide benefits impartially to, and otherwise impact directly on, millions of citizens as well as state and local governments. The further politicization of the civil service in the field is now occurring with positions below the Regional Directors being taken out of the

competitive civil service. It would be in the public interest to revise this trend by specifying in law the above criteria and making it clear that they are to be applied faithfully.

We believe it would be in the public interest for the Senate to disapprove both S. 2640 and Reorganization Plan No. 2. This will provide the Governmental Affairs Committee and the Administration the opportunity to improve and perfect the legislation and the Reorganization Plan so that there is at least a reasonable chance of meeting the high expectations of the American people for reform in the Federal civil service.

CHARLES McC. MATHIAS, Jr.
TED STEVENS.

XI. CHANGES IN EXISTING LAW

In compliance with subsection 4 of Rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed shown in Roman):

* * * * *

CIVIL SERVICE REFORM ACT OF 1978

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Chair lay before the Senate calendar order No. 900.

The PRESIDING OFFICER. The bill will be stated by title.

The assistant legislative clerk read as follows:

A bill (S. 2640) to reform the civil service laws.

The PRESIDING OFFICER. Is there objection to the present consideration of the bill?

Mr. GRIFFIN. Mr. President, I object and call for the regular order.

Mr. ROBERT C. BYRD. Mr. President, what is the regular order?

The PRESIDING OFFICER. There is nothing before the Senate.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of the Civil Service Reform bill so that debate can be started. There is no time agreement on the bill whatsoever.

Mr. GRIFFIN. Mr. President, will the distinguished majority leader yield for a comment?

Mr. ROBERT C. BYRD. I yield.

Mr. GRIFFIN. I understand there is no agreement on this, and I had been under the impression that the CETA leg-

islation was before the Senate and had been laid aside. Am I incorrect?

Mr. ROBERT C. BYRD. Just temporarily. It will be my intention—

Mr. GRIFFIN. If it was temporarily laid aside, is it not now the pending business?

Mr. ROBERT C. BYRD. No. There is an order.

The PRESIDING OFFICER. It is not.

Mr. ROBERT C. BYRD. I have an order authorizing me to go back to that and to several tax bills which I intend to go back to, but I wanted to get the civil service bill before the Senate and let the principals present their opening statements and probably during the afternoon go back to the tax bills.

Mr. GRIFFIN. When does the majority leader intend to finish the CETA legislation?

Mr. ROBERT C. BYRD. Before we go out. It could be today; it could be tomorrow.

Mr. GRIFFIN. Of course, he has a time agreement on the CETA legislation.

Mr. ROBERT C. BYRD. Yes.

Mr. GRIFFIN. And it could be handled and disposed of; whereas, as to the civil service legislation, where there is no time agreement, obviously it is going to be very difficult to dispose of that.

Mr. ROBERT C. BYRD. The Senator

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14267

has my assurance that the CETA bill will be called up either today or tomorrow and disposed of whether or not action is finished on civil service.

Mr. GRIFFIN. The Senator from Michigan is very concerned that the CETA legislation may not be handled and disposed of before Saturday.

Mr. ROBERT C. BYRD. The Senator has my assurance it will be because we have an agreement on that, and we have disposed of most of the amendments, I think, on it already.

Mr. GRIFFIN. I want to let the majority leader know that there is a good deal of feeling, at least from this Senator, that it would be well to get the CETA legislation and handle that as soon as possible, and I will cooperate if the majority leader has that intention, and I appreciate his expression.

Mr. ROBERT C. BYRD. The Senator has that assurance.

Mr. JAVITS. Mr. President, will the majority leader yield?

Mr. ROBERT C. BYRD. I yield.

Mr. JAVITS. I, too, am questioning. I will be in charge of that bill, and I am the ranking minority member of the subcommittee and the full committee, and we are fully ready. The majority leader has given me the same assurance and I shall rely on them, that this will be dealt with before we go out and that he will use every power and influence to see that it is before tomorrow night.

I appreciate the Senator's problems of Saturday, and I will be just as cooperative.

Richard Wegman, Paul Hoff, Paul Rosenthal, Claude Barfield and Claudia Ingram of the Governmental Affairs Committee staff; John Childers, Connie Evans, Kenneth Ackerman, Brian Conboy and Jackie Abelman of the minority staff; Brian Walsh of Senator CHILES' staff; Emily Eiselman of Senator EAGLETON's staff; Knox Walkup, Cindy Anderson, Howard Orenstein, and Edwin Jayne of Senator SASSER's staff; and Bill Motes of Senator CLARK's staff.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. RIBICOFF. Mr. President, I ask unanimous consent that Senator CLARK be added as a cosponsor of S. 2640.

The PRESIDING OFFICER. Without objection, it is so ordered.

THE CIVIL SERVICE REFORM ACT OF 1978

Mr. RIBICOFF. Mr. President, today the Senate begins consideration of S. 2640, the Civil Service Reform Act of 1978. The changes in law which are proposed in S. 2640 will constitute the most comprehensive reform of the Federal civilian work force since passage of the Pendleton Act in 1883. Since that time, total civilian employment has increased from approximately 131,000 to almost 2.9 million employees. In 1977, the Federal civilian payroll amounted to over \$46 billion, more than 11 percent of Federal outlays for that year. Despite the enormous growth in Federal employment and the accompanying increase in the laws and regulations governing the civil service, no systematic congressional re-

which suffers when insufficient attention is given to the hiring, training, and advancement of people who manage the 20 or 30 percent of the income which people pay the Federal Government in taxes. It is the public which suffers when excellence is no more rewarded than mediocrity.

Federal employees, too, deserve a better civil service system. Federal employees are dedicated and hardworking but the civil service system serves now to unjustifiably tarnish the public image of these employees. Civil servants do not deserve a system in which both the excellent and poor employee march in lockstep through their careers.

Mr. President, we have an opportunity to create a civil service system that is worthy of the public and its confidence: One in which hiring, promotion, and pay is truly based on merit and one in which those who cannot or will not perform their jobs well will not perform at all for the Federal Government. This bill makes important changes so that our civil service will be more efficient and accountable.

At the same time, it adds in many ways to the protections against political abuse that now exist in the civil service system. Enactment of this bill will actually reduce the danger that the merit system will be undermined for political purposes.

I ask unanimous consent that there be included at the conclusion of my remarks a summary of some 18 different areas where this bill adds new protections against political abuse not now existing in law.

We were here until 1 a.m. this morning, and I am willing to be here until 1 a.m. Saturday morning so the Senator to be able to keep his engagement.

Mr. ROBERT C. BYRD. I will assure the Senator from Michigan with all of the power that I have that the measure will be disposed of before the close of business tomorrow.

Mr. ORIFFIN. It is very difficult to understand why the matter the Senator is about to go to could not be handled after the CETA legislation.

Mr. ROBERT C. BYRD. The reason is that I assured Mr. RIBICOFF and Mr. PERCY that we would at least get started on their bill today, and the Senator from Michigan has my assurance the Senate will go back to CETA because under the order I can go to that at any time. We will go back to that if not today, certainly tomorrow.

Mr. GRIFFIN. All right.

Mr. ROBERT C. BYRD. Mr. President, I thank the distinguished Senator from Michigan (Mr. ORIFFIN).

The PRESIDING OFFICER. The question is on agreeing to the request to proceed to the consideration of S. 2640.

There being no objection, the Senate proceeded to consider the bill, which had reported from the Committee on Governmental Affairs with an amendment in the nature of a substitute.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. RIBICOFF. Mr. President, I ask unanimous consent that the following staff members be granted the privilege of the floor during consideration and votes on S. 2640.

view or revision of the system has been attempted in almost a century. S. 2640 is that long overdue, comprehensive reform.

The existing civil service system is the product of an earlier reform movement which arose in protest against the 19th century spoils system. The civil service system promised a work force in which employees were selected and advanced on the basis of competence rather than political or personal favoritism. Although that goal has largely been realized, there have still been assaults on the merit system. These assaults have taken place despite, and in some instances because of, the complicated rules and procedures that have developed over the last century.

Unfortunately, the complex rules that have emerged threaten to kill the merit principle itself. Since the Second Hoover Commission in the 1950's, complaints have been heard that existing procedures have become the refuge of the incompetent employee. The existing system impairs the ability of managers to effectively perform their program responsibilities. When incompetent and inefficient employees are allowed to stay on the rolls, it is the dedicated and competent employee who must increase his workload so that the public may be benefited. The morale of the best motivated employee is bound to suffer under such a system. Moreover, the system's rigid procedures—providing almost automatic pay increases for all employees—makes it as difficult to reward the outstanding public servant as it is to remove an incompetent employee.

It is the public which suffers from a system which neither permits managers to manage nor provides assurance against political abuse. It is the public

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. RIBICOFF. Let me briefly list some of the most significant provisions of the bill. The bill—

Codifies, for the first time, merit system principles and prohibited personnel practices. Employees who commit prohibited personnel practices would be subject to disciplinary action;

Provides for an independent Merit Systems Protection Board and special counsel to adjudicate employee appeals and serve as the "watchdog" of the merit system;

Provides new protections for employees who disclose illegal or improper Government conduct;

Empowers a new Office of Personnel Management to supervise personnel management in the executive branch and delegate certain personnel authority to the agencies;

Establishes new performance appraisal systems and requires that decisions to advance, pay, or discipline employees be based on performance;

Creates new standards for dismissal based on unacceptable performance and streamlines the processes for dismissing and disciplining employees;

Creates a new Senior Executive Service where tenure, development, and rewards will be based on managerial accomplishment;

Authorizes the Office of Personnel Management to conduct research in public management and carry out demonstration projects that test new approaches to Federal personnel administration; and

Creates a statutory base for the improvement of labor-management relations, including the establishment in statute of the Federal Labor Relations Authority.

These proposals have been reviewed and debated extensively. The President's personnel management project conducted a 5-month study of the civil service system. The great majority of the 110 staff members of that project were career employees. The project staff held 17 public hearings throughout the United States in which approximately 7,000 individuals participated as part of the consultation process. Also, 800 organizations were contacted for comments on options papers. Many of the recommendations from the study were incorporated in S. 2640.

The Governmental Affairs Committee held 12 days of hearings, during which 86 individuals, representing 55 organizations, testified. The committee held seven markup sessions before ordering the bill reported to the full Senate.

During the course of these extensive deliberations, the committee was vitally concerned with providing adequate management flexibility while at the same time assuring that the civil service system and employees are protected against partisan political abuse and arbitrary actions. The bill accomplishes these objectives.

In sum, Mr. President, S. 2640 is a bill which the Congress and the American people can be proud of. It will help to

by subordinates that undermine the merit system.

Directs GAO to conduct audits and review to assure agency compliance with the laws. The current civil service laws do not charge GAO with this responsibility.

TITLE II

Specifically, title H—

Creates a new 3-member Board, bipartisan in make-up, whose sole responsibility will be to enforce the merit system principle and the civil service laws generally. It will be free of any inconsistent responsibility to develop or manage personnel policies favored by the President and other political officials in the government. The responsibilities of the current Civil Service Commission for both the management of the civil service system, and adjudication of complaints against the way the system is implemented, create an irreconcilable conflict.

*Establishes set terms for both the Board members and the Director of OPM, and prohibits the President from removing Board members or the Director of OPM for political reasons, or for any other reason except for cause, that is, inefficiency, neglect of duty, or malfeasance in office. The present Civil Service Commission members are appointed by the President, for a set term, but they may be removed by the President at any time for any reason. Consequently the Commission is not a safe check against the broad discretionary powers the President has under the civil service laws to issue rules, and direct the management of the civil service system.

*Protects the independence of the Board from political pressures from the White House by allowing the Board to represent itself in any court, except the Supreme Court, free of Justice Department supervision; requires separate Senate confirmation of any

exists under the present system.

*Authorizes the Special Counsel to initiate on his own, or in response to complaints, investigations of any violations of the laws protecting the merit system for political abuses. No comparable procedure exists in current law.

*Authorizes the Special Counsel to initiate, on his own initiative, actions before the Board to correct political practices or other violations of the merit system principles, or to discipline officials who violate the merit principles. No comparable procedure exists under current law.

*Provides that the Board may dismiss, suspend, fine, cut an employee's salary off, or otherwise discipline employees who are guilty of political abuses or otherwise violate the law. Except in the case of specific Hatch Act violations, the Civil Service Commission has no clear authority under current statute to impose such sanctions on government officials.

*Directs the Director of OPM to observe the provisions in the Administrative Procedure Act requiring public notice and comment before issuing any regulations. Current law does not require the Civil Service Commission to comply with the Administrative Procedure Act when issuing rules.

TITLE IV—SENIOR EXECUTIVE SERVICE

Any career appointee serving in the SES will be protected by the safeguards established in titles I and II. In addition, the IV specifically

Limits the number of top executive positions governmentwide, and in each agency, which may be filled on a political basis. Henceforth, no more than 10% of the top jobs in the government may be filled by non-career, political appointees. Under current law the President directly, or through the

restore merit to the merit system. The Government will be made more efficient and accountable. It is a reform that is long overdue. I urge the Senate to adopt S. 2640 without delay.

EXHIBIT 1

SUMMARY OF HOW S. 2640 INCREASES OVER PRESENT LAW THE PROTECTIONS AGAINST POLITICAL ABUSES

The following is a summary of 18 major areas in titles I, II, and IV of S. 2640 where the bill adds new protections—not now in current law—to prevent the merit system from being undermined by political abuses. In 14 of these areas, the protections were added or significantly strengthened by Committee amendments.

TITLE I—MERIT SYSTEM PRINCIPLES

Specifically, title I—

Establishes as a merit system principle that personnel action may not be taken on basis of political affiliation. The bill prohibits all Federal employees—including all political employees—from violating this principle. There is no statutory prohibition now against an agency taking a personnel action against an employee because of his political affiliation.

*Bars, as a prohibited personnel action, reprisal against any employee who discloses information about the employee's agency. The protections apply to information that may be embarrassing to political officials in the agency because it suggests violations of law, mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to the public health or safety. Current law provides no similar protection for whistleblowers.

Charges the head of each agency with personal responsibility for seeing to it that no employee is the subject of a prohibited personnel practice motivated by political favoritism. Current law does not specifically hold the head of the agency responsible for actions

effort by the President to replace the Chairman of the Board; prohibits OPM or the White House from affecting for political purposes the selection of the top staff hired by the Board; and assures direct access by Congress to the views and budget requests of the Board without OMB clearance. None of these provisions currently protect the independence and integrity of the Civil Service Commission.

*Directs the Board to hear and adjudicate complaints that the merit principles have been violated, including complaints that an employee has been discriminated against because of his political affiliation. The Board has the authority to issue and enforce any orders against agencies necessary to correct these practices. The current statutes do not give the Civil Service Commission comparable authority.

*Authorizes the Board to issue both preliminary and permanent stays where the political heads of agencies seek to coerce employees into engaging in political activities or to take reprisal against an employee because of his political activities, or because of the statements the employee makes about the activities of the agency. No comparable injunctive authority exists in current law to stay Hatch Act violations, or prevent reprisals against whistleblowers.

*Requires the Board to report to Congress annually on whether OPM policies and decisions are in accord with the merit system principles, including the prohibitions against political abuses, and authorizes the Board to conduct any additional, special studies it wants on such matters. The management policies of the Civil Service Commission are not subject now to any similar kind of independent evaluation.

*Creates a separate, independent Special Counsel who shall serve a four-year term, and who may not be removed by the President during the term except for inefficiency, neglect of duty, or malfeasance in office. No watchdog office like the Special Counsel

Civil Service Commission, could make all these supergrade positions non-career jobs that could be filled on a political basis.

*Prohibits the agencies from hiring any career executives unless an independent qualification review board—staffed by a majority of career executives—certifies the executive's managerial qualifications. In the case of several thousand supergrade positions that will be largely filled by career appointees to the SES, the Civil Service Commission now has no way of assuring the merit qualifications of the career employees hired. Even in the case of career appointments to the remaining supergrade jobs, there now is no independent review process by independent experts comparable to the independent qualifications review boards established by the bill.

*Prohibits removal or reassignment of a career member of the SES within 120 days after the appointment of either a new agency head, or the political appointee who is the executive's immediate boss. Under present law a career executive may be reassigned at any time by political appointees in the agency.

Mr. RIBICOFF. Mr. President, I ask unanimous consent that Mr. Tom Polgar, of Senator MORCAN's staff, be granted the privileges of the floor.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. RIBICOFF. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

*Provisions added or significantly strengthened in Committee.

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14209

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ROBERT C. BYRD. Mr. President, I would hope Senators who have amendments to this bill would come to the floor and offer those amendments so that they may be disposed of.

Mr. RIBICOFF. Mr. President, we are calling up those Senators who we know have amendments and asking them to come and present their amendments. Many of these amendments are acceptable to the manager of the bill, and my feeling is that if the Senators come to the floor the noncontroversial ones can be disposed of rather rapidly.

Mr. ROBERT C. BYRD. I thank the Senator.

Mr. RIBICOFF. Mr. President, I ask unanimous consent that Karen Minton of Senator BUMPERS' staff have the privileges of the floor.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ROBERT C. BYRD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. GARN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. GARN. I ask unanimous consent that Jeff Bingham of my staff be allowed the privileges of the floor during the debate and votes on this issue.

the current system is to concerted attack by partisan forces. On the other hand, because of the maze of rules, regulations, legalese, and bureaucratise that has grown up around this system over past decades, the principle of "merit" has become largely replaced with incentives for mediocrity. A system where 95 percent of employees receive an annual performance rating of satisfactory and where 98 percent of employees receive periodic pay increases regardless of merit is certainly in need of reform. This is simply not credible to a single Member of this body that spends an important part of his or her office allowance on doing "case work" and trying to get decisions or action out of, too frequently, an unresponsive, insensitive, and lackadaisical bureaucracy.

If we really had, as indicated by the rating system, 95 percent of the 2 million employees under civil service who deserved a satisfactory rating and 98 percent who deserved periodic pay increases, if they really were competent, and really were doing those jobs, we would not need to spend the millions of dollars we do to redress the grievances of citizens, whether it be of veterans or of social security retirees whose payments are late, or whatever group it may be. The bureaucracy loads this city with lobbyists, loads this city with businessmen, loads this city with labor leaders, loads it with other people who simply cannot get decisions out of the bureaucracy and cannot get action. It is those kinds of costs that Congress is being blamed for. Congress is having mount-

would, I wish to commend every member of the Governmental Affairs Committee and every member of the minority and majority staffs that have worked so closely with us.

Mr. RIBICOFF. Mr. President, if the Senator will yield, I pay tribute to the distinguished Senator from Illinois, the ranking minority member. It is really a privilege to work with him on this important legislation.

Our efforts on the committee can truly be said to be bipartisan. I do not recall any major piece of legislation in which the committee has divided along partisan lines. We try to do a truly constructive piece of workmanship on every item of legislation we have before us.

We are truly fortunate in the members of the committee and in our committee staff, led by Mr. Wegman and Mr. Hoff on the majority side and, at the moment, Mr. Ken Ackerman on the minority side.

We have had truly magnificent cooperation from Mr. Campbell of the Commission, and from the President of the United States. I will have some comments to make when our distinguished colleague from Maryland (Mr. MATHIAS) introduces his amendment, because without the constructive effort and cooperation of the Senator from Maryland (Mr. MATHIAS) and the Senator from Alaska (Mr. STEVENS) we could not have achieved a well-rounded bill.

Senator MATHIAS and Senator STEVENS are truly the experts in this body on the entire civil service establishment. Both of those Senators have large numbers of

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. GRIFFIN. Mr. President, I make a similar request with regard to Marc Steinberg of my staff.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Indiana.

Mr. BAYH. I make a similar request for Fred Williams and Barbara Dixon of my staff.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. GRIFFIN. Mr. President, on behalf of two other Senators, I ask unanimous consent that similar privileges be granted for David Gogle of Senator LUJAR's staff, and Joseph di Genova of Senator MATHIAS' staff.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Illinois.

Mr. PERCY. Mr. President, the original Civil Service Act of 1883 embodies two basic principles of good government which still hold true today: first, that persons be chosen for positions of responsibility in the Federal Government on the basis of individual qualifications to do the job well; and, second, that the Federal executive bureaucracy be politically neutral, insulated from the destructive effects of partisan patronage manifested in the "spoils system" prevalent at that time.

In recent years, we have seen an erosion of both of these principles which lie at the heart of our system of government organization. Political assaults on the civil service, particularly during the last decade, have shown just how vulnerable

ing payrolls, and yet the unresponsiveness and unwillingness of that bureaucracy to face and solve their own problems is what creates the huge amount of mail, the huge number of phone calls, and the great number of visitors we have.

So no one can tell this body that 95 percent of all civil service workers should be rated as satisfactory in their jobs, when we see the poor job being done by the present bureaucracy.

The legislation before the Senate today, S. 2640, the Civil Service Reform Act of 1978, is aimed at correcting both of the aforementioned problems. It represents the first comprehensive overhaul of this system in 95 years.

I wish, certainly, to pay tribute to my distinguished colleague with whom I have been privileged to work for so many years, the Senator from Connecticut (Mr. RIBICOFF), and a truly outstanding staff, for bringing this monumental piece of legislation to the floor at this time. Both of us pay tribute to the joint leadership for scheduling it this early, which will give us adequate time to debate the issue, but also time to complete the work. Also, we both wish to indicate the fine degree of cooperation we have had from President Carter, from the members of the White House Staff, and from Mr. Campbell, the chairman of the Civil Service Commission, who has worked very closely with us to bring forward a monumental piece of legislation which will be a giant forward step to improve the effectiveness of the Government. And I wish to commend not only our chairman but, as I know he

civil servants in their jurisdictions. They are most sensitive and knowledgeable concerning all the problems of the civil service. We found that time and time again we called upon their knowledge and experience in helping us fashion a good bill.

There were some differences between the objectives that we thought were necessary and those of the Senator from Maryland and the Senator from Alaska; and yet, through careful work between ourselves and our respective staffs, I think we did fashion some constructive alternatives which are included in the amendments to be offered by the Senator from Maryland and the Senator from Alaska.

The ranking minority member, the Senator from Illinois (Mr. PERCY) and I consider it a privilege to cosponsor those amendments, because we do feel they add to the value of the legislation.

Mr. PERCY. I thank my distinguished colleague for his comments, and join with him in paying tribute to the assistant minority leader, the distinguished Senator from Alaska (Mr. STEVENS), who has worked valiantly with us over a period of many months to protect the interests of the Federal workers, but to do so consistent with what most of those workers want—a competent, highly respected civil service that will be a credit to this country.

I commend Senator MATHIAS' deep background, his compassion, his understanding, his concern for the rights of all individuals, not strictly those employed by the Federal Government—which we term the bureaucracy, but we do it many

August 24, 1978

times in the best sense of that term. Many civil servants are criticized because of the incompetence of some, the lackadaisical attitude of others, and the indecisiveness of others—those, we would hope, are in the minority. We must recognize that we need to protect the rights of those who are employed by the Federal Government, but that we also need to recognize outstanding service as well as that which is less than competent. We have balanced out a bill which, with the amendments, which I will be proud to support, offered by Senators MATHIAS and STEVENS, will be a bill than can serve and accomplish our major overall objective.

The Federal Government currently maintains a work force of some 2.8 million civilian employees at an annual payroll cost in excess of \$46 billion. More than 2 million of these employees fall within the civil service merit system. Only if these individuals work to their fullest potential, only if our system of personnel management is structured to bring out the best in each of them, will government programs succeed. Government consists of people and quality government requires quality people performing quality work. A system in which rewards for exceptional performance are rare and subpar performance is rarely disciplined can only result in mediocre performance, and mediocre government. This is basic commonsense.

The problem with the present system is pointedly seen in one story related to the Governmental Affairs Committee by a

thority to uncover and correct merit abuses, discipline violators, enforce employee protections, and objectively oversee new management flexibilities, encompass significant improvements over the present system under which the Civil Service Commission plays the roles of both administrator and watchdog. The inherent institutional conflicts of interests have detracted from both roles.

The Committee on Government Affairs has studied this legislation thoroughly, having conducted 12 days of public hearings at which 86 individual witnesses representing 55 organizations were heard from, in addition to the administration. In addition, I have conducted field hearings on this legislation in Rock Island, Springfield, East St. Louis, and Chicago, Ill. I commend S. 2640 to my colleagues.

Mr. President, I point out that the text of the bill before us extends from page 129 to page 322. The pending amendment before the Senate is the text of some 13 pages and inasmuch as Mr. Ken Ackerman of the Senate minority staff has prepared a brief summary of the Civil Service Reform Act of 1978, S. 2640, I ask unanimous consent that a brief summary of the bill be printed in the RECORD.

There being no objection, the summary was ordered to be printed in the RECORD, as follows:

BRIEF SUMMARY, CIVIL SERVICE REFORM ACT OF 1978—S. 2640

Title I establishes (1) Merit System Principles to govern all Federal personnel ac-

9. No reprisals for use of appeal rights;
10. No violation of law, rule, regulation, or merit system principles.

An employee who commits a Prohibited Personnel Practice is subject to disciplinary action by the Merit Systems Protection Board, leading to penalties including reprimand, civil fine, removal, or disbarment from Federal employment for up to five years.

Title II reorganizes the Civil Service Commission and establishes rules for adverse actions against employees.

REORGANIZATION

The 95-year-old Civil Service Commission is abolished, and two new agencies are created in its place:

1. An Office of Personnel Management (OPM) headed by a single Director, appointed by the President, subject to Senate confirmation, for a 4 year term co-terminous with the President, removable by the President only for cause.

OPM would be the administrative arm of Federal personnel management, serve as Presidential policy advisor, would promulgate regulations, set policy, run research and development programs, implement rules and regulations, and would manage a centralized, innovative Federal personnel program.

All regulatory functions of OPM would be subject to the provisions of the Administrative Procedures Act, including public notice, comment on proposed regulations and open hearings. OPM would not be permitted to become involved in recommending political appointments to the President.

OPM would be authorized to *delegate* personnel functions, including competitive examining of applicants, to agency heads subject to various controls. The purpose of decentralization is to increase efficiency and reduce delay and "red tape" in personnel actions, such as promotions, hiring, and such.

high agency official. That official, in an attempt to improve agency productivity and identify problem areas, asked her personnel managers for an assessment of employee performance. The result—97 percent of the employees in that agency (EPA) were rated “satisfactory.” Obviously, the current system is of no help to management in achieving one of the central purposes of evaluation—to improve agency performance.

The basic thrust of S. 2640 is threefold: First, to assure that an employee's career prospects are more directly tied to his or her performance; second, to provide management with greater flexibility to implement programs and policies mandated by the people; and third, to assure that merit principles and employee rights are tightly protected.

This is, of course, the obvious area in which Senators MATHIAS and STEVENS have been extraordinarily helpful.

The benefits of this legislation will flow, not only to the taxpayers who are sick to death of paying for waste and inefficiency; not only to the consumers of Government services who are equally frustrated from dealing with indifferent agency officials more concerned with their own institutional self-interests than the interests of the people that they serve; but also to the Government employees themselves who will now receive the benefits of excellence, and who will have a new pride in their careers as Government servants.

The protections built into this legislation against political abuse and derogation of employee rights are strong and significant. A new Merit Systems Protection Board and special counsel with au-

tions and (2) Prohibited Personnel Practices. Violation of Merit System Principles is a prohibited Personnel Practice.

MERIT PRINCIPLES

The Merit System Principles are:

1. Recruitment of qualified candidates for positions aimed at achieving a workforce from all segments of society, selection and advancement determined solely on merit after fair and open competition, equal opportunity;
2. No discrimination;
3. Equal pay for equal work, incentives for excellent performance;
4. High standard of integrity, conduct, concern for the public interest;
6. Efficiency and effectiveness in use of the Federal workforce;
6. Retention of employees based on adequacy of performance, inadequate performance should be corrected, unfit employees should be separated;
7. Training for employees;
8. Protection against arbitrary action, personal favoritism, partisan political coercion, prohibition against use of official authority to influence elections.

PROHIBITED PERSONNEL PRACTICES

The Prohibited Personnel Practices are:

1. No illegal discrimination;
2. No solicitation on consideration of recommendations unless based on personal knowledge or review of records and consisting of evaluation of competence, character, loyalty, or suitability;
3. No political coercion;
4. No willful deception or obstruction of the right of an individual to compete for a Federal job;
5. No influencing of persons to withdraw from competition for Federal positions so as to improve or injure employment prospects of any applicant;
6. No granting of any preference not authorized by law, rule, or regulation;
7. No nepotism;
8. No reprisals against whistleblowers;

2. A Merit Systems Protection Board (MSPB) composed of 3 members, appointed by the President, confirmed by the Senate, removable for cause only, serving 7 year, non-renewable terms, no more than 2 members from the same political party. The MSPB will (a) hear appeals from agency personnel actions, including adverse actions; (b) hear and decide disciplinary cases against alleged violators of Prohibited Personnel Practices, and dispense penalties where changes are sustained; (c) grant stays to prevent reprisals against whistleblowers or political reprisals against employees; (d) order agencies to comply with its decisions, and enforce such compliance; (e) conduct studies of the merit system to ensure that merit principles are being respected, and (f) oversee the OPM.

To assure the independence of the MSPB, (a) its budget and legislative recommendations would be submitted directly to Congress; (b) it would be allowed to represent itself in court; (c) it would have access to records of OPM and agencies, and be authorized to issue subpoenas to individuals; (d) its personnel would not be subject to White House or OPM clearance; (e) plus the structural protections noted above.

The MSPB would have a Special Counsel appointed by the President, confirmed by the Senate, removable for cause, serving a 4-year term co-terminous with the President. The Special Counsel would (1) investigate alleged abuses of the merit system; (2) bring disciplinary actions against violators; (3) petition the MSPB to grant stays against reprisals against whistleblowers and victims of political reprisals; (4) refer information concerning abuses to relevant agencies, be authorized to require the agency to report on what action it has taken to solve the problem, and issue public reports on abuses; (6) refer whistleblower allegation to relevant agencies for investigation; and (6) investigate Hatch Act violations, withholding of information under the Freedom of Information Act, and discrimination.

Disciplinary sanctions against employees who commit Prohibited Personnel Practices may include removal, demotion, suspension, reprimand, civil fine up to \$1,000, or debarment from Federal employment for up to five years. If the employee is a Presidential appointee confirmed by the Senate, however, the Special Counsel would refer his charges to the President.

Performance Appraisals.—Each agency would be required to establish systems for appraising the work of employees, and using the results of appraisals as the basis for promoting, demoting, training, reassigning, retaining, or separating employees. Performance standards would be communicated to employees at the beginning of each appraisal period. Employees would participate in establishing standards, would be assisted in getting their performance up to par, and those whose performance continues to be unacceptable would be subject to adverse actions.

RULES FOR ADVERSE ACTIONS

Two adverse action procedures are established by S. 2640, one for actions based on unacceptable performance (incompetence), the other for actions based on other cause (such as misconduct). In either case, the employee would be removable on 30 days notice stating reasons, have the right to respond, be represented by an attorney or other representative, and receive a written decision. Once removed, the employee could appeal the action to the MSPB where an evidentiary hearing would be guaranteed wherever a material issue of fact is in dispute. The difference between the two types of cases is in the burden of proof needed to sustain the agency action.

For actions based on unacceptable performance, the agency would have the initial burden to establish a reasonable basis on

Removals for other cause (such as misconduct) would be appealable to the MSPB, and require 30 days notice to the employee.

Pay for SES Executives would be set by the particular appointing authority within the agency, would be at one of five levels of pay within the GS-16 through Executive Level IV range set by the President, could be adjusted not less frequently than annually. A lowering in pay would not constitute an adverse action, as would a demotion for a non-SES employee.

Bonuses for SES executives would be limited to those who received at least a satisfactory rating on their performance appraisals, and would be subject to recommendations by Performance Review Boards. No more than 50 per cent of SES could receive bonuses of no more than 20 per cent of base salary during any one year. Other incentive awards would be authorized, including those for Meritorious Executives (no more than 6 per cent of SES—\$2,500/year for five years) and Distinguished Executives (no more than 1 per cent of SES—\$5,000/year for five years).

To protect against abuse of the bonus system and easy removal procedures, a written record would be kept by Performance Review Boards in arriving at their recommendations, a record which could later be used by the MSPB Special Counsel in investigating allegations of abuse.

For special needs, there would be authorized Limited Emergency Appointments (non-career-18 month limit) and Limited Term Appointments (non-career-3 year limit) for particular emergency, isolated situations.

Title V establishes a system of Merit Pay for Federal managers GS-13 through GS-15, (some 72,000 individuals). Decisions as to who would receive merit pay would be made by the agency. Merit pay would replace current quality step increases. No employee

Order 11491 in that it authorizes employees to form and bargain collectively through unions over matters regarding working conditions in the Federal government. Specifically excluded from the scope of bargaining are agency budgets; mission; organization; security; hire, promotion, transfer, and removal of employees; maintenance of agency efficiency; method, means, and personnel of agency operations; and emergency operations. All parties are required to bargain in good faith, and unfair labor practices are specified for both agency management and labor.

Negotiated grievance procedures leading to binding arbitration are authorized, including arbitration of adverse actions against employees where the employee, at his or her option, chooses arbitration as an alternative to statutory appeals rights. Arbitration of adverse actions would be subject to the same burdens of proof as applicable to the MSPB for similar cases, and subject to similar court review. Arbitration of adverse actions is the single substantive departure of Title VII from E.O. 11491.

A Federal Service Impasses Panel is established to intervene where union-agency contract negotiations have broken down.

Mr. STEVENS. Mr. President, the civil service reform bill will produce extensive changes to the existing Federal personnel system. The three-member, bipartisan Civil Service Commission will be replaced by a single Director. This new Director, as head of the Office of Personnel Management, will have enormous authority to promulgate new rules, regulations, and policy with the power to implement. A second radical management change results in the creation of a Senior

the record, subject to rebuttal by the employee, that the employee's performance was unacceptable, subject to affirmative defenses of discrimination, substantial procedural error, or other violation of law (including prohibited personnel practices). For actions based on other cause, the agency would have the burden of establishing substantial evidence on the record that the energy action promoted the efficiency of the service.

Adverse action decisions by MSP would be subject to judicial review in a United States Court of Appeals or Court Claims.

Title III allows agencies to use student volunteers where such use would not take jobs away from Civil Service employees; establish probation periods for employees; allow training programs; and make other changes.

Title V creates a Senior Executive Service (SES) consisting of Federal managers GS-16 throughout Executive Level IV, some 8,500-9,200 individuals. The SES would be a highly mobile corps of government executives who can easily be moved where needed, rewarded through bonuses, removed for less than satisfactory performance, and otherwise placed in a system where excellence can be rewarded while unsatisfactory performance can be eliminated.

To prevent politicization of the SES, no more than 10 percent of the SES governmentwide can consist of political appointees, nor can there be any more than 26 percent within any one agency or more than the pre-existing proportion of political appointees. Further, the SES would be subject to the full policing and disciplinary powers of the MSPB and its Special Counsel to assure against abuse.

Career appointees to SES would have their qualifications certified by Qualifications Review Boards, a majority of which must consist of career employees.

Removal for less than satisfactory performance would be tightly tied to performance Review Boards, would not be appealable to the MSPB, and employees so removed would be returned to the GS-15 level.

would have current salary decreased by this provision.

Title VI authorizes OPM to conduct research and demonstration projects to improve Federal personnel management policies and practices. Demonstration projects could involve up to 5,000 employees for up to 5 years, and, in creating experimental conditions, OPM would be authorized to waive certain provisions of Title 5, United States Code. To protect against abuse of this authority, S. 2640 specifies that the rules governing Merit Systems Principles and Prohibited Personnel Practices must be adhered to. Congress must be given 3 months prior notification, employees 6 months notification, the project Plan must be published in the Federal Register and subjected to public hearings, and employees or employee organizations must be given an opportunity to consult. Projects could not violate agency-union agreements.

Title VI also amends the Intergovernmental Personnel Act to provide that adherence to merit system principles by State and local governments may be a condition of receiving Federal grants.

Title VII concerns Federal labor-management relations, the manner in which the government deals with employee unions. Currently, some 58 per cent of all Federal Civil Service employees are represented by unions. A Federal Labor Relations Authority (FLRA) is created, consisting of 3 members, appointed by the President, subject to Senate confirmation, serving rotating 5 year terms. The FLRA would administer the Federal labor relations program, decide questions concerning appropriate units for representation, supervise elections, decide unfair labor practices, hear exceptions to arbitration awards, and decide other matters. The FLRA would be authorized to issue cease and desist orders, issue subpoenas, and require remedial actions.

The FLRA would have a General Counsel who would investigate and prosecute complaints of "unfair labor practices" before the FLRA.

Title VII codifies into statute Executive

Executive Service. The reform bill will organize most of the top civil service managers into an executive group having separate procedures for pay, promotion, and separation. This Executive Service will consist of both career service employees and political appointees. The Office of Personnel Management which I mentioned will establish procedures and regulations for personnel administration of the Senior Executive Service.

My major concerns with Senate bill 2640 relate to the politicization of jobs which could result from these two major changes. Even with a bipartisan Civil Service Commission, several administrations have manipulated Federal personnel regulations for partisan reasons. The Office of Personnel Management could increase any administration's leverage in the pursuit of political goals. The Senior Executive Service expands that influence by grouping most agency supergrades under one system. These managers will be exposed to higher degrees of political influence in the name of efficiency and responsiveness.

For the purpose of confirming my reservations about the proposed civil service reform, I would like to review some significant events in the history of the civil service.

Mr. President, I shall present a study prepared by my staff entitled "Politics and the Federal Service."

I urge individuals interested in this legislation to reflect upon the review. It is important to put reform measures in perspective with what has happened in the past and with what might occur in the future. What is finally accomplished by this bill should generate lasting benefit without the need to make corrections every few years.

The Hoover Commission developed the substance of what has proved to be a lasting reform of civil service. I would like to discuss some of the considerations and conclusions of that Commission's findings.

THE HOOVER COMMISSION

On July 7, 1947, the 80th Congress approved Public Law 162, thereby establishing the Commission on Organization of the executive branch of the Government. The Commission became known as the First Hoover Commission. It was directed to investigate the structure of the executive branch and recommend ways of improving its efficiency, effectiveness, and accountability.

Between July of 1947 and May of 1949, 300 men and women worked for the Hoover Commission. Twenty-four task forces scrutinized each of the major functional areas of the Government and reported their findings and recommendations. The Commission then studied and evaluated the task force reports and issued a series of 19 reports to the Congress.

In a statement of purpose and principle, the Hoover Commission declared:

There is perhaps no time in history when it has been more important to evaluate the effectiveness of the executive branch of the Government in carrying out the will of the Congress and the people. While we recognize that efficiency in itself is no guarantee of democratic government, the sobering fact remains that the highest ideals and aims of democracy can be thwarted through excessive administrative costs and through waste,

personnel organizations, the Commission was particularly cautious.

It recommended that "recruitment, selection, and other processes of personnel administration be decentralized to the agencies under standards to be approved and enforced by the Civil Service Commission." In addition, the Civil Service Commission would have to develop unmistakably clear policies, establish standards of performance, and improve its systems of reporting and inspection to insure that its policies were carried out.

The Hoover Commission declared:

The Civil Service Commission, as the central personnel agency of the government, should direct its efforts towards developing standards designed to secure economy and the uniform observance of government-wide policies governing civil rights, employee loyalty, veterans' preference, and the protection of the merit system. It must likewise give positive assistance to the agencies in introducing these standards, as well as conduct inspections to review the compliance of the agencies with established standards.

The Commission contended that decentralization would require "a realignment in the internal organization of the Civil Service Commission to secure more unified administration and to place greater emphasis upon standards, inspection, and information activities."

On considering restructuring the Civil Service Commission, the Hoover Commission warned that "the Government must impose upon itself many regulations and controls to fend off myriad pressures

Thus, while the Chairman would exercise authority to implement the rules and regulations of the civil service, the full Commission would retain its power and responsibility for establishing those rules and regulations. In addition, the Hoover Commission assigned to the Commissioners not designated as Chairman the duty of continuing the study of the nature, frequency, and source of abuses of the merit system in order to initiate steps to prevent their recurrence.

The first Hoover Commission acknowledged the threat to the merit system posed by its proposed concentration of authority in the Chairman of the Civil Service Commission. Consequently, it sustained a scrupulous concern for precluding political abuse.

The Commission reported shortcomings in the application of the merit system and urged its extension. It criticized improper exceptions from the competitive service and unwarranted political clearance of appointments and promotions. It exposed methods of undermining the purpose of the "rule of three" and suggested ways of preventing the subversion of the merit system.

With respect to the expansion of the competitive service, the Commission remarked:

While much progress has been made over the years in bringing positions under the competitive service, further progress can still be made . . . The existence of a large block of "non-status" employees restricts career and promotion opportunities for the employees concerned and deprives the agencies

disunity, apathy, irresponsibility, and other byproducts of inefficient government.

The Commission's recommendations in total, therefore, are directed to the achievement of reforms which it hopes will bring about a more responsible and a more responsive government, a government that will act with dispatch, with greater internal coordination and harmony, with consistency of administrative policy, and economy of operation.

Thus, the fundamental objective of the First Hoover Commission was to determine methods of making the Federal Government more efficient. Ever since the establishment of the Civil Service Commission under the Pendleton Act of 1883, a conflict has existed between the desire for governmental efficiency and the need for political independence in the Federal service. Because the Senate now deliberates a bill which could unnecessarily sacrifice the political neutrality of the civil service to its improved efficiency, it is important to consider the personnel recommendations of the First Hoover Commission. For, despite the preoccupation of the Commission with improving the performance of the executive branch, it maintained a conscientious concern for preserving the integrity of the civil service.

The Commission argued that the Government had exceeded a limit in its size and complexity beyond which services could not be furnished without serious bottlenecks, delays, and confusion. It therefore urged that the form and functions of executive agencies be modified to implement the principle of decentralized administration under centralized control. However, in the consideration of

and influences which seek special privilege or gain, particularly for political reasons." It therefore rejected all single-administrator forms of organization and concentrated on organizational structures which would protect the merit system and at the same time provide the desirable benefits of single administration. It refused to propose any reorganization which would weaken the protective functions of or sacrifice the public confidence in a full-time, bipartisan commission of three members.

Accordingly, the Hoover Commission recommended that the bipartisan, three-member Commission form be retained but that the President designate one of the Commissioners as Chairman and vest in him full responsibility for administering the operating organization and program of the Commission. The Chairman's role, apart from that of the other Commissioners, was to be the principal point of contact between the President and the heads of operating agencies in all matters of civilian personnel management, both domestic and foreign, acting within the rules and regulations established by the full Commission.

The full Commission would be required, by majority action, to: prepare rules and regulations for consideration by the President; review and recommend new or revised legislation affecting Federal personnel management; promulgate rules and regulations to preserve and strengthen any phase of the merit system; investigate any phase of the merit system; and, establish appellate bodies, supervise their work, and act as court of final appeal.

in many cases of desirable flexibility in promoting and assigning employees.

The Hoover Commission believed that in a true career service, the employee could go as far as his ability and initiative and qualifications indicated, excepting only decisionmaking or confidential posts. It held:

Top policy-making officials must and should be appointed by the President. But all employment activities below these levels, including some positions now in the exempt category, should be carried on within the framework of (the civil service system).

The Hoover Commission was anxious to ensure that its reorganization of the Civil Service Commission would not erode the integrity of the civil service. Accordingly, it decided that "in order to strengthen the application of the merit system under the proposed plan of decentralization, it is recommended that there be enacted into law . . . the prohibition against political favoritism in appointments which appears in the Tennessee Valley Authority Act of 1933." The TVA Act makes mandatory the removal of appointing officers exercising political favoritism in making appointments. The Hoover Commission assigned such importance to this requirement which it raised seven times, in seven separate places. Outlawing political favoritism appeared first on the list of steps to authorize the Commission's proposals in personnel management. It immediately followed the requirement that the recruiting, examining, and selection of personnel be handled in conformance with "reasonable economy and protection of the merit system."

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14273

The First Hoover Commission spent nearly 2 years considering many methods of improving the efficiency of the executive branch and evaluating each method with regard to its effects on the justice and integrity of the Government's performance. In the area of personnel management, where the streamlining of the Civil Service Commission threatened to undermine its political neutrality, the Hoover Commission was especially wary. The Commission warned in the conclusion of its report no personnel management:

We desire to emphasize that the recommendations in this report, and the actions which may be taken as a result of the recommendations, are to be subject to just one test: namely, their ability to provide the United States Government . . . with men and women of unquestionable ability, integrity, and devotion to the common good.

The U.S. civil service faces the same difficult task in 1978 as it has in every year since 1883: to operate with dispatch while thwarting political manipulation. It is ill-advised to attempt a restructuring of the civil service without comprehensive consideration of both aspects of the mandate of the civil service system.

Our consideration of S. 2640 must focus on the basic need for apolitical management of the personnel system. We must not sacrifice an independent, public conscience in rulemaking to flexibility in management style. We must achieve a harmony between efficiency and effectiveness in the executive branch and

played by the administration in power to infiltrate the Commission's ranks and to guide its actions.

The determination and ingenuity, with which some of our administrations have tried to intervene in the lawful functioning of the Civil Service Commission, should give us insight into the considerations which must be addressed in reform legislation.

President Kennedy entered the White House after Republicans had occupied it for 8 years. He found himself surrounded by an administration which he felt was unsympathetic to his views. In order to get the best results possible out of his New Frontier program, he wanted to find ideological sympathizers to fill policymaking positions. Kennedy appointed his Special Assistant for Congressional Relations to "clear out the executive branch" of all persons whom he felt could not be trusted politically. With the help of the Departments and Agencies, the assignment was reportedly completed in 180 days.

During both the Kennedy and Johnson administrations, the patronage pressures of FDR's New Deal and Eisenhower's administration returned. In certain ways, President Johnson went further than Kennedy in an effort to restaff the executive branch. Johnson's Special Assistant in direct charge of the recruitment of ranking administration officials, the political clearance system at the White House, and the White House po-

hands of the President. The purpose of the manual was to politicize the executive branch; the document exposes the immense power available to an incumbent President to undercut civil service reform and to increase his own power.

"Grantsmanship" was practiced with such recognized patronage "resources" as jobs, contracts, grants, subsidies, the execution of Federal law, public relations offices, and the provision of domestic and international transportation. This process was made more effective by feeding money to "target areas" considered crucial to the election. For example, the General Services Administration was supposed to emphasize minority procurement "in those States and areas where there is a real opportunity to win some of the black vote."

According to one of Nixon's assistants, each governmental department was expected to draw up a plan to make governmental resources responsive to political needs. The White House would review each plan and insure compliance through the use of progress reports, evaluations, and followups. Nearly all the agencies drew up plans. Once a grant had been designated a "must," a White House coordinating group would determine the kind of grant appropriate. A local official would be informed as to what kind of grant application to submit and the White House would insure its acceptance.

The executive branch needed to con-

merit and political neutrality in the Federal service.

We shall submit amendments to check the concentrated authority vested in the Office of Personnel Management. The Senate must act to insure that new Federal personnel rules and regulations are founded in the spirit of merit principles and protected from unwarranted political interference.

With the same concern, we must consider the unfavorable repercussions of a Senior Executive Service. There is reason to question the effect of this executive service on long-standing career managers of the Federal Government. Previous administrations have not hesitated to bend the personnel rules for promotion of political goals.

RECENT ADMINISTRATION HISTORIES

In our governmental system, Federal employees are intended to be protected from political influences which may mar the performance of their official duties. We need only to examine the history of our Government to find numerous examples of job politicization within the Federal service. A view of recent administrations and their interactions with the Civil Service Commission will show that with tightening legislative controls over governmental employment and managing policies, those who still wish to influence the Government's actions, beyond the point permitted by law, have resorted to ever more complex and secretive designs. Among others, Presidents Kennedy, Johnson, and Nixon made elaborate attempts to control politically useful sectors of our Government. The Civil Service Commission has had increasing difficulty withstanding the varied tactics em-

political control over personnel in the executive branch, simultaneously became the Chairman of the Civil Service Commission. A former staff member in charge of Democratic patronage matters for the House of Representatives' Democratic Caucus became the Vice Chairman of the Civil Service Commission. Together the two held a majority on the three-member Commission.

Furthermore, all nominees for executive level and supergrade positions in the Government were interviewed and cleared by the White House—before or at the same time that paperwork was submitted to the Civil Service Commission. In addition, "insurance" was obtained with respect to the loyal performance of the appointee by first positioning him or her under Limited Executive Assignment and then converting that person to career status a year later.

A final objective of the Johnson administration was to insure the continued loyalty of the bureaucracy to democratic programs and Johnson policies after takeover by the Nixon administration. This was accomplished through last minute appointments and reorganizations that placed political appointees within the career service.

The Nixon administration has been attributed with the "rape of the merit system." It was during these years that the "Federal Political Personnel Manual" was prepared. It is not clear how much of the program's design to subvert the merit system actually went into effect and what precise role the Civil Service Commission played. The various schemes developed, however, emphasize the vulnerability of the civil service at the

control civil servants if it was to manipulate programs and, in some cases, violate the law. The manual outlined the establishment of a "political personnel office to insure political control of each department." It was to find an Assistant Secretary loyal to the President and a key budget official to create extra positions. In a reference form of this office, the applicant's name and his political desirability would be specified.

Besides recruitment, this office was also to reward loyal political employees by raising their grade. It was claimed that a "loyal classification specialist" could get any grade he asked for, on the other hand, the manual stated that the civil service system creates many hardships in the removal of politically undesirable employees from their posts. Instead of lowering the status or grades of these employees, the process of which required formal procedures, other methods were employed. One was to ask the employee to resign with a farewell luncheon and a positive recommendation. An uncooperative employee could later be forced out and "his employment references from the department and his permanent personnel record (would) not look the same as if he had accepted (the) offer."

A second method, the "Transfer Technique," suggested finding some geographical location such that the employee would rather resign than be transferred there. There was also the "Special Assignment" for the family man who did not enjoy traveling; he would be assigned a special evaluation project supposedly because of "special competence," but in fact to drive him into submission by keeping him on the road. Other un-

August 24, 1978

desirable employees could also be transferred to apparently meaningful, but essentially meaningless positions.

The Senate Watergate report summarized the effects of the incumbency-responsiveness program of the Nixon administration. These included flagrant abuses of Federal funding of minority and constituent groups stemming from the "improper involvement of campaign officials in Government decisionmaking." One example involved a Spanish-American official, of the Committee to Re-Elect the President, having the power to approve or disapprove grants to Spanish-speaking communities. Another showed campaign officials taking part in the selection process of money awards of GSA architectural and engineering design contracts. A special report procedure was established at GSA to facilitate the patronage effort.

Under Nixon was assembled a group of men who were determined to do everything possible to insure the President's reelection. Programs were evaluated in terms of contribution to the President's positive image and vote count. Most communications between the White House and the departments were verbal. No documents were to indicate White House involvement in any way. This would keep the President disassociated from any questionable program in case of a leak. A sort of filter system was created at the White House. Stanton Anderson became the initial White House

service reform bill. The balance of my comments should convince the Senate of a need to consider these problems seriously. My concerns with this legislation are founded in the reality of historical experience. That experience demands the Senate's consideration of the following established facts:

Previous studies of the civil service have established a fundamental need to maintain political independence in reform programs intending to improve the efficiency of the Federal personnel system.

The First Hoover Commission warned against weakening the protective function embodied in an independent rule-making Civil Service Commission. Public confidence in the promulgation of Federal personnel rules must be preserved.

The Hoover Commission recommended decentralization but strongly advocated increasing controls and auditing when such changes were made.

The Hoover Commission recommended strengthening the merit system by minimizing noncareer appointments and prohibiting political favoritism in appointments.

My review of recent administrations has established the reality of ever present political threats to the Federal personnel system.

I recognize the need and commend the effort to make the civil service more efficient, responsive, and effective. But we

we consider a bill which purposes to make the administration of the Civil Service more efficient and effective, we must reflect on the inefficiency and ineffectiveness inflicted on the Federal service by excessive executive authority. We must realize that unless we take adequate precautions against politicization, we will allow the Civil Service again to be used as a political treasure trove.

Article II, section 2, of the Constitution provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public ministers and consuls, Judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: But the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

The first Presidents desired to adhere to the principle of appointing on the basis of merit. George Washington wrote:

I must be permitted, with the best lights I can obtain, and upon a general view of characters and circumstances to nominate such persons alone to offices, as in my judgment shall be the best qualified to discharge the functions of the departments to which they have been appointed.

Thomas Jefferson claimed that the only questions concerning a candidate

contact point for any grant proposals. If action should be taken, Anderson would talk to Nixon's OMB aide on the issue. A plan for "Executive Branch responsiveness" was drawn up in which all policy matters would be handled by the Domestic Council staff, and all operational matters by two of the President's Special Assistants. When questioned by James Hamilton late in 1973 as to whether the President was informed about the responsiveness program and whether he had approved it, Stanton Anderson said it "would not be the kind of thing they would tell him about."

What seemed to have been built up during the Nixon administration was the blueprint for an executive tyranny surrounded and protected by an army of ambitious men. Their web of influence, as indicated by the manual and other documents, had the potential to spread and control more and more of the civil service system. The full extent of the Nixon administration's actions is uncertain; it is likely we are all still feeling its effects in more ways than the widely publicized Watergate revelations have made apparent.

These experiences in past administrations establish the need to analyze carefully provisions of the bill which expose the career service to political interference. The Senior Executive Service was vulnerable to political manipulation as drafted by the administration. In my opinion, the bill under Senate consideration still lacks adequate safeguards for the career manager dedicated to public service. We have submitted amendments to allay these concerns.

My statement began with the identification of problems contained in the civil

must acknowledge the previous abuses and manipulations, for partisan purposes, or the civil service system. Even with its existing protections, the Civil Service Commission has constantly had to contend against improper political assaults on merit principles. Before we restructure these protections, we should reflect on the persistence and insatiability of partisan pressures and consider reform measures which preserve the principles of the civil service.

I want to emphasize that the patronage influences imposed in the past upon the Civil Service take no political form. They have appeared in Democratic and Republican administrations alike. The desire of a new President to use a broom and sweep the office clean has always emerged—always.

I think that those who say that we need civil service reform in order to protect the public merit commendation. Those who would allow civil service reform to bring about additional political pressures upon the 2.1 million people in this country who have entered the career Federal service should be restrained.

POLITICS AND THE FEDERAL SERVICE

Mr. President, the relationship between the Civil Service and politics has been a controversial issue and persistent problem throughout the history of the United States. The President has always needed a small group of executives politically sympathetic with him. Yet political partisanship has always infiltrated and influenced the large group of what should be independent civil servants. Though civil service reform efforts have restored merit to offices once distributed as spoils, they have never successfully rid the system of improper political interference. As

should be: Is he honest? Is he capable? Is he faithful to the Constitution?

Nevertheless, Chief Executives yielded to the political and administrative expedience of making tenure of office contingent upon party loyalty. During the years while Washington was President, removals for political reasons were unknown. However, after Adams became President, he was urged at times to replace officials for party reasons and a few changes were made in which political differences played a role. With the inauguration of Jefferson in 1801, the Presidency passed from the Federalists to the Democratic-Republicans. Jefferson observed:

Out of about six hundred officers named by the President there were six Republicans only when I came into office, and these were chiefly half-breeds.

He claimed:

I had foreseen, years ago, that the first republican President who should come into office after all the places in the government had become exclusively occupied by federalists, would have a dreadful operation to perform. That the republicans would consent to a continuation of everything in federal hands, was not to be expected, because neither just nor politic. On him, then, was to devolve the office of an executioner.

The Civil Service Commission's history, "Biography of an Ideal," notes that the series of appointments made by Adams as a lame duck and the reaction of Jefferson to confronting a politically incompatible Federal service set in motion partisan patterns which culminated in the spoils system. Once the pendulum started swinging, it became increasingly difficult to stop.

The Tenure of Office Act, passed in 1820, facilitated the replacement of civil

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14275

servants. It specified a 4-year limit to many offices of indeterminate length. Jefferson, in a letter to Madison prompted by Monroe's signing the Tenure of Office Act, reviled the bill and eloquently outlined its implications:

(The Act) will keep in constant excitement all the hungry cormorants for office, render them, as well as those in place, sycophants to their Senators, engaging these in eternal intrigue to turn out one and put in another, in cabals to stop work; and make of them what all executive directories become, mere stinks of corruption and faction. This must have been one of the midnight signatures of the President, when he had not time to consider, or even read the law.

An attempt at civil service reform was made in 1829. The Senate Select Committee on Executive Patronage, known as the Benton Committee, was created to "inquire into the expediency of reducing the Patronage of the Executive Government of the United States."

The committee observed that neither the jealous foresight of the authors of the Constitution nor any human sagacity could have foreseen, and placed a competent guard upon, every possible avenue to the abuse of power. It argued that because the appointing power, the President, was not an emanation of the popular will, he could not be trusted with the sole direction of the Federal service. The committee suggested six bills to govern appointments, but all six were tabled.

With Andrew Jackson's inauguration in 1829, the spoils system became a tra-

election; the Democrats returned in 1844 only to be thrown out again in the election of 1848. The Whigs lost in 1852 and it was not until then that the Democrats were able to remain in office for two consecutive terms. They were defeated in 1860 by a new national party that had never held the Presidency. No sequence of events could have been more conducive to coerce party leaders to apply the doctrine of rotation. Thus, in the period between the administration of Andrew Jackson and Abraham Lincoln, the apogee of the spoils system was reached. Old traditions of respectability had passed away and the later spirit of reform had not arisen. The victors distributed the spoils and were unashamed. The Presidential election became a quadrennial contest, with the civil service as the prize.

Political abuses were flagrant and egregious. Julius Bing, an advocate of civil service reform, declared in 1868:

At present there is no organization save that of corruption; no system save that of chaos; no test of integrity save that of partisanship; no test of qualification save that of intrigue.

Seward, later to be Lincoln's Secretary of State, remarked in 1849:

The world seems almost divided into two classes: those who are going to California in search of gold, and those going to Washington in quest of office.

President Polk had conducted a series of removals more extensive than any before this, despite having succeeded a

the election of qualified candidates and to employ people to conduct the investigation of the candidates.

President Grant exercised the authority provided him and appointed a seven-member commission. The Grant Commission prohibited political evaluation of candidates and promulgated four requirements: Competitive examinations for appointments, the "rule of three," a 6-month probationary period, and competitive examinations for promotion.

However, in 1875 Congress refused to appropriate funds for the Civil Service Commission. President Grant, having insisted that he would not maintain the civil service regulations without congressional support, terminated the civil service rules and regulations and abolished the examining boards. In spite of this suffocation the Grant Civil Service Commission left a legacy in both law and practice.

Public support for civil service reform swelled. Leagues formed to promote "reforms to remove the evils of patronage, favoritism, and partisan coercion from the civil service, and cause appointments, promotions, and removals to be made with due reference to character, merit, and economy."

As President, Hayes made repeated requests for reform legislation and revival of the Grant Commission. In his third annual message he made a particularly strong plea for reform:

The authority of appointment and removal is not a prerequisite, which may be used to aid a friend or reward a partisan, but

dition openly practiced. Though Jackson did not introduce the theory of rotation in office or the use of patronage for political advantage, he did introduce the spoils system on a wider scale than his predecessors had and did carry it out openly rather than apologetically and quietly.

Rotation-in-office under Jackson helped to destroy the concept of property in office and to solve the problems of disability and superannuation in the civil service. Jackson stated:

I can not believe that more is lost by the long continuance of men in office than is generally gained by their experience.

However, the fundamental motivation for the implementation of widespread removal was its political desirability.

During Jackson's second term, Clay, Calhoun, and Webster led a series of debates attacking the patronage system. Clay warned:

Incumbents, feeling the instability of their situations, and knowing their liability to periodic removals, at short terms, without any regard to the manner in which they have executed their trust will be disposed to make the most of their uncertain officers while they have them, and hence we may expect immediate cases of fraud, predation, and corruption.

Nevertheless, the patronage system was to become ingrained, not excised.

It was a fundamental weakness of the civil service as established in the United States that when one party had begun to turn out its opponents, its successors were almost forced to do the same. The alternation in party control of the Presidency between 1840 and 1860 reinforced the pattern. The Whigs carried the 1840

President who had filled many positions with their common adherents. And even Polk was repulsed by the depth of the desire for Federal jobs. He wrote in his diary:

The passion for office among members of Congress is very great, if not absolutely disruptive, and greatly embarrasses the operations of the Government. They create offices by their own votes and then seek to fill them themselves. I shall refuse to appoint them . . . because their appointment would be most corrupting in its tendency.

The effort to establish and insure the political neutrality of the civil service began in 1864 when Senator Sumner offered a bill which he described as providing for "the greater efficiency of the civil service." The Sumner bill was tabled; a similar bill introduced in 1865 by Representative Jenckes received no immediate action. However, in 1866 the House approved Jenckes' resolution to establish a select committee to investigate the civil service and suggest methods of improving it. Between 1867 and 1869, Jenckes offered four bills requiring open competitive examinations administered by a commission. The problems generated by politicization had become intolerable. Charles Eliot Norton declared in 1869:

The question seems to be now whether the politicians,—“the men inside politics,”—will ruin the country, or the country take summary vengeance, by means of Jenckes' bill, upon them.

The civil service reform movement achieved its first major victory in 1871 during the closing moments of a lame-duck session. Congress passed a civil appropriations bill with a rider authorizing the President to prescribe rules for

is a trust, to be exercised in the public interest under all the sanctions which attend the obligation to apply the public funds only for public purposes.

In February 1881, Senator Pendleton reported, from the select committee to examine the several branches of the civil service, a bill providing for competitive examinations administered by a commission. The committee report cited the repeated requests from Presidents Grant and Hayes for continued appropriations to the Civil Service Commission and pointed out that the pleas never met with congressional action. The report concluded:

It was therefore Congress, and not the Executive, which arrested the new system based on character, capacity, and common justice.

Ironically, the lame-duck session adjourned without considering the bill.

It took a tragedy to stimulate legislative action. James Garfield had declared:

The present (spoils) system . . . impairs the efficiency of the legislators; . . . it degrades the civil service; . . . it repels from the service those high and many qualities which are so necessary to a pure and efficient administration; and finally, it debauches the public mind by holding up public office as the reward of mere party zeal.

On July 2, 1881, Garfield was assassinated by a disappointed office-seeker.

The public instinctively associated the President's murder with the spoils system. One reformer exclaimed:

On the myriad pages of our journals, of every section and class, the truth has been daily uttered in words of mingled anxiety, shame and detestation.

Late in 1881, Pendleton reintroduced

his civil service reform bill. The full Senate again took no action; but the Committee on Civil Service and Retrenchment issued a report supporting civil service reform and declaring:

In the discharge of (the appointing power), the highest of all executive functions, political influences and compensations have come to dominate and to subordinate all other considerations; and the distribution of official spoils has come to be the logical prerogative of political ascendancy.

Finally, in January of 1883, the Pendleton Act was passed by Congress and signed by President Arthur. The Pendleton Act established the three-member, bipartisan Civil Service Commission to enforce the merit system. It provided for competitive examinations and political neutrality and made tenure contingent upon satisfactory performance. It required a probationary period for the evaluation of appointees, the continuation of veterans' preference, and promotion on the basis of merit and competition.

One would expect that at the triumph of the reform movement, the motives of the supporters of the Civil Service Act would be pure and altruistic. In fact, much of the support for the bill was impelled by political considerations. The outlook for the Republican Party in 1884 was not promising; Republicans were filled with apprehension and Democrats were filled with anticipation. Those who very shortly would be out of Congress were in a majority and controlled the Presidency. It

This process was hastened by the alternation of party control in the 1880's and 1890's, which led Presidents to make additions to the classified list every 4 years. During this period, Presidents entered office taking full advantage of their patronage prerogatives within the unclassified service, but left office with extensions of the merit system to their credit.

During the last two decades of the 19th century, the classified service expanded for political reasons. Meanwhile, Congress faced attempts to dissolve the Civil Service Commission. Seven bills to repeal the Pendleton Act were offered during Cleveland's first administration. Eight were introduced in Harrison's. Four were offered during Cleveland's second. In addition to outright rescission, attempts were made to starve the Civil Service Commission by curtailing its boards, and to specify fixed terms for all Government employees. Thus in its inception, the Civil Service Commission had to contend against legislative assaults and to expand primarily through the blanketing in of patronage appointees.

In 1903, Roosevelt revised and consolidated the civil service rules. Until 1903, the competitive service was identified by specifically enumerating the parts of the executive branch to which it applied. President Roosevelt defined the competitive service as all positions in the executive branch except those specifically exempted by Congress or the President.

really deserving Democrats will not be forgotten.

The reported circumvention of merit principles and practices generated protests within and outside the Government. While the number of positions excepted from civil service laws was increasing from 111,000 in 1932 to 309,000 in 1937, public interest in the extension and improvement of the merit system was increasing to a level unequaled since the Pendleton Act. The executive council of the National Federation of Federal Employees wrote President Roosevelt:

Democratic government cannot thrive when political considerations are the dominant factors in appointments to the federal service. Waste, maladministration, inefficiency, and corruption inevitably follow when a spoils policy is substituted for a sound civil service system under which men and women attain their positions through competitive examination and retain them through proved capacity.

The extension of the merit system was a major campaign issue in 1936. The platforms of both parties pledged support for expanding the coverage of the competitive service.

Between 1936 and 1940, Executive orders and laws reinforced the merit principles. President Roosevelt in 1936 revised the civil service rules to require that incumbents meet noncompetitive standards in order to acquire permanent status. In 1938, he extended the competitive service to include most of the exempted positions which he had the

would be advantageous for Republicans to make permanent the tenure of office-holding friends while supporting the reform their constituents so obviously desired. Republicans supported the Pendleton Act for two reasons: They could pose as reformers in 1884 and win back lost support and they could freeze Republicans in office behind civil service rules in case the Democrats won the election.

Though political pragmatism constituted the motives of some Members of Congress, it in no way compromised the longrun design of civil service reform. Indeed, during the two decades following the passage of the Pendleton Act, patronage itself effected the expansion of the merit system.

The principles of civil service reform advanced not because of further action by Congress, but because of Executive action. After 1883, Presidents had a general responsibility for personnel administration: Approval of the rules of the Civil Service Commission and extension of the merit system. The Executive Orders from 1883 to 1901 were almost wholly devoted to civil service matters. Ironically, Executive action stemmed more from a desire to place fellow members permanently in the civil service than from a wish to reform. The process involved placing political friends in a branch of the unclassified, or un-reformed, service and extending the rules to cover it. Incumbents, when the civil service rules were extended to a new class of officers, were included within the protection of the civil service rules without the trial of an examination. Therefore, Presidents extended the classification to protect their party friends.

He thereby shifted the burden of specification from including positions to excluding them.

Excepting positions from the civil service rules became a customary practice. The most common antimerit system legislation following 1903 specifically exempted new or old positions from the requirements of the Pendleton Act. Such exemptions were made repeatedly.

Circumvention of the merit principles was accomplished even without legislation. Temporary employees could be hired without going through the civil service procedures. Thus temporary posts were ideally suited for the continuation of spoils practices.

The practice of exempting positions from civil service rules culminated in the early 1930's. The Great Depression and the change of administration in 1933 combined to encourage sweeping exceptions from civil service jurisdiction. Eighty percent of the civilian-occupied Federal positions were within the competitive service in 1932. Only 60 percent were within the service in 1936. During this period the excepted service grew by 200,000 positions or 160 percent.

Relief agencies were created outside of the requirements of the merit system. The expressed justification was that the agencies were temporary, but a fundamental motive was the desire to control a pool of patronage jobs. One Congressman declared:

We have had twelve long, lean and hungry years in this country . . . I may say I do hope and pray, adopting somewhat the spirit of old Andrew Jackson on these propositions of rewarding the faithful, inasmuch as we have so many faithful and so many deserving . . . that the rights and interests of

power to convert. The Hatch Act prohibiting active participation in politics by employees and officials of the executive branch was passed in 1939. In the next year, Congress passed the Rampeck Act, which authorized the President to extend the classified service to cover almost all positions previously exempted by statute.

With respect to the development of the merit system, the outstanding characteristic of the emergency war years of the forties and early fifties was that the expansions and contractions of the civil service were contained within the classified service. Despite extensive delegation of examining authority to the employing agencies, merit system standards and practices were respected.

Nevertheless, patronage influences continued to impose themselves as they had in the past. The Second Hoover Commission in 1955 declared:

There has never been a clean break with the mid-nineteenth century patronage system . . . The merit system and the spoils system have continued to exist side by side . . . Until a clear-cut decision is made to get rid of patronage in the civil service and to concentrate political appointments in the area of political executives . . . patronage will continue to affect both the efficiency and the prestige of the public service adversely.

Manipulation of the civil service for political ends has continued during recent administrations. President Johnson appointed his special assistant responsible for the White House recruitment and political clearance system to hold simultaneously the post of Civil Service Commission Chairman. He acquired a politically sympathetic majority on the Commission by appoint-

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14277

ing, as its Vice Chairman, a staff member in charge of patronage for the House Democratic Caucus. Though President Johnson had insured political sensitivity in the administration of the civil service, he further required that all nominees for executive level and supergrade positions be interviewed and cleared by the White House before the Civil Service Commission screening was initiated.

We have seen, and I reiterate to demonstrate that there is no politics in the statement I am making, that the Nixon administration attempted a vast subversion of the merit system. Agencies were instructed by the Federal Political Personnel Manual to appoint politically loyal candidates. Promotions and removals were to be made on the basis of partisan support. Transfers to force the employees were utilized in an especially ruthless manner.

Clearly, the civil service has had to struggle to serve the needs of the public while serving the interests of the Executive. It has been employed as a reservoir for political patronage while being a repository for public trust.

Senate bill 2640 still, in my opinion, threatens to efface the accomplishments made during 100 years of struggle against political manipulation of the civil service. I support making the civil service more efficient; I uphold making it more effective. But I am convinced that neither efficiency nor effectiveness will be attained unless politicization is precluded.

Mr. STEVENS. Mr. President, I see that the Senator from Tennessee (Mr. SASSER) is on his feet and seeks recognition. He and I have worked together on these matters in a spirit of bipartisanship. I am most delighted to have the opportunity to participate with him on Senate bill 2640.

It is a necessity, I feel, for the Senate to have Members on both sides of the aisle who are willing to give their time to what often seems to be small, minor, or technical amendments, but which have far-reaching impact upon those people who serve the Federal Government in all times, through good times and times of crisis, with devotion to our system.

I want to say, with the two ranking members present, that I am delighted that we have had the assistance of my good friend from Tennessee, and to recognize him here as a participant on this bill.

Mr. RIBICOFF. Mr. President, if the Senator will yield, the distinguished Senator from Tennessee (Mr. SASSER), the chairman of the subcommittee which has the responsibility for Civil Service, has been invaluable to the entire committee. This is hard work. It is work that takes a great deal of time. The Senator from Tennessee has devoted himself to all these problems, and his contributions have been invaluable in the formulation of this legislation.

Mr. SASSER. Mr. President, let me first say that I am greatly indebted to

through history. For our Nation's first century, entry into the Federal service was most often accomplished strictly on the basis of patronage. Patronage politics was a principal plank in the platform of a fellow Tennessean, Andrew Jackson, who believed that "to the victor goes the spoils." Jackson thought that all Federal employees should be politically loyal to the President, and that it was best to rotate citizens in and out of Federal jobs in order that an elite bureaucratic class not develop. Many Americans shared Jackson's views, which he succinctly defined in his first annual address in 1829:

I cannot but believe that more is lost by the long continuance of men in office than is generally gained by their experience.

Although President Jackson was one of the few Presidents who loudly proclaimed the virtues of spoils, his successors continued the Jacksonian policy of rewarding the party faithful with Federal appointments.

PASSAGE OF THE PENDLETON ACT

History, however, and changing circumstances, demonstrated that the worst aspects of the spoils system outweighed the benefits. The spoils system had a debilitating effect in the long run on the efficiency of the Federal service.

In 1871, Congress, under pressure from a "good government" movement led by progressives in the electorate, sensed that the Nation was swinging to the idea that good government meant

Mr. President, there is a series of amendments within this amendment. One deals with rule-posting requirements; another with the policy of career placement in the SES; another with OPM certification of appraisal systems; another with an advisory committee for the Director of the Office of Personnel Management; and another with the payment of attorneys' fees in arbitration.

I will make statements on these matters after the remarks of my distinguished colleague from Maryland.

I commend the managers of the bill, the Senator from Connecticut and the Senator from Illinois, for being patient with those of us who feel that we must persist in making certain that if we have reform it will not make the avenue into the career civil service the avenue of politics.

Mr. PERCY. Mr. President, I ask unanimous consent that Chris Brewster, of the staff of Senator DANFORTH, be granted the privileges of the floor during the discussion and votes on the pending bill.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. CRANSTON. Mr. President, I ask unanimous consent that Jon Steinberg, Bill Brew, Babette Polzer, Janice Orr, Jack Wickes, and John Pressly be granted the privileges of the floor throughout consideration of S. 2640 and S. 2570.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MATHIAS. May I make the same request, Mr. President, for Peter Connolly, of Senator NELSON's staff?

The PRESIDING OFFICER. Without objection, it is so ordered.

the distinguished Senator from Alaska for the splendid spirit of cooperation he has displayed as the ranking minority member of the Civil Service Committee. He makes a tremendous contribution, and it is always a great pleasure to work with him; and I thank him for his kind and generous remarks.

Also to the distinguished manager of the bill, Mr. President, I wish to express my appreciation for his generous remarks and for his splendid assistance and guidance in getting this bill through the shoals of the committee and to the Senate floor today.

Mr. President, the Civil Service Reform Act of 1978, S. 2640, is one of the most important and historic pieces of legislation this Chamber will consider for many years.

Our civil service system is composed of over 2 million workers. It has grown tremendously in size and responsibility since 1883, when the Pendleton Act first established the civil service. Yet it has undergone no major revision for 95 years. We have had piecemeal change lumped on top of piecemeal change, sometimes without regard for how the overall system would be affected.

Now, in 1978, we find the civil service to be the target of a great deal of criticism. It's time to make comprehensive changes in the way our Government's personnel system is operated. Not to make such changes is to encourage continued criticism of the system and to undermine further the morale of the Federal employees themselves.

THE SPOILS SYSTEM

The nature of the Federal personnel system has been constantly evolving

neutral and impartial government. Civil service reform became a rallying cry. This was a switch from the idea that government should at all levels reflect the character of those who won the last election—that in order to be responsive to the people, public officials had to be appointees of those whom the people elected.

The rejection of the spoils system and calls for civil service reform led to the popular acceptance of the "merit" concept for public employment. Politics was removed from the running of Government, both in the appointments process, where competitive examination replaced political connections, and in the day-to-day operation of the Federal service.

The "good government" movement culminated in 1883, after nearly a century of the spoils system and patronage politics, in the passage of the Pendleton Act, which established the merit system and created the Civil Service Commission. At that time, however, only 10.5 percent of the Federal workforce, or 13,780 employees, was included in the merit system.

Successive acts of Congress authorized Presidents to classify more and more positions in the Federal service under the merit system. And as Government continued to grow, the new positions, more often than not, were classified in the competitive service rather than as patronage. By 1904, when President Theodore Roosevelt took office, the percentage of the Federal workforce under the merit system had increased to 53, and the number of Federal employees in the competitive service had increased to 154,093. These numbers continued to increase to 83.1 percent and 2,430,144 employees in the competitive service in 1971, when the

Postal Reorganization Act was passed and a different merit personnel system was established for the postal service.

CHANGING NATURE OF COMMISSION

With the rapid expansion of Government services in the 1930's to cope with the effects of the Depression, the Government's personnel system became stretched and strained. On the one hand, the Civil Service Commission was evolving into the central personnel agency for the Federal Government. The transition from serving primarily as policeman to administrative leader of the Government personnel network was accompanied by a growing list of expanded functions for the Commission. By the mid-fifties, according to one report:

In addition to its historical responsibilities in examining, the Commission now had responsibilities under the Hatch Acts (1939 and 1940), and the Veterans' Preference Act (1944); as well as for position classification in both the departmental and field service (the Classification Act of 1949). It had responsibilities for Performance Rating (1950), for Incentive Awards (1954) and for the Group Life Insurance Act (1954), not to mention a number of other statutes, or a host of important responsibilities under Executive Order (such as in the area of employee suitability and loyalty).

And the period from 1958 to the present continued the trend. Just to name a few of the major bills among the 25 or so civil service measures passed by each Congress, there has been the Employees Training Act of 1958, the Federal Em-

operated under their own statutory collective bargaining law.

Today, combined with the rapid growth of the public employment and the changing nature of personnel administration, 58 percent of the Federal workforce is represented by exclusive bargaining agents in work-related areas, excluding pay and fringe benefits. The Civil Service Commission has had to adjust its functions accordingly, but without the benefit of any new laws or the guidance of congressional intent.

NEED FOR COMPREHENSIVE STRUCTURAL REFORM

It is not difficult, then, to see how massively the Federal personnel system has changed since the passage of the Pendleton Act in 1883. But the civil service laws have not adequately changed with the growth of the system. Modernization of public administration techniques, the greatly expanded role of the Civil Service Commission, and the increasing reality of a highly organized Federal workforce have not been reflected in the civil service laws.

Attempts have been made to address these issues, yet no comprehensive reform bill has been seriously considered by Congress.

The first and second Hoover Commissions, which made detailed inquiries into the state of the civil service, submitted recommendations which were considered but never adopted. Among those recommendations was the suggestion that the functions of the Civil Service Commis-

in public administration. S. 2640 would address both of these problems by strengthening the protection against merit abuse and by giving greater flexibility to Government managers to run their programs for the benefit of the people without delay and redtape.

SUBCOMMITTEE AND COMMITTEE ACTION

Mr. President, as chairman of the Senate Subcommittee on Civil Service and General Services, and as a member of the Senate Committee on Governmental Affairs, I have had an ongoing concern that the civil service laws reflect the current state of the Federal workforce; that they be fair to those who have chosen Government service as a career; and that they promote efficiency in administration.

In 1977, when the new Civil Service Commissioners, Dr. Campbell, Mr. Sugarman, and Ms. Poston, came before the committee to be confirmed, I raised many of the issues that are now addressed by this bill, S. 2640, today. I raised the subject of protection for civil servants from merit abuse. This subject particularly concerned me and concerned those who work for the Government, after repeated attempts by past administrations to use the civil service for partisan purposes.

I raised the question of the lack of opportunities in our Federal Government for women and minorities.

The Commissioners were asked at those hearings about the dual function of the Civil Service Commission. and

ployees Health Benefits Act of 1959, the Federal Salary Reform Act of 1962, the Federal Pay Comparability Act of 1970 and the Intergovernmental Personnel Act of 1970.

CHANGING WORKFORCE—COLLECTIVE BARGAINING

Further, the Commission has had to deal with the ramifications at the Federal level of the rapid rise of unionization in public sector employment. With the decline of the notion of the sovereignty of the State in labor relations with public workers, labor organizations in government increased their efforts to improve relations with their employers. From 1949 to 1961, labor organizations of Federal workers pressed for legislation in Congress to authorize statutorily the concept of union recognition and bargaining among Federal employees. The Federal employee labor groups, which had been excluded from the National Labor Relations Act, persuaded various Congressmen to introduce legislation on their behalf, and hearings were held in the 82d, 84th, and 86th Congresses.

The interest and pressures generated by these bills caused President Kennedy to appoint a task force to study employment management in the Federal service. The recommendations of the task force resulted in the eventual promulgation of Executive Order 10988, "Employee-Management Cooperation in the Federal Service," in 1962. Executive Order 10988 established the first formal labor-management relations system for Federal employees of the several agencies of the executive branch, although certain employees, such as those in the Tennessee Valley Authority, had for years

sion be decentralized. It was felt that the Commission was taking on too many conflicting roles and that its functions should be narrowed.

One legislative initiative was made to respond to the issues raised by the Hoover Commissions and other recommendations of civil service experts. In 1958 and 1959, Senator Joseph Clark introduced legislation which, according to a report of the Post Office and Civil Service Committee:

Would establish an Office of Personnel Management in the Executive Office of the President and transfer to it those functions of the Civil Service Commission which comprise the positive leadership functions in the field of personnel administration now assigned to the Commission but more properly the function of the Chief Executive. The Civil Service Commission would retain those functions associated with its "watchdog" role as the protector of the merit system.

Hearings were held on the Clark bill, but no Senate action was ever taken. The Clark bill represented the last major congressional consideration of the Civil Service Commission until the 1970's, when merit abuses by the Nixon administration heightened congressional concern over the civil service laws and regulations.

The bill we have before us today, Mr. President, is finally a comprehensive effort to address the concerns that have been raised about the Federal personnel system over the past 95 years. We have found that there is not enough merit in the merit system, and yet at the same time there is not sufficient administrative flexibility to operate the Federal Government in an efficient and productive manner, consistent with the latest techniques

whether those functions should be split.

I raised the question of lengthy and often-wasteful appeals procedures, which often did not help those who were in the right but allowed those who were in the wrong to tie up their superiors in mounds of paperwork and months of proceedings.

One of the most important questions in those confirmation hearings dealt with protections for whistleblowers.

I raise the issue that many Federal employees consider the current Executive order governing labor-management relations to be inadequate.

THE INK REPORT

The administration's response to these and other issues raised was, first of all, a comprehensive study of the entire Federal personnel system. The Federal personnel management project, conducted mainly by career civil servants, was a top-to-bottom review of every personnel law and regulation and their effect on the efficiency of the public service. This project was headed by Mr. Dwight Ink, a public administration expert.

The Ink project was an outgrowth not only of congressional concern, but also of President Carter's clear commitment to reorganization and reform of the civil service.

As a candidate, Jimmy Carter had repeatedly expressed his belief that the Federal Government was too big, too disorganized, and too unresponsive. In early 1976, candidate Carter said:

There is a pervasive tendency in government toward unrestrained growth in salaries, number of personnel, and expenditure of funds. This growth often bears little relationship to the actual need for government services. . . . The first piece of legislation I will send to Congress will initiate a complete

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14279

overhaul of our federal bureaucracy and budgeting systems. The second part, as a follow-up to the first, will initiate the reorganization of our federal bureaucratic structure. . . . The greatest need facing the United States today is for a well-managed structure of government—one that is simple, efficient and economical.

The Federal personnel management project issued study finding and option papers in installments throughout much of last year, and concluded its operations in November 1977.

The findings of the Ink report touched upon virtually every aspect of the Federal civil service system.

Among the hundreds of recommendations made were proposals to abolish the Civil Service Commission to create a new office of personnel management, to create an independent merit protection board, to create a senior executive service, to simplify Federal staffing procedures, to reform and streamline various Federal pay systems, to give agency managers more authority to recruit and examine, to provide for a system of financial incentives and bonuses, to reform the "rule of three" and other certification processes, and to provide greater promotion flexibility.

On December 19, 1977, President Carter gave his approval to the proposal to abolish the existing Civil Service Commission and create two new agencies in its place.

On March 2, 1978, the President sent his civil service reform message to Con-

gressors and to give managers more flexibility and better rewards for outstanding performance;

An incentive pay plan for lower-level managers and supervisors at the GS-13 through GS-15 grade range which relates pay increases to the quality of their performance;

An authorization for research and demonstration projects aimed at experimenting with new personnel management techniques and improving the efficiency of the Federal service;

Statutory creation of an Office of Personnel Management, to be the administration's chief personnel bureau and to make policy decisions for the President on personnel matters; and

Statutory creation of a Merit Systems Protection Board, to hear appeals from employees against whom an adverse action has been taken, to give protection to Federal employees who disclose examples of Government wrongdoing, and to be the watchdog over merit abuses within the system.

These provisions were included in the bill in the following titles:

Title I, merit system principles.

Title II, civil service functions; performance appraisal; adverse actions.

Title III, staffing.

Title IV, senior executive service.

Title V, merit pay.

Title VI, research and demonstration authority.

On April 25, 1978, the President submitted as an amendment title VII, which

As noted earlier, it has been the feeling of public administrators going back to President Roosevelt's Committee on Administrative Management in 1937 that there should be a single-headed entity to direct the Federal personnel system. The concept has been discussed for decades and has been adopted extensively with success at the State and local government levels.

The Merit Systems Protection Board would have three members appointed by the President. It would, along with its Special Counsel, be responsible for safeguarding the effective operation of the merit principles in practice. The Board would decide cases brought to it by employees who feel they have been disciplined in a manner inconsistent with the merit principles or who bring to the attention of the Special Counsel other instances of Federal employees acting in violation of the merit principles.

A strong, independent Merit Protection Board was also endorsed by witnesses before the committee. It is obvious, in studying the merit abuses which were found to be prevalent in past administrations, that the current Civil Service Commission was not adequately carrying out its role as protector of the merit system.

The need to establish the adjudicatory and the personnel management functions of the Commission in two separate bodies was pointed out by the public administration experts who testified before the committee. Thus, it was felt not only

gress, stating:

The simple concept of a "merit system" has grown into a tangled web of complicated rules and regulations. Managers are weakened in their ability to reward the best and most talented people—and to fire those few who are unwilling to work.

The sad fact is that it is easier to promote and transfer incompetent employees than to get rid of them. It may take as long as three years merely to fire someone for just cause, and at the same time the protection of legitimate rights is a costly and time-consuming process for the employee.

You cannot run a farm that way, you cannot run a factory that way, and you certainly cannot run a government that way.

S. 2640

The bill we have before us here today, Mr. President, addresses these issues in a straightforward and comprehensive manner. When S. 2640 was submitted by the administration in March, it contained the following provisions:

Codification, for the first time, of basic merit principles governing the Federal personnel system, and specific identification of prohibited personnel practices which undermine the merit system;

Improved and streamlined procedures for deciding employee appeals;

New procedures for appraising employee performance, with less cumbersome procedures for taking corrective action on the basis of poor performance records;

Additional participation by agencies in the staffing process, with increased flexibility in hiring decisions;

Increased opportunities in Federal employment for disabled and Vietnam-era veterans and for minorities and women;

A Senior Executive Service to utilize the skills of the Nation's best public ad-

would create an independent Federal Labor Relations Authority to administer the Federal labor relations program, and which would codify the existing Executive Order 11491, which now governs labor relations in the Federal sector.

The Civil Service Reform Act of 1978, S. 2640, was a companion to Reorganization Plan No. 2 of 1978, which seeks to abolish the Civil Service Commission and replace it with a single-headed Office of Personnel Management, a Merit Systems Protection Board, and a Federal Labor Relations Authority. The reorganization plan makes the major structural changes in the civil service system, while the legislation implements the policy changes President Carter feels are essential to reforming the Federal personnel system.

Mr. President, I would like at this time to highlight the major areas of reform addressed by this bill and to underscore why they are so essential to getting a handle on the bureaucracy, affording greater management flexibility, and insuring fair treatment and adequate rewards for Federal employees who do their jobs.

I. ABOLISHING THE CIVIL SERVICE COMMISSION AND REPLACING IT WITH AN OFFICE OF PERSONNEL MANAGEMENT AND A MERIT SYSTEMS PROTECTION BOARD

Nearly every witness who testified before the Committee on Governmental Affairs supported the concept of splitting the Civil Service Commission into an Office of Personnel Management and a Merit Systems Protection Board.

The Office of Personnel Management would be the primary agent advising the President and helping him carry out his duty to manage the Federal workforce.

that the functions of the Commission needed to be better defined, but that it should be done by removing the oftentimes conflicting nature of the Commission's duties. A simple reorganization of functions was felt to be insufficient. Instead, it is time in this bill for major structural reform of the civil service.

The General Accounting Office examined the dual nature of the Commission last year and recommended that Congress eliminate the conflicting roles of the Civil Service Commission as policymaker, prosecutor, judge, and employee protector.

I ask unanimous consent, Mr. President, that the testimony of other expert witnesses and interested groups before the committee on this issue be inserted in the RECORD at this point.

The material follows:

The American Society for Personnel Administration:

Dividing the Civil Service Commission into the Office of Personnel Management and the Merit System Protection Board would alleviate the conflicting roles the current Civil Service Commission is required to perform. . .

As a nation, we rely on our system of checks and balances. However, this system does not appear to exist in the current operation of the Civil Service system, but would be established under this proposal.

The National Academy of Public Administration:

We agree that a serious conflict does exist in the Civil Service Commission's responsibilities, that its personnel management and policing roles are fundamentally incompatible and should be performed by two different organizations.

National Civil Service League:

We strongly favor the replacement of the Civil Service Commission by (1) an Office

of Personnel Management and (2) a Merit Systems Protection Board.

The National Federation of Professional Organizations:

Our group is in accord with the stated purposes of S. 2640, which is to split the present Civil Service Commission into two organizations, the Office of Personnel Management, and the Merit Systems Protection Board. The Civil Service Commission has long been entrapped in conflict of interest, in attempting to be the adviser to agencies on personnel matters, and also the independent, impartial adjudicator of disputes between employees and their agencies.

American Civil Liberties Union:

We wholeheartedly support the division of the present Civil Service Commission into two independent agencies. One of our major objections to the present system is that the Commission serves as co-plaintiff, investigator, prosecutor and judge in personnel actions, insuring a management-oriented result in the majority of cases.

Committee for Economic Development:

The CED plan and the President's plan on termination of the Civil Service Commission, creation of the Office of Personnel Management and the creation of a Board ("Federal Public Service Board" or Merit System Protection Board") are nearly identical.

Common Cause:

The existing Civil Service Commission, serving as the primary personnel agency of the federal government, has a number of responsibilities which are so disparate and inconsistent that it is presently unable to fulfill any of them adequately . . .

Common Cause strongly supports the Administration's proposal to divide the existing Civil Service Commission into an Office of Personnel Management (OPM) and a Merit Systems Protection Board (MSPB).

nature of public service for an employee to blow the whistle on superiors who are mispending the taxpayers' dollars or who are breaking the law.

Nevertheless, we have seen to many examples in the past of Federal employees who found themselves fired, transferred, or deprived of meaningful work simply because they were brave enough to place the public interest ahead of their own personal career interest.

There is no reason, Mr. President, why an employee should have to risk his career and his family's financial stability for performing a public service.

Because of past examples of whistleblowers who suffered reprisals, legislation has been introduced to offer meaningful protection for employees who find themselves in such a situation. In particular, my distinguished colleagues, Senators ABOUREZK and LEAHY, have done outstanding work in this area. Also, Senator METZENBAUM has introduced legislation which is currently pending in the Judiciary Committee.

The Governmental Affairs Committee, after hearing considerable testimony highlighting the urgent need for whistleblower protection, considered each of these bills, together with the administration's proposal in S. 2640, as introduced. The committee's version of whistleblower protection is commendable for balancing the need for legitimate protections for whistleblowers and potential whistleblowers with the concern that Government not be endlessly tied up by un-

senior executives from improper political manipulation or coercion.

Except for the concerns about politicization, the concept of a senior executive service received broad bipartisan support from witnesses who testified before the committee. I, too, support the creation of a senior executive service.

The SES would accomplish the following important reforms:

Encourage mobility of senior executives among agencies;

Reward outstanding performance of career executives with additional compensation in the form of bonuses and status;

Provide flexibility to agency heads in the assignment of executives;

Provide opportunities for career executives to serve in higher level positions, including Presidential appointments, without losing their identification with the career service;

Provide for performance appraisals that meaningfully reflect both the executive's individual performance and his unit's success in carrying out its functions; and

Eliminate redtape and delay in the removal of executives whose performance is unsatisfactory or marginal.

Mr. President, the U.S. Government is the largest employer in the Nation. Its programs are far reaching, complex, and widely varied. They must be conducted with sensitivity to conflicting interests and under constant public and media attention, for they affect every citizen. To

International Personnel Management Association:

IPMA endorses the establishment of the Office of Personnel Management and the Merit Systems Protection Board. The inherently conflicting roles of the current Civil Service Commission have impaired its effectiveness and credibility.

Ralph Nader:

Structurally, the Civil Service Commission has two inherently contradictory roles, to be the top personnel manager of the federal government and to protect the non-political, competitive nature of civil service. The Commission has tilted towards the management role at the expense of the merit protector role. President Carter has recognized this role conflict and, in Reorganization Plan Number 2, has recommended splitting the Civil Service Commission. This proposal should have a positive impact and we endorse it.

Mr. SASSER. Mr. President, the proposed reorganization and restructuring of the Civil Service Commission is absolutely essential to assuring each President that he will be able to run the bureaucracy effectively and to assuring Federal employees that their job security will not be threatened by arbitrary actions based on political motivations.

II. PROTECTION FOR WHISTLEBLOWERS

I am pleased that this legislation addressed a long-standing deficiency in the civil service laws: that patriotic employees who bring examples of official wrongdoing to the public's attention have, in the past, enjoyed no meaningful protection against reprisals by their supervisors.

Mr. President, it should be public policy to encourage responsible whistleblowing rather than chill it. It is in the true

founded complaints from employees with less-exalted motives.

The committee bill gives the Special Counsel of the Merit Systems Protection Board the power to step in and request a stay of any personnel action if he determines that such action is a reprisal against an employee who disclosed illegal or improper Government action. This is an important new statutory provision that goes much farther than ever before to protect whistleblowers.

The committee felt, however, that this bill should address only the personnel aspect of a whistleblower complaint. The resolution of the substance of the revelation of Government wrongdoing should be handled by the agency involved and by the President—not by the Special Counsel or the Merit Systems Protection Board.

I agree with the committee's decision to limit the whistleblower language in this bill to personnel actions. The committee has also recommended to the Senate legislation to establish office of inspector general in each of the agencies. These offices are the appropriate mechanism for investigating and correcting instances of official wrongdoing.

The whistleblower protections offered in S. 2640, as reported, are strong and meaningful, and I urge their adoption by the Senate.

III. CREATION OF A SENIOR EXECUTIVE SERVICE

One of the bill's most innovative reforms is the proposed creation of a new senior executive service.

While many people have expressed legitimate concerns that the senior executive service could be politicized, I believe that the bill adequately protects

meet this responsibility requires an executive work force that is carefully chosen, well trained, well motivated, farsighted, able to respond to events, and able to achieve Presidential and congressional goals.

Nevertheless, no fully effective Government-wide system exists today for selecting, assigning, developing, advancing, rewarding, and managing the men and women who administer the hundreds of Federal programs that are vital to the Nation.

The Senior Executive Service is designed to provide such a system.

IV. STAFFING

One of the foremost problems identified in the Ink report of the Federal personnel management project was that there was insufficient flexibility in the staffing process. Since all staffing has been done through the Civil Service Commission, there too often are months of needless delay, mounds of redtape, and other administrative burdens associated simply with hiring one employee in one agency.

The reform proposal provides for delegation of selected personnel authority to departments and agencies. Any potential abuse stemming from increased agency personnel authority would be minimized by performance agreements between agencies and the Office of Personnel Management, reporting requirements, and followup evaluations. The OPM would have the authority to direct corrective action whenever the delegated agency authority is abused.

I am certain that millions of our citizens have encountered the months of unnecessary redtape and delay now as-

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14281

sociated with applying for a career position in the Federal Government. We doubtless lose thousands of highly qualified and competent individuals who forsake application for public service rather than undergo months of uncertainty and confusion. The reforms spelled out in S. 2640 should help to alleviate this problem.

V. MERIT PRINCIPLES AND PROHIBITED PERSONNEL PRACTICES

The civil service, thanks only to the honesty and patriotism of career Federal employees, has survived every attempt to undermine the merit system by those who have sought to use the civil service for partisan purposes.

This legislation, S. 2640, proposes to write into the statute the merit principles upon which our civil service is based. In addition, the bill would establish statutorily a set of prohibited personnel practices and would charge the Merit Systems Protection Board and the special counsel with enforcing the merit principles and the prohibited personnel practices. There would be a clear mandate from Congress that such violations are not to be tolerated in the future, and employees who are the victims of political manipulation will have statutory protection.

The codification of the merit principles is a long-needed step which I wholeheartedly endorse.

VI. PERFORMANCE APPRAISALS

Current law is inadequate to allow meaningful appraisals of the work of

VII. MERIT PAY

The Federal Government needs to move away from the concept that employees' pay should be raised each year simply because the employee is still on the payroll. Too often in the past, a large number of Federal employees have almost automatically received such "longevity" pay increases that were not tied to better performance or to an increase in responsibilities.

This legislation recognizes that Federal employees should be given pay increases on the basis of merit. Merit pay would be phased in an experiment with GS-13 to 15 and senior executive service employees. Limits would be placed on the number of employees each year who could be given merit increases, so that agency heads would be forced to make the tough decisions about which employees' performances should be rewarded and which should not be.

Under the bill, meaningful performance appraisals would be required, with an employee's pay tied to the result of the appraisal.

VIII. PROCEDURES FOR DISMISSALS AND APPEALS

One of the most widely-held impressions is that when a citizen enters the Civil Service, he receives, in effect, lifetime tenure and cannot be dismissed except under the most extraordinary circumstances. This impression feeds the public's perception of Federal employees as marginal workers who do enough each day to get by but who have no incentive to work hard.

There should not, however, be another 95-year period before the Government alters its civil service system again.

This legislation recognizes that the Office of Personnel Management should be encouraged to experiment, wherever feasible, with new and better ways of managing the Government's human resources. Improved administration benefits the public and improves employee morale.

Title VI of the bill embodies the intent of Congress that continuing review with proper safeguards, of personnel techniques and systems is a vital aspect of civil service reform.

X. LABOR-MANAGEMENT RELATIONS

Since Federal employees were not included in the coverage of the National Labor Relations Act, it has been the goal of many employees and some in Congress to recognize the positive results of collective bargaining and extend such benefits to the Federal sector. Although some employees in certain agencies have statutory collective bargaining rights, no such right exists for the vast majority of Federal employees.

Currently, Federal labor relations are governed by Executive Order 11491, as amended. The Executive order establishes the right of Federal employees to belong to unions and establishes procedures for the recognition of bargaining units. But the Federal labor relations program continues to differ in substantive ways from that of the private sector.

For one, Federal employees are not al-

each employee. Under the current "outstanding," "satisfactory," and "unsatisfactory" scale of performance ratings, the reality is that over 90 percent of the ratings are grouped into the "satisfactory" category.

The current system renders performance appraisals almost meaningless, and certainly useless, in determining who should be dismissed for poor performance and who should be given raises for excellent performance. When nearly everyone is grouped together, there is no way to distinguish the marginal performers from the competent and motivated workers.

Further, under the current system, managers have incentives to rate all of their employees "satisfactory," the employee may appeal the rating, oftentimes tying up the supervisor in months of paperwork and proceedings. It is, quite honestly, simply much easier to rate everybody the same and get on with your work.

The performance appraisal problem is even further complicated by the effect which the "satisfactory" ratings have on a manager who attempts to discipline or fire an employee for incompetence. Most employees need only to point to their years of "satisfactory" ratings to contend that it is the manager, not the employee, who is the incompetent.

The bill gives authority to the agencies to develop better performance appraisal systems, with ratings being tied directly to job performance. In addition, the bill requires that performance evaluation be used as a basis for all decisions about rewarding, promoting, and retaining Federal employees.

Anyone who has observed the Civil Service knows that the overwhelming majority of Federal employees are hard-working and dedicated and do not fit the popular stereotype. However, it is true that the lengthy process for dismissing a Federal employee has meant in the past that many marginal workers were simply kept on the public payroll because it was not worth the trouble to the supervisor to fire such employees.

In this legislation, the procedure for dismissing an employee, and for the employee's appeals, are streamlined; protection is afforded employees from being arbitrarily dismissed, but employees who are incompetent cannot tie up the Federal personnel system in months of delay, paperwork, and unfounded appeals.

S. 2640 eliminates unnecessary layers of appeal and for the first time specifies the standards to be used by the adjudicatory agency in determining whether an adverse action should be upheld. Employees in collective bargaining units are also given the opportunity to choose, as an alternative to the statutory appeals route, mandatory arbitration of adverse action appeals.

I strongly support the new procedures for dismissals and appeals and believe that they will be helpful in countering the public's misconception that lazy Federal employees can never be fired for incompetence.

IX. RESEARCH AND DEMONSTRATION PROJECTS

One of the main reasons we are dealing with comprehensive civil service reform legislation today is that the Federal Government has been too slow to recognize, test, and implement new techniques in public administration.

lowed to strike. Also, exclusive representatives of Federal employees may not bargain over pay or fringe benefits. Further, there is no agency shop in the Federal Government; no employee must join or pay dues to a union in order to be a member of a bargaining unit.

This legislation does not in any way alter the unique role of public employees as it is applied to labor-management relations. The legislation continues to recognize that there must be certain differences between unions in the private sector and unions in the Federal sector.

However, S. 2640 does take the important step of establishing congressional control over the Federal labor relations program by essentially codifying the current Executive Order 11491. The bill addresses the fundamental reality that today's Federal work force is a highly unionized work force, and that there should be adequate mechanisms in the law to allow the Government to work cooperatively with employee representatives toward better productivity and improved employee morale.

To that end, the legislation, combined with Reorganization Plan No. 2 of 1978, establishes an independent Federal Labor Relations Authority, in which are consolidated the functions of the current Federal Labor Relations Council and the Assistant Secretary of Labor for Labor-Management Relations.

The FLRA will administer the Federal labor relations program, make policy decisions, supervise elections for exclusive representatives, hear and decide complaints of unfair labor practices, and oversee the machinery for the resolution of adverse action appeals through the arbitration process. There will be a gen-

August 24, 1978

eral counsel in the FLRA to investigate and bring before the FLRA complaints of unfair labor practices.

The FLRA is far preferable to the current labor relations structure in the Government, which is comprised totally of management officials. The independent nature of the FLRA will promote effective labor-management relations in the Federal sector.

CONCLUSION

Mr. President, to conclude my opening remarks on this legislation, I wish to praise the distinguished chairman of the Committee on Governmental Affairs, Senator RIBICOFF, for his outstanding work in moving this bill through committee. This legislation is representative of his fair and judicious approach to legislation in general, and, specifically, to matters affecting Federal personnel policies and procedures.

I know that Senator RIBICOFF is troubled, as I am, by the fact that many outstanding civil servants are frustrated in their attempts to serve the public in a professional and responsive manner. Over the years, the accumulation of laws and regulations, coupled with added layers of controls and procedures that were designed to remedy problems as they developed within the civil service system, have unfortunately become major obstacles to Government productivity and a shield for nonperformance.

If Congress fails in its duty to reform these outdated laws and procedures, we

necessary reforms which we present to the Senate today in S. 2640, should in no way call into question the essential fact that the overwhelming majority of Federal civil servants are dedicated, competent and well-motivated men and women.

Mr. President, Chairman RIBICOFF and Senator PERCY have managed this bill through many months of controversy and hard work as the committee sought to develop and resolve so many important and complex issues. They were joined by the extraordinarily talented Chairman of the Civil Service Commission, Alan Campbell, a constituent of mine and a distinguished former dean of the Maxwell School of Public Affairs at Syracuse University. I wish to commend the fine efforts of them and others on the committee and in the executive branch who contributed significantly to S. 2640.

In my judgment, the bill presents a comprehensive approach to reform of the civil service system. There are several provisions which I believe are particularly important:

First, I support separating the Civil Service Commission into a Merit Systems Protection Board and an Office of Personnel Management. There is no question that a serious conflict has existed in the Civil Service Commission's responsibilities, that its personnel management and policing roles are fundamentally incompatible and should be performed by two different offices. The

is designed to create increased advancement opportunities to career executives. Career appointments will be made strictly on the basis of merit with most senior positions in grades GS16-Executive Level IV assigned to the SES. All too often I have seen talented people leave the Government when they have reached the top of the pay scale. I believe that the potential for bonuses and awards contained in the bill will not only help to keep civil servants but also to attract creative and experienced people from the private sector.

Third, I am pleased that the bill would create a new Federal Labor Relations Authority. Consolidating responsibility in FLRA should eliminate what is perceived by Federal employee unions and others as a conflict of interest in the existing Council. Its members consist of the Chairman of the Civil Service Commission, the Director of the Office of Management and Budget, and the Secretary of Labor—policymakers who are responsible primarily as top managers in the incumbent administration. S. 2640 will assure impartial adjudication of labor-management cases by providing for a new Board whose members are selected independently—nominated by the President and confirmed by the Senate—rather than by virtue of their service as Federal managers.

Establishment of the FLRA also will eliminate the existing fragmentation of authority between the Assistant Secre-

shall continue to see ineffective management, violations of merit principles and squandering of taxpayers' dollars.

This legislation is an historic step in returning merit to the merit system and restoring faith in the millions of men and women who serve the public at the Federal level.

Mr. JAVITS. Mr. President, last year when President Carter spoke with members of the Governmental Affairs Committee about his proposal to reform the Federal Civil Service, I was particularly impressed with the breadth and reach of his ideas. I was equally impressed with the serious substantive and political difficulties inherent in any such proposal precisely because they represented a fundamental reappraisal of a nearly 100-year old civil service system.

The bill before the Senate today is the product of a truly extraordinary effort to reach compromise and balance important interests. Those balances and compromises have been achieved, however, without detracting from the ambitious goals of the initial legislation. It is a strong bill which will strengthen and further promote a competent, nonpartisan civil service based upon the principle of merit.

S. 2640, in bringing about needed reforms, will improve the responsiveness and effectiveness of the Federal Government while assuring that public servants will be rewarded for merit and protected from bias, bureaucratic insensitivity, and political favoritism.

The bill will do that while giving greater authority to managers and supervisors and greater incentives to civil servants to achieve better performance. I wish to emphasize, however, that the

Independent Merit Systems Protection Board will be a strong merit "watchdog" and an employee protector, which is long overdue.

Second, the establishment of an Office of OPM should go a long way toward increasing flexibility in all levels of Government management. Currently, all personnel operations and actions are centralized in the CSC. This centralization is often the cause of delays in hiring, creates complex administrative procedures and excessive costs. The bill would authorize the President to delegate to the Director of OPM, who in turn would be permitted to delegate to agency heads, all personnel functions presently conducted solely within the CSC.

The bill also provides for new systems of appraising employee performance that will make it possible for agencies to do a better job of recognizing and rewarding good employees and of identifying and aiding those who are not performing at the level required. The bill further requires that these performance evaluations be used as a basis for all decisions about rewarding, promoting, and retaining Federal employees. At the same time, the bill improves employees rights in the area of adverse actions and appeals.

Most importantly, the bill provides a mechanism by which whistleblowers, those employees who disclose illegality in the Government, are fully protected from reprisals. The Special Counsel may petition the MSPB to suspend retaliatory actions against whistleblowers, and disciplinary action against violators of whistleblowers' rights also may be initiated by the Special Counsel.

I am particularly pleased that the bill creates a Senior Executive Service which

tary of Labor for Labor-Management Relations and the Federal Labor Relations Council. The FLRA will have comprehensive jurisdiction in Federal labor-management relations. Merging the responsibility into a single agency will eliminate the need for continuous coordination between two separate agencies with differing and at least potentially conflicting mandates. This change should result in more effective policy-making and administration in this area of vital importance to both Federal employees and Federal managers, as well as the public at large.

S. 2640 also provides explicit statutory responsibilities for FLRA. The part-time Federal Labor Relations Council was established by Executive order. With approval of S. 2640, the intent of Congress regarding the functions and operations of Federal labor-management relations will be clearly established.

Mr. President, S. 2640 is indeed designed to promote the restoration of public faith in the effectiveness and productivity of our Government. It is designed to enhance public service and to make it a more challenging and attractive career choice for those currently in Federal employment and the thousands of others who will follow in the years ahead.

It is designed to give to the President and the heads of departments an opportunity to exercise greater leadership in the carrying out of Executive policy without endangering or compromising the rights of employees.

This legislation will achieve these basic objectives. It is my deep conviction that these reforms will serve to reinvigorate Federal service and bring about significant improvements in the delivery of

August 24, 1978

CONGRESSIONAL RECORD—SENATE

S 14283

Federal services to the people of this country. I hope that the Senate will act expeditiously and favorably.

UP AMENDMENT NO. 1766

(Purpose: To strengthen procedural protections relating to preference eligibility for disabled veterans and for other purposes)

Mr. CRANSTON. Mr. President, I send an unprinted amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from California (Mr. CRANSTON) proposes an unprinted amendment numbered 1755.

Mr. CRANSTON. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 198, after line 25, insert the following new sections:

DEFINITIONS RELATING TO PREFERENCE ELIGIBLES

Sec. 305. (a) Section 2108 of title 5, United States Code, is amended by—

(1) amending paragraph (1) by—

(A) inserting "who is a veteran as defined in section 101(2) of title 38, United States Code, and" after "individual"; and

(B) striking out all below clause (B);

(2) amending paragraph (2) by—

(A) striking out all between "individual" and "and has" and inserting in lieu thereof "who is a veteran as defined in section 101(2) of title 38, United States Code, or who has performed active military, naval, or air serv-

"(5) 'retired member of the armed forces' means a member or former member of the armed forces who is entitled, under statute, to retired, retirement, or retainer pay on account of service as such a member."

(b) The amendments made to title 5, United States Code, by clauses (3)(A) and (4) of subsection (a) of this section shall take effect on October 1, 1980.

NONCOMPETITIVE APPOINTMENTS OF CERTAIN
DISABLED VETERANS

Sec. 306. (a)(1) Chapter 31 of title 5, United States Code, is amended by adding at the end thereof the following new section: "§ 3112. Disabled veterans; noncompetitive appointment

"Under such regulations as the Office of Personnel Management shall prescribe, an agency may make a noncompetitive appointment leading to conversion to career or career-conditional employment of a disabled veteran who has a service-connected disability rated at 30 percent or more on the basis of which such veteran is receiving compensation or disability retirement benefits because of a public statute administered by the Veterans' Administration or a military department."

(2) The Director of the Office of Personnel Management shall include in the reports required by section 2014(d) of title 88, United States Code, the same type of information regarding the use of the authority provided in section 3112 of title 5, United States Code (as added by paragraph (1) of this subsection), as is required by such section 2014 with respect to the use of the authority to make veterans readjustment appointments.

(b) The analysis of chapter 81 of title 5, United States Code, is amended by adding at the end thereof the following new item: "3112. Disabled veterans; noncompetitive appointment."

"(c) If other rating systems are used, preference eligibles are entitled to comparable preference."

(2) The item relating to section 3309 in the analysis of chapter 33 of title 5, United States Code, is amended to read as follows: "3309. Preference eligibles; examinations; additional credit for."

(c) Section 3312 of title 5, United States Code, is amended by—

(1) inserting "(a)" before "In", and striking out "Civil Service Commission" and inserting in lieu thereof "Office of Personnel Management";

(2) striking out "Commission" in clause (2) and inserting in lieu thereof "Office of Personnel Management"; and

(3) adding after subsection (a) (as designated by clause (1) of this subsection) the following new subsection:

"(b) If an examining agency determines that, on the basis of evidence before it, a preference eligible under section 2108(8)(C) is not able to fulfill the physical requirements of the position, the examining agency shall notify the Office of Personnel Management of such determination and, at the same time, such agency shall notify the preference eligible of the reasons for such determination and of the right to respond, within 15 days of the date of such notification, to the Office of Personnel Management. The Office of Personnel Management shall require a demonstration by the appointing authority that such notification was timely sent to the preference eligible's last known address and shall, prior to the selection of any other person for the position in question, make a final determination on the physical ability of the preference eligible to perform the duties of the position, taking into account any additional information provided in any such response. When the Office

ice as defined in section 101(24) of such title 38":

(B) striking out the comma and inserting in lieu thereof "or" after "compensation";

(C) striking out "benefits, or pension" and inserting in lieu thereof "benefits"; and

(D) striking out "and" at the end thereof;

(3) amending paragraph (8) by—

(A) inserting a comma and "except as provided in paragraph (4) of this section," after "means";

(B) striking out "(A)" the second place it appears in clause (A);

(C) amending clause (B) to read as follows:

"(B) the unmarried widow or widower of a veteran as defined by paragraph (1) of this section, other than a widow or widower described in paragraph (3)(D) of this section;"

(D) amending clause (3)(D) to read as follows:

"(D) the unmarried widow or widower of a veteran as defined by paragraph (1) of this section who lost his or her life under honorable conditions while serving in the armed forces or who died as the result of a service-connected disability or disabilities or who, at the time of his or her death, when such death was not as a result of the willful misconduct of such veteran or such veteran's spouse, had a service-connected disability or disabilities rated as total;"

(E) striking out "(A)" in clause (F); and

(F) striking out the period at the end thereof and inserting in lieu thereof a semicolon; and

(4) adding at the end thereof the following new paragraphs:

"(4) except for purposes of chapter 75 of this title, 'preference eligible' does not include a retired member of the armed forces unless—

"(A) the individual is a disabled veteran; or

"(B) the individual retired below the rank of major or its equivalent; and

EXAMINATION, CERTIFICATION, AND APPOINTMENT OF PREFERENCE ELIGIBLES

SEC. 307. (a) (1) Section 3305 of title 5, United States Code, is amended to read as follows:

"§ 3305. Competitive service; preference eligibles; applications

"On the application of a preference eligible, a competitive examination shall be held for any position for which there is an appropriate list of eligibles."

(2) The item relating to section 3305 in the analysis of chapter 33 of title 5, United States Code, is amended to read as follows:

"3305. Competitive service; preference eligibles; applications."

(b) (1) Section 3309 of title 5, United States Code, is amended to read as follows:

"§ 3309. Preference eligibles; examinations; additional credit for

"(a) A preference eligible who qualifies in an examination for entrance into the competitive service is entitled to additional points above the individual's earned rating, as follows:

"(1) a preference eligible under section 2108(3)(A) or (B) of this title—5 points; and

"(2) a preference eligible under section 2108(3)(C)—(O) of this title—10 points.

"(b) A preference eligible under section 2108(3)(C) of this title who has a service-connected disability rated at 10 percent or more and who has qualified in an examination for entrance into the competitive service shall be placed at the head of the list of eligibles, except that, in the case of scientific and professional positions in GS-9 or higher, such eligible shall be placed on the list of eligibles in the order of the eligible's rating, including points added under paragraph (2) of subsection (a) of this section. As to all competitive positions, the names of preference eligibles shall be entered ahead of the names of those who are not preference eligibles and who have the same rating.

of Personnel Management has completed its review of the proposed disqualification on the basis of physical disability, it shall send its findings to the appointing authority and the preference eligible in question. The appointing authority shall comply with the findings of the Office of Personnel Management. The functions of the Office of Personnel Management under this subsection shall not be delegated to any other department, agency, or instrumentality."

(d) Section 3314 of title 5, United States Code, is amended by striking out "Civil Service Commission" and inserting in lieu thereof "Office of Personnel Management", and by striking out "named by section 3813" and inserting in lieu thereof "established by section 3309".

(e) Section 3315 of title 5, United States Code, is amended by—

(1) striking out in the first sentence of subsection (a) "named by section 3313" and inserting in lieu thereof "established by section 3309";

(2) striking out in the second sentence of subsection (a) "Civil Service Commission" and inserting in lieu thereof "Office of Personnel Management"; and

(3) striking out in subsection (b) "Commission" and inserting in lieu thereof "Office of Personnel Management".

(f) Section 3318(b) of title 5, United States Code, is amended to read as follows:

"(b) If an appointing authority proposes to pass over a preference eligible on a certificate in order to select an individual who is not a preference eligible, such authority shall file written reasons with the Office of Personnel Management for passing over the preference eligible and, at the same time, such authority shall notify a preference eligible under section 2108(3)(C) (hereinafter in this section called "a disabled preference eligible") of the proposed passover and the reasons therefor and of the right to respond to such reasons, within 15 days of the date of such notification, to the Office of Personnel Management. The Office of Personnel

Management shall make the reasons presented by the appointing authority part of the record of the preference eligible and may require the submission of more detailed information from the appointing authority in support of the passover of the preference eligible. The Office of Personnel Management shall require a demonstration by the appointing authority that the passover notification was timely sent to the preference eligible's last known address and shall, prior to the selection of any other person for the position in question, determine the sufficiency or insufficiency of the reasons submitted by the appointing authority, taking into account any response received from the preference eligible. When the Office of Personnel Management has completed its review of the proposed passover, it shall send its findings to the appointing authority and the disabled preference eligible in question, if any. The appointing authority shall comply with the findings of the Office of Personnel Management. A preference eligible under section 2108(3)(A), (B), or (D)-(G), or such preference eligible's representative, shall be entitled, on request, to a copy of (1) the reasons submitted by the appointing authority in support of the proposed passover, and (2) the findings of the Office of Personnel Management. The functions of the Office of Personnel Management under this subsection shall not be delegated to any other department, agency, or instrumentality."

(g) Chapter 33 of title 5, United States Code, is amended by—

- (1) repealing section 3313; and
- (2) amending the analysis therefor by striking out the item relating to such section 3313.

RETENTION PREFERENCE

Sec. 308. (a) Section 3502 of title 5, United States Code, is amended by striking out sub-

demonstration by the appointing authority that such notification was timely sent to the preference eligible's last known address and shall, prior to the selection of any other person for the position in question, make a final determination on the physical ability of the preference eligible to perform the duties of the position, taking into account any additional information provided in any such response. When the Office of Personnel Management has completed its review of the proposed disqualification on the basis of physical disability, it shall send its findings to the appointing authority and the preference eligible in question. The appointing authority shall comply with the findings of the Office of Personnel Management. The functions of the Office of Personnel Management under this subsection shall not be delegated to any other department, agency, or instrumentality."

On page 281, line 4, strike out "or (B)" and insert in lieu thereof "(C)", and insert "(B) diminish in any way rights, procedures, and remedies available to preference eligibles under chapters 13, 21, 31, 33, 35, and 75 of this title, or" after "title."

Mr. CRANSTON. Mr. President, the basic purpose of these amendments before us is to strengthen certain provisions in title 5, United States Code, relating to disabled preference eligibles.

As chairman of the Committee on Veterans' Affairs, I am very pleased that the Committee on Governmental Affairs, in connection with its consideration of the "Civil Service Reform Act," took action to maintain existing law with respect to veterans' preference. However, Mr. President, I have found certain aspects of the present law to be inadequate in protect-

during active duty for training would also be entitled to 10-point preference.

Other changes made in current law by my amendments, Mr. President, would provide—as proposed by the administration—for the elimination of veterans' preference for military personnel who retire after 20 years or more of service at field grade rank or above. Also, under the amendments, regardless of whether or not a competitive exam is closed, all preference eligibles would be entitled to take such an exam as long as a list of eligibles exists. Moreover, Mr. President, all preference rights, procedures, and remedies would be made applicable in demonstration projects conducted by the Office of Personnel Management as authorized by the amendments made in title VI of the reported bill.

Mr. President, these are the primary issues addressed in my amendments. I ask unanimous consent that a full explanation of the amendments and an analysis of changes that would be made in existing law be printed in the Record at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.
(See exhibit 1.)

Mr. RIBICOFF. Mr. President, the amendment being offered by the distinguished Senator from California is a constructive one. It addresses a number of concerns raised by veterans organizations.

The amendment is acceptable to the manager of the bill.

section (b) and inserting in lieu thereof the following new subsections:

"(b) A preference eligible under section 2108(3)(C) of this title who has a service-connected disability rated at 10 percent or more and whose performance meets a standard of adequacy under a performance appraisal system implemented under chapter 43 of this title is entitled to be retained in preference to other preference eligibles.

"(c) An employee who is entitled to retention preference and whose performance meets a standard of adequacy under a performance appraisal system implemented under chapter 43 of this title is entitled to be retained in preference to other competing employees."

(b) Section 3503 of title 5, United States Code, is amended by striking out in subsections (a) and (b) "each preference eligible employed" and inserting in lieu thereof "each competing employee" both places it appears.

(c) Section 3504 of title 5, United States Code, is amended by—

(1) inserting "(a)" before "In" and striking out "Civil Service Commission" and inserting in lieu thereof "Office of Personnel Management";

(2) striking out "Commission" in clause (2) and inserting in lieu thereof "Office of Personnel Management"; and

(3) adding after subsection (a) (as designated by clause (1) of this subsection) the following new subsection:

"(b) If an examining agency determines that, on the basis of evidence before it, a preference eligible under section 2108(3)(C) is not able to fulfill the physical requirements of the position, the examining agency shall notify the Office of Personnel Management of such determination and, at the same time, such agency shall notify the preference eligible of the reasons for such determination and of the right to respond, within 15 days of the date of such notification, to the Office of Personnel Management. The Office of Personnel Management shall require a

ing the rights of disabled preference eligibles—generally, veterans with service-connected disabilities. The main purpose of my amendments is to remedy that inadequacy.

The two areas of primary concern for disabled veterans which are addressed in these amendments are the waivers of physical requirements for both initial hiring and for reduction in force—RIF—procedures, and the passing over of a preference eligible to appoint a non-preference eligible. In each of these instances, the amendment would require the appointing authority to notify the disabled preference eligible of the reasons why such preference eligible was found unqualified for the position for which he or she applied. The disabled preference eligible would then have 15 days to respond to these findings. The Office of Personnel Management would make a decision on the appointing authority's findings, taking into account the response made by the disabled preference eligible, if any. Until a final decision is reached by OPM, the position in question would have to be held open. These authorities could not be delegated by OPM to any appointing authority.

Mr. President, the amendments would also give the Office of Personnel Management the authority to make noncompetitive appointments within the Federal civil service for any veteran who has a service-connected disability rated at 30 percent or more. This provision is derived from an administration proposal.

Further, the amendments provide that 10-point preference eligibles would have retention rights over 5-point preference eligibles. Veterans who were disabled

Mr. PERCY. As far as the Senator from Illinois knows, there is no objection to the amendment on this side. Certainly, on behalf of the minority, we accept the amendment.

Mr. STEVENS. Mr. President, I hope my colleague will not do that too quickly.

Mr. PERCY. Mr. President, I am not aware of any objection, but we would certainly be happy to hear from the Senator from Alaska.

Mr. STEVENS. I do have a couple of questions of the Senator from California.

Does this mean that if a person was a pilot in World War II, a major, entered civil service, has never used civil service in any way so far, and faces a reduction in force, after passage of this bill he, for the first time, cannot call on his veteran's preference rights? It seems to me to be very sweeping, I will say to my friend from California.

Mr. CRANSTON. If a person such as you described was retired regularly after 20 years or more of service he would have until October 1, 1980, to take advantage of the present opportunities he has under the preference provisions of existing law.

Mr. STEVENS. That does not answer my question about those who were in service and who had 20 years. If a person entered the service in 1950, put in 20 years of service by 1970, went into the civil service in 1971 by competitive examination, and became a career civil servant, he has a preference now in terms of a RIF. He has never yet exercised any of the preference that was given to him from his service in World War II. Is this going to eliminate this?

Mr. CRANSTON. If the Senator will

August 24, 1978

CONGRESSIONAL RECORD—SENATE

S 14285

yield, there is no RIF protection for those people under present law. The person such as you describe would be able to use the entry preference opportunities he now has—as many times as he is able—until October 1, 1980. But he presently has no RIF protection at all under title 5.

Mr. STEVENS. Then this is not taking away any of the existing or contractual rights of those veterans who entered in the past? All are prospective considerations as far as veterans preference is concerned? That is my understanding. Maybe the Senator from Maryland can correct me, but I understood our understanding was that the application would be prospective and not retroactive. If the Senator is saying that anyone who enters the service—

Mr. CRANSTON. That is not exactly the effect of this amendment. He would have the preference entry opportunities until October 1, 1980.

Mr. STEVENS. What about his other veterans preference rights? Does this deal only with entrance preference?

Mr. CRANSTON. This deals only with entry. It does not affect any other rights he may have now.

Mr. STEVENS. And it is only those who enter after 20 years of service?

Mr. CRANSTON. That is correct, those who then retire and are at the field grade or above.

Mr. STEVENS. But you obtain field grade rather rapidly in wartime. Those people who had field grade during the Korean war or the Vietnam conflict and

understand the unique nature of the special title 38 Department of Medicine and Surgery pay and personnel system and that, in view of this, if the Administrator of Veterans' Affairs were to request the President to grant a waiver—as permitted by the provision in the bill—of the inclusion of such D.M. & S. physicians in the Executive Service Corps, that request will be given sympathetic consideration by the Civil Service Commission or its successor—the Office of Personnel Management—in making its recommendation to the President.

Mr. President, I ask unanimous consent that these amendments be considered en bloc and urge the Senate to adopt them.

The PRESIDING OFFICER (Mr. MOYNIHAN). The question is on agreeing to the amendments.

The amendments were agreed to.

EXHIBIT 1

EXPLANATION OF CRANSTON VETERANS AMENDMENT No. 1786 to S. 2640

The proposed amendment No. 1786 (actually two amendments) would add four additional sections to title III of the Civil Service reform bill, S. 2640, as reported by the Senate Governmental Affairs Committee, and amend new section 4703 of title VI of the bill.

New section 305 would amend current section 2108 of title 5, the definitional section dealing with veterans and eligibility for veterans preference. The clauses of this new section provide as follows:

Clause (1) would amend the definition of "veteran" in current section 2108(1) to incorporate the basic definition used in title 38 for purposes of eligibility to all VA bene-

Clause (8) would amend the definition of "preference eligible" in current section 2108 (3) (D) to subdivide the class in current law of "unmarried widow or widower of a veteran" so as to create a five-point preference group of such unmarried surviving spouses of veterans who died of non-service-connected causes and a second ten-point preference group that includes unmarried surviving spouses of those veterans who died either on active duty or of service-connected causes, or who were rated as 100-percent service-connected disabled at the time of their death.

Clause (4) would amend the definition of "preference eligible" in current section 2108 (3) by adding two new paragraphs designed to remove, as proposed by the Administration, individuals who retired from military service at the rank of major (or its equivalent) or above from eligibility for veterans preference unless such a person is a disabled veteran.

New section 306 would amend chapter 31 of title 5, to add a new section 3112 which authorizes noncompetitive appointments of disabled veterans with a service-connected disability rated by the VA or a military department at 30 percent or greater and for which the veteran is receiving compensation or disability retirement benefits from the VA or a military department. This provision is modeled on the Administration's initial proposal, but it is different in the degree of the service-connected disability required (30 percent versus 50 percent) and in its not including as eligible those who are enrolled in or who have successfully completed a job-related training program under chapter 31 of title 38. The Administration supports this modification.

New section 307 would amend various sections of chapter 33 of title 5, Examination, Selection and Appointment, relating to veterans preference.

Subsection (a) would amend current sec-

did not serve 20 years have the same rights as anyone else; is that correct?

Mr. CRANSTON. That is correct.

Mr. STEVENS. This means those who stayed in and made a career out of the military—

Mr. CRANSTON. Only those who retired would be affected.

Mr. STEVENS. Only those retired after 20 years?

Mr. CRANSTON. Right. Or more.

Mr. STEVENS. I thank the Senator.

I do not object.

Mr. CRANSTON. Mr. President, I have worked very closely with the distinguished chairman of the Committee on Governmental Affairs (Mr. RIBICOFF) and its able ranking minority member (Mr. PERCY), as well as the Civil Service Commission, on these amendments. The administration has indicated that it supports all of the changes made in existing law by these amendments will support them through conference and does not oppose any of the other provisions in the amendment.

Mr. President, there is one other veterans item I would like to comment on. I note that the Senior Executive Service, to be established under title IV of the reported bill, would include certain top-level physicians in the VA's Department of Medicine and Surgery. This could result in a substantial threat to the quality of health care service to the Nation's veterans by impairing the attractiveness of VA service to such physicians and the effective management of such physicians by the VA. In light of these considerations, I have been assured by the Civil Service Commission both that they fully

fits. The effect of the change would be to provide veterans preference to any veteran who received a discharge under other than honorable conditions but who subsequently received a favorable "character of discharge" determination from the VA holding that such discharge was under "conditions other than dishonorable." In this regard, it should be noted that all veterans who received upgraded discharges under the Carter or Ford special discharge review programs but the circumstances of whose discharges were, pursuant to P.L. 95-128, later determined by a naval or military discharge review board not to merit VA benefits, are entitled to preference under title 5. The incorporation of the title 38 definition would, with respect to all future preference eligibility determinations, render the VA the definitive interpreter of the meaning of "veteran" for this title 5 purpose and arbiter of whether any individual with a discharge under other than honorable conditions was discharged under "conditions other than dishonorable."

Clause (2) would amend the definition of "disabled veteran" in current section 2108(2) to (a) incorporate, as would clause (1) of this section, the basic definition of "veteran" used in title 38 for purposes of eligibility to all VA benefits, so as to provide veterans preference to any disabled veteran who received a discharge under other than honorable conditions, but who subsequently received a favorable "character of discharge" determination from the VA holding that such discharge was under "conditions other than dishonorable"; (b) include in that definition those individuals who suffered a service-connected disability while serving on active duty for training (such individuals are eligible for VA benefits); and (c) remove those who merely receive a non-service-connected VA pension from the category of "disabled veteran." The definitions in clauses (22) and (23) of section 101 of title 38 are incorporated by reference to clause (24).

tion 3305 to require that a competitive examination be given to a preference eligible, upon application by such eligible, for any position for which there is a list of eligibles. Current law provides this right only to 10-point preference eligibles and permits the reopening of an examination for any position to which an appointment has been made in the previous three years—a benefit of questionable value since, in most cases, the job would already be filled.

Subsection (b) would amend current section 3309 to bring together in one section provisions relating to the awarding of preference points and to the treatment of preference eligibles, including the placement of service-connected disabled veterans with a 10-percent or greater rating at the head of a list of eligibles. The new section 3309 would also include in subsection (b) a requirement that a comparable preference system be applied for preference eligibles if other rating systems are used.

Subsection (c) would amend current section 3312 to provide new protections for disabled veterans when they are denied a job on the basis of inability to fulfill the physical requirements of the position. These protections include a notice requirement, a requirement that the position not be filled until the disabled veteran has had the opportunity, within 15 days, to appeal the denial and have the appeal decided by the Office of Personnel Management, and a prohibition on the delegation of this responsibility by the Office of Personnel Management.

Subsection (d) would amend current section 3314 to make conforming changes to reflect the amendments which would be made to current section 3309 by subsections (b) and (c) of the new bill section.

Subsection (e) would make conforming amendments to current section 3315 which would be necessitated by the amendments which would be made by subsections (b) and (c) of the new bill section.

Subsection (f) would amend current section 3318 to provide new protections for disabled veterans (as redefined by new section 305(2) of the bill) when an agency proposes passovers of such veterans. The protections include a notice requirement, a requirement that the job not be filled until the disabled veteran has had the opportunity, within 18 days, to appeal the proposed passover and have the appeal decided by the Office of Personnel Management, and a prohibition on the delegation of this responsibility by the Office of Personnel Management.

Subsection (g) would repeal current section 3313, the content of which was placed in the new section 3309 by subsection (b) of the new bill section.

Subsection (h) would make conforming changes to the analysis for chapter 33 necessitated by the amendments which would be made by subsections (a) and (b) of the new bill section.

New section 308 would make amendments to chapter 35, Retention Preference, Restoration and Reemployment, to strengthen retention rights, especially for disabled veterans.

Subsection (a) would amend current section 3502 by adding two new subsections as follows:

New subsection (b) would provide that a service-connected disabled veteran whose performance meets a standard of adequacy under an appraisal system under chapter 43 shall be retained in preference to other preference eligibles. This is an entirely new protection.

New subsection (c) would generally codify existing practice under current subsection (b) by providing that a preference eligible whose performance meets a standard of adequacy under an appraisal system under chapter 43 shall be retained in preference to other competing employees.

existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE—GOVERNMENT ORGANIZATION AND EMPLOYEES

PART III—EMPLOYEES

Subpart A—General Provisions

Chapter 21—DEFINITIONS

§ 2108. Veteran; disabled veteran; preference eligible

For the purpose of this title—

(1) "veteran" means an individual who is a veteran as defined in section 101(2) of title 38, United States Code, and who—

(A) served on active duty in the armed forces during a war, in a campaign or expedition for which a campaign badge has been authorized, or during the period beginning April 28, 1952, and ending July 1, 1955; or

(B) served on active duty as defined by section 101(21) of title 38 at any time in the armed forces for a period of more than 180 consecutive days any part of which occurred after January 31, 1955, and before the date of the enactment of the Veterans' Education and Employment Assistance Act of 1978, not including service under section 511(d) of title 10 pursuant to an enlistment in the Army National Guard or the Air National Guard or as a Reserve for service in the Army Reserve, Naval Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve;

[and who has been separated from the armed forces under honorable conditions;]

(2) "disabled veteran" means an individual [who has served on active duty in the armed forces, has been separated therefrom under honorable conditions,] who is a vet-

(III) she has remarried but is widowed, divorced, or legally separated from her husband when preference is claimed; and

(G) the mother of a service-connected permanently and totally disabled veteran, if—

(i) her husband is totally and permanently disabled;

(ii) she is widowed, divorced, or separated from the father and has not remarried; or

(iii) she has remarried but is widowed, divorced, or legally separated from her husband when preference is claimed[.];

(4) except for purposes of chapter 75 of this title, "preference eligible" does not include a retired member of the armed forces unless—

(A) the individual is a disabled veteran; or

(B) the individual retired below the rank of major or its equivalent; and

(5) "retired member of the armed forces" means a member or former member of the armed forces who is entitled, under statute, to retired, retirement, or retainer pay on account of service as such a member.

Subpart B—Employment and Retention

Chapter 31—AUTHORITY FOR EMPLOYMENT

Sec.

3101. General authority to employ.

3102. Employment of readers for blind employees.

3103. Employment at seat of Government only for services rendered.

3104. Employment of specially qualified scientific and professional personnel.

3105. Appointment of hearing examiners.

3106. Employment of attorneys; restrictions.

3107. Employment of publicity experts; restrictions.

3108. Employment of detective agencies; restrictions.

Subsection (b) would substitute the phrase "each competing employee" for "each preference eligible employed" in each of the two subsections of current section 3603, "Transfer of functions". This is an Administration requested change designed to reflect actual practice when a function is transferred from one agency to another or one agency replaces another.

Subsection (c) would amend current section 3504 to provide other new protections for disabled veterans during reduction-in-force situations. The new protections—identical to those that would obtain under new section 3312 (as it would be added by subsection (c) of new bill section 307) with respect to appointments would apply if an agency determines that a disabled veteran is unsuitable for retention on the basis of his or her ability to fulfill the physical requirements of a position. The protections include a notice requirement, a requirement that the position in question not be filled until the disabled veteran has had the opportunity, within 15 days, to appeal the decision and have the appeal decided by the Office of Personnel Management, and a prohibition on the delegation of this responsibility by the Office of Personnel Management.

The amendment to title VI of the bill would amend the proposed new section 4703 of title 5.

New section 4703 would provide that no demonstration project conducted by the Office of Personnel Management could diminish the rights, procedures or remedies available to preference eligibles under other specified chapters in title 5.

CHANGES IN EXISTING LAW MADE BY AMENDMENT No. 1766 to S. 2640 AS REPORTED

Changes in existing law made by the amendment are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic,

eran as defined in section 101(2) of title 38, United States Code, or who has performed active military, naval, or air service as defined in section 101(24) of such title 38 and has established the present existence of a service-connected disability or is receiving compensation[,] or disability retirement benefits[, or pension] because of a public statute administered by the Veterans' Administration or a military department; (and)

(3) "preference eligible" means, except as provided in paragraph (4) of this section, —

(A) a veteran as defined by paragraph (1) [(A)] of this section;

[(B) a veteran as defined by paragraph (1) (B) of this section;]

(B) the unmarried widow or widower of a veteran as defined by paragraph (1) of this section, other than a widow or widower described in paragraph (3) (D) of this section;

(C) a disabled veteran;

(D) the unmarried widow or widower of a veteran as defined by paragraph (1) [(A)] of this [section;] section who lost his or her life under honorable conditions while serving in the armed forces or who died as the result of a service-connected disability or disabilities or who, at the time of his or her death, when such death was not as a result of the wilful misconduct of such veteran or such veteran's spouse, had a service-connected disability or disabilities rated as total;

(E) the wife or husband of a service-connected disabled veteran if the veteran has been unable to qualify for any appointment in the civil service or in the government of the District of Columbia;

(F) the mother of an individual who lost his life under honorable conditions while serving in the armed forces during a period named by paragraph (1) [(A)] of this section, if—

(1) her husband is totally and permanently disabled;

(11) she is widowed, divorced, or separated from the father and has not remarried; or

3109. Employment of experts and consultants; temporary or intermittent.

3110. Employment of relatives; restrictions.

3112. Disabled veterans; noncompetitive appointment.

§ 3112. Disabled veterans; noncompetitive appointment

Under such regulations as the Office of Personnel Management shall prescribe, an agency may make a noncompetitive appointment leading to conversion to career or career-conditional employment of a disabled veteran who has a service-connected disability rated at 30 percent or more on the basis of which such veteran is receiving compensation or disability retirement benefits because of a public statute administered by the Veterans' Administration or a military department.

Chapter 33—EXAMINATION, SELECTION, AND PLACEMENT

Subchapter I—Examination, Certification, and Appointment

Sec.

- 3301 Civil service; generally.
- 3302. Competitive service; rules.
- 3303. Competitive service; recommendations of Senators or Representatives.
- 3304. Competitive service; examinations.
- 3304a. Competitive service; career appointment after 3 years' temporary service.
- 3305. Competitive service; [examinations; when held.] preference eligibles; applications.
- 3306. Competitive service; departmental service; apportionment.
- 3307. Competitive service; maximum-age entrance requirements; exceptions.
- 3308. Competitive service; examinations; educational requirements prohibited; exceptions.
- 3309. Preference eligibles; examinations; additional [points] credit for.

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14287

3310. Preference eligibles; examinations; guards, elevator operators, messengers, and custodians.
3311. Preference eligibles; examinations; crediting experience.
3312. Preference eligibles; physical qualifications; waiver.
- [3313. Competitive service; registers of eligibles.]
3314. Registers; preference eligibles who resigned.
3315. Registers; preference eligibles furloughed or separated.
- 3315a. Registers; individuals receiving compensation for work injuries.
3316. Preference eligibles; reinstatement.
3317. Competitive service; certification from registers.
3318. Competitive service; selection from certificates.
3319. Competitive service; selection; members of family restriction.
3320. Excepted service; government of the District of Columbia; selection.
3321. Competitive service; probation; period of.
3322. Competitive service; temporary appointments after age 70.
3323. Automatic separations; reappointment; reemployment of annuitants.
3324. Appointments at GS-16, 17, and 18.
3325. Appointments to scientific and professional positions.
3326. Appointments of retired members of the armed forces to positions in the Department of Defense.
3327. [Repealed.]
- • • • •
- § 3305. Competitive service; [examinations; when held] preference eligibles; applications
- {(a) The Civil Service Commission shall

of subsection (a) of this section. As to all competitive positions, the names of preference eligibles shall be entered ahead of the names of those who are not preference eligibles and who have the same rating.

(c) If other rating systems are used, preference eligibles are entitled to comparable preference.

• • • • •

§ 3312. Preference eligibles; physical qualifications; waiver

(a) In determining qualifications of a preference eligible for examination for, appointment in, or reinstatement in the competitive service, the [Civil Service Commission] Office of Personnel Management or other examining agency shall waive—

(1) requirements as to age, height, and weight, unless the requirement is essential to the performance of the duties of the position; and

(2) physical requirements if, in the opinion of the [Commission] Office of Personnel Management or other examining agency after considering the recommendation of an accredited physician, the preference eligible is physically able to perform efficiently the duties of the position.

(b) If an examining agency determines that, on the basis of evidence before it, a preference eligible under section 2108(3)(C) is not able to fulfill the physical requirements of the position, the examining agency shall notify the Office of Personnel Management of such determination and, at the same time, such agency shall notify the preference eligible of the reasons for such determination and of the right to respond, within 15 days of the date of such notification, to the Office of Personnel Management. The Office of Personnel Management shall require a demonstration by the appointing authority

to have his name placed again on all registers for which he may have been qualified, in the order [named by section 8313] established by section 3309 of this title.

§ 3315. Registers; preference eligibles furloughed or separated

(a) A preference eligible who has been separated or furloughed without delinquency or misconduct, on request, is entitled to have his name placed on appropriate registers and employment lists for every position for which his qualifications have been established, in the order [named by section 8313] established by section 3309 of this title. This subsection applies to registers and employment lists maintained by the [Civil Service Commission,] Office of Personnel Management, an Executive agency, or the government of the District of Columbia.

(b) The [Commission] Office of Personnel Management may declare a preference eligible who has been separated or furloughed without pay under section 7512 of this title to be entitled to the benefits of subsection (a) of this section.

• • • • •

§ 3318. Competitive service; selection from certificates

(a) The nominating or appointing authority shall select for appointment to each vacancy from the highest three eligibles available for appointment on the certificate furnished under section 8317(a) of this title, unless objection to one or more of the individuals certified is made to, and sustained by, the Civil Service Commission for proper and adequate reason under regulations prescribed by the Commission.

{(b) An appointing authority who passes over a preference eligible on a certificate and selects an individual who is not a pref-

1646

hold examinations for the competitive service at least twice a year in each State and territory or possession of the United States where there are individuals to be examined.

[(b) The Commission shall hold an examination for a position to which an appointment has been made within the preceding 3 years, on the application of an individual who qualifies as a preference eligible under section 2108(3)(C)-(G) of this title. The examination shall be held during the quarter following the application.

On the application of a preference eligible, a competitive examination shall be held for any position for which there is an appropriate list of eligibles.

§ 3309. Preference eligibles; examinations; additional [points] credit for

[A preference eligible who receives a passing grade in an examination for entrance into the competitive service is entitled to additional points above his earned rating, as follows—

[(1) a preference eligible under section 2108(3)(C)-(G) of this title—10 points; and

[(2) a preference eligible under section 2108(3)(A) of this title—5 points.]

(a) *A preference eligible who qualifies in an examination for entrance into the competitive service is entitled to additional points above the individual's earned rating, as follows:*

(1) *a preference eligible under section 2108(3)(A) or (B) of this title—5 points; and*

(2) *a preference eligible under section 2108(3)(C)-(G) of this title—10 points.*

(b) *A preference eligible under section 2108(3)(C) of this title who has a service-connected disability rated at 10 percent or more and who has qualified in an examination for entrance into the competitive service shall be placed at the head of the list of eligibles, except that, in the case of scientific and professional positions in GS-9 or higher, such eligible shall be placed on the list of eligibles in the order of the eligible's rating, including points added under paragraph (2)*

that such notification was timely sent to the preference eligible's last known address and shall, prior to the selection of any other person for the position in question, make a final determination on the physical ability of the preference eligible to perform the duties of the position, taking into account any additional information provided in any such response. When the Office of Personnel Management has completed its review of the proposed disqualification on the basis of physical disability, it shall send its findings to the appointing authority and the preference eligible in question. The appointing authority shall comply with the findings of the Office of Personnel Management. The functions of the Office of Personnel Management under this subsection shall not be delegated to any other department, agency, or instrumentality.

§ 3313. Competitive service; registers of eligibles

[The names of applicants who have qualified in examinations for the competitive service shall be entered on appropriate registers or lists of eligibles in the following order—

[(1) for scientific and professional positions in GS-9 or higher, in the order of their ratings, including points added under section 3309 of this title; and

[(2) for all other positions—

[(A) disabled veterans who have a compensable service-connected disability of 10 percent or more, in order of their ratings, including points added under section 3309 of this title; and

[(B) remaining applicants, in the order of their ratings, including points added under section 3309 of this title.

[The names of preference eligibles shall be entered ahead of others having the same rating.]

§ 3314. Registers; preference eligibles who resigned

A preference eligible who resigns, on request to the [Civil Service Commission,] Office of Personnel Management, is entitled

to preference eligible shall file written reasons with the Commission for passing over the preference eligible. The Commission shall make these reasons a part of the record of the preference eligible. The Commission may require the submission of more detailed information in support of the passing over of the preference eligible. The Commission shall determine the sufficiency or insufficiency of the reasons submitted and shall send its findings to the appointing authority. The appointing authority shall comply with the findings of the Commission. The preference eligible or his representative, on request, is entitled to a copy of—

[(1) the reasons submitted by the appointing authority; and

[(2) the findings of the Commission.]

(b) *If an appointing authority proposes to pass over a preference eligible on a certificate in order to select an individual who is not a preference eligible, such authority shall file written reasons with the Office of Personnel Management for passing over the preference eligible and, at the same time, such authority shall notify a preference eligible under section 2108(3)(C) (hereinafter in this section called "a disabled preference eligible") of the proposed passover and the reasons therefor and of the right to respond to such reasons, within 15 days of the date of such notification, to the Office of Personnel Management. The Office of Personnel Management shall make the reasons presented by the appointing authority part of the record of the preference eligible and may require the submission of more detailed information from the appointing authority in support of the passover of the preference eligible. The Office of Personnel Management shall require a demonstration by the appointing authority that the passover notification was timely sent to the preference eligible's last known address and shall, prior to the selection of any other person for the position in question, determine the sufficiency or insufficiency of the reasons submitted by the appointing authority, taking into account any response*

received from the preference eligible. When the Office of Personnel Management has completed its review of the proposed pass-over, it shall send its findings to the appointing authority and the disabled preference eligible in question, if any. The appointing authority shall comply with the findings of the Office of Personnel Management. A preference eligible under section 2108(3) (A), (B), or (D)-(G), or such preference eligible's representative, shall be entitled, on request, to a copy of (1) the reasons submitted by the appointing authority in support of the proposed passover, and (2) the findings of the Office of Personnel Management. The functions of the Office of Personnel Management under this subsection shall not be delegated to any other department, agency, or instrumentality.

(c) When three or more names of preference eligibles are on a reemployment list appropriate for the position to be filled, a nominating or appointing authority may appoint from a register of eligibles established after examination only an individual who qualifies as a preference eligible under section 2108(3) (C)-(G) of this title.

Chapter 35—RETENTION PREFERENCE,
RESTORATION, AND REEMPLOMENT

Subchapter I—Retention Preference

§ 3502. Order of retention

(a) The Civil Service Commission shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to—

- (1) tenure of employment;
- (2) military preference, subject to section 3501(a) (3) of this title;
- (3) length of service; and
- (4) efficiency or performance ratings.

§ 3503. Transfer of functions

(a) When a function is transferred from one agency to another, each [preference eligible employed] *competing employee* in the function shall be transferred to the receiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position.

(b) When one agency is replaced by another, each [preference eligible employed] *competing employee* in the agency to be replaced shall be transferred to the replacing agency for employment in a position for which he is qualified before the replacing agency may make an appointment from another source to that position.

§ 3504. Preference eligibles; retention; physical qualifications; waiver

(a) In determining qualifications of a preference eligible for retention in a position in the competitive service, an Executive agency, or the government of the District of Columbia, the [Civil Service Commission] *Office of Personnel Management* or other examining agency shall waive—

(1) requirements as to age, height, and weight, unless the requirement is essential to the performance of the duties of the position; and

(2) physical requirements if, in the opinion of the [Commission] *Office of Personnel Management* or other examining agency, after considering the recommendation of an accredited physician, the preference eligible is physically able to perform efficiently the duties of the position.

(b) *If an examining agency determines that, on the basis of evidence before it, a preference eligible under section 2108(3) (C) is not able to fulfill the physical requirements of the position, the examining agency*

Mr. RANDOLPH, and Mr. STAFFORD, proposes an unprinted amendment numbered 1767.

On page 196, between lines 7 and 8, insert the following new subsections:

(c) Chapter 31 of title 5, United States Code, is further amended by—

(1) amending section 3102 by—

(A) redesignating clause (4) of subsection (a) as clause (5) and striking out "and" at the end of clause (3) and inserting below such clause the following new clause (4):

"(4) 'deaf employee' means an individual employed by an agency who establishes, to the satisfaction of the appropriate authority of the agency concerned under regulations of the head of that agency, that he or she has a hearing impairment, either permanent or temporary, so severe or disabling that the employment of an interpreting assistant or assistants for the employee is necessary or desirable to enable such employee to perform their work."

(B) amending subsection (b) by (1) inserting "and interpreting assistant or assistants for a deaf employee" after "or assistants for a blind employee", and (11) amending the last sentence to read as follows:

"A reading assistant or an interpreting assistant, other than the one employed or assigned under subsection (d) of this section, may receive pay for their services by and from the blind or deaf employee or a nonprofit organization, without regard to section 209 of title 18."

(C) amending subsection (c) by inserting "or deaf" after "blind"; and

(D) inserting at the end thereof the following new subsection:

"(d) The head of each agency may also employ or assign, subject to section 209 of title 18 and to the provisions of this title governing appointment and chapter 61 and

In computing length of service, a competing employee—

(A) who is not a retired member of a uniformed service is entitled to credit for the total length of time in service in the armed forces;

(B) who is a retired member of a uniformed service is entitled to credit for—

(1) the length of time in active service in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized; or

(1) the total length of time in the active service in the armed forces if he is included under section 3501(a) (3) (A), (B), or (C) of this title; and

(C) who is an employee in or under the Department of Agriculture is entitled to credit for service rendered as an employee of a county committee established pursuant to section 690h(b) of title 16, or of a committee or an association of producers described in section 610(b) of title 7.

[(b) A preference eligible employee whose efficiency or performance rating is "good" or "satisfactory" or better than "good" or "satisfactory" is entitled to be retained in preference to other competing employees. A preference eligible employee whose efficiency or performance rating is below "good" or "satisfactory" is entitled to be retained in preference to competing nonpreference employees who have equal or lower efficiency or performance ratings.]

(b) A preference eligible under section 2108(3)(C) of this title who has a service-connected disability rate at 10 percent or more and whose performance meets a standard of adequacy under a performance appraisal system implemented under chapter 43 of this title is entitled to be retained in preference to other preference eligibles.

(c) An employee who is entitled to retention preference and whose performance meets a standard of adequacy under a performance appraisal system implemented under chapter 43 of this title is entitled to be retained in preference to other competing employees.

shall notify the Office of Personnel Management of such determination and, at the same time, such agency shall notify the preference eligible of the reasons for such determination and of the right to respond, within 15 days of the date of such notification, to the Office of Personnel Management. The Office of Personnel Management shall require a demonstration by the appointing authority that such notification was timely sent to the preference eligible's last known address and shall, prior to the selection of any other person for the position in question, make a final determination on the physical ability of the preference eligible to perform the duties of the position, taking into account any additional information provided in any such response. When the Office of Personnel Management has completed its review of the proposed disqualification on the basis of physical disability, it shall send its findings to the appointing authority and the preference eligible in question. The appointing authority shall comply with the findings of the Office of Personnel Management. The functions of the Office of Personnel Management under this subsection shall not be delegated to any other department, agency, or instrumentality.

UP AMENDMENT NO. 1767

(Purpose: To authorize the employment of reading assistants for blind employees and interpreters for deaf employees and for other purposes)

Mr. CRANSTON. Mr. President, I now send to the desk the second amendment and ask for its immediate consideration. This will take just a moment, I assure the Senator from Maryland.

The PRESIDING OFFICER. The amendment will be stated.

The second assistant legislative clerk read as follows:

The Senator from California (Mr. CRANSTON), for himself, Mr. WILLIAMS, Mr. JAVITS,

subchapter VIII of chapter 53 of this title governing classification and pay, such reading assistants for blind employees and such interpreting assistants for deaf employees as may be necessary to enable such employees to perform their work.”;

(2) amending the analysis of chapter 31 by striking out the item relating to section 3102 and inserting in lieu thereof the following:

“3102. Employment of reading assistants for blind employees and interpreting assistants for deaf employees.”; and

(3) amending the caption of section 3102 to read as follows:

“§ 3102. Employment of reading assistants for blind employees and interpreting assistants for deaf employees”.

(d) Section 410(b)(1) of title 39, United States Code, is amended by inserting after “conduct of employees” a comma and “3102 (employment of reading assistants for blind employees and interpreting assistants for deaf employees)”.

On page 196, line 8, strike out (c) and insert in lieu thereof (e).

On page 197, line 9, strike out (d) and insert in lieu thereof (f).

On page 197, line 11, strike out (e) and insert in lieu thereof (g).

Mr. CRANSTON. Mr. President, joining me in offering this amendment are Senators WILLIAMS, JAVITS, RANDOLPH, and, I believe, STAFFORD. It is a simple amendment which has been worked out with the Civil Service Commission and the Committee on Governmental Affairs. The amendment, in part, clarifies a matter concerning the assignment of employees to be readers for blind employees. A recent decision by the General Accounting Office with respect to providing readers and interpreters for blind and deaf employees in training courses under the Government Employ-

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14289

ees' Training Act raised doubts as to the Federal Government's authority to hire or assign readers other than in connection with such training. The amendment we propose would clarify this by providing specific authority for the employment and assignment of readers for the blind. The proposed amendment would also expand current law to provide specific authority for the employment or assignment of interpreters for the deaf and, in addition, would specifically apply such authorizations to the Postal Service.

Mr. President, the administration agrees with the need for this amendment and favors its enactment. In this regard, I understand that Jule Sugarman, Vice Chairman of the Civil Service Commission, has, today, written to Senator RIBICOFF to this effect.

Mr. President, section 501 of the Rehabilitation Act of 1973 requires each department, agency, and instrumentality of the Federal Government—including the Postal Service and Postal Rate Commission—to submit to the Civil Service Commission an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Each year, the submitted plan is required to be updated by the submitting department, agency, or instrumentality and reviewed by the Civil Service Commission. The Commission, after such review, may approve the plan if it contains sufficient assurances, procedures, and commitments to assure

general prohibition against receiving salary from sources other than the Federal Government, subsection (b) of the section provides specifically that the reading assistant may be paid for his or her reading assistance services by the blind employee or a nonprofit organization. At the time of passage of Public Law 87-614, it was envisioned that readers would also serve on a voluntary basis. No comparable provision was included regarding the use of nonpaid employees as interpreters for deaf employees.

Mr. President, the limitation of section 3102 to "nonpaid employees" has restricted the ability of some Federal agencies to meet their section 801 obligations. As a result, during the past few months, a number of departments and agencies have written to the Commission with respect to readers. In this regard, I would like to insert in the RECORD a recent letter from the Honorable Elsa A. Porter, Assistant Secretary for Administration at the Department of Commerce, to the Honorable Alan Campbell, Chairman of the U.S. Civil Service Commission.

Mr. President, I ask unanimous consent that the text of that letter be printed in the RECORD at this point.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

U.S. DEPARTMENT OF COMMERCE,
THE ASSISTANT SECRETARY FOR
ADMINISTRATION,
Washington, D.C., May 13, 1978.
HON. ALAN K. CAMPBELL,

affirmative action plans for the hiring, placement, and advancement of handicapped persons. One result has been the expansion of employment opportunities for professionally trained blind persons. As one small example, this Department hired two blind attorneys. For them, immediate access to the written word is critical to the accomplishment of their duties.

Both employees, however, have faced constant problems obtaining the reading assistance they require. Their plight is shared by other blind employees in the Department and, I am certain, by visually impaired employees throughout the Federal government.

Do we not place an unfair burden on the blind by our inability to guarantee competent reading service when needed? Dependence on volunteers creates an aura of uncertainty both as to their availability when required and their familiarity with the kind of material they are reading. Readers of technical materials, for example, should ideally be somewhat knowledgeable about the subject matter in which they are reading in order to make it comprehensible to the blind. We cannot always be certain volunteers will have the proper backgrounds for this.

The competence of the reader is a minor problem compared to the difficulty of scheduling reading periods. Volunteers are not automatically available when needed, and agency employees likewise do not always find it easy to juggle their other work assignments in order to read to the blind at the time the service is necessary. It has been reported that on many occasions volunteers and/or agency employees have been available only when no reading was required and unavailable when it was. Conceivably, the unavailability of competent, timely reading assistance could adversely affect a blind employee's work performance to the extent that career advancement could not be justified. At the least this would appear to violate the

adequate hiring, placement, and advancement opportunities for handicapped individuals within the submitting department, agency, or instrumentality.

In addition, Mr. President, section 7153 of title 5, United States Code, authorizes the President to prescribe rules which "shall prohibit, as nearly as conditions of good administration warrant, discrimination because of physical handicap in an Executive agency or in the competitive service with respect to a position the duties of which, in the opinion of the Civil Service Commission, can be performed efficiently by an individual with a physical handicap, except that the employment may not endanger the health or safety of the individual or others."

Mr. President, Congress has enunciated clearly our general goal that the Federal Government be a leader and an example with respect to the employment of handicapped individuals. At the time of passage of section 501 as part of the Rehabilitation Act of 1973, I stressed that the Federal Government should be "an equal opportunity employer." The amendment we are submitting today would assist us in reaching that goal with respect to handicapped individuals.

Currently, section 3102 of title 5, United States Code—initially enacted in Public Law 87-614—provides authority for the head of each agency to employ nonpaid readers for blind employees of the Federal Government without regard to provisions governing appointments in the competitive service. Contrary to the

*Chairman,
U.S. Civil Service Commission,
Washington, D.C.*

DEAR CHAIRMAN CAMPBELL: As we implement the new appeals system for handicapped employees and applicants, my attention has been brought to the growing problem of providing readers for blind employees. At present agencies are authorized to assign regular employees the duty of reading on a part-time or as-needed basis or to appoint readers without compensation. Under the latter authorization, reading services are obtained either through unpaid volunteers or by individuals paid directly by the blind employees. None of these approaches is completely satisfactory, and I therefore propose that the Civil Service Commission initiate appropriate action to provide agencies the option of employing paid readers on a full-time, part-time, or when actually employed basis when justified by the employee's need and job functions. I see no real difference between providing paid reading assistance for the blind and providing secretarial or clerical assistance for any other employee.

The option I ask the Commission to consider could appropriately be accomplished through the establishment of a new Schedule A appointing authority. The existing mechanism for providing reading assistance would remain in effect and would be the preferred means of providing the assistance needed. The new authority would merely provide agencies with greater flexibility to meet the needs of their employees.

While I appreciate the traditional means of providing reading services, I feel they are inadequate to meet the needs of today and will greatly restrict our ability to respond to the challenges of tomorrow. The inadequacy of these means began to grow apparent with the advent of the Rehabilitation Act of 1973 (P.L. 93-112). Section 501 of the Act, as you know, requires Federal agencies to develop

requirements of Section 501 of the Rehabilitation Act. At most it might be grounds for a complaint under the new regulations.

The general policy of the Federal government is to become a model employer of handicapped individuals. This is specifically stated in Section 713.703 of the new Subpart G ("Prohibition Against Discrimination Because of a Physical or Mental Handicap") of the Commission's equal opportunity regulations. If agencies are to carry out this policy with respect to the blind, there must be greater flexibility than now possessed to meet and deal with the reading needs of the employees.

Section 713.704 of Subpart G discusses the topic of reasonable accommodations. The Section states in part:

(a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include . . . the provision of readers and interpreters, and other similar actions.

Item (c) provides guidance on determining whether a proposed accommodation would impose an undue hardship on the operation of the agency's programs. I feel that under whatever criteria are used, the authority I am proposing for giving agencies greater flexibility to meet the reading needs of the blind can only be seen as a means of carrying out the Commission's expressed policy with respect to the Federal government's role as a model employer and to the principle of reasonable accommodation.

On a peripheral note, I see evidence of increasing court-ordered accommodations for the handicapped. One precedent-setting decision was handed down last July when a Federal judge ordered Converse College in

South Carolina to pay for an interpreter for a deaf student. The judge ruled that the college's refusal to pay for interpreter services violated the regulations under Section 504 of the Rehabilitation Act. That Section states that no otherwise qualified handicapped individual shall, because of his handicap, be subjected to discrimination under any program receiving Federal financial assistance.

Section 504 does not address itself to the employment practice of Federal agencies, but Section 501, with its requirement for affirmative action to broaden employment and advancement opportunities for the handicapped, does. That section, together with the Commission's new regulations on prohibition of discrimination because of handicaps, the requirement to provide reasonable accommodation, and new court rulings, certainly justify the establishment of an appointing authority for reading assistants to the blind.

I fully recognize the great strides which are already being made to help the sightless. Use of special equipment like the Optacon and talking calculators is increasing, and new devices are under development. Braille materials, tapes and cassettes are appearing on a growing variety of topics. At the same time the blind are broadening their own horizons and preparing themselves to enter new occupational fields.

The authority I propose is not seen as a panacea. Problems in fully accommodating all the needs of the blind will remain. The authority will at least assure agencies another means to be more directly involved in providing a needed service.

I hope the Commission will give prompt and thorough consideration to my proposal and look forward to your response.

Sincerely,

ELSA A. PORTER,
Assistant Secretary for Administration.

pects from the private sector with respect to affirmative action efforts in the employment of handicapped individuals.

Mr. President, our amendment would provide much-needed flexibility—a flexibility that should assist the Federal Government in the hiring and advancement of individuals handicapped by reason of sight or sound impairment. The amendment would not supplant existing authority; rather it would augment existing authority. It is a necessary step to assist us in meeting our responsibilities of promoting exemplary equal employment opportunity. I urge my colleagues to support it.

Mr. President, I ask unanimous consent that a short summary of the amendment, an analysis of changes which would be made by it in title 5, and the August 24 letter from the Civil Service Commission be printed in the RECORD at this point.

There being no objection, the summary was ordered to be printed in the RECORD, as follows:

SUMMARY AND ANALYSIS OF UNPRINTED AMENDMENT NO. 1767 REGARDING READERS FOR BLIND AND INTERPRETERS FOR DEAF EMPLOYEES

SUMMARY

The amendments would add to S. 2640 as reported new subsections (c) and (d) to section 301 to amend section 3102 of title 5, United States Code, and section 410 of title 39, United States Code, to:

(1) authorize the head of each agency to employ interpreting assistants to serve without Federal pay to assist any deaf employee (as defined in section 3102, as amended) of such agency in carrying out his or her job, and to permit such an interpreter to receive

their services by the blind or deaf employee or by a nonprofit organization without regard to section 209 of title 18 (relating to limitation on salaries of Federal Government employees being payable only by the United States).

Subsection (c) would be amended by making specific that the assignment or employment of a reading or interpreting assistant or assistants under section 3102 may not be held or considered to prevent or limit the assignment to the blind or deaf employee of appropriate clerical or secretarial assistance.

Section 3102 would be further amended by the insertion of a new subsection (d) authorizing the head of each agency to employ or assign, subject to section 209 of title 18 and chapter 61 and subchapter VIII of chapter 53 of this title relating to classification and pay, such reading assistants for blind employees and such interpreting assistants for deaf employees as may be necessary to enable such employees to perform their work.

The analysis of chapter 31 would be amended by redesignating the item relating to section 3102 to conform with the redesignated section heading.

Section 410(b)(1) of title 39 (relating to the specific applicability of certain statutory provisions to the Postal Service) would be amended to include section 3102 among the section so made applicable.

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., August 24, 1978.

HON. ABRAHAM A. RUBINOFF,
Chairman, Committee on Governmental Affairs, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: It is my understanding that Senator Cranston and others are proposing to introduce an amendment to section 3102 of title 5, United States Code, which essentially authorizes the employ-

Mr. CRANSTON. Mr. President, Assistant Secretary Porter's letter graphically illustrates the limitations of section 3102. It is these limitations which the amendment we are submitting is designed to overcome, both with respect to the employment of blind individuals as well as deaf individuals.

Mr. President, in March of this year, the Civil Service Commission issued final regulations setting up procedures for processing complaints of discrimination based on physical or mental handicap (5 C.F.R. 713(G)). Included as part of those regulations are provisions that require agencies to make reasonable accommodations to the known physical or mental limitations of a qualified handicapped applicant or employee, unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Reasonable accommodation may include, but is not limited to, making facilities readily accessible to and usable by handicapped persons, job restructuring, part-time or modified work schedules, acquisition or modification of examinations, the provision of readers and interpreters, and other similar actions. The Commission's regulations on reasonable accommodations were based on the regulations issued by the Department of Labor for Federal contractors under section 503 of the Rehabilitation Act of 1973 and by the Department of HEW for Federal grant recipients under section 504 of the act.

Mr. President, the Federal Government must do no less than what it ex-

pay from the deaf individual or a nonprofit organization for such services;

(2) make specific that the assignment or employment of a paid employee as a reader for a blind or interpreter for a deaf employee does not constitute the provision of appropriate clerical or secretarial support for such employee;

(3) authorize agency heads to employ or assign as paid Federal employees readers for blind and interpreters for deaf employees; and

(4) make specific the application of the section 3102 authorities to the U.S. Postal Service.

ANALYSIS OF CHANGES MADE IN CURRENT LAW

Section 3102 would be amended by redesignating the caption to read as follows: "Employment of reading assistants for blind employees and interpreting assistants for deaf employees".

Subsection (a) would be amended by adding a new definition of deaf employee: An individual employed by an agency who satisfactorily establishes that he or she has a hearing impairment, either permanent or temporary or so severe or disabling that the employment of an interpreting assistant or assistants for such employee is necessary or desirable to enable such employee to perform his or her work.

Subsection (b) would be amended to include an interpreting assistant (or assistants) for a deaf employee as among those nonpaid employees whom the head of each agency is currently authorized to employ without regard to the competitive service and chapters 51 (relating to pay and allowances) and 53 (relating to pay rates and systems) provisions of title 5. In addition, subsection (b) would be amended to make specific that a reading or interpreting assistant (or assistants)—except for those employed or assigned under subsection (d) of section 3102 as amended—may be paid for

ment of reading assistants for blind employees and interpreters for deaf employees.

In our view, the authorization to provide for these services is needed very much. Federal employers are required by law to exercise affirmative action in the hiring, placement, and advancement of handicapped persons. For the successful employment of blind and deaf persons, two of the most important accommodations are readers and interpreters. We have stated for some time that such services are allowable on an "as required basis" by other Federal employees, but experience shows that these services are often inadequate.

The real need is to convince managers that these are legitimate services and refusal to employ or promote deaf or blind individuals cannot be based upon a need for "extra" services. Senator Cranston's proposed amendment will be very helpful in overcoming these barriers and in assuring that the payment of these services is indeed legal. For these reasons, the Administration favors the amendment.

Sincerely yours,

JULE M. SUGARMAN,
Vice Chairman.

Mr. CRANSTON. Mr. President, the amendment is noncontroversial and I hope that it is acceptable to the floor managers of the pending measure.

● Mr. RANDOLPH. Mr. President, I am pleased to be a cosponsor of the amendment introduced by my good friend from California, Mr. CRANSTON. This amendment will aid blind Government employees and deaf Government employees by authorizing the employment of reading assistants and interpreting assistants, by authorizing the assignment of paid employees as reading or inter-

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14291

preting assistants, by authorizing the head of an agency to employ interpreting assistants to serve without pay, and by applying the provisions of section 3102 of the Civil Service Act to the Postal Department.

This amendment is similar to a bill I introduced in the 94th Congress, S. 1607. It was and is my strong conviction that it is time for the Government to realistically assist blind and deaf Federal employees so that they may have the same employment opportunities as other Americans. It is my feeling that this amendment will facilitate the employment of and advancement in employment of blind and deaf individuals in Federal service.

This amendment provides a flexible approach to meeting the reading and interpreting needs of blind individuals and deaf individuals. It must be remembered, however, that blind and deaf Americans have demonstrated that they have much to contribute, and there is no justification for requiring them to pay for their own reading assistants and interpreters. When S. 1607 was introduced, I emphasized that blind individuals and deaf individuals should not have to use their own funds, as is sometimes the case in Federal employment, to pay for reading assistants and interpreting assistants. Under this amendment, an agency will have available a variety of options for providing reading assistants and interpreting assistants to the blind employee and deaf employee, which will in no way

The amendment was agreed to.

Mr. CRANSTON. Mr. President, I wish to express my thanks and appreciation to all the Senators and all those who helped us work this out. I also express by deep appreciation for the tremendous work Senator RIBICOFF and Senator PERCY have done in developing this bill. I think it will lead us to a more manageable, more responsible and responsive Federal Government, and I truly thank both of them for the work they and the other Senators have done.

I thank the Senator from Maryland for yielding to me.

Mr. MATHIAS. Mr. President, now that the Senate has undertaken consideration of S. 2640, the civil service reform bill, I wish to take this opportunity to commend my distinguished colleagues, the Senator from Connecticut (Mr. RIBICOFF), the chairman of the Governmental Affairs Committee and the Senator from Illinois (Mr. PERCY), the committee's ranking minority member for the serious and responsible work they have done on this important and essential legislation. The members of this committee labored long and for many hours to debate the issues and hear 12 days of testimony from 86 individuals representing 55 organizations.

That is just to give the Members of the Senate some concept of the scope of this work.

Mr. President, I have expressed some very strong views about this bill and its accompanying reorganization plan.

granted to the Director of the Office of Personnel Management. This Director would have the authority to make personnel policy for the Federal Government. There existed possibilities for manipulating the civil service for "personal or political favoritism" for personnel policy would be made by a single administrator serving at the pleasure of the President. I also pointed out that the bill neglected to give the public any opportunity to scrutinize the policymaking sessions of the OPM. Additionally, the proposed bill completely changed the examination system for Federal employees. It delegated authority to individual agencies rather than keeping that function with the Civil Service Commission. This meant a return to the pre-1965 era of civil service which was shot through with a use, favoritism, delay, agency pressures and varying quality standards. Finally, the bill created a Senior Executive Service. This was first proposed by the second Hoover Commission back in 1955. The executives who will be included in this group have proven historically that they are the glue that holds the Government together during times of political transition or turmoil when the confidence of the American people in their Government must remain unshaken. Yet this bill granted authority to Presidential appointees to reassign, transfer, promote, and demote almost all top career executives and replace them with political or career appointees more to their liking.

require the blind or deaf individual to use his or her funds.

It is my feeling that it is important for the blind or deaf individual to be able to select an assistant with whom he or she can work most effectively. A blind or deaf individual's opportunity to select his or her reader or interpreter can contribute to a compatible working relationship and efficiency. While this amendment does not speak specifically on this point, the flexibility allows for the establishment of a policy regarding selection of reading assistants or interpreting assistants by the blind or deaf employee.

Mr. President, blind individuals and deaf individuals have much to contribute and will contribute even more if they are provided with the appropriate opportunities. This amendment will assist in the provision of those opportunities.●

Mr. RIBICOFF. Mr. President, the amendment of the distinguished Senator from California is acceptable to the manager of the bill.

Mr. PERCY. Mr. President, the amendment just offered by my distinguished colleague from California is, once again, a sound idea. It is acceptable. I know of no objection on this side.

Mr. CRANSTON. I thank the Senator very much.

I have now heard from Senator STAFFORD, and I ask unanimous consent that Senator STAFFORD may be added as a cosponsor and shown as such.

The PRESIDING OFFICER. Without objection, it is so ordered.

The question is on agreeing to the amendment.

While the committee has made major and substantial improvements in the bill, I think there is general agreement that there are several modifications that can and must be made on the floor.

The word "reform" always has a pleasing appeal. When it is associated with a project, there is a natural assumption that the project must be desirable and ought to be supported.

But good words like "reform" can be associated with programs which, though well motivated, are not carefully thought out.

This can have unfortunate results. Any real reform can be defeated. So even programs that are called reforms ought to be carefully examined. This is what we must do with this so-called civil service reform.

We have to be sure that the rough edges are smoothed off. We do not want to go back to the spoils system that existed in the days before civil service was instituted. We do not want to go back to raw political control of the Government, with Government employee upheavals at every election. We must keep these factors in mind while we are deciding how to reform the civil service.

When the committee first met to hear witnesses on the bill I expressed grave concerns that if the provisions of the bill were enacted there would be unbridled and unchecked discretion to politicize the civil service. The President had simply fallen short of his goal to provide Federal managers more discretion and flexibility in personnel management while at the same time assuring a civil service based on merit principles. I spoke specifically about the sweeping authority

Mr. President, the original proposal failed to recognize that Federal employees are, for the most part, dedicated, loyal men and women who work hard at their jobs. They want to be successful in their careers of public service. Very often they joined the civil service because of patriotic motives and deserve respect and dignity and security in their jobs.

The President's bill called for drastic firing capabilities. But we cannot be overzealous with our attempts to get rid of the deadwood. The President has said that in 1976, only 226 employees had been fired for incompetence and inefficiency. The President's figures were slightly in error. In fact, some 17,000 employees had been fired for cause in 1976. This indicates that the situation was not quite as bad as the President perceived it to be. Therefore, I do not think that the remedy should be quite as drastic as the President proposes. And this is one example—only one—of why we have to look carefully at the administration's civil service reform bill.

I concluded that the President's legislation could be salvaged, but only through amendments. So when the committee met to consider amendments to the bill, I sought to have several changes adopted. Senator STEVENS and I proposed modifications in the structure of the Office of Personnel Management that would provide bipartisan leadership. The changes would also limit the authority of this central personnel agency to conduct demonstration projects. The administration's bill granted authority to the OPM to conduct these projects for almost 5 years for upward of a quarter to a half million people, while setting

aside all civil service laws and important merit principles. Alterations in the examining process were suggested. Insuring the independence of the Merit Systems Protection Board and the Special Counsel was another goal. Lastly, these amendments called for important modifications regarding the burden of proof in adverse action cases against employees, providing basic protections to members of the Senior Executive Service and drastically curtailing opportunities for politicizing the Service.

These proposals met with mixed success, and as a result Senator STEVENS and I submitted Minority Views to the committee's report on this bill. Those views reiterated each of our concerns expressed during committee deliberations.

The distinguished chairman of the committee, Senator RIBICOFF offered several weeks ago to have his staff negotiate with Senator STEVENS' staff and my own to attempt to reach agreement on many of these issues. Senator PERCY's staff also participated in these talks. These sessions proved to be quite fruitful, for today I am pleased to report that Senators RIBICOFF, PERCY, STEVENS, and I have reached agreement to offer a joint amendment coordinated with the administration, that we believe adequately addresses most of the issues raised in the minority report. I assume that we will undertake consideration of this amendment later during the debate on this measure. There are other concerns that have not been addressed, however.

"(iii) the filing of a written complaint by the Special Counsel.

"(B) In reviewing any rule or regulation pursuant to this paragraph the Board shall declare such rule or regulation invalid, in whole or in part, if it determines that—

"(i) such rule or regulation would, on its face, violate section 2302 of this title, including the prohibition against violating the merit system principles, if implemented by an agency, or

"(ii) such rule or regulation, as it has been implemented by agencies through personnel actions taken, or policies adopted in conformity therewith, violates section 2302 of this title, including such principles.

"(C) The Director of the Office of Personnel Management, and any agency implementing the rule or regulation under review in any proceeding conducted pursuant to this paragraph, shall have the right to participate in such proceeding. Any proceeding conducted by the Board pursuant to this paragraph shall be limited to determining the validity of the rule or regulation under review. The Board shall prohibit future agency compliance with any rule it determines to be invalid."

On page 145, line 21, strike out "(b)" and insert in lieu thereof "(b)(1)".

On page 145, after line 25, insert the following:

"(2) If notice of a rule or regulation proposed by the Director is required by section 553 of this title, the Director shall insure that—

"(A) the proposed rule or regulation is posted in offices of Federal agencies maintaining copies of the Federal personnel regulations; and

"(B) to the extent the Director determines appropriate and practical, exclusive representatives of employees affected by such proposed rule or regulation and interested mem-

The Director shall provide a full explanation for his determination in each case.

On page 212, between lines 1 and 2, in the item relating to section 3133, after "positions", insert "; number of career reserved positions".

On page 226, between lines 14 and 15, insert the following:

"(1) permit the accurate evaluation of job performance on the basis of criteria which are related to the position in question and specify the critical elements of the position;"

On page 226, line 15, strike out "(1)" and insert in lieu thereof "(2)".

On page 226, line 17, strike out "(2)" and insert in lieu thereof "(3)".

On page 226, line 19, strike out "(3)" and insert in lieu thereof "(4)".

On page 227, line 18, insert before "Upon" the following new sentence: "The Office of Personnel Management shall review each performance appraisal system developed by any agency under this section, and determine whether the performance appraisal system meets the requirements of this subchapter."

On page 227, between lines 22 and 23, insert the following new subsection:

"(d) The Comptroller General shall from time to time review on a selected basis performance appraisal systems established under this section to determine the extent to which such system meets the requirements of this subchapter and shall periodically report its findings to the Office of Personnel Management and to Congress.

On page 201, strike out line 23, and insert in lieu thereof "prohibited personnel practices;"

On page 202, line 3, strike out "and".

On page 202, between lines 6 and 7, insert the following new paragraphs:

"(14) utilize career executives to fill positions in the Senior Executive Service to the greatest extent practicable consistent with

The Senate must endeavor to make this a true "reform" package, smoothing its rough edges, while striking the proper balance between protection of merit principles and management flexibility.

AMENDMENT NO. 3533

(Purpose: Improving the protections afforded Federal employees)

Mr. MATHIAS. Mr. President, I call up amendment No. 3533.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

The Senator from Maryland (Mr. MATHIAS), for himself, Mr. STEVENS, Mr. BERICOFF, and Mr. PERCY, proposes an amendment numbered 3533.

Mr. MATHIAS. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 152, line 6, strike out the end period and insert in lieu thereof a semicolon and "and".

On page 152, between lines 6 and 7, insert the following:

"(D) review, as provided in paragraph (6), rules and regulations of the Office of Personnel Management."

On page 154, between lines 19 and 20, insert the following:

"(6) (A) At any time after the effective date of any rule or regulation issued by the Office of Personnel Management pursuant to section 1103(b) of this title, the Board shall review such rule or regulation upon—

"(1) its own motion;

"(11) the petition of any interested person if the Board, in its sole discretion, grants such petition after consideration of it; or

bers of the public are notified of such proposed rule or regulation."

On page 206, line 12, after "positions", insert "; number of career reserved positions".

On page 208, between lines 20 and 21, insert the following:

"(h) (1) Not later than one hundred and twenty days after the date of the enactment of the Civil Service Reform Act of 1978, and from time to time thereafter as the Director of the Office of Personnel Management finds appropriate, the Director of the Office of Personnel Management shall establish, by rule issued in accordance with section 1103(b) of this title, the number of positions out of the total number of positions in the Senior Executive Service, as authorized by this section or section 412 of such Act, that are to be career reserved positions. Except as provided in paragraph (2), the number of positions required by this subsection to be career reserved positions shall not be less than the number of positions which, prior to such date of enactment, were authorized to be filled only through competitive civil service appointment.

"(2) The Director of the Office of Personnel Management may, by rule, designate a number of career reserved positions which is less than the number required by paragraph (1) only if he determines it necessary to designate as a general position a position (other than a position described in the last sentence of section 3132(b) of this title) which—

"(A) involves policymaking responsibilities which require the advocacy or management of programs of the President and support of controversial aspects of such programs;

"(B) involves significant participation in the major political policies of the President; or

"(C) requires the executive to serve as a personal assistant of, or adviser to, a Presidential appointee or other key political figure.

the effective and efficient implementation of agency policies and responsibilities; and

"(15) provide for a professional management system that is guided by the public interest and free from improper political interference."

On page 205, line 7, after the end period, insert the following new sentence: "Notwithstanding the provisions of any other law, any position to be designated as a Senior Executive Service position, except a position in the Executive Office of the President, which—

"(1) is under the Executive Schedule, or for which the rate of basic pay is determined by reference to the Executive Schedule, and

"(2) on the day before the date of the enactment of the Civil Service Reform Act of 1978 was specifically required by law, or was required under the provisions of section 2102 of this title, to be in the competitive service, shall be designated as a career reserved position, if the position entails direct responsibility to the public for the management or operation of particular government programs or functions."

On page 146, line 21, after "service", insert ", except that the Director may not delegate open competitive examination authority with respect to positions whose requirements are common to agencies in the Federal Government other than in exceptional cases where the interests of economy and efficiency require it, and where such delegation will not weaken the application of the merit system principles."

On page 307, beginning with line 18, strike out all through page 308, line 2, and insert the following:

"(1) Allocation of the costs of the arbitrator shall be governed by the collective-bargaining agreement. The collective-bargaining agreement may require payment by the agency which is a losing party to a proceeding before the arbitrator of reasonable at-

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14293

torney fees incurred by an employee who is the prevailing party if the arbitrator determines that payment is warranted on the grounds that the agency's action was taken in bad faith. If an employee is the prevailing party and the arbitrator's decision is based on a finding of discrimination prohibited by any law referred to in section 7701 (h) of this title, attorney fees also may be awarded and shall be governed by the standards applicable under the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-5(k))."

On page 308, line 13, after "section." insert the following: "The Authority may award attorney fees to an employee who is the prevailing party to an exception filed under this subsection, but only if it determines that payment by the agency is warranted on the grounds that the agency's action was taken in bad faith."

On page 286, between lines 3 and 4, insert the following:

"§ 7205. Personnel Policy Advisory Committee

"(a) There is established, subject to the provisions of the Federal Advisory Committee Act, the Personnel Policy Advisory Committee (hereinafter in this section referred to as the 'Committee') which shall be composed of—

"(1) the Director of the Office of Personnel Management who shall serve as Chairman of the Committee;

"(2) the Secretary of Labor or his delegate;

"(3) five members appointed by the President from among individuals serving in Executive agencies and military departments in positions not less than the positions of Assistant Secretary or their equivalents;

"(4) one member appointed by the President from the Deputy and Associate Directors of the Office of Personnel Management; and

"(2) Members of the Committee who are full-time officers or employees of the United States shall receive no additional pay on account of their service on the Committee.

"(3) While away from their homes or regular places of business in the performance of service for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of this title."

On page 271, between lines 2 and 3, after the item relating to section 7204, insert the following new item:

"7205. Personnel Policy Advisory Committee."

Mr. HATCH. Will the Senator yield for a unanimous-consent request?

Mr. MATHIAS. I am glad to yield.

Mr. HATCH. Mr. President, I ask unanimous consent that Kristine Iverson of my staff and Robert Hunter of the staff of the Human Resources Committee be accorded the privilege of the floor throughout the debate on this measure and any votes thereon.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MATHIAS. Mr. President, after this legislation had been reported by the Governmental Affairs Committee, Senator STEVENS and I made our objections known by submitting minority views to the report on the bill. Thereafter, we submitted several amendments to the legislation that reflected the serious nature of our concerns with this bill. Mr.

The rule or regulation shall be declared invalid if, as implemented, through personnel actions taken or policies adopted in conformity therewith, violates merit system principles or constitutes a prohibited personnel practice.

Mr. President, this amendment draws a distinction between a regulation or rule prior to or after implementation. The authority given to the Board to invalidate rules or regulations prior to implementation reflects our concern that hundreds of civil servants and many agencies should not be placed in the unseemly position of acting upon a regulation or being affected thereby when it is obvious that implementation would amount to illegality. We—let me say, Mr. President, I think we must caution that this provision should never be interpreted to give a stamp of approval to any rule or regulation that the Board may not have considered.

The Board may act only after the effective date of the rule or regulation, for we feared that if the Board were required to act prior to the effective date, its silence or failure to act may be interpreted as a sign of approval or its signoff of the rule's validity under the law. Thus the Board is not limited as to when it may consider or review any rule or regulation, as long as it is after the rule's effective date.

I might further say, as a matter of legislative history, that the term "interested person" is not meant to be overly restrictive. Rather, it is designed to have

"(5) seven members appointed by the President who shall be officers of labor organizations representing employees in the Federal Government.

Appointments made under paragraph (5) shall reflect the relative numbers of the total Federal employees which are represented by such labor organizations, or affiliates thereof, except that no more than four members shall be from one such organization or its affiliates.

"(b) It shall be the function of the Committee to provide a forum for discussion by agency management and employee representatives of Federal personnel policy and regulations which affect more than one agency, and to make recommendations with respect to such policies and regulations.

"(c) (1) The Committee shall meet at the call of the Chairman but at least once quarterly. The Chairman shall notify each member of a proposed meeting at least fourteen days before it is to be held.

"(2) The Chairman shall prepare an agenda of topics for consideration by the Committee in any meeting and shall include such agenda in the notice sent under paragraph (1).

"(3) If one-third of the members present at a meeting vote to discuss an unscheduled topic, it shall be discussed.

"(d) (1) Recommendations of the Committee may be considered by the Office of Personnel Management in the formulation of Federal personnel policies and regulations.

"(2) Copies of the transcripts of the meetings of the Committee shall be sent to the Merit Systems Protection Board and the Federal Labor Relations Authority.

"(e) (1) Except as provided in paragraph (2), members of the Committee shall receive as compensation the daily equivalent of the annual rate of basic pay in effect for grade GS-18 for each day (including traveltime) during which they are engaged in the actual performance of duties vested in the Committee.

RIBICOFF, the distinguished senior Senator from the State of Connecticut, and chairman of the Governmental Affairs Committee and Senator PERCY, the ranking minority member of the committee, agreed to begin sessions with Senator STEVENS and myself in an effort to satisfy or at least meet some of our concerns. I am pleased that these discussions have produced highly satisfactory results. After each of us had reached substantial agreement on these issues, our staffs met with representatives of the administration and reviewed with them the package that is now represented by this amendment.

Mr. President, the bill as reported by the committee does not provide sufficient checks on the policymaking powers of the Director of the Office of Personnel Management. Without some restrictions, the Director of the Office of Personnel Management, as a political appointee of the President, could issue rules which would politicize the civil service in violation of merit system principles.

This amendment provides that at any time after the effective date of any rule or regulation issued by the OPM the Board is directed to review the rule or regulation upon the filing of a written complaint by the special council. The Board in its discretion may review the regulation upon its own motion. The Board is further directed to consider the petition of any interested person, and may grant the petition in its sole discretion. The Board must declare the rule or regulation invalid if it finds that the rule or regulation, on its face, if implemented would constitute a prohibited personnel practice or violate merit system prin-

the same meaning as that term is given in the context of the Administrative Procedure Act, and all the case law construing its meaning.

SENIOR EXECUTIVE SERVICE

Mr. President, there is a major danger in the provisions of the bill that create the senior executive service. Currently there are about 9,000 executive positions in the Federal service (aside from those filled by Presidential appointees). About 10 percent, or 900 of these, are designated as specific positions to be filled politically. The administration proposes to change this so that most of the 9,000 positions could be filled by political appointment, although at one time no more than 10 percent of all executive positions could be occupied by political appointees.

Once the impartiality and nonpartisanship of a career executive is no longer a requirement for filling these positions, the baser elements of human nature will flourish. Significant numbers of career people in positions in and just below the senior executive service will surely be encouraged to use their official discretion in subtle ways to serve partisan and special interests. Some unfortunately will probably succumb to the temptation in hopes of being looked on favorably as they seek entry into the senior executive service. Of course, with a career appointment, these individuals would not be part of the 10-percent limitation on the number of political appointees. They would remain career appointees—who have demonstrated their political reliability. In other words, it would be relatively easy to politicize far more than 10 percent of these positions in this service, particularly so because career execu-

tives could be reassigned and demoted without cause.

To satisfy ourselves that this scenario is not farfetched, we need only read the House Post Office and Civil Service Committee's "Final Report on Violations and Abuses of Merit Principles in Federal Employment." It reads:

Testifying in closed session before the Senate Select Committee, John Ehrlichman, Counsel to President Nixon for Domestic Policy, was asked if there was an interest to influence the career service in a partisan manner. Mr. Ehrlichman responded to Senate committee staff by saying, "It was an itch on our part to get friends in the departments rather than the people that we found there, but that was just a general ongoing desire on our part." The Committee Counsel asked if career positions as well as others were considered. "Sure . . .", was Mr. Ehrlichman's reply. The Committee Counsel asked how something such as this would be carried out, and Mr. Ehrlichman's response was, "By attrition essentially . . ."

It takes very little imagination to predict what would happen if Presidential appointees had the power to create attrition at will.

This amendment, which I am joined in by the distinguished Senator from Alaska, as well as by Senator RIBICOFF and Senator PERCY, will provide adequate safeguards against the possibilities for politically abusing the Senior Executive Service. We have proposed that within 120 days of the effective date of the Civil Service Reform Act, the Director of the Office of Personnel Management, by rule and in accordance with the rule and in

Mr. RIBICOFF. Mr. President, I commend the Senator from Alaska and the Senator from Maryland. They were very, very watchful watchdogs, and both the ranking minority member and myself feel that they have made a substantial contribution and have improved the bill.

We are very pleased to accept the Senator's amendment.

Mr. MATHIAS. Mr. President, the Senator from Connecticut is extremely kind and generous as he always is.

I know that the Senator from Alaska and I both share a sense of appreciation to him for his sentiments here as for his cooperation throughout the whole process.

Mr. President, I might just comment briefly on one aspect of the bill that we have not yet covered, and that is the question of competitive examinations.

The bill as it left the committee would authorize shifting from the central personnel agency to each individual agency the authority to examine applicants for jobs in that agency, and this, of course, was the practice in Civil Service prior to 1965, and those of us who were in Congress prior to 1965 will remember that there were many complaints that there was an uneven system, that there was a difference in the way applicants were being treated agency to agency, and in one part of the country to the other, and it was considered a great reform in 1965 that we centralized the system.

I personally think it would be a mistake to go back to the previous system and just one example of why it would

RULE POSTING REQUIREMENTS

Mr. STEVENS. Mr. President, this addition to the civil service reform bill will assure Federal workers an early notice of new rules and regulations enacted by the Office of Personnel Management. The provision requires a posting of these regulations in Federal offices maintaining copies of the Federal personnel regulations. The requirement will have the effect of advising concerned government employees at their general office location regardless of its remoteness to Washington, D.C.

This amendment is an improvement of the Administrative Procedure Act. The Procedure Act depends heavily on notification through the Federal Register. Such notification becomes less effective for the lower grades of government employees who are not accustomed to reviewing the Register regularly. This point is also valid in the smaller government installations found in many States.

This posting requirement is a straightforward attempt to notify all employees of new rules and regulations that will affect their jobs. The requirement includes notification of employee representatives. The process should promote a clear understanding of Federal regulations early in the implementation stage. Combined with new authorities of the Merit System Protection Board, adequate notification will promote merit principles and minimize questionable regulations which might result in prohibited personnel practices if imple-

accordance with the rulemaking provisions of the Administrative Procedure Act, must specify the number of positions in the Senior Executive Service that are to be career reserved positions. That number can be no less than the number of positions that can today be filled only through competitive civil service appointment. This means that the Director of the OPM will designate approximately 5,100 of the almost 9,000 positions in the Senior Executive Service that will be career reserved. The Director of the OPM is given the authority by our amendment to reduce the number of career reserved positions by designating them general positions. In order to do so, however, he must make a finding with respect to each such position he proposes to redesignate. He must find that the position: Involves policy making responsibilities which require the advocacy or management of programs of the President and support of controversial aspects of such programs; involves significant participation in the major political policies of the President; or requires the Executive to serve as a personal assistant of, or adviser to, a Presidential appointee or other key political figure. These criteria for designating positions as general reflect the view that any such redesignation should be considered to be motivated primarily by political considerations. These criteria that were established by Executive Order during the Eisenhower administration, and modified by the Johnson administration, provide a reasonable balance for management flexibility, protection against political and personal favoritism, and most important, the effective continuity of Government.

be a mistake is included in a recent report of the Civil Service Commission which states that—
136,000 white collar jobs are overgraded.

And I think this overgrading can be traced in a great many of these cases to the fact that the agency managers pressure for the overgrading. They are pushing for this overgrading, and it is an example of what can happen when more of the recruiting activity is delegated to the agencies.

There are, of course, problems in the centralized system. The biggest one is that it takes too long to fill the jobs.

But the record seems to indicate that most of the delay is in the agencies, not in the area offices of the Commission, and steps can be taken to speed up that process and to make other improvements.

So, this amendment very briefly also prohibits the delegation of competitive examination authority for the positions common to agencies.

There may be delegation when the positions are unique to agencies or in extraordinary circumstances in the interests of economy and efficiency because, as the Senator from Alaska said, we are all interested in the most economic, the most efficient, and the most effective Government service that we can get. But I do not think we can reach that kind of a civil service if we are not very careful and very searching in the ways that we recruit people into the service.

Therefore, we suggest the prohibition of the delegation of competitive examinations be accepted under these extraordinary circumstances.

mented by the agency.

POLICY OF CAREER PLACEMENT IN THE SES

Mr. President, this amendment establishes two important principles in the administration of the Senior Executive Service.

One revision represents a policy statement advocating maximum utilization of career service employees. The reform bill authorizes a ceiling of 10 percent for the placement of political appointees. Ten percent should not become a goal of each administration. We hope the goal of placement in the Senior Executive Service will center on individual qualifications for Government service. Therefore, maximum placement of career employees will be in the best public interest.

The second change states a goal for the Senior Executive Service. I believe that statement is self-explanatory and self-supporting. The change establishes as Senior Executive Service policies: "goals for a professional management system and the necessity to assure career members protection from prohibited personnel practices."

CERTIFICATION OF APPRAISAL SYSTEMS

Mr. President, this revision to the reform bill will improve the quality of performance appraisal systems to be used in the Senior Executive Service. There can be few things of more importance to these executives than the technique of their evaluation.

The amendment will require the Office of Personnel Management to review all performance appraisal systems prior to implementation. This review will promote objective systems that will uniformly evaluate performance within the ex-

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14295

executive group regardless of the agency. One approving authority, the Office of Personnel Management, will assure adherence to merit principles in the development of all performance appraisal systems.

A second benefit of this amendment involves a statutory auditing role for the General Accounting Office. The GAO will perform representative audits of performance appraisal systems in the Senior Executive Service. The Comptroller General will issue reports periodically on the effectiveness of these appraisal systems.

ADVISORY COMMITTEE FOR THE DIRECTOR OF THE
OFFICE OF PERSONNEL MANAGEMENT

This amendment establishing an advisory committee will fulfill one of the recommendations of the Personnel Management Project of the President's reorganization plan. Senate bill 2640 confines the scope of collective bargaining to those matters which properly belong within the purview of labor-management consultation. Specifically, it excludes matters governed by the policies and regulations of the Office of Personnel Management and the Merit Systems Protection Board. And it bars consideration of issues reserved as management rights: the determination of the agency's mission, budget, organization, and work force size and structure. These restraints are fully consistent with the objectives of providing administrative efficiency and protecting the public interest.

However, it is important that neither labor nor management be excluded from

establish harmony between, first, the desire of unions and agencies to have a meaningful and systematic role in determining central personnel agency rules; and, second, the need of the central personnel agencies to achieve the effective execution of laws and Presidential directives.

In drawing on the insight and expertise of labor and management, the proposal will improve the efficiency and preserve the authority of Federal personnel management.

PAYMENT OF ATTORNEY FEES IN ARBITRATION

Mr. President, this revision provides for attorney fees incurred by an employee who is the prevailing party in an arbitration case. This amendment will be superseded by negotiated agreements where the agency and the representative of employees have agreed to alternative terms in a contract. The intent of this amendment is to provide a standard rule on such awards that is consistent with the provisions available to the Merit Systems Protection Board.

The arbitrator shall decide the award of such payments if the Agency's action is considered to have been taken in bad faith. The award should cover reasonable attorney fees and accepted court expense items such as filing fees and the cost of transcripts. It is our intention that these awards should reflect the actual costs incurred, realizing that costs in some States would be higher than others for the same case.

The provisions of this amendment are consistent with the accepted awards au-

Chairman Campbell, Chairman of the Civil Service Commission.

The purpose of the amendment is to address concerns that S. 2640 as reported from committee contain the potential for political abuse in the Federal bureaucracy.

The amendment addresses these fears while retaining the essential structure and thrust of the overall legislation. For instance, the Merit System Protection Board review procedure is drafted so as not to allow MSPB a role in policymaking, this area being reserved for OPM. It is simply a way to assure that OPM in implementing policy through regulations does not step over the line and commit prohibitive personnel actions which is the sole standard of review for striking regulations down.

The amendment is structured to allow MSPB to act any time after the effective date of the regulation, either before harm has been done, or in response to harm that has been done.

The purpose of the amendment is to assure against political manipulation of the senior executive service as well as to establish a presumption in favor of career reserve positions.

I find that the amendment which has been worked out is extraordinarily helpful and certainly incorporated as original text is acceptable to the Senator from Illinois.

Mr. LEAHY. I ask unanimous consent that David Julian of my staff have all privileges to the floor for today, during votes and debates.

the process of developing rules and policies. Unions must work under central personnel management requirements. Agencies must administer them. Most importantly, both unions and agencies possess extensive knowledge of the general and the particular aspects of the substance of central management decisions. It is important that unions and agencies be provided a formal consultative role in the policymaking process.

While the central personnel agencies have frequently consulted with unions and agencies in the past, these were ad hoc processes initiated by the personnel agencies. There is no process which insures that consultation is systematic.

This amendment will establish a regular and structured conference procedure. It provides for Presidential appointment of a fifteen-member Personnel Policy Committee. The Director of the Office of Personnel Management will chair the committee, which will also include seven members from among the heads of executive agencies and military departments and seven members selected from unions, primarily on the basis of their relative size in representing Federal employees.

The Personnel Policy Committee will meet at least once a quarter. It will be able to consider all Federal personnel policies and regulations which affect more than one agency.

Ideally, the Personnel Policy Committee will provide a forum at which management and organized labor will offer, defend, and consider recommendations on Federal personnel policies and regulations. The amendment is designed to es-

thorized in the statutory process of appeals. Title VII of the civil service reform bill provides the employees working within negotiated agreements to have a choice between the statutory appeals process or the terms of the contract. This amendment corrects an inequity that exists if the employee chooses arbitration.

The amendment authorizes the Federal Labor Relations Authority to grant attorney fees in the same manner described for the arbitrator. Obviously, some arbitration decisions will be appealed to this new Authority. The intention of this revision is to provide relief equivalent to the statutory process when the employee decided on arbitration. Such fees will include those appropriate costs which had been incurred in the arbitration process.

Mr. RIBICOFF. Mr. President, I ask unanimous consent that both the committee amendment in the nature of a substitute as amended and the amendments proposed by the Senator from Maryland, and others, be agreed to and as agreed to be considered original text for purposes of further amendment.

The PRESIDING OFFICER. Without objection, the committee amendment as amended, is agreed to.

Mr. PERCY. Mr. President, I concur that the amendment before us should be accepted as original text. This amendment which is the result of long and arduous negotiations of staffs representing Senator RIBICOFF, myself, Senators MATHIAS and STEVENS, was accepted by the administration in a meeting of four Senators with President Carter and

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. RIBICOFF. Mr. President, I make the same request in behalf of Jim Davidson, Terry Jolly, and Andy Conlin of Senator MUSKIE's staff.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. THURMOND. Mr. President, I ask unanimous consent that Eric Hultman of the Judiciary Committee staff be allowed on the floor during the debate and votes on S. 2640.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MATHIAS. Mr. President, I ask unanimous consent that Mr. Fred Williams, of the staff of the distinguished Senator from Indiana (Mr. BAYH) be accorded the privilege of the floor during this debate.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. RIBICOFF. Mr. President, I also ask unanimous consent that George Kerr, of Senator MOYNIHAN's staff, be granted the privilege of the floor during the consideration and votes on S. 2640.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. RIBICOFF. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The Clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. STEVENS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. STEVENS. Mr. President, I would like to submit three amendments which have been discussed with the staff of the Committee on Governmental Affairs. The amendments are not complicated, and I feel they will improve some important aspects of the civil service reform bill. It is my desire to try to reach a quick decision on these revisions. Would that be acceptable to the manager of the bill at this time?

Mr. RIBICOFF. Yes, it would. I will say to the distinguished Senator from Alaska or ask are they the four amendments which have been submitted?

Mr. STEVENS. These are three amendments that we would like to treat individually, if we may.

Mr. RIBICOFF. I have no objection.

UP AMENDMENT NO. 1768

(Purpose: Providing for review of certain performance appraisal system)

Mr. STEVENS. I send the first amendment to the desk, Mr. President.

The PRESIDING OFFICER. The clerk will report.

The second assistant legislative clerk read as follows:

The Senator from Alaska (Mr. STEVENS) proposes an unprinted amendment numbered 1768.

Mr. STEVENS. Mr. President, I ask unanimous consent to dispense with further reading of the amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 173, line 25, before "It" insert the following: "The Office of Personnel Man-

addition, my proposal will require an audit of Federal personnel appraisal systems by the General Accounting Office. Congress would then receive periodic reports from the Comptroller General concerning the results of such an audit.

I am hopeful that the managers will accept this amendment as it is offered.

Mr. RIBICOFF. Mr. President, the amendment is acceptable to the manager and the administration as well.

Mr. PERCY. Mr. President, I would like to ask the distinguished Senator from Alaska to yield for a question. In the opening statement of the Senator from Illinois he made reference to the fact that the appraisal system in the Federal Government today just seems to be a terrible waste of time. I would throw the whole thing out kit and kaboodle. If you take 2 million people and ask for a performance evaluation of them, and year after year you get 95 percent of them just rated satisfactory, there just are not that many good people in the private sector or wherever they may be.

Does the Senator's suggested amendment in any way improve that situation or have any effect upon it so that we really have an appraisal system that will, a performance that will, really be meaningful? In a grade system inside schools you grade people against one another for performance from top to bottom many times. Is there anything in the Senator's amendment that would have any effect on that whatsoever, in view of the pres-

on the performance of the civil service and how OPM is responding to this amendment.

Mr. STEVENS. That is right. We feel the GAO ought to be able to look from outside the OPM and the civil service system, determine whether these new performance appraisal systems are working, and periodically give the committees of Congress a report on what the OPM has done to carry out the authorization to develop new performance appraisal systems. GAO will, in effect, evaluate the effectiveness of those new systems.

Mr. PERCY. The Senator from Illinois finds the amendment—in fact, all three amendments when we get to each, acceptable, and very much in the spirit of what the Senator from Illinois hoped to accomplish.

The Senator from Illinois has not worked in the civil service, but has had civil servants, while serving in the U.S. Navy, working for him, and has seen the rigidity of that system years and years ago.

The Senator from Illinois has had testimony directly given to him throughout the State of Illinois and in hearings here in Washington as to the rigidity of the system and the lack of effectiveness of performance ratings, so that the Senator commends his distinguished colleague for these amendments.

As part of the legislative history, the Senator from Illinois would request that the Comptroller General make careful audits of the so-called quality control that is now being introduced, in order

agement shall review each performance appraisal system developed by any agency under this section and determine whether the performance appraisal system meets the requirements of this subchapter."

On page 174, between lines 6 and 7, insert the following:

"(c) The Comptroller General shall from time to time review on a selected basis performance appraisal systems established under this subchapter to determine the extent to which such system meets the requirements of this subchapter and shall periodically report its findings to the Office of Personnel Management and to Congress.

Mr. STEVENS. This amendment deals, Mr. President, with OPM review of performance appraisal systems.

S. 2640 permits agencies to develop new performance appraisal systems for the evaluation of employes. My amendment would require the Office of Personnel Management to review all the new appraisal systems.

The provision will insure compliance with merit principles and appropriate personnel standards.

Existing performance ratings in the civil service fail to measure the relative merits of employees. The rating system is a burden that withdraws more in effort than it returns in efficiency or morale. Performance appraisals must be conducted uniformly, efficiently, and objectively. They should tell the employee what management thinks of his present contribution and his future prospects.

They should help management to utilize its employees more fully.

My amendment will insure central approval of all new appraisal systems. In

ent system which the Senator from Illinois has criticized?

Mr. STEVENS. Mr. President, I would like to respond to the Senator from Illinois by saying that the first amendment deals with the centralization of the performance appraisal systems through a review by OPM.

My second amendment will require the establishment of objective criteria in the development of the systems.

The bill already permits the development of new performance appraisal systems. We would like to have those systems approved by OPM so that one agency is not developing a step backward while another one is developing a step forward.

The second amendment will give OPM the right to establish what are objective criteria for these performance appraisal systems.

I commented in my statement that I believe, having served in the civil service system, that the present review is a tremendous amount of paperwork which achieves very little for the management or for the employees.

We are trying to develop, and the bill instructs the agency to develop, new performance appraisal systems. But we think they ought to be coordinated. That is what this amendment will do.

The next one will set up important guidelines for the development of such systems.

Mr. PERCY. As I understand the amendment, there is an audit procedure for this policy control that is being introduced, where the Comptroller General will report periodically to Congress

to evaluate the system's fairness and general administrative suitability, so that when we look at performance appraisals of individuals, we can have them in such a way that we can take into account promotions that should be received, awards that should be received, and removals that should be made.

That is the essence of the system. But when you get a report that 95 percent of all the employees of the Federal civil service are satisfactory, where do you begin then? There simply is no real basis for that, and I commend our distinguished colleague for giving us the opportunity to point out the necessity of having a performance appraisal system for employees that is far more effective than we have under our present civil service system.

Mr. STEVENS. I thank my colleague.

Mr. President, I ask unanimous consent that my amendment be printed in the Record at this point. I ask unanimous consent that I may offer the second amendment so that the two amendments may be considered en bloc, inasmuch as they deal with the same subject.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment (UP No. 1768) is as follows:

On page 173, line 26, before "IT" insert the following: "The Office of Personnel Management shall review each performance appraisal system developed by any agency under this section and determine whether the performance appraisal system meets the requirements of this subchapter."

On page 174, between lines 6 and 7, insert the following:

"(c) The Comptroller General shall from time to time review on a selected basis per-

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14297

formance appraisal systems established under this subchapter to determine the extent to which such system meets the requirements of this subchapter and shall periodically report its findings to the Office of Personnel Management and to Congress.

UP AMENDMENT NO. 1769

(Purpose: Requires identification of critical elements in the evaluation of job performance)

Mr. STEVENS. Mr. President, I send the second amendment to the desk.

The PRESIDING OFFICER. The amendment will be stated.

The bill clerk read as follows:

The Senator from Alaska (Mr. STEVENS) proposes an unprinted amendment numbered 1769.

Mr. STEVENS. I ask unanimous consent that further reading of the amendment be waived.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. STEVENS. I ask that the amendment be printed in the RECORD at the conclusion of these remarks outlining its effect.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. STEVENS. Mr. President, I wish to submit an amendment to establish objective criteria in the development of performance appraisal systems. Senate bill 2640 requires agencies to develop new appraisal systems to evaluate the performance of all employees affected by the legislation. These systems for employee evaluation will be even more sig-

On page 169, line 24, after "system", insert the following: "which permit the accurate evaluation of job performance on the basis of criteria which are related to the position in question and specify the critical elements of the position".

Mr. RIBICOFF. Mr. President, as manager of the bill, I am willing to accept the amendments of the Senator from Alaska. I understand that the amendments are satisfactory to Senator PERCY as well.

Mr. STEVENS. I move, then, that the amendments be agreed to en bloc.

The PRESIDING OFFICER. The question is on agreeing, en bloc, to the amendments (UP No. 1768 and UP No. 1769) of the Senator from Alaska (Mr. STEVENS).

The amendments, en bloc, were agreed to.

UP AMENDMENT NO. 1770

(Purpose: To minimize Federal involvement in State and local government personnel matters)

Mr. STEVENS. Mr. President, I have a third amendment, which I send to the desk.

The PRESIDING OFFICER. The amendment will be stated.

The bill clerk read as follows:

The Senator from Alaska (Mr. STEVENS) offers an unprinted amendment numbered 1770.

Mr. STEVENS. I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

ing rules governing employees outside of the Federal system. The amendment will improve the administration and execution of Federal assistance programs and protect the right of State and local authorities to govern their own employees.

I hope, again, that the managers of the bill will find this injunction, which requires that particular OPM standards shall be prescribed in such a manner as to minimize Federal intervention in State and local personnel administration, acceptable to them.

Mr. RIBICOFF. Mr. President, the amendment of the Senator from Alaska is acceptable to the manager of the bill, and also to the ranking minority member (Mr. PERCY).

Mr. STEVENS. Mr. President, I ask unanimous consent that the amendment be printed in the RECORD following my remarks, and I move its adoption.

The PRESIDING OFFICER. Without objection, it is so ordered. The question is on agreeing to the amendment.

The amendment was agreed to.

Mr. STEVENS' amendment (UP No. 1770) is as follows:

On page 265, line 22, after the word "and" insert the following: "such standards shall be prescribed in such a manner as to minimize Federal intervention in State and local personnel administration and"

The PRESIDING OFFICER (Mrs. HUMPHREY). The Senator from Illinois.

UP AMENDMENT NO. 1771

(Purpose: Allowing the Board to make a finding in cases of prohibited personnel practices involving Presidential appointees)

1666

nificant than current applications. Personnel actions including removal have been strengthened by a streamlining of the appeals process. The basis for adverse action will be even more clearly centered on the employees' performance appraisal.

The appraisal systems currently used in civil service have been widely criticized. The fact that practically all evaluations result in a satisfactory rating is a symptom of the problem. The current system lacks some specific standards to meet the goals of personnel evaluation required in the civil service reform bill.

The reform bill requires agencies to develop new performance appraisal systems consistent with criteria to be established by the Office of Personnel Management. Yet the bill is silent on establishing one criterion of the greatest importance. Critical elements of the position must be clearly stated as basis for performance evaluation. Critical elements should be defined as those specific skill levels, responsibilities, or individual actions which will be evaluated in performance appraisal.

My amendment requires performance appraisal systems to identify the critical elements of a position. The employee must know the specific criteria which will be used in his evaluation. This amendment clearly states that intention.

Mr. President, I am hopeful that since we have considered these two amendments together, the managers of the bill will accept them en bloc.

EXHIBIT 1

Mr. STEVENS' amendment (UP No. 1769) is as follows:

The amendment is as follows:

On page 265, line 22, after the word "and" insert the following: "such standards shall be prescribed in such a manner as to minimize Federal intervention in State and local personnel administration and".

Mr. STEVENS. Mr. President, I am offering this amendment to reduce Federal involvement in State and local personnel administration. Senate bill 2640 currently permits Federal agencies to require, as a condition of participation in assistance programs, systems of personnel administration consistent with personnel standards prescribed by the Office of Personnel Management. These standards will apply specifically to the positions involved in carrying out the assistance programs.

Adherence to merit principles is desirable in all personnel systems, whether Federal, State, or local. But the imposition of other Federal personnel standards on State and local governments is often inappropriate.

Federal intervention in State and local personnel administration interferes with State sovereignty. The power to govern State and local employees is a right which properly belongs to State and local governments. Such power is indispensable to the separate and independent existence of these jurisdictions.

This amendment will require that the personnel standards, prescribed by the Office of Personnel Management and governing individuals administering assistance programs, be designed to minimize Federal intervention in State and local personnel administration. Its purpose is to limit the authority of the Office of Personnel Management in establish-

Mr. PERCY. Madam President, I send an unprinted amendment to the desk and ask for its immediate consideration. The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Illinois (Mr. Percy) proposes an unprinted amendment numbered 1771.

Mr. PERCY. Madam President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 162, strike out lines 18 through 20, and insert in lieu thereof the following:

"(1) If the Special Counsel determines, after any investigation under this section of any prohibited personnel".

On page 163, strike out lines 5 through 11.

On page 163, strike out lines 16 through 20, and insert in lieu thereof "Systems Protection Board."

On page 165, line 14, strike out "Any" and insert in lieu thereof "(a) Except as provided in subsection (b), any".

On page 166, line 9, strike out the end quotation marks and the end period.

On page 166, between lines 9 and 10, insert the following:

"(b) In the case of an employee in a confidential, policy-making, policy-determining, or policy-advocating position who was appointed by the President, by and with the advice and consent of the Senate, such employee shall be entitled to the hearing provided in subsection (a) but the Board shall issue no final order in such case. The Board shall transmit to the President, and make available to the public, its findings and recommendations for disciplinary action in such case."

Mr. PERCY. Madam President, the Governmental Affairs Committee put much effort into developing this civil service reform bill to absolutely insure against any form of destructive political manipulation of the Federal bureaucracy. We have provided for a strong Merit Systems Protection Board and Special Counsel, firm protections for "whistle-blowers," controls on political use of the Senior Executive Service, firm merit principles and prohibited personnel actions, all aimed in this direction.

One weakness in this area, however, remains. This concerns an exemption in the legislation under which Presidential appointees, those individuals appointed by the President and confirmed by the Senate to fill the highest positions in Government, about 900 individuals in all, are provided a special immunity from responsibility for wrongful actions.

My amendment is intended to plug this final loophole.

Title II of S. 2640 provides that any Government official who commits a "prohibited personnel practice" can be brought before the Merit Systems Protection Board on charges of abuse. If the Board finds the charges substantiated, it may impose disciplinary penalties ranging from reprimand to suspension to removal to civil fines to disbarment from Federal service for a period of up to 5 years.

The provision, however, specifically excludes Presidential appointees from this enforcement authority. If the spe-

sition to effectively police against abuses under the new system.

We have worked long and hard over past years to eliminate what is often a double standard of justice in this country under which the powerless bear the full brunt of law, while the powerful go free. Surely, we do not want to institutionalize such a double standard of justice into the civil service system.

I urge adoption of my amendment.

Mr. RIBICOFF. Madam President, Senator CHILES, who had opposed this amendment and prevailed in the committee seven to six, should be given the opportunity of presenting the opposite point of view. I supported in committee the position of the distinguished Senator from Illinois.

Mr. PERCY. Madam President, if the Senator will yield, the staff of the Senator from Illinois has notified Senator CHILES that the amendment is pending now and we have not had word back yet. Certainly, I want to give every opportunity to the distinguished Senator from Florida to comment on the amendment.

Mr. RIBICOFF. I suggest the absence of a quorum while we try to get Senator CHILES.

Mr. PERCY. Also, I think Senator MATHIAS wishes to speak on the amendment. He has been advised also that the amendment is pending.

The PRESIDING OFFICER. Does the Senator from Connecticut suggest the absence of a quorum?

Mr. RIBICOFF. I suggest the absence of a quorum, yes.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. RIBICOFF. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. PERCY. Madam President, the distinguished Senator from Maryland (Mr. MATHIAS) and the Senator from Illinois have discussed the pending amendment and the point has been made, and I think aptly so, that what we should do is attempt in every way possible to have an evenhanded approach toward the presidential and non-presidential appointments, taking into account that by the amendment the ultimate decision is to be made by the President in a case of presidential appointees.

In the wording of the amendment, as it now stands, it provides that "The Board shall transmit to the President and make available to the public its findings and recommendations."

The Senator from Illinois asks unanimous consent to modify the wording of the amendment to strike out the words "and make available to the public," and substitute the words "to the appropriate committees of the Senate." In some cases there may be more than one committee that has jurisdiction.

I so make such unanimous-consent request.

The PRESIDING OFFICER (Mr. SPARKMAN). The Senator has a right to

cial counsel comes across evidence that a Presidential appointee has abused the merit system, all he can do is to report his finding to the President. Not only is the MSPB denied the ability to impose sanctions—it is not even given an opportunity to judge whether the charges have a basis. The President is thus presented with unproven allegations, the official has no chance to attempt to clear his name, and the lines of responsibility for wrongful actions are left thoroughly blurred.

While it is true that, constitutionally, only a President can remove one of his appointees, and that good policy might dictate allowing the President to be the final judge of what discipline short of removal is best suited, a system under which a finding of guilt or innocence is never made would leave even the most well-intentioned President in a difficult situation, having no independent finding upon which to base his decision.

My amendment would remedy the problem by allowing the MSPB to hear charges of merit abuse brought against Presidential appointees and make a public finding on those charges, both as to whether the allegations are true and a recommendation as to what discipline is proper. It would then be up to the President to decide, at his own discretion, whether action is to be taken.

S. 2640 provides broad grants of management flexibility and administrative powers to agency heads, Presidential appointees, particularly under the Senior Executive Service. Without this type of authority, the MSPB would be in no po-

The assistant legislative clerk proceeded to call the roll.

Mr. MATHIAS. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MATHIAS. I ask unanimous consent that Cynthia Guley of the staff of the distinguished Senator from Wyoming (Mr. WALLOP) may have the privilege of the floor during this debate. I make a similar request on behalf of Betty McKay of the staff of the Senator from California (Mr. HAYAKAWA).

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MATHIAS. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. MATHIAS. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MATHIAS. Madam President, I ask unanimous consent that Mr. Michael Jones of the staff of the Senator from Massachusetts (Mr. BROOKE) may be permitted the privilege of the floor during this debate.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MATHIAS. I suggest the absence of a quorum.

modify his amendment. The unanimous consent is not required.

The amendment is so modified.

The amendment, as modified, is as follows:

On page 162, strike out lines 18 through 20, and insert in lieu thereof the following:

"(1) If the Special Counsel determines, after any investigation under this section of any prohibited personnel"

On page 163, strike out lines 5 through 11.

On page 163, strike out lines 16 through 20, and insert in lieu thereof "Systems Protection Board."

On page 165, line 14, strike out "Any" and insert in lieu thereof "(a) Except as provided in subsection (b), any".

On page 166, line 9, strike out the end quotation marks and the end period.

On page 166, between lines 9 and 10, insert the following:

"(b) In the case of an employee in a confidential, policy-making, policy-determining, or policy-advocating position who was appointed by the President, by and with the advice and consent of the Senate, such employee shall be entitled to the hearing provided in subsection (a) but the Board shall issue no final order in such case. The Board shall transmit to the President, and to the appropriate Committees of the Senate, its findings and recommendations for disciplinary action in such case."

Mr. PERCY. The purpose of this modification in the amendment is simply, first, to treat non-Presidential appointees and Presidential appointees the same with respect to making public the findings and recommendations. They should be handled exactly on the same basis.

But the Senate should have the ability to act and in the advice and consent authority that it has from the Constitu-

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14299

tion should know whether an appointee by the President, confirmed by the Senate based, generally speaking, upon the recommendation of the appropriate Senate committee with oversight authority, should know when charges have been made against a presidential appointee.

The wording of the amendment simply provides that the MSFB hear charges of merit abuse brought against presidential appointees.

The Senator from Illinois wishes to point out that this is not a charge that is made by an individual. This would be a charge made by the special counsel and only by the special counsel, and it would only be for a personnel abuse, and prohibited personnel practices are clearly defined in this legislation.

It could not be just an indiscriminate charge. It would have to be a charge that there has been either illegal discrimination; or solicitation in consideration of recommendations unless based on personal knowledge or a review of the record consisting of an evaluation of competence, character, loyalty, or suitability; or a charge of political coercion; or a charge of willful deception or obstruction of the right of an individual to compete for a Federal job; or a charge of influencing a person to withdraw from competition for Federal positions so as to improve or injure employment prospects of any applicant; or a charge by the special counsel of granting of any preference not authorized by law, rule or regulation; a charge of nepotism; reprisals against whistle blowers; reprisals for use

The Senator from Illinois brings to the attention of his colleagues a situation we have faced, and I mention it only because it has been in the headlines of the newspapers all across the country, involving GSA. Certainly this is a matter that should and must be dealt with as effectively as possible, and should there be such instances involving possibly a Presidential appointee, then it would seem to the Senator from Illinois that a system of fairness should prevail, and there should be a procedure that would be followed.

Surely I think that we, as the Senator said in his opening comments, have worked long and hard over past years to eliminate what is often a double standard of justice in this country under which the powerless bear the full brunt of law while the powerful go free. Surely we do not want to institutionalize such a double standard of justice into the civil service system.

It is for this reason that the Senator from Illinois offers the pending amendment which, I believe, would be an improvement in the bill before the Senate, S. 2640.

Mr. CHILES addressed the Chair. The PRESIDING OFFICER. The Senator from Florida.

Mr. CHILES. Mr. President, this matter in a slightly different form was presented to the Committee on Governmental Affairs and discussed in the Committee on Governmental Affairs. The committee, after deliberation on it, decided to delete this and to change this

tive examinations, people who do not have tenure, people who serve at the pleasure of the President of the United States, and when the President changes they change, and if the President wants to change them, they change, and these employees do not have the normal protections of the civil service employees nor are they normally brought before the Merit Board for disciplinary response because they are the charges of the President of the United States.

One reason, and a very strong reason, why I resist this is because I do not think you take away or you should take away from the President the responsibility for knowing that he is the one who must discipline his appointees; he is the one who is responsible for their misconduct, and I do not think we should put a buffer between the President and that responsibility.

Under provisions now, any charges referred to the special counsel, he can investigate those charges, he can report his findings, together with his investigations, together with those charges, to the President, and they become the responsibility of the President. That is where the responsibility should rest. It should not go to a merit board which is going to determine whether it thinks the President should do this or that, and the board sends its recommendations to the President and the President, according to this amendment, does not have to follow the recommendations. So you are not adding anything really to it because he does not have to follow the recommenda-

of appellate rights; or a charge of violation of law, rule, regulation, or merit system principles.

These charges cannot be lightly made. They would have been thoroughly investigated by the special counsel. He would have made such charges only after having adequate evidence that there is a reasonable basis for those allegations.

And then the amendment simply provides that when a Presidential appointee is involved that the MSPB shall have an opportunity to have a hearing exactly as with any other charge against any other civil servant in a supervisory capacity and to make a determination and a recommendation that those determinations and recommendations shall be sent to the President. In accordance with the terms of the Percy amendment it is at the President's discretion and the President's sole discretion as to whether action of any kind shall be taken.

But when the President is dealing with some, at the present time, 900 Presidential appointees, he would have available to him a proven procedure that is applicable to all civil servants. That would give him the benefit of that proven system so that he would then have available to him all of the facts taken in the same procedure which is applicable to other Federal supervisory employees, and would enable the President to make a determination as to what should be done.

Also, of course, the appropriate committee of the Senate would be given such information and could advise and counsel with the President in this particular case.

provision and provided, as in the bill now, that in the case of an employee in a confidential, policymaking policy-determining or policy-advocating position, who was appointed by the President, by and with the advice and consent of the Senate, that such complaint and statement and any response by the employee to such complaint shall be presented to the President in lieu of the board or administrative law judge referred to in paragraph (1) of this subsection.

I think to understand this we really need to try to determine what we are seeking to do in this civil service reform. What we need to determine is what the role of the special counsel is going to be, what the role of the merit board is, what the duties and responsibilities of the President are.

First, we are talking about civil service employees. That is what this bill is all about. When we talk about a special counsel who is going to provide protection for whistleblowers, we are talking about a special counsel who is going to prosecute people in the civil service system, the civil service employees against whom charges are brought before the Merit Board so we will know we can have faith and confidence in the civil service system.

But what we really are talking about and what we are dealing with here are civil service employees.

When we start talking about presidential appointees, we are talking about people now who are in that category who are appointed not out of the ranks of the registry, not after taking competi-

tions. He could say, "Well, the merit board looked at this and they took care of it, so I am free of the responsibility."

I do not think he should be free, if he has a Haldeman, an Ehrlichman, if he has someone else, who is doing something wrong, I think he should have the responsibility, and it is a political responsibility, it is his political appointment, and that responsibility should rest clearly with him.

On the other side, I think we want to be careful that we do not stop the Government from operating. If we go into a situation in which we are going to require a trial now before the merit board, the merit board ought to be protecting those civil service employees; the merit board ought to be weeding out those civil service employees who are not doing their job. It is civil service reform we are talking about, and it is the civil service system that needs looking after. That is what the public wants us to do. But we are going to give them an additional charge. We are going to give them a charge where, if the special counsel decides one of the Presidential appointees is doing something bad, they are going to sit as the judge over that case and they are going to listen to that case, and then they are to report their findings to the President.

I just see no real reason for it. If we are accomplishing anything, we are making it public, and if an employee is charged, that charge goes to the President, it goes to the press at the same time. People know, and it is up to the President to determine what he is going to do about that charge, and that polit-

S 14300

CONGRESSIONAL RECORD — SENATE

August 24, 1978

ical responsibility should rest solely with him.

On that basis, it seems to me we would be much better off to keep it that way and to keep that focus clearly on the President and not dilute it by putting some merit system in the middle and giving them something else to do which takes them away from their duties, their primary duties, of being the overseers of the civil service system itself.

Mr. SASSER. Mr. President, will the Senator from Florida yield?

Mr. CHILES. I yield.

Mr. SASSER. I ask unanimous consent that Mr. Alvin From of the Subcommittee on Intergovernmental Relations be allowed the privileges of the floor.

The PRESIDING OFFICER (Mr. HART). Without objection, it is so ordered.

Mr. SASSER. Mr. President, will the Senator from Florida yield further?

Mr. CHILES. I yield.

Mr. SASSER. Mr. President, I rise to agree with the distinguished Senator from Florida. This issue, which has been raised, was fully debated in the committee consideration of this bill, and I share the concerns of the Senator from Florida that the President of the United States should be solely responsible for the discipline of his own appointees.

Another consideration which I think is raised by this amendment of the distinguished Senator from Illinois is simply a question of whether or not such a statutory provision would be constitutional.

I believe fully that the executive branch and the President should be responsible to the American people and responsible to the legislative branch of the Government. But in making them responsible, I do not think we are acting in the best interests of this country, or that it is good public policy, to dilute the authority of the President of the United States to discipline and manage those whom he—or she—would appoint to high office in the Government of this country.

I yield back the remainder of my time.

Mr. CHILES. I yield the floor.

The PRESIDING OFFICER (Mrs. ALLEN). The question is on agreeing to the amendment.

Mr. PERCY. Madam President, I wish to comment very briefly, and then I am prepared for a vote. Since we apparently do have a difference on this issue, I would ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

Mr. PERCY. First, the Senator from Illinois would like to make it eminently clear that the Special Counsel is an appointee of the President, and it is only the charges made by the Special Counsel of the Merit System Protection Board that we are involved with. If that special counsel, a Presidential appointee, after investigation, makes charges against a Presidential appointee, then there may be a hearing before the Merit System Protection Board.

times, into an entirely new activity, and we are all well aware of the fact that we have today serving in Government people who have been in the private sector, who, for the first time, have assumed a government role.

Certainly the President cannot be expected, or the White House staff cannot be expected, to be a watchdog over everything that 900 people do.

All the Senator from Illinois is trying to do is provide a procedure because of that, because of the known abuses and the great problems we have, and the fact that we do find an erosion of confidence in government. It used to be that we looked upon the Federal Government as an area where there was little abuse of the kind that we had experienced in local politics. You would expect to see hanky-panky in the sheriff's office, but you would not expect to see problems with the FBI. You would to see problems in the State legislature of one State or another, but you very seldom ever did in the Congress of the United States. You might expect to see, in some local financial agency or in a State government, problems of conflicts of interest or payoffs or kickbacks, but you would not expect to see it in the General Services Administration of the United States of America.

But all of us, within the last 12 months, have seen that Congress is not immune, the FBI is not held guiltless in some of its activities because of the charges that have been made, and certainly the present Civil Service administration has not

A Justice Department opinion given the Committee on Governmental Affairs recognizes that there is some uncertainty, as a matter of fact considerable uncertainty, on this issue. This body ought to be careful, Mr. President, about inviting disputes on constitutional grounds.

Second, a statutory discipline procedure could delay or thwart a President's desire for summary discipline of an appointee whose conduct was inconsistent—I emphasize that, was inconsistent—with the merit system, and that prospect to the Senator from Tennessee is, frankly, very disturbing.

However, I believe the strongest argument is the one which has been so ably made by the distinguished Senator from Florida, and that is in favor of the provisions that are now present in the committee bill rather than those in favor of the amendment; that is, we must hold the President responsible for the actions of his personal advisers and his personal appointees, and to pass that responsibility off, even in this limited way, to a merit board or any other authority, merely gives the President an excuse or could give a President the excuse for not disciplining his closest advisers.

I find, Mr. President, that in this legislative body there still appears to the Senator from Tennessee to be a Water-gate hangover. This hangover appears to manifest itself in efforts of the legislative branch, on occasion, to take from the executive branch that which should be the executive branch's natural prerogative, and in some cases those prerogatives which are given the executive branch by the Constitution of the United States.

In the case of a non-Presidential appointee, the finding of the Merit System Protection Board is binding; the case ends there. In the case of a Presidential appointee, the Merit System Protection Board merely transmits to the President and to the appropriate committees of the Senate its findings and a recommendation, but the decision is entirely in the hands of the President of the United States.

Perhaps a comparable case—the parallel is not exact, of course, but when the President appoints an Attorney General, and that Presidential appointee makes charges against an individual in the Government who happens to be a Presidential appointee, he is not restricted at all. That individual is not above the law, and he must obey the law; and if the Attorney General and the Justice Department wish to take action, they certainly can.

In this case, the categories of charges are extremely limited. They must constitute a merit abuse, and they must be certain specific abuses as outlined by the Senator from Illinois.

So it would seem to me that by working with the distinguished Senator from Maryland, who fully supports this amendment, we have found a mechanism to help the President, because the tendency is, as we all know, in the real world in which we live, that when a new administration is being put together, the President, his advisers, and the campaign staff have to draw upon people who have worked with them, whom they have gotten to know in the campaign in one context. They take people up out of one activity of life and put them, many

been immune from the kind of problems that we have encountered at other levels of government.

This is merely to say that the public's erosion of confidence in the Federal Government must be arrested, and we have to take steps to see that we do not have a double standard, with one standard applying to most officials in positions of responsibility, but making immune 900 of the most powerful positions in the executive branch of the Government.

I should think the President would welcome and look forward to having the feeling that, a general counsel, appointed by him, confirmed by the Senate, through the Merit System Protection Board, once he had a basis for feeling that there had been violations of these particular areas, nepotism, illegal discrimination, et cetera, that he would have the protection that could be offered to his office, if charges were made by the special counsel, the Merit Systems Protection Board would have a hearing and have its findings sent to the President for his final and ultimate determination.

The Senator from Illinois is quite prepared to vote on the amendment, unless there are further comments.

Mr. CHILES. Mr. President, I would like to comment briefly. There was an allusion that this might be similar to the Attorney General being able to prosecute charges against any Presidential appointee.

There is a distinct difference there. The Attorney General is charged with being sort of the chief prosecutor of all crimes. He is not over civil service employees; he is not over a class of people.

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14301

His job, of course, is to be the chief law enforcement officer of the United States, for and against all of its citizens.

We are now dealing with the Merit Protection Board, which is to oversee and to look over charges for and against employees under civil service. That is a class of people; it is not all citizens, so there is a distinct difference in that regard.

As I pointed out earlier, it is my feeling that we are reaching a point here where we should allow the merit protection system to work its judgment for and against employees that are covered by the civil service. We should allow the special counsel to protect the whistleblower bringing charges against a wrongdoer under the civil service.

We are dealing with a class of people who are given special protections, protection against firing, protection against layoff. They also have to pass a merit exam to get that employment. We are taking them out of the old political system.

But we decided in the wisdom of many, many Congresses, and many past actions, that we will allow a President to appoint a certain number of appointees who are political appointees. At the same time, we make him directly responsible for those appointees. I think we need to continue that responsibility. I think it is very important that we continue that responsibility, that we do not set up a buffer that says, "You are going to allow the merit system to look in between."

Mr. STEVENS. I announce that the Senator from Tennessee (Mr. BAKER), the Senator from New Mexico (Mr. DOMENICI), the Senator from Nevada (Mr. LAXALT), and the Senator from New Mexico (Mr. SCHMITT) are necessarily absent.

The result was announced—yeas 60, nays 31, as follows:

[Rollcall Vote No. 363 Leg.]

YEAS—60

Allen	Glenn	Metzenbaum
Bayh	Gravel	Moyinihan
Bentsen	Hart	Muskie
Biden	Hatfield,	Nelson
Bumpers	Mark O.	Nunn
Burdick	Hatfield,	Packwood
Byrd,	Paul G.	Pearson
Harry P., Jr.	Hathaway	Fell
Byrd, Robert C.	Hodges	Proxmire
Cannon	Hollings	Randolph
Chiles	Huddleston	Ribicoff
Church	Humphrey	Riegle
Clark	Inouye	Sarbanes
Cranston	Jackson	Sasser
Culver	Kennedy	Sparkman
Danforth	Leahy	Stennis
DeConcini	Long	Stevenson
Durkin	Magnuson	Stone
Eagleton	Matsunaga	Thurmond
Ford	McGovern	Williams
Garn	Melcher	Zorinsky

NAYS—31

Bartlett	Hatch	Schweiker
Bellmon	Hayakawa	Scott
Brooke	Helms	Stafford
Case	Helms	Stevens
Chafee	Javits	Talmadge
Curris	Lugar	Tower
Dole	Mathias	Wallop
Goldwater	McClure	Welcker
Griffin	McIntyre	Young
Hansen		
Haskell	Beth	

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. STONE. Madam President, the same request for Craig Wolfson of my staff.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BUMPERS. Madam President, the same request for Karen Minton of my staff.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. WALLOP. Madam President, the same request for Cynthia Guiley of my staff.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DeCONCINI. Madam President, the same request for Shirley Wilson.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HARRY P. BYRD, JR. Madam President, the same request for Joan O'Neal.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. NUNN. Madam President, the same request for Robert Carragher.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEAHY. Madam President, the same request for Jeff Petrich of Senator DURKIN's staff and, for the duration of the day, Michael Choukas of my staff.

The PRESIDING OFFICER. Without objection, it is so ordered.

UP AMENDMENT NO. 1772

(Purpose: To protect whistleblowers within the Federal Government)

We do not give the special counsel these additional responsibilities.

If charges are made, and it is covered in this bill, if charges are made against one of these Presidential appointees, the special counsel who can look into those charges would report his findings to the President, and those findings are made public. We allow the public spotlight to determine whether the President handles those charges correctly or not. I think it is that political responsibility that is the strongest kind of force we could have to have the President act properly. At the same time, I would not relieve him of that responsibility at all.

Under the circumstances, Madam President, I move to table the amendment of the Senator from Illinois, and and I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the motion to lay on the table the amendment of the Senator from Illinois. The yeas and nays have been ordered and the clerk will call the roll.

The second assistant legislative clerk called the roll.

Mr. CRANSTON. I announce that the Senator from South Dakota (Mr. ABOUREZK), the Senator from Minnesota (Mr. ANDERSON), the Senator from Mississippi (Mr. EASTLAND), the Senator from North Carolina (Mr. MORGAN), and the Senator from Louisiana (Mr. JOHNSTON) are necessarily absent.

I further announce that, if present and voting, the Senator from North Carolina (Mr. MORGAN) would vote "yea."

NOT VOTING—9

Abourezk
Anderson
Baker

Domenici
Eastland
Johnston

Laxalt
Morgan
Schmitt

So the motion to lay on the table UP amendment No. 1771 was agreed to.

Mr. CHILES. Madam President, I move to reconsider the vote by which the motion to table was agreed to.

Mr. EAGLETON. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. I will yield for unanimous-consent requests.

Mr. HEINZ. Madam President, I ask unanimous consent that Pam Haynes of my staff be granted privilege of the floor during consideration of this.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. EAGLETON. Madam President, I ask unanimous consent that Emily Eiselman and Sally Brian be granted privilege of the floor during the pendency of this measure, as well as the tariff and tax bills.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. PELL. Madam President, I ask unanimous consent that William Young and John Rich of the Foreign Relations Committee staff be granted privilege of the floor.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. GLENN. Madam President, the same request for Walker Nolan of my staff.

The PRESIDING OFFICER. The amendment will be read.

The legislative clerk read as follows: The Senator from Vermont (Mr. LEAHY) proposes an unprinted amendment numbered 1773.

Mr. LEAHY. Madam President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

Page 158, line 22, strike "(J)" and insert in lieu thereof "(1)".

Page 158, line 25, strike "(J) (2)" and insert in lieu thereof "(1) (2)".

Strike page 159, line 12 through page 161, line 14, and insert in lieu thereof the following new subsection:

"(e) (1) The Special Counsel may receive information, the disclosure of which is not specifically prohibited by statute or Executive Order 11652, or any related amendments thereto, concerning the existence of any activity which appears to constitute a violation of law, rule, or regulation, or mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to the public health or safety. In such cases, the Special Counsel shall not disclose the identity of the person who disclosed the information without the consent of such person, unless the Special Counsel determines that such disclosure is unavoidable.

"(2) (A) Whenever the Special Counsel receives information of the type described in paragraph (1) of this subsection, the Special Counsel shall promptly transmit such information to the appropriate agency head.

(B) If, within fifteen days after the receipt of such information, the Special Counsel determines that there is a substantial likelihood that the information discloses a violation of law, rule, or regulation, or mismanagement, gross waste of funds, abuse of

authority, or a substantial and specific danger to the public health or safety, the Special Counsel may require the agency head to conduct an investigation and submit a written report within sixty days after the day on which the information is transmitted to the agency head or within such longer period of time as agreed to in writing by the Special Counsel: *Provided, however,* That the Special Counsel may require an agency head to conduct an investigation and submit a written report only where the information was transmitted to the Special Counsel by a present or past employee or applicant for employment in the agency which the allegation concerns.

"(3) Any report required under subparagraph (2) (B) of this subsection shall be reviewed and personally signed by the agency head and shall include—

"(A) a summary of the information with respect to which the investigation was initiated;

"(B) a description of the conduct of the investigation;

"(C) a summary of the findings of the investigation;

"(D) a listing of any violation or apparent violation of any law, rule, or regulation found during the course of the investigation; and

"(E) a description of any corrective action taken or planned as a result of the investigation, such as—

"(i) changes in agency rules, regulations or practices;

"(ii) restoration of any aggrieved employee;

"(iii) disciplinary action against any employee; and

"(iv) referral to the Attorney General of any evidence of criminal violation.

Any such report shall be sent to the Congress, to the President, and to the Special

Page 162, line 18, strike "(1) (1)" and insert in lieu thereof "(h) (1)".

Page 163, line 12, strike "(j) (1)" and insert in lieu thereof "(i) (1)".

Page 163, line 17, strike "(1) (2)" and insert in lieu thereof "(h) (2)".

Page 163, line 20, strike "(1) (2)" and insert in lieu thereof "(h) (2)".

Page 164, line 4, strike "(k)" and insert in lieu thereof "(j)".

Page 164, line 10, strike "(1)" and insert in lieu thereof "(k)".

Page 164, line 16, strike "(m)" and insert in lieu thereof "(1)".

Page 164, line 20, strike "(n)" and insert in lieu thereof "(m)".

Page 164, line 24, strike "(o)" and insert in lieu thereof "(n)".

Page 165, line 6, strike "(d), (e), (1) or (j)" and insert in lieu thereof "(d), (e), (h) or (1)".

Mr. LEAHY. Madam President, the amendment I have sent up is very similar to the amendment that was there before with some changes. It is a whistle-blowing amendment.

The amendment collapses two subsections of section 1206—subsection (e), concerning special counsel discovery of illegality, and subsection (f), dealing with special counsel referral of the substance of whistle-blower complaints—into a single new subsection (e).

Under the provisions of this amendment, the special counsel is authorized to receive allegations of violations of law, rule, or regulation, mismanagement, gross waste of funds, abuse of authority, or substantial and specific dangers to the

the agency head to inform the Special Counsel that no investigation has been conducted nor is planned. The Special Counsel informs the individual who made the allegation of what the agency head reports.

The Special Counsel is required to keep a public log of all noncriminal referrals and the reports of the agency heads about these referrals. This public log will not contain any classified or statutorily protected information.

Whenever the Special Counsel or the agency head finds evidence of criminal wrongdoing by an employee, they are under an obligation to report that information to the Attorney General and to the Directors of OPM and OMB.

The Leahy whistleblowing amendment will not change who can report allegations to the Special Counsel. It will not affect in any way the number of complaints which the Special Counsel is likely to receive. All of the provisions are identical to the language which was reported from the Senate Government Affairs Committee.

The Leahy amendment will also not change the protection from reprisals which are provided for in the committee bill.

When an agency conducts an investigation in response to a substantial likelihood request from the Special Counsel, a report of that investigation will be forwarded to the President, the Congress, and the Special Counsel. The Special

Counsel for transmittal to the complainant. Whenever the Special Counsel does not receive the report of the agency head within the time prescribed in subparagraph (2) (B) of this subsection, the Special Counsel may transmit a copy of the information which was transmitted to the agency head to the President and to the Congress together with a statement noting the failure of the agency head to file the required report.

"(4) Whenever the Special Counsel transmits any information to the agency head under subparagraph (2) (A) of this subsection, but does not require an investigation under subparagraph (2) (B) of this subsection, the agency head shall, within a reasonable time after the information was transmitted, inform the Special Counsel, in writing, of what action has been, or is to be taken and when such action will be completed. The Special Counsel shall inform the complainant of the report of the agency head.

The Special Counsel shall maintain and make available to the public a list of non-criminal matters referred to agency heads under paragraph (2) of this subsection together with the reports submitted by the heads of agencies; Provided, however, that nothing in this paragraph shall permit the public disclosure of any information the disclosure of which is specifically prohibited by statute or Executive Order 11652 or any related amendments thereto.

"(5) If, during the course of any investigation, the Special Counsel or the agency head determines that there is reasonable cause to believe that a criminal violation by an employee has occurred, such official shall promptly report such determination to the Attorney General and shall submit a copy of such report to the Director of the Office of Personnel Management and to the Director of the Office of Management and Budget."

Page 161, line 15, strike "(g) (1)" and insert in lieu thereof "(f) (1)".

Page 162, line 13, strike "(h)" and insert in lieu thereof "(g)".

public health or safety. All such allegations must be promptly transmitted to the head of the agency which the allegations concern. The identity of the complainant should not be disclosed by the special counsel except where it is unavoidable. In those cases, however, where the special counsel finds, within 15 days, that there is a substantial likelihood that the allegation is true, the special counsel can order an agency investigation. However, the special counsel can insist on an agency investigation only when the complainant is a present or recent past employee or applicant for employment in the department which the allegation concerns.

In "substantial likelihood" cases, the agency can conduct whatever type of investigation which, in its discretion, it determines to be appropriate. The agency must, however, report back to the Special Counsel, to the President, and to the Congress within a fixed time—60 days unless the Special Counsel extends—on the conduct and findings of the investigation. The Special Counsel transmits his copy of the report of the agency head to the individual who made the allegation, so that his identity need never be revealed. Where the agency head fails to report back within the fixed time, the Special Counsel may send the original allegation to the President and the Congress with a statement noting the failure of the agency head to respond.

In cases other than "substantial likelihood" cases, the agency head is under an obligation to inform the Special Counsel, within a reasonable time, of what action has been taken or is planned. Where the allegation is frivolous on its face, it would be appropriate for

Counsel will not review or comment on the report. He or she will provide the original whistleblower with a copy of the agency report. This will complete the circle since the whistleblower went to the Special Counsel to be assured, whenever possible, of anonymity. The President and the Congress can decide what, if any, action they consider appropriate having received the report.

Madam President, this matter has come up somewhat earlier than we expected. I should note that a Dear Colleague letter in support of this amendment was to have been circulated this afternoon. I would like to share that Dear Colleague letter and list our co-sponsors:

COMMITTEE ON APPROPRIATIONS,
Washington, D.C., August 24, 1978.

DEAR COLLEAGUE: When the Senate considers S. 2640, the Civil Service Reform Act, we intend to offer an amendment to strengthen the whistleblower protections. This proposal will assure that the charges raised by whistleblowers—those federal employees who disclose illegality, waste, abuse, or dangers to public health or safety—are fully investigated. We ask you to join with us in establishing a mechanism for the handling of whistleblower complaints which will result in the systematic weeding out of wronged from the federal service.

The Governmental Affairs Committee strengthened the protections accorded federal employees who go public with evidence of illegality, mismanagement, waste of funds, or dangers to public health or safety. The Committee should be praised for its efforts to safeguard the free speech rights of federal employees. We do not believe, however, that the committee went far enough.

Although employees are free, under the committee's bill, to publicly disclose impropriety, no dissent channel is established so that employees can seek internal resolu-

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14303

tion of allegations. Our amendment seeks to assure that employees have a safe place to go outside their agency where their allegations will be taken seriously. We hope to encourage employees to give the government the first crack at cleaning its own house before igniting the glare of publicity to force correction. We do not want to limit the employees' rights to speak out when they see wrongdoing; we do want to assure them that the government has a commitment to eliminating the wrongdoing.

The amendment would empower the Special Counsel of the Merit System Protection Board to receive complaints of violations of law, rule, or regulation, mismanagement, gross waste of funds, abuse of authority, or substantial and specific dangers to the public health or safety. The Special Counsel would protect the employee by preserving his or her anonymity. All complaints would be forwarded to the head of the agency involved, but for those complaints with a substantial likelihood of validity the Special Counsel could order a sixty day agency investigation. The agency would report on its findings to the President, so he could exercise his executive responsibilities; to the Congress, so it could fulfill oversight obligations; and to the Special Counsel, so he could transmit the report to the employee who filed the complaint.

Hence, the Special Counsel serves first and foremost as the protector of employees' rights and as a conduit to prevent reprisals and to help agencies purge wrongdoing. The Special Counsel is not set up as an all-powerful overseer: He lacks any power to investigate or to review the investigation of an agency. Rather, we assume that authorizing the President and the Congress to review agency reports will force agencies to take corrective action.

information or have any questions please contact David Julian (x42398).

Sincerely,
Bob Dole, William Proxmire, Edward M. Kennedy, Charles H. Percy, Robert T. Stafford, Clalborne Pell, James Abourezk, Howard Metzenbaum, Patrick J. Leahy, Muriel Humphrey, Dennis DeConcini, Richard Lugar, Dick Clark, Donald Riegle, Henry Bellmon, John Melcher, and Orrin Hatch.

Mr. RIBICOFF. Will the Senator yield?

Mr. LEAHY. Certainly.

Mr. RIBICOFF. Madam President, I want to take this opportunity to extend praise to the distinguished Senator from Vermont for his early and hard work to protect whistleblowers.

The committee's action in strengthening the protection of whistleblowers came primarily because of the work that the Senator from Vermont and the Senator from Minnesota (Mrs. HUMPHREY) contributed.

I do believe that this amendment improves the protection for whistleblowers.

I want to commend the Senator from Vermont and, as manager of the bill, I am more than pleased to accept the amendment of the Senator from Vermont.

Mr. LEAHY. I thank the Senator.

Mr. METZENBAUM. Madam President, I rise to support the amendment of my distinguished colleague from Vermont (Mr. LEAHY). He has worked diligently in the development of his own legislation to provide greater protections

certain that such financial hardship does not compare to the enormous psychological costs to employees who are the objects of reprisals.

Federal agencies and departments will benefit from this amendment, because they will be able to cure waste, mismanagement, violations of law, and dangers to health and safety without the glare of publicity that can accompany whistleblowing. If appropriate governmental bodies fail to act to solve such problems, the Congress and the President will be alerted so they can initiate the necessary reforms.

I commend my good friend from Vermont for this innovative approach to protecting whistleblowers when they reveal governmental deficiencies and to encouraging the most effective and efficient Federal bureaucracy possible.

Mr. LEAHY. Madam President, I appreciate the comments of the Senator from Ohio. I appreciate very much the comments of the distinguished Senator, the chairman (Mr. RIBICOFF).

I might say that Senator RIBICOFF has been in the forefront of this effort long before I came to the U.S. Senate. It would have been impossible for me to have put together this amendment without his help and diligence, the help of the ranking minority member (Mr. PERCY), and the others I have named here today. We all have worked very closely together.

I might say, also, that Senator CHILES, who has shown a great deal of interest in this matter, has worked closely with

Adoption of this amendment will vindicate the Code of Ethics for Government Service, established by Congress twenty years ago, which demands that all federal employees "Uphold the Constitution, laws, and legal regulation of the United States and all governments therein and never be a party to their evasion" and "Expose corruption wherever discovered." Under our amendment, an employee can fulfill these obligations without putting his or her job and career on the line. In fact, an employee could force agency self-correction without ever going public, under this amendment.

Our amendment creates a systematic method of eliminating various forms of wrongdoing from the federal government. Historically, changes are made only after a scandal is disclosed. This method of rooting out corruption is hit or miss, scatter-shot. The amendment allows for selfcleaning to take place on a regular, continual basis. If vigilant government workers are around, illegalities need no longer swell and fester for years before discovery. Mismanagement, abuse, and waste of funds can be promptly discovered and corrected with the help of dedicated federal employees. In the long run, we are certain that this early discovery and rectification will result in more efficient, less bloated government. Isn't the message we have been getting from the country in the last few months precisely this—that people want an honest and emicent government that works?

Finally, this amendment can assure that the type of over politicization which some fear will result from S. 2640 is nipped in the bud. Disclosure can call a halt to a President misusing agency personnel to perform campaign work or to advance certain favored special interests. This amendment provides the counterweight to the increased management flexibility provided for in the Civil Service Reform Bill.

We seek your cosponsorship and support on our amendment. If you need additional

for whistleblowers. I commend him for his efforts in this area. I, too, submitted a bill to this Congress which would have provided judicial remedies for Federal employees who suffer reprisals after exposing illegal or wasteful governmental activities. My work in this area convinces me that the amendment now offered by my colleague from Vermont would establish the best possible mechanism for protecting whistleblowers. It would allow the special counsel of the Merit Protection Board to order an investigation of allegations of illegal conduct or gross waste in the Federal Government without revealing the name of the complaining employee. This approach would protect whistleblowers from reprisals while exposing deficiencies in the way the Government and its employees operate.

I am sure there are a number of Federal employees today who would speak out about abuses of authority if it were not for the real danger that they would be subjected to harassment, financial loss, or damage to their careers. The country needs conscientious civil servants who care enough to criticize deficiencies and want to improve the Federal Government's ability to meet its obligations to the citizenry. Providing remedies to employees only after some overzealous superior has acted to discipline outspokenness is not the answer. The costs are too great even when the whistleblower eventually prevails. Ernest Fitzgerald, and those who have helped him, spent over half a million dollars to gain job reinstatement after Fitzgerald disclosed a \$2 billion cost overrun in the C-5A program. And, I am

us today. The final bill is a result of the cooperation among Senator RIBICOFF, Senator PERCY, Senator CHILES, Senator HUMPHREY, myself, and others. We have a bill on which we all agree.

I yield to the Senator from Illinois.

Mr. PERCY. Madam President, as a cosponsor of the Leahy amendment, the Senator from Illinois knows of no objection on this side of the aisle, and the amendment is acceptable.

I commend my distinguished colleague for his leadership in this area.

Mr. LEAHY. I understand the committee is going to accept this amendment, and I am perfectly willing to yield back the remainder of my time.

The PRESIDING OFFICER. There is no time limitation.

Mr. RIBICOFF. As I said, Madam President, the amendment is acceptable to the manager of the bill and the ranking minority member.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment was agreed to.

Mr. LEAHY. Madam President, I move to reconsider the vote by which the amendment was agreed to.

Mr. RIBICOFF. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The bill is open to further amendment.

● Mr. DOLE. Mr. President, as an original cosponsor of this amendment, I am pleased to rise in support of this long-needed protection.

Mr. President, this amendment will provide Federal employees an opportu-

ny to speak out when they witness governmental waste, inefficiency, and illegality, without fear of reprisal.

WHISTLEBLOWER PROTECTION

Mr. President, one of the most important aspects of this amendment is the encouragement of Federal employees to disclose illegality, waste, abuse, or dangers to public health or safety, without the fear of reprisal. As we all know, Federal employees who have been aware of wrongdoings have not felt comfortable or safe in complaining within their own agencies. Unfortunately, those who have and have been punished for their whistleblowing, clearly points to the need for a separate, independent agency to receive and process these allegations in a safe, confidential, and in an expeditious manner.

WHISTLE BLOWING: LET US PROTECT ITS USEFULNESS

Mr. President, while I wholeheartedly endorse the concept behind this amendment, that is, to encourage Federal employees to disclose acts of governmental wrongdoings, and to protect the employees—the whistle blower—from retaliation, I want to make it very clear that this is not an open invitation to any disgruntled Federal employee or misinformed citizen to make false allegations of wrongdoings by a Federal agency.

Mr. President, in this regard, our amendment would empower the special council of the Merit System Protection Board to receive complaints of govern-

On page 175, line 15, strike out “, and” and insert in lieu thereof: “; or”.

“(D) an individual whose position is in the Foreign Service of the United States; and”.

On page 178 line 14, strike out the period and insert in lieu thereof: “; or”.

“(5) whose position is in the Foreign Service of the United States.”.

On page 203, line 2, immediately after “position”, insert: “(other than a position in the Foreign Service of the United States)”.

On page 203, line 17, strike out “Except for a position in the Foreign Service” and capitalize “the” immediately after the deleted phrase.

On page 258, line 13, immediately after “individual” insert “(other than an individual in the Foreign Service of the United States)”.

Mr. PELL. Mr. President, this amendment is cosponsored by Senators GLENN and JAVITS. I ask unanimous consent that their names be added as cosponsors.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. PELL. Madam President, what this amendment does as modified—am I correct in saying that it is modified?

The PRESIDING OFFICER. It is modified.

Mr. PELL. Madam President, this amendment, as modified, exempts from the civil service reform bill the Foreign Service officers, who are a small group with their own personnel system, their own grievance procedures, their own selection-out system, a system that does not apply to the CIA or the FBI.

The PRESIDING OFFICER. Will the Senator suspend?

The Senate will be in order. The gal-

live and work abroad for a substantial part of one's career.

It is not necessary for Foreign Service personnel to have a separate avenue of appeal to the proposed Merit Systems Protection Board. Neither is it necessary to give the Board and its special counsel authority to investigate merit violations in the Foreign Service system, nor authority to stay an adverse Foreign Service personnel action. To do so would be to duplicate existing appeal rights and related investigatory authority—the exact opposite of the much advertised streamlining purpose of this civil service reform bill.

Madam President, the fundamental change in the Foreign Service personnel system about which I spoke at the outset could result from the inclusion of Foreign Service personnel under the proposed Senior Executive Service that would be established by title IV of this bill.

Title IV adapts principles applicable to the Foreign Service and military systems from their founding—and, of course, the military is not covered in any way by this bill. These principles are the rank-in-person rather than rank-in-position pay system and transferability at the convenience of the Government rather than the individual.

The Senior Executive Service would provide a rank-in-person system which allows flexible assignments, but only at the senior level and covering all agencies. This program is fundamentally incompatible with the existing personnel

mental wrongdoings. The special council would protect the employee by preserving his or her anonymity. It is my understanding that all the complaints would be forwarded to the head of the agency involved, and that for those complaints with a substantial likelihood of validity, the special council could order a 60-day agency investigation. The agency would then report on its findings to the President, enabling him to exercise Executive responsibility to the Congress so it could fulfill oversight obligations; and to the special counsel so he could transmit the report to the employee who filed the complaint.

Mr. President, I believe that the American people will be the prime beneficiaries if this amendment is adopted. The American people are entitled to the best Government and the best officials their tax dollars pay for.●

AMENDMENT NO. 3514, AS MODIFIED

Mr. PELL. Madam President, I call up my printed amendment and ask that it be stated and modified as indicated.

The PRESIDING OFFICER. The amendment, as modified, will be stated. The legislative clerk read as follows:

The Senator from Rhode Island (Mr. PELL) proposes an amendment numbered 3514.

The amendment, as modified, is as follows:

On page 133, line 21, immediately before the semicolon, insert "the Foreign Service of the United States".

On page 167, after line 7, insert the following new section:

"§ 1308. Exception for the Foreign Service
"This chapter shall not apply to the Foreign Service of the United States."

eries will please be quite.

Mr. PELL. Madam President, this bill would make a fundamental change in the Foreign Service career personnel system and would reduce the authority of the Secretary of State to administer the system. These are not changes that should be made lightly, without full consideration, and I do not believe they have received such consideration. Certainly the Foreign Relations Committee has not had an opportunity to hold hearings on this bill.

Accordingly I propose this amendment to exempt Foreign Service personnel from several provisions of this bill to avoid possible inadvertent long-term damage to the Foreign Service.

This is the civil service reform bill. The fundamental problems addressed by this bill are related primarily to the Government-wide civil service system administered by the Civil Service Commission. The employees involved are in the general schedule—GS—pay system.

There is no need to cover the Foreign Service under this bill, because it has its own set of statutory merit principles, very similar to those in this bill. It is administered by the Secretary of State independently from the Government-wide civil service, general schedule system. It has its own legislated grievance system—the only such system in the Government of which I am aware. Foreign Service employees with a grievance can appeal to the independent Foreign Service Grievance Board and get a fair hearing. That Board is set up to deal with the problems that may arise in the context of the Foreign Service requirement to

structure of the Foreign Service, which operates on a rank-in-person system with mobility among jobs throughout an entire career.

The pursuit of our national objectives in the areas of foreign policy requires a Foreign Service system which trains people in diplomacy throughout their careers, and which can retain those individuals in the Foreign Service in senior positions. The career concept of the Foreign Service also depends upon the availability of senior positions for those personnel who spend their professional lives developing the necessary skills and attributes to fill them. Those senior level jobs are an integral part of the total Foreign Service personnel system and should not be treated differently.

Foreign Service officers are hired not to fill a particular post, but for their long-term career potential. They are promoted by merit from rank to rank as they grow in experience. The system is disciplined, and characterized by frequent transfers from job to job and country to country; it is designed not just to insure that necessary tasks are performed, but to develop leaders through increasing challenges. The system prepares and screens the best of officers for service at ambassadorial and other high levels.

I note that the intelligence services which also have their own career personnel systems in the Excepted Service are exempted from the Senior Executive Service, and I support that position. My amendment would add the Foreign Service of the United States to the list of personnel systems and agencies to be

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14305

exempted from title IV of the civil service reform bill and from other titles and sections of this bill that would lead to duplication or that would be potentially harmful to the Nation's ability to effectively carry out its foreign policies and programs.

The effect of these amendments will be to maintain the present, separate legislative base for the modern Foreign Service of the United States which the Congress has taken great care to preserve over the years since the passage of the Rogers Act of 1924 and more recently the Foreign Service Act of 1946.

In the Foreign Service Act of 1946, Congress introduced a new personnel structure to replenish the war-depleted ranks of the Foreign Service "through entry at the bottom on the basis of competitive examination and advancement by merit to positions of command." * The almost military tone of that passage from the report indicates that the congressional authors had in mind a highly disciplined, tightly unified service running clear to the top positions in our foreign affairs activities.

The necessity for such a disciplined and unified service is no less strong today. Unless the civil service reform bill is amended, the Foreign Service would face the same problem that would confront the military services if their senior ranks above colonel and captain were put into a separate organization. A disciplined service has to be a unified service. The congressional founders of the

Mr. PELL. It keeps them as they are, as a separate service. This does not apply to the secretaries and staff people who would be under the system. It applies only to people who have commissions signed by the President or the Secretary of State as Foreign Service officers.

Mr. GOLDWATER. I see no objection. They are far better protected than any people under civil service.

The PRESIDING OFFICER. The question is on agreeing to the amendment, as modified.

The amendment, as modified, was agreed to.

Mr. PELL. Madam President, I move to reconsider the vote by which the amendment was agreed to.

Mr. GLENN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. Is there further amendment?

Mr. RIBICOFF. I think the Senator from Pennsylvania has an amendment.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. METZENBAUM. Madam President, will the Senator yield for a unanimous-consent request?

Mr. HEINZ. I yield.

Mr. METZENBAUM. Madam President, I ask unanimous consent that Marc Asch and Ellen Bloom have the privilege of the floor during the consideration of this measure.

The PRESIDING OFFICER. Without

DUAL PAY FOR RETIRED MEMBERS OF THE UNIFORMED SERVICES

SEC. 306. (a) Section 5532 of title 5, United States Code, is amended—

(1) in subsection (b)—

(A) by inserting after "entitled" the following: ", except as provided in subsection (c),"; and

(B) by striking out "or retirement" each place it appears;

(2) by inserting after subsection (b) the following new subsection:

"(c) (1) If any member or former member is receiving retired pay and is employed in a position the annual rate of basic pay for which, when combined with the member's annual rate of retired pay (reduced, in the case of a retired officer of a regular component of a uniformed service, by an amount equal to the annual rate of the reduction under subsection (b) of this section), exceeds the rate of basic pay then currently paid for level V of the Executive Schedule such member's pay for such employment shall be reduced by an amount computed under paragraph (2). The amounts of the reduction shall be deposited to the general fund of the Treasury of the United States.

"(2) The amount of each reduction under paragraph (1) for any pay period in connection with employment in a position shall be equal to the retired pay allocable to the pay period (reduced, in the case of such an officer, by an amount equal to the amount of the reduction under subsection (b) of this section for such period), except that the amount of the reduction may not result in the amount payable for the pay period, when combined with the retired pay allocable to the pay period (as so reduced in any such case), being at a rate less than the rate of basic pay then currently paid for level V

Foreign Service saw that, and my amendments will serve to keep intact the structure which they considered so important to conduct of our foreign relations.

For those reasons, it seems sensible that this amendment should be accepted.

I have been in conversation with the manager of the bill and the ranking minority manager of the bill, and they have indicated some support.

Mr. RIBICOFF. Madam President, the amendment of the distinguished Senator from Rhode Island is acceptable to the manager of the bill.

Mr. PERCY. Madam President, the distinguished Senator from Rhode Island, I think, is the only member of the U.S. Senate who has served in the Foreign Service and we look to him for guidance and counsel many times. I find the amendment acceptable, and I know of no objection.

Mr. GOLDWATER. Madam President, if the Senator will yield, I really do not understand what this amendment does. Will the Senator explain it?

Mr. PELL. It gives the Foreign Service officer corps, who have their own personnel system, their own grievance procedure system, their own promotion system, based on promotion up or selection out—very like the military—the same exemption that the CIA, the FBI, and the military services enjoy under the bill as drafted.

Mr. GOLDWATER. In other words, to put them under Civil Service?

Mr. PELL. No, just the opposite.

Mr. GOLDWATER. They are taken out?

*HR Rep. No. 2508, 79th Cong., 2nd Session (1946)

objection, it is so ordered.

Mr. GOLDWATER. Madam President, will the Senator yield for a comment?

Mr. HEINZ. I yield.

Mr. GOLDWATER. Madam President, I have listened to these requests for staff members to be on the floor. I have made the interesting observation that there are more staff members on the floor than elected Senators of the United States. Maybe we had better include the Senators under Civil Service and let the staff take the floor.

[Laughter.]

The PRESIDING OFFICER. Is the Chair supposed to comment?

[Laughter.]

The Senator from Pennsylvania.

UP AMENDMENT NO. 1773

(Purpose: Placing restrictions on dual pay for retired military members serving as civilian employees of the Government)

Mr. HEINZ. Madam President, I send to the desk an amendment on behalf of myself, Senator EAGLETON, and Senator PERCY.

The PRESIDING OFFICER. The amendment will be stated.

The second assistant legislative clerk read as follows:

The Senator from Pennsylvania (Mr. HEINZ) proposes an unprinted amendment numbered 1773.

Mr. HEINZ. Madam President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 198, after line 25, insert the following:

of the Executive Schedule.”;

(3) by redesignating subsection (c) as subsection (d);

(4) in subsection (d), as so redesignated—

(A) by striking out “subsection (b) of”;

(B) by striking out “or retirement”;

(C) by striking out “a retired officer of a regular component of a uniformed service” and inserting in lieu thereof “a member or former member receiving retired pay”; and

(D) in paragraph (1), by striking out “whose retirement was” and inserting in lieu thereof “whose retired pay is computed, in whole or in part,”; and

(5) by striking out subsection (d), as in effect before the effective date on this subsection.

(b)(1) The heading for section 5532 of title 5, United States Code, is amended to read as follows:

“§ 5532. Employment of retired members of the uniformed services; reduction in pay”.

(2) The item relating to section 5532 in the analysis for chapter 55 of title 5, United States Code, is amended to read as follows:

“5532. Employment of retired members of the uniformed services; reduction in pay.”.

(c) Section 5531 of title 5, United States Code, is amended—

(1) by striking out “and” at the end of paragraph (1);

(2) by striking out the period at the end of paragraph (2) and inserting in lieu thereof a semicolon; and

(3) by adding at the end thereof the following new paragraphs:

“(3) ‘member’ has the meaning given such term by section 101 (23) of title 37; and

“(4) ‘retired pay’ means—

“(A) retired pay, as defined in section 8311 (3) of this title, determined without regard to subparagraphs (A) through (D) of such section 8311 (3); or

“(B) a pension or compensation paid under laws administered by the Veterans’ Adminis-

tration after a waiver of retired pay pursuant to section 3105 of title 38."

(d) The amendments made by this section shall apply only with respect to pay periods beginning after the effective date of this Act and only with respect to members who first become eligible for retired pay (as defined in section 5531 (3) of title 5, United States Code (as amended by this section), after the effective date of this Act except that the provisions of section 5532 (b), as amended by this Act, shall apply to any officer of a regular component of a uniformed service irrespective of the date he became eligible for retired pay.

Mr. HEINZ. Madam President, the purpose of this amendment is to place certain restrictions on dual pay for retired military members serving as civilian employees of the Government at the highest levels.

What our amendment does is to address the problem of double dippers—namely, those military retirees collecting pensions who are employed by and are earning salaries from the Federal Government.

Currently, only retired regular military officers have their total earnings limited. Any such retiree who is employed by a Federal agency will have his military pension reduced by approximately \$4,000 plus one-half of the remainder. This is current law. But because this applies only to retired regular officers—and exceptions are permitted among even these—we currently have thousands of military retirees who are simultaneously getting paid twice by the Federal Government.

ined and considered by Congress; but there should be no doubt in our minds that it is not in the national interest to have at Executive Level V, at the Deputy Assistant Secretary level, at a policy level or position, somebody who would be identified as a double dipper, paid for at taxpayer expense.

Madam President, it is my understanding that the administration has no objection to this amendment.

Indeed we have attempted to work closely with them. I am tempted to say that they support it, but I cannot say that simply because I have not had the opportunity this afternoon to discuss with them personally their support. But my understanding is that they did support the House amendment and that this amendment actually does a somewhat better job from the administration's point of view than does the House amendment.

Mr. GOLDWATER. Madam President, will the Senator yield to me?

Mr. GLENN. Madam President, will the Senator yield for a question?

Mr. HEINZ. Let me first yield to the Senator from Arizona and then I will be happy to yield to my good friend from Ohio.

Mr. GOLDWATER. Madam President, I understand what my friend from Pennsylvania is getting at, and I really think it is time we take a proper long look at this so-called double dipping.

If the Senator wants to include me I can be included and so can many Members of this body and the other body.

into this whole field. I say I think we are wrong in attacking the man in uniform or former man in uniform just because he happens to have gathered knowledge while he was on duty and knowledge that has to be used by the Government is going to be penalized because people look rather shabbily at the man who was in the service of his country.

I hope that when the Senator resumes his studies next year, we cover the whole field including the man in civilian clothes along with the man in uniform.

Mr. HEINZ. Let me say to my good friend from Arizona that I think he makes an excellent point.

First, as a former man in uniform, a former enlisted man, a former member of the Air Force Reserve, and I think the Senator from Arizona still can claim that he is an active member of the Air Force Reserve—maybe he is now retired—but let me say that I share the sentiments about our military myself. I am the stepson of a retired career military officer. My stepfather went to Pensacola and Annapolis, and served in the Navy for 20 years and worked very hard for the Federal Government in that capacity. I have nothing but the highest respect for our men in uniform, and I know the Senator from Arizona is well aware of that.

I happen also to be the only Vietnam veteran in this Chamber. I did not actually fight in Vietnam. I did not go there. But I served in our Armed Forces during that period.

This spring, the House of Representatives held extensive hearings on the problem of dual compensation, and we were shocked to learn that, as a result of our dual compensation law, there are nonetheless more than 200 retirees earning a combined income of between \$60,000 and \$80,000 annually, paid for by the Federal Government, and that means taxpayers. There are another estimated 2,500 retirees earning an average of \$48,000.

The amendment that Senator EAGLETON, Senator PERCY, and I are proposing will limit the total combined income for all military retirees, except those disabled in combat, to the pay limit of Executive Level 5, which currently is \$47,500. It will extend to Reserve officers and enlisted personnel and those who could be excepted under current law.

My amendment would be prospective—I emphasize that—and would not penalize any of those retirees currently employed by the Federal Government in civilian capacities.

The House version of the Civil Service Reform Act, H.R. 1128, contains a similar provision, which provision is estimated by the Congressional Budget Office to save approximately \$56 million over the next 5 years.

Madam President, this amendment is an extremely modest but nonetheless necessary and reasonable first step in addressing the complex issues of dual compensation.

I feel that the issue as a whole needs a great deal more further study and deep consideration, so that more extensive resolutions to this problem can be exam-

But all of the attention is focused on the former man in uniform. One-tenth of 1 percent of the people employed by the Federal Government were formerly officers of the military. Most of these people were enlisted men making very low salaries who now have an opportunity, because of their experience, to make a little more money than their retired pay.

I am not complaining about the Senator's efforts to look into the double dipping, so called, of the military man, but I wish to raise the question about the former Members of Congress who have been important members of committees who go to work in big law firms in Washington and draw down fees that are very exorbitant mostly because of their former association with, say, the Interior Committee or the Judiciary Committee, or who have many friends left on committees on the Hill to whom they can go and get favors.

While that does not come under the same classification, I am getting a little sick and tired of hearing the man in uniform kicked around because he has the expertise, he has the know-how, that certain agencies of Government have to have and they cannot find it anyplace else. Yet at the same time we allow, without any comment, former colleagues of ours on retired pay to take jobs with foreign countries, to take jobs representing giant concerns, where they can use their influence with former friends in Congress to accomplish things.

So I suggest to my friend from Pennsylvania that when he resumes the study of so-called double dipping that we get

I think the Senator is correct that this is a broad issue. Indeed, this is the reason that we have a commission that has been asked to study this in some detail; namely, the President's Commission on Military Compensation, and it is our hope that that commission will finish its work shortly.

This amendment, I point out once again, is prospective in its application. It will not hurt a single Federal employee, even those who might be earning \$80,000 from their combined pay and pension. We do not touch those people, and we do not intend to because that would be breaking a contract implied, I believe, that we have, and we will in no way touch, even prospectively, any of our disabled military, and I hope that the Senator from Arizona feels that the amendment is wise and just in that regard.

I thank my friend.

Mr. GLENN. Madam President, will the Senator yield for a question?

Mr. GOLDWATER. The Senator is not making it retroactive.

Mr. HEINZ. The Senator is entirely correct. We are not making it retroactive.

Mr. GOLDWATER. That is good.

Mr. GLENN. Madam President, will the Senator yield for a question?

Mr. HEINZ. I am very pleased to yield to the Senator from Ohio.

Mr. GLENN. I thank the Senator from Pennsylvania.

On page 5 of the amendment I note that that whole section says, ". . . after effective date of this Act, except that the provisions of section 5532(b), as amended, by this Act, shall apply to

August 24, 1978

CONGRESSIONAL RECORD—SENATE

S 14307

any officer of a regular component of a uniformed service irrespective of the date he became eligible for retired pay."

Can the Senator illuminate a little for me what section 5532(b) is?

Mr. HEINZ. Section 5532(b) is the existing civil service law, and it is not the intention of this amendment to change the existing civil service law at all, and it does not.

The section that the Senator from Ohio refers to is to ensure that we do not repeal section 5532(b) through any action that we take here. It is the existing law.

Mr. GLENN. Is it the one where a retired regular officer comes to the Senate, he loses under existing law about a fourth or a third of his retirement pay? Is that the part that is affected here that would continue the same way?

Mr. HEINZ. I regret that I do not have the civil service code in front of me. I could tell the Senator, though, how it reads. Essentially, it says that if you have a pension and are a Federal employee, you will be entitled to your retirement benefit and retirement pay—what is it—approximately \$4,000—it is \$2,000 adjusted by the cost of living since that law was enacted, which is quite a while ago, plus one-half of the remainder of your retired pay. I do not know, I have to say to the Senator, whether that is the section that the Senator is referring to, but that is what the section does.

Mr. GLENN. This will not change existing law, then?

Government, their Government lives up to it, and that is it.

But if we would do anything that was retroactive, I think we would be breaking faith with people who put up with lesser pay at that time. My kids did with lesser things than I might have been able to buy for them at that time, and my family, because I was willing to accept this deferred pay concept.

I want to explain this because I think a lot of people believe that somehow there is a big ripoff occurring here. I ask the Senator from Pennsylvania if this study should be of all different aspects of double-dipping, whether it comes from retired Members of Congress who may come back into a different Government position and still have retirement benefits here, whether it occurs by some of the examples mentioned by the Senator from Arizona a few moments ago, why are we pushing this particular area right now to get it through in this bill when we have a big study coming up that should address the whole thing?

A second question would be: To my knowledge there has never been any extensive hearing conducted on this as to what the different groups of people should be who would be considered in this, and I am very happy to see this go forward, let me make that very, very clear. I am happy to see a study of this go forward that would encompass the whole problem of double-dipping and not just addressing it in this one specific area which has been beaten to death over

Mr. GLENN. I would agree that probably not too many of them can.

Mr. HEINZ. So we cannot look at it, I say to my friend from Ohio, as civil servants going into the military. That leaves only one thing, the military going into civil service. We cannot help it, it is just the way life works.

Why the particular range of salaries? Well, this happens to be executive level 5. These are policymaking jobs in the U.S. Government, executive level 5, and up—which includes people who make policy for the military, for the civil service, for the Defense Department, for veterans, for health care.

The President himself, both in his campaign and since, has taken a very hard line against double dipping, and this simply conforms to making sure that in the future nobody comes aboard into those policymaking level positions who is going to be considered, no matter how you slice it, a double-dipper.

If there are any double dippers in those policy-level jobs we are not going to hurt them, as this is something that is prospective and will only affect those people who would have, as I say, a combined compensation of \$47,500, that is, equivalent to executive level 5 compensation.

Mr. GLENN. Mr. President, if the Senator will yield, if we are addressing this double dipping problem, should we not say and/or Congressmen, Members of Congress, who are eligible for retirement and leave the Congress and go into a Government position with their retire-

Mr. HEINZ. This will not change existing law in any way.

Mr. GLENN. I wish to add that I favor the prospective aspects of this, but I also associate my remarks or my views very much with those of the Senator from Arizona, Senator GOLDWATER, in this regard. I think this double-dipping thing is looked at wrongly by a lot of people compared to the views that were held by regular officers of the vintage in which I was in in the military for 23 years.

We looked at it as deferred pay. We gave up some of our pay at that time. At that time we were receiving what was looked at then, and I am sure would be considered now, as substandard pay compared to our compatriots who were in the civilian business world and holding comparable jobs in industry.

I was offered about 2½ times once what my military pay was to go on the outside. If I had done that it would not have taken in the same kind of retirement benefits, and I was quite happy to stay where I was at the reduced pay level with the idea that when I retired it was a good retirement. It was deferred pay, and that is the way I looked at it.

I was earning that, I was earning every nickel of it at the time, and willing to take the reduced salary at the time in order to have this guaranteed income later on when I might retire.

That is the way all people looked at it at that time. We were happy to accept that.

Pay scales in the interim period drastically changed in the military, and I have no objection at all to going forward here henceforth with a different arrangement that people know about when they get in, it is part of their contract with their

the past couple of years, until the military are supposed to look as though they were big crooks, conning the Government out of something they never earned, when they in fact devoted their lives to the service of their country. All they are asking is that the original contract be lived up to. That is a minimum.

I would be happy to support a very thorough investigation of the whole double-dipping situation if we would go forward with it affecting Congressmen and other people who have been in Government service, other people who have come into Government, if we study the whole thing of double compensation and take it up as a unit.

I would be happy to support it and would be happy to appear as a witness and be happy to participate in such debate and in such hearing.

But to take it up on one little narrow issue that just hits at the military, when we do have a big study coming up, is a bit premature.

Mr. HEINZ. Let me respond to the Senator. First, I agree wholly with the sentiment expressed by the Senator, and I think the question he asked, namely, why do we want to address this very narrow range, this very narrow category, at this time is a perfectly good question.

What is the reason we are addressing this narrow range? First, let us ask the question why are we looking only at military people. Well, there are only two groups of people who can be affected by this legislation: civil servants, because this is the Civil Service Act we are dealing with, and the military people.

As a practical matter, I know of no retired civil servants who have gone into the military. It is pretty hard to get in at age 45, just like it is any place else.

ment pay intact? They are probably worse double-dippers than most military because the retirement pay of Congress is very liberal.

Mr. RIBICOFF. Mr. President, will the Senator yield?

Mr. HEINZ. If I may just respond, as the Senator well knows, the point he is making is extremely well taken. Congress is not subject, as he knows, to the civil service laws. Congress is not subject to EEOC, Congress is not subject to the child labor law; Congress is not subject to a lot of things. I think the Senator understands—and I wish it were otherwise—that he and I believe together that what is good for the goose is good for the gander, and I know the Senator joins me in that.

But I think the Senator also knows, without my having to say so, that this is a civil service law, and that is why, as the Senator I am sure knows, it will not apply to Congressmen.

Mr. GLENN. That is true, but the problem—

Mr. RIBICOFF. Mr. President, will the Senator yield?

Mr. HEINZ. I will be happy to yield.

Mr. RIBICOFF. The committee held 12 days of hearings with 86 individuals representing 55 organizations. In addition, Senator PERCY and I wrote to about 90 experts in public administration and personnel administration. What bothers me, as the manager of this bill, is the fact that we had no discussion or comment directed in any way to the problem we are now discussing under this amendment.

It is important. I think the Senator from Arizona (Mr. GOLDWATER) and the Senator from Ohio (Mr. GLENN) have

raised very important points. The question comes with the study commission: Are we obligated to go into all phases of double dipping and not just the question of those in the military?

I have discussed this with the Senator from Tennessee (Mr. SASSER), who is chairman of the Subcommittee on Civil Service, and I have asked him whether he would be willing, at the beginning of next year to conduct full hearings on this, and all these problems, so that we can address it intelligently and have an answer to the Senator from Arizona (Mr. GOLDWATER) and the Senator from Ohio (Mr. GLENN), which I do not think we have here. With all the work we have done on civil service reform, we in no way touched upon this most important field.

I feel that we do not have the necessary information to make an intelligent judgment on this matter. So I personally am reluctant to approve this amendment without having hearings. There were no direct discussions in committee and in the markup. We held 7 days of markup. There was a tangential discussion, if my memory serves me right, in which the Senator from Ohio made some comment, but there was no direct discussion, if my memory serves me right, on anything approaching the Heinz-Eagleton amendment.

I think there is a vacuum here. This is a very important point, raised by the distinguished Senator from Pennsylvania.

Mr. HEINZ. Mr. President, if the Sen-

Mr. HEINZ. Yes, we do.

Mr. GLENN. I have not seen any figures or heard any testimony on that.

Mr. HEINZ. We have exact figures on the number of retired people employed by the Federal Government, the number of retired military employed by the Federal Government, with exact statistics on their income.

We do not have any consensus, but we have statements of policy from the administration on what they want.

Mr. GLENN. We have never, as the Senate, held hearings on this, as we do on every other subject, is that not correct?

Mr. HEINZ. I cannot speak for the Senator from Ohio, but this is not the first time I have been involved in the subject.

Mr. GLENN. I know of no hearings we have had on this double dipping since I have been in the Senate. Perhaps there have been some I was not aware of.

Mr. HEINZ. I am not in a position to dispute what the Senator says.

The PRESIDING OFFICER. (Mr. BAYH). Does the Senator yield the floor?

Mr. HEINZ. I yield the floor.

Mr. EAGLETON. Mr. President, let me address a few remarks, if I may, to the exchange between the Senator from Ohio and the Senator from Pennsylvania.

First of all, as to the context in which Senator HEINZ and I raise this amendment, it was raised in the first place by Mrs. SCHROEDER on the House side. It is part of the House bill. The best estimate

Now, why is there concern about this question of double dipping and retired pay? I think the reason there is great concern about it, Mr. President, is that if we permit this military pension business to linger and malingering, as it has for decades, then one of these days it will bankrupt even the incredibly wealthy Pentagon.

Ten years ago, retired pay, out of the defense budget, was \$1 billion. Ten years ago, \$1 billion; that was the total annual payment for pensions out of the Pentagon to retirees.

Do you know what it is today—\$10 billion? In a decade it has gone from \$1 billion to \$10 billion. And do you know what actuarial experts say it will be by 1995—\$34 billion? That is what it will be.

Now, we hear people say, "You know, we ought to start thinking about doing something about it, but this is not the right time."

"Now is not the right time," it is said. Thirty years from now it might be the right time, but now now. Do you know how many Presidential and departmental study commissions there have been in recent years to "study" this question of dual compensation, double dipping, retired pay, and the like? Five. Five commissions, either commissioned by the President of the United States or by the Secretary of Defense, the most recent one being called the Zwick Commission. What are we told after each of these commissions makes its report? "Study

ator will yield—

Mr. RBICOFF. You have the floor.

Mr. HEINZ. I do not dispute in any way the Senator's characterization of our discussion, but that is not to say that this issue has not been discussed year in and year out, on many occasions, both on the floor of this body and the floor of the House of Representatives, over in the committees of Congress, and downtown.

Indeed, this amendment has been discussed with the administration and with the civil service people. It conforms to their suggestions and to what they feel they can accept, and it conforms, most importantly, I think, to a standard that was adopted in the House of Representatives. I am referring to the Schroeder amendment which was adopted in committee after discussion over there.

Just because this idea was not invented in our committee—and I would be the first to give full credit to Representative SCHROEDER for having taken the initiative on this—I do not think we should reject it. I would hope that the committee would see fit to accept the amendment.

Mr. GLENN. Mr. President, will the Senator yield?

Mr. HEINZ. I yield.

Mr. GLENN. I would agree with the floor manager. I think it is great that we are considering this. But just as an example, do we have any figures on the number of people affected?

Mr. HEINZ. Yes, we do.

Mr. GLENN. Do we have figures on the dollar savings?

Mr. HEINZ. Yes, we do.

Mr. GLENN. Do we have figures on how the public has been misled?

is that it will be in the House bill that goes to conference. So the issue will be joined, one way or the other.

Mrs. SCHROEDER, in the draft of her amendment, proposes to repeal the one section of existing law with reference to "double dipping."

Let me tell you what the law says. It is called the Dual Compensation Act. Here is approximately what it says: Assume you retire from the military, and your military retirement pay is, let us say, \$20,000. Assume then you go to work, often the very next day, often at the very same desk, often using the same parking lot. The only difference is that one day you are called "colonel" and the next day you are called "mister."

Now let us assume your civilian salary the next day is \$30,000. You get \$20,000 in retired pay, and \$30,000 in new civilian salary.

Existing law says that is not right. So what does existing law do about it? Existing law says that the first \$4,300 of your retirement pay, you keep that and next, you keep half the difference between the \$4,300 and what your retirement pay would have been had you not gone to work in a civilian capacity for the Federal Government.

Thus, under my hypothesis, a fellow who would have been entitled to \$20,000 retirement pay would get \$4,300 off the top, and half of \$15,700, plus his \$30,000 new salary.

Senator HEINZ and I did not invent that law. This is no stab in the back, no insult, no violation of contract. This is what is on the law books today.

Mrs. SCHROEDER, with her amendment, repealed the one existing law on the books.

it further," we are told "Study, study, study, but never act." That is what we are constantly advised to do. "Double dipping," as an amendment, was raised on a Defense Appropriation bill some years ago, and it was said to those who offered the amendment at that time, "Now is not the right time." It was offered a year later and it was said to those who offered that amendment, "Now is not the right time." Never is it the right time.

This is not a question, Mr. President, of trying to be punitive or petulant or peevish, or to punish anyone. This is a question that, if it constantly remains unsolved, I repeat, one of these days it will bankrupt the Pentagon.

This is the first, halting, "tip of the iceberg" attempt to focus some attention on this issue. What brought it to a head—I do not have the newspaper clip with me, but what brought it to a head was a front page news article in one of the newspapers which showed a fellow holding up his two paychecks, one his retired pay and the other his newest civilian paycheck and the total annual aggregate was, I think, was some \$80,000. Mrs. SCHROEDER and others thought that was not a very good system of compensation, to pay somebody \$40,000 in retirement, and the next day move him one desk over to keep doing the same thing, and pay him an additional \$40,000. That was an imperfect way to do the public's business, some of us believed.

Now, what about Congress? I would be delighted to see an amendment that said any former Member of Congress, if he takes another Government job, postpones his pension or retirement until such time as he gives up that second Government

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14309

job. If he wants to take a second Government job as a member of the Cabinet, or, as a janitor in some building, or whatever he wants to do, that is fine; let him take the job.

But do not let him draw his Government pension at the same time he is drawing a new Government salary.

That is quite proper, as far as I am concerned.

All we are talking about in the Heinz-Eagleton amendment is retired Regular military officers who get the next Government job usually with the Pentagon. There are 5,000 currently in such a capacity; that is, 5,000 retired Regular military officers receiving a second Government paycheck for a subsequent Government job.

The Heinz-Eagleton amendment simply says:

If the sum aggregate of the retired Government paycheck you receive and the new Government paycheck you are about to receive exceeds \$47,500, that is too much. You cap it out at \$47,500.

As I have said, it is a tip of the iceberg situation we have before us. But it would demonstrate, if adopted, that this Congress is about at its outer limit of tolerance insofar as this retired military pay, "double dipping" business is concerned.

Mr. GOLDWATER. Will the Senator yield?

Mr. EAGLETON. I yield.

Mr. GOLDWATER. Mr. President, it is not easy for me to oppose this amendment. I agree with the Senator from Mis-

reserve officer on the same footing as the regular as far as time went.

When I first went on duty in 1930 as a reservist, every 2 days I served as a reservist counted as a full day, or 1 day for pay purposes. This was changed in the late 1940's to give equal time for reservists. Had I been in a capacity where I could have assisted by a vote, I would have voted against it, because I have never believed that a man in the reserve who only spends time on duty when he is called to active duty or his weekends or summers, which in my case amounted to 37 years of which probably 7 years was served on active duty—I do not think I should be treated as an equal to a man on regular status.

I looked into this because I have had people raise all kinds of hell with me for double dipping. So I asked the Air Force what would happen if I asked them to stop sending me my monthly check for retirement. They said, "It would cause a lot of trouble. First of all, have you ever told a computer to stop doing anything?"

I said, "Well, let us say that you do it."

They said, "Fine, here you retire from politics and you will have to pay income on the whole ball of wax."

If I have no other income than the income when retiring from the Senate, without that retired pay as major general I will be back for food stamps or something.

Missouri. I think he has made an excellent case for the amendment we jointly offer.

Just so there is no misunderstanding among any of our colleagues here in the Chamber, I want to reemphasize once again the very modest effect of this amendment. It is prospective; it is not retroactive. It only applies to those at the \$47,500 level. If you took all the retired regular officers—all of them—who are now employed in the Federal Government at whatever level of pay, they would total all of 5,164 people.

That is fewer than 4 percent of the total retired personnel.

I just want to emphasize, as I say, that this is a very modest step. I say to my good friend from Arizona that I stand foursquare with him. It is not my intention to pick, in any way, shape, or form, on the military or my retired navy stepfather, or anybody like that.

This is a civil service bill. This matter is germane to the bill. Indeed, it is unlikely that we are going to have another civil service reform bill in Lord knows how many years. Indeed, this bill has been much too long coming to Congress.

I do not say that with any disrespect to the Senator from Connecticut or the Senator from Illinois. They have worked wonders in bringing this bill to us. It is not their fault that we have not been able to produce a civil service reform bill years before this.

Mr. GLENN. Will the Senator yield for a question?

August 24, 1978

military pay plus half the difference between \$4,300 and the full amount.

The Senator does not want, I take it, to do what is done with respect to civilians and knock them out entirely with a dollar-for-dollar offset?

Mr. GLENN. No, because I think the military, in general, has had a lower pay scale than civil service employees with comparable responsibilities.

Would the Senator accept congressional limitations, for example, if there are congressional retirees who come back into the civil service from whatever area? Why should they be paid twice if regular officer military retirees are not?

Mr. HEINZ. They are covered by the present law, as I understand it the law that the Senator from Missouri just referred to is as follows:

It seems to me the Senator's problems, as I understand it, are already addressed by current law.

Mr. EAOLETON. If the Senator will yield, I should like to read three sentences into the Record from the report, "Dual Compensation Paid to Retired Uniformed Services' Personnel in Federal Civilian Positions." It is from the Subcommittee on Investigations of the Committee on Post Office and Civil Service of the House of Representatives, dated April 3, 1978:

REEMPLOYED ANNUITANTS

Civil service annuitants who retire from civilian positions are not barred from reemployment in the Federal service because of their retired status. If an annuitant becomes

Mississippi (Mr. EASTLAND), the Senator from Alaska (Mr. GRAVEL), and the Senator from Louisiana (Mr. JOHNSTON) are necessarily absent.

Mr. STEVENS. I announce that the Senator from Tennessee (Mr. BAKER), the Senator from New Mexico (Mr. DOMENICI), the Senator from Nevada (Mr. LAKALT), and the Senator from New Mexico (Mr. SCHMITT) are necessarily absent.

The result was announced—yeas 32, nays 58, as follows:

[Rollcall Vote No. 364 Leg.]

YEAS—32

Allen	Hathaway	Sarbanes
Bumpers	Hollings	Sparkman
Byrd,	Huddleston	Stennis
Harry F., Jr.	Humphrey	Stevens
Byrd, Robert C.	Inouye	Stevenson
Cannon	Jackson	Stone
Chiles	Long	Talmadge
Clark	Mathias	Young
Culver	Mathunaga	
Durkin	McIntyre	
Glenn	Moynihan	
Hatfield,	Nunn	
Mark O.	Ribicoff	

NAYS—58

Bartlett	Hart	Nelson
Bayh	Haakell	Packwood
Bellmon	Hatch	Pearson
Bentsen	Hatfield,	Pell
Biden	Paul G.	Percy
Brooks	Hayakawa	Proxmire
Burdick	Helms	Randolph
Cass	Helms	Riegle
Chafee	Hodges	Roth
Church	Javits	Sasser
Cranston	Kennedy	Schweiker
Curtis	Leahy	Scott
Danforth	Lugar	Stafford
DeConcini	Magnuson	Thurmond

UP AMENDMENT NO 1774
Mr. HATCH. Mr. President, I send to the desk an unprinted amendment.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:
The Senator from Utah (Mr. HATCH) proposes an unprinted amendment numbered 1774.

Mr. HATCH. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 8, strike lines 17-25.

On page 9, strike lines 1-25.

On page 10, strike lines 1-25.

On page 11, strike lines 1-4.

Mr. ROBERT C. BYRD. Mr. President, will the Senator yield briefly?

Mr. HATCH. I yield.

Mr. ROBERT C. BYRD. Mr. President, it is my understanding that the managers of the bill may be prepared to accept this amendment.

Mr. HATCH. The managers have indicated that they would accept it. Senator MATHIAS and Senator STEVENS have indicated that they would accept it. It is not controversial, so far as I know, and there is no reason to debate it.

Mr. RIBICOFF. There are a few amendments being offered by the Senator from Utah which we have discussed, and I am ready to accept the series of amendments being offered by the Senator from Utah. I am uncertain about

reemployed in an appointive or elective position in the Federal Government subject to the Civil Service retirement system, the salary in that position is usually reduced by the amount of annuity paid. The reduction in civilian salary is . . .

So there is the dollar-for-dollar offset. Under the Heinz-Eagleton amendment, there is not a dollar-for-dollar offset. It keeps the so-called Dual Compensation Act on the books as it is which is more generous to retired military officers.

Mr. President, I ask for the yeas and nays on the amendment.

The PRESIDING OFFICER. The yeas and nays have been requested. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. Is there further discussion?

Mr. GLENN. Mr. President, I move to lay the amendment on the table and ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the motion to lay the amendment on the table. The yeas and nays have been requested. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. GOLDWATER (when his name was called). Present.

Mr. CRANSTON. I announce that the Senator from South Dakota (Mr. ABOUREZK), the Senator from Minnesota (Mr. ANDERSON), the Senator from Mis-

Dole
Eagleton
Ford
Garn
Griffin
Hansen

McClure
McGovern
Melcher
Metzenbaum
Morgan
Muskie

Tower
Wallop
Wetcker
Williams
Zorinsky

ANSWERED "PRESENT"—1

Goldwater

NOT VOTING—9

Abourezk
Anderson
Baker

Domenici
Eastland
Gravel

Johnston
Laxalt
Schmitt

So the motion to lay on the table UP amendment No. 1773 was rejected.

Mr. HEINZ. Mr. President, I move to reconsider the vote by which the motion to lay on the table was rejected.

Mr. EAGLETON. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from Pennsylvania. On this question the yeas and nays have been ordered.

Mr. HEINZ. Mr. President, I ask unanimous consent that the order for the yeas and nays on my amendment be vitiated.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

The question is on agreeing to the amendment.

The amendment was agreed to.

Mr. RIBICOFF. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. RANDOLPH. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

any other amendments.

Mr. STEVENS. I shall offer the one we have discussed with the Senator's staff, and I shall not offer the other.

Mr. RIBICOFF. During the discussion, we will go into the other amendment. I am not sure which one that is.

Mr. ROBERT C. BYRD. Mr. STEVENS has one amendment. Are there other amendments? Only the amendment by Mr. STEVENS after the amendments by Mr. HATCH.

Mr. STEVENS. Senator DOLE has an amendment.

Mr. ROBERT C. BYRD. Mr. President, I ask for the yeas and nays on final passage.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The Senate will be in order.

Mr. HATCH. Mr. President, are the floor managers willing to accept the amendment I have just sent to the desk? As I understand it, they have accepted the amendment.

Mr. RIBICOFF. It is accepted by the manager of the bill.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment was agreed to.

Mr. HATCH. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. RIBICOFF. I move to lay the motion on the table.

The motion to lay on the table was agreed to.

August 24, 1978

CONGRESSIONAL RECORD—SENATE

S 14311

UP AMENDMENT NO. 1775

(Purposes: (1) To insure secret ballot elections under all circumstances prior to imposing a bargaining obligation on any agency. (2) To decertify any exclusive representative who fails to take action to prevent or stop a strike, work stoppage, slowdown, or picketing of any agency. (3) To protect the employee's right to hear both sides of union representation arguments so long as no threats, force or promise of benefit are involved)

Mr. HATCH. Mr. President, I send three unprinted amendments to the desk.

The PRESIDING OFFICER. Does the Senator request that they be considered en bloc?

Mr. HATCH. Yes. I ask unanimous consent that they be considered en bloc.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendments will be stated.

The legislative clerk read as follows:

The Senator from Utah (Mr. HATCH) proposes three unprinted amendments numbered 1775.

Mr. HATCH. Mr. President, I ask unanimous consent that reading of the amendments be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendments are as follows:

On page 296, line 8, after the word "chapter" delete the period and substitute a semicolon and then add the following new proviso,

"Provided, That nothing in this chapter shall be construed as requiring an agency to negotiate in good faith with any labor or-

choice through a secret ballot election and only through that process which is the proven method of guaranteeing a fair and unfettered employee choice. That is amendment No. 1.

That is amendment No. 1.

No. 2: The second amendment also deals with title VII and provides for the decertification of any labor organization which is found by the authority to have condoned, by failing to take appropriate action to prevent any strike, work stoppage, or slowdown by employees. I believe the public interest demands that we take the legal authority away from any union which abrogates its responsibility to remedy unlawful employee actions. This act creates rights and duties on the part of both collective bargaining participants, and I feel this is a minimum obligation the union should assume or risk losing its legal bargaining status.

The third amendment: The last amendment protects the employee's right to hear both sides of union representation arguments so long as no threat, force, or promise of benefit are involved. Employees should be able to hear, and digest, any personal views, arguments, opinions, or other statements about the union situation whether by the union agents or the agency's managers and supervisors without an unfair labor practice being found or an election set aside based upon the expression of views. We have the added protection here that the views must be fair and not contain threats, force, or any promises of bene-

by the Civil Service Commission; is that correct? The Civil Service Commission is the employer, for practical purposes, is it not? Has any effort been made to get labor's view on these amendments?

Mr. RIBICOFF. Personally, I did not discuss this with labor. I do not feel it is incumbent upon me personally, as a U.S. Senator, to discuss something with labor or with management. It was worked out with the Civil Service Commission after a series of conferences. I was busy in the Chamber with the entire bill, and I was willing to accept this. I will be candid with my distinguished colleague from New York.

Mr. JAVITS. All right. I just wanted to get the ground rules. I am not trying to find any fault with the managers at all. I will get to the merits in just a minute. But I did first want to find out how the managers felt and their reasons.

Mr. PERCY. Mr. President, will the Senator yield for a question on this?

Mr. JAVITS. I yield to the Senator.

Mr. PERCY. Obviously you cannot touch base with everyone, I am sure this could have been run by some additional people. But in looking at the amendments and considering that the distinguished Senator from Utah brought in a rather bulky package of amendments today, I think that what has been sifted out gets right down to the heart of some of his concerns.

The first, as I understand it, would be to decertify any union found to be involved in a strike—that is an illegal ac-

ganization certified after the enactment of this Act until a representative of its employees has been determined by means of a secret ballot election conducted in accordance with the provisions of this chapter. This proviso shall not be construed to bar a consolidation of units without an election.

On page 301, line 3, add the following new subparagraph,

"(e) Any labor organization which has violated section 7216(b) (4) (B) shall, upon an appropriate finding by the authority of such violation, have its exclusive recognition status revoked and it shall cease immediately to be legally entitled and obligated to represent employees in the unit."

On page 298, line 16, add the following new subparagraph,

"(f) The expression of any personal views, argument, opinion or the making of any statement shall not (1) constitute or be evidence of an unfair labor practice under any of the provisions of this chapter, or (2) constitute grounds for, or evidence justifying, setting aside the results of any election conducted under any provisions of this chapter, if such expression contains no threat of reprisal or force or promise of benefit."

Mr. HATCH. Mr. President, these amendments also are acceptable to the managers of the bill, and I move their adoption.

Mr. BELLMON. Mr. President, may we have a brief explanation of what these amendments do?

Mr. HATCH. Mr. President, the first amendment deals with title VII and provides that no new labor organization which comes into being after the enactment of this act can achieve collective bargaining rights unless a majority of the employees in an appropriate unit vote for the union via a secret ballot election. This amendment preserves the sanctity of the employee making a free

fit for the employee involved.

I commend the three amendments offered en bloc to the attention of the floor managers and I believe they are willing to agree to them, and they have been run by the administration, they agree to them, and I believe that they are very good amendments which will enhance this bill, especially title VII.

Mr. JAVITS. Mr. President, I ask the managers of the bill, because they have been handling the bill, and I am a member of the same committee—these are labor amendments—what is their rationale for accepting each amendment, and have they consulted with the administration and is the administration willing?

Mr. RIBICOFF. May I say that there was consultation between the Senator from Utah and Mr. Campbell, as I understand it, and the staffs.

Mr. HATCH. That is correct.

Mr. RIBICOFF. Mr. Campbell, the chairman of the Civil Service Commission, worked out the language with the Senator from Utah.

Mr. HATCH. Mr. President, will the Senator yield for a slight additional explanation.

Mr. RIBICOFF. I yield.

Mr. HATCH. We have revamped a number of amendments which I brought to the attention of Mr. Campbell and the civil service people and their aides and staffs, and we revamped them in accordance with their recommendations and desires, and I believe the amendments are in good order.

Mr. JAVITS. So the managers are not prepared to explain the rationale; they are simply relying upon the fact that these amendments have been accepted

tion against the Government and that appeared on the surface at least to be reasonable; to insure a secret ballot in all union elections, and that should be, I would think, something the unions would want to preserve; and to see that there is a full opportunity to insure the expression of personal or dissenting views in union campaigns.

Mr. HATCH. Mr. President, will the Senator yield?

Mr. PERCY. I am happy to yield.

Mr. HATCH. This also protects both the unions and the civil service people because it allows the consolidation to take place. As I understand it, there are some 3,500 different unions, and it protects their right to consolidate and protects them prospectively and retrospectively in this matter.

Mr. PERCY. As the Senator from Illinois mentioned many times during the debate on the labor reform bill, it is our duty in Congress to protect the rights of the individual.

As I interpret these amendments, they do go to the heart of protecting individuals. I should think that responsible labor leadership would support them. But the Senator from Illinois will admit that time pressure has been so great this afternoon with the intention of the leadership to finish this bill and have final passage voted by 5 o'clock—we are now 1 hour and 5 minutes behind that—but if there are serious reservations about them, we will certainly do the best we can to check it out to be certain we looked at every aspect of it.

Mr. JAVITS. Mr. President, the purpose of my taking the floor is because I am the ranking minority member of the

Labor Committee, a committee of which Senator HATCH is a member, and his views on union organization are as well known as mine.

Mr. HATCH. That is correct.

Mr. JAVITS. Therefore, it is my duty to examine them carefully and find out what is the rationale, to decide whether I wish to agree or to oppose. But before I do that, because the Senators are my friends, and I have great faith in them, and they are handling this bill, I wanted to find out the basis on which they were taking them, and now they have told me.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. STEVENSON). Without objection—

Mr. METZENBAUM. I object.

The PRESIDING OFFICER. Objection is hear.

Mr. ROBERT C. BYRD. I just want to make an announcement.

Mr. METZENBAUM. I withdraw my objection.

ORDER OF PROCEDURE TONIGHT

Mr. ROBERT C. BYRD. Mr. President, it is hoped that the Senate can complete action on this bill this evening without having to stay late and, if that is possible and achievable, then the Senate will go out until 9 o'clock tomorrow morning.

desire on the part of the executive branch to remove the person from the position, if the removal occurs within 1 year of the appointment it can be done without any difficulty whatsoever. All that is necessary is for the notice to be given to the senior executive service member, and that member then goes back to his original position without any problem.

Mr. RIBICOFF. May I respond to the distinguished Senator from Oklahoma by saying that a senior executive service employee with career status may be reinstated to any senior executive service position if he has completed the probationary period, which is 1 year.

However, if he left the senior executive service for either misconduct, neglect of duty, malfeasance or for less than fully successful performance, then he could not. But in the absence of those provisions he could go back to his career position.

Mr. BELLMON. Mr. President, if the Senator will let me raise another question, as I understand, one of the main objectives of this bill is to provide the executive branch with greater flexibility in filling the key decisionmaking positions in Government. It is an objective that I strongly endorse. But, it seems to me, if a member of the civil service agrees to an appointment in the senior executive service that it is not necessarily desirable to require the executive branch to have to make a case that this person is then guilty of misconduct, neglect of duty, or malfeasance in order to replace that person or send that person

and if such charges are made, does this then force the member of the senior executive service to go into court to defend his reputation?

Mr. RIBICOFF. He does not have to charge misconduct. He can remove that person from the position he has within the senior executive service to another position within the senior executive service. The employee would have a career in the senior executive service, but there would be flexibility to move him within the agency. He could not be moved involuntarily from one department or agency to another or out of the senior executive service. He would be protected to be in that higher echelon of employees.

Mr. BELLMON. Then this really only gives the executive branch flexibility one time; there will be a chance to appoint a good many people to these senior executive services one time, but from then on they will be more or less locked in?

Mr. RIBICOFF. They are not locked in the particular position, but they can remain in the senior executive service, provided they do the job and are not guilty of misconduct or perform unsatisfactorily. There is the senior executive service, and they can be shifted within their agency, but you cannot force them out of that senior executive service.

Mr. BELLMON. Except for malfeasance, misconduct, and these other things?

Mr. RIBICOFF. And if it were done for partisan political purposes, it would be a prohibited personnel practice.

On tomorrow the Senate will take up the CETA bill and the remaining tax bills. So I hope that all Senators will cooperate and work together to complete action on this bill this evening and, if possible, hopefully it will not be too late and, as I say, the Senate will go out.

Mr. METZENBAUM. Mr. President, the three amendments that have been offered are matters of major concern, as I see it, and I am just taking the time in order to see if I can find out exactly what they do provide. It is for that reason that I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. BELLMON. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. METZENBAUM. Mr. President, reserving the right to object, and I will not object, as I understand it, the Senator wishes to raise a point having nothing to do with the Hatch amendments?

Mr. BELLMON. That is correct.

Mr. President, I would like to call the attention of the distinguished floor manager of the bill to section 3591 on page 222 of the bill. This is the section that deals with removal from the senior executive service, and I would like to ask a question or two in order to be better informed about how the removal procedure would operate.

As I understand the language of the bill, if a person has been serving in the senior executive service, and there is a

back to his permanent civil service rating, and that we think this unnecessarily damaging to the civil servants who may only be—when the executive branch may desire to make a change. Perhaps the person has been doing good work but the executive branch feels other persons can do better. How flexible is this procedure?

Mr. RIBICOFF. I think he gets more protection than at the present time. Now he may be removed from the civil service and he is out entirely.

But here, if he is removed from the senior executive service and there was no misconduct or malfeasance, he can go back to the career service, to the job that he had before, on the same level.

Mr. BELLMON. Let us assume the person does not necessarily want to leave the senior executive service.

Mr. RIBICOFF. Well, he could come back provided there was not misconduct or less than fully successful performance. If there was misconduct or malfeasance, he may be removed, after he has a hearing and goes through all the disciplinary proceedings.

Mr. BELLMON. Let me take a possible case. Let us assume that President Carter appoints a person from the civil service to the senior executive service, and when President Carter leaves office in 1980 or 1984, the new President decides that he wants a different person put in that position. Is it necessary, then, for the new President or the new administration to charge this member of the senior executive service with less than fully successful performance or misconduct, neglect of duty, or malfeasance,

Mr. BELLMON. I think the distinguished Senator from Connecticut will agree with me that sometimes it is a good thing to give the executive branch some flexibility to bring people into these decisionmaking slots, and then, if they do not perform necessarily as well as they might, even though they are not guilty of misconduct, neglect of duty, or malfeasance, be able to move them out or put them back where they came from.

Mr. RIBICOFF. Well, they can do it today, of course. If they do not successfully perform their jobs, they could be removed. But again, there would have to be proof of unsatisfactory performance. If they are removed, they go back into a GS-15 position in the civil service. They retain their standing in the career service.

Mr. BELLMON. I believe the distinguished Senator from Connecticut will agree that at the present time it is practically impossible to remove someone from civil service without a lengthy court proceeding, and very often those proceedings fail and people have to be reinstated with backpay.

Mr. RIBICOFF. That is one of the reasons for this bill, because for all practical purposes today, you cannot remove anybody from Government employment, no matter how bad he is. Here we are trying to make it easier to keep the good ones and get rid of the bad ones.

Mr. BELLMON. But it seems to me section 3591 sets up a procedure that will lead to the same result as is the current experience.

Mr. RIBICOFF. Well, he can be removed. Under section 3591 he can be

August 24, 1978

CONGRESSIONAL RECORD—SENATE

S 14313

removed, first, during the 1-year probationary period, or for less than fully successful executive performance, or for neglect of duty, misconduct, or malfeasance. So there is an opportunity to remove someone if he does not do his job, if he does not perform successfully, or if he is guilty of neglect of duty or misconduct.

During the 5-year period, if he has two unsatisfactory annual ratings he is out of the Senior Executive Service; or if he gets three less than fully successful annual ratings in the 5-year period he is out. So it is easier to get rid of somebody than it is at the present time. At the present time it is almost impossible to remove employees for unsatisfactory performance. But under this bill there are these ratings that must show satisfactory performance in order to stay.

Mr. BELLMON. If a new administration came into office, theoretically, at least, they could give every one of the members of the Senior Executive Service an unfavorable rating for 2 years in a row, and those people would all be—

Mr. RIBICOFF. No; they could not just give it. There are standards as to what constitutes an unsatisfactory or less than satisfactory rating. If a person is discharged and he feels that is less than just, he has a right to appeal.

Mr. BELLMON. So that may set in action the same kind of appeal process that we have under the present law.

Mr. RIBICOFF. The appeals process is somewhat different under the bill. If it

Mr. YOUNG. But if he refuses any of these transfers, is that grounds for being fired?

Mr. RIBICOFF. I would say yes. He is out.

Mr. YOUNG. He can be fired?

Mr. RIBICOFF. That is what is the situation at the present time. That is the case at the present time, yes.

Mr. YOUNG. I have one further question. What recourse would he have if he is fired? What recourse would he have to the Civil Service Board of Appeals?

Mr. RIBICOFF. He has full appeal rights.

Mr. YOUNG. Full appeal rights?

Mr. RIBICOFF. To the Merit System Protection Board.

Mr. YOUNG. Thank you.

Mr. MATSUNAGA. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. JAVITS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. JAVITS. Mr. President, do I understand that the amendments of Senator HATCH are now pending?

The PRESIDING OFFICER. The Senator is correct.

Mr. JAVITS. Has there been a consolidation of them?

Mr. HATCH. I have moved that they be considered en bloc.

Mr. HATCH. As I understand it, the same way that the bill does. That is by requiring a secret ballot election. Under existing law the two sides can get together and alleviate the secret ballot election. This mandates the secret ballot election in all civil service certification.

Mr. JAVITS. That is right. The two sides could get together and dispense with the election, but this would require such an election.

Mr. HATCH. That is right, and this is for the protection of the employees who work in civil service.

Mr. JAVITS. And is prospective in its operation?

Mr. HATCH. That is correct.

Mr. JAVITS. Mr. President, speaking for myself alone, I personally see no objection. It is a change in the law and it does make a difference, but I do not think it makes so much of a difference that I would care to disturb the existing understanding between the managers of the bill and my colleague.

Mr. MATSUNAGA. Will the Senator from New York yield?

Mr. JAVITS. I yield.

Mr. MATSUNAGA. Mr. President, as I read the amendment being discussed by the Senator from New York and the Senator from Utah, it requires an additional election, after a union has been certified, to choose a representative of the employees, such as a business agent, by a secret ballot election before the agency may deal with that representative of the employees. Is my interpretation correct?

is a career employee whose performance is being reviewed, he has to have a majority of fellow career employees on the rating board. So it is not just Presidential appointees; it is career employees who are rating their fellow employees.

Mr. BELLMON. Would the Senator object if we worked out some language to make the removal less complicated, and so that it does not require the destruction of a career service employee's character in order to get him out of the senior executive service and back into the position from which he came?

Mr. RIBICOFF. We tried to work this out with the distinguished Senator from Alaska. I think we were able to achieve it in the Mathias-Stevens amendment. During the continuation of the quorum call, we will be able to call your attention to the Stevens-Mathias amendment, which may have taken care of the situation that concerns the Senator from Oklahoma. If the quorum call continues, we will go over that with you, to see if we have not achieved what you desire.

Mr. YOUNG. Mr. President, could I ask one question?

Mr. RIBICOFF. Yes.

Mr. YOUNG. If a career civil service employee refuses to be transferred, what recourse does he have? He can be fired for refusing a transfer, can he?

Mr. RIBICOFF. If he is transferred and refuses to do it, he cannot stay in the senior executive service.

Mr. YOUNG. He cannot be fired for that?

Mr. RIBICOFF. He can be voluntarily transferred from HEW to Commerce or Labor, or from HEW to Agriculture or Interior.

Mr. JAVITS. Mr. President, are they divisible?

The PRESIDING OFFICER. The amendments are not divisible because they are to be considered en bloc, by unanimous consent.

Mr. JAVITS. I thank the Chair.

Mr. President, my first question would be addressed to the Senator from Utah as follows: The amendment which relates to the choice for the representative of the employees by means of a secret ballot election, that, as I understand it, would make it necessary to have a secret ballot election before there could be certification. That is a change in existing law or practice. Otherwise, there could be a certification on some other evidence of representation or on the volition of the United States. In short, is the effect of the amendment to require a secret ballot election where it otherwise might not be necessary as a matter of law to have one?

Mr. HATCH. As I understand it, the bill provides—

Mr. JAVITS. I cannot hear the Senator. Will he use his microphone?

Mr. HATCH. As I understand it, the bill itself provides for certification by a secret ballot election. What this amendment does is reinforce that, plus it does so prospectively, so that no organization which presently represents any of the civil service employees would be decertified by this amendment.

Mr. JAVITS. Decertified? In other words, this would only apply to future certification?

Mr. HATCH. That is what I understand.

Mr. JAVITS. How does it change existing law?

Mr. HATCH. On a prospective basis, that is true. In other words, in the future the employees will be protected by the mandated secret ballot election with regard to Federal civil service employees. This is an employee's right that we want to protect. That really does not hurt the union, so far as I am concerned.

Mr. MATSUNAGA. So that in the event a union has been certified by secret ballot, if that union is to send a business agent to deal with the agency, that union must hold a second election to elect the business agent who is sent to deal with the agency?

Mr. HATCH. No, upon the effective date of this act, all duly certified unions representing civil service employees which have been certified up to that time, whether or not by secret ballot, will be preserved. But after the duly effective date of this act, from that time forward, all elections certifying the union will have to be secret-ballot elections. So the Senator is incorrect.

Mr. MATSUNAGA. That is already in the law, is it not?

Mr. HATCH. No.

Mr. MATSUNAGA. My question, I suppose, is directed to the meaning of the term "representative of its employees" as shown in the Senator's amendment.

Mr. HATCH. That is right.

Mr. MATSUNAGA. What does that refer to? Does that refer to the union or to the business agent of the union?

Mr. HATCH. That refers to the union.

Mr. MATSUNAGA. It refers to the union?

Mr. HATCH. Right.

Mr. MATSUNAGA. That clarifies it.

Mr. HATCH. It preserves the union's representative status.

Mr. MATSUNAGA. So as I understand it, there is no requirement for election by a secret ballot of a business agent sent by the union?

Mr. HATCH. That is right. In other words, it is not a requirement for a secret ballot to choose the union agent, only the union, as the representative of the employees.

Mr. MATSUNAGA. I thank the Senator.

Mr. WILLIAMS. Will the Senator yield?

Mr. JAVITS. May I ask one other thing? Then I shall yield to the Senator.

I think quite inadvertently, the Senator's amendment said "Nothing in this chapter shall be construed as requiring an agency to negotiate in good faith." I am sure the Senator did not mean that entitles him to negotiate in bad faith?

Mr. HATCH. No, certainly.

Mr. JAVITS. I wonder if he would strike the words "in good faith". I do not think the Senator had any such intention, but it could be so read.

Mr. HATCH. I ask unanimous consent that the amendment be modified in that manner.

The PRESIDING OFFICER. The Senator has that right.

The amendment was modified.

Mr. WILLIAMS. Mr. President, I should like to make an observation. The Senator from New York said he was speaking only for himself in agreeing

union organization or, at least making it possible under the propriety of law.

Is it not a fact that, under this free speech amendment, an individual manager, speaking personally, could say that he does not like unions and he does not think they are a very good idea and he does not think that they will do anybody who joins them any good. That would still be within the purview of this amendment, would it not?

Mr. HATCH. That is correct.

Mr. JAVITS. Because it does not include a threat of reprisal or force or promise of benefit.

Mr. HATCH. That is right. In other words, he may express his personal good-faith opinion, but he cannot express a threat of reprisal or force or promise of benefit, which is the present law. But he may tell what he personally feels without fear of an unfair labor practice charge.

Mr. JAVITS. Would that privilege, as the Senator describes it, also apply to an employee of the Federal Government, who could say to the other employees, "I think he is all wet?"

Mr. HATCH. No question about it.

Mr. JAVITS. "Notwithstanding that he is the manager, he is a hired hand just like the rest of us and does not know what he is talking about," et cetera. He can be just as vehement and just as strong.

Mr. HATCH. Just like the rest of them.

Mr. JAVITS. Just so long as it contains no fear of reprisal or threat.

Mr. HATCH. Under the present law, as

point because, if there are any misunderstandings or difficulties, I want to clear them up.

Mr. JAVITS. I just managed a very complicated bill on the floor and I know that there are at least a dozen Senators who would have a right to complain because I did not consult them about this or that or the other. I realize the problems and I understand them fully.

Mr. RIBICOFF. Mr. President, I deeply regret that the distinguished Senator had other duties, because we had our hands full on the floor. We did rely on the Civil Service Commission and the staff to work it out.

I think it should be pointed out that it is my understanding, on the freedom of speech and expression amendment, the employees and union officials clearly can comment as well as somebody representing the agency.

Mr. HATCH. No question about it.

Mr. RIBICOFF. Employees and union officials have the same freedom of speech.

Mr. HATCH. Will the Senator yield to me to make one more comment about that?

Mr. RIBICOFF. Yes.

Mr. HATCH. The difference between this and present law is that this provision for free speech allows anybody to speak freely about the collective bargaining process as long as it does not involve threats of reprisal or force or promise of benefit. Under present law, the only ones who basically can do that with impunity happen to be the union organizer, not

that this amendment was acceptable to him. I speak for the Labor Committee, and for myself, quite frankly, I did not know of this amendment until almost literally minutes ago. Recognizing the substantial distinctions between private sector collective bargaining, it seems to me that in the context of public sector unionism, the proposal that before a union must be bargained with it must be certified in a secret ballot election is not an unreasonable one and I am prepared to vote for it.

Mr. HATCH. I thank my distinguished friend.

I assumed when I brought these amendments up that they were acceptable and I was asked to expedite it to the extent that I could, so I tried. I am happy to have had this colloquy at this time. I shall be happy to answer any other questions.

Mr. JAVITS. Moving now to the next amendment, the so-called free speech amendment, that troubles me for this reason, and I shall communicate my concern to the Senator and he will give me his views and his explanation. It is a fact that we consider the Federal Government in this bill as an employer, but it is also the Federal Government.

Mr. HATCH. That is true.

Mr. JAVITS. And you cannot strike against the Federal Government, so, if you work for the Federal Government, you give up something. You may strike illegally, as the postal workers are threatening to do, but that is true of any law. It can be broken and punishment and reaction must follow.

The United States has laws favoring

the Senator knows, the employee can do that, even if it threatens reprisal, but the employer cannot. I think in the enlightened Federal Government of today, this is not an undue exercise of free speech by the manager or the employee.

Mr. JAVITS. Of course, the manager is also a Government employee; he is not the owner of his own business. I think it is quite different.

I am not saying that I find this so offensive and I do not think at this stage that it interferes with what I know.

May I explain that, and say I am really sorry that I felt duty bound to pick this up. Everything seemed to be going so well and smoothly between the managers. But I am sure the Senator, like myself, when he has a duty and he sees it, simply cannot suppress it.

Mr. HATCH. Will the Senator yield on that?

Mr. JAVITS. Of course.

Mr. HATCH. I appreciate the Senator's bringing up his concerns on these amendments. I assumed, when talking to both floor managers, who are, as the Senator knows, both very distinguished Senators on this floor and have reviewed this matter, but more particularly, in talking to the representatives of the civil service, including the top man of the civil service, and, I felt, a labor representative as well, that this matter had been covered. I am glad that we are able to have this colloquy. Certainly, I was not trying to put these forth without the Senator's having the opportunity of seeing them, and would not try that, as the distinguished Senator from New York knows.

I do appreciate this colloquy at this

even the employees. So what this does is correct, and I think allow, anybody in good faith, as long as they are not threatening a reprisal or force or promising a benefit, to speak freely what is in their minds.

Mr. JAVITS. There is one thing that is different, I say to the Senator. It probably can be worked out in conference, but I should like to call it to his attention.

He has used at the end of this amendment a different catechism than has been used elsewhere in the bill. Just so long as we are clear on his intention, I do not think it will cause us any headaches, but I should like to point this out.

If we look back at 7216(a) (1) and (2), we see that it is an unfair labor practice for an agency—and here is where the catechism comes in—to interfere with, restrain, or coerce an employee in connection with the exercise of rights assured by this chapter or to encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment.

Therefore, it might have been better if the end of the amendment said, "if such expression is not in violation of section 7216(a) (1) and (2)."

The Senator might just study that.

Mr. HATCH. I certainly will.

Mr. JAVITS. Then he would have a consistency of expression as to exactly what he had in mind.

Mr. HATCH. I do not have any problem because we are talking about the right of individual expression and not of the right of the agency.

Now, if the agency comes down and threatens or, in this case, encourages or

August 24, 1978

CONGRESSIONAL RECORD—SENATE

S 14315

discourages any labor organization, I think it would apply, I would agree.

Mr. JAVITS. It just said, "encourage or discourage," and says "by discrimination."

The Senator does not expect—

Mr. HATCH. I do not expect that.

Mr. JAVITS. That is why I say what I do. Look it over, study it, not this minute.

Mr. HATCH. As long as the rights of individual managers—I think I do not mean by this the individual manager who expresses his own belief or opinion, then since he works for the agency his actions are imputed under agency law to the agency.

I do not intend my amendment to forbid his personal right of expression.

Mr. JAVITS. It may be giving him in that regard, because the language is different, although its purpose and meaning are the same—

Mr. HATCH. Yes, but I would not want to have this construed, anyway, because it would make it meaningless, the free speech amendment, when he speaks from his own standpoint, he binds the agency, so it violates this rule.

Mr. JAVITS. Does the Senator feel the words "no threat or reprisal, or force or promise of benefit" are any different than—

Mr. HATCH. No. Those words apply even to the individual. Even my amendment. But I do not want, as it says in 7216(a) (2), that it should be an unfair labor practice for an agency to encour-

if so, it would be the agency guilty of the unfair labor practice if the rules of agency designated him as the agent.

That is why I suggested that language, because I do not think the Senator's language means anything different than what is already contained.

But for the purpose of this discussion, if the Senator feels he cannot do that, what I would like to ask the Senator is the following.

Mr. HATCH. Yes.

Mr. JAVITS. Does he intend that in this amendment, that is, the personal views, argument, opinion, or the making of any statement by the individual, that those views, argument, opinion, or the making of any statement shall be equivalent to interfering with restraining or coercing an employee in connection with the exercise of rights assured by this chapter, or encouraging or discouraging membership in any labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment?

Mr. HATCH. The language in my amendment does not permit that.

Mr. JAVITS. All right. We agree on that.

Mr. HATCH. We agree on that.

Mr. JAVITS. We will worry about the language.

Mr. HATCH. Right. I believe the conferees could change that.

Mr. JAVITS. So much for the free speech amendment.

Mr. HATCH. But let me add this, that

is important enough so that I ought to read to the Senate what section 7216 (b) (4) (B) says.

Mr. HATCH. Right.

Mr. JAVITS. It says:

Condone any activity described in subparagraph (A) by failing to take action to prevent or stop it.

Let me read (A) because that is what is referred to:

(A) Call or participate in, a strike, work stoppage, slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes or reasonably threatens to interfere with an agency's operations.

May I ask as a first question, why did the Senator not include (A), why just (B), just as a question of curiosity?

Mr. HATCH. Because (B) does by implication include (A).

Mr. JAVITS. In other words, the Senator intends to include (A)?

Mr. HATCH. Yes; there is no question about it.

Mr. JAVITS. And the condoning of course, is the more inclusive.

Mr. HATCH. Yes; to make it even more clear, the authority is the labor authority provided for pursuant to this act. If that authority says they have condoned this type activity, then when the union itself has an affirmative duty in the public interest not to have such activity, then this remedy does and should come into play.

Mr. JAVITS. As a practical matter, Mr. President, the Senator goes on in

age or discourage membership in any labor organization by discrimination in regard to hiring, tenure, promotion—

Mr. JAVITS. The Senator does not want the individual manager to do that, either, does he?

Mr. HATCH. Not representing the agency, but I want him to have the right of free speech, otherwise.

Mr. JAVITS. Well, a fellow is a manager, he is the boss in the particular agency. If he is going to discriminate in regard to hiring, tenure, or promotion, or others, I think the Senator goes a lot further than there is any reason for going in order to give him freedom of expression.

Mr. HATCH. I do not believe my amendment permits him to discriminate in any way.

On the other hand, I also do not intend this amendment to mean because he expresses his own viewpoint with regard to whether or not a union is good or bad that it is imputed under agency rules to involve the agency itself.

Mr. JAVITS. Let us break it down—

Mr. HATCH. The agency may have a standard that their managers have to comply with, and that standard may very well say they cannot speak ill of the unions, regardless.

Mr. JAVITS. What concerns me is the Senator may have a conflict between his amendment and section 7216, depending on who is the manager.

The normal rules of agency may apply to him.

Mr. HATCH. I say I do not want them to apply to him with regard to the expressions made in good faith.

Mr. JAVITS. But they may apply and,

I want the free speech provisions to enable any member of the civil service management to speak his own mind freely, without it being imputed to the agency, thus involving these technical rules and causing the agency to be guilty of an unfair labor practice.

Mr. JAVITS. Would the Senator consider that? In view of his intent, adding to the end of the amendment the following:

Such expression contains no threat of reprisal or force or promise of benefit and is not made under coercive conditions.

Mr. HATCH. Yes, that is fine.

Mr. JAVITS. All right.

Mr. HATCH. I would accept that language.

Mr. President, I move that my amendment be modified to accept that particular language.

Mr. JAVITS. I will send the modification to the desk.

Mr. HATCH. I do move the modification.

The PRESIDING OFFICER. The Senator has the right.

The amendment is so modified.

Mr. JAVITS. Mr. President, the last amendment—I apologize to the Senate for the time, but I think we are making very good progress in this matter.

I would like to point out to the Senator that in respect to decertification of a labor organization, which is a very lethal remedy—

Mr. HATCH. It certainly is.

Mr. JAVITS. The Senator knows that.

At the same time, the Senator is absolutely right that the matter which he is seeking to redress is a very strong and important Federal right, and I think it

his amendment to say, "upon an appropriate finding by the authorities"—

Mr. HATCH. By the authority.

Mr. JAVITS. Authority.

Mr. HATCH. Meaning the authority in this bill.

Mr. JAVITS. The authority in this bill of such a violation.

The Senator will agree, will he not?

Mr. HATCH. That is the Federal labor relations authority provided in this bill.

Mr. JAVITS. The Senator will agree that this being a drastic remedy, there could be a lot of argument about the facts and the merits.

Mr. HATCH. I certainly do agree.

Mr. JAVITS. Is there any procedure—and I have not examined this closely and I am sure the Senator has, and that is why I ask this—is there any procedure with relation to a finding? Is there a notice, a hearing, an opportunity to contest the facts?

The Senator says in his amendment that upon an appropriate finding by the authority, its exclusive recognition status is revoked and it shall cease immediately to be legally entitled and obligated to represent employees. That is a pretty drastic remedy. Has the Senator any procedure of notice or hearing or appeal or some procedure which is involved in such a drastic remedy?

Mr. HATCH. Yes; pursuant to this particular bill, there would be notice of an unfair labor practice that would be litigated. If it is found to be unfair and the condoning has taken place, the offending union would be decertified.

Mr. JAVITS. Can the Senator key us to these procedure sections, notice and hearing, which relate to the issue, the

words "appropriate finding"? I beg the Senator to help me in that, because, as I say, he undoubtedly has checked this out closely.

Mr. HATCH. Does the manager of the bill know exactly where that provision is? He may be able to assist us in that regard. I think it begins on page 271. I think it is paragraph 7216.

Mr. JAVITS. What page is that?

Mr. HATCH. 7216 starts on page 295. So it would be pursuant to the unfair labor practices section, as I understand it, in the committee bill which we are considering at the present time.

Mr. JAVITS. So when the Senator speaks—

Mr. HATCH. Probably also 7233, although I am not positive of that.

Mr. JAVITS. When the Senator speaks of "appropriate finding," the Senator incorporates by reference the procedure of 7216?

Mr. HATCH. The whole chapter 72 on the Federal service management relations chapter, which starts on 7201, up through 7205.

Mr. JAVITS. In other words, the whole procedure chapter.

Mr. HATCH. That is right—as defined in the bill.

Mr. JAVITS. Is it not the fact, also, that whether or not the word "immediately" belongs will depend upon the outcome of that proceeding?

Mr. HATCH. That is correct.

Mr. JAVITS. So that we really need it or do not need it.

Mr. HATCH. Why do we not change the language this way, to satisfy the Senator:

and it shall cease, upon such finding, to be legally entitled and obligated to represent employees in the union.

Mr. JAVITS. That is all right. Do not do it yet, though.

Mr. President, for the moment, I should like to yield the floor, because I see that Senator METZENBAUM is anxious to be heard on this matter.

The PRESIDING OFFICER (Mr. STONE). The Senator from Ohio is recognized.

Mr. METZENBAUM. Mr. President, will the Senator from Utah yield for a question?

Mr. JAVITS. I have yielded the floor.

Mr. HATCH. I will be happy to answer any questions.

Mr. METZENBAUM. Will the Senator from Utah tell me whether in private practice, with respect to employers, there is any situation which is comparable to that just provided for under his section (b), which provides that where a labor union condones any activity described in paragraph (a), that labor union may be decertified?

All the Senator provides here is that under paragraph (b), if the labor union fails to take action to prevent or stop certain procedures as provided for under paragraph (a), then, whether immediate or otherwise, you have decertification. Is it not a fact that a private labor organization—when I say private, I mean a

My question is, Why does the Senator go to the extreme that he goes in this case in order to decertify the union and cause it to lose its parking rights?

Mr. HATCH. Because the union, by becoming a decertified union in the public sector, has as its basic tenet the obligation and affirmative duty to act in the public interest, too. Since the law says that a union cannot strike—which is the present law, irrespective of what is being done here in civil service reform—the union has an obligation not to promote or encourage a strike.

The reason why I believe this provision is not extreme but a provision which is needed is that presently we are being faced with all kinds of threats of strikes on the part of public-sector employees, and even some of their union leaders, in violation of the law, in violation of their affirmative duty not to do so.

As Senator JAVITS pointed out, I am trying to prevent that, thus putting some teeth in the law, so that they will have to think twice before they advocate in any way abridgement of their affirmative duty not to strike in the public sector.

To be honest with Senators, they will have all of their rights protected, as Senator JAVITS in his characteristic fashion has so amply pointed out, by formal litigation proceedings which may under certain circumstances go to the Supreme Court of the United States, but this puts some teeth into that particular provision. And that is the purpose of it.

Mr. METZENBAUM. Mr. President, I

Mr. HATCH. There would have to be a justicable decision, with all the rights accorded to both sides.

Mr. JAVITS. And that decision would determine the time of its effectiveness and the procedure?

Mr. HATCH. That is right. If that procedure is appealed, there has to be an ultimate decision that determines the immediate effect.

Mr. JAVITS. By using the word "immediately"—which I hope the Senator ultimately will decide against—the Senator is not trying either to abbreviate or increase that time?

Mr. HATCH. No. We do not want to be unfair to any labor organization with this amendment, so "immediately" refers to the finding of an unfair labor practice, meaning condoning the illegal activities provided for under this bill.

I think it is going to be up to the labor authority to determine whether that immediate effect takes effect upon the finding, even though there may be an appeal.

Mr. JAVITS. Yes.

Mr. HATCH. Or whether it will not take effect until there be a final resolution of the matter, which may be in the Supreme Court of the United States.

Mr. JAVITS. Would not the Senator agree with me that under the expression he gives the words "appropriate finding" and the word "immediately," it really is not necessary, because it may be immediate and it may not? It depends upon the determination, the rules, the procedures, of the authority? All I am trying to avoid is to add or subtract anything that the Senator has incorporated by reference.

private employer—

Mr. HATCH. The Senator is talking about the private sector?

Mr. METZENBAUM. Yes.

All that would occur under those circumstances is that the union would be found guilty of an unfair labor practice; but there is no procedure and the courts have not ruled, even in some cases which were very flagrant with respect even to discriminatory practices, where the union has been decertified. Is that not a fact?

Mr. HATCH. Let me answer the question this way:

Even in the private sector, which is distinguishable here, there is no law which says a union cannot strike. They have the right to strike in the private sector. In the public sector, they do not have the right to strike. Yet, we are finding all kinds of threats to strike all over the country, which could cause chaos.

My amendment may resolve that. But there are some situations. I can think of one cursorily in which a union, even under the private sector, can be decertified for certain activity, and that is where it practices racial discrimination. It can be decertified even in the private sector, under that circumstance, and there may be others.

Mr. METZENBAUM. The courts have not held in accordance with the statement just made by the Senator from Utah, as I understand it. I think the case is *Handy Andy*, or something like that.

The fact is that merely for condoning a strike, even if the union has agreed by contract not to strike, or condoning picketing, or a slowdown, or a work stoppage, unions do not become decertified in the private sector.

suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. JAVITS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. JAVITS. Mr. President, I wonder whether the Senator from Utah would mind if momentarily his amendments are set aside so that Senator HEINZ may offer an amendment which I gather will be accepted and then immediately resume on the amendments of the Senator.

I make that unanimous-consent request.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Pennsylvania.

Mr. HEINZ. Mr. President, of course, I say to the managers of the bill, Senator RIBICOFF and Senator PEACOCK, how much I admire the excellent job they have done on this legislation, not only here in the Chamber but in our Governmental Affairs Committee.

Mr. President, before discussing this amendment, I reiterate my support for S. 2640 and commend my colleagues on the Governmental Affairs Committee for their long and careful consideration of the civil service reform legislation and the civil service reorganization proposal. More than a year has been spent by the administration and Congress in closely analyzing the many problems of the civil service system and weighing various solutions to them. After this amount of effort, we have a responsibility to insure that the bill we pass will truly address

August 24, 1978

CONGRESSIONAL RECORD—SENATE

S 14317

these problems. It is clear that our civil service system is in dire need of reform; the Federal bureaucracy has become a labyrinth of redtape duplicated and unnecessary work, and lack of responsiveness to the needs of the American people. The public today is frustrated at the size and cost of Government; it is frustrated at its inefficiency, and frustrated at its inability to provide the services they are paying for with their taxes. Not only is the public dissatisfied, but civil servants are frustrated with the amount of redtape and bureaucratic barriers which prevent them from effectively performing their jobs as public servants.

Reforming this system on the basis of sound management principles, enabling "managers to manage", and streamlining the existing maze of rules and regulations which control Federal personnel management is certainly a meritorious goal. I am, however, deeply concerned that S. 2640, as reported from the Governmental Affairs Committee, falls short of ensuring that these goals will be met. The problem of size and cost of this bureaucracy is not adequately addressed. "Streamlining" the existing bureaucracy should make it smaller and more cost effective; it should not increase its size and cost. The amendment I am proposing will partially address this inconsistency and ensure that this legislation will more truly be a reform measure.

Inherent in S. 2640 and in the reorganization plan, which will soon go into effect, is an increase in the number of

Member—executive level IV, \$50,000. Special Counsel to the MSPB—executive level IV, \$50,000.

These positions alone will add an additional \$417,500 in salaries for top level appointees. This figure does not include the cost of assistants and secretaries which will almost certainly accompany them.

In addition, Mr. President, the creation of the Federal Labor Relations Authority will also create new top level slots in the bureaucracy. The responsibilities of the Chairman, two Members and General Counsel have until now been held by personnel in the Civil Service Commission, the Department of Labor and the Office of Management and Budget. These were not previously full-time responsibilities for any single members of those agencies. The new Federal Labor Relations Authority positions will be:

FEDERAL LABOR RELATIONS AUTHORITY

Chairman—executive level II, \$52,500. Members (two)—executive level IV, \$50,000.

To more effectively implement Federal personnel policy it may in fact be necessary to separate responsibilities currently held by the Civil Service Commission, creating two new agencies, and to create permanent full-time positions to direct Federal labor relations; however, I feel it is an unnecessary expenditure of taxpayers dollars to elevate these positions to the proposed levels. The remainder of my amendment would, therefore, reduce each of the proposed new

"(87) Director of the Office of Personnel Management."

(2) Section 5315 of such title is amended by inserting at the end thereof the following new paragraph:

"(122) Deputy Director of the Office of Personnel Management."

(3) Section 5316 of such title is amended by inserting at the end thereof the following new paragraph:

"(144) Associate Directors of the Office of Personnel Management (5)."

On page 166, strike out lines 10 through 23 and insert in lieu thereof the following:

(b)(1) Section 5315 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(123) Chairman of the Merit Systems Protection Board."

(2) Section 5316 of such title is amended by adding at the end thereof the following new paragraphs:

"(145) Members, Merit Systems Protection Board.

"(146) Special Counsel of the Merit Systems Protection Board."

(3) (A) Paragraph (17) of section 5314 of such title is hereby repealed.

(B) Paragraph (86) of section 5315 of such title is hereby repealed.

(C) Paragraph (99) of section 5316 of such title is hereby repealed.

On page 316, strike out lines 4 through 15, and insert in lieu thereof the following:

(f) Section 5315 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(124) Chairperson, Federal Labor Relations Authority."

(g) Section 5316 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(147) Members, Federal Labor Relations

1706

top level appointed positions in the civil service system and an increase in the cost of these top level positions. Currently, the civil service is controlled by the Civil Service Commission. This presidentially appointed, three-member commission is head by a chairman, and includes the vice chairman and third Commission member.

CIVIL SERVICE COMMISSION
Chairman—Executive Level III, \$52,500.
Vice Chairman—Executive Level IV, \$50,000.

Member—Executive Level IV, \$50,000.

The reorganization and reform proposals will abolish the Civil Service Commission and replace it with an Office of Personnel Management and a Merit System Protections Board to assume the personnel management and judicial responsibilities currently held by the Civil Service Commission, respectively. The creation of these two new agencies will not only increase the number of top level management positions from 3 to 11, it will also increase the executive levels of those positions. This increases bureaucracy; it will also increase its cost by the additional positions and the upgrading of these positions.

OFFICE OF PERSONNEL MANAGEMENT
Director—executive level II, \$57,500.
Deputy Director—executive level III, \$52,500.
Associate directors (five)—executive level IV, \$50,000.

MERIT SYSTEMS PROTECTION BOARD
Chairman—executive level III, \$52,500.
Vice Chairman—executive level VI, \$50,000.

positions by one executive level. This would result in an annual savings of an estimated \$132,500, or 18.5 percent, of the current salary levels in the bill.

In sum, Mr. President, we are seeing a so-called reform proposal transpose what are 3 full-time positions and 3 very much part-time jobs into a total of 13 top level full-time positions, all at a higher pay level than currently. While it is tempting to try to restructure and prune back this proliferation of top level political appointees, my amendment only seeks to cut the pay of these positions by one level, thus preventing the pay inflation in the bill.

UP AMENDMENT NO. 1776
(Purpose: Reducing the level of compensation of officers and members of OPM, MSPB and FLRA)

Mr. HEINZ. Mr. President, I send to the desk my unprinted amendment and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Pennsylvania (Mr. HEINZ) proposes an unprinted amendment numbered 1776.

Mr. HEINZ. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 147, strike out lines 10 through 22, and insert in lieu thereof the following:

(b)(1) Section 5314 of title 5, United States Code, is amended by inserting at the end thereof the following new paragraph:

Authority (2)."
On page 281, line 6, strike out "Senate." and insert in lieu thereof the following: "Senate, and shall be paid at an annual rate of basic pay equal to the maximum annual rate of basic pay currently paid, from time to time, under the General Schedule."

Mr. HEINZ. I would be pleased to respond to questions.

Mr. RIBICOFF. Mr. President, we have had an explanation of the amendment by the distinguished Senator from Pennsylvania. He makes his point and he makes it well. His amendment is acceptable to the manager of the bill.

Mr. PERCY. Mr. President, I find the amendment acceptable and I know of no opposition on this side.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from Pennsylvania.

The amendment was agreed to.

Mr. HEINZ. I would just like to thank the managers of the bill.

I very much appreciate their acceptance of the amendment.

Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. RIBICOFF. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. RIBICOFF. Mr. President, if I may have the attention of the distinguished Senator from Ohio (Mr. METZENBAUM), the Senator from New York (Senator JAVITS), and the Senator from Utah (Senator GARN). I do appreciate the concern of the distinguished Senator from New York and the Senator from Ohio. Unfortunately, they were

not on the floor in the early part of the afternoon. During the day the distinguished Senator from Utah presented this amendment to us in advance of a series of amendments.

The distinguished Senator from Illinois (Senator PERCY) and I were busily engaged in explaining this bill and handling amendments. It was my suggestion that the Senator from Utah and our staffs meet with Mr. Campbell, the Chairman of the Civil Service Commission, and the staff of the executive branch to try to work out a series of amendments that would be consistent with the thrust of S. 2640.

The amendments of the Senator from Utah were voluminous. Although the philosophy of the Senator from Utah certainly differs basically from that of the Senator from New York and the Senator from Ohio and myself—and I will let the Senator from Illinois speak for himself—the Senator from Utah was completely cooperative in trying to work out a series of accommodations, and the Senator from Utah came back after meeting with the administration and our staffs with these amendments.

I can understand the concern of the Senator from New York and the Senator from Ohio. At no time was the Senator from Utah trying to pull a fast one on anyone. This was carefully crafted and worked out with Mr. Campbell and his staff in the Vice President's office. We felt that in the sense of accommodation they worked it out.

here, but certainly in looking after the interests of workers throughout the country, as the distinguished Senator from New York always has, we must take into account that there are mixed feelings on all these issues with Government workers as well.

But the managers of the bill have tried the best they could to work out the most practical solution. The Senator from Illinois wants to express appreciation again to the Senator from Utah for his cooperation and to the distinguished Senator from New York for the extraordinary service he has rendered now in helping to clarify these matters that have been of concern to him and to our distinguished colleague from Ohio (Mr. METZENBAUM).

Mr. MATSUNAGA. Mr. President, pursuant to the response of the Senator from Utah to questions put to him earlier, in order to clarify the first amendment of the three, which he has offered, I propose an amendment to change in the second line of the proviso, the words "a representative of its employees" to "such labor organization." I have discussed this matter with the Senator from Utah, and he has indicated a willingness to accept my amendment as a modification to his first amendment.

I now yield to the Senator from Utah for that purpose.

Mr. HATCH. Mr. President, if the Senator will yield to me, I will yield to the distinguished Senator from New York so that he can have the floor and then he

from Hawaii, the distinguished Senator from Ohio and, of course, my very revered chairman of the Governmental Affairs Committee have all added to the colloquy which, I think, has made this quite clear.

So let me make some modifications which I think will resolve the conflicts but still not denigrate the purpose of my amendments, which are acceptable to me.

Let us start with the first amendment, which was with regard to the secret ballot election. To accommodate the distinguished Senator from New York, we have already moved that the words "in good faith" be stricken, and that has been accepted, to the best of my knowledge. If not, then I so move.

The PRESIDING OFFICER (Mr. HART). The amendment has been so modified.

Mr. HATCH. To accommodate the distinguished Senator from Hawaii, although "a representative of its employees" is a series of legal terms of art in labor law, and since "labor organization" is utilized throughout this particular bill, we will strike "a representative of its employees," and substitute in lieu thereof "such labor organization," and I so move.

The PRESIDING OFFICER. The Senator has that right, and the amendment is so modified.

Mr. HATCH. I offer this amendment.

Mr. MATSUNAGA. If the Senator from Utah will yield, I thank him for his willingness to make the modifications I

I do feel, with the colloquy that took place between the Senator from New York and the Senator from Utah, that some of the fuzziness or misunderstanding was clarified, and I do believe both the Senator from New York and the Senator from Ohio have rendered a public service to all of us on this legislation.

I want to make it perfectly clear that the Senator from Utah was most cooperative in trying to work out a very knotty problem.

Mr. HATCH. I thank the distinguished Senator.

Mr. PERCY. Mr. President, I will just be a moment. I should like to reiterate also what my distinguished colleague, Senator Ribicoff, has indicated. From the outset of the day until now we have worked with the Senator from Utah. I did participate in some of the meetings with Chairman Campbell and members of the White House staff in the Vice President's office, and considering what we started with and what we now have there has been a remarkable change and a spirit of cooperation.

Once again we are deeply indebted to the distinguished Senator from New York for raising the question, for taking every word in these amendments to clarify what they mean, what the impact might be and what the implications might be for changing and modifying some of that wording accepted by the Senator from Utah, and also by establishing legislative history we can certainly get the intent and purpose of these amendments.

Under no condition or under no circumstances are we trying, basically trying, to change the thrust and direction

will yield and I will make the modifications.

Mr. JAVITS. Mr. President, I stirred this up and I hope to be able to be here when it is finished. I wish immediately to thank my colleague, Senator Matsunaga, and my colleague, Senator Merzenbaum, for giving this matter their close attention, and it has been very helpful, but my purpose was only to clarify, not to, if possible, interfere with the actions taken by my completely trusted colleagues, to wit, the managers of the bill, and Senator Hatch. He had not the remotest idea but that this matter was thoroughly cleared in every way that it should be, and I repeat I mentioned before and I say again, simply being on the floor and having some experience in labor matters and feeling it my duty to read things and to ask questions if I am in doubt, I carried out my responsibility.

I am pleased that things have ended up in concord, and I beg the Senator from Utah to believe that there is not the remotest question I think in anybody's mind on the floor that his conduct as a Senator was absolutely impeccable.

Mr. HATCH. I thank the distinguished Senator from New York. I always appreciate his good cooperation and his conduct, and I can truthfully say I thought everything had been cleared. I would certainly not present any amendment without having it cleared, and especially when we had had it cleared with the administration and the leaders of the bill, as is the usual case. I tried to be accommodating in having this language meet the needs of the Senators here, and I believe the distinguished Senator from New York, the distinguished Senator

have suggested. Since he has accepted my proposed amendments and the modifications suggested by the Senator from New York, I can now lend him my support.

Mr. RIBICOFF. The modifications are acceptable to the manager of the bill.

Mr. HATCH. Since the modifications are acceptable to the manager of the bill, I move the amendment be adopted.

The PRESIDING OFFICER. The question is on agreeing to the amendment as modified.

Mr. METZENBAUM. Has the amendment not been accepted?

Mr. JAVITS. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. JAVITS. Is it not a fact that only one vote is required on all three amendments, but that they may be separately modified? That is the privilege of the Senator, is it not?

The PRESIDING OFFICER. The Senator is correct.

Mr. HATCH. Then I will present all the amendments and move they be adopted en bloc, the second amendment with the changes we have agreed to. It has to do with explicit recognition standards. He have stricken the word "immediate" and inserted in lieu thereof "upon such findings." Is there anything else we added?

Mr. JAVITS. We added something we sent to the desk on a yellow sheet, did we not? No; that is on free speech.

Mr. HATCH. I move that particular change. It may have been moved, but I move it again.

The PRESIDING OFFICER. The Sen-

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14319

ator has the right to modify his amendment.

Mr. HATCH. As to the third amendments, with regard to free speech and the rights of free speech, at the conclusion of the amendment we have stricken the period and have added "or unduly coercive conditions," and I move that modification.

The PRESIDING OFFICER. The modification has been made.

Mr. HATCH. As I understand it, the managers of the bill have accepted all three of these amendments en bloc.

Mr. METZENBAUM. Mr. President, will the Senator yield?

Mr. HATCH. Excuse me; Senator METZENBAUM also had another modification. I am sorry, Senator, I forgot yours.

With regard to the exclusive recognition amendment, we should add the words "after any labor organization which" and then add the words "willfully and intentionally by omission or commission has violated" and I move those additional changes.

Mr. METZENBAUM. Mr. President—

The PRESIDING OFFICER. The Senator has the right to modify his amendments.

Mr. METZENBAUM. Will the Senator from Utah yield for a minute?

Mr. HATCH. I am happy to yield for 1 minute.

Mr. METZENBAUM. I appreciate very much the cooperation of the Senator from Utah. It makes the amendment less objectionable than it was. I do not wish

Mr. DOLE. I yield to the Senator from Utah.

UP AMENDMENT NO. 1777

(Purposes: (1) To separate the reporting requirement from the MSPB and vest it with an independent agency. (2) To reduce the expense of an SES executive on a paid sabbatical. (3) Clarifies the manner in which the Director of the Office of Personnel Management may intervene in a proceeding of the MSPB)

Mr. HATCH. Mr. President, I send three unprinted amendments to the desk and ask for their immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Utah (Mr. HATCH) proposes unprinted amendments, en bloc, numbered 1777. On page 141, add, following after line 21—

Mr. HATCH. I ask unanimous consent that further reading of the amendments be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered. The Chair wishes to inform the Senator from Utah that for the amendments to be considered en bloc would require unanimous consent.

Mr. JAVITS. Could we hear them all first?

Mr. HATCH. Yes.

Mr. JAVITS. Let us hear them all read, and then ask unanimous consent.

Mr. HATCH. That will be fine.

shall be permitted to interfere with the independence decision-making of the MSPB."

The PRESIDING OFFICER. Does the Senator from Utah wish to—

Mr. HATCH. I ask unanimous consent that the amendments be considered en bloc.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered. The Senator from Utah.

Mr. HATCH. Mr. President, the original language of the bill mandated a report to Congress prepared by the Merit System Protection Board, the MSPB mentioned in the amendment, on the "state of civil service," including analysis of whether the actions of the Office of Personnel Management have been in accord with merit principles.

I felt at the outset that this assessment should be performed by an independent agency, one apart from the executive branch or the civil service structure.

The managers of the legislation, however, have presented a better idea, which is two reports, one by the MSPB and one by GAO. In this way, all viewpoints and data will be stated. We in Congress, as well as the President, will be able to effectively evaluate our new reforms.

So that is the purpose for amendment No. 1.

Amendment No. 2 is an amendment which will change the policy with regard to sabbatical periods to a period not exceeding 12 months—well, half-pay for 12 months, with full benefits for the 12 months, or with full pay and full bene-

to indicate support for the amendment, but rather than delay the debate this evening, I am pleased with his spirit of cooperation and am willing to accept this amendment as the basis from which to go forward at this point.

Mr. HATCH. I thank the Senator from Ohio for his cooperation, and I now move the adoption of the amendments, en bloc.

The PRESIDING OFFICER. Will the Senator from Utah send his amendments to the desk, so that there is no question about them?

Mr. HATCH. Could I ask that my aide and Senator METZENBAUM work these out? I do not have them written out. We will work them out at the desk. Is that acceptable to everyone?

Mr. MATSUNAGA. I have them written out.

Mr. METZENBAUM. I think it is pretty much agreed that we are really only inserting the language "willfully or intentionally, by omission or commission."

The PRESIDING OFFICER. The question is on the adoption of the amendments, as modified, en bloc.

The amendments, as modified, were agreed to en bloc.

Mr. HATCH. I move to reconsider the vote by which the amendments were agreed to.

Mr. JAVITS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Several Senators addressed the Chair.

Mr. HATCH. Mr. President, I wish to finish with my amendments.

The PRESIDING OFFICER. The Senator from Kansas is recognized.

The assistant legislative clerk read as follows:

On page 141, add the following after line 21:

"(b) The General Accounting Office shall prepare and submit an annual report to the President and the Congress on the activities of the MSPB which shall include a description of significant actions taken by the Board to carry out its functions under this title. The report shall also review the activities of the Office of Personnel Management, including an analysis of whether or not the actions of the Office of Personnel Management are in accord with merit system principles and free from prohibited personnel practices."

On page 220, strike lines 11 through 23 and insert in lieu thereof the following:

"(d) An agency head may grant leave with half pay and full benefits to a career executive for a sabbatical period not exceeding twelve months or full pay and full benefits for six months to permit such person to engage in study or uncompensated work experience which will contribute to the individual's development and effectiveness. A sabbatical leave may not be granted more than once in a ten-year period. An individual, to be eligible for a sabbatical leave, must have completed at least seven years of Federal service in a position with a level of duties and responsibilities equivalent to the Senior Executive Service and at least two of which were as a member of the Senior Executive Service."

On page 153, line 24, strike the words "intervene in any such proceeding" and insert in lieu thereof "appear as a party or send a representative to any hearing called under paragraph (2) (O), present written briefs and other relevant material".

On page 153, line 25, strike the words "intervene" and insert in lieu thereof "participate".

On page 154, line 2, insert the following immediately after the period "Nothing in this title shall be construed to mean the OPM

fits for 6 months, and the employee has the right to make the choice in those matters.

I believe it is a very good compromise and an effective change in the bill. I also believe that the managers have agreed to accept this particular amendment.

The third one is an amendment which clarifies the manner in which the Director of the Office of Personnel Management may intervene in a proceeding before the MSPB. I believe the managers of the bill are prepared to take these amendments.

Mr. RIBICOFF. I will also point out that these amendments have been carefully gone over with the administration and have their approval. The amendment is acceptable to the manager of the bill.

Mr. HATCH. Mr. President, I move the adoption of the amendment.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment was agreed to.

Mr. HATCH. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. RIBICOFF. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. HATCH. I compliment the distinguished managers of this bill for their cooperative efforts and the aid and counsel they have given me throughout what I did not expect to be a lengthy time with these amendments but which has been, I believe, an effective time. I hope we have been able to assist them in the preparation of their bill.

UP AMENDMENT NO. 1778

(Purpose: Eliminating an inequity in computing annuities of Federal law enforcement officers or firefighters)

Mr. DOLE. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Kansas (Mr. DOLE) proposes an unprinted amendment numbered 1778.

Mr. DOLE. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 198, after line 25, insert the following new section:

COMPUTATION OF CERTAIN ANNUITIES

SEC. 305. (a) Section 8339(d) of title 5, United States Code, is amended by inserting "(1)" immediately after "(d)" and by adding at the end thereof the following new paragraph:

"(2) The annuity of an employee retiring under this subchapter with at least 5 years but less than 20 years of service as a law enforcement officer or firefighter, or any combination thereof, is computed under subsection (a) of this section, except that the annuity of such employee is computed with respect to the service of such employee as a law enforcement officer or firefighter, or any combination thereof, by multiplying 2½ percent of his average pay by the years of that

appropriate annuity credit to retiring Federal employees who have at least 5 years' service as law enforcement or firefighter personnel, but who have not completed 20 years. This would be consistent with the full credit given congressional employees under the higher 2½-percent formula after they have served 5 years (5 U.S.C.A. 8339(b)). As the law now stands, Government employees who have performed "hazardous duties" for fewer than 20 years are penalized merely because they fail to reach the magic benefit line. Even though they were exposed to the same dangers, subjected to the same perils, and employed in the same high risk endeavors for our Nation, they receive no recognition if, for one reason or another, they choose or are compelled to leave such service 1 day before their 20 years are up.

SUPPORT FOR AMENDMENT

This legislation has been endorsed by the International Association of Chiefs of Police, Inc., and has been praised by the Federal Criminal Investigators Association, the National Treasury Employees Union, and the Society of Former Special Agents of the FBI.

AN EQUITABLE ARRANGEMENT

Although the Civil Service Commission is on record as opposing preferential computation formulas as a reward for particular kinds of service, it seems to me that as long as the current law provides for such treatment, all those entitled should receive it. If they do not, we are going to find ourselves in the business of

tations are done on an individual basis anyway, and no additional administrative burden would be imposed.

Any measure designed to eliminate an existing inequity should, Mr. President, receive the sympathetic consideration of this body. I hope my colleagues will support this adjustment in the annuity computation formula for Federal hazardous-duty employees.

Mr. President, I ask unanimous consent that a letter from Glen R. Murphy, director, Bureau of Governmental Relations and Legal Counsel, International Association of Chiefs of Police, Inc., dated July 28, 1977; a letter from James L. McGovern, president, Society of Former Special Agents of the Federal Bureau of Investigation, dated May 23, 1977; and a letter from Frank J. Scodari, national secretary, Federal Criminal Investigators Association, dated March 16, 1977, be printed in the RECORD at this point.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

JULY 28, 1977.

Senator ROBERT J. DOLE,
Dirksen Senate Office Building,
Washington, D.C.

DEAR MR. DOLE: I would like to express to you, on behalf of the International Association of Chiefs of Police, our Association's support of S. 565, a bill introduced by you dealing with the computation of annuities for federal law enforcement officers and firefighters.

I might note that the International Association of Chiefs of Police, a nonprofit orga-

service.”

(b) Section 8339(h) of such title is amended by striking out “section 8338(d)” and inserting in lieu thereof: “section 8338(d)(1)”.

(c) The amendments made by this section shall apply with respect to individuals who become entitled to receive an annuity on or after the effective date of this Act.

Mr. DOLE. Mr. President, the amendment I am offering at this time was originally introduced as Senate bill S. 565 during February of 1977. At that time, I pointed out that the legislation is intended to correct an oversight in Public Law 93-350, which was enacted by the 93d Congress. That measure was the result of efforts by Senators PERCY and JAVRS, as well as others. The bill, S. 565, was referred to the Government Affairs Committee. However, in the intervening year and a half, no hearings have been held, and no action has been taken to report the measure to the Senate. For that reason, I have chosen to bring the proposal to the attention of my colleagues in this manner.

ANNUITY COMPUTATION FORMULA

Mr. President, during the 93d Congress, we gave our approval to a bill, H.R. 9281—later enacted as Public Law 93-530—to provide Federal law enforcement and firefighting personnel a special 2½-percent retirement computation formula in recognition of the special, hazardous duty service which they perform. In doing so, however, we failed to recognize the substantial inequity that would result from premising the incentive credit on a full 20 years of service in such capacity.

In order to correct that oversight, I have proposed this amendment, to extend

suppressing lateral movement of these types of Government employees, as well as discouraging the initial recruitment of qualified personnel who may not wish to commit themselves for a full 20 years in such a demanding profession.

In addition to the recruitment argument, it is my belief that the change I am proposing could also operate to help retain qualified and experienced personnel within the Government by encouraging them to stay in, or return to, civil service rather than the private sector. Too often, now, for example, a firefighter or law enforcement officer who has put in perhaps 10 years of service and decides that it is not in his own or his family's best interest to continue for another 10 years, would have just as much motivation to go to private industry as to another Government agency.

It seems to me that 5 years is a reasonable minimum to expect of a career-oriented professional and that, in many instances, we are promoting morale problems and indifference among 15- to 20-year agents who are “putting in their time” simply because of the leverage being held over them by the 20-year requirement. Again, I think we could have a much more dedicated, effective, and inspired contingent of Federal officers if they knew they could transfer at any time from a hazardous position and still receive full credit for the period spent in that position when they eventually qualify for Government retirement.

Since the amendment I am proposing would become effective upon enactment, any problem of recomputation for those already retired would be avoided. Moreover, Federal service retirement compu-

nization, has been serving the law enforcement profession and the public interest by advancing the art of police science since 1893. Its staff of 110 police consultants, attorneys and educators develops and disseminates improved administrative, technical, and operational practices and promotes their use in police work. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world; to bring about recruitment and training of qualified persons; and to encourage adherence of all police officers to high professional standards of performance and conduct. IACP is the world's leading association of police executives with approximately 11,600 members representing 64 nations of the world.

The IACP is appreciative of the efforts being made to eliminate the existing inequities in the computation of annuities under title 8 of the U.S. Code. Please be advised of our continued support for this pending legislation, and do not hesitate to call on me if I can be of any assistance in assuring passage of the bill.

Sincerely,
GLEN R. MURPHY,
Director, Bureau of Governmental Relations and Legal Counsel.

ATLANTA, GA.,
May 23, 1977.

*Senator BOB DOLE,
Senate Office Building,
Washington, D.C.

DEAR SENATOR DOLE: The membership of the Society of Former Special Agents of the F.B.I. join me in expressing our appreciation to you for your interest in retirement benefit legislation affecting Federal law enforcement officers.

We are aware that your pending bill does not alter the provisions of Public Law 93-350 and appreciate your statement that you would have no objection to expanding those hearings which may be held on S. 565 during the 98th Congress so as to include provi-

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14321

skion for retroactive consideration of P.L. 93-350.

Sincerely,

JAMES L. MCGOVERN,
President.

WEST HEMPSTEAD, N.Y.,
March 16, 1977.

HON. ROBERT DOLE,
U.S. Senate,
Washington, D.C.

DEAR SENATOR DOLE: Thank you for your letter regarding bill S. 565 which you recently introduced in the United States Senate.

Please be assured that this Association is keenly interested in having the bill passed and we will lend every assistance possible towards this goal. . . .

We appreciate your interest in seeking legislation that is beneficial and equitable for all Federal Criminal Investigators.

Very truly yours,

FRANK J. SCODARI,
National Secretary.

Mr. RIBICOFF. Mr. President, this amendment is acceptable to the managers of the bill.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment was agreed to.

Mr. GARN. Mr. President, my objection to the House civil service reform bill is simply because they have the Hatch Act provisions attached to it. On numerous occasions I have talked to both the distinguished majority manager of the bill and the minority manager of the bill and they have agreed with my concern. So the Senate bill does not have any Hatch Act provisions in it. The House

There will not be any such amendment, obviously, in this bill in the Senate. We have tried to send as unmistakable and as clear a message as possible to our colleagues in the House that it would be an exercise in futility to attempt to add it in the House.

This bill should be a civil service reform bill, period. Everything that we have attempted to do to depoliticize the civil service might be undone by Hatch Act changes, and certainly there would be absolutely no possibility of getting any such bill through the Congress this year.

I give my colleague as strong an assurance as any Senator can that this Senator would resist every attempt to have the Hatch Act reform provision added to this bill. It simply will not be done.

Mr. GARN. I thank my distinguished colleagues for their very definite and precise reassurances. On the basis of those reassurances, I intend to vote for the bill.

Mr. PERCY. I would like to say that my distinguished Illinois colleague, Congressman DEWINSKI, feels just as strong about this matter and has been working to reason with his colleagues in the House not to in any way impede or incurber, holdup or make impossible, the passage of civil service reform, which is a matter of high priority on both sides of the aisle, with both the Congress and the President of the United States.

Mr. SCOTT. Mr. President, I wonder when we are going to have a final vote. I told my wife I would leave here at 7:30. If we are going to have a vote right now,

On page 298, between lines 16 and 17, insert the following:

"(1) (1) Any employee or agency adversely affected or aggrieved by a final order or decision of the Authority with respect to a matter raised as an unfair labor practice under this section, or with respect to an exception filed to any arbitrator's award under section 7321(j) of this title which involves an unfair labor practice complaint, may obtain judicial review of such an order or decision.

"(2) In review of a final decision or order under paragraph (1), the agency or the labor organization involved in the unfair labor practice complaint shall be the named respondent, except that the Authority shall have the right to appear in the court proceeding if it determines, in its sole discretion, that the appeal may raise questions of substantial interest to it. Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority, and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law."

"(3) A petition to review a final order or decision of the Authority shall be filed in the Court of Claims or a United States Court of Appeals as provided in chapters 91 and 158, respectively, of title 28 and shall be filed within 30 days after the date the petitioner received notice of the final decision or order of the Board.

"(4) The court shall review the administrative record for the purpose of determining whether the findings were arbitrary or capricious, and not in accordance with law, and whether the procedures required by statutes and regulations were followed. The findings of the Authority are conclusive if

bill does. That bill has not passed the House.

My concern is what the actions of the managers of this bill would be in conference if there were attached in conference the Hatch Act provisions.

Mr. RIBICOFF. Mr. President, may I respond as manager of this bill and chairman of the Governmental Affairs Committee?

Personally, I am opposed to changing the Hatch Act as it now exists. I have been consistent in opposition to any changes.

Also, there is no room for amending S. 2640 for the Hatch Act.

It is my personal view that to do so would negate all we are trying to achieve in S. 2640.

The Senator from Utah has my personal assurance that, the Senate not having put into S. 2640 an amendment in which the Hatch Act is changed, under no circumstances would I sign a conference report and bring back a conference report to this body which contained a change in the present Hatch Act.

Mr. GARN. I thank the distinguished Senator from Connecticut.

Mr. PERCY. I would like to advise that I have now put on the record a number of times the position of the Senator from Illinois on this matter. I took the position with the majority manager that if there was an attempt to put the Hatch Act amendment on his bill, it would kill the civil service reform bill. I have clearly indicated that I oppose such measure.

As minority floor manager of the civil service reform bill, I would refuse to sign a conference report which incorporated such a provision.

I want to vote. But if not, I am going to have to leave.

Mr. RIBICOFF. The Senator from Alaska has a final amendment and then we will go to third reading and vote on passage, if we can have the cooperation of the other Members of the Senate.

AMENDMENT NO. 3416

(Purpose: To provide for judicial review of Federal Labor Relations Authority unfair labor practice decisions)

Mr. STEVENS. Mr. President, I call up my amendment No. 3416 and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Alaska (Mr. STEVENS) proposes an amendment numbered 3416.

Mr. STEVENS. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. STEVENS. Mr. President, I send a modification of the amendment to the desk.

The PRESIDING OFFICER. The modification will be stated.

Mr. STEVENS. Mr. President, I ask unanimous consent that the reading of the modification be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment as modified, is as follows:

On page 285, line 20, after "title," insert "and except as provided in section 7216(f) of this title

supported by substantial evidence in the administrative record. If the court determines that further evidence is necessary, it shall remand the case to the Authority which, after such further proceedings as may be required, may modify its findings, and shall file with the court the record of such proceedings. The findings of the Authority are conclusive if supported by substantial evidence in the administrative record as supplemented."

On page 308, line 13, after "section" insert "and under section 7216(f) of this title".

On page 318 between lines 15 and 16, insert the following:

"(1) Section 2342 of title 28, United States Code, as amended by section 206 of this Act, is amended—

"(1) by striking out 'and' at the end of paragraph (5),

"(2) by striking out the period at the end of paragraph (6) and inserting in lieu thereof '; and'; and

"(3) by adding at the end thereof the following new paragraph:

"(7) all final orders of the Federal Labor Relations Authority made reviewable by section 7216(f) of title 5."

Mr. STEVENS. Mr. President, an employee aggrieved by a decision of the Merit System Protection Board is entitled to judicial review. Also, one who receives an adverse decision from the National Labor Relations Board has access to judicial review. However, presently S. 2640 fails to provide comparable review for decisions by the Federal Labor Relations Authority. This gives a body under the control of the President untenable authority.

Adverse actions, unacceptable performance appraisals, and discrimination complaints, among others, are appealable to the Merit Systems Protection Board,

whether they proceed through negotiated grievance procedures under the labor section of the bill or through the normal appellate route. Such decisions by the Merit System Protection Board are appealable. Unfair labor practice decisions by the Federal Labor Relations Authority are not appealable, however, because the Federal Labor Relations Authority decisions are not subject to judicial review. Unfair labor practice complaints can be serious as complaints labeled adverse actions. So why should one board be subjected to judicial scrutiny while the other is not?

What is even more compelling is that decisions by the National Labor Relations Board are subject to judicial review. An unfair labor practice is basically the same, whether it is brought before the Federal Labor Relations Authority or the National Labor Relations Board. The only difference is in one case the employer is the Government, in the other it is private industry.

Mr. President, my amendment will provide for judicial review of Federal Labor Relations Authority decisions as they concern unfair labor practices. The review will be similar to that of the Merit System Protection Board's and the National Labor Relation Board's. The Federal Labor Relations Authority decisions will be subjected to the same substantial evidence standard of review.

Mr. President, judicial review is at the core of our Nation's beginnings and future.

Mr. RIBICOFF. Mr. President, the

House language be viewed as the better approach to this problem, in my judgment.

I point out that under the plan supported and originally submitted by the Carter administration the President felt that the administration was joined by the civil rights organizations in feeling that the discrimination complaints should be handled by the Equal Employment Opportunities Commission. I do not think any Member of this body wants civil service reform to be viewed as an effort to shortcut and lessen our efforts to wipe out the last vestiges of discrimination in public service.

With that in mind, I hope that the Senate conferees will consider again their position on this bill, and if at all possible, yield to the House of Representatives because I feel that is the position which gives us the best chance to fight against discrimination with all that it means.

Mr. THURMOND. Mr. President, I rise in support of S. 2640, the Civil Service Reform Act of 1978.

Efforts to reform the civil service system have been under consideration since the days of the Hoover administration. Administrations of both parties have sought to achieve a civil service system that is both accountable to the public through its elected leaders, but protected from the pressures and potential abuses of the political spoils system.

Unfortunately, over the years the civil service system has become weighted down with complicated and inflexible

employees and give them an opportunity to be rewarded for work well done. It is a voluntary service for no more than 9,200 persons, but an excellent tool for attracting and keeping top-flight people in the service of the Federal Government.

Finally, Mr. President, this bill streamlines the processes for dismissing and disciplining Federal employees, which in my opinion is necessary in order to have a civil service capable of adequately serving the American people.

Mr. President, there are two aspects of this bill which are of special importance to me. The first is the exclusion of certain employees from the coverage of civil service laws and regulations.

Several sections of S. 2640 specifically exclude employees of the Federal Bureau of Investigation, the Central Intelligence Committee, and other intelligence-gathering and investigatory agencies of the Government. These employees are now excluded from civil service coverage, and they should remain so.

These people are excluded for proper reasons. The security of our country is at stake and to allow employees to act without fear of disciplinary action or dismissal would seriously impair the ability of our Government to carry out its intelligence gathering and investigative responsibilities. In addition, with the so-called whistleblower protections in this bill, the threat of other and numerous "Pentagon Papers" situations would increase if CIA, FBI and other national security-related employees were

amendment of the Senator from Alaska is acceptable to the managers of the bill. I commend and thank the Senator from Alaska for his cooperation throughout the entire consideration of this legislation in the committee, in markup, and on the floor.

Mr. PERCY. I would like to add my voice of appreciation to that, Mr. President. I know of no objection to the amendment. The amendment is acceptable on this side.

Mr. STEVENS. Mr. President, I move adoption of the amendment, as modified.

The PRESIDING OFFICER. The question is on agreeing to the amendment, as modified.

The amendment, as modified, was agreed to.

Mr. BAYH. Mr. President, I support this legislation enthusiastically because I think it is important for us to find every humanly possible way to make our governmental service more efficient. I think it is possible for us to build on the strength and the dedication of the tens of thousands of dedicated public servants, to award merits, and yet see that those who are not meritorious are removed from the public service.

Mr. President, I am concerned about only one feature of this bill and feel compelled to call it to the Senate's attention.

The language in the Senate bill differs from the House version regarding the EEOC jurisdiction in the adjudication of discrimination cases. In the Senate version EEOC must share jurisdiction with the Merit System Protection Board.

If it necessary that the difference be closely examined in conference and that

rules and procedures that have prevented merit principles to be maintained. It is the taxpayers of this country that suffer from this situation. When managers are unable to get dedicated and competent employees to perform the Government's work, the public is adversely affected. The need for an efficient and competent civil service is long overdue.

Mr. President, the overall thrust of S. 2640 is sound. It recognizes that an efficient and accountable civil service will improve services to the public, while insulating Federal employees from the political spoils system that plagued the Federal service in its early days.

There are major features of the bill that I believe will lead to definite improvements in the civil service. First, the bill separates the relationship of Federal employees. There is created an office of personnel management to supervise personnel management in the executive branch.

Second, it creates an independent merit systems protection board and special counsel to adjudicate employee appeals and protect the merit system.

Third, a Federal labor relations authority is established that would seek to improve labor-management relations by providing procedures for resolving grievances and defining unfair labor practices, exclusive recognition and employee rights.

Fourth, the bill creates a senior executive service which embodies a new structure for selecting, developing, and managing top-level Federal executives. This is an important feature since it would provide incentives to top-level em-

covered by civil service laws and regulations. Exclusion of these employees from the bill would insure that these situations could not arise in the future in great numbers.

Mr. President, the other area of concern to me is the elimination of the veterans' preference in the hiring and promotion of Federal civil service employees. I support the provisions of the bill as currently drafted and would be opposed to any effort to eliminate the current preference given our Nations' veterans in civil service employment.

This legislation is badly needed and deserves the support of my colleagues.

CIVIL SERVICE REFORM IS OVERDUE

● Mr. BIDEN. Mr. President, I am pleased that the President's proposal for civil service reform has come to the floor for action by the full Senate.

Although to the average person on the street, much of the bill is seemingly concerned with technical and procedural changes in personnel and management policies, in fact this legislation will impact on the very quality of Government itself.

Public services are only as good as the people who are responsible for delivering them.

And that is what I think this bill will do, improve the responsiveness and quality of Federal Government employees.

The provision of high-quality public services rests on three things: The quality of people we recruit into the Government; the effectiveness of sound management and incentives for motivating good employee performance.

August 24, 1978

CONGRESSIONAL RECORD—SENATE

S 14323

On the whole, I believe that the merit system has provided the Federal Government with reasonable, well-qualified candidates for public service.

The Government attracts many intelligent, dedicated men and women into its service each year.

We have made and must continue to make progress in recruiting qualified women and minority group members into all levels of Government policymaking.

There are still attitudinal and procedural barriers to the advancement of women, blacks, and other minority groups into middle and upper level management positions.

We must renew our commitment to overcoming these barriers.

At the same time, we must also recognize our special debt to those who fought in our Nation's service, particularly disabled veterans and Vietnam war veterans.

The Vietnam war was the longest and most divisive war fought by this country in over 100 years.

The scars and memories of that war still linger on.

We must insure that there is an adequate period for Vietnam war vets to readjust.

For those who were disabled during our Nation's recent conflicts, there can never be complete readjustment.

The loss of a limb or of an eye can never be completely overcome.

Too many young men have been forced by these disabilities to abandon earlier

Finally, the most important part of civil service reform must be to motivate good employee performance.

And it is in this area that the civil service system is most in need of improvement.

One of the most irritating and detrimental aspects of the present civil service system is the inability of managers to remove or transfer personnel who are obviously incompetent or who allow personal problems, like alcoholism, to interfere with their job performance.

Under existing procedures it is very difficult, if not impossible to fire these employees, because of the length and complexity of the appeals process.

So what happens?

The employee is either given nothing to do or is shoved off to some other division of the agency.

The employee becomes so embittered that he or she detracts from the performance of the agency and lowers the morale of other staff members.

The result is more "deadwood" on the Government payroll.

However, that does not mean that the agency can and should ride roughshod over employee rights.

The burden of proof should be upon the agency to prove that an employee is not performing his or her tasks.

The agency should also consider alternatives to outright dismissal of the employee.

Such alternatives might include job or personal counseling where alcoholism or

I do not believe that a purely political criteria is adequate.

There must be some substantive criteria available upon which to judge performance.

I do not think it is proper to create a mentality in the upper echelons of our civil service where "to get along, is to go along."

This would tend to reduce the quality of higher level employees and create a cadre of political hacks.

For this reason, I would like to see a little more guidance for performance review of the senior executive concept in this bill.

In conclusion, Mr. President, the time is long overdue that the Federal Government adopt widely accepted management techniques which any large organization interested in efficient operation would find logical.

The recruitment of high quality personnel and the establishment of effective management practices and employee performance incentives are closely related.

Strengthening each component will strengthen the overall effectiveness of the Civil Service.

And most important, it will allow the Federal Government to provide services to Americans on a fairer, more efficient, and compassionate basis.

This is what I believe civil service reform is all about and I intend to vote in favor of this bill. I urge my colleagues to support this legislation.●

● Mr. GLENN. I support and have co-

plans for the future and turn to other pursuits within their physical capabilities.

We must insure that opportunities remain available to disabled veterans in the Federal Government.

I believe that the separation of the Civil Service Commission into an Office of Personnel Management and a Merit Systems Protection Board, envisioned in this bill, is a sound move.

Increasingly the flexibility of recruitment decisionmaking to separate agencies, I believe, will enhance the ability of agencies to hire persons capable of carrying out the tasks entrusted to the agency.

The Merit System Protection Board will be responsible for insuring that agencies do not discriminate against women, blacks, minorities, or any other groups.

The Board would also be charged with protecting the rights of agency employees.

We must see to it that the system promotes effective management.

The Federal Government has been woefully slow in adopting management tools which could increase protection.

Title VI of the Civil Service Reform Act allows Federal agencies to experiment on a limited basis with various management and organizational changes which could enhance the delivery of services.

While managers should not experiment for the sake of experimentation, Government agencies should not retain outmoded and inadequate procedures simply because it is inconvenient to change.

personal problems interfere with the employee's productivity.

Another disincentive to good employee performance is the regularity which pay raises and promotions are given in the Federal Government.

Once you get on the payroll, promotions come as a matter of course, not necessarily because you deserve it.

It almost has gotten to the point where you have to actively try to not get the increase.

So I think there is a need to establish an incentive system where outstanding performances are rewarded.

That does not mean that I favor withholding cost-of-living increases because some GS-5 only processes 298 claims in 1 year as opposed to an average of 300.

But we do need a better way to reward the GS-5 employee who processed 400 claims a year.

After reviewing this legislation, I find the concept of a senior executive service reward based on performance evaluations interesting.

I certainly believe that employees at the GS-16 level and above do have a primary responsibility to insure that executive policy is carried out in their agency.

If they strongly believe that a particular directive is incorrect policy then I think they should be willing to resign rather than attempt to subvert the directive by covert means.

My major concern with this performance evaluation concept is who is going to be doing the evaluating and upon that criteria are senior executives going to be evaluated?

This is one area which is inadequately spelled out in the bill.

sponsored the civil service reform bill as it is reported by the committee and believe it to be, on the whole, an excellent proposal. I disagree, however, with a major feature of the bill: its apportionment of administrative authority relating to employment discrimination involving Federal workers.

The committee bill would create a procedure under which differences between the Equal Employment Opportunity Commission and the Merit System Protection Board on employment discrimination questions would be resolved by the Court of Appeals. As the committee report states, "neither agency should have the authority to overrule the view of the other," and, when the matter is certified to the Court of Appeals, neither "agency should be considered as appealing the action of the other."

An alternative procedure, which I urged the committee to adopt but which it rejected, would allow both the MSPB and the EEOC to rule on such discrimination questions in a manner similar to that provided by the committee but would designate the EEOC as the final authority at the administrative level on such questions. Under this procedure, which was originally proposed by the administration, the EEOC would review the MSPB's actions insofar as they related to discrimination and render a decision which could be implemented immediately and, if reviewed, treated by the court with the deference normally accorded to final agency actions.

The basic difference between the two approaches lies in the respective answers they give to the question: Which agency

should be the final administrative authority on issues of alleged employment discrimination in the Federal work force? The committee's answer is that such final authority should be shared—although the extent of the sharing is ambiguous—between the MSPB and the EEOC. My approach would place that authority clearly in the EEOC.

The case for the latter approach rests on the proposition that the EEC is the Federal Government's central repository of sensitivity and expertise on employment discrimination matters. It is the administrative agency that has the responsibility at the Federal level for considering employment discrimination disputes arising in the private sector. I see no reason why, where discrimination disputes involve the employment practices of a Federal agency, the final administrative authority relating to those disputes ought not also to be centralized in the EEOC.

From the beginning three basic arguments have been made against this approach: that it would damage the independence of the MSPB by subjecting its decisions on certain questions to review by an executive branch agency; that the combination of adjudicatory and advocacy functions within the EEOC would be undesirable; and that such an approach would be administratively unworkable. I am not persuaded by these arguments.

With respect to the first, this committee and the Congress on several oc-

The PRESIDING OFFICER. The yeas and nays have already been ordered.

The bill having been read the third time, the question is, Shall the bill pass?

The clerk will call the roll.

Mr. ROBERT C. BYRD. Mr. President, there will be no further rollcall votes tonight.

The second assistant legislative clerk called the roll.

Mr. CRANSTON. I announce that the Senator from South Dakota (Mr. ABOUREZK), the Senator from Minnesota (Mr. ANDERSON), the Senator from Delaware (Mr. BIDEN), the Senator from Mississippi (Mr. EASTLAND), the Senator from Alaska (Mr. GRAVEL), the Senator from Louisiana (Mr. JOHNSTON), and the Senator from South Dakota (Mr. McGOVERN) are necessarily absent.

Mr. STEVENS. I announce that the Senator from Tennessee (Mr. BAKER), the Senator from New Mexico (Mr. DOMENICI), the Senator from Arizona (Mr. GOLDWATER), the Senator from Nevada (Mr. LAXALT), and the Senator from New Mexico (Mr. SCHMITT) are necessarily absent.

The result was announced—yeas 87, nays 1, as follows:

[Rollcall Vote No. 365 Leg.]

YEAS—87

Allen	Hart	Moynihan
Bartlett	Haskell	Muskie
Bayh	Hatch	Nelson
Bellmon	Hatfield,	Nunn
Bentsen	Mark O.	Packwood
Brooke	Hatfield,	Pearson
Bumpers	Paul G.	Fell

Mr. ROBERT C. BYRD addressed the Chair.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. ROBERT C. BYRD. Mr. President, the Civil Service Reform Act of 1978, which the Senate has passed today is, without doubt, one of the most important pieces of legislation to have confronted us in the 95th Congress. It is truly landmark legislation. For this bill represents the first comprehensive overhaul of the civil service system in 95 years.

One of the great complaints of the citizens of this country over the past several years has been the feeling that their Government has become so vast and unwieldy as to no longer be responsive to their needs. They have come to regard their Government as impersonal and inefficient—composed of faceless individuals who loaf more than work.

This impression of the Federal worker is simply untrue and does him a great injustice. Of course, some of these workers do fail to give a full day's work for a day's pay—just as in any institution. But your average Federal worker is certainly fully as dedicated as his counterpart in private industry.

To the extent that this false impression of the Federal worker has been created and to the extent that the Federal Government has, indeed, become unresponsive to the needs of the people of this country, these things are due in large measure to a civil service system that no longer functions in the manner in which originally anticipated. Although

casions have permitted an executive agency to override an independent regulatory commission on questions which were considered best left to the executive branch. Precedents can be found in the existing Presidential override authority of the Civil Aeronautics Board and the International Trade Commission; and in the Department of Energy Organization Act and the Nuclear Non-proliferation Act of 1978, both of which were considered earlier in this Congress by this committee.

It is not the case, as it sometimes has been argued, that the executive branch may exercise these override authorities only in the foreign policy area. Under the DOE Organization Act, the DOE may veto FERC decisions on "energy actions" and other domestic matters specified in the act.

On the second and third of the arguments put forward, I can see no difference between the committee's approach and the one I support in the extent to which they are subject to the concerns raised. Apart from that, I believe those concerns to be minor at worst.

It is my hope therefore that the committee's action on this matter will be reversed in conference and that the House version will prevail.●

The PRESIDING OFFICER. The bill is open to further amendment. If there be no further amendment to be proposed, the question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading, and was read the third time.

Mr. RIBICOFF. Mr. President, I ask for the yeas and nays on final passage.

Burdick
Byrd,
Harry F., Jr.
Byrd, Robert C.
Cannon
Case
Chafee
Chiles
Church
Clark
Cranston
Culver
Curtis
Danforth
DeConcini
Dole
Durkin
Eggleton
Ford
Garn
Glenn
Griffin
Hansen

Hathaway
Hayakawa
Helms
Helms
Hodges
Hollings
Huddleston
Humphrey
Inouye
Jackson
Javits
Kennedy
Leahy
Long
Lugar
Magnuson
Mathias
Matsunaga
McClure
McIntyre
Melcher
Metzenbaum
Morgan

Percy
Proxmire
Randolph
Ribicoff
Riegle
Roth
Sarbanes
Sasser
Schweiker
Sparkman
Stafford
Stennis
Stevens
Stevenson
Stone
Talmadge
Thurmond
Tower
Wallop
Weicker
Williams
Young
Zorinsky

NAYS—1

Scott

NOT VOTING—12

Abourezk
Anderson
Baker
Biden

Domenici
Eastland
Goldwater
Gravel

Johnston
Laxalt
McGovern
Schmitt

So the bill (S. 2640), as amended, was passed.

Mr. RIBICOFF. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. PERCY. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. RIBICOFF. Mr. President, I ask unanimous consent that the Secretary of the Senate be authorized to make technical and clerical corrections in the engrossment of S. 2640.

The PRESIDING OFFICER (Mr. CLARK). Without objection, it is so ordered.

laudably intended to provide a work force in which employees were selected and advanced on the basis of competence rather than political or personal favoritism, the inflexible structures that have developed over the years as a result of a patchwork of statutes and rules built up over almost a century threaten to asphyxiate the merit principle itself.

There are four major areas of concern about the civil service system that were originally voiced by the Second Hoover Commission in the late 1940's and that still remain valid today. First, there is insufficient incentive and reward for encouraging high productivity and competence in the Federal work force. Second, bureaucratic procedures delay even the most elementary personnel actions, including decisions to hire and promote employees. Third, it is difficult and time consuming to fire employees whose work is unsatisfactory. Finally, the Civil Service Commission provides inadequate protection against partisan political abuse of the merit system.

The bill that the Senate has passed today will be a giant step toward resolving these concerns.

Through the creation of the Senior Executive Service, the mandating of performance appraisal systems, and the establishment of a bonus pay system, ample incentives and rewards are provided for exemplary employee performance.

The decentralization of major personnel management procedures and the increased ability provided to agency heads to reassign senior managers to positions where they may be more effective will serve to streamline personnel procedures.

August 24, 1978

CONGRESSIONAL RECORD — SENATE

S 14325

The elimination of unnecessary review, the establishment of time limits for processing cases and the establishment of new standards for disciplining employees guilty of unacceptable performance will render more effective the procedures for dismissing employees who do not perform as they should.

The creation of a Merit Systems Protection Board, the establishment of a special counsel of the Merit Board and the codification of merit principles and prohibited personnel practices will protect the integrity of the merit system.

In sum, the bill that we have passed today will make major strides toward the goal of insuring the people of this country an efficient and effective Government where reward and promotion are based upon merit rather than partisan politics. It will go a long way toward strengthening the faith of the citizens of this country in their Government.

Mr. President, this legislation would never have come before the Senate but for the diligence and long hours of hard work and skillful labors of the distinguished Senator from Connecticut and chairman of the Governmental Affairs Committee, Mr. RIBICOFF. This great effort on behalf of what was a very controversial piece of legislation has resulted in its passage so easily today. His dedication and willingness to work for what he believes in are well known and have been amply evidenced again.

Great credit must also be given to the distinguished Senator from Illinois (Mr.

we tried to take these measures on a nonpartisan basis and work them out for the benefit of the Senate and the entire country.

I think this vote today, of 87 to 1, is a tribute to the President of the United States. It is a tribute to Mr. Campbell, and Mr. Sugarman, Chairman and Vice Chairman of the Civil Service Commission, and the other members of the administration who worked on this legislation. It is a tribute to Senator PERCY and the entire membership of the Governmental Affairs Committee.

Every member, both Democrat and Republican, of that committee worked completely cooperatively. They gave it their attention. Their staffs are outstanding.

Again, my thanks to the majority leader and Senator PERCY and, of course, Senator JAVRS, who always is in there pitching.

Also, I call attention to the Senator from Tennessee (Mr. SASSER). While he sits in the rear of this Chamber, he is the chairman of the subcommittee that has the responsibility for civil service legislation. This legislation could not have been achieved and accomplished without his expression of support. He chaired hearing after hearing. In markup, he was a tower of strength. We are fortunate to have the Senator from Tennessee (Mr. SASSER) as a member of our committee in chairing this most important subcommittee.

I also wish to thank the following staff

ule. That is the way he runs the Governmental Affairs Committee.

The ranking minority member, the Senator from Illinois, attempts always to be in his seat, ready to go, precisely on time. We probably are one of the few committees that tries to stay on time.

Both of us are deeply indebted to our distinguished majority leader, who, together with Senator BAKER, has on occasion probably gotten somewhat weary of talking to Senator RIBICOFF and Senator PERCY about civil service reform; because, as the distinguished Senator from Connecticut indicated, they do have many items of priority, and every committee chairman and every ranking minority member feels that his legislation is the most important and must be done now.

Every commitment made to us has been fulfilled. In scheduling this matter, the distinguished majority leader and the distinguished minority leader, Senator BAKER, have known that it not only is terribly important to those of us in Congress to see that we have a responsive civil service but also very important to the President of the United States.

The President, without hesitation, with tremendous courage and great foresight, has pioneered in this area. He has worked closely with the Chairman of the Civil Service Commission, Chairman Alan Campbell. Together, they have been sufficiently responsive to the individual needs and feelings of Members of the Senate so that their flexibility has

PERCY), the ranking member of the Governmental Affairs Committee, for his efforts on behalf of this bill as well. He, too, has worked hard for and can take pride in its passage.

The people of this Nation owe both of these men a great debt of gratitude.

I have once again witnessed the exemplary skill and dedication, and the ability to work together, that have been so often manifested by these two Senators, Mr. RIBICOFF and Mr. PERCY.

The Senate is in their debt.

I am personally grateful to both, and the country will be well served by their labors today.

Mr. RIBICOFF. Mr. President, will the majority leader yield?

Mr. ROBERT C. BYRD. I yield.

Mr. RIBICOFF. Mr. President, I take this opportunity to thank the majority leader for his gracious comments. My thanks, too, for his understanding and consideration of the requests of the distinguished Senator from Illinois and myself to try to schedule this measure before the recess.

This, indeed, is one of the most important measures that this body has passed during this session. It became very important in the closing days, when the Calendar is so crowded and so many measures seek the attention of the majority leader. He was courteous and thoughtful in scheduling this bill today.

Again, not only do I appreciate his comments about my colleague, the Senator from Illinois. I do not know how a chairman could expect or hope for a ranking minority member to be the equal of Senator PERCY. We have worked together, our staffs have worked together,

members of our committee for the outstanding efforts on behalf of this legislation:

Richard Wigman, Paul Hoff, Paul Rosenthal, Claude Barfield, and Claudia Ingram of the Governmental Affairs Committee staff; John Childers, Ken Ackerman, and Connie Evans of the minority staff; Knox Walkup, Cindy Anderson, Ed Jayne, and Howard Orenstein of the Civil Service Subcommittee; Carl Fait and Jamie Cowan of Senator STEVENS' staff; Riley Temple of Senator MATHIAS' staff; Brian Conboy and Jackie Abelman of Senator JAVITS' staff; Brian Walsh of Senator CHILES' staff; Emily Eiselman of Senator EAGLETON's staff; Tom Cator of Senator HUMPHREY's staff, and Pamela Haynes of Senator HEINZ' staff.

Mr. PERCY. Mr. President, I have said many times that people in the business community with whom I have worked for many years have said, "Will you ever get any satisfaction in the Senate? Isn't it just frustrating in Washington?" Every time we have brought to a successful conclusion a major piece of legislation throughout the course of the years, I feel that that piece of legislation probably will do more good for more people than another 25 years in business might.

Never in my career have I ever had the privilege and pleasure of working with a colleague such as Senator RIBICOFF. With his sense of decency, his sense of dedication, his tremendous accomplishment, and his immense capacity for work, he could run General Motors, he could run Ford, he could run Chrysler, and he could run them on time and on sched-

made possible this achievement tonight.

I express my deep gratitude to the distinguished majority leader for his words. They mean a great deal to the Senator from Illinois. Speaking as one member of the minority, it is an honor and privilege and a pleasure to work with my distinguished colleague as leader of the U.S. Senate on the majority side. He provides a great deal of inspiration to all of us who want to see a sense of accomplishment and he is backed up ably by our beloved and distinguished colleague from California Senator CRANSTON.

The members of our committee, who have worked so tirelessly on this legislation, all of whom we have mentioned previously today, deserve great credit.

I yield to the majority leader.

Mr. ROBERT C. BYRD. Mr. President, both the distinguished chairman and the distinguished ranking minority member have been very gracious in their comments. It is characteristic of them.

I also take this occasion to express appreciation to Mr. MATHIAS and Mr. STEVENS for the dedication they gave to this work. They worked with the chairman and the ranking minority member in dealing with a great many problems. It is because they were able to work together and resolve many of these problems before the bill was even called up that it was made possible for the bill to pass the Senate.

I am glad the distinguished chairman has called attention to the services of the very able Senator from Tennessee (Mr. SASSER). I have noted how this new Senator has gone about his work. He is self-effacing. He works quietly but effec-

tively and with great dedication. I see in Senator SASSER one of the developing strong Senators in this institution.

He gives any job that is handed to him his best, and he makes a little job big. He distinguished himself by this kind of dedication and by the excellence of the product he brings to the floor. Also, he cooperates well with the leadership.

I take this opportunity to express my thanks to him, as the chairman has done, for the quiet but very dedicated and effective work he has done in making this accomplishment today possible.

Mr. PERCY. Mr. President, I yield to my distinguished colleague from Tennessee. I know the Senator from Indiana wishes to obtain the floor, but I believe the Senator from Tennessee would like to make a comment in this colloquy. Then, after I ask for a unanimous-consent request, I will be happy to yield the floor to Senator BAYH, who has been waiting patiently.

Mr. SASSER. I thank the distinguished Senator from Illinois for yielding.

Mr. President, I thank the able and distinguished majority leader for the kind and generous remarks he has directed toward this Senator this evening. With the help of the majority leader and with the capable and farsighted leadership of the chairman of the Governmental Affairs Committee, the distinguished Senator from Connecticut, and with the able cooperation and able leadership of the ranking minority member of the Governmental Affairs Committee, the distinguished Senator from Illinois,

we have produced this evening a significant piece of legislation. We have grappled with a very difficult problem and have done it very well.

I am very hopeful that what we have done in this legislation and what we have produced this evening will be the opening salvo in making the civil service and the Government service of this country more responsive to the constituency it serves.

I thank the distinguished Senator for yielding.

Mr. PERCY. Mr. President, the Senator from Illinois will yield for a final concluding comment by the distinguished Senator from Maryland.

Mr. MATHIAS. I will forego that pleasure for the moment.

Mr. PERCY. Mr. President, the Senator from Illinois wishes to say that this bill would not have been possible without the devotion and dedication of our distinguished colleague from Maryland, who has truly done a momentous job in balancing out the interests of the people of this country with the interests of the Federal employees.

The PRESIDING OFFICER. The Chair recognizes the Senator from Indiana.

Mr. BAYH. Mr. President, I add my commendations to the distinguished Senator from Connecticut and the distinguished Senator from Illinois and my friends from Maryland and Tennessee, and all of those who were responsible for the passage of this very important piece of legislation.



United States
of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 95th CONGRESS, SECOND SESSION

Vol. 124

WASHINGTON, WEDNESDAY, OCTOBER 4, 1978

No. 159

Senate

(Legislative day of Thursday, September 28, 1978)

CIVIL SERVICE REFORM ACT OF 1978—CONFERENCE REPORT

Mr. RIBICOFF. Mr. President, I submit a report of the committee of conference on S. 2640 and ask for its immediate consideration.

The PRESIDING OFFICER (Mr. SARBANES). The report will be stated.

The legislative clerk read as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 2640) to reform the civil service laws, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses this report, signed by a majority of the conferees.

The PRESIDING OFFICER. Without objection, the Senate will proceed to the consideration of the conference report.

(The conference report is printed in the proceedings of the House of Representatives.)

Mr. RIBICOFF. Mr. President, for the past 2 weeks, the Senate and House conferees and their staffs have worked long and hard to integrate and perfect the civil service reform bills passed by their respective Houses. The result is a bill and conference substitute of which the Senate, the Congress, and the President can be most proud.

In brief, the Civil Service Reform Act of 1978 accomplishes the following:

Codifies the merit system principles and subjects employees who commit prohibited personnel practices to disciplinary action;

Provides for an independent Merit Systems Protection Board and special counsel to adjudicate employee appeals and protect the merit system;

Provides new protection for whistleblowers who disclose illegal or improper Government conduct;

October 4, 1978

CONGRESSIONAL RECORD—SENATE

S 17083

Streamlines the processes for dismissing and disciplining Federal employees;

Establishes new performance appraisal systems and a new standard for dismissal of employees who are not performing acceptably;

Creates a Senior Executive Service to manage and supervise Federal programs;

Provides a merit pay system for GS-13 to GS-15 managers to that increases in pay are linked to quality of performance; and

Creates a statutory base for labor-management relations, including the establishment of a Federal Labor-Management Relations Authority.

Mr. President, this bill constitutes the most comprehensive reform of the Federal civil service system since passage of the Pendleton Act of 1883. A competent, well-managed, and highly motivated civil service is a foundation stone of effective and just Government. The public has a right to an efficient Government, which is responsive to its needs as perceived by elected officials. At the same time, the public has a right to a Government which is impartially administered. This balanced bill will, I think, help accomplish these objectives. It is a tremendously important step toward making the Federal Government more effective and more accountable to the American people.

Both the Senate and the House conferees worked with a spirit of dedication and a bent toward sensible compromise. I should especially like to thank the Senate conferees; Senator PERCY, the rank-

Services and a member of the Committee on Governmental Affairs, I participated actively in the hearings and markup of this legislation. I believe that, out of those hearings, Congress has gained a sound understanding of the problems in the civil service system, and I can say confidently here today that the conference report we bring to the Senate addresses these problems in a comprehensive and reform-minded manner.

One of the most important changes in this bill is that we have lowered the standard of evidence needed to uphold the dismissal of an employee who has been fired for poor performance. This change is designed to boost employee morale by allowing Government supervisors to get rid of those employees who are not doing the job. The appeals procedure is streamlined so that months of delay do not ensue simply to dismiss one incompetent employee.

The bill will strengthen personnel management by giving authority to a new Office of Personnel Management to run the executive branch. And the bill strengthens the merit system by codifying the merit system principles and establishing a Merit System Protection Board to insure that employees are not treated arbitrarily. Within the Merit Board to insure that employees are not for the first time in our Nation's history will offer protection to Government whistleblowers from reprisal by their superiors.

The most far-reaching innovation is the establishment of the Senior Executive Service. I am pleased that Congress

the House and Senate versions of this legislation, maintaining key reforms aimed at making the Federal Government a more vital and effective instrument of public policy. As a conferee, I am pleased to fully support this final document.

It is now over 7 months since S. 2640, the Civil Service Reform Act, was first introduced in the Senate by Senators RUBINOFF, SASSER, JAVITS, and me. During that period, the legislation has been examined from every conceivable angle and perspective. Changes have been made to correct weaknesses pointed out by many Members of this Chamber as well as the House of Representatives. The statesmanship and concern for the public good, as well as the rights of employees that has been demonstrated in both Houses of Congress throughout this long proceeding has been impressive, and a credit to those in both Houses who have been involved in the process.

The legislation, as it has emerged from conference, will establish a new Senior Executive Service, not as a 2-year experiment as proposed by the House, but rather as a firmly established element in the Federal personnel structure, with full recognition by Congress of its status as a full, ongoing program.

Likewise, a new system of merit pay for Federal managers GS-13 through 15 will be established to reward competence rather than longevity in dispersing career rewards.

At the core of the legislation, the conference agreed to provisions expediting and easing the process for disciplining

ing minority member of the Governmental Affairs Committee; Senator EAGLETON, Senator SASSER, Senator CHILES, and Senator HUMPHREY for the majority; Senator JAVITS, Senator STEVENS, and Senator MATHIAS for the minority. I much appreciated their support and the long hours they spent in perfecting the conference substitute.

Mr. SASSER. Mr. President, I rise in strong support of the conference report on S. 2640.

This legislation is the product of a year's work by the administration and the Congress. The compromises reached by the conference committee are a testimonial to the spirit of cooperation shown throughout the debate by all involved.

S. 2640 is a good, sound, sensible civil service reform bill. It makes changes in the civil service that are long needed, and it gives our Government a strong framework on which to build its personnel system in the coming years.

Mr. President, there has not been a major comprehensive overhaul of the civil service system since the Pendleton Act was passed in 1883. In the last 95 years, piecemeal change has been lumped on top of piecemeal change—each time, the change was well-meaning in the short run, but there was little effort made to see whether the system itself was being served. Thus, our civil service system has become a mass of rules and regulations that are often contradictory and contrary to the national interest. This legislation changes all of that.

As chairman of the Senate Subcommittee on Civil Service and General

has gone on record as supporting a full-fledged, governmentwide Senior Executive Service. The SES will apply proven management incentive techniques to the Federal Government, where civil service regulations have too often in the past served as obstacles to the development and retention of top managers.

The conference report sets up a system of merit pay for middle level Government managers. These employees will have their pay raises determined by evaluations of their performance, rather than on the length of their service.

Finally, Mr. President, the conference report establishes a responsible and balanced system of labor-management relations for Federal employees. These employees will now be authorized by law to set up procedures for adjudicating their grievances. An independent Federal Labor Relations Authority will administer the labor relations program.

Mr. President, this legislation takes great strides in improving the Federal personnel system. Our goal when we began civil service reform was to reshape the civil service into a system where merit was rewarded and incompetence unprotected. The reforms in this conference report are a historic step in creating a civil service system that truly serves the American public while offering necessary protections to the millions of men and women who dedicate their careers to public service.

Mr. PERCY. Mr. President, the conference report on the Civil Service Reform Act, adopted by the Senate earlier this evening, represents a fair and carefully considered compromise between

and removing unfit Federal employees. Rather than the current procedure under which a supervisor must prove by a "preponderance of evidence" that an employee's performance has not been up to par, the conference decided to adopt the long recognized "substantial evidence" test, under which greater deference would be accorded the judgment of agency supervisors in assessing the work of employees, and a standard of reasonableness would be substituted for the strict legalese which has so rigidified the current system.

This single reform alone is worth the tremendous effort that has been put into this legislation.

Finally, in the area of Federal labor-management relations, the proposal that has been worked out with the House of Representatives, I believe, represents a fair balance between the rights of employees to form and participate in bargaining units, already recognized under law through Executive Order 11491, and the need of the Government to maintain the efficiency of its operations.

I am gratified that my colleagues have adopted the report of the conference committee.

Mr. STEVENS. I rise in support of the civil service reform conference report. Although the conference bill is drastically different from the administration's proposal, most of the President's fundamental reform measures remain in the legislation. The Civil Service Commission will be replaced by the Office of Personnel Management and the Merit Systems Protection Board. A Senior Executive Service was approved for senior managers and provisions for Federal

Labor Management Relations were accepted. Both Houses of Congress rejected the administration's proposals to reduce veterans' preference in the civil service.

All of my amendments have been accepted by the Senate-House conference. Some of the major changes will serve to diffuse the threat of political domination of the Federal service. Other significant changes will improve the rights of employees in collective bargaining units and the Senior Executive Service.

Senator MATTHIAS and I developed three provisions to reduce political manipulation and unwarranted management force:

First. The Independent Merit Systems Protection Board will be authorized to strike down improper rules or regulations developed by the Office of Personnel Management. The Merit Board will eliminate any rule or regulation which would violate merit principles or result in prohibited personnel practices upon agency implementation.

Second. The Office of Personnel Management will be required to post all new rules and regulations as an early warning of impending changes to the Federal personnel system. The provision will assure adequate notification to all em-

ployees and exclusive representatives affected by the changes.

Third. The Office of Personnel Management will be required to approve all performance appraisal systems developed by agencies. The approval must consider each system's effectiveness, objectivity, and compliance with merit principles. All performance appraisal systems will be required to identify the specific skill levels, responsibilities, and individual actions that will be considered in performance evaluation.

I recommended other changes which were accepted by the conference to enforce employee rights and insulate senior managers from unwarranted political influence.

Some of these changes include:

Judicial review will be provided for the Federal Labor Relations Authority's decisions on unfair labor practices.

Attorney fees will be authorized to prevailing parties in decisions by an arbitrator or the Federal Labor Relations Authority.

Half of the Senior Executive Service positions will be classified as career reserved and will not be available for political appointment. Also, 70 percent of

the members must be composed of career civil servants who have had 5 continuous years of service prior to appointment in the SEC.

Boards reviewing the qualifications or performance of a career civil servant in the SEC must contain a majority of career members.

Inserted a provision to protect pension rights of Reserve officers who currently qualify for retirement but have not reached the mandatory age of 60 years.

Considering the substantial revisions made in the area of employee rights and protection from unwarranted political influence, I have decided to support the conference report and urge its adoption.

Mr. President, I move that the Senate adopt the conference report.

The PRESIDING OFFICER (Mr. NUNN). The question is on agreeing to the conference report.

The conference report was agreed to. Mr. RIBICOFF. Mr. President, I move to reconsider the vote by which the conference report on S. 2640 was agreed to.

Mr. HOLLINOS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

95TH CONGRESS
2d Session

S. 2640

IN THE SENATE OF THE UNITED STATES

August 24 (legislative day, August 16), 1978
Ordered to be printed as passed

AN ACT

To reform the civil service laws.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

SHORT TITLE

3
4 SECTION 1. This Act may be cited as the "Civil
5 Service Reform Act of 1978".

TABLE OF CONTENTS

6
7 SEC. 2. The table of contents is as follows:

II—O

TABLE OF CONTENTS

Sec. 1. Short title.
Sec. 2. Table of contents.
Sec. 3. Findings and statement of purpose.

TITLE I—MERIT SYSTEM PRINCIPLES

Sec. 101. Merit system principles; prohibited personnel practices.

TITLE II—CIVIL SERVICE FUNCTIONS; PERFORMANCE APPRAISAL; ADVERSE ACTIONS

Sec. 201. Office of Personnel Management.
Sec. 202. Merit Systems Protection Board and Special Counsel.
Sec. 203. Performance appraisals.
Sec. 204. Adverse actions.
Sec. 205. Appeals.
Sec. 206. Technical and conforming amendments.

TITLE III—STAFFING

Sec. 301. Volunteer services.
Sec. 302. Training.
Sec. 303. Travel, transportation, and subsistence.
Sec. 304. Retirement.
Sec. 305. Definitions relating to preference eligibles.
Sec. 306. Noncompetitive appointments of certain disabled veterans.
Sec. 307. Examination, certification, and appointment of preference eligibles.
Sec. 308. Retention preference.
Sec. 309. Dual pay for retired members of the uniformed services.
Sec. 310. Computation of certain annuities.

TITLE IV—SENIOR EXECUTIVE SERVICE

Sec. 401. Coverage.
Sec. 402. Authority for employment.
Sec. 403. Examination, certification, and appointment.
Sec. 404. Removal and placement rights.
Sec. 405. Performance rating.
Sec. 406. Incentive awards and ranks.
Sec. 407. Pay rates and systems.
Sec. 408. Pay administration.
Sec. 409. Travel, transportation, and subsistence.
Sec. 410. Leave.
Sec. 411. Disciplinary actions.
Sec. 412. Conversion to the Senior Executive Service.
Sec. 413. Repealer.
Sec. 414. Savings provision.
Sec. 415. Effective date.

TITLE V—MERIT PAY

Sec. 501. Pay for performance amendments.
Sec. 502. Conforming and technical amendments.
Sec. 503. Effective date.

TABLE OF CONTENTS—Continued

TITLE VI—RESEARCH, DEMONSTRATION, AND
OTHER PROGRAMS

- Sec. 601. Research and demonstration projects.
 Sec. 602. Intergovernmental Personnel Act amendments.
 Sec. 603. Amendments to the mobility program.

TITLE VII—LABOR-MANAGEMENT RELATIONS

- Sec. 701. Labor-management relations.
 Sec. 702. Remedial authority.

TITLE VIII—MISCELLANEOUS

- Sec. 801. Savings provisions.
 Sec. 802. Authorization of appropriations.
 Sec. 803. Powers of President unaffected except by express provisions.
 Sec. 804. Technical and conforming amendments.
 Sec. 805. Effective dates.

1	FINDINGS AND STATEMENT OF PURPOSE
2	SEC. 3. It is the policy of the United States that—
3	(1) in order to provide the people of the United
4	States with a competent, honest, and productive Federal
5	work force reflective of the Nation's diversity, and to
6	improve the quality of public service, Federal personnel
7	management should be implemented consistent with
8	merit system principles and free from prohibited person-
9	nel practices;
10	(2) the merit system principles which shall govern
11	in the competitive service and in the executive branch
12	of the Federal Government should be expressly stated
13	to furnish guidance to Federal agencies in carrying out
14	their responsibilities in administering the public business
15	and prohibited personnel practices should be statutorily

1 defined to enable Government officers and employees to
 2 avoid conduct which undermines the merit system prin-
 3 ciples and the integrity of the merit system;

4 (3) Federal employees should receive appropriate
 5 protection through increasing the authority and powers
 6 of the independent Merit Systems Protection Board in
 7 processing hearings and appeals affecting Federal
 8 employees;

9 (4) the authority and power of the independent
 10 Special Counsel should be increased so that the Special
 11 Counsel may investigate allegations involving prohibited
 12 personnel practices, protect Federal employees from re-
 13 prisals for the lawful disclosure of information and from
 14 political coercion, and bring complaints and disciplinary
 15 charges against agencies and employees that engage in
 16 prohibited personnel practices;

17 (5) the function of filling positions and other per-
 18 sonnel functions in the competitive service and in the
 19 executive branch should be delegated in appropriate
 20 cases to the agencies to expedite processing appoint-
 21 ments and other personnel actions, with the control and
 22 oversight of this delegation being maintained by the
 23 Office of Personnel Management to protect against pro-
 24 hibited personnel practices and the use of unsound man-
 25 agement practices by the agencies;

(6) a Senior Executive Service should be established to provide the flexibility needed by Executive agencies to recruit and retain the highly competent and qualified executives needed to provide more effective management of Executive agencies and their functions, and the more expeditious administration of the public business;

(7) in appropriate instances, pay increases should be based on quality of performance rather than length of service;

(8) a research and demonstration program should be authorized to permit Federal agencies to experiment with new and different personnel management concepts in controlled situations to achieve more efficient management of the Government's human resources and greater productivity in the delivery of service to the public;

(9) the training program of the Government should include retraining of employees for positions in other agencies to avoid separations during reductions in force and the loss to the Government of the knowledge and experience that these employees possess, and to maintain the morale and productivity of employees; and

(10) the right of Federal employees to organize, bargain collectively, and participate through labor organizations in decisions which affect them, with full regard

for the public interest and the effective conduct of public business, should be specifically recognized in statute.

TITLE I—MERIT SYSTEM PRINCIPLES

MERIT SYSTEM PRINCIPLES; PROHIBITED PERSONNEL PRACTICES

SEC. 101. (a) Title 5, United States Code, is amended by inserting, after chapter 21, the following new chapter:

CHAPTER 23—MERIT SYSTEM PRINCIPLES

^{Sec.}
"2301. Merit system principles.
"2302. Prohibited personnel practices.
"2303. Responsibility of the General Accounting Office.

§ 2301. Merit system principles

"(a) (1) Except as provided in paragraph (2) of this subsection, this chapter shall apply to—

"(A) an Executive agency;

"(B) the Administrative Office of the United States Courts; and

"(C) the Government Printing Office.

"(2) This chapter shall not apply to—

"(A) a Government corporation;

"(B) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, any positions in the Drug Enforcement Administration which are excluded from the competitive service under section 201

1 of the Crime Control Act of 1976 (90 Stat. 2425),
 2 Foreign Service officers of the United States, and, as
 3 determined by the President, an executive agency or unit
 4 thereof whose principal function is the conduct of foreign
 5 intelligence or counterintelligence activities;

6 “(C) the General Accounting Office; and

7 “(D) any position excluded from the application of
 8 this chapter by the President based on a determination by
 9 him that it is necessary and warranted by conditions of
 10 good administration or because of its confidential, policy-
 11 making, policy determining or policy advocating charac-
 12 ter, except that any appointee to a position which is ex-
 13 cluded by the President under this subparagraph shall
 14 be required to comply with the provisions of section 2302
 15 of this title.

16 “(b) Federal personnel management shall be imple-
 17 mented consistent with the following merit system principles:

18 “(1) Recruitment should be from qualified candidates
 19 from appropriate sources in an endeavor to achieve a work
 20 force from all segments of society, and selection and ad-
 21 vancement should be determined solely on the basis of rela-
 22 tive ability, knowledge, and skills, after fair and open com-
 23 petition which assures that all receive equal opportunity.

24 “(2) All applicants and employees should receive fair
 25 and equitable treatment in all aspects of personnel manage-

1 ment without regard to political affiliation, race, color, reli-
 2 gion, national origin, sex, marital status, age, or handicap-
 3 ping condition, and with proper regard for their privacy and
 4 constitutional rights.

5 “(3) Equal pay should be provided for work of equal
 6 value to attract and retain highly qualified personnel, with
 7 appropriate consideration of both national and local rates
 8 paid by non-Federal employers, and appropriate incentives
 9 and recognition should be provided for excellence in
 10 performance.

11 “(4) All employees should maintain high standards of
 12 integrity, conduct, and concern for the public interest.

13 “(5) The Federal work force should be used efficiently
 14 and effectively.

15 “(6) Employees should be retained on the basis of the
 16 adequacy of their performance, inadequate performance
 17 should be corrected, and employees should be separated who
 18 cannot or will not improve their performance to meet re-
 19 quired standards.

20 “(7) Employees should be provided effective education
 21 and training in cases in which such education and training
 22 would result in better organizational and individual perform-
 23 ance.

24 “(8) Employees should be—

25 “(A) protected against arbitrary action, personal

1 favoritism, or coercion for partisan political purposes,
2 and

3 “(B) prohibited from using their official authority
4 or influence for the purpose of interfering with or affect-
5 ing the result of an election or a nomination for election.

6 “(c) Pursuant to his authority under this title, the
7 President may take such actions, including the issuance of
8 rules, regulations, or directives, as the President determines
9 are necessary to assure that personnel management in the
10 agencies covered by this section is based on and embodies
11 the merit system principles.

12 “§ 2302. Prohibited personnel practices

13 “(a) For the purpose of this section, ‘personnel action’
14 means—

15 “(1) an appointment;

16 “(2) a promotion;

17 “(3) an action under chapter 75 of this title or
18 other disciplinary or corrective action;

19 “(4) a detail, transfer, or reassignment;

20 “(5) a reinstatement;

21 “(6) a restoration;

22 “(7) a reemployment;

23 “(8) a performance evaluation under chapter 43 of
24 this title;

25 “(9) a decision concerning pay, benefits, or awards,

1 or a decision concerning education or training if it may
2 reasonably be expected to lead to a personnel action
3 within the meaning of this subsection; or

4 “(10) any other significant change in duties or
5 responsibilities which is inconsistent with the employee’s
6 salary or grade level;

7 with respect to an employee in, or applicant for, a position
8 in the competitive service, a career appointee in the Senior
9 Executive Service, or a position in the excepted service in
10 an executive agency other than a position which is expected
11 from the competitive service because of its confidential,
12 policy-advocating, policy-determining, or policymaking
13 character.

14 “(b) Any employee who has authority to take, direct
15 others to take, recommend, or approve any personnel action,
16 shall not, with respect to such authority—

17 “(1) discriminate for or against any employee or
18 applicant for employment on the basis of race, color,
19 religion, sex, or national origin as prohibited by the
20 Civil Rights Act of 1964 (42 U.S.C. 2000e-16 or the
21 Fair Labor Standards Act of 1938 (29 U.S.C.
22 206(d)), age as prohibited by the Age Discrimination
23 in Employment Act of 1967 (29 U.S.C. 633a), handi-
24 capping conditions as prohibited by section 501 of the
25 Rehabilitation Act of 1973 (29 U.S.C. 791), or marital

1 status or political affiliation as prohibited by applicable
2 law, rule, or regulation;

3 “(2) solicit or consider any recommendation or
4 statement, oral or written, with respect to any individual
5 who requests or is under consideration for any personnel
6 action unless such recommendation or statement is based
7 on the personal knowledge or records of the person fur-
8 nishing it and consists of—

9 “(A) an evaluation of the work performance,
10 ability, aptitude, or general qualifications of such in-
11 dividual; or

12 “(B) an evaluation of the character, loyalty,
13 or suitability of such individual;

14 “(3) coerce the political activity of any person,
15 obligate any person to make any political contribution
16 (including providing any political service), or take any
17 action against any employee or applicant as a reprisal
18 for the refusal of any person to engage in such political
19 activity, make such contribution, or provide such service;

20 “(4) willfully deceive or obstruct any person with
21 respect to such person's right to compete for Federal
22 employment;

23 “(5) influence any person to withdraw from com-
24 petition for any position for the purpose of improving

1 or injuring the prospects of any applicant for employ-
2 ment;

3 “(6) grant any preference or advantage not author-
4 ized by law, rule, or regulation to any employee or
5 applicant for employment (including defining the scope
6 or manner of competition or the requirements for any
7 position) for the purpose of improving or injuring the
8 prospects of any particular individual or category of
9 individuals;

10 “(7) appoint, employ, promote, advance, or advo-
11 cate for appointment, employment, promotion, or
12 advancement, in or to a civilian position, any individual
13 who is a relative (as defined in section 3110(a) (3) of
14 this title) of such employee if such position is in the
15 agency in which such employee is serving as a public
16 official (as defined in section 3110(a) (2) of this title)
17 or over which such employee exercises jurisdiction or
18 control as such an official;

19 “(8) take or threaten to take any personnel action
20 against any employee or applicant for employment as a
21 reprisal for the disclosure, not prohibited by statute or
22 Executive Order 11652, or any related amendments
23 thereto, of information concerning the existence of any
24 activity which the employee or applicant reasonably be-
25 lieves constitutes a violation of law, rules, or regulations,

1 or mismanagement, gross waste of funds, abuse of author-
 2 ity, or a substantial and specific danger to the public
 3 health or safety;

4 “(9) take any personnel action against any em-
 5 ployee or applicant for employment as a reprisal for the
 6 exercise of any appeal right granted by law, rule, or
 7 regulation; or

8 “(10) take any other personnel action that violates
 9 any law, rule, or regulation implementing, or relating
 10 to, the merit system principles contained in section 2301.

11 The term ‘prohibited personnel practice’, when used in
 12 this title, means an action described in this subsection. This
 13 section does not constitute authority to withhold information
 14 from Congress or to take any personnel action against an
 15 employee who discloses information to Congress.

16 “(c) The head of each executive agency shall be re-
 17 sponsible for the prevention of prohibited personnel prac-
 18 tices, for the compliance with and enforcement of applicable
 19 civil service laws, rules, and regulations, as well as other
 20 aspects of personnel management. Any individual to whom
 21 the head of an executive agency delegates authority for per-
 22 sonnel management, or for any aspect thereof, shall be
 23 similarly responsible within the limits of the delegation.

24 “(d) This section shall not be construed to extinguish
 25 or lessen any effort to achieve equal employment opportunity

1 through affirmative action or any right or remedy available
 2 to any employee or applicant for employment in the civil
 3 service under the provisions of the Civil Rights Act of 1964
 4 (42 U.S.C. 2000e-16), prohibiting discrimination based on
 5 race, color, religion, sex, or national origin, the Age Discrimi-
 6 nation in Employment Act of 1976 (29 U.S.C. 633a), pro-
 7 hibiting age discrimination, the Fair Labor Standards Act of
 8 1938 (29 U.S.C. 206(d)), prohibiting discrimination on
 9 account of sex in the payment of wages, section 501 of the Re-
 10 habilitation Act of 1973 (29 U.S.C. 791), prohibiting dis-
 11 crimination on account of handicapping condition, or under
 12 any other applicable law, rule, or regulation prohibiting dis-
 13 crimination on such grounds or on the basis of marital status
 14 or political affiliation.

15 “§ 2303. Responsibility of the General Accounting Office

16 “(a) If ordered by either House of Congress, or upon
 17 his own initiative, or if requested by any committee of the
 18 House of Representatives or the Senate, the Comptroller
 19 General shall conduct audits and reviews to determine com-
 20 pliance with the laws, rules, and regulations governing em-
 21 ployment in the executive branch and in the competitive serv-
 22 ice and to assess the effectiveness and soundness of Federal
 23 personnel management.

24 “(b) The General Accounting Office shall prepare and
 25 submit an annual report to the President and the Congress

1 on the activities of the Merit Systems Protection Board which
 2 shall include a description of significant actions taken by
 3 the Board to carry out its functions under this title. The re-
 4 port shall also review the activities of the Office of Personnel
 5 Management, including an analysis of whether or not the ac-
 6 tions of the Office of Personnel Management are in accord
 7 with merit system principles and free from prohibited per-
 8 sonnel practices.”.

9 (b) (1) The table of chapters for part III of title 5,
 10 United States Code, is amended by adding after the item
 11 relating to chapter 21 the following new item:

“23. Merit system principles..... 2301.”

12 (2) Section 7153 of title 5, United States Code, is
 13 amended—

14 (A) by striking out “Physical handicap” in the
 15 catchline and inserting in lieu thereof “Handicapping
 16 condition”; and

17 (B) by striking out “physical handicap” each place
 18 it appears in the text and inserting in lieu thereof “han-
 19 dicapping condition”.

20 (3) The table of sections for chapter 71 of title 5,
 21 United States Code, is amended by striking out “physical
 22 handicap” in the item relating to section 7153 and inserting
 23 in lieu thereof “handicapping condition”.

1 TITLE II—CIVIL SERVICE FUNCTIONS; PER-
 2 FORMANCE APPRAISAL; ADVERSE ACTIONS
 3 OFFICE OF PERSONNEL MANAGEMENT

4 SEC. 201. (a) Chapter 11 of title 5, United States
 5 Code, is amended to read as follows:

6 “CHAPTER 11—OFFICE OF PERSONNEL
 7 MANAGEMENT

“Sec.

“1101. Office of Personnel Management.

“1102. Director; Deputy Director; Associate Directors.

“1103. Functions of the Director.

“1104. Delegation of authority for personnel management.

8 “§ 1101. Office of Personnel Management

9 “The Office of Personnel Management is an independent
 10 establishment in the Executive branch. The Office shall have
 11 an official seal which shall be judicially noticed and shall
 12 have its principal office in the District of Columbia, but it
 13 may have field offices in other appropriate locations.

14 “§ 1102. Director; Deputy Director; Associate Directors

15 “(a) (1) There is at the head of the Office of Personnel
 16 Management a Director of the Office of Personnel Manage-
 17 ment appointed by the President, by and with the advice and
 18 consent of the Senate for a term of 4 years coterminous with
 19 that of the President.

20 “(2) The Director may be removed by the President
 21 only for inefficiency, neglect of duty, or malfeasance in office.

1 “(3) A Director appointed to fill a vacancy occurring
2 before the end of a term of office of his predecessor serves for
3 the remainder of the term.

4 “(b) There is in the Office a Deputy Director of the
5 Office of Personnel Management appointed by the President,
6 by and with the advice and consent of the Senate. The
7 Deputy Director shall perform such functions as the Director
8 may from time to time prescribe and shall act as Director
9 during the absence or disability of the Director or in the
10 event of a vacancy in the Office of the Director.

11 “(c) No person shall, while serving as Director or
12 Deputy Director, serve in any other office or position in the
13 Government of the United States except as otherwise provided
14 by law or at the direction of the President, except that the
15 Director or Deputy Director shall not advise the President
16 concerning political appointments.

17 “(d) There shall be within the Office of Personnel Man-
18 agement not more than five Associate Directors, who shall be
19 appointed by the Director as executives in the Senior Execu-
20 tive Service, and who shall have such titles as the Director
21 shall from time to time determine.

22 “§ 1103. Functions of the Director

23 “(a) The following functions are vested in the Director
24 of the Office of Personnel Management, and shall be per-

1 formed by the Director, or by such employees of the Office as
2 the Director designates—

3 “(1) aiding the President, as the President may
4 request, in preparing such civil service rules as the Pres-
5 ident prescribes, and otherwise advising the President on
6 actions which may be taken to promote an efficient civil
7 service and a systematic application of the merit system
8 principles, including recommending policies relating to
9 the selection, promotion, transfer, performance, pay, con-
10 ditions of service, tenure, and separation of employees;

11 “(2) executing, administering, and enforcing—

12 “(A) the civil service rules and regulations
13 of the President and the Office and the statutes gov-
14 erning the same, and

15 “(B) the other activities of the Office including
16 retirement, classification, and training activities;
17 except to the extent that the Merit Systems Protection
18 Board or the Special Counsel is authorized to exercise
19 such executing, administering or enforcement functions;

20 “(3) securing accuracy, uniformity, and justice in
21 the functions of the Office;

22 “(4) appointing individuals to be employed by the
23 Office;

24 “(5) directing and supervising employees of the
25 Office, distributing business among employees and orga-

1 nizational units of the Office, and directing the internal
2 management of the Office;

3 “(6) directing the preparation of requests for ap-
4 propriations and the use and expenditure of funds;

5 “(7) reviewing the operations under chapter 87 of
6 this title; and

7 “(8) conducting, or otherwise providing for the
8 conduct of, studies and research into methods of assuring
9 improvements in personnel management.

10 “(b) (1) In the issuance of rules and regulations, the
11 Director of the Office of Personnel Management shall be sub-
12 ject to section 553 of this title (notwithstanding the exemp-
13 tion in section 553 (a) (2) of this title relating to agency
14 management or personnel).

15 “(2) If notice of a rule or regulation proposed by the
16 Director is required by section 553 of this title, the Director
17 shall insure that—

18 “(A) the proposed rule or regulation is posted in
19 offices of Federal agencies maintaining copies of the
20 Federal personnel regulations; and

21 “(B) to the extent the Director determines appro-
22 priate and practical, exclusive representatives of em-
23 ployees affected by such proposed rule or regulation
24 and interested members of the public are notified of
25 such proposed rule or regulation.

1 “(c) Notwithstanding any other provision of law, the
2 Director of the Office of Personnel Management shall have
3 the right to intervene in any proceeding before the Equal
4 Employment Opportunity Commission not subject to section
5 7701 (h) of this title, if the proceeding involves any civil
6 service employee or applicant and if the Director determines
7 that any order or decision of the Commission in such matter
8 may substantially affect the interpretation or administration
9 of the civil service laws, or the Director possesses information
10 which the Director believes may be relevant to the
11 proceeding.

12 “§ 1104. Delegation of authority for personnel management

13 “(a) Notwithstanding any other provision of this
14 title—

15 “(1) the President may delegate, in whole or in
16 part, authority for personnel management functions,
17 including authority for competitive examinations, to the
18 Director of the Office of Personnel Management; and

19 “(2) the Director may delegate, in whole or in
20 part, any function vested in the Director, including au-
21 thority for competitive examinations, to the heads of
22 agencies in the executive branch and other agencies
23 employing persons in the competitive service, that the
24 Director may not delegate open competitive examination

1 authority with respect to positions whose requirements
2 are common to agencies in the Federal Government
3 other than in exceptional cases where the interests of
4 economy and efficiency require it, and where such dele-
5 gation will not weaken the application of the merit
6 system principles.

7 “(b) Authority to conduct competitive examinations
8 delegated to the head of an agency under subsection (a) (2)
9 of this section shall be in accordance with standards issued by
10 the Director and shall be subject to oversight by the Director
11 to assure application of merit system principles in examina-
12 tions and selections.

13 “(c) Personnel actions taken by an agency under the
14 authority of this section which are contrary to any law, regu-
15 lation, or standard issued by the Director shall be canceled
16 by the agency upon the direction of the Director.

17 “(d) Nothing in subsection (a) of this section shall be
18 construed as affecting the responsibility of the Director to as-
19 sure compliance with the civil service laws and regulations.”

20 (b) (1) Section 5314 of title 5, United States Code, is
21 amended by inserting at the end thereof the following new
22 paragraph:

23 “(67) Director of the Office of Personnel Manage-
24 ment.”.

1 (2) Section 5315 of such title is amended by inserting
2 at the end thereof the following new paragraph:

3 “(122) Deputy Director of the Office of Personnel
4 Management.”.

5 (3) Section 5316 of such title is amended by inserting
6 at the end thereof the following new paragraph:

7 “(144) Associate Directors of the Office of Per-
8 sonnel Management (5).”

9 (c) (1) The heading of part II of title 5, United States
10 Code, is amended by striking out “The United States Civil
11 Service Commission” and inserting in lieu thereof “Civil
12 Service Functions and Responsibilities”.

13 (2) The item relating to chapter 11 in the table of
14 chapters for part II of such title is amended by striking out
15 “Organization” and inserting in lieu thereof “Office of
16 Personnel Management”.

17 (d) Notwithstanding the provisions of section 1102 of
18 title 5, United States Code, the term of office of the first
19 Director of Office of Personnel Management appointed under
20 such section shall expire on the last day of the term of the
21 President during which he was appointed.

22 MERIT SYSTEMS PROTECTION BOARD AND SPECIAL
23 COUNSEL

24 SEC. 202. (a) Title 5, United States Code, is amended
25 by inserting after chapter 11 the following new chapter:

1 "CHAPTER 12—MERIT SYSTEMS PROTECTION
2 BOARD AND SPECIAL COUNSEL

"Sec.

"1201. Appointment of members of the Merit Systems Protection Board.

"1202. Term of office; filling vacancies; removal.

"1203. Chairman; Vice Chairman.

"1204. Special Counsel; appointment and removal.

"1205. Powers and functions of the Merit Systems Protection Board; subpenas.

"1206. Authority and responsibilities of the Special Counsel.

"1207. Hearings and decisions on complaints filed by the Special Counsel.

"1208. Exception for Foreign Service officers.

3 "§ 1201. Appointment of members of the Merit Systems
4 Protection Board

5 "The Merit Systems Protection Board is composed of
6 3 members appointed by the President, by and with the
7 advice and consent of the Senate, not more than 2 of whom
8 may be adherents of the same political party and none of
9 whom may hold another office or position in the Government
10 of the United States. The Chairman and members of the
11 Board shall be individuals who, by demonstrated ability,
12 background, training, or experience are especially qualified
13 to carry out the functions of the Board. The Board shall have
14 an official seal which shall be judicially noticed. The Board
15 shall have its principal office in the District of Columbia
16 and may have field offices in other appropriate locations.

17 "§ 1202. Term of office; filling vacancies; removal

18 "(a) The term of office of each member of the Merit
19 Systems Protection Board is 7 years.

1 "(b) A Board member appointed to fill a vacancy oc-
2 ccurring before the end of a term of office of his predecessor
3 serves for the remainder of that term. The appointment is
4 subject to the requirements of section 1201 of this title.

5 "(c) Any Board member appointed for a 7-year term
6 may not be reappointed to any following term but may con-
7 tinue to serve until a successor is appointed and has qualified,
8 except that such member may not continue to serve for more
9 than one year after the date on which the term of the mem-
10 ber would otherwise expire under this section.

11 "(d) A Board member may be removed by the Pres-
12 ident only for inefficiency, neglect of duty, or malfeasance in
13 office.

14 "(e) Any term of office of any member of the Merit
15 Systems Protection Board serving on the effective date of
16 this Act shall continue in effect until such time as such term
17 would expire under section 1102 of title 5, United States
18 Code, as in effect immediately before the effective date of
19 this Act, and upon expiration of such term, appointments to
20 such office shall be made under this chapter.

21 "§ 1203. Chairman; Vice Chairman

22 "(a) The President shall from time to time appoint, by
23 and with the advice and consent of the Senate, one of the
24 Board members to serve as the Chairman of the Merit Sys-

1 tems Protection Board. The Chairman is the chief executive
2 and administrative officer of the Board. The Chairman may
3 continue to serve as Chairman until a successor is appointed
4 and qualified.

5 “(h) The President shall from time to time designate
6 one of the Board members as Vice Chairman of the Board.
7 During the absence or disability of the Chairman, or when
8 the office is vacant, the Vice Chairman shall perform the
9 functions vested in the Chairman.

10 “(c) During the absence or disability of both the
11 Chairman and Vice Chairman, or when both offices are
12 vacant, the remaining Board member shall perform the
13 functions vested in the Chairman.

14 **“§ 1204. Special Counsel; appointment and removal**

15 “(a) The Special Counsel of the Merit Systems Protec-
16 tion Board shall be appointed by the President from attor-
17 neys, by and with the advice and consent of the Senate, for a
18 term of 4 years coterminous with that of the President. A
19 Special Counsel appointed to fill a vacancy occurring before
20 the end of a term of office of his predecessor serves for the
21 remainder of the term.

22 “(b) The Special Counsel of the Merit Systems Protec-
23 tion Board shall be removed by the President only for ineffi-
24 ciency, neglect of duty, or malfeasance in office.

1 **“§ 1205. Powers and functions of the Merit Systems Pro-
2 tection Board; subpoenas**

3 “(a) (1) The Merit Systems Protection Board shall—

4 “(A) hear, adjudicate, or provide for the hearing
5 or adjudication, of all matters within the jurisdiction
6 of the Board under this title, section 2023 of title 38,
7 or any other law, rule, or regulation; and take final
8 action on any such matter;

9 “(B) order any Federal agency or employee to
10 comply with any order or decision issued by the Board
11 under the authority granted under subparagraph (A),
12 and enforce compliance with any such order;

13 “(C) conduct, from time to time, special studies
14 relating to the civil service and to other merit systems
15 in the executive branch, and report to the President
16 and to the Congress as to whether the public interest
17 in a civil service free of prohibited personnel practices
18 is being adequately protected; and

19 “(D) review, as provided in paragraph (6), rules
20 and regulations of the Office of Personnel Management.

21 “(2) (A) One member of the Merit Systems Protection
22 Board may issue a stay, not to exceed 15 days, of an agency
23 personnel action in which a violation of paragraph (3), (8),
24 or (9) of section 2302(b) of this title is alleged by an
25 employee or applicant upon a petition of the Special Counsel
26 demonstrating a reasonable basis for the complaint.

1 “(B) An extension of the stay granted under subpara-
 2 graph (A), not to exceed a total of 45 days, may be granted
 3 by the Merit Systems Protection Board, upon a petition of the
 4 Special Counsel demonstrating that a violation of paragraph
 5 (3), (8), or (9) of section 2302 (b) of this title probably
 6 occurred or probably will occur, but such stay may be ex-
 7 tended only if an opportunity to oppose the extension of the
 8 stay has been accorded to the agency. The agency shall be
 9 accorded a hearing upon request before the Board for this
 10 purpose.

11 “(C) A permanent stay may be granted by the Merit
 12 Systems Protection Board upon petition of the Special Coun-
 13 sel after a hearing before the Board, or an employee desig-
 14 nated by the Board to conduct such hearing, in which the
 15 Special Counsel, the employee or applicant involved, and the
 16 agency shall have the right to present all relevant and mate-
 17 rial evidence. The Board may grant a permanent stay upon a
 18 demonstration that the personnel action resulted from a per-
 19 sonnel practice prohibited by paragraph (3), (8), or (9) of
 20 section 2302 (b) of this title.

21 “(D) As part of its consideration of any petition under
 22 subparagraphs (A) and (B) of this paragraph the Board
 23 may grant such interim relief as it deems appropriate during
 24 the pendency of the application of the Special Counsel for a
 25 permanent stay.

1 “(3) (A) In any proceeding under paragraph (1) (A)
 2 any member of the Board may request from the Director of
 3 the Office of Personnel Management an advisory opinion
 4 concerning the interpretation of any rule, regulation, or other
 5 policy directive promulgated by the Office of Personnel
 6 Management.

7 “(B) If the interpretation or application of any rule,
 8 regulation, or policy directive of the Office of Personnel
 9 Management is at issue in any proceeding under paragraph
 10 (1) (A), the Board shall promptly notify the Director of the
 11 Office of Personnel Management, and the Director shall have
 12 the right to appear as a party or send a representative to any
 13 hearing called under paragraph (2) (C), present written
 14 briefs and other relevant material. If the Director exercises
 15 his right to participate in a proceeding before the Board, he
 16 shall do so as early in the proceeding as practicable. Nothing
 17 in this title shall be construed to mean the Office of Personnel
 18 Management shall be permitted to interfere with the inde-
 19 pendent decisionmaking of the Merit Systems Protection
 20 Board.

21 “(4) In enforcing compliance with any order under
 22 paragraph (1) (B), the Board may order that any employee
 23 charged with complying with such order, other than an em-
 24 ployee appointed by the President by and with the advice
 25 and consent of the Senate, shall not be entitled to receive

1 payment for service as an employee during any period that
 2 the order has not been complied with. The Board shall
 3 certify to the Comptroller General of the United States that
 4 such an order has been issued and no payment shall be made
 5 out of the Treasury of the United States for any service
 6 specified in such order.

7 “(5) In carrying out any study under paragraph (1)
 8 (G), the Board shall make such inquiries as may be neces-
 9 sary and, unless otherwise prohibited by law, shall have
 10 access to personnel records or information collected by the
 11 Office of Personnel Management and may require additional
 12 reports from other agencies as needed.

13 “(6) (A) At any time after the effective date of any
 14 rule or regulation issued by the Office of Personnel Manage-
 15 ment pursuant to section 1103 (b) of this title, the Board
 16 shall review such rule or regulation upon—

17 “(i) its own motion;

18 “(ii) the petition of any interested person if the
 19 Board, in its sole discretion, grants such petition after
 20 consideration of it; or

21 “(iii) the filing of a written complaint by the Spe-
 22 cial Counsel.

23 “(B) In reviewing any rule or regulation pursuant to
 24 this paragraph the Board shall declare such rule or regula-
 25 tion invalid, in whole or in part, if it determines that—

1 “(i) such rule or regulation would, on its face,
 2 violate section 2302 of this title, including the prohibition
 3 against violating the merit system principles, if imple-
 4 mented by an agency; or

5 “(ii) such rule or regulation, as it has been imple-
 6 mented by agencies through personnel actions taken, or
 7 policies adopted in conformity therewith, violates section
 8 2302 of this title, including such principles.

9 “(C) The Director of the Office of Personnel Manage-
 10 ment, and any agency implementing the rule or regulation
 11 under review in any proceeding conducted pursuant to this
 12 paragraph, shall have the right to participate in such pro-
 13 ceeding. Any proceeding conducted by the Board pursuant
 14 to this paragraph shall be limited to determining the validity
 15 of the rule or regulation under review. The Board shall
 16 prohibit future agency compliance with any rule it deter-
 17 mines to be invalid.

18 “(b) The Chairman of the Merit Systems Protection
 19 Board shall designate representatives to chair boards of
 20 review established under section 3383 (b) of this title.

21 “(c) The Board may delegate the performance of any
 22 of its administrative functions under this title to any officer
 23 or employee of the Board.

24 “(d) The Board shall have the authority to prescribe
 25 such regulations as may be necessary for the performance

1 of its functions. The Board shall not issue advisory opinions.

2 The Board may issue rules and regulations, consistent with
3 statutory requirements, defining its review procedures, in-
4 cluding the time limits within which an appeal must be filed
5 and the rights and responsibilities of the parties to an appeal.
6 All regulations of the Board shall be published in the Federal
7 Register.

8 “(e) Except as provided in section 518 of title 28,
9 relating to litigation before the Supreme Court, attorneys
10 designated by the Chairman of the Board may appear for
11 the Board, and represent the Board, in any civil action
12 brought in connection with any function carried out by the
13 Board pursuant to this title or as otherwise authorized by law.

14 “(f) The Chairman of the Board may appoint such
15 personnel as may be necessary to perform the functions of
16 the Board. Any appointment made under this subsection
17 to a confidential, policy-determining, policy-advocating, or
18 policymaking position, or to a position in the Senior Execu-
19 tive Service, shall comply with the provisions of this title,
20 except that such appointment shall not be subject to the
21 approval or supervision of the Office of Personnel Manage-
22 ment or the Executive Office of the President.

23 “(g) The Board shall prepare and submit to the Presi-
24 dent, and, at the same time, to the appropriate committees of
25 Congress, an annual budget of the expenses of the Board.

1 The President shall include the budget of the Board, as re-
2 vised by him, as a separate item in the budget required to be
3 transmitted to the Congress under section 11 of title 31.

4 “(h) (1) The Board shall submit to the President and, at
5 the same time, to the appropriate committees of Congress,
6 any legislative recommendations of the Board relating to any
7 of its functions under this title.

8 “(2) The Board shall submit an annual report to the
9 President and the Congress on its activities, which shall in-
10 clude a description of significant actions taken by the Board
11 to carry out its functions under this title. The report shall also
12 review the activities of the Office of Personnel Management,
13 including an analysis of whether or not the actions of the
14 Office of Personnel Management are in accord with merit
15 system principles and free from prohibited personnel prac-
16 tices.

17 “(i) (1) The Board, the Special Counsel, any adminis-
18 trative law judge appointed under section 3105 of this title,
19 and any member or employee of the Board designated by the
20 Board may—

21 “(A) issue subpoenas requiring the attendance and
22 testimony of witnesses and the production of documen-
23 tary or other evidence from any place in the United
24 States or any territory or possession thereof, the Com-

1 monwealth of Puerto Rico, or the District of Columbia,
2 and

3 “(B) administer oaths, take or order the taking of
4 depositions, order responses to written interrogatories,
5 examine witnesses, and receive evidence.

6 “(2) In the case of contumacy or failure to obey a
7 subpoena issued under paragraph (1) (A), the Board or the
8 Special Counsel, as the case may be, may, through its own
9 attorneys, request the United States district court for the
10 judicial district in which the person to whom the subpoena is
11 addressed resides or is served to an order requiring such per-
12 son to appear at any designated place to testify or to produce
13 documentary or other evidence. Any failure to obey the order
14 of the court may be punished by the court as a contempt
15 thereof.

16 “(3) Witnesses (whether appearing voluntarily or
17 under subpoena) shall be paid the same fee and mileage
18 allowances which are paid subpoenaed witnesses in the courts
19 of the United States.

20 “§ 1206. Authority and responsibilities of the Special
21 Counsel

22 “(a) The Special Counsel may receive and investigate
23 allegations of prohibited personnel practices described in
24 section 2302 (b) of this title, or initiate on his own such

1 investigations, and may take such action as provided in this
2 section.

3 “(b) The Special Counsel shall conduct an investigation
4 requested by any person if the Special Counsel has reason to
5 believe that a personnel action was taken, or is to be taken,
6 as a result of a prohibited personnel practice.

7 “(c) In cases involving alleged action prohibited by sec-
8 tion 2302 (b) (3), (8), or (9) of this title, the Special
9 Counsel—

10 “(1) shall not, during the investigation, disclose the
11 identity of the complainant without the consent of the
12 complainant, unless the Special Counsel determines such
13 disclosure is unavoidable during the course of the in-
14 vestigation;

15 “(2) may petition the Board under section 1205
16 (a) (2) of this title for a stay of an agency personnel
17 action and for any other relief authorized under such
18 section.

19 Refusal by an agency to comply with any stay ordered by the
20 Board or a member thereof may be cause for disciplinary
21 action under subsection (i) of this section.

22 “(d) If the Special Counsel determines that there are
23 prohibited personnel practices which require corrective action,
24 pursuant to subsection (i) (2), the Special Counsel shall, ex-
25 cept where the Special Counsel initiates an action before the

1 Board to correct such practices, report his findings and rec-
 2 ommendations to the Merit Systems Protection Board, the
 3 agency affected and to the Office of Personnel Management
 4 and may report such findings to the President. The Special
 5 Counsel may include in such report suggestions as to what
 6 corrective action should be taken, but the final decision on
 7 what corrective action should be taken shall be made by the
 8 agency involved, subject to guidance and instruction from the
 9 Office of Personnel Management. The Special Counsel may
 10 furnish a copy of such report to the Congress.

11 “(c) (1) The Special Counsel may receive information,
 12 the disclosure of which is not specifically prohibited by statute
 13 or Executive Order 11652, or any related amendments
 14 thereto, concerning the existence of any activity which ap-
 15 pears to constitute a violation of law, rule, or regulation, or
 16 mismanagement, gross waste of funds, abuse of authority, or
 17 a substantial and specific danger to the public health or
 18 safety. In such cases, the Special Counsel shall not disclose
 19 the identity of the person who disclosed the information
 20 without the consent of such person, unless the Special Counsel
 21 determines that such disclosure is unavoidable.

22 “(2) (A) Whenever the Special Counsel receives in-
 23 formation of the type described in paragraph (1) of this
 24 subsection, the Special Counsel shall promptly transmit such
 25 information to the appropriate agency head.

1 “(B) If, within fifteen days after the receipt of such
 2 information, the Special Counsel determines that there is a
 3 substantial likelihood that the information discloses a viola-
 4 tion of law, rule, or regulation, or mismanagement, gross
 5 waste of funds, abuse of authority, or a substantial and
 6 specific danger to the public health or safety, the Special
 7 Counsel may require the agency head to conduct an investi-
 8 gation and submit a written report within sixty days after
 9 the day on which the information is transmitted to the agency
 10 head or within such longer period of time as agreed to in
 11 writing by the Special Counsel: *Provided, however, That the*
 12 *Special Counsel may require an agency head to conduct an*
 13 *investigation and submit a written report only where the*
 14 *information was transmitted to the Special Counsel by a*
 15 *present or past employee or applicant for employment in*
 16 *the agency which the information concerns.*

17 “(3) Any report required under subparagraph (2) (B)
 18 of this subsection shall be reviewed and personally signed by
 19 the agency head and shall include—

20 “(A) a summary of the information with respect to
 21 which the investigation was initiated;

22 “(B) a description of the conduct of the investi-
 23 gation;

24 “(C) a summary of the findings of the investigation;

1 “(D) a listing of any violation or apparent violation
2 of any law, rule, or regulation found during the course of
3 the investigation; and

4 “(E) a description of any corrective action taken
5 or planned as a result of the investigation, such as—

6 “(i) changes in agency rules, regulations or
7 practices;

8 “(ii) restoration of any aggrieved employee;

9 “(iii) disciplinary action against any em-
10 ployee; and

11 “(iv) referral to the Attorney General of any
12 evidence of criminal violation.

13 Any such report shall be sent to the Congress, to the
14 President, and to the Special Counsel for transmittal to
15 the complainant. Whenever the Special Counsel does not
16 receive the report of the agency head within the time pre-
17 scribed in subparagraph (2) (B) of this subsection, the
18 Special Counsel may transmit a copy of the information
19 which was transmitted to the agency head to the Presi-
20 dent and to the Congress together with a statement not-
21 ing the failure of the agency head to file the required report.

22 “(4) Whenever the Special Counsel transmits any in-
23 formation to the agency head under subparagraph (2) (A)
24 of this subsection, but does not require an investigation un-
25 der subparagraph (2) (B) of this subsection, the agency

1 head shall, within a reasonable time after the information
2 was transmitted, inform the Special Counsel, in writing, of
3 what action has been, or is to be taken and when such action
4 will be completed. The Special Counsel shall inform the com-
5 plainant of the report of the agency head. The Special Coun-
6 sel shall maintain and make available to the public a list
7 of noncriminal matters referred to agency heads under
8 paragraph (2) of this subsection together with the reports
9 submitted by the heads of agencies: *Provided, however,*
10 That nothing in this paragraph shall permit the public dis-
11 closure of any information the disclosure of which is specifi-
12 cally prohibited by statute or Executive Order 11652 or
13 any related amendments thereto.

14 “(5) If, during the course of any investigation, the
15 Special Counsel or the agency head determines that there
16 is reasonable cause to believe that a criminal violation by an
17 employee has occurred, such official shall promptly report
18 such determination to the Attorney General and shall sub-
19 mit a copy of such report to the Director of the Office of
20 Personnel Management and to the Director of the Office of
21 Management and Budget.

22 “(f) (1) In addition to the authority otherwise pro-
23 vided in this section, the Special Counsel may, except as
24 provided in paragraph (2) of this subsection, conduct an

1 investigation of any other alleged prohibited practice which
2 consists of—

3 “(A) political activity by any employee which is
4 prohibited under subchapter III of chapter 73 of this
5 title;

6 “(B) political activity by any State or local officer
7 or employee which is prohibited under chapter 15 of
8 this title;

9 “(C) arbitrary or capricious withholding of infor-
10 mation prohibited under section 552 of this title; or

11 “(D) involvement by any employee in any pro-
12 hibited discrimination found by any court or appropri-
13 ate administrative authority to have occurred in the
14 course of any personnel action.

15 “(2) The Special Counsel shall make no investigation
16 of any allegation of any prohibited practice referred to in
17 subparagraph (A) or (D) of paragraph (1) of this sub-
18 section if the Special Counsel determines that such allegation
19 may be more appropriately resolved under an administrative
20 appeals procedure.

21 “(g) During any investigation initiated in accordance
22 with this section, no disciplinary action shall be taken against
23 any employee for any alleged prohibited activity under such
24 investigation or any related activity without the approval of
25 the Special Counsel.

1 “(h) (1) Except as provided in paragraph (2) of this
2 subsection, if the Special Counsel determines, after any in-
3 vestigation under this section of any prohibited personnel
4 practice by any employee, that disciplinary action should be
5 taken against such employee because of such prohibited per-
6 sonnel practice, the Special Counsel shall prepare a written
7 complaint against such employee containing such determina-
8 tion and present such complaint together with a statement
9 of supporting facts to the Merit Systems Protection Board
10 or to an administrative law judge appointed under section
11 3105 of this title and designated by the Board, for a hearing
12 and decision pursuant to section 1207.

13 “(2) In the case of an employee in a confidential, policy-
14 making, policy-determining, or policy-advocating position
15 who was appointed by the President, by and with the advice
16 and consent of the Senate, such complaint and statement, and
17 any response by the employee to such complaint, shall be
18 presented to the President in lieu of the Board or adminis-
19 trative law judge referred to in paragraph (1) of this sub-
20 section.

21 “(i) (1) The Special Counsel may bring disciplinary
22 action, in accordance with the procedures set forth in section
23 1207 of this title against any employee who knowingly and
24 willfully refuses or fails to comply with an order of the Merit
25 Systems Protection Board, except that in the case of an

1 employee described in subsection (h) (2), the Special Coun-
 2 sel shall submit to the President in lieu of the Board a report
 3 on the actions of such employee, which shall include the
 4 information described in subsection (h) (2).

5 “(2) If the Special Counsel believes there is a pattern
 6 of prohibited personnel practices by any agency or employee
 7 and such practices involve matters which are not otherwise
 8 appealable to the Board under section 7701 of this title,
 9 the Special Counsel may seek corrective action by filing a
 10 written complaint with the Board against such agency or
 11 such employee and the Board shall order such corrective
 12 action as it finds necessary.

13 “(j) The Special Counsel may as a matter of right in-
 14 tervene or otherwise participate in any proceeding before
 15 the Merit Systems Protection Board, except that the Special
 16 Counsel shall comply with the rules of the Board and the
 17 Special Counsel shall not have any right of judicial appeal
 18 in connection with such intervention.

19 “(k) The Special Counsel may appoint such legal, ad-
 20 ministrative, and support personnel as may be necessary to
 21 perform the functions of the Special Counsel. Any appoint-
 22 ment made under this subsection shall not be subject to the
 23 approval or supervision of the Office of Personnel Manage-
 24 ment or the Executive Office of the President.

25 “(l) The Special Counsel may prescribe such regula-

1 tions as may be necessary for investigations under this sec-
 2 tion. Such regulations shall be published in the Federal
 3 Register.

4 “(m) The Special Counsel shall not issue any advisory
 5 opinion concerning any law, rule, or regulation (other than
 6 chapter 15 and subchapter III of chapter 73 of this title,
 7 or any rule or regulation thereunder).

8 “(n) The Special Counsel shall submit an annual report
 9 to Congress on his activities. Such reports shall describe the
 10 work of the Special Counsel, including the number, types,
 11 and disposition of allegations of prohibited personnel practices
 12 filed with it, investigations conducted by it, and actions
 13 initiated by it before the Board, as well as a description of the
 14 recommendations and reports made by it to other agencies
 15 pursuant to subsection (d), (e), (h), or (i) of this section,
 16 and the actions taken by the agencies as a result of the reports
 17 or recommendations. The report required by this subsection
 18 shall include whatever recommendations for legislation or
 19 other action by Congress the Special Counsel may deem
 20 appropriate.

21 “§ 1207. Hearings and decisions on complaints filed by
 22 the Special Counsel

23 “(a) Any employee against whom a complaint has been
 24 presented to the Merit Systems Protection Board or an
 25 administrative law judge under section 1206 of this title

1 shall be entitled to a hearing on the record before the
 2 Board or an administrative law judge appointed under
 3 section 3105 of this title and designated by the Board. In
 4 the case of a State or local officer or employee under chapter
 5 15 of this title, such hearing shall be conducted in accordance
 6 with section 1505 of this title. There may be no administra-
 7 tive appeal from a final order of the Board. A final order of
 8 the Board may impose disciplinary action including removal,
 9 demotion, or debarment from Federal employment not to
 10 exceed 5 years, reprimand, suspension, or a civil penalty not
 11 to exceed \$1,000. In the case of any State or local officer or
 12 employee under chapter 15 of this title, the Board shall act
 13 in accordance with section 1506 of this title. An employee
 14 subject to a final order imposing disciplinary action may
 15 obtain judicial review of the final order of the Board in the
 16 United States Court of Appeals for the circuit in which such
 17 employee was employed at the time of the action.”

18 (b) (1) Section 5315 of title 5, United States Code,
 19 is amended by adding at the end thereof the following new
 20 paragraph:

21 “(123) Chairman of the Merit Systems Protection
 22 Board.”

23 (2) Section 5316 of such title is amended by adding at
 24 the end thereof the following new paragraphs:

25 “(145) Members, Merit Systems Protection Board.

1 “(146) Special Counsel of the Merit Systems
 2 Protection Board.”

3 (3) (A) Paragraph (17) of section 5314 of such title
 4 is hereby repealed.

5 (B) Paragraph (66) of section 5315 of such title is
 6 hereby repealed.

7 (C) Paragraph (99) of section 5316 of such title is
 8 hereby repealed.

9 (c) The term of office of the first individual appointed
 10 and qualified as the Special Counsel of the Merit Systems
 11 Protection Board under section 1204 (a) of title 5, United
 12 States Code, as added by subsection (a), shall expire on
 13 the last day of the term of the President during which he
 14 was appointed.

15 (d) The table of chapters for part II of title 5, United
 16 States Code, is amended by inserting after the item relating
 17 to chapter 11 the following new item:

18 “12. Merit Systems Protection Board and Special Counsel..... 1201.
 19 “§ 1208. Exception for Foreign Service officers

20 “This chapter shall not apply to Foreign Service offi-
 21 cers of the United States.”

22 **PERFORMANCE APPRAISALS**

23 SEC. 203. (a) Chapter 43 of title 5, United States
 Code, is amended to read as follows:

1 "CHAPTER 43—PERFORMANCE APPRAISAL

2 "SUBCHAPTER I—PERFORMANCE APPRAISAL—GENERAL

- "Sec.
- "4301. Definitions.
- "4302. Establishment of performance appraisal systems.
- "4303. Actions based on unacceptable performance.
- "4304. Responsibilities of Office of Personnel Management.
- "4305. Regulations.

3 "§ 4301. Definitions

4 "For the purpose of this subchapter—

5 "(1) 'agency' means—

6 "(A) an Executive agency;

7 "(B) the Administrative Office of the United
8 States Courts; and

9 "(C) the Government Printing Office;

10 but does not include—

11 "(i) the General Accounting Office;

12 "(ii) the Central Intelligence Agency, the De-
13 fense Intelligence Agency, and the National Secu-
14 rity Agency, and, as determined by the President,
15 an Executive agency, or unit thereof, whose prin-
16 cipal function is the conduct of foreign intelligence
17 or counterintelligence activities;

18 "(iii) a Government corporation; and

19 "(iv) an agency or unit of an agency excluded
20 from coverage of this subchapter by regulation of
21 the Office of Personnel Management;

1 "(2) 'employee' means an individual employed in
2 or under an agency, but does not include—

3 "(A) an employee outside the United States
4 who is paid in accordance with local native pre-
5 vailing wage rates for the area in which employed;

6 "(B) an individual in the Foreign Service of
7 the United States;

8 "(C) a physician, dentist, nurse, or other em-
9 ployee in the Department of Medicine and Surgery,
10 Veterans' Administration, whose pay is fixed under
11 chapter 73 of title 38;

12 "(D) an administrative law judge appointed
13 under section 3105 of this title;

14 "(E) an individual in the Senior Executive
15 Service;

16 "(F) an individual appointed by the Presi-
17 dent; or

18 "(G) an individual occupying a position not in
19 the competitive service excluded from coverage of
20 this subchapter by regulations of the Office of Per-
21 sonnel Management; and

22 "(3) 'unacceptable performance' means perform-
23 ance which fails to meet established standards in one or
24 more critical elements of the job.

1 "§ 4302. Establishment of performance appraisal systems

2 " (a) Each agency shall develop one or more perform-
3 ance appraisal systems which—

4 " (1) provide for periodic appraisals of job perform-
5 ance of employees;

6 " (2) encourage employee participation in establish-
7 ing performance objectives; and

8 " (3) use the results of performance appraisals as
9 a basis for training, rewarding, reassigning, promoting,
10 demoting, retaining, and separating employees.

11 " (b) Under such regulations as the Office of Personnel
12 Management shall prescribe, each performance appraisal
13 system shall provide for—

14 " (1) establishing performance standards for each
15 employee under such system which permit the accurate
16 evaluation of job performance on the basis of criteria
17 which are related to the position in question and specify
18 the critical elements of the position, communicating such
19 standards to such employee at the beginning of an ap-
20 praisal period, and evaluating such employee during
21 such period on such standards;

22 " (2) recognizing and rewarding employees whose
23 performance so warrants;

24 " (3) assisting employees whose performance is un-
25 acceptable to improve; and

1 " (4) reassigning, demoting, or separating em-
2 ployees whose performance continues to be unacceptable,
3 but only after an opportunity to demonstrate acceptable
4 performance.

5 "§ 4303. Actions based on unacceptable performance

6 " (a) Subject to the provisions of this section, the head
7 of an agency may at any time demote or remove an em-
8 ployee whose performance is unacceptable.

9 " (b) An employee subject to demotion or removal from
10 the service under this section is entitled to—

11 " (1) at least 30 days' advance written notice of the
12 proposed action which identifies the expected standard of
13 performance for the employee, the areas in which the
14 employee's performance is currently unacceptable, and
15 any other failures to perform acceptably during the
16 1-year period ending on the date of the notice which may
17 be considered in making a decision on the proposed
18 action;

19 " (2) be accompanied by an attorney or other
20 representative;

21 " (3) reply to the notice orally and in writing; and

22 " (4) a written decision which states the reasons for
23 the decision and which, unless proposed by the agency
24 head, has been concurred in by an employee who is in a

1 higher position than the employee who proposed the
2 action.

3 “(c) An agency may, under regulations prescribed by
4 the head of the agency, extend the notice period under sub-
5 section (b) of this section for not more than 30 days. An
6 agency may extend such a notice period for more than 30
7 days only in accordance with regulations issued by the Office
8 of Personnel Management. The decision to retain, remove, or
9 demote an employee shall be made within 30 days after the
10 date of the expiration of the notice period. The decision to
11 retain, remove or demote an employee shall be based upon
12 one or more failures to perform acceptably as identified in the
13 notice provided under subsection (b) (1) of this section.

14 “(d) If no action is taken because of performance
15 improvement during the notice period and the employee's
16 performance continues to be acceptable for one year from
17 the date of the notice provided under subsection (b) of this
18 section, any entry or other notation of the unacceptable per-
19 formance shall be removed from official records relating to
20 such employee and shall not subsequently be the basis for an
21 action under this section.

22 “(e) An employee who is a preference eligible or is in
23 the competitive service and who has been demoted or re-
24 moved under the provisions of subsection (b) of this section
25 may appeal the action to the Merit Systems Protection Board.

1 Except as provided in subsection (f), the appeal shall be
2 conducted in accordance with the procedures established in
3 section 7701 of this title.

4 “(f) (1) In any appeal under subsection (e) of this
5 section, the agency shall have the initial burden of proof,
6 subject to an opportunity for rebuttal by the employee, in
7 establishing that there is a reasonable basis on the record
8 taken as a whole to believe that the employee failed to satisfy
9 one or more performance standards established for that em-
10 ployee, or otherwise failed to perform acceptably, as set
11 forth in the notice provided to the employee under subsection
12 (b) (1) of this section.

13 “(2) An agency action shall be sustained by the Board,
14 the administrative law judge, or the appeals officer unless—

15 “(A) the agency's procedures contained error that
16 substantially impaired the rights of the employee;

17 “(B) the agency's decision was based on discrimi-
18 nation prohibited by section 2302 (b) (1) of this title; -

19 “(C) there is no reasonable basis on the record for
20 the agency's decision; or

21 “(D) the agency's decision involved a prohibited
22 personnel practice, or was otherwise contrary to law.

23 “(g) This section does not apply to—

24 “(1) the demotion to the grade previously held of

1 a supervisor or manager who has not completed the pro-
 2 bationary period under section 3321 (a) (2) of this title
 3 in an initial supervisory or managerial position,

4 “(2) the separation or demotion of an individual
 5 in the competitive service who is serving a proba-
 6 tionary or trial period or who has not completed one
 7 year of current continuous employment under other
 8 than a temporary appointment limited to one year or
 9 less, or

10 “(3) the separation or demotion of an individual
 11 in the excepted service who has not completed one year
 12 of current continuous employment in the same or similar
 13 positions.

14 “§ 4304. Responsibilities of the Office of Personnel Man-
 15 agement

16 “(a) The Office of Personnel Management shall make
 17 technical assistance available to agencies in the develop-
 18 ment of performance appraisal systems.

19 “(b) The Office of Personnel Management shall review
 20 each performance appraisal system developed by any agency
 21 under this section and determine whether the performance
 22 appraisal system meets the requirements of this subchapter.
 23 If the Office of Personnel Management determines that a
 24 system does not meet the requirements of this subchapter

1 (including regulations prescribed under section 4305), the
 2 Office of Personnel Management shall direct the agency to
 3 implement an appropriate system or to correct operations
 4 under the system, and any such agency shall take any action
 5 so required.

6 “(c) The Comptroller General shall from time to time
 7 review on a selected basis performance appraisal systems
 8 established under this subchapter to determine the extent to
 9 which such system meets the requirements of this subchapter
 10 and shall periodically report its findings to the Office of
 11 Personnel Management and to Congress.

12 “§ 4305. Regulations

13 “The Office of Personnel Management may prescribe
 14 regulations to carry out the purposes of this subchapter,
 15 except as it concerns any matter with respect to which the
 16 Merit Systems Protection Board may prescribe regulations.”

17 (b) The item relating to chapter 43 in the table of
 18 chapters for part III of title 5, United States Code, is
 19 amended by striking out “Performance Rating” and insert-
 20 ing in lieu thereof “Performance Appraisal”.

21 ADVERSE ACTIONS

22 SEC. 204. (a) Chapter 75 of title 5, United States
 23 Code, is amended by striking out subchapters I and II and
 24 inserting in lieu thereof the following:

1 "SUBCHAPTER I—SUSPENSION FOR 30 DAYS
2 OR LESS

3 "§ 7501. Definitions

4 "For the purpose of this subchapter—

5 "(1) 'employee' means an individual in the com-
6 petitive service who is not serving a probationary or
7 trial period under an initial appointment, or who has
8 completed 1 year of current continuous employment in
9 the same or similar positions under other than a tem-
10 porary appointment limited to 1 year or less, but does
11 not include—

12 "(A) an individual in the Senior Executive
13 Service;

14 "(B) an individual occupying a position not in
15 the competitive service excluded from coverage of
16 this subchapter by regulation of the Office of Per-
17 sonnel Management;

18 "(O) an individual whose position is in an
19 agency, or unit thereof, excepted from coverage of
20 the merit system principles pursuant to section
21 2301 (a) (2) (B) of this title; or

22 "(D) an individual who is a Foreign Service
23 officer of the United States; and

1 "(2) 'suspension' means the placing of an em-
2 ployee, for disciplinary reasons, in a temporary status
3 without duties and pay.

4 "§ 7502. Actions covered

5 "This subchapter applies to a suspension for 30 days
6 or less, but does not apply to a suspension under section 7532
7 of this title or an action initiated by the Special Counsel
8 under section 1206 of this title.

9 "§ 7503. Cause and procedure

10 "(a) Under regulations prescribed by the Office of
11 Personnel Management, an employee may be suspended for
12 30 days or less only for such cause as will promote the
13 efficiency of the service.

14 "(b) An employee against whom a suspension for 30
15 days or less is proposed is entitled to—

16 "(1) a written notice stating reasons for the pro-
17 posed action;

18 "(2) a reasonable time to answer orally and in
19 writing and to furnish affidavits and other documentary
20 evidence in support of the answer;

21 "(3) be accompanied by an attorney or other
22 representative; and

23 "(4) a written decision at the earliest practicable
24 date.

1 **“§ 7504. Regulations**

2 “The Office of Personnel Management may prescribe
3 regulations to carry out the purposes of this subchapter.

4 **“SUBCHAPTER II—REMOVAL, SUSPENSION FOR**
5 **MORE THAN 30 DAYS, REDUCTION IN GRADE**
6 **OR PAY, OR FURLOUGH FOR 30 DAYS OR**
7 **LESS**

8 **“§ 7511. Definitions; application**

9 “(a) For the purpose of this subchapter—

10 “(1) ‘employee’ means—

11 “(A) an individual in the competitive service
12 who is not serving a probationary or trial period
13 under an initial appointment, or who has completed
14 1 year of current continuous employment under
15 other than a temporary appointment limited to 1
16 year or less; and

17 “(B) a preference eligible in an Executive
18 agency in the excepted service, and a preference
19 eligible in the United States Postal Service and the
20 Postal Rate Commission, who has completed one
21 year of current continuous service in the same or
22 similar positions;

23 “(2) ‘suspension’ has the meaning as set forth in
24 section 7501 of this title;

1 “(3) ‘grade’ means a level of classification under
2 a position classification system;

3 “(4) ‘pay’ means the rate of basic pay fixed by
4 law or administrative action for the position held by an
5 employee; and

6 “(5) ‘furlough’ means the placing of an employee
7 in a temporary status without duties and pay because
8 of lack of work or funds or other nondisciplinary reasons.

9 “(b) This subchapter does not apply to an employee—

10 “(1) whose appointment is required to be made by
11 and with the advice and consent of the Senate;

12 “(2) whose position has been determined to be of
13 a confidential, policymaking, policy-determining, or
14 policy-advocating character by—

15 “(A) the Office of Personnel Management for
16 a position that it has excepted from the competitive
17 service; or

18 “(B) the President or the head of an agency
19 for a position which is excepted from the competitive
20 service by statute;

21 “(3) whose position is in the Senior Executive
22 Service;

23 “(4) whose position is in an agency, or unit thereof,
24 excepted from coverage of the merit systems principles
25 pursuant to section 2301 (a) (2) (B) of this title; or

1 “(5) who is a Foreign Service Officer of the United
2 States.

3 “(c) The Office of Personnel Management may provide
4 for the application of this subchapter to any position or
5 group of positions excepted from the competitive service by
6 regulation of the Office of Personnel Management.

7 “§ 7512. Actions covered

8 “This subchapter applies to—

9 “(1) a removal;

10 “(2) a suspension for more than 30 days;

11 “(3) a reduction in grade;

12 “(4) a reduction in pay of an amount exceeding one
13 step of the employee's grade or 3 percent of the em-
14 ployee's basic pay; and

15 “(5) a furlough for 30 days or less;

16 but does not apply to—

17 “(A) a suspension or removal under section 7532
18 of this title,

19 “(B) a reduction in force action under section 3502
20 of this title,

21 “(C) the demotion of a supervisor or manager who
22 has not completed the probationary period under section
23 3321 (a) (2) of this title in an initial supervisory position
24 if such demotion is to the grade held immediately before
25 becoming such a supervisor,

1 “(D) a demotion or removal under section 4303
2 of this title; or

3 “(E) an action initiated by the Special Counsel
4 under section 1206 of this title.

5 “§ 7513. Cause and procedure

6 “(a) Under regulations prescribed by the Office of Per-
7 sonnel Management, an agency may take an action covered
8 by this subchapter against an employee only for such cause
9 as will promote the efficiency of the service.

10 “(b) An employee against whom an action is pro-
11 posed is entitled to—

12 “(1) at least 30 days' advance written notice, ex-
13 cept when there is reasonable cause to believe the em-
14 ployee has committed a crime for which a sentence of
15 imprisonment can be imposed, stating specific reasons
16 for the proposed action;

17 “(2) a reasonable time to answer orally and in
18 writing and to furnish affidavits and other documentary
19 evidence in support of the answer;

20 “(3) be accompanied by an attorney or other repre-
21 sentative; and

22 “(4) a written decision and reasons therefor at the
23 earliest practicable date.

1 “(c) An agency may in its discretion provide by regu-
2 lation for a hearing which may be in lieu of or in addition to
3 the opportunity to answer provided under subsection (b) (2)
4 of this section.

5 “(d) An employee against whom an action is taken
6 under this section is entitled to appeal to the Merit Systems
7 Protection Board under section 7701 of this title.

8 “(e) Copies of the notice of proposed action, the answer
9 of the employee when written, a summary thereof when
10 made orally, the notice of decision and reasons therefor, and
11 any order affecting an adverse action shall be maintained by
12 the agency and shall be furnished to the Merit Systems Pro-
13 tection Board upon its request and to the individual affected
14 upon such individual's request.

15 “§ 7514. Regulations

16 “The Office of Personnel Management may prescribe
17 regulations to carry out the purposes of this subchapter,
18 except as it concerns any matter with respect to which the
19 Merit Systems Protection Board may prescribe regulations.”

20 (b) The table of sections for chapter 75 of title 5,
21 United States Code, is amended by striking out all the items
22 preceding the item relating to subchapter III and inserting
23 in lieu thereof the following:

1 “CHAPTER 75—ADVERSE ACTIONS

“SUBCHAPTER I—SUSPENSION OF 30 DAYS OR LESS

“Sec.

“7501. Definitions.

“7502. Actions covered.

“7503. Cause and procedure.

“7504. Regulations.

“SUBCHAPTER II—REMOVAL, SUSPENSION FOR MORE
THAN 30 DAYS, REDUCTION IN GRADE OR PAY, OR
FURLOUGH FOR 30 DAYS OR LESS

“7511. Definitions; application.

“7512. Actions covered.

“7513. Cause and procedure.

“7514. Regulations.”

2 APPEALS

3 Sec. 205. Chapter 77 of title 5, United States Code, is
4 amended to read as follows:

5 “CHAPTER 77—APPEALS

“Sec.

“7701. Appellate procedures.

“7702. Judicial review of decisions of the Merit Systems Protection
Board.

6 “§ 7701. Appellate procedures

7 “(a) An employee, or applicant for employment, may
8 submit an appeal to the Merit Systems Protection Board
9 from any action which is appealable to the Board under
10 any law, rule, or regulation. An appellant shall have the
11 right to be accompanied by an attorney or other representa-
12 tive. The appeal shall be processed in accordance with regu-
13 lations prescribed by the Board.

14 “(b) The Board may refer any case appealable to it to
15 an administrative law judge appointed under section 3105

1 of this title, or to an appeals officer, who shall, except as
 2 provided in subsection (c) of this section, render a deci-
 3 sion after conducting an evidentiary hearing with an oppor-
 4 tunity for cross-examination. In any case involving a removal
 5 from the service, the Board shall assign such case to a more
 6 senior appeals officer, or to an administrative law judge.

7 “(c) At any time after the filing of the appeal, any
 8 party may move for summary decision. The adverse party
 9 shall have a reasonable time, fixed by regulations of the
 10 Board, to respond. If the response of the adverse party
 11 shows that he cannot for reasons stated present facts essen-
 12 tial to justify his opposition, the motion may be denied or
 13 a continuance may be ordered to permit affidavits to be ob-
 14 tained or depositions to be taken or discovery to be had. If
 15 the administrative law judge or appeals officer finds, based
 16 on the written submission of the parties and other materials
 17 in the record that there are no genuine and material issues
 18 of fact in dispute, the administrative law judge or appeals
 19 officer shall grant a summary decision to the party entitled
 20 to such a decision as a matter of law. The administrative
 21 law judge or appeals officer may, at the request of either
 22 party, provide for oral presentation of views in coming to
 23 a decision under this subsection.

24 “(d) (1) In any appeal from any agency action under
 25 this chapter, the agency shall have an affirmative burden

1 of proof to establish that there is substantial evidence on
 2 the record taken as a whole that the action from which the
 3 appeal has been taken promotes the efficiency of the service.

4 “(2) An agency action shall be upheld by the Board,
 5 the administrative law judge, or the appeals officer unless—

6 “(A) the agency’s procedures contained error that
 7 substantially impaired the rights of the employee;

8 “(B) the agency’s decision was based on discrimi-
 9 nation prohibited by section 2302 (b) (1) of this title;

10 “(C) the agency’s decision is unsupported by sub-
 11 stantial evidence on the record taken as a whole; or

12 “(D) the agency’s decision involved a prohibited
 13 personnel practice, or was otherwise contrary to law.

14 “(e) Any decision under subsections (b) and (c) of
 15 this section shall be final unless a party to the appeal or the
 16 Office of Personnel Management petitions the Board for
 17 a review within 30 days after receipt of the decision, unless
 18 the Board, for good cause shown, extends the 30-day period
 19 or reopens and reconsiders a case on its own motion. The
 20 Director of the Office of Personnel Management may peti-
 21 tion the Board for a review only if, in the exercise of his sole
 22 discretion, he determines that the decision is erroneous and
 23 will have a substantial impact on a civil service law, rule,
 24 regulation, or policy directive within the jurisdiction of the
 25 Office of Personnel Management. One member of the Board

1 may grant a petition or otherwise direct that a decision
 2 be reviewed by the full Board. This procedure shall not
 3 apply if, by law, a decision of an administrative law judge
 4 or appeals officer is required to be acted upon by the Board.

5 “(f) (1) Subject to paragraph (2) of this subsection,
 6 in the case of any complaint of discrimination which under
 7 subsection (h) is required to be heard by the Board, an
 8 appeals officer assigned to hear discrimination complaints
 9 filed under section 717 (b) of the Civil Rights Act of 1964
 10 (42 U.S.C. 2000e-16 (b)) may make a decision on the
 11 record or conduct an evidentiary hearing, as the circum-
 12 stances may warrant, pursuant to regulations prescribed by
 13 the Board.

14 “(2) An appeal may be heard under paragraph (1) of
 15 this subsection if the employee, or applicant for Federal
 16 employment, submits the discrimination complaint to the
 17 agency, which shall have 60 days to resolve the complaint.
 18 If the complaint is not resolved to the satisfaction of the com-
 19 plainant or if the agency fails to issue a final decision thereon
 20 within 60 days, the complainant may appeal to the Board.
 21 Such an appeal must be submitted within 30 days of notice
 22 to the complainant of the agency’s decision or following
 23 expiration of the 60-day period if the agency has failed to
 24 issue a decision on the complaint. Class complaints of discrim-

1 ination may be processed by an appeals officer pursuant to
 2 regulations prescribed by the Board.

3 “(g) Members of the Board and administrative law
 4 judges or appeals officers assigned by the Board may—

5 “(1) consolidate appeals filed by two or more
 6 appellants, or

7 “(2) join two or more appeals filed by the same
 8 appellant and hear and decide them concurrently,

9 if the Board, the administrative law judge, or the appeals
 10 officer, as the case may be, determines in its discretion that
 11 such action could result in the appeals’ being processed more
 12 expeditiously and such action would not prejudice the parties.

13 “(h) Notwithstanding any other provision of law, an
 14 employee who has been affected by an action appealable to
 15 the Board and who alleges that discrimination prohibited
 16 by section 717 of the Civil Rights Act of 1964 (42 U.S.C.
 17 2000e-16c), section 6 (d) of the Fair Labor Standards Act
 18 of 1938 (29 U.S.C. 206 (d)), section 501 of the Rehabilita-
 19 tion Act of 1973 (29 U.S.C. 971), and section 15 of the Age
 20 Discrimination in Employment Act of 1967 (29 U.S.C.
 21 633a), and the rules, regulations, and policy directives issued
 22 thereunder, was a basis for the action shall have both the
 23 issue of discrimination and the appealable action decided
 24 by the Board in the appeal decision under the Board’s
 25 appellate procedures.

1 “(i) (1) If any statute referred to in subsection (h), or
 2 if any rule, regulation, or policy directive issued by the Equal
 3 Employment Opportunity Commission pursuant to such
 4 statute, is at issue in any appeal conducted by the Board
 5 pursuant to subsection (f), the Board shall promptly notify
 6 the Equal Employment Opportunity Commission and the
 7 Commission shall, consistent with the provisions of subsec-
 8 tion (f), have the right to participate fully in the proceeding,
 9 including such submissions as it deems appropriate on issues
 10 of fact and law.

11 “(2) Notwithstanding any other provision of law, any
 12 decision and order issued by the Board pursuant to sub-
 13 section (h) of this section shall be the final administrative
 14 decision in the matter unless, pursuant to paragraph (3), the
 15 Equal Employment Opportunity Commission reconsiders the
 16 decision and order of the Board.

17 “(3) The Commission may reconsider the decision and
 18 order of the Board upon a petition from the employee who
 19 brought the proceeding, or on its own initiative, if the Com-
 20 mission finds in writing that the decision and order may
 21 have a substantial impact on the general administration by
 22 the Commission of its responsibilities for preventing dis-
 23 crimination in Federal employment as a whole. The Com-
 24 mission shall have 30 days from the issuance of the decision

1 and order of the Board to determine whether to reconsider
 2 such decision and order. If the Commission does reconsider
 3 any decision and order of the Board pursuant to this para-
 4 graph, the Commission shall, within 60 days of the issuance
 5 of the decision and order of the Board, consider the entire
 6 record of the proceedings before the Board, and, solely on
 7 the basis of the evidentiary record compiled pursuant to sub-
 8 section (f), taken as a whole, either—

9 “(A) concur in the decision and order of the Board;

10 or

11 “(B) issue another decision and order, which differs
 12 from the decision and order of the Board to the extent
 13 that the Commission finds in writing that, in its view,
 14 the interpretation by the Board of the meaning of any
 15 statute, rule, regulation or policy directive referred to
 16 in subsection (h) was erroneous, or the application of
 17 such law to the evidence in the record was unsupportable,
 18 as a matter of law.

19 “(4) If the Commission concurs pursuant to paragraph
 20 (3) (A) in the decision and order of the Board, such deci-
 21 sion and order of the Board shall be final agency action in
 22 the matter.

23 “(5) If the Commission issues a different decision and
 24 order pursuant to paragraph (3) (B), the Board shall
 25 reconsider and, within 30 days—

1 “(A) concur and adopt in whole the order of the
2 Commission, together with any additional decision of
3 the Board as it deems appropriate;

4 “(B) reaffirm the initial decision and order of the
5 Board; or

6 “(C) reaffirm the initial decision and order of the
7 Board with such revisions as it deems appropriate.

8 Whenever action is not taken pursuant to subparagraph (A)
9 the matter shall be immediately certified to the United States
10 Court of Appeals for the District of Columbia for review.

11 The administrative record in the proceedings shall be for-
12 warded by the Board within 30 days to such court. Such
13 record shall consist of the factual record compiled by the
14 Board pursuant to subsection (f), any order or decision
15 issue by the Board or the Commission, the findings required
16 by paragraph (3), and any transcript of oral arguments
17 made, or legal briefs filed, before the Board or the Commis-
18 sion. Upon review, the court shall give due deference to
19 the respective expertise of each agency. Upon application
20 by the employee, the Commission may issue such interim
21 relief as it deems appropriate to mitigate any exceptional
22 hardship the employee might otherwise incur as a result of
23 certification under this subsection, except that the commis-
24 sion may not stay, or order the employing agency to reverse
25 on an interim basis, the personnel action on which the appeal

1 of the matter to the Board was based. The court shall, on
2 the basis of the record certified to it pursuant to this para-
3 graph, promptly decide the matter.

4 “(j) Members of the Board, administrative law judges,
5 and appeals officers assigned to the Board may require pay-
6 ment by the agency which is the losing party to a proceed-
7 ing before the Board, of reasonable attorney fees incurred by
8 an employee, if the employee is the prevailing party and
9 the deciding official or officials determine that payment by
10 the agency is warranted on the grounds that the agency's
11 action was taken in bad faith, except that where an employee
12 or applicant for employment is the prevailing party and the
13 decision is based on a finding of discrimination prohibited
14 by any law referred to in subsection (h), the awarding of
15 attorney fees shall be governed by the standards applicable
16 under the Civil Rights Act of 1964 (42 U.S.C. 2000e-
17 5(k)).

18 “(k) The Board may, by regulation, provide for alterna-
19 tive methods for settling matters subject to the appellate
20 jurisdiction of the Board. A decision under such a method
21 shall be final, unless the Board reopens and reconsiders a
22 case at the request of the Office of Personnel Management
23 under subsection (e) of this section.

24 “(l) (1) Upon the submission of any appeal to the Board
25 under this section, the Board, through reference to such cate-

1 gories of cases, or other means, as it deems appropriate,
 2 shall establish and announce publicly the date by which
 3 it intends to complete final agency action on the matter.
 4 Such date shall assure expeditious consideration of the ap-
 5 peal, consistent with the interests of fairness and other pri-
 6 orities of the Board. If the Board fails to complete action on
 7 the appeal by the announced date, and the expected delay
 8 will exceed thirty days, the Board shall publicly announce
 9 the new date by which it intends to complete action on the
 10 appeal.

11 “(2) Not later than March 1 of each year, the Board
 12 shall submit to the Congress a report describing the number of
 13 appeals submitted to it during the prior calendar year, the
 14 number of appeals on which it completed action during the
 15 prior year, and the number of instances during the prior year
 16 in which it failed to conclude a proceeding by the date origi-
 17 nally announced, along with an explanation of the reasons
 18 therefor.

19 “(3) The Board shall by rule indicate any other cate-
 20 gory of significant Board action which the Board determines
 21 should be subject to the provisions of this subsection.

22 “(4) It shall be the duty of the Board, an administra-
 23 tive law judge, or an appeals officer to expedite to the greatest
 24 extent possible any proceedings under this section.

1 “(m) The Merit Systems Protection Board may pre-
 2 scribe regulations to carry out the purposes of this section.
 3 “§ 7702. Judicial review of decisions of the Merit Systems
 4 Protection Board

5 “(a) Any employee, or applicant for employment, ad-
 6 versely affected or aggrieved by a final order or decision of
 7 the Merit Systems Protection Board may obtain judicial
 8 review of such an order or decision. The Board shall be the
 9 named respondent in any proceeding brought pursuant to this
 10 subsection, unless the employee or applicant for employment
 11 seeks review of a final order or decision issued by the Board
 12 under section 7701. In review of a final order or decision
 13 issued under section 7701, the agency responsible for taking
 14 the action appealed to the Board shall be the named respond-
 15 ent, except that the Board shall have the right to appear in
 16 the court proceeding if the Board, in its sole discretion, deter-
 17 mines that the appeal may raise questions of substantial inter-
 18 est to it.

19 “(b) A petition to review a final order or decision
 20 of the Board shall be filed in the Court of Claims or a
 21 United States Court of Appeals as provided in chapters 91
 22 and 158, respectively, of title 28, except for actions filed in
 23 the United States district courts pursuant to the anti-dis-
 24 crimination laws referred to in section 7701(h) of this title,
 25 or under section 8715 or 8912 of this title. Notwithstanding

1 any other provision of law any petition for review must be
 2 filed within 30 days after the date the petitioner received
 3 notice of the final order or decision of the Board. In the case
 4 of any action brought pursuant to section 717 (c) of the Civil
 5 Rights Act of 1964 (42 U.S.C. 2000e-16 (c)) or under
 6 section 15 of the Age Discrimination in Employment Act of
 7 1967 (29 U.S.C. 633a (c)) the employee shall have 30 days
 8 after the decision and order of the Board issued pursuant to
 9 section 7701 (i) (2) or, if applicable, section 7701 (i) (4) or
 10 section 7701 (i) (5) (A), (B), or (C) to file such action.
 11 If an employee files an action in district court concerning such
 12 matter, the jurisdiction of the Court of Appeals over the mat-
 13 ter pursuant to section 7701 (i) (5), and any interim relief
 14 afforded the employee by the Equal Employment Opportunity
 15 Commission pursuant to section 7701 (i) (5), shall terminate.
 16 “(c) In cases filed in the United States Court of Claims
 17 or a United States Court of Appeals, the court shall review
 18 the administrative record for the purpose of determining
 19 whether the findings were arbitrary or capricious, and not in
 20 accordance with law, and whether the procedures required by
 21 statute and regulations were followed. The administrative
 22 findings of the Board are conclusive if supported by substan-
 23 tial evidence in the administrative record. If the court deter-
 24 mines that further evidence is necessary, it shall remand the
 25 case to the Board. The Board, after such further proceedings

1 as may be required, may modify its findings, and shall file
 2 with the court the record of such proceedings. The findings of
 3 the Board are conclusive if supported by substantial evidence
 4 in the administrative record as supplemented.

5 “(d) The Director of the Office of Personnel Manage-
 6 ment may obtain review of any final order or decision of the
 7 Board by filing a petition for judicial review in the United
 8 States Court of Appeals for the District of Columbia if the
 9 Director determines, in his sole discretion, that the Board
 10 erred in interpreting a civil service law, rule, regulation, or
 11 policy directive affecting personnel management and that the
 12 Board’s decision will have a substantial impact on a civil
 13 service law, rule, regulation, or policy directive. Where the
 14 Director did not intervene in a matter before the Board, the
 15 Director may not petition for review of a Board decision
 16 under this section unless the Director first petitions the Board
 17 for a reconsideration of its decision, and such petition is
 18 denied. In addition to the named respondent, the Board and
 19 all other parties to the proceedings before the Board shall
 20 have the right to appear in the proceeding before the Court
 21 of Appeals. The granting of the petition for judicial review
 22 shall be at the discretion of the Court of Appeals.”

23 TECHNICAL AND CONFORMING AMENDMENTS

24 SEC. 206. Section 2342 of title 28, United States Code,
 25 is amended—

1 (1) by striking out "and" at the end of paragraph

2 (4),

3 (2) by striking out the period at the end of para-
4 graph (5) and inserting in lieu thereof "; and", and

5 (3) by adding at the end thereof the following new
6 paragraph:

7 " (6) all final orders of the Merit Systems Protec-
8 tion Board except as provided for in section 7702 (b)
9 of title 5."

10 TITLE III—STAFFING

11 VOLUNTEER SERVICE

12 SEC. 301. (a) Chapter 31 of title 5, United States
13 Code, is amended by adding at the end thereof the following
14 new section:

15 "§ 3111. Acceptance of volunteer service

16 " (a) For the purpose of this section, 'student' means
17 an individual who is enrolled, not less than half-time, in
18 a high school, trade school, technical or vocational institute,
19 junior college, college, university, or comparable recognized
20 educational institution. An individual who is a student is
21 deemed not to have ceased to be a student during an interim
22 between school years if the interim is not more than 5
23 months and if such individual shows to the satisfaction of
24 the Office of Personnel Management that such individual has
25 a bona fide intention of continuing to pursue a course of

1 study or training in the same or different educational in-
2 stitution during the school semester (or other period into
3 which the school year is divided) immediately after the in-
4 term.

5 " (b) Notwithstanding section 665 (b) of title 31, the
6 head of an agency may accept, subject to regulations issued
7 by the Office of Personnel Management, voluntary service
8 for the United States if the service—

9 " (1) is performed by a student, with the permission
10 of the institution at which the student is enrolled, as
11 part of an agency program established for the purpose
12 of providing educational experiences for such students;

13 " (2) is to be uncompensated; and

14 " (3) will not be used to displace any employee.

15 " (c) An individual who provides voluntary service
16 under subsection (b) of this section shall not be considered
17 a Federal employee for any purpose other than for pur-
18 poses of chapter 81 of this title (relating to compensation
19 for injury) and sections 2671 through 2680 of title 28
20 (relating to tort claims)."

21 (b) The analysis of chapter 31 of title 5, United States
22 Code, is amended by adding at the end thereof the following
23 new item:

"3111. Acceptance of volunteer service."

1 (c) Chapter 31 of title 5, United States Code, is
2 further amended by—

3 (1) amending section 3102 by—

4 (A) redesignating clause (4) of subsection (a)
5 as clause (5) and striking out “and” at the end of
6 clause (3) and inserting below such clause the
7 following new clause (4) :

8 “(4) ‘deaf employee’ means an individual employed
9 by an agency who establishes, to the satisfaction of the
10 appropriate authority of the agency concerned under
11 regulations of the head of that agency, that he or she has
12 a hearing impairment, either permanent or temporary,
13 so severe or disabling that the employment of an inter-
14 preting assistant or assistants for the employee is neces-
15 sary or desirable to enable such employee to perform
16 their work.”;

17 (B) amending subsection (b) by (i) inserting
18 “and interpreting assistant or assistants for a deaf
19 employee” after “or assistants for a blind em-
20 ployee”, and (ii) amending the last sentence
21 to read as follows: “A reading assistant or an inter-
22 preting assistant, other than the one employed or
23 assigned under subsection (d) of this section, may
24 receive pay for their services by and from the blind

1 or deaf employee or a nonprofit organization, with-
2 out regard to section 209 of title 18.”;

3 (C) amending subsection (c) by inserting “or
4 deaf” after “blind”; and

5 (D) inserting at the end thereof the following
6 new subsection:

7 “(d) The head of each agency may also employ or
8 assign, subject to section 209 of title 18 and to the provisions
9 of this title governing appointment and chapter 51 and sub-
10 chapter VIII of chapter 53 of this title governing classifica-
11 tion and pay, such reading assistants for blind employees and
12 such interpreting assistants for deaf employees as may be
13 necessary to enable such employees to perform their work.”;

14 (2) amending the analysis of chapter 31 by strik-
15 ing out the item relating to section 3102 and inserting
16 in lieu thereof the following:

“3102. Employment of reading assistants for blind employees and inter-
preting assistants for deaf employees.”; and

17 (3) amending the caption of section 3102 to read
18 as follows:

19 “§ 3102. Employment of reading assistants for blind em-
20 ployees and interpreting assistants for deaf
21 employees.”.

22 (d) Section 410 (b) (1) of title 39, United States Code,
23 is amended by inserting after “conduct of employees)” a
24 comma and “3102 (employment of reading assistants for

1 blind employees and interpreting assistants for deaf em-
2 ployees);”

3 (e) Section 3321 of title 5, United States Code, is
4 amended to read as follows:

5 “§ 3321. Competitive service; probation; period of

6 “(a) The President may take such action, including
7 the issuance of rules, regulations, and directives, as shall
8 provide as nearly as conditions of good administration war-
9 rant, for a period of probation—

10 “(1) before an appointment in the competitive serv-
11 ice becomes final; and

12 “(2) before initial appointment to a supervisory or
13 managerial position becomes final.

14 “(b) An individual—

15 “(1) who has been transferred, assigned, or pro-
16 moted from a position to a supervisory or managerial
17 position, and

18 “(2) who does not satisfactorily complete the pro-
19 bationary period under subsection (a) (2) of this
20 section,

21 shall be returned to a position of no lower grade and pay
22 than the position formerly occupied by the individual. Noth-
23 ing in this section prohibits an agency from instituting an
24 adverse action against an individual serving a probationary

1 period under subsection (a) (2) for cause unrelated to su-
2 pervisory or managerial performance.”

3 (f) Section 3319 of chapter 33 of title 5, United States
4 Code, is repealed.

5 (g) The analysis for chapter 33 of title 5, United States
6 Code, is amended by striking out the item relating to section
7 3319.

8 TRAINING

9 SEC. 302. Section 4103 of title 5, United States Code,
10 is amended by inserting “(a)” before “In order to increase”
11 and by adding at the end thereof the following new subsec-
12 tion:

13 “(b) (1) Notwithstanding any other provision of this
14 chapter, an agency may train any of its employees to prepare
15 such employee for placement in another agency if the head
16 of the agency determines that such employee will otherwise
17 be separated under conditions which would entitle such em-
18 ployee to severance pay under section 5595 of this title.

19 “(2) Before undertaking any training under this sub-
20 section, the head of the agency shall obtain verification from
21 the Office of Personnel Management that there exists a rea-
22 sonable expectation of placement in another agency.

23 “(3) In selecting an employee for training under this
24 subsection, the head of the agency shall consider—

25 “(A) the extent to which the current skills, knowl-

1 edge, and abilities of the employee may be utilized in
2 the new position;

3 " (B) the employee's capability to learn new skills
4 and acquire new knowledge and abilities needed in the
5 new position; and

6 " (C) the benefits to the Government which would
7 result from retaining competent employees in the Fed-
8 eral service."

9 TRAVEL, TRANSPORTATION, AND SUBSISTENCE

10 SEC. 303. Section 5723 (d) of title 5, United States
11 Code, is amended by striking out "not".

12 RETIREMENT

13 SEC. 304. Section 8336 (d) (2) of title 5, United States
14 Code, is amended to read as follows:

15 " (2) voluntarily, during a period when the agency
16 in which the employee is serving is undergoing a major
17 reorganization, a major reduction-in-force, or a major
18 transfer of function, as determined by the Office of Per-
19 sonnel Management, and such employee is serving in a
20 geographic area designated by the Office,".

21 DEFINITIONS RELATING TO PREFERENCE ELIGIBLES

22 SEC. 305. (a) Section 2108 of title 5, United States
23 Code, is amended by—

24 (1) amending paragraph (1) by—

1 (A) inserting "who is a veteran as defined in
2 section 101 (2) of title 38, United States Code, and"
3 after "individual"; and

4 (B) striking out all below clause (B);

5 (2) amending paragraph (2) by—

6 (A) striking out all between "individual" and
7 "and has" and inserting in lieu thereof "who is a
8 veteran as defined in section 101 (2) of title 38,
9 United States Code, or who has performed active
10 military, naval, or air service as defined in section
11 101 (24) of such title 38";

12 (B) striking out the comma and inserting in
13 lieu thereof "or" after "compensation";

14 (C) striking out "benefits, or pension" and
15 inserting in lieu thereof "benefits"; and

16 (D) striking out "and" at the end thereof;

17 (3) amending paragraph (3) by—

18 (A) inserting a comma and "except as pro-
19 vided in paragraph (4) of this section," after
20 "means";

21 (B) striking out "(A)" the second place it
22 appears in clause (A);

23 (C) amending clause (B) to read as follows:

24 "(B) the unmarried widow or widower of a
25 veteran as defined by paragraph (1) of this section,

1 other than a widow or widower described in para-
2 graph (3) (D) of this section;”;

3 (D) amending clause (3) (D) to read as
4 follows:

5 “(D) the unmarried widow or widower of a
6 veteran as defined by paragraph (1) of this section
7 who lost his or her life under honorable conditions
8 while serving in the armed forces or who died as
9 the result of a service-connected disability or disabili-
10 ties or who; at the time of his or her death,
11 when such death was not as a result of the willful
12 misconduct of such veteran or such veteran’s spouse,
13 had a service-connected disability or disabilities
14 rated as total;”;

15 (E) striking out “(A)” in clause (F); and

16 (F) striking out the period at the end thereof
17 and inserting in lieu thereof a semicolon; and

18 (4) adding at the end thereof the following new
19 paragraphs:

20 “(4) except for purposes of chapter 75 of this title,
21 ‘preference eligible’ does not include a retired member of
22 the armed forces unless—

23 “(A) the individual is a disabled veteran; or

24 “(B) the individual retired below the rank of
25 major or its equivalent; and

1 “(5) ‘retired member of the armed forces’ means a
2 member or former member of the armed forces who is
3 entitled, under statute, to retired, retirement, or retainer
4 pay on account of service as such a member.”.

5 (b) The amendments made to title 5, United States
6 Code, by clauses (3) (A) and (4) of subsections (a) of
7 this section shall take effect on October 1, 1980.

8 NONCOMPETITIVE APPOINTMENTS OF CERTAIN DISABLED
9 VETERANS

10 SEC. 306. (a) (1) Chapter 31 of title 5, United States
11 Code, is amended by adding at the end thereof the follow-
12 ing new section:

13 “§ 3112. Disabled veterans; noncompetitive appointment

14 “Under such regulations as the Office of Personnel Man-
15 agement shall prescribe, an agency may make a noncom-
16 petitive appointment leading to conversion to career or ca-
17 reer-conditional employment of a disabled veteran who has a
18 service-connected disability rated at 30 percent or more on
19 the basis of which such veteran is receiving compensation or
20 disability retirement benefits because of a public statute ad-
21 ministered by the Veterans’ Administration or a military
22 department.”.

23 (2) The Director of the Office of Personnel Manage-
24 ment shall include in the reports required by section 2014
25 (d) of title 38, United States Code, the same type of in-

1 formation regarding the use of the authority provided in sec-
 2 tion 3112 of title 5, United States Code (as added by
 3 paragraph (1) of this subsection), as is required by such
 4 section 2014 with respect to the use of the authority to make
 5 veterans readjustment appointments.

6 (b) The analysis of chapter 31 of title 5, United States
 7 Code, is amended by adding at the end thereof the following
 8 new item:

"§112. Disabled veterans; noncompetitive appointment."

9 EXAMINATION, CERTIFICATION, AND APPOINTMENT OF
 10 PREFERENCE ELIGIBLES

11 SEC. 307. (a) (1) Section 3305 of title 5, United States
 12 Code is amended to read as follows:

13 "§ 3305. Competitive service; preference eligibles; appli-
 14 cations

15 "On the application of a preference eligible, a competi-
 16 tive examination shall be held for any position for which
 17 there is an appropriate list of eligibles."

18 (2) The item relating to section 3305 in the analysis of
 19 chapter 33 of title 5, United States Code, is amended to read
 20 as follows:

"3305. Competitive service; preference eligibles; applications."

21 (b) (1) Section 3309 of title 5, United States Code, is
 22 amended to read as follows:

1 "§ 3309. Preference eligibles; examinations; additional
 2 credit for

3 "(a) A preference eligible who qualifies in an examina-
 4 tion for entrance into the competitive service is entitled to
 5 additional points above the individual's earned rating, as
 6 follows:

7 "(1) a preference eligible under section 2108 (3)
 8 (A) or (B) of this title—5 points; and

9 "(2) a preference eligible under section 2108 (3)
 10 (C)–(G) of this title—10 points.

11 "(b) A preference eligible under section 2108 (3) (C)
 12 of this title who has a service-connected disability rated at
 13 10 percent or more and who has qualified in an examination
 14 for entrance into the competitive service shall be placed at
 15 the head of the list of eligibles, except that, in the case of
 16 scientific and professional positions in GS-9 or higher, such
 17 eligible shall be placed on the list of eligibles in the order of
 18 the eligible's rating, including points added under paragraph
 19 (2) of subsection (a) of this section. As to all competitive
 20 positions, the names of preference eligibles shall be entered
 21 ahead of the names of those who are not preference eligibles
 22 and who have the same rating.

23 "(c) If other rating systems are used, preference eligi-
 24 bles are entitled to comparable preference."

25 (2) The item relating to section 3309 in the analysis of

1 chapter 33 of title 5, United States Code, is amended to
2 read as follows:

"3309. Preference eligibles; examinations; additional credit for."

3 (o) Section 3312 of title 5, United States Code, is
4 amended by—

5 (1) inserting "(a)" before "In", and striking out
6 "Civil Service Commission" and inserting in lieu thereof
7 "Office of Personnel Management";

8 (2) striking out "Commission" in clause (2) and
9 inserting in lieu thereof "Office of Personnel Manage-
10 ment"; and

11 (3) adding after subsection (a) (as designated by
12 clause (1) of this subsection) the following new sub-
13 section:

14 "(b) If an examining agency determines that, on the
15 basis of evidence before it, a preference eligible under section
16 2108 (3) (C) is not able to fulfill the physical requirements
17 of the position, the examining agency shall notify the Office
18 of Personnel Management of such determination and, at the
19 same time, such agency shall notify the preference eligible of
20 the reasons for such determination and of the right to re-
21 spond, within 15 days of the date of such notification, to the
22 Office of Personnel Management. The Office of Personnel
23 Management shall require a demonstration by the appointing
24 authority that such notification was timely sent to the prefer-

1 ence eligible's last known address and shall, prior to the
2 selection of any other person for the position in question,
3 make a final determination on the physical ability of the
4 preference eligible to perform the duties of the position, tak-
5 ing into account any additional information provided in any
6 such response. When the Office of Personnel Management
7 has completed its review of the proposed disqualification on
8 the basis of physical disability, it shall send its findings to the
9 appointing authority and the preference eligible in question.
10 The appointing authority shall comply with the findings of
11 the Office of Personnel Management. The functions of the
12 Office of Personnel Management under this subsection shall
13 not be delegated to any other department, agency, or
14 instrumentality."

15 (d) Section 3314 of title 5, United States Code, is
16 amended by striking out "Civil Service Commission" and
17 inserting in lieu thereof "Office of Personnel Management",
18 and by striking out "named by section 3313" and inserting
19 in lieu thereof "established by section 3309".

20 (e) Section 3315 of title 5, United States Code, is
21 amended by—

22 (1) striking out in the first sentence of subsection

23 (a) "named by section 3313" and inserting in lieu
24 thereof "established by section 3309";

25 (2) striking out in the second sentence of sub-

1 section (a) "Civil Service Commission" and inserting
 2 in lieu thereof "Office of Personnel Management"; and
 3 (3) striking out in subsection (b) "Commission"
 4 and inserting in lieu thereof "Office of Personnel
 5 Management".

6 (f) Section 3318 (b) of title 5, United States Code, is
 7 amended to read as follows:

8 " (b) If an appointing authority proposes to pass over
 9 a preference eligible on a certificate in order to select an
 10 individual who is not a preference eligible, such authority
 11 shall file written reasons with the Office of Personnel Man-
 12 agement for passing over the preference eligible and, at the
 13 same time, such authority shall notify a preference eligible
 14 under section 2108 (3) (C) (hereinafter in this section
 15 called 'a disabled preference eligible') of the proposed pass-
 16 over and the reasons therefor and of the right to respond
 17 to such reasons, within 15 days of the date of such notifica-
 18 tion, to the Office of Personnel Management. The Office of
 19 Personnel Management shall make the reasons presented
 20 by the appointing authority part of the record of the
 21 preference eligible and may require the submission of more
 22 detailed information from the appointing authority in sup-
 23 port of the passover of the preference eligible. The Office
 24 of Personnel Management shall require a demonstration by
 25 the appointing authority that the passover notification was

1 timely sent to the preference eligible's last known address
 2 and shall, prior to the selection of any other person for the
 3 position in question, determine the sufficiency or insuffi-
 4 ciency of the reasons submitted by the appointing authority,
 5 taking into account any response received from the prefer-
 6 ence eligible. When the Office of Personnel Management
 7 has completed its review of the proposed passover, it shall
 8 send its findings to the appointing authority and the dis-
 9 abled preference eligible in question, if any. The appointing
 10 authority shall comply with the findings of the Office of
 11 Personnel Management. A preference eligible under sec-
 12 tion 2108 (3) (A), (B), or (D)-(G), or such preference
 13 eligible's representative, shall be entitled, on request, to a
 14 copy of (1) the reasons submitted by the appointing au-
 15 thority in support of the proposed passover, and (2) the
 16 findings of the Office of Personnel Management. The func-
 17 tions of the Office of Personnel Management under this sub-
 18 section shall not be delegated to any other department,
 19 agency, or instrumentality."

20 (g) Chapter 33 of title 5, United States Code, is
 21 amended by—

- 22 (1) repealing section 3313; and
- 23 (2) amending the analysis therefor by striking out
 24 the item relating to such section 3313.

RETENTION PREFERENCE

1
2 SEC. 308. (a) Section 3502 of title 5, United States
3 Code, is amended by striking out subsection (b) and insert-
4 ing in lieu thereof the following new subsections:

5 " (b) A preference eligible under section 2108 (3) (C)
6 of this title who has a service-connected disability rated at 10
7 percent or more and whose performance meets a standard of
8 adequacy under a performance appraisal system implemented
9 under chapter 43 of this title is entitled to be retained in
10 preference to other preference eligibles.

11 " (c) An employee who is entitled to retention prefer-
12 ence and whose performance meets a standard of adequacy
13 under a performance appraisal system implemented under
14 chapter 43 of this title is entitled to be retained in preference
15 to other competing employees."

16 (b) Section 3503 of title 5, United States Code, is
17 amended by striking out in subsections (a) and (b) "each
18 preference eligible employed" and inserting in lieu thereof
19 "each competing employee" both places it appears.

20 (c) Section 3504 of title 5, United States Code, is
21 amended by—

22 (1) inserting "(a)" before "In" and striking out
23 "Civil Service Commission" and inserting in lieu thereof
24 "Office of Personnel Management";

1 (2) striking out "Commission" in clause (2) and
2 inserting in lieu thereof "Office of Personnel Manage-
3 ment"; and

4 (3) adding after subsection (a) (as designated by
5 clause (1) of this subsection) the following new sub-
6 section:

7 " (b) If an examining agency determines that, on the
8 basis of evidence before it, a preference eligible under sec-
9 tion 2108 (3) (C) is not able to fulfill the physical re-
10 quirements of the position, the examining agency shall notify
11 the Office of Personnel Management of such determination
12 and, at the same time, such agency shall notify the prefer-
13 ence eligible of the reasons for such determination and of
14 the right to respond, within 15 days of the date of such
15 notification, to the Office of Personnel Management. The
16 Office of Personnel Management shall require a demonstra-
17 tion by the appointing authority that such notification was
18 timely sent to the preference eligible's last known address
19 and shall, prior to the selection of any other person for the
20 position in question, make a final determination on the
21 physical ability of the preference eligible to perform the
22 duties of the position, taking into account any additional
23 information provided in any such response. When the Office
24 of Personnel Management has completed its review of the
25 proposed disqualification on the basis of physical disability,

1 it shall send its findings to the appointing authority and the
2 preference eligible in question. The appointing authority
3 shall comply with the findings of the Office of Personnel
4 Management. The functions of the Office of Personnel Man-
5 agement under this subsection shall not be delegated to
6 any other department, agency, or instrumentality.”.

7 **DUAL PAY FOR RETIRED MEMBERS OF THE UNIFORMED**
8 **SERVICES**

9 **SEC. 309. (a) Section 5532 of title 5, United States**
10 **Code, is amended—**

11 (1) in subsection (b) —

12 (A) by inserting after “entitled” the following:
13 “, except as provided in subsection (c),”; and

14 (B) by striking out “or retirement” each place
15 it appears;

16 (2) by inserting after subsection (b) the following
17 new subsection:

18 “(c) (1) If any member or former member is receiv-
19 ing retired pay and is employed in a position the annual
20 rate of basic pay for which, when combined with the mem-
21 ber’s annual rate of retired pay (reduced, in the case of a
22 retired officer of a regular component of a uniformed service,
23 by an amount equal to the annual rate of the reduction under
24 subsection (b) of this section), exceeds the rate of basic
25 pay then currently paid for level V of the Executive

1 Schedule, such member’s pay for such employment shall be
2 reduced by an amount computed under paragraph (2). The
3 amounts of the reduction shall be deposited to the general
4 fund of the Treasury of the United States.

5 “(2) The amount of each reduction under paragraph
6 (1) for any pay period in connection with employment in a
7 position shall be equal to the retired pay allocable to the pay
8 period (reduced, in the case of such an officer, by an amount
9 equal to the amount of the reduction under subsection (b) of
10 this section for such period), except that the amount of the
11 reduction may not result in the amount payable for the pay
12 period, when combined with the retired pay allocable to the
13 pay period (as so reduced in any such case), being at a rate
14 less than the rate of basic pay then currently paid for level V
15 of the Executive Schedule.”;

16 (3) by redesignating subsection (c) as subsection
17 (d);

18 (4) in subsection (d), as so redesignated—

19 (A) by striking out “subsection (b) of”;

20 (B) by striking out “or retirement”;

21 (C) by striking out “a retired officer of a regu-
22 lar component of a uniformed service” and inserting
23 in lieu thereof “a member or former member receiv-
24 ing retired pay”; and

25 (D) in paragraph (1), by striking out “whose

1 retirement was" and inserting in lieu thereof "whose
2 retired pay is computed, in whole or in part,"; and
3 (5) by striking out subsection (d), as in effect
4 before the effective date of this subsection.

5 (b) (1) The heading for section 5532 of title 5, United
6 States Code, is amended to read as follows:

7 "§ 5532. Employment of retired members of the uniformed
8 services; reduction in pay".

9 (2) The item relating to section 5532 in the analysis for
10 chapter 55 of title 5, United States Code, is amended to read
11 as follows:

"5532. Employment of retired members of the uniformed services; reduction in pay."

12 (c) Section 5531 of title 5, United States Code, is
13 amended—

14 (1) by striking out "and" at the end of paragraph
15 (1);

16 (2) by striking out the period at the end of para-
17 graph (2) and inserting in lieu thereof a semicolon;
18 and

19 (3) by adding at the end thereof the following new
20 paragraphs:

21 " (3) 'member' has the meaning given such term by
22 section 101 (23) of title 37; and

23 " (4) 'retired pay' means—

1 " (A) retired pay, as defined in section 8311
2 (3) of this title, determined without regard to sub-
3 paragraphs (A) through (D) of such section 8311
4 (3); or

5 " (B) a pension or compensation paid under
6 laws administered by the Veterans' Administration
7 after a waiver of retired pay pursuant to section
8 3105 of title 38."

9 (d) The amendments made by this section shall apply
10 only with respect to pay periods beginning after the effec-
11 tive date of this Act and only with respect to members who
12 first become eligible for retired pay (as defined in section
13 5531 (3) of title 5, United States Code (as amended by this
14 section)), after the effective date of this Act except that
15 the provisions of section 5532 (b), as amended by this Act,
16 shall apply to any officer of a regular component of a
17 uniformed service irrespective of the date he became eligible
18 for retired pay.

19 COMPUTATION OF CERTAIN ANNUITIES

20 SEC. 310. (a) Section 8339 (d) of title 5, United
21 States Code, is amended by inserting "(1)" immediately
22 after "(d)" and by adding at the end thereof the following
23 new paragraph:

24 " (2) The annuity of an employee retiring under this
25 subchapter with at least 5 years but less than 20 years of

1 service as a law enforcement officer or firefighter, or any
 2 combination thereof, is computed under subsection (a) of
 3 this section, except that the annuity of such employee is
 4 computed with respect to the service of such employee as a
 5 law enforcement officer or firefighter, or any combination
 6 thereof, by multiplying 2½ percent of his average pay by
 7 the years of that service.”.

8 (b) Section 8339 (h) of such title is amended by
 9 striking out “section 8336 (d)” and inserting in lieu thereof:
 10 “section 8336 (d) (1)”.

11 (c) The amendments made by this section shall apply
 12 with respect to individuals who become entitled to receive
 13 an annuity on or after the effective date of this Act.

14 TITLE IV—SENIOR EXECUTIVE SERVICE

15 COVERAOR

16 SEC. 401. (a) Chapter 21 of title 5, United States Code,
 17 is amended by inserting after section 2101 the following new
 18 section:

19 “§ 2101a. The Senior Executive Service

20 “The ‘Senior Executive Service’ consists of Senior
 21 Executive Service positions.”.

22 (b) Section 2102 (a) (1) of title 5, United States Code,
 23 is amended by striking out the “and” at the end of sub-
 24 paragraph (A); by inserting an “and” at the end of

1 subparagraph (B); and by adding at the end thereof the
 2 following new subparagraph:

3 “(C) positions in the Senior Executive Service;”.

4 (c) Section 2103 (a) of title 5, United States Code, is
 5 amended by inserting before the period at the end thereof the
 6 following: “or the Senior Executive Service”.

7 (d) Section 2108 (3) of title 5, United States Code, is
 8 amended—

9 (1) in subparagraph (G) (iii), by striking out the
 10 period and inserting in lieu thereof a semicolon; and

11 (2) by inserting at the end thereof the following:
 12 “but does not include applicants for, or members of, the
 13 Senior Executive Service.”.

14 (e) The analysis for such chapter 21 is amended by
 15 inserting after the item relating to section 2101 the follow-
 16 ing new item:

“2101a. The Senior Executive Service.”.

17 AUTHORITY FOR EMPLOYMENT

18 SEC. 402. (a) (1) Chapter 31 of title 5, United States
 19 Code, is amended by adding at the end thereof the following
 20 new subchapter:

21 “SUBCHAPTER II—THE SENIOR EXECUTIVE 22 SERVICE

23 “§ 3131. The Senior Executive Service

24 “(a) It is the purpose of this subchapter to establish
 25 and provide for a Senior Executive Service in order to

1 insure that the executive management of the Government of
 2 the United States is of the highest quality and is responsive
 3 to the needs, policies, and goals of the Nation. The Senior
 4 Executive Service shall be administered in such a manner
 5 so as to—

6 “(1) provide for a compensation system, including
 7 salary, benefits, incentives, and other conditions of em-
 8 ployment, designed to attract, reinforce, and retain ex-
 9 cellent Government executives;

10 “(2) establish a positive correlation between execu-
 11 tive success and compensation and retention, with
 12 executive success to be measured on the basis of in-
 13 dividual performance and organizational accomplishment
 14 (including such factors as improvements in efficiency,
 15 productivity, success in meeting equal employment op-
 16 portunity goals, quality of work or service, cost savings,
 17 and timeliness of performance);

18 “(3) assure that executives are accountable and
 19 responsible for the effectiveness and productivity of em-
 20 ployees under them;

21 “(4) make tenure as an executive contingent on
 22 successful performance;

23 “(5) recognize exceptional accomplishment;

24 “(6) enable the head of an agency to reassign

1 and transfer Senior Executive Service employees to best
 2 accomplish the agency's mission;

3 “(7) provide for severance pay and placement
 4 assistance for those who are removed from the Senior
 5 Executive Service for nondisciplinary reasons;

6 “(8) protect Senior Executive Service employees
 7 from arbitrary or capricious actions;

8 “(9) provide for both program continuity and
 9 policy advocacy in the management of public programs;

10 “(10) maintain a merit personnel system free of
 11 prohibited personnel practices;

12 “(11) assure accountability for honest, economical,
 13 and efficient Government;

14 “(12) assure faithful adherence to the law, rules,
 15 and regulations relating to equal employment oppor-
 16 tunity, political activity, and conflicts of interests;

17 “(13) provide for the systematic development of
 18 talented and effective executives and for the continuing
 19 development of incumbents;

20 “(14) utilize career executives to fill positions in
 21 the Senior Executive Service to the greatest extent prac-
 22 ticable consistent with the effective and efficient imple-
 23 mentation of agency policies and responsibilities; and

24 “(15) provide for a professional management sys-
 25 tem that is guided by the public interest and free from
 26 improper political interference.

1 "§ 3132. Definitions and exclusions

2 "(a) For the purpose of this subchapter—

3 "(1) 'agency' means an Executive agency, except
4 a Government corporation and the General Accounting
5 Office, but does not include—

6 "(A) any agency or unit thereof excluded from
7 coverage by the President under subsection (c) of
8 this section; or

9 "(B) the Federal Bureau of Investigation, the
10 Central Intelligence Agency, the Defense Intelli-
11 gence Agency, the National Security Agency, any
12 positions in the Drug Enforcement Administration
13 which are excluded from the competitive service
14 under section 201 of the Crime Control Act of 1976
15 (90 Stat. 2425), and, as determined by the Presi-
16 dent, an Executive agency, or unit thereof, whose
17 principal function is the conduct of foreign intelli-
18 gence or counterintelligence activities;

19 "(2) 'Senior Executive Service position' means a
20 position (other than a Foreign Service officer of the
21 United States) in an agency, as defined by this section,
22 which is properly classifiable above grade GS-15 of the
23 General Schedule and below level III of the Executive
24 Schedule, or their equivalents, in which an employee—

25 "(A) directs the work of an organizational
26 unit;

1 "(B) is held accountable for the success of
2 specific line or staff programs or projects;

3 "(C) monitors the progress of the organization
4 toward goals and periodically evaluates and makes
5 appropriate adjustments to such goals;

6 "(D) supervises the work of employees other
7 than personal assistants; or

8 "(E) exercises other important policymaking
9 or executive functions;

10 The term shall not include any position to which an in-
11 dividual is appointed by the President, by and with the
12 advice and consent of the Senate;

13 "(3) 'executive' means a member of the Senior
14 Executive Service;

15 "(4) 'career reserved position' means a position
16 which can only be filled by a career appointee and to
17 which it is justifiable to restrict appointment to career
18 employees in order to insure impartiality, or the public's
19 confidence in the impartiality, of the Government;

20 "(5) 'general position' means any position, other
21 than those identified as career reserved positions, which
22 may be filled by either a career or noncareer appointee
23 or by a limited emergency or term appointee;

24 "(6) 'career appointee' means an individual ap-
25 pointed to a Senior Executive Service position based on

1 selection through a competitive staffing process con-
 2 sistent with Office of Personnel Management regulations
 3 and, in the case of initial appointment, approval of
 4 executive qualifications by the Office of Personnel
 5 Management;

6 “(7) ‘noncareer appointee’ means an individual ap-
 7 pointed to a Senior Executive Service position without
 8 approval of executive qualifications by the Office of Per-
 9 sonnel Management;

10 “(8) ‘limited emergency appointment’ means a non-
 11 renewable appointment, not to exceed 18 months, to a
 12 position established to meet a bona fide, unanticipated,
 13 urgent need; and

14 “(9) ‘limited term appointment’ means a nonrenew-
 15 able appointment for a term of three years or less to a
 16 position the duties of which will expire during that time
 17 period.

18 “(b) For purposes of paragraph (4) of subsection
 19 (a) of this section, the Office of Personnel Management shall
 20 prescribe the position criteria and regulations governing the
 21 designation of career reserved positions. The designation
 22 of a career reserved position shall be made by the agency.
 23 The designation of a position as a general position is subject
 24 to post audit by the Office of Personnel Management. Not-
 25 withstanding the provisions of any other law, any position

1 to be designated as a Senior Executive Service position ex-
 2 cept a position in the Executive Office of the President,
 3 which—

4 “(1) is under the Executive Schedule, or for which
 5 the rate of basic pay is determined by reference to the
 6 Executive Schedule, and

7 “(2) on the day before the date of the enactment
 8 of the Civil Service Reform Act of 1978 was specifi-
 9 cally required by law, or was required under the pro-
 10 visions of section 2102 of this title, to be in the compet-
 11 itive service,

12 shall be designated as a career reserved position, if the
 13 position entails direct responsibility to the public for the
 14 management or operation of particular government pro-
 15 grams or functions.

16 “(c) An agency may file with the Office of Personnel
 17 Management an application, setting forth reasons why it,
 18 or a unit thereof, should be excluded from placing positions
 19 in the Senior Executive Service. The Office of Personnel
 20 Management shall review the application and reasons, under-
 21 take such other investigation as it considers appropriate to
 22 determine whether the agency or unit should be excluded
 23 from coverage of this subchapter, and upon completion of its
 24 review, recommend to the President whether the agency or

1 unit should be so excluded. The President may, in writing,
2 exclude an agency or unit from such coverage.

3 “(d) Any agency or unit which is excluded from
4 coverage under subsection (o) of this section shall make a
5 sustained effort to bring its personnel system into conformity
6 with the Senior Executive Service insofar as is practicable.

7 “(e) The Office of Personnel Management may at any
8 time recommend to the President that the exclusion from
9 coverage previously granted to an agency or unit under
10 subsection (c) of this section be revoked. The revocation of
11 the exclusion shall be effected upon written determination of
12 the President.

13 “(f) If any agency or unit is excluded under subsection
14 (c) of this section, or if any exclusion is revoked under sub-
15 section (e) of this section, the Office of Personnel Manage-
16 ment shall transmit to Congress, for reference to the appro-
17 priate committee of the Senate and the appropriate commit-
18 tee of the House of Representatives, information concerning
19 the exclusion or revocation.

20 “§ 3133. Authorization for number of Senior Executive
21 Service positions; number of career reserved
22 positions

23 “(a) Each agency shall in each odd-numbered calendar
24 year—

1 “(1) examine its total needs for Senior Executive
2 Service positions for the two fiscal years beginning after
3 such calendar year; and

4 “(2) submit to the Office of Personnel Manage-
5 ment, in accordance with regulations prescribed by the
6 Office, a written request for authority to establish a
7 specific number of positions as Senior Executive Service
8 positions for such fiscal years, including the titles and
9 justifications for each change to the list of career reserved
10 positions.

11 “(b) Each agency request submitted under subsection
12 (a) of this section shall be based on—

13 “(1) the anticipated program activity and budget
14 requests of the agency for the two fiscal years involved;

15 “(2) the anticipated level of work to be performed
16 by the agency in such fiscal years; and

17 “(3) such other factors as may be prescribed from
18 time to time by the Office of Personnel Management.

19 “(c) The Office of Personnel Management, upon con-
20 sultation with the Office of Management and Budget, shall
21 review the request of each agency and, subject to section
22 3135 of this title, shall authorize for each fiscal year—

23 “(1) the establishment of a specific number of
24 Senior Executive Service positions in each agency; and

1 “(2) the number of positions in the entire Senior
2 Executive Service together with an unallocated pool of
3 not more than 5 percent of the number of allocated
4 positions.

5 “(d) Authorizations made under subsection (c) of this
6 section shall remain in effect until changed in accordance
7 with subsection (e), (f), or (g) of this section.

8 “(e) (1) Each agency may submit to the Office of Per-
9 sonnel Management, in accordance with regulations pre-
10 scribed by the Office, a written request for adjustments to its
11 authorized number of Senior Executive Service positions.
12 The Office may, on its own initiative, make reductions in the
13 number of positions assigned to particular agencies.

14 “(2) Each agency adjustment request submitted under
15 paragraph (1) shall be submitted in such form as the Office
16 of Personnel Management shall prescribe and be based on
17 the then current budget and program activity in the agency.

18 “(f) Subject to subsections (e) and (g) of this sec-
19 tion, the Office of Personnel Management may adjust the
20 allocations made under subsection (c) of this section. The
21 total of all adjustments made during a fiscal year under this
22 subsection may not enlarge the Senior Executive Service
23 beyond the number authorized under subsection (c) (2) of
24 this section.

1 “(g) The numbers of positions recommended in the
2 report from the Office of Personnel Management to the Con-
3 gress under section 3135 of this title, relating to the pro-
4 jected number of positions in the total Senior Executive
5 Service and in each agency, shall be the authorized number
6 effective beginning on October 1 following submission of the
7 report.

8 “(h) (1) Not later than one hundred and twenty days
9 after the date of the enactment of the Civil Service Reform
10 Act of 1978, and from time to time thereafter as the Director
11 of the Office of Personnel Management finds appropriate, the
12 Director of the Office of Personnel Management shall estab-
13 lish, by rule issued in accordance with section 1103 (b) of
14 this title, the number of positions out of the total number of
15 positions in the Senior Executive Service, as authorized by
16 this section or section 412 of such Act, that are to be career
17 reserved positions. Except as provided in paragraph (2),
18 the number of positions required by this subsection to be
19 career reserved positions shall not be less than the number
20 of positions which, prior to such date of enactment, were au-
21 thorized to be filled only through competitive civil service
22 appointment.

23 “(2) The Director of the Office of Personnel Manage-
24 ment may, by rule, designate a number of career reserved
25 positions which is less than the number required by para-

1 graph (1) only if he determines it necessary to designate
 2 as a general position a position (other than a position de-
 3 scribed in the last sentence of section 3132 (b) of this title)
 4 which—

5 “(A) involves policymaking responsibilities which
 6 require the advocacy or management of programs of the
 7 President and support of controversial aspects of such
 8 programs;

9 “(B) involves significant participation in the major
 10 political policies of the President; or

11 “(C) requires the executive to serve as a personal
 12 assistant of, or adviser to, a Presidential appointee or
 13 other key political figure.

14 The Director shall provide a full explanation for his deter-
 15 mination in each case.

16 “§ 3134. Limitations on noncareer Senior Executive Service
 17 appointments

18 “(a) On or before December 31 of each year, each
 19 agency shall—

20 “(1) examine its needs for employment of non-
 21 career appointees for the fiscal year beginning in the
 22 following year; and

23 “(2) submit to the Office of Personnel Manage-
 24 ment, in accordance with regulations prescribed by the

1 Office, a written request for authority to employ a specific
 2 number of noncareer appointees for such fiscal year.

3 “(b) The number of noncareer appointments for each
 4 agency shall be determined annually by the Office of Person-
 5 nel Management on the basis of the demonstrated need of
 6 the agency for such positions, except that—

7 “(1) the total number of noncareer appointees to
 8 the Senior Executive Service in all agencies shall not
 9 exceed 10 percent of the total number of Senior Execu-
 10 tive Service positions authorized for all agencies under
 11 section 3133 of this title, and

12 “(2) an agency with four or more Senior Executive
 13 Service positions shall be authorized to fill such positions
 14 only to the extent the proportion of positions filled as
 15 noncareer does not exceed 25 percent, or that proportion
 16 which was authorized in the agency on the date of enact-
 17 ment of the Civil Service Reform Act of 1978, whichever
 18 is greater.

19 “(c) Subject to the 10 percent limitation of subsection
 20 (b) of this section, the Office of Personnel Management may
 21 adjust the number of noncareer positions authorized for any
 22 agency under subsections (a) and (b) of this section if emer-
 23 gency needs arise that were not anticipated when the original
 24 authorizations were made.

1 "§ 3135. Biennial report

2 " (a) The Office of Personnel Management shall submit
 8 to each House of the Congress, at the time the budget is sub-
 4 mitted by the President to the first session of each Congress,
 5 a report on the Senior Executive Service. The report shall
 6 include—

7 " (1) the authorized number of positions prescribed
 8 in the Senior Executive Service for the fiscal year prior
 9 to the fiscal year for which the budget is submitted, the
 10 number of such positions allocated to each agency before
 11 such fiscal year, the title and job description of all Senior
 12 Executive Service positions in each agency, the pro-
 13 jected number of positions to be authorized for each
 14 agency and the total projected number of positions for
 15 all agencies for the next two fiscal years, and an agency-
 16 by-agency projection of planned changes of Senior Exec-
 17 utive Service appointment from career to noncareer and
 18 from noncareer to career over the next two fiscal years;

19 " (2) each exclusion in such fiscal year from this
 20 subchapter of any employee or group of employees under
 21 section 3132 (c) of this title; and

22 " (3) the percentage of agency executives at each
 23 pay rate, statistical data on the distribution and amount
 24 of performance awards in the agency, the proportion
 25 of career and noncareer executives employed by each

1 agency, and such other information on the overall pro-
 2 gram for the management of the Senior Executive Serv-
 3 ice as the Office of Personnel Management considers
 4 appropriate.

5 " (b) The Office of Personnel Management shall submit
 6 to each House of the Congress, at the time the budget is
 7 submitted to the second session of each Congress, an interim
 8 report showing adjustments to the biennial report authorized
 9 under section 3133 (e) and (f) of this title.

10 "§ 3136. Regulations

11 " (1) The Office of Personnel Management shall pre-
 12 scribe regulations necessary to carry out the purpose of this
 13 subchapter."

14 (2) The table of sections for chapter 31 of title 5, United
 15 States Code, is amended—

16 (A) by striking out the heading for chapter 31 and
 17 inserting in lieu thereof the following:

18 "CHAPTER 31—AUTHORITY FOR EMPLOYMENT
 "SUBCHAPTER I—EMPLOYMENT AUTHORITIES";

19 and

20 (B) by inserting at the end thereof the following:

"SUBCHAPTER II—THE SENIOR EXECUTIVE SERVICE

"Sec.

"3131. The Senior Executive Service.

"3132. Definitions and exclusions.

"3133. Authorization for number of Senior Executive Service positions;
 number of career reserved positions.

"3134. Limitations on noncareer Senior Executive Service appointments.

"3135. Biennial report.

"3136. Regulations."

1 (b) Section 3104 (a) of title 5, United States Code, is
2 amended by inserting "nonexecutive" after "establish".

3 (c) Section 3109 of title 5, United States Code, is
4 amended by inserting at the end thereof the following new
5 subsection:

6 " (c) Positions in the Senior Executive Service may not
7 be filled under the authority of subsection (b) of this
8 section."

9 EXAMINATION, CERTIFICATION, AND APPOINTMENT

10 SEC. 403. (a) Chapter 33 of title 5, United States
11 Code, is amended by adding at the end thereof the following
12 new subchapter:

13 "SUBCHAPTER VIII—APPOINTMENT, PLACE-
14 MENT, TRANSFER, AND DEVELOPMENT IN
15 THE SENIOR EXECUTIVE SERVICE

16 "§ 3391. General provisions applicable to career executives

17 " (a) The appointing authority shall adopt qualification
18 standards for all career reserved positions which shall meet
19 the requirements established by the Office of Personnel
20 Management.

21 " (b) Appointees shall meet the qualifications of the
22 career reserved positions to which they are appointed.

23 " (c) The appointing authority is responsible for de-
24 termining that a selectee meets the qualification require-
25 ments of a particular career reserved position.

1 " (d) Discrimination on account of race, color, religion,
2 national origin, sex, marital status, age, political affiliation,
3 and handicapping condition is prohibited.

4 " (e) Career appointees in the Senior Executive Service
5 who accept Presidential appointments requiring Senate con-
6 firmation shall continue to be covered by the performance
7 awards, incentive awards, severance pay, retirement, and
8 leave provisions of this title.

9 "§ 3392. Career appointments to the Senior Executive
10 Service

11 " (a) Notwithstanding any other provision of law, career
12 recruitment may be open to—

13 " (1) only current Federal employees, or

14 " (2) Federal employees and individuals outside
15 of Government.

16 " (b) The recruitment process shall attempt to reach all
17 groups of qualified applicants, including women and minor-
18 ities as designated by the Office of Personnel Management,
19 and applicants with handicapping conditions.

20 " (c) Competitive staffing shall be conducted by an
21 agency executive resources board and the staffing process
22 shall meet requirements established by the Office of Person-
23 nel Management.

24 " (d) The Office of Personnel Management shall estab-
25 lish qualification review boards to review and certify, in

1 accordance with regulations prescribed by the Office, the
 2 executive qualifications of candidates for appointment as a
 3 career executive and, except as provided in subsection (e)
 4 of this section, no individual shall be appointed to such a
 5 position unless his qualifications have been certified. The
 6 Office of Personnel Management may appoint as members of
 7 qualification review boards individuals from within and out-
 8 side the Federal service, except that a majority of members
 9 of each such board shall consist of career executives. The
 10 Office of Personnel Management shall appoint as members
 11 of qualification review boards persons knowledgeable about
 12 the field of public management and other occupational fields
 13 relevant to the type of occupation for which an individual
 14 is being considered. The Office of Personnel Management, in
 15 consultation with such review boards, shall set the criteria
 16 for establishing executive qualifications for appointment to
 17 the Senior Executive Service. Such criteria shall include—

18 “(1) demonstrated performance in executive work;

19 “(2) successful participation in a centrally spon-
 20 sored or agency career executive development program
 21 approved by the Office of Personnel Management; or

22 “(3) unique or special individual qualities predi-
 23 cative of success to apply in those cases in which an out-
 24 standing candidate would otherwise be excluded from
 25 appointment.

1 “(e) Employees with career status from other Govern-
 2 ment personnel systems shall have their executive qualifi-
 3 cations approved by the Office of Personnel Management for
 4 career appointment.

5 “(f) Discrimination on account of political affiliation is
 6 prohibited.

7 “(g) Employees entering the Senior Executive Service
 8 under career appointments shall serve a 1-year probationary
 9 period.

10 “(h) The title of each career reserved position shall be
 11 published in the Federal Register.

12 “§ 3393. Appointments to general positions in the Senior
 13 Executive Service

14 “(a) Each agency shall, after consultation with the
 15 Office of Personnel Management, establish qualification stand-
 16 ards for all general positions. Such standards shall, to the
 17 maximum extent practicable, conform to qualification require-
 18 ments established by the Office of Personnel Management for
 19 comparable career reserved positions. The appointing au-
 20 thority is responsible for determining that an individual
 21 appointed to a general position meets the qualifications
 22 established for that position.

23 “(b) Employees given noncareer appointments do not
 24 acquire credit toward career status and may be removed
 25 at any time by the appointing authority.

1 gency appointment may not exceed 18 months and
2 under a limited term appointment may not exceed three
3 years;

4 “(2) may not be given a career appointment in the
5 Senior Executive Service except under the competitive
6 merit staffing process; and

7 “(3) may not, within twelve months of the expira-
8 tion of a limited appointment, be given another limited
9 appointment in the same agency if the executive com-
10 pleted the maximum period of service authorized for such
11 original appointment.

12 “(c) An executive with a noncareer appointment—

13 “(1) may be reassigned to any general position in
14 the same agency;

15 “(2) may transfer to a general position in another
16 agency;

17 “(3) may be appointed to a noncareer position out-
18 side the Senior Executive Service; and

19 “(4) may not be given a career appointment ex-
20 cept under the competitive staffing process.

21 “(d) A career executive may not be involuntarily reas-
22 signed or removed from the Senior Executive Service within
23 120 days after the appointment of an agency head or after
24 the appointment of a noncareer employee who is closest to the

1 career executive in the supervisory chain of command, except
2 in those cases where the reassignment or removal is the result
3 of an action initiated under section 4313 (b) (4) (B) or (C)
4 of this title following an unsatisfactory performance rating
5 given the career executive prior to such appointment.

6 “§ 3396. Development for and within the Senior Executive
7 Service

8 “(a) The Office of Personnel Management shall estab-
9 lish programs for the systematic development of candidates
10 for the Senior Executive Service, and for the continuing de-
11 velopment of executives in the Senior Executive Service, or
12 require the establishment of such programs by agencies which
13 meet criteria prescribed by the Office of Personnel Manage-
14 ment.

15 “(b) The Office of Personnel Management shall assist
16 agencies in the establishment of programs required under
17 subsection (a) of this section and shall monitor the imple-
18 mentation of such programs. The Office of Personnel Man-
19 agement shall direct agencies to take corrective action if
20 required to bring such programs into compliance with such
21 criteria.

22 “(c) It shall be the duty of the Office of Personnel Man-
23 agement to encourage and assist individuals to improve their
24 skills and increase their contribution by service in a variety

1 of agencies as well as by accepting temporary placements in
2 State or local governments or in the private sector.

3 “(d) An agency head may grant leave with half pay
4 and full benefits to a career executive for a sabbatical period
5 not exceeding twelve months or full pay and full benefits for
6 six months to permit such person to engage in study or
7 uncompensated work experience which will contribute to
8 the individual’s development and effectiveness. A sabbatical
9 leave may not be granted more than once in a ten-year
10 period. An individual, to be eligible for a sabbatical leave,
11 must have completed at least seven years of Federal service
12 in a position with a level of duties and responsibilities equiv-
13 alent to the Senior Executive Service and at least two of
14 which were as a member of the Senior Executive Service.

15 “§ 3397. Definitions

16 “For purposes of this subchapter, the terms ‘career
17 reserved position’, ‘career appointee’, ‘general position’, ‘lim-
18 ited emergency appointment’, ‘limited term appointment’,
19 and ‘executive’ have the same meaning as such terms are
20 given in section 3132 of this title.

21 “§ 3398. Regulations

22 “The Office of Personnel Management shall prescribe
23 regulations necessary to carry out the purpose of this sub-
24 chapter.”

1 (b) The table of sections for chapter 33 of title 5, United
2 States Code, is amended by adding at the end thereof the
3 following:

“SUBCHAPTER VIII—APPOINTMENT, PLACEMENT, TRANS-
FER, AND DEVELOPMENT IN THE SENIOR EXECUTIVE
SERVICE

“Sec.

- “3391. General provisions applicable to career executives.
- “3392. Career appointments to the Senior Executive Service.
- “3393. Appointments to general positions in the Senior Executive Service.
- “3394. Limited appointments to the Senior Executive Service.
- “3395. Placement and transfer within the Senior Executive Service.
- “3396. Development for and within the Senior Executive Service.
- “3397. Definitions.
- “3398. Regulations.”

4 REMOVAL AND PLACEMENT RIGHTS

5 SEC. 404. (a) Chapter 35 of title 5, United States
6 Code, is amended by adding at the end of subsection (b) of
7 section 3501 the following new sentence: “This subchapter
8 does not apply to employees in the Senior Executive Service.”

9 (b) Chapter 35 of title 5, United States Code, is
10 amended by adding at the end thereof the following new
11 subchapter:

12 “SUBCHAPTER V—REMOVAL, REINSTATEMENT,
13 AND GUARANTEED PLACEMENT PROVISIONS
14 IN THE SENIOR EXECUTIVE SERVICE

15 “§ 3501. Removal from the Senior Executive Service

16 “(a) Career appointees may be removed from the Senior
17 Executive Service—

18 “(1) during the one-year period of probation in the
19 Senior Executive Service;

1 “(2) for less than fully successful executive per-
2 formance appraisals determined under the provisions of
3 subchapter II of chapter 43 of this title; or

4 “(3) for misconduct, neglect of duty, or mal-
5 feasance,

6 except that in the case of a removal under paragraph (2)
7 the career appointee shall, at least 15 days prior to such
8 removal, be entitled, upon request, to an informal public
9 hearing before an official designated by the Merit Systems
10 Protection Board at which the executive may appear and
11 present arguments, but such hearing shall not give the execu-
12 tive the right to initiate an action with the Board under
13 section 7701 of this title, nor need the removal action be
14 delayed as a result of the granting of such hearing.

15 “(b) Limited emergency appointees may be removed at
16 any time from the Federal service by the appointing author-
17 ity and shall be separated after 18 months.

18 “(c) Limited term appointees may be removed at any
19 time from the Federal service by the appointing authority
20 before the expiration of that period and shall be separated
21 after 3 years.

22 “(d) Noncareer employees may be removed at any time
23 from the Federal service by the appointing authority.

24 “§ 3592. Reinstatement in the Senior Executive Service

25 “A former Senior Executive Service employee with ca-

1 reer status may be reinstated to any Senior Executive Serv-
2 ice position if—

3 “(1) the individual has successfully completed the
4 probationary period in the Senior Executive Service;
5 and

6 “(2) the reasons for leaving the Senior Executive
7 Service were not for misconduct, neglect of duty, mal-
8 feasance, or less than fully successful performance.

9 “§ 3593. Guaranteed placement in other personnel systems

10 “(a) Career appointees who are—

11 “(1) appointed from a career or career-type posi-
12 tion within the civil service (as determined by the
13 Office of Personnel Management), and

14 “(2) removed from the Senior Executive Service—

15 “(A) during the one-year probationary pe-
16 riod for reasons other than misconduct, neglect of
17 duty, or malfeasance, or

18 “(B) for less than fully successful perform-
19 ance

20 shall be entitled to placement in a position as provided in
21 subsection (c).

22 “(b) Career appointees in the Senior Executive Serv-
23 ice who accept Presidential appointments outside the Senior
24 Executive Service and who leave these appointments for
25 reasons other than misconduct, neglect of duty, or malfea-

1 sance shall have the right to placement in the Senior Execu-
 2 tive Service if the appointee applies within 90 days after the
 3 separation from the Presidential appointment.

4 “(c) (1) A career appointee described in subsection (a)
 5 shall be placed in a continuing career position in at least
 6 grade GS-15, or its equivalent, and shall receive an annual
 7 rate of basic pay in such position equal to the higher of—

8 “(A) the rate of basic pay such appointee received
 9 prior to his appointment to the Senior Executive Service,
 10 or

11 “(B) the rate of basic pay which such appointee
 12 received in the Senior Executive Service immediately be-
 13 fore his removal.

14 “(2) No employee in any agency in which an appointee
 15 is placed under paragraph (1) shall be separated or reduced
 16 in grade as a result of such placement.

17 “(3) If the rate of basic pay to which an appointee is
 18 entitled to under paragraph (1) exceeds the maximum rate
 19 of basic pay for the position in which such appointee was
 20 placed, the employee shall continue to receive the rate of basic
 21 pay to which he is entitled under paragraph (1), except that
 22 such appointee shall receive only one-half of any comparabil-
 23 ity increase under section 5305 of this title until such time as
 24 his rate of basic pay equals such maximum rate.

1 “§ 3594. Definitions

2 “For purposes of this subchapter, the terms ‘career
 3 appointee’ and ‘Senior Executive Service position’ have the
 4 same meaning as such terms are used in section 3132 of this
 5 title.

6 “§ 3595. Regulations

7 “The Office of Personnel Management shall prescribe
 8 regulations necessary to the administration of this
 9 subchapter.”

10 (c) The table of sections for chapter 35 of title 5, United
 11 States Code, is amended by adding at the end thereof the
 12 following:

“SUBCHAPTER V—REMOVAL, REINSTATEMENT, AND
 GUARANTEED PLACEMENT PROVISIONS IN THE
 SENIOR EXECUTIVE SERVICE

“Sec.
 “3591. Removal from the Senior Executive Service.
 “3592. Reinstatement in the Senior Executive Service.
 “3593. Guaranteed placement in other personnel systems.
 “3594. Definitions.
 “3595. Regulations.”

13 PERFORMANCE RATING

14 SEC. 405. (a) Chapter 43 of title 5, United States Code,
 15 is amended by adding at the end thereof the following new
 16 subchapter:

17 “SUBCHAPTER II—PERFORMANCE APPRAISAL
 18 IN THE SENIOR EXECUTIVE SERVICE

19 “§ 431L Senior Executive Service performance appraisal
 20 systems

21 “(a) Each agency shall, in accordance with standards
 22 established by the Office of Personnel Management, develop
 23 one or more performance appraisal systems designed to—

1 “(1) permit the accurate evaluation of job per-
2 formance on the basis of criteria which are related to
3 the position in question and specify the critical elements
4 of the position;

5 “(2) provide for systematic appraisals of job per-
6 formance of individuals in the Senior Executive Service;

7 “(3) encourage excellence in performance for in-
8 dividuals in the Senior Executive Service; and

9 “(4) link the performance of each individual in
10 the Senior Executive Service with eligibility for re-
11 tention and performance awards.

12 “(b) Each performance appraisal system for individuals
13 in the Senior Executive Service shall provide—

14 “(1) that performance requirements for each in-
15 dividual be established in consultation with the indi-
16 vidual at the beginning of the rating period and
17 communicated to the individual;

18 “(2) for written appraisals of performance based
19 on the accomplishment of the previously established
20 personal and organizational performance requirements;
21 and

22 “(3) that each individual be shown the appraisal
23 and rating and given an opportunity to respond in writ-
24 ing and have the rating reviewed by an employee in a
25 higher managerial level in the agency prior to final
26 action by the agency head.

1 “(c) The Office of Personnel Management shall review
2 each performance appraisal system developed by any agency
3 under this section, and determine whether the performance
4 appraisal system meets the requirements of this subchapter.
5 Upon determination by the Office of Personnel Manage-
6 ment that an agency performance appraisal system does not
7 meet the requirements of this subchapter and the regulations
8 prescribed thereunder, the Office of Personnel Management
9 shall order corrective action.

10 “(d) The Comptroller General shall from time to time
11 review on a selected basis performance appraisal systems
12 established under this section to determine the extent to
13 which such system meets the requirements of this subchapter
14 and shall periodically report its findings to the Office of Per-
15 sonnel Management and to Congress.

16 “§ 4312. Criteria for performance appraisals

17 “Appraisals of managerial success in the Senior Execu-
18 tive Service shall—

19 “(1) take into account both individual performance
20 and organizational accomplishment, and

21 “(2) be based on factors such as—

22 “(A) improvements in efficiency, productivity,
23 and quality of work or service;

24 “(B) the effectiveness and productivity of the
25 employees for whom the executive is responsible;

- 1 " (C) cost savings or cost efficiency ;
 2 " (D) timeliness of performance ; and
 3 " (E) the meeting of affirmative action goals
 4 and the achievement of equal employment oppor-
 5 tunity requirements.

6 "§ 4313. Ratings for executive performance appraisal

7 " (a) Each performance appraisal system shall provide
 8 for annual summary ratings representing a number of levels
 9 of performance including one or more fully successful levels,
 10 a level of performance which is minimally satisfactory, and
 11 an unsatisfactory level.

12 " (b) The head of each agency shall establish a system
 13 to appraise the performance of members of the Senior Execu-
 14 tive Service. The system shall provide that the appraisal
 15 will—

16 " (1) include a review and appraisal of requirements
 17 and accomplishments by an agency performance review
 18 board established under regulations of the Office of Per-
 19 sonnel Management.

20 " (2) take place at least annually, except that no
 21 evaluation of a career employee shall be initiated within
 22 120 days after the beginning of a new administration,
 23 and permit the assignment of an unsatisfactory rating
 24 at any time during the performance appraisal period;

1 " (3) not be appealable to the Merit Systems Pro-
 2 tection Board, and

3 " (4) have the following results—

4 " (A) career appointees receiving ratings at
 5 any of the fully successful levels may be given per-
 6 formance awards as prescribed in section 5384 of
 7 this title,

8 " (B) an unsatisfactory rating requires correc-
 9 tive action by removal of the employee from the
 10 current position through reassignment, transfer, or
 11 separation from the Senior Executive Service except
 12 that employees who receive 2 unsatisfactory annual
 13 ratings in 5 consecutive years shall be separated
 14 from the Senior Executive Service, and

15 " (C) employees who twice in any 3-year period
 16 receive a less than fully successful annual rating
 17 shall be separated from the Senior Executive Service.

18 " (c) (1) In conducting an appraisal of an executive
 19 under this section, a performance review board shall receive
 20 from the supervising official an initial appraisal. The execu-
 21 tive may respond in writing to such appraisal. The board
 22 shall review the initial appraisal and the executive's response,
 23 conduct such further review as it finds necessary, and advise
 24 the appointing authority in writing of its appraisal of the
 25 executive.

1 "§ 5382. Establishment and adjustment of rates of pay for
2 the Senior Executive Service

3 "(a) There shall be 5 or more rates of basic pay for
4 the Senior Executive Service, and any individual serving
5 in a Senior Executive Service position shall be paid at one
6 of these rates. The rates of basic pay shall be initially estab-
7 lished and thereafter adjusted by the President in accord-
8 ance with the provisions of this section.

9 "(b) In setting rates of basic pay, the lowest rate for the
10 Senior Executive Service shall not be less than the rate
11 for the sixth step of grade GS-15 of the General Schedule
12 and the highest rate shall not exceed the rate for level IV of
13 the Executive Schedule.

14 "(c) The minimum and maximum rates of basic pay
15 for the Senior Executive Service shall be adjusted by the
16 President at the same time he adjusts the rates of pay under
17 section 5305 of this title, and the adjusted minimum and
18 maximum rates of basic pay for the Senior Executive Service
19 shall be included in the report transmitted to the Congress by
20 the President under section 5305 (a) (3) or (c) (1) of this
21 title.

22 "(d) The rates of basic pay that are established and
23 adjusted under this section shall be printed in the Federal

1 Register and shall supersede any prior rates of basic pay
2 for the Senior Executive Service.

3 "§ 5383. Setting individual executive pay

4 "(a) The pay rate for each executive shall be set by the
5 appointing authority according to criteria established by the
6 Office of Personnel Management.

7 "(b) Except for pay adjustments provided for in sec-
8 tion 5382 of this title, the rate of basic pay of a member of
9 the Senior Executive Service may only be adjusted once
10 during any 12-month period. In the case of a reduction in
11 the basic rate of pay for an executive, the agency shall furnish
12 to the executive at least 15 days before the first day of the pay
13 period for which the reduction is to take effect a written
14 notification of the impending action.

15 "§ 5384. Performance awards for the Senior Executive
16 Service

17 "(a) To encourage excellence in performance by exec-
18 utives under the Senior Executive Service, performance
19 awards shall be paid to executives in accordance with the
20 provisions of this section, and shall be in addition to the rate
21 of basic pay paid under section 5382 of this title and shall
22 not be subject to the limit placed on salaries under section
23 5308. It shall be the responsibility of each agency head to
24 see that the provisions of this section are administered in
25 the agency in such a way that excellence is encouraged in

1 the performance of the agency's executives. A performance
 2 review board established under section 4313 of this title shall
 3 make recommendations to the appointing authority with re-
 4 spect to whether or not such authority should make a per-
 5 formance award to an executive and the amount of the award.

6 "(b) Each career executive shall annually be eligible
 7 to receive a performance award subject to the following
 8 criteria:

9 "(1) No performance award is to be paid to an
 10 executive whose performance was determined to be less
 11 than fully successful at the time of the executive's most
 12 recent performance evaluation under subchapter II of
 13 chapter 43 of this title.

14 "(2) The amount of a performance award is to be
 15 determined by the agency head but shall not exceed 20
 16 percent of the executive's rate of basic pay.

17 "(3) Performance awards may not be paid in any
 18 fiscal year to more than 50 percent of the executives in
 19 an agency which employs 4 or more members of the
 20 Senior Executive Service.

21 "(c) After annual review as provided for in section
 22 3135 (a) and (b) of this title, the Office of Personnel Man-
 23 agement is authorized to issue guidance to agencies concern-
 24 ing the proportion of Senior Executive Service salary ex-
 25 penses that may be appropriately applied to payment of

1 performance awards and the distribution of awards of each
 2 amount.

3 "§ 5385. Regulations

4 "Subject to such policies and procedures as the Presi-
 5 dent may prescribe, the Office of Personnel Management
 6 shall issue regulations necessary for the administration of
 7 this subchapter."

8 (c) (1) Section 8331 (3) of title 5, United States Code,
 9 is amended by inserting "any performance award under
 10 subchapter VIII of chapter 53 of this title," after "deceased
 11 employee"

12 (2) Section 8704 (c) of title 5, United States Code, is
 13 amended by inserting "but does not include any perform-
 14 ance award under subchapter VIII of chapter 53 of this
 15 title" before the period at the end thereof.

16 (d) The analysis of chapter 53 of title 5, United States
 17 Code, is amended by adding at the end thereof the following
 18 new items:

"SUBCHAPTER VIII—PAY FOR THE SENIOR EXECUTIVE
 SERVICE

"Sec.

"5381. Purpose; definitions.

"5382. Establishment and adjustment of rates of pay for the Senior
 Executive Service.

"5383. Setting individual executive pay.

"5384. Performance awards for the Senior Executive Service.

"5385. Regulations."

19 PAY ADMINISTRATION

20 SEC. 408, Chapter 55 of title 5, United States Code,
 21 is amended—

(1) by inserting "other than an employee or individual excluded by section 5541 (2) (xvi) of this section" immediately before the period at the end of section 5504 (a) (B);

(2) by amending section 5541 (2) by striking out "or" after paragraph (xiv), by striking out the period after paragraph (xv) and inserting "; or" in lieu thereof, and by adding the following paragraph at the end thereof:

"(xvi) executives in the Senior Executive Service established under subchapter II of chapter 31 of this title."; and

(3) by inserting "other than a member of the Senior Executive Service" after "employee" in section 5595 (a) (2) (i).

TRAVEL, TRANSPORTATION, AND SUBSISTENCE

SEC. 409. Chapter 57 of title 5, United States Code, is amended—

(1) in section 5723 (a) (1) by striking out "; and" and adding in lieu thereof "or of a new member of the Senior Executive Service; and";

(2) by adding at the end of subchapter IV the following section:

"§ 5752. Travel expenses of Senior Executive Service candidates

"Employing agencies may pay candidates for Senior

Executive Service positions travel expenses incurred incident to preemployment interviews requested by the employing agency."; and

(3) by adding at the end of the analysis of subchapter IV the following new item:

"5752. Travel expenses of Senior Executive Service candidates."

LEAVE

SEC. 410. Chapter 63 of title 5, United States Code, is amended by inserting in subsection (a) of section 6304 "(e), and (f)" in lieu of "and (e)," and by adding at the end of such section the following new subsection:

"(f) Annual leave accrued by an individual serving in a position under the Senior Executive Service shall not be subject to the limitation on accumulation otherwise imposed by this section."

DISCIPLINARY ACTIONS

SEC. 411. (a) Chapter 75 of title 5, United States Code, is amended by adding at the end thereof the following:

"SUBCHAPTER V—SENIOR EXECUTIVE SERVICE

"§ 7541. Definitions

"For the purpose of this subchapter—

"(1) 'employee' means a career executive in the Senior Executive Service who—

"(A) has completed a year of current continu-

1 ous service in the Senior Executive Service; or

2 “(B) at the time of appointment to a position
3 in the Senior Executive Service was covered by the
4 provisions of subchapter II of this chapter;

5 “(2) ‘disciplinary action’ means an action based
6 on the conduct of the employee which results in in-
7 voluntary removal or suspension for more than 30 days
8 of the employee, including misconduct, neglect of duty,
9 or malfeasance, and not including less than fully success-
10 ful performance;

11 “(3) ‘removal’ means separation from the Federal
12 service; and

13 “(4) ‘suspension’ means the placing of an employee
14 in a temporary nonduty nonpay status for disciplinary
15 reasons.

16 **“§ 7542. Actions covered**

17 “This subchapter applies to a disciplinary removal or
18 suspension for more than 30 days, but does not apply to a
19 suspension or removal under section 7532 of this title.

20 **“§ 7543. Cause and procedure**

21 “(a) Under regulations prescribed by the Office of Per-
22 sonnel Management, an agency may take disciplinary action
23 against any employee only for such cause as shall promote
24 the efficiency of the service. Removal from the Senior Execu-

1 tive Service for less than fully successful performance is not a
2 disciplinary action within the meaning of this provision.

3 “(b) An employee against whom a disciplinary action
4 is proposed is entitled to—

5 “(1) at least 30 days’ advance written notice, un-
6 less there is reasonable cause to believe that the em-
7 ployee is guilty of a crime for which a sentence of im-
8 prisonment can be imposed, stating specific reasons for
9 the proposed action;

10 “(2) a reasonable time to answer orally and in
11 writing and to furnish affidavits and other documentary
12 evidence in support of the answer;

13 “(3) be accompanied by an attorney or other rep-
14 resentative; and

15 “(4) a written decision and reasons therefor at the
16 earliest practicable date.

17 “(c) An agency may in its discretion provide, by
18 regulation, for a hearing which may be in lieu of or in
19 addition to the opportunity to answer provided under sub-
20 section (b) (2) of this section.

21 “(d) Copies of the notice of proposed action, the answer
22 of the employee if written and a summary thereof if made
23 orally, the notice of decision and reasons therefor, and any
24 order effecting a disciplinary action shall be made a part
25 of the records of the agency and, on request, shall be fur-

1 nished to the Merit Systems Protection Board or the Office
2 of Personnel Management.

3 “(e) An employee in the Senior Executive Service
4 against whom a disciplinary action is taken is entitled to
5 appeal to the Merit Systems Protection Board under section
6 7701 of this title and the decision of the agency shall be
7 sustained on appeal except as provided in such section.”

8 (b) The table of sections of chapter 75 of title 5, United
9 States Code, is amended by adding at the end thereof the
10 following:

“SUBCHAPTER V—SENIOR EXECUTIVE SERVICE

“Sec.
“7541. Definitions.
“7542. Actions covered.
“7543. Cause and procedure.”

11 CONVERSION TO THE SENIOR EXECUTIVE SERVICE

12 SEC. 412. (a) During the period beginning on the date
13 of the enactment of this Act and ending on the effective date
14 of this title, each agency under the guidance and review of
15 the Office of Personnel Management and the definitions in
16 chapter 31 of title 5, United States Code, as amended by this
17 title, shall designate those positions which are to be incor-
18 porated into the Senior Executive Service and shall designate
19 those positions which are career reserved. These designations
20 shall be published in the Federal Register.

21 (b) Each agency shall also submit a request for total
22 Senior Executive Service space allocations and for the

1 number of noncareer appointments needed. The Office of
2 Personnel Management shall establish interim authoriza-
3 tions within the limits defined in sections 3133 and 3134
4 of title 5, United States Code, as amended by this Act.

5 (c) Each employee serving in a position at the time
6 it is officially designated as a position in the Senior Execu-
7 tive Service shall have the option to—

8 (1) decline conversion and remain in the current
9 appointment system and pay system, retaining the grade,
10 seniority, and other rights and benefits associated with
11 career and career-conditional appointment, and election
12 of such option shall not cause the separation, displace-
13 ment, or reduction in grade of any other employee in the
14 agency; or

15 (2) convert to a Senior Executive Service appoint-
16 ment according to the automatic appointment conversion
17 provisions of subsections (d), (e), (f), (g), and (h)
18 of this section.

19 The employee shall be notified in writing that his position
20 has been brought into the Senior Executive Service and
21 what the employee's options are under subsections (d),
22 (e), (f), (g), and (h) of this section. The employee shall
23 be given 90 days from the date of such notification to elect
24 one of the options.

25 (d) Each employee who has elected an automatic

1 appointment conversion, is serving immediately before the
 2 effective date in a position designated as a Senior Executive
 3 Service position, and is currently under (1) a career or
 4 career-conditional appointment; or (2) a similar type of
 5 appointment in an excepted service as determined by the
 6 Office of Personnel Management, shall receive a career ap-
 7 pointment to that position in the Senior Executive Service
 8 not subject to section 3392 (e) and (g) of title 5, United
 9 States Code.

10 (e) Each employee who has elected an automatic
 11 appointment conversion and is currently under an excepted
 12 appointment in a position which is not designated a career
 13 reserved position in the Senior Executive Service, but is—

14 (1) a position in schedule C of subpart C of part
 15 213 of title 5, Code of Federal Regulations;

16 (2) a position filled by noncareer executive assign-
 17 ment under subpart F of part 305 of title 5, Code of
 18 Federal Regulations;

19 (3) a position in the Executive Schedule under
 20 subchapter II of chapter 53 of title 5, United States
 21 Code, except career Executive Schedule positions; or

22 (4) a similar type of appointment in an excepted
 23 service as determined by the Office of Personnel Manage-
 24 ment;

1 shall receive a noncareer appointment in the Senior Execu-
 2 tive Service.

3 (f) Each employee described in subsection (e) of this
 4 section who is serving immediately before the effective date
 5 in a position designated as a Senior Executive Service career
 6 reserved position shall be reassigned to an appropriate Senior
 7 Executive Service general position or terminated.

8 (g) Each employee described in subsection (e) of this
 9 section who is serving immediately before the effective date,
 10 in a position designated as a Senior Executive Service posi-
 11 tion and who has reinstatement eligibility to a position in the
 12 competitive service, may request the reinstatement of the
 13 employee's career status from the Office of Personnel Man-
 14 agement and be converted to a career appointment in the
 15 Senior Executive Service. The names and grounds for status
 16 of all such employees who are so reinstated and converted
 17 shall be published in the Federal Register.

18 (h) Each employee who has elected an automatic ap-
 19 pointment conversion and is under a limited executive assign-
 20 ment under subpart F of part 305 of title 5, Code of Federal
 21 Regulations, shall—

22 (1) be converted to a Senior Executive Service
 23 limited term appointment if the position encumbered
 24 immediately before the effective date will terminate
 25 within 3 years of the effective date;

1 (2) be converted to a Senior Executive Service
 2 noncareer appointment if the position encumbered im-
 3 mediately before the effective date is designated as a
 4 Senior Executive Service general position; or

5 (3) be converted to a Senior Executive Service
 6 noncareer appointment and reassigned to a Senior Ex-
 7 ecutive Service general position if the encumbered posi-
 8 tion immediately before the effective date is designated
 9 as a Senior Executive Service career reserved position.

10 (i) Employees whose actual base pay at the time of
 11 conversion exceeds the pay of the rate to which they are
 12 converted shall retain their pay.

13 (j) The Office of Personnel Management shall prescribe
 14 regulations to carry out the purpose of this section. There
 15 shall be a right of appeal to the Merit Systems Protection
 16 Board for an employee who believes such employee's agency
 17 has violated the employee's rights under this section, section
 18 3395 (d), or section 3593, or who believes that the agency's
 19 action has not been timely under section 4313 (b) (2) of this
 20 title.

21 **REPEALER**

22 **SEC. 413.** Except for the Presidential authority pro-
 23 vided in section 5317 of title 5, United States Code, all au-
 24 thority in effect immediately before the effective date of this

1 section for the establishment or the pay, or both, as the case
 2 may be, of each position subject to section 401 of this Act
 3 is repealed.

4 **SAVING PROVISION**

5 **SEC. 414.** The enactment of this title shall not decrease
 6 the present pay, allowances, or compensation, or future an-
 7 nuity of any person.

8 **EFFECTIVE DATE**

9 **SEC. 415.** The provisions of this title shall take effect 9
 10 months after the date of the enactment of the Act with the
 11 exception of section 412, regarding conversion procedures,
 12 which shall take effect on such date of enactment.

13 **TITLE V—MERIT PAY**

14 **PAY FOR PERFORMANCE AMENDMENTS**

15 **SEC. 501.** (a) Part III of title 5, United States Code,
 16 is amended by inserting after chapter 53 the following new
 17 chapter:

18 **"CHAPTER 54—MERIT PAY**

"Sec.
 "5401. Purpose.
 "5402. Merit pay system.
 "5403. Reports.
 "5404. Regulations.

19 **"§ 5401. Purpose**

20 "It is the purpose of this chapter to provide for a merit
 21 pay system which shall—

1 “(1) within available funds, recognize and reward
2 quality performance by varying merit pay adjustments;

3 “(2) use performance appraisals as the basis for
4 determining merit pay adjustments;

5 “(3) within available funds, provide for training
6 to improve objectivity and fairness in the evaluation of
7 performance; and

8 “(4) regulate the costs of merit pay by establishing
9 appropriate control techniques.

10 “§ 5402. Merit pay system

11 “(a) In accordance with the purposes set forth in section
12 5401 of this title, the Office of Personnel Management shall
13 establish a merit pay system which shall cover any employee
14 in a position which regularly requires the exercise of man-
15 agerial or supervisory responsibilities and which is in GS-13
16 through GS-15 as established under chapters 51 and 53 of
17 this title.

18 “(b) (1) An agency may file with the Office of Personnel
19 Management an application, setting forth reasons why it, or
20 a unit thereof, should be excluded from placing positions un-
21 der the merit pay system. The Office of Personnel Manage-
22 ment shall review the application and reasons, undertake such
23 other investigation as it considers appropriate to determine
24 whether the agency or unit should be excluded from coverage
25 of this subchapter, and upon completion of its review, recom-

1 mend to the President whether the agency or unit should
2 be so excluded. The President may, in writing, exclude an
3 agency or unit from such coverage.

4 “(2) Any agency or unit which is excluded from cov-
5 erage under this subsection shall make a sustained effort to
6 bring its personnel system into conformity with the merit pay
7 system insofar as is practicable.

8 “(3) The Office of Personnel Management may at any
9 time recommend to the President that the exclusion from
10 coverage previously granted to an agency or unit under this
11 subsection be revoked. The revocation of the exclusion shall
12 be effected upon written determination of the President.

13 “(c) The merit pay system established under subsection
14 (a) of this section shall provide for a range of basic pay for
15 each grade to which it applies, which range shall be limited
16 by the minimum and maximum rate of basic pay payable
17 for each such grade.

18 “(d) (1) Concurrent with each adjustment under section
19 5305 of this title, the Office of Personnel Management in
20 consultation with the Office of Management and Budget shall
21 determine the extent to which such adjustment shall be made
22 in rates of basic pay for all employees covered by the merit
23 pay system.

24 “(2) An increase in pay under this subsection is not an

1 equivalent increase in pay within the meaning of section
2 5335 of this title.

3 “(3) No employee may be paid less than the minimum
4 rate of basic pay of the grade of such employee's position. No
5 employee shall suffer a reduction in the rate of basic pay as
6 a result of the employee's initial coverage by, or subsequent
7 conversion to, the merit pay system.

8 “(e) (1) Under regulations prescribed by the Office of
9 Personnel Management, the head of each agency may pro-
10 vide for increases within the range of basic pay for any
11 employee covered by a merit pay system.

12 “(2) Determinations to provide pay increases under this
13 subsection to an employee—

14 “(A) may take into account both individual per-
15 formance and organizational accomplishment, and

16 “(B) shall be based on factors such as—

17 “(i) improvements in efficiency, productivity,
18 and quality of work or service;

19 “(ii) cost savings or cost efficiency;

20 “(iii) timeliness of performance; and

21 “(iv) the quality of performance by the em-
22 ployees for whom the manager or supervisor is
23 responsible;

24 “(C) shall be subject to review only in accordance

1 with and to the extent provided by procedures estab-
2 lished by the agency head; and

3 “(D) shall be made in accordance with guidelines
4 issued by the Office of Personnel Management which
5 relate to the distribution of increases available under
6 this subsection.

7 “(3) For any fiscal year, the head of any agency may
8 exercise authority under paragraph (1) of this subsection
9 only to the extent of the funds available for purposes of
10 this subsection.

11 “(4) The funds available for purposes of this subsection
12 to the head of an agency for any fiscal year shall be deter-
13 mined by the Office of Personnel Management on an annual
14 basis, after consultation with the Office of Management and
15 Budget, before the beginning of such fiscal year. The amount
16 so available for any such agency shall be determined by
17 the Office on the basis of—

18 “(A) the additional amount of the adjustments
19 under section 5305 of this title, and

20 “(B) the amount estimated by the Office to reflect
21 within-grade step increases and quality step increases,
22 which would have occurred if the employee covered by
23 the merit pay system in such agency were not so
24 covered.

1 “(f) (1) The head of an agency may pay a cash award
2 to, and incur necessary expenses for the honorary recognition
3 of, any employee covered by a merit pay system who—

4 “(A) by such employee’s suggestion, invention,
5 superior accomplishment, or other personal effort con-
6 tributes to the efficiency, economy, or other improve-
7 ment of Government operations; or

8 “(B) performs a special act or service in the
9 public interest in connection with or related to such
10 employee’s official employment.

11 “(2) The President may pay a cash award to, and
12 incur necessary expenses for the honorary recognition of,
13 any employee covered by a merit pay system who—

14 “(A) by such employee’s suggestion, invention,
15 superior accomplishment, or other personal effort con-
16 tributes to the efficiency, economy, or other improve-
17 ment of Government operations; or

18 “(B) performs an exceptionally meritorious special
19 act or service in the public interest in connection with or
20 related to such employee’s official employment.

21 A Presidential award may be in addition to an agency award
22 under paragraph (1) of this subsection.

23 “(3) A cash award under this subsection is in addition
24 to the basic pay and any merit increase to basic pay of the
25 employee receiving the award. Acceptance of a cash award

1 under this subsection constitutes an agreement that the use
2 by the Government of an idea, method, or device for which
3 the award is made does not form the basis of a further claim
4 of any nature against the Government by the employee, his
5 heirs, or assigns.

6 “(4) A cash award to, and expenses for the honorary
7 recognition of, any employee covered by a merit pay system
8 may be paid from the fund or appropriation available to the
9 activity primarily benefiting or the various activities bene-
10 fitting. The head of the agency concerned shall determine the
11 amount to be paid by each activity for an agency award
12 under paragraph (1) of this subsection. The President shall
13 determine the amount to be paid by each activity for a Presi-
14 dential award under paragraph (2) of this subsection.

15 “(5) Except as provided by paragraph (6) of this
16 subsection, a cash award under this subsection may not ex-
17 ceed \$10,000.

18 “(6) If the head of an agency certifies to the Office
19 of Personnel Management that the suggestion, invention,
20 superior accomplishment, or other meritorious effort for
21 which the award is proposed is highly exceptional and un-
22 usually outstanding, a cash award in excess of \$10,000 but
23 not in excess of \$25,000 may be granted with the approval
24 of such office.

25 “(7) An agency may pay or grant an award under

1 this subsection notwithstanding the death or separation from
2 the service of the employee concerned, if the suggestion,
3 invention, superior accomplishment, other meritorious effort
4 for which the award is proposed was made or performed
5 while the employee was in the employ of the Government.

6 (g) Under regulations prescribed by the Office of Per-
7 sonnel Management, the benefit of advancement through the
8 range of basic pay shall be preserved for an employee cov-
9 ered by the merit pay system, whose continuous service is
10 interrupted in the public interest by service with the armed
11 forces, or by service in essential non-Government civilian
12 employment during a period of war or national emergency.

13 (h) For purposes of section 5941 of this title, rates
14 of basic pay subject to increases under the merit pay system
15 are considered pay fixed by statute.

16 § 5403. Reports

17 "Until such time as the merit pay system is fully im-
18 plemented, the Office of Personnel Management shall submit
19 to the Congress annual reports on the operation of the merit
20 pay system and the proposed schedule for completing the
21 implementation of the system, and the costs associated with
22 implementing it. Thereafter the Office of Personnel Manage-
23 ment shall periodically submit reports to Congress on the
24 effectiveness of the system and the costs associated with it.

1 "§ 5404. Regulations

2 "The Office of Personnel Management shall prescribe
3 regulations necessary for the administration of this chapter."

4 CONFORMING AND TECHNICAL AMENDMENTS

5 SEC. 502. (a) Section 4501 (2) (A) of title 5, United
6 State Code, is amended by striking out "; and" and inserting
7 in lieu thereof "but does not include an individual paid under
8 the merit pay system established under section 5402 of this
9 title; and".

10 (b) Section 4502 (a) of title 5, United States Code,
11 is amended by striking out "\$5,000" and inserting in lieu
12 thereof "\$10,000".

13 (c) Section 4502 (b) of title 5, United States Code, is
14 amended—

15 (1) by striking out "Civil Service Commission"
16 and inserting in lieu thereof "Office of Personnel
17 Management";

18 (2) by striking out "\$5,000" and inserting in lieu
19 thereof "\$10,000"; and

20 (3) by striking out "the Commission" and inserting
21 in lieu thereof "the Office".

22 (d) Section 4506 of title 5, United States Code, is
23 amended by striking out "Civil Service Commission may"
24 and inserting in lieu thereof "Office of Personnel Manage-
25 ment shall".

1 (e) Section 5332 (a) of title 5, United States Code, is
2 amended by inserting after "applies" the second time it
3 appears the following: "; except an employee covered by
4 chapter 54 of this title,".

5 (f) Section 5334 of title 5, United States Code, is
6 amended—

7 (1) in paragraph (2) of subsection (c) by insert-
8 ing "; or for an employee appointed to a position covered
9 by the merit pay system, any dollar amount," after
10 "step"; and

11 (2) by adding at the end thereof the following new
12 subsection:

13 "(g) In applying this section to an employee covered
14 by the merit pay system, the term '6 percent' shall be substi-
15 tuted for the term 'two steps' and 'two step-increases' each
16 place they appear."

17 (g) Section 5335 (e) of title 5, United States Code, is
18 amended by inserting after "individual" the following: "cov-
19 ered by chapter 54 of this title, or".

20 (h) Section 5336 (c) of title 5, United States Code, is
21 amended by inserting after "individual" the following: "cov-
22 ered by chapter 54 of this title, or".

23 (i) The table of chapters for part III of title 5, United
24 States Code, is amended by inserting after the item relating
25 to chapter 53 the following new item:

"54. Merit Pay..... 5401".

1 EFFECTIVE DATE

2 SEC. 503. The provisions of this title shall take effect
3 on the date of the enactment of this Act, except that such
4 provisions shall be applied to positions in accordance with
5 such schedule as the Office of Personnel Management
6 determines.

7 TITLE VI—RESEARCH, DEMONSTRATION, AND
8 OTHER PROGRAMS

9 RESEARCH AND DEMONSTRATION PROJECTS

10 SEC. 601. (a) Part III of title 5, United States Code,
11 is amended by adding at the end of subpart C thereof the fol-
12 lowing new chapter:

13 "CHAPTER 47—PERSONNEL RESEARCH AND
14 DEMONSTRATION PROJECTS

"Sec.
"4701. Definitions.
"4702. Research and development functions.
"4703. Demonstration projects.
"4704. Allocation of funds.
"4705. Reports.
"4706. Regulations.

15 "§ 4701. Definitions

16 "For the purpose of this chapter—

17 "(1) 'agency' means an agency as defined in sec-
18 tion 2301 (a) (without regard to paragraph (2) (D)
19 thereof);

20 "(2) 'agency' does not include the Federal Bureau
21 of Investigation, the Central Intelligence Agency, the

1 Defense Intelligence Agency, the National Security
 2 Agency, any positions in the Drug Enforcement Ad-
 3 ministration which are excluded from the competitive
 4 service under section 201 of the Crime Control Act of
 5 1976 (90 Stat. 2425), and, as determined by the Presi-
 6 dent, an executive agency or unit thereof whose prin-
 7 cipal function is the conduct of foreign intelligence or
 8 counterintelligence activities;

9 “(3) ‘employee’ means an individual (other than
 10 a Foreign Service officer of the United States) em-
 11 ployed in or under an agency;

12 “(4) ‘eligible’ means an individual who has quali-
 13 fied for appointment in an agency and whose name has
 14 been entered on the appropriate register or list of
 15 eligibles;

16 “(5) ‘demonstration project’ means a project con-
 17 ducted by the Office of Personnel Management, or un-
 18 der its supervision, to determine whether a specified
 19 change in personnel management policies or procedures
 20 would result in improved Federal personnel manage-
 21 ment; and

22 “(6) ‘research program’ means a planned study of
 23 the manner in which public management policies and
 24 systems are operating, the effects of those policies and

1 systems, the possibilities for change, and comparisons
 2 among policies and systems.

3 “§ 4702. Research and development functions

4 “The Office of Personnel Management shall—

5 “(1) establish and maintain (and assist in the es-
 6 tablishment and maintenance of) research and develop-
 7 ment projects of improved methods and technologies in
 8 Federal personnel management;

9 “(2) evaluate projects, and proposed projects, de-
 10 scribed in paragraph (1);

11 “(3) establish and maintain a program for the
 12 collection and public dissemination of information relat-
 13 ing to personnel management research and for encour-
 14 aging and facilitating the exchange of information among
 15 interested persons and entities; and

16 “(4) carry out the preceding functions directly or
 17 through agreement or contract.

18 “§ 4703. Demonstration projects

19 “(a) Except as provided in this section, the Office of
 20 Personnel Management may directly, or through agreement
 21 or contract with one or more Federal agencies and other
 22 public and private organizations, conduct and evaluate dem-
 23 onstration projects, except that there may be no more than 10
 24 active demonstration projects in effect at any one time. The
 25 conduct of demonstration projects shall not be limited by any

1 lack of specific authority in this title to take the action con-
 2 templated, or by any provision of this title, or any regulation
 3 issued thereunder, which is inconsistent with such action, in-
 4 cluding laws or regulations relating to—

5 “(1) the methods of establishing qualification re-
 6 quirements for, recruitment for, and appointment to
 7 positions;

8 “(2) the methods of classifying positions and com-
 9 pensating employees, except that no variation is hereby
 10 authorized in employee benefits provided by chapter 63
 11 or subpart G of part III of this title;

12 “(3) the methods of assigning, reassigning, or
 13 promoting employees;

14 “(4) the methods of disciplining employees;

15 “(5) the methods of providing incentives to em-
 16 ployees, including the provision of group or individual
 17 incentive bonuses or pay;

18 “(6) hours of work per day or per week;

19 “(7) the methods of involving employees, unions,
 20 and employee organizations in personnel decisions; and

21 “(8) the methods of reducing overall agency staff
 22 and grade levels.

23 Notwithstanding the provisions of this subsection, no dem-
 24 onstration project shall (A) affect leave under chapter 63 of
 25 this title or insurance or annuities under subpart G of part

1 III of this title, (B) diminish in any way rights, proce-
 2 dures, and remedies available to preference eligibles under
 3 chapters 13, 21, 31, 33, 35, and 75 of this title, or (C) be
 4 inconsistent with any merit system principles established, or
 5 personnel practices prohibited, under chapter 23 of this title.

6 “(b) Before conducting or entering into any agreement
 7 to conduct a demonstration project, the Office of Personnel
 8 Management shall—

9 “(1) develop a plan for such project which iden-
 10 tifies—

11 “(A) purposes;

12 “(B) the types of employees or eligibles, cate-
 13 gorized by organizational series, grade, or organi-
 14 zational unit;

15 “(C) the number of employees or eligibles to
 16 be included, in total amount or by category;

17 “(D) the methodology;

18 “(E) the duration;

19 “(F) the training to be provided;

20 “(G) the anticipated costs; and

21 “(H) the methodology and criteria for
 22 evaluation;

23 “(2) publish such plan in the Federal Register and
 24 submit such plan so published to public hearing;

25 “(3) notify, at least 6 months in advance of the date

1 any project proposed under this section is to take effect,
 2 any employee who may be affected by the project, and
 3 consult with such employees in accordance with subsections
 4 (e) and (f); and

5 " (4) provide Congress with a report at least 3
 6 months in advance of the date any project proposed
 7 under this section is to take effect detailing the nature
 8 and purpose of the project, and the extent, if any, to
 9 which the project is inconsistent with existing law.

10 Any such plan shall not be implemented until it is approved
 11 by each agency involved.

12 " (c) Each demonstration project shall—

13 " (1) involve no more than 5,000 individuals other
 14 than individuals in any control groups necessary to
 15 validate the results of the project; and

16 " (2) terminate before the end of the 5-year period
 17 beginning on the date of approval by the Office of Personnel
 18 Management except that research may continue
 19 beyond such date to the extent necessary to validate the
 20 results of the project.

21 " (d) Subject to the terms of any written agreement
 22 between the Office of Personnel Management and an agency,
 23 a demonstration project involving an agency may be terminated
 24 by the Office of Personnel Management, or such
 25 agency, if either determines that the project creates a sub-

1 substantial hardship on, or is not in the best interest of, the
 2 public, the Federal Government, employees, or eligibles.

3 " (e) Employees within a unit with respect to which
 4 an organization of Government employees has been accorded
 5 exclusive recognition shall not be included within
 6 any project under subsection (b) of this section—

7 " (1) if such project would violate a negotiated
 8 agreement between such agency and such organization
 9 unless there is a written agreement with respect to such
 10 project between such agency and such organization; or

11 " (2) if such project is not covered by a negotiated
 12 agreement, until there has been consultation or negotiation,
 13 as appropriate, with such organization.

14 " (f) Employees within any unit with respect to which
 15 an organization of Government employees has not been
 16 accorded exclusive recognition shall not be included within
 17 any project under subsection (b) of this section unless there
 18 has been agency consultation regarding the project with the
 19 employees in such unit.

20 " (g) Evaluation of the results of the project and its impact
 21 on improving public management shall be undertaken
 22 for each project.

23 " (h) Upon the request of the Director of the Office of
 24 Personnel Management, agencies shall cooperate with and
 25 assist the Office as far as practical in the performance of this

1 function and provide the Office with requested information
2 and reports relating to the conduct of demonstration projects
3 in their respective agencies.

4 "§ 4704. Allocation of funds

5 "Funds appropriated to the Office of Personnel Manage-
6 ment for the purposes of this chapter may be allocated by
7 the Office of Personnel Management to any agency conduct-
8 ing demonstration or research projects or assisting the Office
9 of Personnel Management in conducting such projects. Funds
10 so allocated shall remain available for such period as may be
11 specified in appropriation Acts. No contract shall be entered
12 into under this section unless such contract has been provided
13 for in advance in appropriation Acts.

14 "§ 4705. Reports

15 "The Office of Personnel Management shall include in
16 the annual report required by section 1308 of this title a
17 summary of research and demonstration projects conducted
18 during the year, the effect of that research on improving
19 public management and increasing efficiency, and recom-
20 mendations of policies and procedures which will improve
21 the attainment of general research objectives.

22 "§ 4706. Regulations

23 "The Office of Personnel Management shall prescribe
24 regulations for the administration of this chapter."

1 (b) The table of chapters for subpart C of part III of
2 title 5, United States Code, is amended by adding at the end
3 thereof the following new item:

"47. Personnel Research and Demonstration Projects..... 4701".

4 INTERGOVERNMENTAL PERSONNEL ACT AMENDMENTS

5 SEC. 602. (a) Section 208 of the Intergovernmental
6 Personnel Act of 1970 is amended—

7 (1) by striking out the section heading and insert-
8 ing in lieu thereof the following:

9 "TRANSFER OF FUNCTIONS AND ADMINISTRATION OF
10 MERIT POLICIES";

11 (2) by redesignating subsections (b), (c), (d),
12 (e), (f), and (g) as subsections (c), (d), (e), (f),
13 (g), and (i), respectively, and by inserting after sub-
14 section (a) the following new subsection:

15 "(b) In accordance with regulations of the Office of
16 Personnel Management, Federal agencies may require as a
17 condition of participation in assistance programs, systems of
18 personnel administration consistent with personnel standards
19 prescribed by the Office of Personnel Management for posi-
20 tions engaged in carrying out such programs. Such standards
21 shall include the merit principles in section 2 of this Act.
22 Such standards shall be prescribed in such a manner as to
23 minimize Federal intervention in State and local personnel
24 administration."; and

1 (3) by inserting after subsection (g), as redesignated by this section, the following new subsection:

2
3 “(h) Effective one year after the date of the enactment of this subsection, all statutory personnel requirements established as a condition of the receipt of Federal grants-in-aid by State and local governments are hereby abolished, except—

4
5
6
7
8 “(1) those requirements listed in subsection (a) of this section,

9
10 “(2) those that generally prohibit discrimination in employment or require equal employment opportunity,

11
12 “(3) the Davis-Bacon Act (40 U.S.C. 276 et seq.), and

13
14 “(4) chapter 15 of title 5, United States Code relating to political activities of certain State and local employees.”

15
16
17 (b) Section 401 of such Act is amended by striking the period after “institutions of higher education” and inserting in lieu thereof “and other organizations.”

18
19 (c) Section 403 of such Act is amended by striking out “(less applicability to commissioned officers of the Public Health Service)”.

20
21 (d) Section 502 of such Act is amended in paragraph (3) by inserting “the Trust Territory of the Pacific Islands,” before “and a territory or possession of the United States.”

1 (e) Section 506 of such Act is amended—

2 (1) by inserting in subsection (b) (2) “the Commonwealth of Puerto Rico, Guam, American Samoa, and the Virgin Islands)” after “(Other than the District of Columbia,)”; and

3
4
5
6 (2) by striking out of subsection (b) (5) “and the District of Columbia,” and by inserting in lieu thereof “the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, and the Virgin Islands.”.

7
8
9
10 AMENDMENTS TO THE MOBILITY PROGRAM

11 SEC. 603. (a) Section 3371 of title 5, United States Code is amended—

12
13 (1) by inserting “the Trust Territory of the Pacific Islands,” after “Puerto Rico,” in paragraph (1) (A); and

14
15
16 (2) by striking out “and” at the end of paragraph (1), by striking out the period at the end of paragraph (2) and inserting a semicolon in lieu thereof, and by adding at the end thereof the following:

17
18
19
20 “(3) ‘Federal agency’ means an executive agency, a military department, a court of the United States, the Administrative Office of the United States Courts, the Library of Congress, the Botanic Garden, the Government Printing Office, the Congressional Budget Office, the United States Postal Service, the Postal Rate Com-

1 mission, the Office of the Architect of the Capitol, the
 2 Office of Technology Assessment, and such other appro-
 3 priate agencies of the legislative and judicial branches as
 4 determined by the Office of Personnel Management; and

5 “(4) ‘other organizations’ means—

6 “(A) a national, regional, State-wide, areawide
 7 or metropolitan organization representing member
 8 State or local governments;

9 “(B) an association of State or local public
 10 officials; or

11 “(C) a nonprofit organization, one of whose
 12 principal functions is to offer professional advisory,
 13 research, development, educational, or related serv-
 14 ices to governments or universities concerned with
 15 public management.”

16 (b) Sections 3372 through 3375 of title 5, United States
 17 Code, are amended by striking out “executive agency” and
 18 “an executive agency” each place they appear and by insert-
 19 ing in lieu thereof, respectively, “Federal agency” and “a
 20 Federal agency”.

21 (c) Section 3372 (a) (1) of title 5, United States
 22 Code, is further amended by inserting immediately before
 23 the semicolon the following: “, except that an employee
 24 in a Federal agency does not include an employee in the
 25 Senior Executive Service serving under a non-career appoint-

1 ment and an employee in the excepted service who is serving
 2 in a confidential or policy-determining or policy-advocating
 3 position”.

4 (d) Section 3372 of title 5, United States Code, is
 5 amended—

6 (1) in subsection (b) (1), by striking out “and”
 7 after “higher education”;

8 (2) in subsection (b) (2), by striking out the
 9 period after “executive agency” and inserting in lieu
 10 thereof a semicolon; and

11 (3) by adding at the end thereof the following:

12 “(3) an employee of a Federal agency to another
 13 organization; and

14 “(4) an employee of another organization to a
 15 Federal agency.”

16 (e) Section 3374 of title 5, United States Code, is
 17 amended—

18 (1) by adding the following new sentence at the
 19 end of subsection (b) :

20 “The above exceptions shall not apply to non-Federal em-
 21 ployees who are covered by chapters 83, 87, and 89 of this
 22 title by virtue of their non-Federal employment immediately
 23 before assignment and appointment under this section.”;

24 (2) in subsection (c) (1), by striking out the semi-

1 colon at the end thereof and by inserting in lieu thereof
 2 the following: " , except to the extent that the compen-
 3 sation received from the State or local government is
 4 less than the appropriate rate of pay which the duties
 5 would warrant under the applicable pay provisions of
 6 this title or other applicable authority."; and

7 (3) by striking out the period at the end of sub-
 8 section (c) and adding the following: " , or for the
 9 contribution of the State or local government, or a part
 10 thereof, to employee benefit systems."

11 (f) Section 3375 (a) of title 5, United States Code, is
 12 amended by striking out "and" at the end of paragraph
 13 (4), by redesignating paragraph (5) as paragraph (6),
 14 and by inserting after paragraph (4) thereof the following:

15 " (5) section 5724a (b) of this title, to be used by
 16 the employee for miscellaneous expenses related to
 17 change of station where movement or storage of house-
 18 hold goods is involved; and"

19 TITLE VII—LABOR-MANAGEMENT RELATIONS

20 LABOR-MANAGEMENT RELATIONS

21 SEC. 701. (a) Subpart F of part III of title 5, United
 22 States Code, is amended by adding after chapter 71 the fol-
 23 lowing new chapter:

1 "CHAPTER 72—FEDERAL SERVICE LABOR- 2 MANAGEMENT RELATIONS

"SUBCHAPTER I—GENERAL PROVISIONS

"Sec.

"7201. Findings and purpose.

"7202. Definitions; application.

"7203. Federal Labor Relations Authority; Office of General Counsel.

"7204. Powers and duties of the Authority and of the General Counsel.

"SUBCHAPTER II—RIGHTS AND DUTIES OF EMPLOYEES, AGENCIES AND LABOR ORGANIZATIONS

"7211. Employees' rights.

"7212. Recognition of labor organizations.

"7213. National consultation rights.

"7214. Exclusive recognition.

"7215. Representation rights and duties.

"7216. Unfair labor practices.

"7217. Standards of conduct for labor organizations.

"7218. Basic provisions of agreements.

"7219. Approval of agreements.

"SUBCHAPTER III—GRIEVANCES AND IMPASSES

"7221. Grievance procedures.

"7222. Federal Service Impasses Panel; negotiation impasses.

"SUBCHAPTER IV—ADMINISTRATIVE AND OTHER PROVISIONS

"7231. Allotments to representatives.

"7232. Use of official time.

"7233. Remedial action.

"7234. Subpenas.

"7235. Regulations.

3 "SUBCHAPTER I—GENERAL PROVISIONS

4 "§ 7201. Findings and purpose

5 " (a) The Congress finds that the public interest de-
 6 mands the highest standards of employee performance and
 7 the continued development and implementation of modern
 8 and progressive work practices to facilitate and improve
 9 employee performance and the efficient accomplishment of
 10 the operations of the Government.

1 “(b) The Congress also finds that, while significant
2 differences exist between Federal and private employment,
3 experience under Executive Order Numbered 11491 indicates
4 that the statutory protection of the right of employees to or-
5 ganize, to bargain collectively within prescribed limits, and
6 to participate through labor organizations of their own
7 choosing in decisions which affect them—

8 “(1) may be accomplished with full regard for the
9 public interest,

10 “(2) contributes to the effective conduct of public
11 business, and

12 “(3) facilitates and encourages the amicable settle-
13 ment between employees and their employers of disputes
14 involving personnel policies and practices and matters
15 affecting working conditions.

16 “(c) It is the purpose of this chapter to prescribe cer-
17 tain rights and obligations of the employees of the Federal
18 government subject to the paramount interest of the public
19 and to establish procedures which are designed to meet the
20 special requirements and needs of the Federal government
21 in matters relating to labor-management relations.

22 “§ 7202. Definitions; application

23 “(a) For purposes of this chapter—

24 “(1) ‘agency’ means an Executive agency other
25 than the General Accounting Office;

1 “(2) ‘employee’ means an individual who—

2 “(A) is employed in an agency;

3 “(B) is employed in a nonappropriated fund
4 instrumentality described in section 2105 (c) of this
5 title;

6 “(C) is employed in the Veterans’ Canteen
7 Service, Veterans’ Administration, and who is de-
8 scribed in section 5102 (c) (14) of this title; or

9 “(D) is an employee (within the meaning of
10 subparagraph (A), (B), or (C)) who was sepa-
11 rated from the service as a consequence of, or in con-
12 nection with, an unfair labor practice described in
13 section 7216 of this title;

14 but does not include—

15 “(i) an alien or noncitizen of the United States
16 who occupies a position outside the United States;

17 “(ii) a member of the uniformed services
18 (within the meaning of section 2101 (3) of this
19 title);

20 “(iii) for purposes of exclusive recognition or
21 national consultation rights unless authorized under
22 the provisions of this chapter, a supervisor, a man-
23 agement official, or a confidential employee;

24 “(3) ‘labor organization’ means any lawful organi-
25 zation of employees which was established for the

1 purpose, in whole or in part, of dealing with agencies
 2 in matters relating to grievances and personnel policies
 3 and practices or in other matters affecting the working
 4 conditions of the employees, but does not include an or-
 5 ganization which—

6 “(A) except as authorized under this chapter,
 7 consists of, or includes, management officials, con-
 8 fidential employees, or supervisors;

9 “(B) assists, or participates, in the conduct of a
 10 strike against the Government of the United States
 11 or any agency thereof or imposes a duty or obliga-
 12 tion to conduct, assist, or participate in such a strike;

13 “(C) advocates the overthrow of the constitu-
 14 tional form of government of the United States; or

15 “(D) discriminates with regard to the terms or
 16 conditions of membership because of race, color,
 17 religion, national origin, sex, age, or handicapping
 18 condition;

19 “(4) ‘agency management’ means the agency head
 20 and all management officials, supervisors, and other rep-
 21 resentatives of management having authority to act for
 22 the agency on any matters relating to the implementa-
 23 tion of the agency labor-management relations program
 24 established under this chapter;

1 “(5) ‘Authority’ means the Federal Labor Rela-
 2 tions Authority established under section 7203 of this
 3 title;

4 “(6) ‘General Counsel’ means the General Counsel
 5 of the Federal Labor Relations Authority;

6 “(7) ‘Panel’ means the Federal Service Impasses
 7 Panel established under section 7222 of this title;

8 “(8) ‘Assistant Secretary’ means the Assistant Sec-
 9 retary of Labor for Labor-Management Relations;

10 “(9) ‘confidential employee’ means an employee
 11 who assists, and acts in a confidential capacity to, indi-
 12 viduals who formulate and carry out management policies
 13 in the field of labor relations;

14 “(10) ‘management official’ means an employee
 15 having authority to make, or to influence effectively the
 16 making of, policy with respect to personnel procedures
 17 or programs which is necessary to an agency or an
 18 activity;

19 “(11) ‘supervisor’ means an employee having au-
 20 thority, in the interest of an agency, to hire, transfer,
 21 suspend, lay off, recall, promote, discharge, assign, re-
 22 ward, or discipline other employees or responsibly to di-
 23 rect them, or to adjust their grievances, or effectively to
 24 recommend such action, if in connection with the fore-
 25 going the exercise of authority is not of a merely routine

1 or clerical nature, but requires the use of independent
2 judgment;

3 “(12) ‘professional employee’ means—

4 “(A) any employee engaged in the perform-
5 ance of work—

6 “(i) requiring knowledge of an advanced
7 type in a field of science or learning customarily
8 acquired by a prolonged course of specialized
9 intellectual instruction and study in an institu-
10 tion of higher learning or in a hospital, as
11 distinguished from work requiring knowledge
12 acquired from a general academic education,
13 an apprenticeship, or training in the perform-
14 ance of routine mental, manual, or physical
15 processes;

16 “(ii) requiring the consistent exercise of
17 discretion and judgment in its performance;

18 “(iii) which is predominantly intellectual
19 and varied in character and not routine mental,
20 manual, mechanical or physical work; and

21 “(iv) which is of such a character that the
22 measurement of the output produced, or of the
23 result accomplished, cannot be standardized by
24 relating it to a given period of time; or

1 “(B) any employee who has completed the
2 courses of specialized intellectual instruction and
3 study described in subparagraph (A) and who is
4 performing related work under the direction or
5 guidance of a professional employee to qualify the
6 employee to become a professional employee.

7 “(13) ‘agreement’ means an agreement entered into
8 as a result of collective bargaining pursuant to the pro-
9 visions of this chapter;

10 “(14) ‘collective bargaining’, ‘bargaining’, or
11 ‘negotiating’ means the performance of the mutual ob-
12 ligation of the representatives of the agency and the ex-
13 clusive representative as provided in section 7215 of
14 this title;

15 “(15) ‘exclusive representative’ includes any labor
16 organization which has been—

17 “(A) selected pursuant to the provisions of
18 section 7214 of this title as the representative of
19 the employees in an appropriate collective bargain-
20 ing unit; or

21 “(B) certified or recognized prior to the effec-
22 tive date of this chapter as the exclusive representa-
23 tive of the employees in an appropriate collective
24 bargaining unit;

25 “(16) ‘person’ means an individual, labor organi-

1 nation, or agency covered by this chapter; and
 2 “(17) ‘grievance’ means any complaint by any
 3 person concerning any matter which falls within the
 4 coverage of a grievance procedure.

5 “(b) Except as provided in subsections (c), (d), and
 6 (e) of this section, this chapter applies to all employees of
 7 an agency.

8 “(c) This chapter shall not apply to—

9 “(1) the Federal Bureau of Investigation;

10 “(2) the Central Intelligence Agency;

11 “(3) the National Security Agency;

12 “(4) any agency not described in paragraph (1),
 13 (2), or (3), or any unit within any agency, which has
 14 as a primary function intelligence, investigative, or na-
 15 tional security work, if the head of the agency deter-
 16 mines, in the agency head’s sole judgment, that this
 17 chapter cannot be applied in a manner consistent with
 18 national security requirements and considerations;

19 “(5) any unit of an agency which has as a pri-
 20 mary function investigation or audit of the conduct or
 21 work of officers or employees of the agency for the
 22 purpose of insuring honesty and integrity in the dis-
 23 charge of official duties, if the head of the agency
 24 determines, in the agency head’s sole judgment, that

1 this chapter cannot be applied in a manner consistent
 2 with the internal security of the agency;

3 “(6) the United States Postal Service;

4 “(7) the Foreign Service of the United States;

5 “(8) the Tennessee Valley Authority; or

6 “(9) officers and employees of the Federal Labor
 7 Relations Authority, including the Office of General
 8 Counsel and the Federal Service Impasses Panel.

9 “(d) The head of an agency may, in the agency
 10 head’s sole judgment and subject to such conditions as he may
 11 prescribe, suspend any provision of this chapter with respect
 12 to any agency, installation, or activity located outside the
 13 United States if the agency head determines that such suspen-
 14 sion is necessary for the national interest.

15 “(e) Employees engaged in administering a labor-man-
 16 agement relations law who are otherwise authorized by this
 17 chapter to be represented by a labor organization shall not
 18 be represented by a labor organization which also represents
 19 other employees covered by such law or which is affiliated
 20 directly or indirectly with an organization which represents
 21 such employees.

22 “§ 7203. Federal Labor Relations Authority; Office of Gen-
 23 eral Counsel

24 “(a) There is established, as an independent establish-

1 ment of the executive branch of the Government, the Federal
2 Labor Relations Authority.

3 “(b) The Authority shall consist of three members, not
4 more than two of whom may be adherents of the same polit-
5 ical party and none of whom may hold another office or posi-
6 tion in the Government of the United States except as pro-
7 vided by law or by the President.

8 “(c) Members of the Authority shall be appointed by
9 the President, by and with the advice and consent of the
10 Senate, and shall be eligible for reappointment. The Presi-
11 dent shall designate one member to serve as Chairman of the
12 Authority. Any member of the Authority may be removed
13 by the President.

14 “(d) The term of office of each member of the Authority
15 is 5 years, except that a member may continue to serve
16 beyond the expiration of the term to which appointed until
17 the earlier of—

18 “(1) the date on which the member’s successor has
19 been appointed and has qualified, or

20 “(2) the last day of the session of the Congress be-
21 ginning after the date the member’s term of office would
22 (but for this sentence) expire.

23 “(e) A vacancy in the Authority shall not impair the
24 right of the remaining members to exercise all of the powers.

1 of the Authority. An individual chosen to fill a vacancy shall
2 be appointed for the unexpired term of the member such
3 individual replaces.

4 “(f) The Authority shall make an annual report to the
5 President for transmittal to the Congress and shall include
6 in such report information as to the cases it has heard and
7 the decisions it has rendered under this chapter.

8 “(g) There is established within the Authority an Office
9 of General Counsel. The General Counsel shall be appointed
10 by the President, by and with the advice and consent of the
11 Senate, and shall be paid at an annual rate of basic pay
12 equal to the maximum annual rate of basic pay currently
13 paid, from time to time, under the General Schedule. The
14 General Counsel shall be appointed for a term of 5 years
15 and may be reappointed to any succeeding term. The Gen-
16 eral Counsel may be removed by the President. The Gen-
17 eral Counsel shall hold no other office or position in the Gov-
18 ernment of the United States except as provided by law or
19 by the President.

20 “§ 7204. Powers and duties of the Authority and of the
21 General Counsel

22 “(a) The Authority shall administer and interpret the
23 provisions of this chapter, decide major policy issues, pre-
24 scribe regulations, and disseminate information appropriate
25 to the needs of agencies, labor organizations, and the public.

1 " (b) The Authority shall, in accordance with regula-
2 tions prescribed by it—

3 " (1) decide questions submitted to it with respect
4 to the appropriate unit for the purpose of exclusive
5 recognition and with respect to any related issue;

6 " (2) supervise elections to determine whether a la-
7 bor organization has been selected by a majority of the
8 employees in an appropriate unit who cast valid ballots
9 in the election;

10 " (3) decide questions with respect to the eligibility
11 of labor organizations for national consultation rights;
12 and

13 " (4) decide unfair labor practice complaints.

14 " (c) The Authority may consider, in accordance with
15 regulations prescribed by it, any—

16 " (1) appeal from any decision on the negotiabil-
17 ity of any issue as provided in subsection (e) of section
18 7215 of this title;

19 " (2) exception to any arbitration award as provided
20 in section 7221 of this title;

21 " (3) appeal from any decision of the Assistant
22 Secretary issued pursuant to section 7217 of this title;

23 " (4) exception to any final decision and order of the
24 Panel issued pursuant to section 7222 of this title; and

1 " (5) other matters it deems appropriate in order
2 to assure it carries out the purposes of this chapter.

3 " (d) The Authority shall adopt an official seal which
4 shall be judicially noticed.

5 " (e) The Authority shall maintain its principal office
6 in or about the District of Columbia but it may meet and
7 exercise any or all of its powers at any time or place. Sub-
8 ject to subsection (g) of this section, the Authority may, by
9 one or more of its members or by such agents as it may desig-
10 nato, make any inquiry necessary to carry out its duties
11 wherever persons subject to this chapter are located. A mem-
12 ber who participates in such inquiry shall not be disqualified
13 from later participating in a decision of the Authority in the
14 same case.

15 " (f) The Authority shall appoint an Executive Direc-
16 tor, such attorneys, regional directors, administrative law
17 judges, and other officers and employees as it may from time
18 to time find necessary for the proper performance of its duties
19 and may delegate to such officers and employees authority to
20 perform such duties and make such expenditures as may be
21 necessary.

22 " (g) All of the expenses of the Authority, including all
23 necessary traveling and subsistence expenses outside the Dis-
24 trict of Columbia, incurred by members, employees, or agents
25 of the Authority under its orders, shall be allowed and paid

1 on the presentation of itemized vouchers therefor approved by
2 the Authority or by an individual it designates for that pur-
3 pose and in accordance with applicable law.

4 “(h) (1) The Authority is expressly empowered and di-
5 rected to prevent any person from engaging in conduct found
6 violative of this chapter. In order to carry out its functions
7 under this chapter, the Authority is authorized to hold hear-
8 ings, subpoena witnesses, administer oaths, and take the testi-
9 mony or deposition of any person under oath, and in connec-
10 tion therewith, to issue subpoenas requiring the production
11 and examination of evidence as provided in section 7234 of
12 this title relating to any matter pending before it and to take
13 such other action as may be necessary. In the exercise of the
14 functions of the Authority under this title, the Authority may
15 request from the Director of the Office of Personnel Manage-
16 ment an advisory opinion concerning the proper interpreta-
17 tion of regulations or other policy directives promulgated by
18 the Office of Personnel Management in connection with a
19 matter before the Authority for adjudication.

20 “(2) If a regulation or other policy directive issued by
21 the Office of Personnel Management is at issue in an appeal
22 before the Authority, the Authority shall timely notify the
23 Director, and the Director shall have standing to intervene
24 in the proceeding and shall have all the rights of a party to
25 the proceeding.

1 “(3) The Director may request that the Authority
2 reopen an appeal and reconsider its decision on the ground
3 that the decision was based on an erroneous interpretation of
4 law or of a controlling regulation or other policy directive
5 issued by the Office of Personnel Management.

6 “(i) In any matter arising under subsection (b) of this
7 section, the Authority may require an agency or a labor or-
8 ganization to cease and desist from violations of this chapter
9 and require it to take such remedial action as it considers
10 appropriate to carry out the policies of this chapter.

11 “(j) (1) The Authority shall maintain a record of its
12 proceedings and make public any decision made by it or any
13 action taken by the Panel under section 7222 of this title.

14 “(2) The provisions of section 552 of this title shall
15 apply with respect to any record maintained under para-
16 graph (1).

17 “(k) The General Counsel is authorized to—

18 “(1) investigate complaints of violations of section
19 7216 of this title;

20 “(2) make final decisions as to whether to issue
21 notices of hearing on unfair labor practice complaints
22 and to prosecute such complaints before the Authority;

23 “(3) direct and supervise all field employees of the
24 General Counsel in the field offices of the Authority; and

1 “(4) perform such other functions as the Authority
2 prescribes.

3 “(1) Notwithstanding any other provision of law, in-
4 cluding chapter 7 of this title, and except as provided in
5 section 7216(f) of this title, the decision of the Authority
6 on any matter within its jurisdiction shall be final and con-
7 clusive, and no other official or any court of the United
8 States shall have power or jurisdiction to review any such
9 decision by an action in the nature of mandamus on appeal
10 of that decision or by any other means, except that nothing in
11 this section shall limit the right of persons to judicial review
12 of questions arising under the Constitution of the United
13 States.

14 “SUBCHAPTER II—RIGHTS AND DUTIES OF
15 EMPLOYEES, AGENCIES AND LABOR ORGANI-
16 ZATIONS

17 “§ 7211. Employees’ rights

18 “(a) Each employee shall have the right freely and
19 without fear of penalty or reprisal to form, join, or assist
20 any labor organization, or to refrain from such activity, and
21 each employee shall be protected in exercising such rights.
22 Except as otherwise provided under this chapter, such rights
23 include the right to—

24 “(1) participate in the management of a labor or-
25 ganization,

1 “(2) act for the organization in the capacity of a
2 representative,

3 “(3) present, in such representative capacity, the
4 views of the organization to agency heads and other
5 officials of the executive branch of the Government, the
6 Congress, or other appropriate authorities, and

7 “(4) bargain collectively, subject to the limits pre-
8 scribed in section 7215(c) of this title, through repre-
9 sentatives of their own choosing.

10 “(b) This chapter does not authorize—

11 “(1) a management official, a confidential em-
12 ployee, or a supervisor to participate in the management
13 of a labor organization or to act as a representative of
14 such an organization, unless such participation or activi-
15 ty is specifically authorized by this chapter, or

16 “(2) any employee to so participate or act if such
17 participation or activity would result in any conflict of
18 interest, or appearance thereof, or would otherwise be
19 inconsistent with any law or the official duties of the
20 employee.

21 “§ 7212. Recognition of labor organizations

22 “(a) An agency shall accord exclusive recognition or
23 national consultation rights at the request of a labor orga-
24 nization which meets the requirements for such recognition
25 or consultation rights under this chapter.

1 “(b) Recognition of a labor organization, once accord-
2 ed, shall continue as long as the organization meets the
3 requirements of this chapter for recognition.

4 “(c) Recognition of a labor organization shall not—

5 “(1) preclude an employee, regardless of whether
6 the employee is in a unit of exclusive recognition, from
7 exercising grievance or appellate rights established by
8 law or regulation or from choosing the employee’s own
9 representative in a grievance or appellate action ex-
10 cept when the grievance or appeal is covered by and
11 pursued under a negotiated procedure as provided in
12 section 7221 of this title;

13 “(2) preclude or restrict consultations and dealings
14 between an agency and a veterans organization with re-
15 spect to matters of particular interest to employees in
16 connection with veterans preference; or

17 “(3) preclude an agency from consulting or deal-
18 ing with a religious, social, fraternal, professional, or
19 other lawful association not qualified as a labor orga-
20 nization with respect to matters or policies which involve
21 individual members of the association or are of particu-
22 lar applicability to it or its members.

23 Consultations and dealings under paragraph (3) shall not
24 assume the character of formal consultation on matters of
25 general employee-management policy covering employees in

1 that unit or extend to areas where recognition of the interests
2 of one employee group may result in discrimination against
3 or injury to the interest of other employees.

4 “§ 7213. National consultation rights

5 “(a) An agency shall accord national consultation
6 rights to a labor organization which qualifies under criteria
7 established by the Authority as the representative of a
8 substantial number of employees of the agency. National
9 consultation rights shall not be accorded for any unit if a
10 labor organization already holds exclusive recognition at the
11 national level for that unit. The granting of national consulta-
12 tion rights shall not preclude an agency from appropriate
13 dealings at the national level with other organizations on
14 matters affecting their members. An agency shall terminate
15 national consultation rights if the labor organization ceases to
16 qualify under the established criteria.

17 “(b) If a labor organization has been accorded national
18 consultation rights, the agency shall notify representatives of
19 such organization of proposed substantive changes in person-
20 nel policies that affect employees such organization represents
21 and provide an opportunity for such organization to comment
22 on the proposed changes. Such organization may suggest
23 changes in the agency’s personnel policies and have its views
24 carefully considered. Representatives of such organization
25 may consult, at reasonable times, with appropriate officials

1 on personnel policy matters and may, at all times, present in
2 writing the organization's views on such matters. An agency
3 is not required to consult with any such organization on any
4 matter on which it would not be required to negotiate if the
5 organization were entitled to exclusive recognition.

6 " (c) Any question with respect to the eligibility of a
7 labor organization for national consultation rights may be
8 referred to the Authority for decision.

9 "§ 7214. Exclusive recognition

10 " (a) An agency shall accord exclusive recognition to
11 a labor organization if the organization has been selected
12 as the representative, in a secret ballot election, by a major-
13 ity of the employees in an appropriate unit who cast valid
14 ballots in the election.

15 " (b) A unit may be established on an agency, plant,
16 installation, craft, functional, or other basis which will as-
17 sure a clear and identifiable community of interest among
18 the employees concerned and will promote effective dealings
19 and efficiency in the agency's operations. A unit shall not
20 be established solely on the basis of the extent to which em-
21 ployees in the proposed unit have organized, nor shall a unit
22 be established if it includes—

23 " (1) except as provided in section 701 (b) (1) of
24 the Civil Service Reform Act of 1978, any manage-
25 ment official, confidential employee, or supervisor;

1 " (2) an employee engaged in Federal personnel
2 work in other than a purely clerical capacity; or

3 " (3) both professional and nonprofessional em-
4 ployees, unless a majority of the professional employees
5 vote for inclusion in the unit.

6 Any question with respect to the appropriate unit may be
7 referred to the Authority for decision.

8 " (c) All elections shall be conducted under the super-
9 vision of the Authority or persons designated by the Author-
10 ity and shall be by secret ballot. Employees eligible to vote
11 shall be provided the opportunity to choose the labor organi-
12 zation they wish to represent them from among those on the
13 ballot and, except in the case of an election described in para-
14 graph (4), the opportunity to choose not to be represented
15 by a labor organization. Elections may be held to determine
16 whether a labor organization should—

17 " (1) be recognized as the exclusive representative
18 of employees in a unit;

19 " (2) replace another labor organization as the ex-
20 clusive representative;

21 " (3) cease to be the exclusive representative;

22 " (4) be recognized as the exclusive representative
23 of employees in a unit composed of employees in units
24 currently represented by that labor organization or con-
25 tinue to be recognized in the existing separate units.

1 An election need not be held to determine whether an organi-
 2 zation should become, or continue to be recognized as, the
 3 exclusive representative of the employees in any unit, or
 4 subdivision thereof, during the 12-month period after a valid
 5 election has been held under this chapter with respect to such
 6 unit.

7 "§ 7215. Representation rights and duties

8 " (a) If a labor organization has been accorded exclusive
 9 recognition, such organization shall be—

10 " (1) the exclusive representative of employees in
 11 the unit and is entitled to act for and negotiate agree-
 12 ments covering all employees in the unit;

13 " (2) responsible for representing the interests of all
 14 employees in the unit without discrimination and without
 15 regard to labor organization membership; and

16 " (3) given the opportunity to be represented at for-
 17 mal discussions between management and employees or
 18 employee representatives concerning grievances, person-
 19 nel policies and practices, or other matters affecting gen-
 20 eral working conditions of employees in the unit.

21 " (b) An agency and an exclusive representative shall
 22 have a duty to negotiate in good faith and in exercising such
 23 duty shall—

24 " (1) approach the negotiations with a sincere re-
 25 solve to reach an agreement;

1 " (2) be represented at the negotiations by appro-
 2 priate representatives prepared to discuss and negotiate
 3 on all negotiable matters;

4 " (3) meet at such reasonable times and places as
 5 may be necessary; and

6 " (4) execute upon request of the agency or the
 7 organization a written document embodying the terms of,
 8 and take such steps as are necessary to implement, any
 9 agreement which is reached.

10 " (o) An agency and an exclusive representative shall,
 11 through appropriate representatives, negotiate in good faith
 12 as prescribed under subsection (b) of this section with re-
 13 spect to personnel policies and practices and matters affecting
 14 working conditions but only to the extent appropriate under
 15 laws and regulations, including policies which—

16 " (1) are set forth in the Federal Personnel Manual,

17 " (2) consist of published agency policies and regu-
 18 lations for which a compelling need exists (as deter-
 19 mined under criteria established by the Authority) and
 20 which are issued at the agency headquarters level or at
 21 the level of a primary national subdivision, or

22 " (3) are set forth in a national or other controlling
 23 agreement entered into by a higher unit of the agency.

24 In addition, such organization and the agency may deter-

1 mine appropriate techniques, consistent with section 7222 of
2 this title, to assist in any negotiation.

3 “(d) In prescribing regulations relating to personnel
4 policies and practices and working conditions, an agency shall
5 give due regard to the obligation to negotiate imposed by this
6 section, except that such obligation does not include an obliga-
7 tion to negotiate with respect to matters concerning the num-
8 ber of employees in an agency, the numbers, types, and
9 grades of positions or employees assigned to an organiza-
10 tional unit, work project or tour of duty, or the technology
11 of performing the agency’s work. The preceding sentence
12 shall not preclude the parties from negotiating agreements
13 providing appropriate arrangements for employees adversely
14 affected by the impact of realignment of work forces or tech-
15 nological change.

16 “(e) (1) If, in connection with negotiations, an issue
17 develops as to whether a proposal is negotiable under this
18 chapter or any other applicable law, regulations, or control-
19 ling agreement, it shall be resolved as follows:

20 “(A) An issue which involves interpretation of a
21 controlling agreement at a higher agency level is re-
22 solved under the procedures of the controlling agreement,
23 or, if none, under regulations prescribed by the agency.

24 “(B) An issue not described in paragraph (1)

1 which arises at a local level may be referred by either
2 party to the head of the agency for determination.

3 “(2) An agency head’s determination under paragraph
4 (1) concerning the interpretation of the agency’s regulations
5 with respect to a proposal shall be final.

6 “(3) A labor organization may appeal to the Authority
7 from a decision under paragraph (1) if it—

8 “(A) disagrees with an agency head’s determina-
9 tion that a proposal is not negotiable under this chapter
10 or any other applicable law or regulation of appropriate
11 authority outside the agency, or

12 “(B) believes that an agency’s regulations, as inter-
13 preted by the agency head, are in violation of this chap-
14 ter or any other applicable law or regulation of appro-
15 priate authority outside the agency, or are not otherwise
16 applicable to bar negotiations under subsection (c) of
17 this section.

18 “§ 7216. Unfair labor practices

19 “(a) It shall be an unfair labor practice for an agency—

20 “(1) to interfere with, restrain, or coerce an em-
21 ployee in connection with the exercise of rights assured
22 by this chapter;

23 “(2) to encourage or discourage membership in any
24 labor organization by discrimination in regard to hiring,
25 tenure, promotion, or other conditions of employment;

1 “(3) to sponsor, control, or otherwise assist any
2 labor organization, unless such assistance consists of
3 furnishing customary and routine services and facilities—
4 “(A) in a manner consistent with the best in-
5 terest of the agency, its employees, and the organiza-
6 tion, and
7 “(B) on an impartial basis to organizations (if
8 any) having equivalent status;
9 “(4) to discipline or otherwise discriminate against
10 an employee because the employee has filed a complaint,
11 affidavit, petition, or given any information or testimony,
12 under the provisions of this chapter;
13 “(5) to refuse to accord appropriate recognition to
14 a labor organization qualified for such recognition; or
15 “(6) to refuse to consult or negotiate in good faith
16 with a labor organization as required by this chapter:
17 *Provided*, That nothing in this chapter shall be construed
18 as requiring an agency to negotiate with any labor or-
19 ganization certified after the enactment of the Act until
20 such labor organization has been determined by means of
21 a secret ballot election conducted in accordance with the
22 provisions of this chapter. This proviso shall not be con-
23 strued to bar a consolidation of units without an election.
24 “(b) It shall be an unfair labor practice for a labor
25 organization—

1 “(1) to interfere with, restrain, or coerce an em-
2 ployee in connection with the exercise of the rights
3 assured by this chapter;
4 “(2) to cause or attempt to cause an agency to
5 coerce an employee in the exercise of rights under this
6 chapter;
7 “(3) to coerce or attempt to coerce an employee, or
8 to discipline, fine or take other economic sanction against
9 a member of the labor organization, as punishment or re-
10 prisal or for the purpose of hindering or impeding work
11 performance, productivity, or the discharge of duties of
12 such employee;
13 “(4) to—
14 “(A) call, or participate in, a strike, work
15 stoppage, slowdown, or picketing of an agency in
16 a labor-management dispute if such picketing inter-
17 feres or reasonably threatens to interfere with an
18 agency's operations, or
19 “(B) condone any activity described in sub-
20 paragraph (A) by failing to take action to prevent
21 or stop it;
22 “(5) to discriminate against an employee with re-
23 gard to the terms or conditions of membership in the
24 organization because of race, color, religion, national ori-
25 gin, sex, age, or handicapping condition; or

1 “(6) to refuse to consult or negotiate in good faith
2 with an agency as required by this chapter.

3 “(c) It shall be an unfair labor practice for a labor or-
4 ganization which is accorded exclusive recognition to deny
5 membership to an employee in an appropriate unit unless
6 such denial is for failure to meet reasonable occupational
7 standards uniformly required for admission or for failure
8 to tender initiation fees and dues uniformly required as a
9 condition of acquiring and retaining membership. This sub-
10 section shall not preclude a labor organization from enforcing
11 discipline in accordance with procedures under its constitu-
12 tion or bylaws which conform to the requirements of this
13 chapter.

14 “(d) Issues which can properly be raised under an ap-
15 peals procedure may not be raised as unfair labor practices
16 prohibited under this section. Except for matters wherein,
17 under sections 7221 (e) and (f) of this title, an employee
18 has an option of using the negotiated grievance procedure or
19 an appeals procedure, issues which can be raised under a
20 grievance procedure may, in the discretion of the aggrieved
21 party, be raised under that procedure or as an unfair labor
22 practice under this section, but not under both procedures.
23 Appeals or grievance decisions shall not be construed as
24 unfair labor practice decisions under this chapter nor as a
25 precedent for such decisions. All complaints of unfair labor

1 practices prohibited under this section that cannot be resolved
2 by the parties shall be filed with the Authority.

3 “(e) Any question with respect to whether an issue can
4 properly be raised under an appeals procedure shall be
5 referred for resolution to the agency responsible for final
6 decisions relating to those issues.

7 “(f) (1) Any employee or agency adversely affected
8 or aggrieved by a final order or decision of the Authority
9 with respect to a matter raised as an unfair labor practice
10 under this section, or with respect to an exception filed to
11 any arbitrator's award under section 7221 (j) of this title
12 which involves an unfair labor practice complaint, may ob-
13 tain judicial review of such an order or decision.

14 “(2) In review of a final decision or order under para-
15 graph (1), the agency or the labor organization involved
16 in the unfair labor practice complaint shall be the named re-
17 spondent, except that the Authority shall have the right to
18 appear in the court proceeding if it determines, in its sole
19 discretion, that the appeal may raise questions of substan-
20 tial interest to it. Except as provided in section 518 of title
21 28, relating to litigation before the Supreme Court, attorneys
22 designated by the Authority may appear for the Authority,
23 and represent the Authority in, any civil action brought in
24 connection with any function carried out by the Authority
25 pursuant to this title or as otherwise authorized by law.

1 “(3) A petition to review a final order or decision of
2 the Authority shall be filed in the Court of Claims or a
3 United States Court of Appeals as provided in chapters 91
4 and 158, respectively, of title 28 and shall be filed within
5 30 days after the date the petitioner received notice of the
6 final decision or order of the Board.

7 “(4) The court shall review the administrative record
8 for the purpose of determining whether the findings were
9 arbitrary or capricious, and not in accordance with law, and
10 whether the procedures required by statutes and regulations
11 were followed. The findings of the Authority are conclusive
12 if supported by substantial evidence in the administrative
13 record. If the court determines that further evidence is ne-
14 cessary, it shall remand the case to the Authority which,
15 after such further proceedings as may be required, may
16 modify its findings, and shall file with the court the record
17 of such proceedings. The findings of the Authority are con-
18 clusive if supported by substantial evidence in the administra-
19 tive records as supplemented.

20 “(g) The expression of any personal views, argument,
21 opinion, or the making of any statement shall not (i) consti-
22 tute or be evidence of an unfair labor practice under any of
23 the provisions of this chapter, or (ii) constitute grounds for,
24 or evidence justifying, setting aside the results of any election
25 conducted under any provisions of this chapter, if such ex-

1 pression contains no threat of reprisal or force or promise of
2 benefit or undue coercive conditions.

3 “§ 7217. Standards of conduct for labor organizations

4 “(a) An agency shall only accord recognition to a labor
5 organization that is free from corrupt influences and influ-
6 ences opposed to basic democratic principles. Except as pro-
7 vided in subsection (b) of this section, an organization is not
8 required to prove that it is free from such influences if it is
9 subject to governing requirements adopted by the organiza-
10 tion or by a national or international labor organization or
11 federation of labor organizations with which it is affiliated,
12 or in which it participates, containing explicit and detailed
13 provisions to which it subscribes calling for—

14 “(1) the maintenance of democratic procedures and
15 practices, including provisions for periodic elections to be
16 conducted subject to recognized safeguards and provi-
17 sions defining and securing the right of individual mem-
18 bers to participate in the affairs of the organization, to
19 receive fair and equal treatment under the governing
20 rules of the organization, and to receive fair process in
21 disciplinary proceedings;

22 “(2) the exclusion from office in the organization of
23 persons affiliated with communist or other totalitarian
24 movements and persons identified with corrupt influences;

1 “(3) the prohibition of business or financial interests
2 on the part of organization officers and agents which con-
3 flict with their duty to the organization and its members;
4 and

5 “(4) the maintenance of fiscal integrity in the con-
6 duct of the affairs of the organization, including provi-
7 sions for accounting and financial controls and regular
8 financial reports or summaries to be made available to
9 members.

10 “(b) Notwithstanding the fact that a labor organization
11 has adopted or subscribed to standards of conduct as provided
12 in subsection (a) of this section, the organization is required
13 to furnish evidence of its freedom from corrupt influences or
14 influences opposed to basic democratic principles if there is
15 reasonable cause to believe that—

16 “(1) the organization has been suspended or ex-
17 pelled from, or is subject to other sanction, by a parent
18 labor organization, or federation of organizations with
19 which it had been affiliated, because it has demonstrated
20 an unwillingness or inability to comply with governing
21 requirements comparable in purpose to those required by
22 subsection (a) of this section; or

23 “(2) the organization is in fact subject to influences
24 that would preclude recognition under this chapter.

1 “(c) A labor organization which has or seeks recogni-
2 tion as a representative of employees under this chapter
3 shall file financial and other reports with the Assistant Sec-
4 retary, provide for bonding of officials and employees of the
5 organization, and comply with trusteeship and election
6 standards.

7 “(d) The Assistant Secretary shall prescribe such regu-
8 lations as are necessary to carry out the purposes of this
9 section. Such regulations shall conform generally to the
10 principles applied to labor organizations in the private sec-
11 tor. Complaints of violations of this section shall be filed
12 with the Assistant Secretary. In any matter arising under
13 this section, the Assistant Secretary may require a labor
14 organization to cease and desist from violations of this section
15 and require it to take such action as he considers appropri-
16 ate to carry out the policies of this section.

17 “(e) Any labor organization which by omission or
18 commission has willfully and intentionally violated section
19 7216 (b) (4) (B) shall upon an appropriate finding by the
20 Authority, of such violation, have its exclusive recognition
21 status revoked and it shall cease immediately to be legally
22 entitled and obligated to represent employees in the unit.

23 “§ 7218. Basic provisions of agreements

24 “(a) Each agreement between an agency and a labor
25 organization shall provide the following:

1 “(1) In the administration of all matters covered
2 by the agreement, officials and employees shall be gov-
3 erned by—

4 “(A) existing or future laws and the regula-
5 tions of appropriate authorities, including policies
6 which are set forth in the Federal Personnel
7 Manual,

8 “(B) published agency policies and regula-
9 tions in existence at the time the agreement was
10 approved, and

11 “(C) subsequently published agency policies
12 and regulations required by law or by the regula-
13 tions of appropriate authorities, or authorized by
14 the terms of a controlling agreement at a higher
15 agency level.

16 “(2) Management officials of the agency shall re-
17 tain the right to determine the mission, budget, organi-
18 zation, and internal security practices of the agency,
19 and the right, in accordance with applicable laws and
20 regulations, to—

21 “(A) direct employees of the agency;

22 “(B) hire, promote, transfer, assign, and re-
23 tain employees in positions within the agency, and
24 to suspend, demote, discharge, or take other dis-
25 ciplinary action against employees;

1 “(C) relieve employees from duties because of
2 lack of work or for other legitimate reasons;

3 “(D) maintain the efficiency of the Government
4 operations entrusted to such officials;

5 “(E) determine the methods, means, and per-
6 sonnel by which such operations are to be conducted;
7 and

8 “(F) take such actions as may be necessary
9 to carry out the mission of the agency in situations
10 of emergency.

11 “(b) Nothing in subsection (a) of this section shall
12 preclude the parties from negotiating—

13 “(1) procedures which management will observe in
14 exercising its authority to decide or act in matters re-
15 served under such subsection; or

16 “(2) appropriate arrangements for employees ad-
17 versely affected by the impact of management's exercis-
18 ing its authority to decide or act in matters reserved un-
19 der such subsection,

20 except that such negotiations shall not unreasonably delay
21 the exercise by management of its authority to decide or act,
22 and such procedures and arrangements shall be consistent
23 with the provisions of any law or regulation described in
24 7215 (c) of this title, and shall not have the effect of negat-
25 ing the authority reserved under subsection (a).

1 be invoked only by the agency or the exclusive representa-
 2 tive. Except as provided in subsection (g) of this section, the
 3 procedure must also provide that the arbitrator is empowered
 4 to resolve questions as to whether or not any grievance is
 5 on a matter subject to arbitration under the agreement.

6 “(d) A negotiated grievance procedure may cover any
 7 matter within the authority of an agency if not inconsistent
 8 with the provisions of this chapter, except that it may not
 9 include matters involving examination, certification and ap-
 10 pointment, suitability, classification, political activities, retire-
 11 ment, life and health insurance, national security, or the Fair
 12 Labor Standards Act of 1938 (29 U.S.C. 201 et seq.).

13 “(e) Matters covered under sections 4303 and 7512 of
 14 this title which also fall within the coverage of the negotiated
 15 grievance procedure may, in the discretion of the aggrieved
 16 employee, be raised either under the appellate procedures of
 17 section 7701 of this title or under the negotiated grievance
 18 procedure, but not both. Similar matters which arise under
 19 other personnel systems applicable to employees covered by
 20 this chapter may, in the discretion of the aggrieved employee,
 21 be raised either under the appellate procedures, if any, appli-
 22 cable to those matters, or under the negotiated grievance pro-
 23 cedure, but not both. An employee shall be deemed to have
 24 exercised his option under this subsection to raise a matter
 25 either under the applicable appellate procedures or under the

1 negotiated grievance procedure at such time as the employee
 2 timely files a notice of appeal under the applicable appellate
 3 procedures or timely files a grievance in writing in accord-
 4 ance with the provisions of the parties' negotiated grievance
 5 procedure, whichever event occurs first.

6 “(f) An aggrieved employee affected by a prohibited per-
 7 sonnel practice under section 2302(b)(1) of this title which
 8 also falls under the coverage of the negotiated grievance pro-
 9 cedure may raise the matter under a statutory procedure or
 10 the negotiated procedure, but not both. An employee shall be
 11 deemed to have exercised his option under this subsection to
 12 raise the matter under either a statutory procedure or the
 13 negotiated procedure at such time as the employee timely
 14 initiates an action under the applicable statutory procedure or
 15 timely files a grievance in writing, in accordance with the
 16 provisions of the parties' negotiated procedure, whichever
 17 event occurs first. Selection of the negotiated procedure in
 18 no manner prejudices the right of an aggrieved employee to
 19 request the Merit Systems Protection Board to review the
 20 final decision pursuant to subsections (h) and (i) of sec-
 21 tion 7701 of this title in the case of any personnel action
 22 that could have been appealed to the Board, or, where ap-
 23 plicable, to request the Equal Employment Opportunity
 24 Commission to review a final decision in any other matter
 25 involving a complaint of discrimination of the type prohibited

1 by any law administered by the Equal Employment Oppor-
2 tunity Commission.

3 “(g) Any question that cannot be resolved by the parties
4 as to whether or not a grievance is on a matter excepted by
5 subsection (d) of this section shall be referred for resolution
6 to the agency responsible for final decisions relating to those
7 matters.

8 “(h) In matters covered under sections 4303 and 7512
9 of this title which have been raised under the negotiated
10 grievance procedure in accordance with the provisions of
11 subsection (e) of this section, an arbitrator shall be governed
12 by the provisions of section 4303 (f) or 7701 (d) of this
13 title, as applicable.

14 “(i) Allocation of the costs of the arbitrator shall be
15 governed by the collective-bargaining agreement. The col-
16 lective-bargaining agreement may require payment by the
17 agency which is a losing party to a proceeding before the
18 arbitrator of reasonable attorney fees incurred by an em-
19 ployee who is the prevailing party if the arbitrator deter-
20 mines that payment is warranted on the grounds that the
21 agency's action was taken in bad faith. If an employee is the
22 prevailing party and the arbitrator's decision is based on a
23 finding of discrimination prohibited by any law referred to
24 in section 7701 (h) of this title, attorney fees also may be
25 awarded and shall be governed by the standards applicable

1 under the Civil Rights Act of 1964, as amended (42
2 U.S.C. 2000e-5 (k)).

3 “(j) Either party may file exceptions to any arbitrator's
4 award with the Authority, except that no exceptions may be
5 filed to awards concerning matters covered under subsection
6 (e) of this section. The Authority shall sustain a challenge
7 to an arbitrator's award only on grounds that the award
8 violates applicable law, appropriate regulation, or other
9 grounds similar to those applied by Federal courts in private
10 sector labor-management relations. Decisions of the Author-
11 ity on exceptions to arbitration awards shall be final, except
12 for the right of an aggrieved employee under subsection (f)
13 of this section and under section 7216 (f) of the title. The
14 Authority may award attorney fees to an employee who is
15 the prevailing party to an exception filed under this subsec-
16 tion, but only if it determines that payment by the agency is
17 warranted on the grounds that the agency's action was taken
18 in bad faith.

19 “(k) In matters covered under sections 4303 and 7512
20 of this title which have been raised under the provisions of
21 the negotiated grievance procedure in accordance with the
22 provisions of subsection (e) of this section, the provisions of
23 section 7702 of this title pertaining to judicial review shall
24 apply to the award of an arbitrator in the same manner and
25 under the same conditions as if the matter had been decided

1 by the Merit Systems Protection Board. In matters similar
 2 to those covered under sections 4303 and 7512 which arise
 3 under other personnel systems and which an aggrieved em-
 4 ployee has raised under the negotiated grievance procedure,
 5 judicial review of an arbitrator's award may be obtained in
 6 the same manner and on the same basis as could be obtained
 7 of a final decision in such matters raised under applicable
 8 appellate procedures.

9 **“§ 7222. Federal Service Impasses Panel; negotiation im-**
 10 **passes**

11 “(a) (1) There is established within the Authority, as
 12 a distinct organizational entity, the Federal Service Impasses
 13 Panel. The Panel is composed of the Chairman, and an even
 14 number of other members, appointed by the President solely
 15 on the basis of fitness to perform the duties and functions of
 16 the Office, from among individuals who are familiar with
 17 Government operations and knowledgeable in labor-manage-
 18 ment relations. No employee (as defined under section 2105
 19 of this title) shall be appointed to serve as a member of the
 20 Panel.

21 “(2) At the time the members of the Panel (other than
 22 the Chairman) are first appointed, half shall be appointed for
 23 a term of 1 year and half for the term of 3 years. An individ-
 24 ual appointed to serve as the Chairman shall serve for a term
 25 of 5 years. A successor of any member shall be appointed for

1 terms of 5 years, except that an individual chosen to fill a
 2 vacancy shall be appointed for the unexpired term of the
 3 member whom such individual replaces. Any member of the
 4 Panel may be removed by the President.

5 “(3) The Panel may appoint an executive secretary and
 6 such other employees as it may from time to time find neces-
 7 sary for the proper performance of its duties. Each member
 8 of the Panel is entitled to pay at a rate equal to the daily
 9 equivalent of the maximum annual rate of basic pay cur-
 10 rently paid, from time to time, under the General Schedule
 11 for each day the member is engaged in the performance of
 12 official business on the work of the Panel, including travel-
 13 time, and is entitled to travel expenses and a per diem allow-
 14 ance under section 5703 of this title.

15 “(b) Upon request, the Federal Mediation and Concilia-
 16 tion Service shall provide services and assistance to agencies
 17 and labor organizations in the resolution of negotiation
 18 impasses.

19 “(c) If voluntary arrangements, including the services
 20 of the Federal Mediation and Conciliation Service or other
 21 third-party mediation fail to resolve a negotiation impasse,
 22 either party may request the Panel to consider the matter.

23 “(d) The Panel or its designee shall promptly investi-
 24 gate any impasse presented to it under subsection (c) of this
 25 section. The Panel shall consider the matter and shall either

1 recommend procedures to the parties for the resolution of the
 2 impasse or assist the parties in arriving at a settlement
 3 through such methods and procedures, including fact finding
 4 and recommendations, as it may find appropriate to accom-
 5 plish the purposes of this section. Arbitration, or third-party
 6 fact finding with recommendations to assist in the resolution
 7 of an impasse, may be used by the parties only when au-
 8 thorized or directed by the Panel. If the parties do not arrive
 9 at a settlement, the Panel may hold hearings, compel under
 10 section 7234 of this title the attendance of witnesses and the
 11 production of documents, and take whatever action is neces-
 12 sary and not inconsistent with the provisions of this chapter
 13 to resolve the impasse. Notice of any final action of the Panel
 14 shall be promptly served upon the parties and such action
 15 shall be binding upon them during the term of the agreement
 16 unless the parties mutually agree otherwise.

17 "SUBCHAPTER IV—ADMINISTRATIVE AND
 18 OTHER PROVISIONS

19 "§ 7231. Allotments to representatives

20 " (a) If, pursuant to an agreement negotiated in accord-
 21 ance with the provisions of this chapter, an agency has re-
 22 ceived from an employee in a unit of exclusive recognition a
 23 written assignment which authorizes the agency to deduct
 24 from the wages of such employee amounts for the payment of
 25 regular and periodic dues of the exclusive representative for

1 such unit, such assignment shall be honored. Except as
 2 required under subsection (b) of this section, any such as-
 3 signment shall be revocable at stated intervals of not more
 4 than 6 months.

5 " (b) An allotment for the deduction of labor organiza-
 6 tion dues terminates when—

7 " (1) the dues withholding agreement between the
 8 agency and the exclusive representative is terminated
 9 or ceases to be applicable to the employee; or

10 " (2) the employee has been suspended or expelled
 11 from the labor organization which is the exclusive
 12 representative.

13 "§ 7232. Use of official time

14 "Solicitation of membership or dues and other internal
 15 business of a labor organization shall be conducted during
 16 the nonduty hours of the employees concerned. Employees
 17 who represent a recognized labor organization shall not be
 18 on official time when negotiating an agreement with agency
 19 management, except that the negotiating parties may agree
 20 to arrangements which provide that the agency will author-
 21 ize a reasonable number of such employees (not normally
 22 in excess of the number of management representatives) to
 23 negotiate on official time for up to 40 hours, or up to one-half
 24 the time spent in negotiations during regular working hours.

1 "§ 7233. Remedial actions

2 "If it is determined by appropriate authority, includ-
3 ing an arbitrator, that certain action will carry out the poli-
4 cies of this chapter, such action may be directed by the ap-
5 propriate authority if consistent with law, including section
6 5596 of this title.

7 "§ 7234. Subpenas

8 "(a) Any member of the Authority, including the Gen-
9 eral Counsel, any member of the Panel, and any employee
10 of the Authority designated by the Authority may—

11 "(1) issue subpenas requiring the attendance and
12 testimony of witnesses and the production of documen-
13 tary or other evidence from any place in the United
14 States or any territory or possession thereof, the Com-
15 monwealth of Puerto Rico, or the District of Columbia,
16 except that no subpena shall be issued under this sec-
17 tion which requires the disclosure of intramanagement
18 guidance, advice, counsel, or training within an agency
19 or between an agency and the Office of Personnel Man-
20 agement; and

21 "(2) administer oaths, take or order the taking of
22 depositions, order responses to written interrogatories,
23 examine witnesses, and receive evidence.

24 "(b) In the case of contumacy or failure to obey a sub-
25 pena issued under subsection (a) (1), the United States

1 district court for the judicial district in which the person to
2 whom the subpoena is addressed resides or is served may issue
3 an order requiring such person to appear at any designated
4 place to testify or to produce documentary or other evidence.
5 Any failure to obey the order of the court may be punished
6 by the court as a contempt thereof.

7 "(c) Witnesses (whether appearing voluntarily or un-
8 der subpoena) shall be paid the same fee and mileage allow-
9 ances which are paid subpoenaed witnesses in the courts of
10 the United States.

11 "§ 7235. Regulations

12 "The Authority, including the General Counsel and the
13 Panel, and the Federal Mediation and Conciliation Service
14 shall each prescribe rules and regulations to carry out the
15 provisions of this chapter applicable to them. Unless other-
16 wise specifically provided in this chapter, the provisions of
17 subchapter II of chapter 5 of this title shall be applicable to
18 the issuance, revision, or repeal of any such rule or regula-
19 tion."

20 (b) (1) The amendments made by subsection (a) shall
21 not preclude—

22 (A) the renewal or continuation of an exclusive
23 recognition, certification of a representative, or a lawful
24 agreement between an agency and a representative of its

1 employees entered into before the effective date of this
2 section; or

3 (B) the renewal, continuation, or initial according
4 of recognition for units of management officials or super-
5 visors represented by labor organizations which his-
6 torically or traditionally represent management officials
7 or supervisors in private industry and which hold ex-
8 clusive recognition for units of such officials or super-
9 visors in any agency on the effective date of this section.

10 (2) Policies, regulations, and procedures established, and
11 decisions issued, under Executive Order Numbered 11491,
12 or under the provision of any related Executive order in
13 effect on the effective date of this section, shall remain in
14 full force and effect until revised or revoked by Executive
15 order or statute, or unless superseded by appropriate deci-
16 sion or regulation of the Federal Labor Relations Authority.

17 (c) Any term of office of any member of the Federal
18 Labor Relations Authority and the General Counsel of the
19 Federal Labor Relations Authority serving on the effective
20 date of this section shall continue in effect until such time as
21 such term would expire under Reorganization Plan Num-
22 bered 2 of 1978, and upon expiration of such term, appoint-
23 ments to such office shall be made under section 7203 of title
24 5, United States Code. Any term of office of any member of
25 the Federal Service Impasses Panel serving on the effective

1 date of this section shall continue in effect until such time as
2 members of the Panel are appointed pursuant to section
3 7222 of title 5, United States Code.

4 (d) There are hereby authorized to be appropriated
5 such sums as may be necessary to carry out the functions and
6 purposes of this section.

7 (e) The table of chapters for subpart F of part III of
8 title 5, United States Code, is amended by adding after the
9 item relating to chapter 71 the following new item:

"72. Federal Service Labor-Management Relations..... 7201".

10 (f) Section 5315 of title 5, United States Code, is
11 amended by adding at the end thereof the following new
12 paragraph:

13 "(124) Chairperson, Federal Labor Relations Au-
14 thority."

15 (g) Section 5316 of title 5, United States Code, is
16 amended by adding at the end thereof the following new
17 paragraph:

18 "(147) Members, Federal Labor Relations Au-
19 thority (2)."

20 (h) Section 2342 of title 28, United States Code, as
21 amended by section 206 of this Act, is amended—

22 (1) by striking out "and" at the end of paragraph

23 (5),

24 (2) by striking out the period at the end of para-

1 graph (6) and inserting in lieu thereof “; and”; and
 2 (8) by adding at the end thereof the following new
 3 paragraph:

4 “(7) all final orders of the Federal Labor Relations
 5 Authority made reviewable by section 7216 (f) of title
 6 5.”.

7 **REMEDIAL AUTHORITY**

8 **SEC. 702.** Section 5596 of title 5, United States Code,
 9 is amended by striking out subsections (b) and (c) and in-
 10 serting in lieu thereof the following:

11 “(b) An employee of an agency who, on the basis of an
 12 administrative determination or a timely appeal, is found by
 13 appropriate authority to have suffered a withdrawal, reduc-
 14 tion, or denial of all or part of the employee’s pay, allow-
 15 ances, differentials, or other monetary or employment bene-
 16 fits, or a denial of an increase in such pay, allowances, differ-
 17 entials, or other monetary or employment benefits, which
 18 would not have occurred but for unjustified or unwarranted
 19 action taken by the agency—

20 “(1) is entitled, on correction of the action, to be
 21 made whole for—

22 “(A) all losses suffered less, in applicable cir-
 23 cumstances, interim earnings, and

24 “(B) if appropriate, to reinstatement or restor-

1 ation to the same or a substantially similar position.
 2 or promotion to a higher level position; and

3 “(2) for all purposes is deemed to have performed
 4 service for the agency during the period of the unjustified
 5 or unwarranted action except that—

6 “(A) annual leave restored under this para-
 7 graph which is in excess of the maximum leave ac-
 8 cumulation permitted by law shall be credited to a
 9 separate leave account for the employee and shall be
 10 available for use by the employee within the time
 11 limits prescribed by regulations of the Office of Per-
 12 sonnel Management, and

13 “(B) annual leave credited under subpara-
 14 graph (A) of this paragraph but unused and still
 15 available to the employee under regulations pre-
 16 scribed by the Office of Personal Management shall
 17 be included in the lump-sum payment under sec-
 18 tion 5551 or 5552 (1) of this title but may not be
 19 retained to the credit of the employee under section
 20 5552 (2) of this title.

21 “(c) For the purposes of this section—

22 “(1) ‘unjustified or unwarranted action’ includes—

23 “(A) any act of commission, either substan-
 24 tive or procedural, which violates or improperly

1 applies a provision of law, Executive order, regula-
 2 tion, or collective bargaining agreement; and
 3 “(B) any act of omission, or failure to take
 4 an action, or confer a benefit, which must be taken
 5 or conferred under a nondiscretionary provision of
 6 law, Executive order, regulation, or collective-bargain-
 7 ing agreement;
 8 “(2) ‘administrative determination’ includes, but is
 9 not limited to, a decision, award, or order issued by—
 10 “(A) a court having jurisdiction over the mat-
 11 ter involved;
 12 “(B) the Office of Personal Management;
 13 “(G) the Merit Systems Protection Board;
 14 “(D) the Federal Labor Relations Authority;
 15 “(E) the Comptroller General of the United
 16 States;
 17 “(F) the head of the employing agency or an
 18 agency official to whom corrective action authority
 19 is delegated; or
 20 “(G) an arbitrator under negotiated binding
 21 arbitration agreement between a labor organization
 22 and agency management;
 23 “(8) ‘appropriate authority’ includes, but is not
 24 limited to—
 25 “(A) a court having jurisdiction;

1 “(B) the Office of Personnel Management;
 2 “(C) the Merit Systems Protection Board;
 3 “(D) the Federal Labor Relations Authority;
 4 “(E) the Comptroller General of the United
 5 States;
 6 “(F) the head of the employing agency or
 7 agency official to whom corrective action authority
 8 is delegated; or
 9 “(G) an arbitrator under a negotiated binding
 10 arbitration agreement between a labor organization
 11 and agency management.
 12 “(d) The provisions of this section shall not apply to
 13 reclassification actions nor shall they authorize the setting
 14 aside of an otherwise proper promotion by a selecting official
 15 from a group of properly ranked and certified candidates.
 16 “(e) The Office of Personnel Management shall pre-
 17 scribe regulations to carry out this section. However, the
 18 regulations are not applicable to the Tennessee Valley Au-
 19 thority and its employees.”
 20 TITLE VIII—MISCELLANEOUS
 21 SAVINGS PROVISIONS
 22 SEC. 801. (a) Except as provisions of this Act may
 23 govern, all Executive orders, rules, and regulations affecting
 24 the Federal service shall continue in effect, according to their

1 terms, until modified, terminated, superseded, or repealed by
 2 the President, the Office of Personnel Management, the
 3 Merit Systems Protection Board, the Equal Employment
 4 Opportunity Commission, or the Federal Labor Relations
 5 Authority as to matters within their respective jurisdictions.

6 (b) No provision of this Act shall affect any adminis-
 7 trative proceedings pending at the time such provision takes
 8 effect. Orders shall be issued in such proceedings and appeals
 9 shall be taken therefrom as if this Act had not been enacted.

10 (c) No suit, action, or other proceeding lawfully com-
 11 menced by or against the Director of the Office of Personnel
 12 Management or the board members of the Merit Systems
 13 Protection Board, or officers or employees thereof in their
 14 official capacity or in relation to the discharge of their official
 15 duties, as in effect immediately before the effective date of
 16 this Act, shall abate by reason of enactment of this Act. Such
 17 suits, actions, or other proceedings shall be determined as if
 18 this Act had not been enacted.

19 AUTHORIZATION OF APPROPRIATIONS

20 SEC. 802. There are authorized to be appropriated, out
 21 of any moneys in the Treasury not otherwise appropriated,
 22 such sums as may be necessary to carry out the provisions
 23 of this Act.

1 POWERS OF PRESIDENT UNAFFECTED EXCEPT BY EXPRESS 2 PROVISIONS

3 SEC. 803. Except as expressly provided in this Act,
 4 nothing contained herein shall be construed to limit, curtail,
 5 abolish, or terminate any function of, or authority available
 6 to, the President which the President had immediately before
 7 the effective date of this Act; or to limit, curtail, or terminate
 8 the President's authority to delegate, redelegate, or terminate
 9 any delegation of functions.

10 TECHNICAL AND CONFORMING AMENDMENTS

11 SEC. 804. (a) Any provision in either Reorganization
 12 Plan Numbered 1 or 2 of 1978 inconsistent with any pro-
 13 vision in this Act is hereby superseded.

14 (b) The President or his designee shall, as soon as
 15 practicable but in any event not later than 30 days after the
 16 date of the enactment of this Act, submit to the Committee on
 17 Post Office and Civil Service of the House of Representatives
 18 and the Committee on Governmental Affairs of the Senate a
 19 draft of any technical and conforming amendments to title 5,
 20 United States Code, which have not been made by the pro-
 21 visions of this Act and which are necessary to reflect through-
 22 out such title the amendments to the substantive provisions
 23 of law made by this Act and by Reorganization Plan Num-
 24 bered 2 of 1978.

1 **EFFECTIVE DATES**
2 Sec. 805. Except as otherwise expressly provided in this
3 Act, the provisions of this Act shall take effect 90 days after
4 the date of the enactment of this Act.

 Passed the Senate August 24 (legislative day, Au-
gust 16), 1978.

Attest:

J. S. KIMMITT,
 Secretary.



CIVIL SERVICE REFORM ACT OF 1978

OCTOBER 5, 1978.—Ordered to be printed

Mr. UDALL, from the committee of conference,
 submitted the following

CONFERENCE REPORT

[To accompany S. 2640]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 2640) to reform the civil service laws, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SHORT TITLE

SECTION 1. This Act may be cited as the "Civil Service Reform Act of 1978".

TABLE OF CONTENTS

SEC. 2. The table of contents is as follows:

Sec. 1. Short title.

Sec. 2. Table of contents.

Sec. 3. Findings and statement of purpose.

TITLE I—MERIT SYSTEM PRINCIPLES

Sec. 101. Merit system principles; prohibited personnel practices.

TITLE II—CIVIL SERVICE FUNCTIONS; PERFORMANCE APPRAISAL;
 ADVERSE ACTIONS

Sec. 201. Office of Personnel Management.

Sec. 202. Merit Systems Protection Board and Special Counsel.

Sec. 203. Performance appraisals.

Sec. 204. Adverse actions.

Sec. 205. Appeals.

Sec. 206. Technical and conforming amendments.

*TABLE OF CONTENTS—Continued***TITLE III—STAFFING**

- Sec. 301. Volunteer services.*
- Sec. 302. Interpreting assistance for deaf employees.*
- Sec. 303. Probationary period.*
- Sec. 304. Training.*
- Sec. 305. Travel, transportation, and subsistence.*
- Sec. 306. Retirement.*
- Sec. 307. Veterans and preference eligibles.*
- Sec. 308. Dual pay for retired members of the uniformed services.*
- Sec. 309. Civil service employment information.*
- Sec. 310. Minority recruitment program.*
- Sec. 311. Temporary employment limitation.*

TITLE IV—SENIOR EXECUTIVE SERVICE

- Sec. 401. General provisions.*
- Sec. 402. Authority for employment.*
- Sec. 403. Examination, certification, and appointment.*
- Sec. 404. Retention preference.*
- Sec. 405. Performance rating.*
- Sec. 406. Awarding of ranks.*
- Sec. 407. Pay rates and systems.*
- Sec. 408. Pay administration.*
- Sec. 409. Travel, transportation, and subsistence.*
- Sec. 410. Leave.*
- Sec. 411. Disciplinary actions.*
- Sec. 412. Retirement.*
- Sec. 413. Conversion to the Senior Executive Service.*
- Sec. 414. Limitations on executive positions.*
- Sec. 415. Effective date; congressional review.*

TITLE V—MERIT PAY

- Sec. 501. Pay for performance.*
- Sec. 502. Incentive awards amendments.*
- Sec. 503. Conforming and technical amendments.*
- Sec. 504. Effective date.*

TITLE VI—RESEARCH, DEMONSTRATION, AND OTHER PROGRAMS

- Sec. 601. Research programs and demonstration projects.*
- Sec. 602. Intergovernmental Personnel Act amendments.*
- Sec. 603. Amendments to the mobility program.*

TITLE VII—FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

- Sec. 701. Federal service labor-management relations.*
- Sec. 702. Backpay in case of unfair labor practices and grievances.*
- Sec. 703. Technical and conforming amendments.*
- Sec. 704. Miscellaneous provisions.*

TITLE VIII—GRADE AND PAY RETENTION

- Sec. 801. Grade and pay retention.*

TITLE IX—MISCELLANEOUS

- Sec. 901. Study on decentralization of governmental functions.*
- Sec. 902. Savings provisions.*
- Sec. 903. Authorization of appropriations.*
- Sec. 904. Powers of President unaffected except by express provisions.*
- Sec. 905. Reorganization plan.*
- Sec. 906. Technical and conforming amendments.*
- Sec. 907. Effective date.*

FINDINGS AND STATEMENT OF PURPOSE

SEC. 3. It is the policy of the United States that—

(1) *in order to provide the people of the United States with a competent, honest, and productive Federal work force reflective of the Nation's diversity, and to improve the quality of public service, Federal personnel management should be implemented consistent with merit system principles and free from prohibited personnel practices;*

(2) *the merit system principles which shall govern in the competitive service and in the executive branch of the Federal Government should be expressly stated to furnish guidance to Federal agencies in carrying out their responsibilities in administering the public business, and prohibited personnel practices should be statutorily defined to enable Federal employees to avoid conduct which undermines the merit system principles and the integrity of the merit system;*

(3) *Federal employees should receive appropriate protection through increasing the authority and powers of the Merit Systems Protection Board in processing hearings and appeals affecting Federal employees;*

(4) *the authority and power of the Special Counsel should be increased so that the Special Counsel may investigate allegations involving prohibited personnel practices and reprisals against Federal employees for the lawful disclosure of certain information and may file complaints against agency officials and employees who engage in such conduct;*

(5) *the function of filling positions and other personnel functions in the competitive service and in the executive branch should be delegated in appropriate cases to the agencies to expedite processing appointments and other personnel actions, with the control and oversight of this delegation being maintained by the Office of Personnel Management to protect against prohibited personnel practices and the use of unsound management practices by the agencies;*

(6) *a Senior Executive Service should be established to provide the flexibility needed by agencies to recruit and retain the highly competent and qualified executives needed to provide more effective management of agencies and their functions, and the more expeditious administration of the public business;*

(7) *in appropriate instances, pay increases should be based on quality of performance rather than length of service;*

(8) *research programs and demonstration projects should be authorized to permit Federal agencies to experiment, subject to congressional oversight, with new and different personnel management concepts in controlled situations to achieve more efficient management of the Government's human resources and greater productivity in the delivery of service to the public;*

(9) *the training program of the Government should include retraining of employees for positions in other agencies to avoid*

separations during reductions in force and the loss to the Government of the knowledge and experience that these employees possess; and

(10) the right of Federal employees to organize, bargain collectively, and participate through labor organizations in decisions which affect them, with full regard for the public interest and the effective conduct of public business, should be specifically recognized in statute.

TITLE I—MERIT SYSTEM PRINCIPLES

MERIT SYSTEM PRINCIPLES; PROHIBITED PERSONNEL PRACTICES

SEC. 101. (a) *Title 5, United States Code, is amended by inserting after chapter 21 the following new chapter:*

“CHAPTER 23—MERIT SYSTEM PRINCIPLES

“Sec.

“2301. *Merit system principles.*

“2302. *Prohibited personnel practices.*

“2303. *Prohibited personnel practices in the Federal Bureau of Investigation.*

“2304. *Responsibility of the General Accounting Office.*

“2305. *Coordination with certain other provisions of law.*

“§ 2301. Merit system principles

“(a) *This section shall apply to—*

“(1) *an Executive agency;*

“(2) *the Administrative Office of the United States Courts;*
and

“(3) *the Government Printing Office.*

“(b) *Federal personnel management should be implemented consistent with the following merit system principles:*

“(1) *Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.*

“(2) *All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.*

“(3) *Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.*

“(4) *All employees should maintain high standards of integrity, conduct, and concern for the public interest.*

“(5) *The Federal work force should be used efficiently and effectively.*

“(6) *Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.*

“(7) *Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.*

“(8) *Employees should be—*

“(A) *protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and*

“(B) *prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.*

“(9) *Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences—*

“(A) *a violation of law, rule, or regulation, or*

“(B) *mismanagement, a gross waste of funds, or an abuse of authority, or a substantial and specific danger to public health or safety.*

“(c) *In administering the provisions of this chapter—*

“(1) *with respect to any agency (as defined in section 2302(a)(2)(C) of this title), the President shall, pursuant to the authority otherwise available under this title, take any action, including the issuance of rules, regulations, or directives; and*

“(2) *with respect to any entity in the executive branch which is not such an agency or part of such an agency, the head of such entity shall, pursuant to authority otherwise available, take any action, including the issuance of rules, regulations, or directives; which is consistent with the provisions of this title and which the President or the head, as the case may be, determines is necessary to ensure that personnel management is based on and embodies the merit system principles.*

“§ 2302. *Prohibited personnel practices*

“(a) (1) *For the purpose of this title, ‘prohibited personnel practice’ means any action described in subsection (b) of this section.*

“(2) *For the purpose of this section—*

“(A) *‘personnel action’ means—*

“(i) *an appointment;*

“(ii) *a promotion;*

“(iii) *an action under chapter 75 of this title or other disciplinary or corrective action;*

“(iv) *a detail, transfer, or reassignment;*

“(v) *a reinstatement;*

“(vi) *a restoration;*

“(vii) *a reemployment;*

“(viii) *a performance evaluation under chapter 43 of this title;*

“(ix) *a decision concerning pay, benefits, or awards, or concerning education or training if the education or training*

may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and

“(x) any other significant change in duties or responsibilities which is inconsistent with the employee’s salary or grade level;

with respect to an employee in, or applicant for, a covered position in an agency;

“(B) ‘covered position’ means any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include—

“(i) a position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

“(ii) any position excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration.

“(C) ‘agency’ means an Executive agency, the Administrative Office of the United States Courts and the Government Printing Office, but does not include—

“(i) a Government corporation;

“(ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

“(iii) the General Accounting Office.

“(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

“(1) discriminate for or against any employee or applicant for employment—

“(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

“(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

“(C) on the basis of sex, as prohibited by section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

“(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

“(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

“(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

“(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

“(B) an evaluation of the character, loyalty, or suitability of such individual;

“(3) *cerce* the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

“(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

“(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

“(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

“(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position, any individual who is a relative (as defined in section 3110 (a) (3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110 (a) (2) of this title) or over which such employee exercises jurisdiction or control as such an official;

“(8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for—

“(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

“(i) a violation of any law, rule, or regulation, or

“(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law or if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

“(B) a disclosure to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

“(i) a violation of any law, rule, or regulation, or

“(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

“(9) take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule, or regulation;

“(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States; or

“(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.

“(c) *The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.*

“(d) *This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under—*

“(1) *section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;*

“(2) *sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;*

“(3) *under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;*

“(4) *section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or*

“(5) *the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.*

“§ 2303. Prohibited personnel practices in the Federal Bureau of Investigation

“(a) *Any employee of the Federal Bureau of Investigation who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority take or fail to take a personnel action with respect to any employee of the Bureau as a reprisal for a disclosure of information by the employee to the Attorney General (or an employee designated by the Attorney General for such purpose) which the employee or applicant reasonably believes evidences—*

“(1) *a violation of any law, rule, or regulation, or*

“(2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. For the purpose of this subsection, ‘personnel action’ means any action described in clauses (i) through (x) of section 2302(a) (2) of this title with respect to an employee in, or applicant for, a position in the Bureau (other than a position of a confidential, policy-determining, policy-making, or policy-advocating character).

“(b) The Attorney General shall prescribe regulations to ensure that a personnel action shall not be taken against an employee of the Bureau as a reprisal for any disclosure of information described in subsection (a) of this section.

“(c) The President shall provide for the enforcement of this section in a manner consistent with the provisions of section 1206 of this title.

“§ 2304. Responsibility by the General Accounting Office

“(a) If requested by either House of the Congress (or any committee thereof), or if considered necessary by the Comptroller General, the General Accounting Office shall conduct audits and reviews to assure compliance with the laws, rules, and regulations governing employment in the executive branch and in the competitive service and to assess the effectiveness and soundness of Federal personnel management.

“(b) the General Accounting Office shall prepare and submit an annual report to the President and the Congress on the activities of the Merit Systems Protection Board and the Office of Personnel Management. The report shall include a description of—

“(1) significant actions taken by the Board to carry out its functions under this title; and

“(2) significant actions of the Office of Personnel Management, including an analysis of whether or not the actions of the Office are in accord with merit system principles and free from prohibited personnel practices.

“§ 2305. Coordination with certain other provisions of law

“No provision of this chapter, or action taken under this chapter, shall be construed to impair the authorities and responsibilities set forth in section 102 of the National Security Act of 1947 (61 Stat. 495; 50 U.S.C. 403), the Central Intelligence Agency Act of 1949 (63 Stat. 208; 50 U.S.C. 403a and following), the Act entitled ‘An Act to provide certain administrative authorities for the National Security Agency, and for other purposes’, approved May 29, 1959 (73 Stat. 63; 50 U.S.C. 402 note), and the Act entitled ‘An Act to amend the Internal Security Act of 1950’, approved March 26, 1964 (78 Stat.).

(b) (1) The table of chapters for part III of title 5, United States Code, is amended by adding after the item relating to chapter 21 the following new item:

“23. Merit system principles..... 2301.”

(2) Section 7153 of title 5, United States Code, is amended—

(A) by striking out “Physical handicap” in the catchline and inserting in lieu thereof “Handicapping condition”; and

(B) by striking out “physical handicap” each place it appears in the text and inserting in lieu thereof “handicapping condition”.

**TITLE II—CIVIL SERVICE FUNCTIONS; PERFORMANCE
APPRAISAL; ADVERSE ACTIONS**

OFFICE OF PERSONNEL MANAGEMENT

SEC. 201. (a) Chapter 11 of title 5, United States Code, is amended to read as follows:

“CHAPTER 11—OFFICE OF PERSONNEL MANAGEMENT

“Sec.

“1101. Office of Personnel Management.

“1102. Director; Deputy Director; Associate Directors.

“1103. Functions of the Director.

“1104. Delegation of authority for personnel management.

“1105. Administrative procedure.

“§ 1101. Office of Personnel Management

“The Office of Personnel Management is an independent establishment in the executive branch. The Office shall have an official seal which shall be judicially noticed and shall have its principal office in the District of Columbia, and may have field offices in other appropriate locations.

“§ 1102. Director; Deputy Director; Associate Directors

“(a) There is at the head of the Office of Personnel Management a Director of the Office of Personnel Management appointed by the President, by and with the advice and consent of the Senate. The term of office of any individual appointed as Director shall be 4 years.

“(b) There is in the Office a Deputy Director of the Office of Personnel Management appointed by the President, by and with the advice and consent of the Senate. The Deputy Director shall perform such functions as the Director may from time to time prescribe and shall act as Director during the absence or disability of the Director or when the office of Director is vacant.

“(c) No individual shall, while serving as Director or Deputy Director, serve in any other office or position in the Government of the United States except as otherwise provided by law or at the direction of the President. The Director and Deputy Director shall not recommend any individual for appointment to any position (other than Deputy Director of the Office) which requires the advice and consent of the Senate.

“(d) There may be within the Office of Personnel Management not more than 5 Associate Directors, as determined from time to time by the Director. Each Associate Director shall be appointed by the Director.

“§ 1103. Functions of the Director

“(a) The following functions are vested in the Director of the Office of Personnel Management, and shall be performed by the Director, or subject to section 1104 of this title, by such employees of the Office as the Director designates:

“(1) securing accuracy, uniformity, and justice in the functions of the Office;

“(2) appointing individuals to be employed by the Office;

“(3) directing and supervising employees of the Office, distributing business among employees and organizational units of the Office, and directing the internal management of the Office;

“(4) directing the preparation of requests for appropriations for the Office and the use and expenditure of funds by the Office;

“(5) executing, administering, and enforcing—

“(A) the civil service rules and regulations of the President and the Office and the laws governing the civil service; and

“(B) the other activities of the Office including retirement and classification activities; except with respect to functions for which the Merit Systems Protection Board or the Special Counsel is primarily responsible;

“(6) reviewing the operations under chapter 87 of this title;

“(7) aiding the President, as the President may request, in preparing such civil service rules as the President prescribes, and otherwise advising the President on actions which may be taken to promote an efficient civil service and a systematic application of the merit system principles, including recommending policies relating to the selection, promotion, transfer, performance, pay, conditions of service, tenure, and separation of employees; and

“(8) conducting, or otherwise providing for the conduct of, studies and research under chapter 47 of this title into methods of assuring improvements in personnel management.

“(b) (1) The Director shall publish in the Federal Register general notice of any rule or regulation which is proposed by the Office and the application of which does not apply solely to the Office or its employees. Any such notice shall include the matter required under section 553(b) (1), (2), and (3) of this title.

“(2) The Director shall take steps to ensure that—

“(A) any proposed rule or regulation to which paragraph (1) applies is posted in offices of Federal agencies maintaining copies of the Federal personnel regulations; and

“(B) to the extent the Director determines appropriate and practical, exclusive representatives of employees affected by such proposed rule or regulation and interested members of the public are notified of such proposed rule or regulation.

“(3) Paragraphs (1) and (2) of this subsection shall not apply to any proposed rule or regulation which is temporary in nature and which is necessary to be implemented expeditiously as a result of an emergency.

“§ Delegation of authority for personnel management

“(a) Subject to subsection (b) (3) of this section—

“(1) the President may delegate, in whole or in part, authority for personnel management functions, including authority for competitive examinations, to the Director of the Office of Personnel Management; and

“(2) the Director may delegate, in whole or in part, any function vested in or delegated to the Director, including authority for competitive examinations (except competitive examinations for administrative law judges appointed under section 3105 of this

title), to the heads of agencies in the executive branch and other agencies employing persons in the competitive service; except that the Director may not delegate authority for competitive examinations with respect to positions that have requirements which are common to agencies in the Federal Government, other than in exceptional cases in which the interests of economy and efficiency require such delegation and in which such delegation will not weaken the application of the merit system principles.

“(b) (1) The Office shall establish standards which shall apply to the activities of the Office or any other agency under authority delegated under subsection (a) of this section.

“(2) The Office shall establish and maintain an oversight program to ensure that activities under any authority delegated under subsection (a) of this section are in accordance with the merit system principles and the standards established under paragraph (1) of this subsection.

“(3) Nothing in subsection (a) of this section shall be construed as affecting the responsibility of the Director to prescribe regulations and to ensure compliance with the civil service laws, rules and regulations.

“(c) If the Office makes a written finding, on the basis of information obtained under the program established under subsection (b) (2) of this section or otherwise, that any action taken by an agency pursuant to authority delegated under subsection (a) (2) of this section is contrary to any law, rule, or regulation, or is contrary to any standard established under subsection (b) (1) of this section, the agency involved shall take any corrective action the Office may require.

“§ 1105. Administrative procedure

“Subject to section 1103 (b) of this title, in the exercise of the functions assigned under this chapter, the Director shall be subject to subsections (b), (c), and (d) of section 553 of this title, notwithstanding subsection (a) of such section 553.”.

(b) (1) Section 5313 of title 5, United States Code, is amended by inserting at the end thereof the following new paragraph:

“(24) Director of the Office of Personnel Management.”.

(2) Section 5314 of such title is amended by inserting at the end thereof the following new paragraph:

“(68) Deputy Director of the Office of Personnel Management.”.

(3) Section 5316 (122) of such title is amended to read as follows:

“(122) Associate Directors of the Office of Personnel Management (5).”.

(c) (1) The heading of part II of title 5, United States Code, is amended by striking out “**THE UNITED STATES CIVIL SERVICE COMMISSION**” and inserting in lieu thereof “**CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES**”.

(2) The item relating to chapter 11 in the table of chapters for part II of such title is amended by striking out “**Organization**” and inserting in lieu thereof “**Office of Personnel Management**”.

MERIT SYSTEMS PROTECTION BOARD AND SPECIAL COUNSEL

Sec. 202. (a) Title 5, United States Code, is amended by inserting after chapter 11 the following new chapter:

**"CHAPTER 12—MERIT SYSTEMS PROTECTION BOARD
AND SPECIAL COUNSEL**

"Sec.

"1201. Appointment of members of the Merit Systems Protection Board.

"1202. Term of office; filling vacancies; removal.

"1203. Chairman; Vice Chairman.

"1204. Special Counsel; appointment and removal.

"1205. Powers and functions of the Merit Systems Protection Board and Special Counsel.

"1206. Authority and responsibilities of the Special Counsel.

"1207. Hearings and decisions on complaints filed by the Special Counsel.

"1208. Stays of certain personnel actions.

"1209. Information.

"§ 1201. Appointment of members of the Merit Systems Protection Board

"The Merit Systems Protection Board is composed of 3 members appointed by the President, by and with the advice and consent of the Senate, not more than 2 of whom may be adherents of the same political party. The Chairman and members of the Board shall be individuals who, by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the Board. No member of the Board may hold another office or position in the Government of the United States, except as otherwise provided by law or at the direction of the President. The Board shall have an official seal which shall be judicially noticed. The Board shall have its principal office in the District of Columbia and may have field offices in other appropriate locations.

"§ 1202. Term of office, filling vacancies; removal;

"(a) The term of office of each member of the Merit Systems Protection Board is 7 years.

"(b) A member appointed to fill a vacancy occurring before the end of a term of office of his predecessor serves for the remainder of that term. Any appointment to fill a vacancy is subject to the requirements of section 1201 of this title.

"(c) Any member appointed for a 7-year term may not be reappointed to any following term but may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire under this section.

"(d) Any member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

"§ 1203. Chairman; Vice Chairman

"(a) The President shall from time to time, appoint, by and with the advice and consent of the Senate, one of the members of the Merit Systems Protection Board as the Chairman of the Board. The Chairman is the chief executive and administrative officer of the Board.

"(b) The President shall from time to time designate one of the members of the Board as Vice Chairman of the Board. During the absence or disability of the Chairman, or when the office of Chairman is vacant, the Vice Chairman shall perform the functions vested in the Chairman.

“(c) *During the absence or disability of both the Chairman and Vice Chairman, or when the offices of Chairman and Vice Chairman are vacant, the remaining Board member shall perform the functions vested in the Chairman.*

“§ 1204. Special Counsel; appointment and removal

“The Special Counsel of the Merit Systems Protection Board shall be appointed by the President from attorneys, by and with the advice and consent of the Senate, for a term of 5 years. A Special Counsel appointed to fill a vacancy occurring before the end of a term of office of his predecessor serves for the remainder of the term. The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

§ 1205. Powers and functions of the Merit Systems Protection Board and Special Counsel

“(a) The Merit Systems Protection Board shall—

“(1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, section 2023 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;

“(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order;

“(3) conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected; and

“(4) review, as provided in subsection (e) of this section, rules and regulations of the Office of Personnel Management.

“(b) (1) Any member of the Merit Systems Protection Board, the Special Counsel, any administrative law judge appointed by the Board under section 3105 of this title, and any employee of the Board designated by the Board may administer oaths, examine witnesses, take depositions, and receive evidence.

“(2) Any member of the Board, the Special Counsel, and any administrative law judge appointed by the Board under section 3105 of this title may—

“(A) issue subpoenas requiring the attendance and testimony of witnesses and the production of documentary or other evidence from any place in the United States or any territory or possession thereof, the Commonwealth of Puerto Rico, or the District of Columbia; and

“(B) order the taking of depositions and order responses to written interrogatories.

“(3) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

“(c) In the case of contumacy or failure to obey a subpoena issued under subsection (b) (2) of this section, the United States district

court for the judicial district in which the person to whom the subpoena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

“(d) (1) In any proceeding under subsection (a) (1) of this section, any member of the Board may request from the Director of the Office of Personnel Management an advisory opinion concerning the interpretation of any rule, regulation, or other policy directive promulgated by the Office of Personnel Management.

“(2) In enforcing compliance with any order under subsection (a) (2) of this section, the Board may order that any employee charged with complying with such order, other than an employee appointed by the President by and with the advice and consent of the Senate, shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with. The Board shall certify to the Comptroller General of the United States that such an order has been issued and no payment shall be made out of the Treasury of the United States for any service specified in such order.

“(3) In carrying out any study under subsection (a) (3) of this section, the Board shall make such inquiries as may be necessary and, unless otherwise prohibited by law, shall have access to personnel records or information collected by the Office and may require additional reports from other agencies as needed.

“(e) (1) At any time after the effective date of any rule or regulation issued by the Director in carrying out its functions under section 1103 of this title, the Board shall review any provision of such rule or regulation—

“(A) on its own motion;

“(B) on the granting by the Board, in its sole discretion, of any petition for such review filed with the Board by any interested person, after consideration of the petition by the Board; or

“(C) on the filing of a written complaint by the Special Counsel requesting such review.

“(2) In reviewing any provision of any rule or regulation pursuant to this subsection the Board shall declare such provision—

“(A) invalid on its face, if the Board determines that such provision would, if implemented by any agency, on its face, require any employee to violate section 2302(b) of this title; or

“(B) invalidly implemented by any agency, if the Board determines that such provision, as it has been implemented by the agency through any personnel action taken by the agency or through any policy adopted by the agency in conformity with such provision, has required any employee to violate section 2302(b) of this title.

“(3) (A) The Director of the Office of Personnel Management, and the head of any agency implementing any provision of any rule or regulation under review pursuant to this subsection, shall have the right to participate in such review.

“(B) Any review conducted by the Board pursuant to this paragraph shall be limited to determining—

“(i) the validity in its face of the provision under review; and

“(ii) whether the provision under review has been validly implemented.

“(C) The Board shall require any agency—

“(i) to cease compliance with any provision of any rule or regulation which the Board declares under this subsection to be invalid on its face; and

“(ii) to correct any invalid implementation by the agency of any provision of any rule or regulation which the Board declares under this subsection to have been invalidly implemented by the agency.

“(f) The Board may delegate the performance of any of its administrative functions under this title to any employee of the Board.

“(g) The Board shall have the authority to prescribe such regulations as may be necessary for the performance of its functions. The Board shall not issue advisory opinions. All regulations of the Board shall be published in the Federal Register.

“(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Chairman of the Board may appear for the Board, and represent the Board, in any civil action brought in connection with any function carried out by the Board pursuant to this title or as otherwise authorized by law.

“(i) The Chairman of the Board may appoint such personnel as may be necessary to perform the functions of the Board. Any appointment made under this subsection shall comply with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than approval required under section 3324 or subchapter VIII of chapter 33 of this title).

“(j) The Board shall prepare and submit to the President, and, at the same time, to the appropriate committees of Congress, an annual budget of the expenses and other items relating to the Board which shall, as revised, be included as a separate item in the budget required to be transmitted to the Congress under section 201 of the Budget and Accounting Act, 1921 (31 U.S.C. 11).

“(k) The Board shall submit to the President and, at the same time, to each House of the Congress, any legislative recommendations of the Board relating to any of its functions under this title.

“§ 1206. Authority and responsibilities of the Special Counsel

“(a) (1) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

“(2) If the Special Counsel terminates any investigation under paragraph (1) of this subsection, the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of the termination of the investigation and the reasons therefor.

“(3) In addition to authority granted under paragraph (1) of this subsection, the Special Counsel may, in the absence of an allegation,

conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

“(b) (1) In any case involving—

“(A) any disclosure of information by an employee or applicant for employment which the employee or applicant reasonably believes evidences—

“(i) a violation of any law, rule, or regulation; or

“(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

if the disclosure is not specifically prohibited by law or if the information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

“(B) a disclosure by an employee or applicant for employment to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information, which the employee or applicant reasonably believes evidences—

“(i) a violation of any law, rule, or regulation; or

“(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

the identity of the employee or applicant may not be disclosed without the consent of the employee or applicant during any investigation under subsection (a) of this section or under paragraph (3) of this subsection, unless the Special Counsel determines that the disclosure of the identity of the employee or applicant is necessary in order to carry out the functions of the Special Counsel.

“(2) Whenever the Special Counsel receives information of the type described in paragraph (1) of this subsection, the Special Counsel shall promptly transmit such information to the appropriate agency head.

“(3) (A) In the case of information received by the Special Counsel under paragraph (1) of this section, if, after such review as the Special Counsel determines practicable (but not later than 15 days after the receipt of the information), the Special Counsel determines that there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to the public health or safety, the Special Counsel may to the extent provided in subparagraph (B) of this paragraph, require the head of the agency to—

“(i) conduct an investigation of the information and any related matters transmitted by the Special Counsel to the head of the agency; and

“(ii) submit a written report setting forth the findings of the head of the agency within 60 days after the date on which the information is transmitted to the head of the agency or within any longer period of time agreed to in writing by the Special Counsel.

“(B) *The Special Counsel may require an agency head to conduct an investigation and submit a written report under subparagraph (A) of this paragraph only if the information was transmitted to the Special Counsel by—*

“(i) *any employee or former employee or applicant for employment in the agency which the information concerns; or*

“(ii) *any employee who obtained the information in connection with the performance of the employee’s duties and responsibilities.*

“(4) *Any report required under paragraph (3)(A) of this subsection shall be reviewed and signed by the head of the agency and shall include—*

“(A) *a summary of the information with respect to which the investigation was initiated;*

“(B) *a description of the conduct of the investigation;*

“(C) *a summary of any evidence obtained from the investigation;*

“(D) *a listing of any violation or apparent violation of any law, rule, or regulation; and*

“(E) *a description of any corrective action taken or planned as a result of the investigation, such as—*

“(i) *changes in agency rules, regulations, or practices;*

“(ii) *the restoration of any aggrieved employee;*

“(iii) *disciplinary action against any employee; and*

“(iv) *referral to the Attorney General of any evidence of a criminal violation.*

“(5) (A) *Any such report shall be submitted to the Congress, to the President, and to the Special Counsel for transmittal to the complainant. Whenever the Special Counsel does not receive the report of the agency head within the time prescribed in subparagraph (3)(A)(ii) of this subsection, the Special Counsel may transmit a copy of the information which was transmitted to the agency head to the President and to the Congress together with a statement noting the failure of the head of the agency to file the required report.*

“(B) *In any case in which evidence of a criminal violation obtained by an agency in an investigation under paragraph (3) of this subsection is referred to the Attorney General—*

“(i) *the report shall not be transmitted to the complainant; and*

“(ii) *the agency shall notify the Office of Personnel Management and the Office of Management and Budget of the referral.*

“(6) *Upon receipt of any report of the head of any agency required under paragraph (3)(A)(ii) of this subsection, the Special Counsel shall review the report and determine whether—*

“(A) *the findings of the head of the agency appear reasonable; and*

“(B) *the agency’s report under paragraph (3)(A)(ii) of this subsection contains the information required under paragraph (4) of this subsection.*

“(7) *Whenever the Special Counsel transmits any information to the head of the agency under paragraph (2) of this subsection but does not require an investigation under subparagraph (3) of this*

subsection, the head of the agency shall, within a reasonable time after the information was transmitted, inform the Special Counsel, in writing, of what action has been, or is to be taken and when such action will be completed. The Special Counsel shall inform the complainant of the report of the agency head.

“(9) Except as specifically authorized under this subsection, the provisions of this subsection shall not be considered to authorize disclosure of any information by any agency or any person which is—

“(A) specifically prohibited from disclosure by any other provision of law; or

“(B) specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

“(9) In any case under subsection (b) (1) (B) of this section involving foreign intelligence or counterintelligence information the disclosure of which is specifically prohibited by law or by Executive order, the Special Counsel shall transmit such information to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

“(c) (1) (A) If, in connection with any investigation under this section, the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to the Board, the agency involved, and to the Office and may report the determination, findings, and recommendations to the President. The Special Counsel may include in the report recommendations as to what corrective action should be taken.

“(B) If, after a reasonable period, the agency has not taken the corrective action recommended, the Special Counsel may request the Board to consider the matter. The Board may order such corrective action as the Board considers appropriate, after opportunity for comment by the agency concerned and the Office of Personnel Management.

“(2) (A) If, in connection with any investigation under this section, the Special Counsel determines that there is reasonable cause to believe that a criminal violation by an employee has occurred, the Special Counsel shall report the determination to the Attorney General and to the head of the agency involved, and shall submit a copy of the report to the Director of the Office of Personnel Management and the Director of the Office of Management and Budget.

“(B) In any case in which the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, the Special Counsel may proceed with any investigation or proceeding instituted under this section notwithstanding that the alleged violation has been reported to the Attorney General.

“(3) If, in connection with any investigation under this section, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred which is not referred to in paragraph (1) or (2) of this subsection, the violation shall be reported to the head of the agency involved. The

Special Counsel shall require, within 30 days of the receipt of the report by the agency, a certification by the head of the agency which states—

“(A) that the head of the agency has personally reviewed the report; and

“(B) what action has been, or is to be, taken, and when the action will be completed.

“(d) The Special Counsel shall maintain and make available to the public a list of noncriminal matters referred to heads of agencies under subsections (b) (3) (A) and (c) (3) of this section, together with—

“(1) reports by the heads of agencies under subsection (b) (3)

(A) of this section, in the case of matters referred under subsection (b); and

“(2) certifications by heads of agencies under subsection (c) (3), in the case of matters referred under subsection (c).

The Special Counsel shall take steps to insure that any such public list does not contain any information the disclosure of which is prohibited by law or by Executive order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs.

“(e) (1) In addition to the authority otherwise provided in this section, the Special Counsel shall, except as provided in paragraph (2) of this subsection, conduct an investigation of any allegation concerning—

“(A) political activity prohibited under subchapter III of chapter 73 of this title, relating to political activities by Federal employees;

“(B) political activity prohibited under chapter 15 of this title, relating to political activities by certain State and local officers and employees;

“(C) arbitrary or capricious withholding of information prohibited under section 552 of this title, except that the Special Counsel shall make no investigation under this subsection of any withholding of foreign intelligence or counterintelligence information the disclosure of which is specifically prohibited by law or by Executive order;

“(D) activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decisionmaking; and

“(E) involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action.

“(2) The Special Counsel shall make no investigation of any allegation of any prohibited activity referred to in paragraph (1) (D) or (1) (E) of this subsection if the Special Counsel determines that the allegation may be resolved more appropriately under an administrative appeals procedure.

“(f) During any investigation initiated under this section, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel.

“(g) (1) *Except as provided in paragraph (2) of this subsection, if the Special Counsel determines that disciplinary action should be taken against any employee—*

“(A) *after any investigation under this section, or*

“(B) *on the basis of any knowing and willful refusal or failure by an employee to comply with an order of the Merit Systems Protection Board,*
the Special Counsel shall prepare a written complaint against the employee containing his determination, together with a statement of supporting facts, and present the complaint and statement to the employee and the Merit Systems Protection Board in accordance with section 1207 of this title.

“(2) *In the case of an employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President; by and with the advice and consent of the Senate (other than an individual in the Foreign Service of the United States), the complaint and statement referred to in paragraph (1) of this subsection, together with any response by the employee, shall be presented to the President for appropriate action in lieu of being presented under section 1207 of this title.*

“(h) *If the Special Counsel believes there is a pattern of prohibited personnel practices and such practices involve matters which are not otherwise appealable to the Board under section 7701 of this title, the Special Counsel may seek corrective action by filing a written complaint with the Board against the agency or employee involved and the Board shall order such corrective action as the Board determines necessary.*

“(i) *The Special Counsel may as a matter of right intervene or otherwise participate in any proceeding before the Merit Systems Protection Board, except that the Special Counsel shall comply with the rules of the Board and the Special Counsel shall not have any right of judicial review in connection with such intervention.*

“(j) (1) *The Special Counsel may appoint the legal, administrative, and support personnel necessary to perform the functions of the Special Counsel.*

“(2) *Any appointment made under this subsection shall comply with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than approval required under section 3324 or subchapter VIII of chapter 33 of this title).*

“(k) *The Special Counsel may prescribe regulations relating to the receipt and investigation of matters under the jurisdiction of the Special Counsel. Such regulations shall be published in the Federal Register.*

“(l) *The Special Counsel shall not issue any advisory opinion concerning any law, rule, or regulation (other than an advisory opinion concerning chapter 15 or subchapter III of chapter 73 of this title).*

“(m) *The Special Counsel shall submit an annual report to the Congress on the activities of the Special Counsel, including the number, types, and disposition of allegations of prohibited personnel practices*

filed with it, investigations conducted by it, and actions initiated by it before the Board, as well as a description of the recommendations and reports made by it to other agencies pursuant to this section, and the actions taken by the agencies as a result of the reports or recommendations. The report required by this subsection shall include whatever recommendations for legislation or other action by Congress the Special Counsel may deem appropriate.

“§ 1207. Hearings and decisions on complaints filed by the Special Counsel

“(a) Any employee against whom a complaint has been presented to the Merit Systems Protection Board under section 1206(g) of this title is entitled to—

“(1) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

“(2) be represented by an attorney or other representative;

“(3) a hearing before the Board or an administrative law judge appointed under section 3105 of this title and designated by the Board;

“(4) have a transcript kept of any hearing under paragraph (3) of this subsection; and

“(5) a written decision and reasons therefor at the earliest practicable date including a copy of any final order imposing disciplinary action.

“(b) A final order of the Board may impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed \$1,000.

“(c) There may be no administrative appeal from an order of the Board. An employee subject to a final order imposing disciplinary action under this section may obtain judicial review of the order in the United States court of appeals for the judicial circuit in which the employee resides or is employed at the time of the action.

“(d) In the case of any State or local officer or employee under chapter 15 of this title, the Board shall consider the case in accordance with the provisions of such chapter.

“§ 1208. Stays of certain personnel actions

“(a) (1) The Special Counsel may request any member of the Merit Systems Protection Board to order a stay of any personnel action for 15 calendar days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice.

“(2) Any member of the Board requested by the Special Counsel to order a stay under paragraph (1) of this subsection shall order such stay unless the member determines that, under the facts and circumstances involved, such a stay would not be appropriate.

“(3) Unless denied under paragraph (2) of this subsection, any stay under this subsection shall be granted within 3 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date of the request for the stay by the Special Counsel.

“(b) Any member of the Board may, on the request of the Special Counsel, extend the period of any stay ordered under subsection (a) of this section for a period of not more than 90 calendar days.

“(c) The Board may extend the period of any stay granted under subsection (a) of this section for any period which the Board considers appropriate, but only if the Board concurs in the determination of the Special Counsel under such paragraph, after an opportunity is provided for oral or written comment by the Special Counsel and the agency involved.

“§ 1209. Information

“(a) Notwithstanding any other provision of law or any rule, regulation or policy directive, any member of the Board, or any employee of the Board designated by the Board, may transmit to the Congress on the request of any committee or subcommittee thereof, by report, testimony, or otherwise, information and views on functions, responsibilities, or other matters relating to the Board, without review, clearance, or approval by any other administrative authority.

“(b) The Board shall submit an annual report to the President and the Congress on its activities, which shall include a description of significant actions taken by the Board to carry out its functions under this title. The report shall also review the significant action of the Office of Personnel Management, including an analysis of whether the actions of the Office of Personnel Management are in accord with merit system principles and free from prohibited personnel practices.”

(b) Any term of office of any member of the Merit Systems Protection Board serving on the effective date of this Act shall continue in effect until the term would expire under section 1102 of title 5, United States Code, as in effect immediately before the effective date of this Act, and upon expiration of the term, appointments to such office shall be made under sections 1201 and 1202 of title 5, United States Code (as added by this section).

(c) (1) Section 5314(17) of title 5, United States Code, is amended by striking out “Chairman of the United States Civil Service Commission” and inserting in lieu thereof “Chairman of the Merit Systems Protection Board”.

(2) Section 5315(66) of such title is amended by striking out “Members, United States Civil Service Commission” and inserting in lieu thereof “Members, Merit Systems Protection Board”.

(3) Section 5315 of such title is further amended by adding at the end thereof the following new paragraph:

“(123) Special Counsel of the Merit Systems Protection Board.”

(4) Paragraph (99) of section 5316 of such title is hereby repealed.

(d) The table of chapters for part II of title 5, United States Code, is amended by inserting after the item relating to chapter 11 the following new item:

“12. Merit Systems Protection Board and Special Counsel..... 1201”.

PERFORMANCE APPRAISAL

SEC. 203. (a) Chapter 43 of title 5, United States Code, is amended to read as follows:

“CHAPTER 43—PERFORMANCE APPRAISAL

“SUBCHAPTER I—GENERAL PROVISIONS

“Sec.

“4301. Definitions.

“4302. Establishment of performance appraisal systems.

“4303. Actions based on unacceptable performance.

“4304. Responsibilities of Office of Personnel Management.

“4305. Regulations.

“§ 4301. Definitions

“For the purpose of this subchapter—

“(1) ‘agency’ means—

“(A) an Executive agency;

“(B) the Administrative Office of the United States Courts; and

“(C) the Government Printing Office;

but does not include—

“(i) a Government corporation;

“(ii) the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, or any Executive Agency or unit thereof which is designated by the President and the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

“(iii) the General Accounting Office;

“(2) ‘employee’ means an individual employed in or under an agency, but does not include—

“(A) an employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed;

“(B) an individual in the Foreign Service of the United States;

“(C) a physician, dentist, nurse, or other employee in the Department of Medicine and Surgery, Veterans’ Administration whose pay is fixed under chapter 73 of title 38;

“(D) an administrative law judge appointed under section 3105 of this title;

“(E) an individual in the Senior Executive Service;

“(F) an individual appointed by the President; or

“(G) an individual occupying a position not in the competitive service excluded from coverage of this subchapter by regulations of the Office of Personnel Management; and

“(3) ‘unacceptable performance’ means performance of an employee which fails to meet established performance standards in one or more critical elements of such employee’s position.

“§ 4302. Establishment of performance appraisal systems

“(a) Each agency shall develop one or more performance appraisal systems which—

“(1) provide for periodic appraisals of job performance of employees;

“(2) encourage employee participation in establishing performance standards; and

“(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees;

“(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for—

“(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public (related to the job in question for each employee or position under the system;

“(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee’s position;

“(3) evaluating each employee during the appraisal period on such standards;

“(4) recognizing and rewarding employees whose performance so warrants;

“(5) assisting employees in improving unacceptable performance; and

“(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

“§ 4303. Actions based on unacceptable performance

“(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

“(b) (1) An employee whose reduction in grade or removal is proposed under this section is entitled to—

“(A) 30 days’ advance written notice of the proposed action which identifies—

“(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

“(ii) the critical elements of the employee’s position involved in each instance of unacceptable performance;

“(B) be represented by an attorney or other representative;

“(C) a reasonable time to answer orally and in writing; and

“(D) a written decision which—

“(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

“(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

“(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b) (1) (A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

*“(c) The decision to retain, reduce in grade, or remove an employee—
 “(1) shall be made within 30 days after the date of expiration
 of the notice period, and*

*“(2) in the case of a reduction in grade or removal, may be
 based only on those instances of unacceptable performance by the
 employee—*

*“(A) which occurred during the 1-year period ending on
 the date of the notice under subsection (b) (1) (A) of this
 section in connection with the decision; and*

*“(B) for which the notice and other requirements of this
 section are complied with.*

*“(d) If, because of performance improvement by the employee dur-
 ing the notice period, the employee is not reduced in grade or removed,
 and the employee’s performance continues to be acceptable for 1 year
 from the date of the advance written notice provided under subsection
 (b) (1) (A) of this section, any entry or other notation of the unac-
 ceptable performance for which the action was proposed under this
 section shall be removed from any agency record relating to the
 employee.*

*“(e) Any employee who is a preference eligible or is in the com-
 petitive service and who has been reduced in grade or removed under
 this section is entitled to appeal the action to the Merit Systems Protec-
 tion Board under section 7701 of this title.*

“(f) This section does not apply to—

*“(1) the reduction to the grade previously held of a supervisor
 who has not completed the probationary period under section 3321
 (a) (2) of this title,*

*“(2) the reduction in grade or removal of an employee in the
 competitive service who is serving a probationary or trial period
 under an initial appointment or who has not completed 1 year of
 current continuous employment under other than a temporary
 appointment limited to 1 year or less, or*

*“(3) the reduction in grade or removal of an employee in the
 excepted service who has not completed 1 year of current con-
 tinuous employment in the same or similar positions.*

“§ 4304. Responsibilities of the Office of Personnel Management

*“(a) The Office of Personnel Management shall make technical as-
 sistance available to agencies in the development of performance
 appraisal systems.*

*“(b) (1) The Office shall review each performance appraisal system
 developed by any agency under this section and determine whether
 the performance appraisal system meets the requirements of this
 subchapter.*

*“(2) The Comptroller General shall from time to time review on a
 selected basis performance appraisal systems established under this
 subchapter to determine the extent to which any such system meets
 the requirements of this subchapter and shall periodically report its
 findings to the Office and to the Congress.*

*“(3) If the Office determines that a system does not meet the re-
 quirements of this subchapter (including regulations prescribed under sec-
 tion 4305), the Office shall direct the agency to implement an appro-
 priate system or to correct operations under the system, and any such
 agency shall take any action so required.*

“§ 4305. Regulations

“The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter.”

(b) The item relating to chapter 43 in the chapter analysis for part III of title 5, United States Code, is amended by striking out “Performance Rating” and inserting in lieu thereof “Performance Appraisal”.

ADVERSE ACTIONS

SEC. 204. (a) Chapter 75 of title 5, United States Code, is amended by striking out subchapters I, II, and III and inserting in lieu thereof the following:

“SUBCHAPTER I—SUSPENSION FOR 14 DAYS OR LESS**“§ 7501. Definitions**

“For the purpose of this subchapter—

“(1) ‘employee’ means an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less; and

“(2) ‘suspension’ means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

“§ 7502. Actions covered

“This subchapter applies to a suspension for 14 days or less, but does not apply to a suspension under section 7521 or 7532 of this title or any action initiated under section 1206 of this title.

“§ 7503. Cause and procedure

“(a) Under regulations prescribed by the Office of Personnel Management, an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service (including discourteous conduct to the public confirmed by an immediate supervisor’s report of four such instances within any one-year period or any other pattern of discourteous conduct).

“(b) An employee against whom a suspension for 14 days or less is proposed is entitled to—

“(1) an advance written notice stating the specific reasons for the proposed action;

“(2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

“(3) be represented by an attorney or other representative; and

“(4) a written decision and the specific reasons therefor at the earliest practicable date.

“(c) Copies of the notice of proposed action, the answer of the employee if written, a summary thereof if made orally, the notice of decision and reasons therefor, and any order effecting the suspension, together with any supporting material, shall be maintained by the agency and shall be furnished to the Merit Systems Protection Board upon its request and to the employee affected upon the employee’s request.

“§ 7504. Regulations

“The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter.

“SUBCHAPTER II—REMOVAL, SUSPENSION FOR MORE THAN 14 DAYS, REDUCTION IN GRADE OR PAY, OR FURLOUGH FOR 30 DAYS OR LESS**“§ 7511. Definitions; application**

“(a) For the purpose of this subchapter—

“(1) ‘employee’ means—

“(A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; and

“(B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions;

“(2) ‘suspension’ has the meaning as set forth in section 7501(2) of this title;

“(3) ‘grade’ means a level of classification under a position classification system;

“(4) ‘pay’ means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

“(5) ‘furlough’ means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

“(b) This subchapter does not apply to an employee—

“(1) whose appointment is made by and with the advice and consent of the Senate;

“(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by—

“(A) the Office of Personnel Management for a position that it has excepted from the competitive service; or

“(B) the President or the head of an agency for a position which is excepted from the competitive service by statute.

“(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office.

“§ 7512. Actions covered

“This subchapter applies to—

“(1) a removal;

“(2) a suspension for more than 14 days;

“(3) a reduction in grade;

“(4) a reduction in pay; and

“(5) a furlough of 30 days or less;

but does not apply to—

“(A) a suspension or removal under section 7532 of this title,

“(B) a reduction in force action under section 3502 of this title,
 “(C) the reduction-in-grade of a supervisor or manager who has not completed the probationary period under section 3321 (a) (2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

“(D) a reduction in grade or removal under section 4303 of this title, or

“(E) an action initiated under section 1206 or 7521 of this title.

“§ 7513. Cause and procedure

“(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

“(b) An employee against whom an action is proposed is entitled to—

“(1) at least 30 days’ advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

“(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

“(3) be represented by an attorney or other representative; and

“(4) a written decision and the specific reasons therefor at the earliest practicable date.

“(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b) (2) of this section.

“(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

“(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee’s request.

“§ 7514. Regulations

“The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter, except as it concerns any matter with respect to which the Merit Systems Protection Board may prescribe regulations.”.

“SUBCHAPTER III—ADMINISTRATIVE LAW JUDGES

“§ 7521. Actions against administrative law judges

“(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

“(b) *The actions covered by this section are—*

- “(1) *a removal;*
- “(2) *a suspension;*
- “(3) *a reduction in grade;*
- “(4) *a reduction in pay; and*
- “(5) *a furlough of 30 days or less;*

but do not include—

- “(A) *a suspension or removal under section 7532 of this title;*
- “(B) *a reduction-in-force action under section 3502 of this title;*

or

“(C) *any action initiated under section 1206 of this title.”*

(b) *So much of the analysis for chapter 75 of title 5, United States Code, as precedes the items relating to subchapter IV is amended to read as follows:*

“CHAPTER 75—ADVERSE ACTIONS

“SUBCHAPTER I—SUSPENSION OF 14 DAYS OR LESS

“Sec.

“7501. *Definitions.*

“7502. *Actions covered.*

“7503. *Cause and procedure.*

“7504. *Regulations.*

“SUBCHAPTER II—REMOVAL, SUSPENSION FOR MORE THAN 14 DAYS, REDUCTION IN GRADE OR PAY, OR FURLOUGH FOR 30 DAYS OR LESS

“7511. *Definitions; application.*

“7512. *Actions covered.*

“7513. *Cause and procedure.*

“7514. *Regulations.*

“SUBCHAPTER III—ADMINISTRATIVE LAW JUDGES

“7521. *Actions against administrative law judges.”*

APPEALS

Sec. 205. *Chapter 77 of title 5, United States Code, is amended to read as follows:*

“CHAPTER 77—APPEALS

“Sec.

“7701. *Appellate procedures.*

“7702. *Actions involving discrimination.*

“7703. *Judicial review of decisions of the Merit Systems Protection Board.*

“§ 7701. Appellate procedures

“(a) *An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—*

“(1) *to a hearing for which a transcript will be kept; and*

“(2) *to be represented by an attorney or other representative.*

Appeals shall be processed in accordance with regulations prescribed by the Board.

“(b) *The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of*

this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an experienced appeals officer, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

"(c) (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

"(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

"(B) in any other case, is supported by a preponderance of the evidence.

"(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

"(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

"(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

"(C) shows that the decision was not in accordance with law.

"(d) (1) In any case in which—

"(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

"(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office:

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

"(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

"(e) (1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless—

"(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

"(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of

the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

“(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulations under the jurisdiction of the Office.

“(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may—

“(1) consolidate appeals filed by two or more appellants, or

“(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

“(g) (1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee, as the case may be, determines that payment by the agency is warranted in the interest of justice, including any case in which prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

“(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b) (1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706k of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

“(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (d) of this section.

“(i) (1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

“(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to

it during the preceding calendar year, the number of appeals on which it completed action during the prior year, and the number of instances during the prior year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

“(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

“(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

“(j) The Board may prescribe regulations to carry out the purpose of this section.

“§ 7702. Actions involving discrimination

“(a) (1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who—

“(A) has been affected by an action which the employee may appeal to the Merit Systems Protection Board, and

“(B) alleges that a basis for the action was discrimination prohibited by—

“(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16c),

“(ii) section 6 (d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),

“(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

“(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

“(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

the Board shall within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of the title and the section.

“(2) In any matter before an agency which involves—

“(A) any action described in subsection (a) (1) (A) of this section; and

“(B) an issue of discrimination prohibited under any provision of law described in subsection (a) (1) (B) of this section;

the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.

“(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of—

“(A) the date of issuance of the decision if the employee does not file a petition with the Equal Employment Opportunity Commission under subsection (b) (1) of this section, or

“(B) the date the Commission determines not to consider decision under subsection (b) (2) of this section.

“(b) (1) *An employee may, within 30 days after notice of the decision of the Board under subsection (a) (1) of this section, petition the Commission to consider the decision*

“(2) *The Commission shall, within 30 days after the date of the petition, determine whether to consider the decision. A determination of the Commission not to consider decision may not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.*

“(3) *If the Commission makes a determination to consider the decision, the Commission shall, within 60 days after the date of the determination, consider the entire record of the proceedings of the Board and, on the basis of the evidentiary record before the Board, as supplemented under paragraph (4) of this subsection, either—*

“(A) *concur in the decision of the Board; or*

“(B) *issue in writing another decision which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law—*

“(i) *the decision of the Board constitute an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in subsection (a) (1) (B) of this section, or*

“(ii) *the decision involving such provision is not supported by the evidence in the record as a whole.*

“(4) *In considering any decision of the Board under this subsection, the Commission may refer the case to the Board, or provide on its own, for the taking (within such period as permits the Commission to make a decision within the 60-day period prescribed under this subsection) of additional evidence to the extent it considers necessary to supplement the record.*

“(5) (A) *If the Commission concurs pursuant to paragraph (3) (A) of this subsection in the decision of the Board, the decision of the Board shall be a judicially reviewable action.*

“(B) *If the Commission issues any decision under paragraph (3) (B) of this subsection, the Commission shall immediately refer the matter to the Board.*

“(c) *Within 30 days after receipt by the Board of the decision of the Commission under subsection (b) (5) (B) of this section, the Board shall consider the decision and—*

“(1) *concur and adopt in whole the decision of the Commission; or*

“(2) *to the extent that the Board finds that, as a matter of law, (A) the Commission decision constitutes an incorrect interpretation of any provision of any civil service law, rule, regulation or policy directive, or (B) the Commission decision involving such provision is not supported by the evidence in the record as a whole—*

“(i) *reaffirm the initial decision of the Board; or*

“(ii) *reaffirm the initial decision of the Board with such revision as it determines appropriate.*

If the Board takes the action provided under paragraph (1) the decision of the Commission shall be a judicially reviewable action.

“(d)(1) *If the Board takes any action under subsection (c)(2) of this section, the matter shall be immediately certified to a special panel described in paragraph (6) of this section. Upon certification, the Board shall, within 5 days (excluding Saturdays, Sundays, and holidays), transmit to the special panel the administrative record in the proceeding, including—*

“(A) *the factual record compiled under this section,*

“(B) *the decisions issued by the Board and the Commission under this section, and*

“(C) *any transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.*

“(2)(A) *The special panel shall, within 45 days after a matter has been certified to it, review the administrative record transmitted to it and, on the basis of the record, decide the issues in dispute and issue a final decision which shall be a judicially reviewable action.*

“(B) *The special panel shall give due deference to the respective expertise of the Board and Commission in making its decision.*

“(3) *The special panel shall refer its decision under paragraph (1) of this subsection and the Board shall order any agency to take any action appropriate to carry out the decision.*

“(4) *The special panel shall permit the employee or applicant who brought the complaint and the employing agency to appear before the panel to present oral arguments and to present written arguments with respect to the matter.*

“(5) *Upon application by the employee or applicant, the Commission may issue such interim relief as it determines appropriate to mitigate any exceptional hardship the employee or applicant might otherwise incur as a result of the certification of any matter under this subsection, except that the Commission may not stay, or order any agency to review on an interim basis, the action referred to in subsection (a)(1) of this subsection.*

“(6)(A) *Each time the Board takes any action under subsection (c)(2) of this section, a special panel shall be convened which shall consist of—*

“(i) *an individual appointed by the President, by and with the advice and consent of the Senate, to serve for a term of 6 years as chairman of the special panel each time it is convened;*

“(ii) *one member of the Board designated by the Chairman of the Board each time a panel is convened; and*

“(iii) *one member of the Commission designated by the Chairman of the Commission each time a panel is convened.*

The chairman of the special panel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

“(B) *The chairman is entitled to pay at a rate equal to the maximum annual rate of basic pay, payable under the General Schedule for each day he is engaged in the performance of official business on the work of the special panel.*

“(C) *The Board and the Commission shall provide such administrative assistance to the special panel as may be necessary and, to the extent practicable, shall equally divide the costs of providing the administrative assistance.*

“(c) (1) Notwithstanding any other provision of law, if at any time after—

“(A) the 120th day following the filing of any matter described in subsection (a) (2) of this section with an agency, there is no judicially reviewable action under this section or an appeal under paragraph (2) of this subsection;’

“(B) the 120th day following the filing of an appeal with the Board under subsection (a) (1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b) (1) of this section); or

“(C) the 180th day following the filing of a petition with the Equal Employment Opportunity Commission under subsection (b) (1) of this title, there is no final agency action under subsection (b), (c), or (d) of this section;

an employee shall be entitled to file a civil action in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), or section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(d)).

“(2) If at any time after the 120th day following the filing of any matter described in subsection (a) (2) of this section with an agency, there is no judicially reviewable action, the employee may appeal the matter to the Board under subsection (a) (1) of this section.

“(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a) (1) of this section after a judicially reviewable action, including the decision of an agency under subsection (a) (2) of this section.

“(f) In any case in which an employee is required to file any action under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency.”.

“§ 7703. Judicial review of decisions of the Merit Systems Protection Board

“(a) (1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

“(2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.

“(b) (1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the Court of Claims or a United States court of appeals as provided in chapters 91 and 158, respectively, of title 28. Notwith-

standing any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

“(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

“(c) In any case filed in the United States Court of Claims or a United States court of appeals, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

“(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

“(2) obtained without procedures required by law, rule, or regulation having been followed; or

“(3) unsupported by substantial evidence; except that in the case of discrimination brought under any section referred to in subsection (b) (2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

“(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the District of Columbia if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.”

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 206. Section 2342 of title 28, United States Code, is amended—

(1) by striking out “and” at the end of paragraph (4),

(2) by striking out the period at the end of paragraph (5) and inserting in lieu thereof “; and”, and

(3) by adding at the end thereof the following new paragraph:

“(6) all final orders of the Merit Systems Protection Board except as provided for in section 7703(b) of title 5.”

TITLE III—STAFFING

VOLUNTEER SERVICE

Sec. 301. (a) Chapter 31 of title 5, United States Code, is amended by adding at the end thereof the following new section:

“§ 3111. Acceptance of volunteer service

“(a) For the purpose of this section, ‘student’ means an individual who is enrolled, not less than half-time, in a high school, trade school, technical or vocational institute, junior college, college, university, or comparable recognized educational institution. An individual who is a student is deemed not to have ceased to be a student during an interim between school years if the interim is not more than 5 months and if such individual shows to the satisfaction of the Office of Personnel Management that the individual has a bona fide intention of continuing to pursue a course of study or training in the same or different educational institution during the school semester (or other period into which the school year is divided) immediately after the interim.

“(b) Notwithstanding section 3679(b) of the Revised Statutes (31 U.S.C. 665(b)), the head of an agency may accept, subject to regulations issued by the Office, voluntary service for the United States if the service—

“(1) is performed by a student, with the permission of the institution at which the student is enrolled, as part of an agency program established for the purpose of providing educational experiences for the student;

“(2) is to be uncompensated; and

“(3) will not be used to displace any employee.

“(c) Any student who provides voluntary service under subsection (b) of this section shall not be considered a Federal employee for any purpose other than for purposes of chapter 81 of this title (relating to compensation for injury) and sections 2671 through 2680 of title 28 (relating to tort claims).”

(b) The analysis of chapter 31 of title 5, United States Code, is amended by adding at the end thereof the following new item:

“3111. Acceptance of volunteer service.”

INTERPRETING ASSISTANTS FOR DEAF EMPLOYEES

Sec. 302. (a) Section 3102 of title 5, United States Code, is amended—

(1) by redesignating paragraph (4) of subsection (a) as paragraph (5), by striking out “and” at the end of paragraph (3), and inserting after paragraph (3) the following new paragraph (4):

“(4) ‘deaf employee’ means an individual employed by an agency who, in accordance with regulations prescribed by the head of the agency, establishes to the satisfaction of the appropriate authority of the agency concerned that the employee has a hearing impairment, either permanent or temporary, so severe or disabling that the employment of an interpreting assistant or assistants for the employee is necessary or desirable to enable such employee to perform the work of the employee; and”;

(2) in subsection (b), by inserting "and interpreting assistant or assistants for a deaf employee" after "or assistants for a blind employee", and amending the last sentence to read as follows: "A reading assistant or an interpreting assistant, other than the one employed or assigned under subsection (d) of this section, may receive pay for services performed by the assistant by and from the blind or deaf employee or a nonprofit organization, without regard to section 209 of title 18.";

(3) in subsection (c), by inserting "or deaf" after "blind"; and

(4) by inserting at the end thereof the following new subsection:

"(d) The head of each agency may also employ or assign, subject to section 209 of title 18 and to the provisions of this title governing appointment and chapter 51 and subchapter III of chapter 53 of this title governing classification and pay, such reading assistants for blind employees and such interpreting assistants for deaf employees as may be necessary to enable such employees to perform their work."

(b) (1) The analysis of chapter 31 of title 5, United States Code, is amended by striking out the item relating to section 3102 and inserting in lieu thereof the following:

"3102. Employment of reading assistants for blind employees and interpreting assistants for deaf employees."

(2) The heading for section 3102 of title 5, United States Code, is amended to read as follows:

"§ 3102. Employment of reading assistants for blind employees and interpreting assistants for deaf employees".

(c) Section 410(b) (1) of title 39, United States Code, is amended by inserting after "open meetings)" a comma and "3102 (employment of reading assistants for blind employees and interpreting assistants for deaf employees);".

PROBATIONARY PERIOD

Sec. 303. (a) Section 3321 of title 5, United States Code, is amended to read as follows:

"§ 3321. Competitive service; probationary period

"(a) The President may take such action, including the issuance of rules, regulations, and directives, as shall provide as nearly as conditions of good administration warrant for a period of probation—

"(1) before an appointment in the competitive service becomes final; and

"(2) before initial appointment as a supervisor or manager becomes final.

"(b) An individual—

"(1) who has been transferred, assigned, or promoted from a position to a supervisory or managerial position, and

"(2) who does not satisfactorily complete the probationary period under subsection (a) (2) of this section, shall be returned to a position of no lower grade and pay than the position from which the individual was transferred, assigned, or promoted. Nothing in this section prohibits an agency from taking an action against an individual serving a probationary period under subsection

(a) (2) of this section for cause unrelated to supervisory or managerial performance.

“(c) Subsections (a) and (b) of this section shall not apply with respect to appointments in the Senior Executive Service.”.

(b) The item in the analysis for chapter 33 of title 5, United States Code, is amended to read as follows:

“3321. Competitive service; probationary period.”.

TRAINING

SEC. 304. Section 4103 of title 5, United States Code, is amended by inserting “(a)” before “In order to increase” and by adding at the end thereof the following new subsection:

“(b) (1) Notwithstanding any other provision of this chapter, an agency may train any employee of the agency to prepare the employee for placement in another agency if the head of the agency determines that the employee will otherwise be separated under conditions which would entitle the employee to severance pay under section 5595 of this title.

“(2) Before undertaking any training under this subsection, the head of the agency shall obtain verification from the Office of Personnel Management that there exists a reasonable expectation of placement in another agency.

“(3) In selecting an employee for training under this subsection, the head of the agency shall consider—

“(A) the extent to which the current skills, knowledge, and abilities of the employee may be utilized in the new position;

“(B) the employee’s capability to learn skills and acquire knowledge and abilities needed in the new position; and

“(C) the benefits to the Government which would result from retaining the employee in the Federal service.”.

TRAVEL, TRANSPORTATION, AND SUBSISTENCE

SEC. 305. Section 5723(d) of title 5, United States Code, is amended by striking out “not”.

RETIREMENT

SEC. 306. Section 8336(d) (2) of title 5, United States Code, is amended to read as follows:

“(2) voluntarily, during a period when the agency in which the employee is serving is undergoing a major reorganization, a major reduction in force, or a major transfer of function, as determined by the Office of Personnel Management, and the employee is serving in a geographic area designated by the Office;”.

VETERANS AND PREFERENCE ELIGIBLES

SEC. 307. (a) Effective beginning October 1, 1980, section 2108 of title 5, United States Code, is amended—

(1) by striking out “and” at the end of paragraph (2);

(2) by inserting in paragraph (3) after “means” the following: “, except as provided in paragraph (4) of this section”;

(3) by striking out the period at the end of paragraph (3) and inserting in lieu thereof a semicolon; and

(4) by adding at the end thereof the following new paragraphs:

“(4) except for the purposes of chapters 43 and 75 of this title, ‘preference eligible’ does not include a retired member of the armed forces unless—

“(A) the individual is a disabled veteran; or

“(B) the individual retired below the rank of major or its equivalent; and

“(5) ‘retired member of the armed forces’ means a member or former member of the armed forces who is entitled, under statute, to retired, retirement, or retainer pay on account of service as a member.”.

(b) (1) Chapter 31 of title 5, United States Code, is amended by adding at the end thereof the following new section:

“§ 3112. Disabled veterans; noncompetitive appointment

“Under such regulations as the Office of Personnel Management shall prescribe, an agency may make a noncompetitive appointment leading to conversion to career or career-conditional employment of a disabled veteran who has a compensable service-connected disability of 30 percent or more.”

(2) The Director of the Office of Personnel Management shall include in the reports required by section 2014(d) of title 38, United States Code, the same type of information regarding the use of the authority provided in section 3112 of title 5, United States Code (as added by paragraph (1) of this subsection), as is required by such section 2014 with respect to the use of the authority to make veterans readjustment appointments.

(3) The analysis of chapter 31 of title 5, United States Code, is amended by adding at the end thereof the following new item:

“3112. Disabled veterans; noncompetitive appointment.”.

(c) Section 3312 of title 5, United States Code, is amended—

(1) by inserting “(a)” before “In”; and

(2) by adding at the end thereof the following new subsection:

“(b) If an examining agency determines that, on the basis of evidence before it, a preference eligible under section 2108(3)(C) of this title who has a compensable service-connected disability of 30 percent or more is not able to fulfill the physical requirements of the position, the examining agency shall notify the Office of the determination and, at the same time, the examining agency shall notify the preference eligible of the reasons for the determination and of the right to respond, within 15 days of the date of the notification, to the Office. The Office shall require a demonstration by the appointing authority that the notification was timely sent to the preference eligible’s last known address and shall, before the selection of any other person for the position, make a final determination on the physical ability of the preference eligible to perform the duties of the position, taking into account any additional information provided in any such response. When the Office has completed its review of the proposed disqualification on the basis of physical disability, it shall send its findings to the appointing authority and the preference eligible. The appointing authority shall

comply with the findings of the Office. The functions of the Office under this subsection may not be delegated.”.

(d) Section 3318(b) of title 5, United States Code, is amended to read as follows:

“(b) (1) If an appointing authority proposes to pass over a preference eligible on a certificate in order to select an individual who is not a preference eligible, such authority shall file written reasons with the Office for passing over the preference eligible. The Office shall make the reasons presented by the appointing authority part of the record of the preference eligible and may require the submission of more detailed information from the appointing authority in support of the passing over of the preference eligible. The Office shall determine the sufficiency or insufficiency of the reasons submitted by the appointing authority, taking into account any response received from the preference eligible under paragraph (2) of this subsection. When the Office has completed its review of the proposed passover, it shall send its findings to the appointing authority and to the preference eligible. The appointing authority shall comply with the findings of the Office.

“(2) In the case of a preference eligible described in section 2108(3) (C) of this title who has a compensable service-connected disability of 30 percent or more, the appointing authority shall at the same time it notifies the Office under paragraph (1) of this subsection, notify the preference eligible of the proposed passover, of the reasons therefor, and of his right to respond to such reasons to the Office within 15 days of the date of such notification. The Office shall, before completing its review under paragraph (1) of this subsection, require a demonstration by the appointing authority that the passover notification was timely sent to the preference eligible’s last known address.

“(3) A preference eligible not described in paragraph (2) of this subsection, or his representative, shall be entitled, on request, to a copy of—

“(A) the reasons submitted by the appointing authority in support of the proposed passover, and

“(B) the findings of the Office.

“(4) In the case of a preference eligible described in paragraph (2) of this subsection, the functions of the Office under this subsection may not be delegated.”.

(e) Section 3502 of title 5, United States Code, is amended by striking out subsection (b) and inserting in lieu thereof the following new subsections:

“(b) A preference eligible described in section 2108(3) (C) of this title who has a compensable service-connected disability of 30 percent or more and whose performance has not been rated unacceptable under a performance appraisal system implemented under chapter 43 of this title is entitled to be retained in preference to other preference eligibles.

“(c) An employee who is entitled to retention preference and whose performance has not been rated unacceptable under a performance appraisal system implemented under chapter 43 of this title is entitled to be retained in preference to other competing employees.”.

(f) Section 3503 of title 5, United States Code, is amended by striking out in subsection (a) and (b) “each preference eligible employed” and inserting in lieu thereof “each competing employee” both places it appears.

(g) Section 3504 of title 5, United States Code, is amended—

(1) by inserting “(a)” before “In”; and

(2) by adding at the end thereof the following new subsection:

“(b) If an examining agency determines that, on the basis of evidence before it, a preference eligible described in section 2108(3) (C) of this title who has a compensable service-connected disability of 30 percent or more is not able to fulfill the physical requirements of the position, the examining agency shall notify the Office of the determination and, at the same time, the examining agency shall notify the preference eligible of the reasons for the determination and of the right to respond, within 15 days of the date of the notification, to the Office. The Office shall require a demonstration by the appointing authority that the notification was timely sent to the preference eligible’s last known address and shall, before the selection of any other person for the position, make a final determination on the physical ability of the preference eligible to perform the duties of the position, taking into account any additional information provided in the response. When the Office has completed its review of the proposed disqualification on the basis of physical disability, it shall send its findings to the appointing authority and the preference eligible. The appointing authority shall comply with the findings of the Office. The functions of the Office under this subsection may not be delegated.”.

(h) (1) Section 3319 of chapter 33 of title 5, United States Code, is repealed.

(2) The analysis for chapter 33 of title 5, United States Code, is amended by striking out the item relating to section 3319.

DUAL PAY FOR RETIRED MEMBERS OF THE UNIFORMED SERVICES

SEC. 308. (a) Section 5532 of title 5, United States Code, relating to retired officers of the uniformed services, is amended by redesignating subsections (c) and (d) as subsections (d) and (e) and by inserting after subsection (b) the following:

“(c) (1) If any member or former member of a uniformed service is receiving retired or retainer pay and is employed in a position the annual rate of basic pay for which, when combined with the member’s annual rate of retired or retainer pay (reduced as provided under subsection (b) of this section), exceeds the rate of basic pay then currently paid for level V of the Executive Schedule, such member’s retired or retainer pay shall be reduced by an amount computed under paragraph (2) of this subsection. The amounts of the reductions shall be deposited to the general fund of the Treasury of the United States.

“(2) The amount of each reduction under paragraph (1) of this subsection allocable for any pay period in connection with employment in a position shall be equal to the retired or retainer pay allocable to the pay period (reduced as provided under subsection (b) of this section), except that the amount of the reduction may not result in—

“(A) the amount of retired or retainer pay allocable to the pay period after being reduced, when combined with the basic pay for the employment during the pay period, being at a rate less than the rate of basic pay then currently paid for level V of the Executive Schedule; or

“(B) the amount of retired pay or retainer pay being reduced to an amount less than the amount deducted from the retired or retainer pay as a result of participation in any survivor’s benefits in connection with the retired or retainer pay or veterans insurance programs.”

(b) Section 5531 of title 5, United States Code is amended—

(1) by striking out paragraph (1) and inserting in lieu thereof the following:

“(1) ‘member’ has the meaning given such term by section 101 (23) of title 37;”;

(2) by striking out the period at the end of paragraph (2) and inserting in lieu thereof “; and”; and

(3) by adding at the end thereof the following new paragraph:

“(3) ‘retired or retainer pay’ means retired pay, as defined in section 8311(3) of this title, determined without regard to subparagraphs (B) through (D) of such section 8311(3); except that such term does not include an annuity payable to an eligible beneficiary of a member or former member of a uniformed service under chapter 73 of title 10.”

(c) Section 5532(d) of title 5, United States Code, as amended by subsection (a), is amended—

(1) by striking out “subsection (b) of”;

(2) by striking out “or retirement” each place it appears and inserting in lieu thereof “or retainer”;

(3) by striking out “a retired officer of a regular component of a uniformed service” and inserting in lieu thereof “a member or former member of a uniformed service who is receiving retired or retainer pay”; and

(4) in paragraph (1), by striking out “whose retirement was” and inserting in lieu thereof “whose retired or retainer pay is computed, in whole or in part,”.

(d) Section 5532(e) of title 5, United States Code, as amended by subsection (a), is amended to read as follows:

“(d) The Office of Personnel Management may during the 5-year period after the effective date of the Civil Service Reform Act of 1978 authorize exceptions to the restrictions in subsections (a), (b), and (c) of this section only when necessary to meet special or emergency employment needs which result from a severe shortage of well qualified candidates in positions of medical officers which otherwise cannot be readily met. An exception granted by the office with respect to any individual shall terminate upon a break in service of 3 days or more.

(e) Section 5532(b) of title 5, United States Code, is amended by striking out “or retirement” each place it appears and inserting in lieu thereof “or retainer”.

(f) (1) The heading for section 5532 of title 5, United States Code, is amended to read as follows:

“§ 5532. Employment of retired members of the uniformed services; reduction in retired or retainer pay”.

(2) The item relating to section 5532 in the table of sections for chapter 55 of title 5, United States Code, is amended to read as follows:

"5532. Employment of retired members of the uniformed services; reduction in retired or retainer pay."

(g) (1) *Except as provided in paragraph (2) of this subsection, the amendments made by this section shall apply only with respect to pay periods beginning after the effective date of this Act and only with respect to members of the uniformed services who first receive retired or retainer pay (as defined in section 5531(3) of title 5, United States Code (as amended by this section)), after the effective date of this Act.*

(2) *Such amendments shall not apply to any individual employed in a position on the date of the enactment of this Act so long as the individual continues to hold any such position (disregarding any break in service of 3 days or less) if the individual, on that date, would have been entitled to retired or retainer pay but for the fact the individual does not satisfy any applicable age requirement.*

(3) *The provisions of section 5532 of title 5, United States Code, as in effect immediately before the effective date of this Act, shall apply with respect to any retired officer of a regular component of the uniformed service who is receiving retired pay on or before such date, or any individual to whom paragraph (1) applies, in the same manner and to the same extent as if the preceding subsections of this section had not been enacted.*

Civil Service Employment Information

Sec. 309. (a) Chapter 33 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"§ 3327. Civil service employment information

"(a) The Office of Personnel Management shall provide that information concerning opportunities to participate in competitive examinations conducted by, or under authority delegated by, the Office of Personnel Management shall be made available to the employment offices of the United States Employment Service.

"(b) Subject to such regulations as the Office may issue, each agency shall promptly notify the Office and the employment offices of the United States Employment Service of—

"(1) each vacant position in the agency which is in the competitive service or the Senior Executive Service and for which the agency seeks applications from persons outside the Federal service, and

"(2) the period during which applications will be accepted.

As used in this subsection, 'agency' means an agency as defined in section 5102(a)(1) of this title other than an agency all the positions in which are excepted by statute from the competitive service."

(b) The table of sections for chapter 33 of title 5, United States Code, is amended by inserting after the item relating to section 3326 the following new item: "3327. Civil service employment information."

MINORITY RECRUITMENT PROGRAM

SEC. 310. Section 7151 of title 5, United States Code, is amended—

(1) by striking out the section heading and inserting in lieu thereof the following:

“§ 7151. Antidiscrimination policy; minority recruitment program”;

(2) by inserting after such section heading the following new subsection:

“(a) For the purpose of this section—

“(1) ‘underrepresentation’ means a situation in which the number of members of a minority group designation (determined by the Equal Employment Opportunity Commission in consultation with the Office of Personnel Management, on the basis of the policy set forth in subsection (b) of this section) within a category of civil service employment constitutes a lower percentage of the total number of employees within the employment category than the percentage that the minority constituted within the labor force of the United States, as determined under the most recent decennial or mid-decade census, or current population survey, under title 13, and

“(2) ‘category of civil service employment’ means—

“(A) each grade of the General Schedule described in section 5104 of this title;

“(B) each position subject to subchapter IV of chapter 53 of this title;

“(C) such occupational, professional, or other groupings (including occupational series), within the categories established under subparagraphs (A) and (B) of this paragraph as the Office determines appropriate.”;

(3) by inserting “(b)” before “It is the policy”; and

(4) by adding at the end thereof the following new subsection:

“(c) Not later than 180 days after the date of the enactment of the Civil Service Reform Act of 1978, the Office of Personnel Management shall, by regulation, implement a minority recruitment program which shall provide, to the maximum extent practicable—

“(1) that each Executive agency conduct a continuing program for the recruitment of members of minorities for positions in the agency to carry out the policy set forth in subsection (b) in a manner designed to eliminate underrepresentation of minorities in the various categories of civil service employment within the Federal service, with special efforts directed at recruiting in minority communities, in educational institutions, and from other sources from which minorities can be recruited; and

“(2) that the Office conduct a continuing program of—

“(A) assistance to agencies in carrying out programs under paragraph (1) of this subsection, and

“(B) evaluation and oversight of such recruitment programs to determine their effectiveness in eliminating such minority underrepresentation.

“(d) Not later than 60 days after the date of the enactment of the Civil Service Reform Act of 1978, the Equal Employment Opportunity Commission shall—

“(1) establish the guidelines proposed to be used in carrying out the program required under subsection (c) of this section; and

"(2) make determinations of underrepresentation which are proposed to be used initially under such program; and

"(3) transmit to the Executive agencies involved, to the Office of Personnel Management, and to the Congress the determinations made under paragraph (2) of this subsection.

"(e) Not later than January 31 of each year, the Office shall prepare and transmit to each House of the Congress a report on the activities of the Office and of Executive agencies under subsection (c) of this section, including the affirmative action plans submitted under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), the personnel data file maintained by the Office of Personnel Management, and any other data necessary to evaluate the effectiveness of the program for each category of civil service employment and for each minority group designation, for the preceding fiscal year, together with recommendations for administrative or legislative action the Office considers appropriate."

TEMPORARY EMPLOYMENT LIMITATION

SEC. 311. (a) The total number of civilian employees in the executive branch, on September 30, 1979, on September 30, 1980, and on September 30, 1981, shall not exceed the number of such employees on September 30, 1977.

(b) (1) For the purpose of this section, "civilian employees in the executive branch" means all civilian employees within the executive branch of the Government (other than in the United States Postal Service or the Postal Rate Commission), whether employed on a full-time, part-time, or intermittent basis and whether employed on a direct hire or indirect hire basis.

(2) (A) Such term does not include individuals participating in special employment programs established for students and disadvantaged youth.

(B) The total number of individuals participating in such programs shall not at any time exceed 60,000.

(c) In applying the limitation of subsection (a)—

(1) part-time civilian employees in excess of the number of part-time civilian employees in the executive branch employed on September 30, 1977, may be counted as a fraction which is determined by dividing 40 hours into the average number of hours of such employees' regularly scheduled workweek; and

(2) the number of civilian employees in the executive branch on September 30, 1977, shall be determined on the basis of the number of such employees as set forth in the Monthly Report of Civilian Employment published by the Civil Service Commission.

(d) (1) The provisions of this section shall not apply during a time of war or during a period of national emergency declared by the Congress or the President.

(2) (A) Subject to the limitation of subparagraph (B) of this paragraph, the President may authorize employment of civilian employees in excess of the limitation of subsection (a) if he deems that such action is necessary in the public interest.

(B) *The President may not, under this paragraph, increase the maximum number of civilian employees in the executive branch by more than the percentage increase of the population of the United States since September 30, 1978, as estimated by the Bureau of the Census.*

(e) *The President shall provide that no increase occurs in the procurement of personal services by contract by reason of the enactment of this section except in cases in which it is to the financial advantage of the Government to do so.*

(f) *The President shall prescribe regulations to carry out the purposes of this section.*

(g) *The provisions of this section shall terminate on January 31, 1981.*

TEMPORARY EMPLOYMENT LIMITATION

TITLE IV—SENIOR EXECUTIVE SERVICE

GENERAL PROVISIONS

SEC. 401. (a) Chapter 21 of title 5, United States Code, is amended by inserting after section 2101 the following new section:

“§ 2101a. The Senior Executive Service

“The ‘Senior Executive Service’ consists of Senior Executive Service positions (as defined in section 3132(a)(2) of this title).”.

(b) *Section 2102(a)(1) of title 5, United States Code, is amended—*
 (1) *by striking out “and” at the end of subparagraph (A);*
 (2) *by adding “and” at the end of subparagraph (B); and*
 (3) *by adding at the end thereof the following new subparagraph:*

“(C) positions in the Senior Executive Service;”.

(c) *Section 2103(a) of title 5, United States Code, is amended by inserting before the period at the end thereof the following: “or the Senior Executive Service”.*

(d) *Section 2108(5) of title 5, United States Code (as amended in section 307 of this Act), is further amended—*

(1) *by striking out the period at the end thereof and inserting in lieu thereof a semicolon; and*

(2) *by adding at the end thereof the following:*

“but does not include applicants for, or members of, the Senior Executive Service.”.

(e) *The analysis for chapter 21 of title 5, United States Code, is amended by inserting after the item relating to section 2101 the following new item:*

“2101a. The Senior Executive Service.”.

AUTHORITY FOR EMPLOYMENT

SEC. 402. (a) Chapter 31 of title 5, United States Code, is amended by inserting after section 3112 (as added by section 307(a) of this Act), the following new subchapter:

SUBCHAPTER II—THE SENIOR EXECUTIVE SERVICE

“§ 3131. *The Senior Executive Service*

“(a) *It is the purpose of this subchapter to establish a Senior Executive Service to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality. The Senior Executive Service shall be administered so as to—*

“(1) *provide for a compensation system, including salaries, benefits, and incentives, and for other conditions of employment, designed to attract and retain highly competent senior executives;*

“(2) *ensure that compensation, retention, and tenure are contingent on executive success which is measured on the basis of individual and organizational performance (including such factors as improvements in efficiency, productivity, quality of work or service, cost efficiency, and timeliness of performance and success in meeting equal employment opportunity goals);*

“(3) *assure that senior executives are accountable and responsible for the effectiveness and productivity of employees under them;*

“(4) *recognize exceptional accomplishment;*

“(5) *enable the head of an agency to reassign senior executives to best accomplish the agency's mission;*

“(6) *provide for severance pay early retirement benefits, and placement assistance for senior executives who are removed from the Senior Executive Service for nondisciplinary reasons;*

“(7) *protect senior executives from arbitrary or capricious actions;*

“(8) *provide for program continuity and policy advocacy in the management of public programs;*

“(9) *maintain a merit personnel system free of prohibited personnel practices;*

“(10) *ensure accountability for honest, economical, and efficient Government;*

“(11) *ensure compliance with all applicable civil service laws, rules, and regulations, including those relating to equal employment opportunity, political activity, and conflicts of interest;*

“(12) *provide for the initial and continuing systematic development of highly competent senior executives;*

“(13) *provide for an executive system which is guided by the public interest and free from improper political interference; and*

“(14) *appoint career executives to fill Senior Executive Service positions to the extent practicable, consistent with the effective and efficient implementations of agency policies and responsibilities.*

“§ 3132. *Definitions and exclusions*

“(a) *For the purpose of this subchapter—*

“(1) *‘agency’ means an Executive agency, except a Government corporation and the General Accounting Office, but does not include—*

“(A) *any agency or unit thereof excluded from coverage by the President under subsection (c) of this section; or*

“(B) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, any positions in the Drug Enforcement Administration which are excluded from the competitive service under section 201 of the Crime Control Act of 1976 (90 Stat. 2425), and, as determined by the President, an Executive agency, or unit thereof, whose principal function is the conduct of foreign intelligence or counterintelligence activities;

“(2) ‘Senior Executive Service position’ means any position (other than a position in the Foreign Service of the United States or an administrative law judge position under section 3105 of this title) in an agency which is in GS-16, 17, or 18 of the General Schedule or in level IV or V of the Executive Schedule, or an equivalent position, which is not required to be filled by an appointment by the President by and with the advice and consent of the Senate, and in which an employee—

“(A) directs the work of an organizational unit;

“(B) is held accountable for the success of one or more specific programs or projects;

“(C) monitors progress toward organizational goals and periodically evaluates and makes appropriate adjustments to such goals;

“(D) supervises the work of employees other than personal assistants; or

“(E) otherwise exercises important policy-making, policy-determining, or other executive functions;

But does not include—

“(i) any position in the Foreign Service of the United States;

“(ii) an administrative law judge position under section 3105 of this title; or

“(iii) any position in the Drug Enforcement Administration which is excluded from the competitive service under section 201 of the Crime Control Act of 1976 (5 U.S.C. 5108 note; 90 Stat. 2425).

“(3) ‘senior executive’ means a member of the Senior Executive Service;

“(4) ‘career appointee’ means an individual in a Senior Executive Service position whose appointment to the position or previous appointment to another Senior Executive Service position was based on approval by the Office of Personnel Management of the executive qualifications of such individual;

appointment to another Senior Executive Service position was based on approval by the Office of the executive qualifications of such individual;

“(5) ‘limited term appointee’ means an individual appointed under a nonrenewable appointment for a term of 3 years or less to a Senior Executive Service position the duties of which will expire at the end of such term;

“(6) ‘limited emergency appointee’ means an individual appointed under a nonrenewable appointment, not to exceed 18 months, to a Senior Executive Service position established to meet a bona fide, unanticipated, urgent need;

“(7) ‘noncareer appointee’ means an individual in a Senior Executive Service position who is not a career appointee, a limited term appointee, or a limited emergency appointee;

“(8) ‘career reserved position’ means a position which is required to be filled by a career appointee and which is designated under subsection (b) of this section; and

“(9) ‘general position’ means any position, other than a career reserved position, which may be filled by either a career appointee, noncareer appointee, limited emergency appointee, or limited term appointee.

“(b)(1) For the purpose of paragraph (8) of subsection (a) of this section, the Office shall prescribe the criteria and regulations governing the designation of career reserved positions. The criteria and regulations shall provide that a position shall be designated as a career reserved position only if the filling of the position by a career appointee is necessary to ensure impartiality, or the public’s confidence in the impartiality, of the Government. The head of each agency shall be responsible for designating career reserved positions in such agency in accordance with such criteria and regulations.

“(2) The Office shall periodically review general positions to determine whether the positions should be designated as career reserved. If the Office determines that any such position should be so designated, it shall order the agency to make the designation.

“(3) Notwithstanding the provisions of any other law, any position to be designated as a Senior Executive Service position (except a position in the Executive Office of the President) which—

“(A) is under the Executive Schedule, or for which the rate of basic pay is determined by reference to the Executive Schedule, and

“(B) on the day before the date of the enactment of the Civil Service Reform Act of 1978 was specifically required under section 2102 of this title or otherwise required by law, to be in the competitive service.

shall be designated as a career reserved position if the position entails direct responsibility to the public for the management or operation of particular government programs or functions.

“(4) Not later than March 1 of each year, the head of each agency shall publish in the Federal Register a list of positions in the agency which were career reserved positions during the preceding calendar year.

“(c) An agency may file an application with the Office setting forth reasons why it, or a unit thereof, should be excluded from the coverage of this subchapter. The Office shall—

“(1) review the application and stated reasons,

“(2) undertake a review to determine whether the agency or unit should be excluded from the coverage of this subchapter, and

“(3) upon completion of its review, recommend to the President whether the agency or unit should be excluded from the coverage of this subchapter.

If the Office recommends that an agency or unit thereof be excluded from the coverage of this subchapter, the President may, on written

determination, make the exclusion for the period determined by the President to be appropriate.

“(d) Any agency or unit which is excluded from coverage under subsection (c) of this section shall make a sustained effort to bring its personnel system into conformity with the Senior Executive Service to the extent practicable.

“(e) The Office may at any time recommend to the President that any exclusive previously granted to an agency or unit thereof under subsection (c) of this section be revoked. Upon recommendation of the Office, the President may revoke, by written determination, any exclusion made under subsection (c) of this section.

“(f) If—

“(1) any agency is excluded under subsection (c) of this section, or

“(2) any exclusion is revoked under subsection (e) of this section,

the Office shall, within 30 days after the action, transmit to the Congress written notice of the exclusion or revocation.

“§ 3133. Authorization of positions; authority for appointment

“(a) During each odd-numbered calendar year, each agency shall—

“(1) examine its needs for Senior Executive Service positions for each of the 2 fiscal years beginning after such calendar year; and

“(2) submit to the Office of Personnel Management a written request for a specific number of Senior Executive Service positions for each of such fiscal years.

“(b) Each agency request submitted under subsection (a) of this section shall—

“(A) be based on the anticipated type and extent of program activities and budget requests of the agency for each of the 2 fiscal years involved; and

“(B) such other factors as may be prescribed from time to time by the Office; and

“(2) shall identify, by position title, positions which are proposed to be designated as or removed from designation as career reserved positions, and set forth justifications for such proposed actions.

“(c) The Office of Personnel Management, in consultation with the Office of Management and Budget, shall review the request of each agency and shall authorize, for each of the 2 fiscal years covered by requests required under subsection (b) of this section, a specific number of Senior Executive Service positions for each agency.

“(d) (1) The Office of Personnel Management may, on a written request of an agency or on its own initiative, make an adjustment in the number of positions authorized for any agency. Each agency request under this paragraph shall be submitted in such form, and shall be based on such factors, as the Office shall prescribe.

“(2) The total number of positions in the Senior Executive Service may not at any time during any fiscal year exceed 105 percent of the total number of positions authorized under subsection (c) of this section for such fiscal year.

“(e)(1) Not later than July 1, 1979, and from time to time thereafter as the Director of the Office of Personnel Management finds appropriate, the Director shall establish, by rule issued in accordance with section 1103(b) of this title, the number of positions out of the total number of positions in the Senior Executive Service, as authorized by this section or section 413 of the Civil Service Reform Act of 1978, which are to be career reserved positions. Except as provided in paragraph (2) of this subsection, the number of positions required by this subsection to be career reserved positions shall not be less than the number of the positions then in the Senior Executive Service which, before the date of such Act, were authorized to be filled only through competitive civil service examination.

“(2) The Director may, by rule, designate a number of career reserved positions which is less than the number required by paragraph (1) of this subsection only if the Director determines such lesser number necessary in order to designate as general positions one or more positions (other than positions described in section 3132(b)(3) of this title) which—

“(A) involve policymaking responsibilities which require the advocacy or management of programs of the President and support of controversial aspects of such programs;

“(B) involve significant participation in the major political policies of the President; or

“(C) require the senior executives in the positions to serve as a personal assistants of, or advisers to, Presidential appointees.

The Director shall provide a full explanation for his determination in each case.

“§ 3134. Limitations on noncareer and limited appointments

“(a) During each calendar year, each agency shall—

“(1) examine its needs for employment of noncareer appointees for the fiscal year beginning in the following year; and

“(2) submit to the Office of Personnel Management, in accordance with regulations prescribed by the Office, a written request for authority to employ a specific number of noncareer appointees for such fiscal year.

“(b) The number of noncareer appointees in each agency shall be determined annually by the Office on the basis of demonstrated need of the agency. The total number of noncareer appointees in all agencies may not exceed 10 percent of the total number of Senior Executive Service positions in all agencies.

“(c) Subject to the 10 percent limitation of subsection (b) of this section, the Office may adjust the number of noncareer positions authorized for any agency under subsection (b) of this section if emergency needs arise that were not anticipated when the original authorizations were made.

“(d) The number of Senior Executive Service positions in any agency which are filled by noncareer appointees may not at any time exceed the greater of—

“(1) 25 percent of the total number of Senior Executive Service positions in the agency; or

“(2) the number of positions in the agency which were filled on the date of the enactment of the Civil Service Reform Act of 1978 by—

“(A) noncareer executive assignments under subpart F of part 305 of title 5, Code of Federal Regulations, as in effect on such date, or

“(B) appointments to level IV or V of the Executive Schedule which were not required or such date to be made by and with the advice and consent of the Senate.

This subsection shall not apply in the case of any agency having fewer than 4 Senior Executive Service positions.

“(e) The total number of limited emergency appointees and limited term appointees in all agencies may not exceed 5 percent of the total number of Senior Executive Service positions in all agencies.

“§ 3135. Biennial report

“(a) The Office of Personnel Management shall submit to each House of the Congress, at the time the budget is submitted by the President to the Congress during each odd-numbered calendar year, a report on the Senior Executive Service. The report shall include—

“(1) the number of Senior Executive Service positions authorized for the then current fiscal year, in the aggregate and by agency, and the projected number of Senior Executive Service positions to be authorized for the next two fiscal years, in the aggregate and by agency;

“(2) the authorized number of career appointees and noncareer appointees, in the aggregate and by agency, for the then current fiscal year;

“(3) the position titles and descriptions of Senior Executive Service positions designated for the then current fiscal year;

“(4) a description of each exclusion in effect under section 3132(c) of this title during the preceding fiscal year;

“(5) the number of career appointees, limited term appointees, limited emergency appointees, and noncareer appointees, in the aggregate and by agency, employed during the preceding fiscal year;

“(6) the percentage of senior executives at each pay rate, in the aggregate and by agency, employed at the end of the preceding fiscal year;

“(7) the distribution and amount of performance awards, in the aggregate and by agency, paid during the preceding fiscal year;

“(8) the estimated number of career reserved position which, during the two fiscal years following the then current fiscal year, will become general positions and the estimated number of general positions which during such two fiscal years, will become career appointees; and [?].

“(9) such other information regarding the Senior Executive Service as the Office considers appropriate.

“(b) The Office of Personnel Management shall submit to each House of the Congress, at the time the budget is submitted to the Congress during each even-numbered calendar year, an interim report

showing changes in matters required to be reported under subsection (a) of this section.

“§ 3136. Regulations

“The Office of Personnel Management shall prescribe regulations to carry out the purpose of this subchapter.”.

(b) Section 3100 of title 5, United States Code, is amended by inserting at the end thereof the following new subsection:

“(c) Positions in the Senior Executive Service may not be filled under the authority of subsection (b) of this section.”.

(c) The analysis for chapter 31 of title 5, United States Code, is amended—

(1) by striking out the heading for chapter 31 and inserting in lieu thereof the following:

“CHAPTER 31—AUTHORITY FOR EMPLOYMENT

“SUBCHAPTER I—EMPLOYMENT AUTHORITIES”;

and

(2) by inserting at the end thereof the following:

“SUBCHAPTER II—THE SENIOR EXECUTIVE SERVICE

“Sec.

“§151. The Senior Executive Service.

“§152. Definitions and exclusions.

“§153. Authorization of positions; authority for appointment.

“§154. Limitations on noncareer appointments.

“§155. Biennial report.

“§156. Regulations.”.

EXAMINATION, CERTIFICATION, AND APPOINTMENT

SEC. 403. (a) Chapter 33 of title 5, United States Code, is amended by adding at the end thereof the following new subchapter:

“SUBCHAPTER VIII—APPOINTMENT, REASSIGNMENT, TRANSFER, AND DEVELOPMENT IN THE SENIOR EXECUTIVE SERVICE

“§ 3391. Definitions

“For the purpose of this subchapter, ‘agency’, ‘Senior Executive Service position’, ‘senior executive’, ‘career appointee’, ‘limited term appointee’, ‘limited emergency appointee’, ‘noncareer appointee’, and ‘general position’ have the meanings set forth in section 3132(a) of this title.

“§ 3392. General appointment provisions

“(a) Qualification standards shall be established by the head of each agency for each Senior Executive Service position in the agency—

“(1) in accordance with requirements established by the Office of Personnel Management, with respect to standards for career reserved positions, and

“(2) after consultation with the Office, with respect to standards for general positions.

“(b) Not more than 30 percent of the Senior Executive Service positions authorized under section 3133 of this title may at any time be filled by individuals who did not have 5 years of current continuous service in the civil service immediately preceding their initial appointment to the Senior Executive Service, unless the President certifies to the Congress that the limitation would hinder the efficiency of the Government. In applying the preceding sentence, any break in service of 3 days or less shall be disregarded.

“(c) If a career appointee is appointed by the President, by and with the advice and consent of the Senate, to a civilian position in the executive branch which is not in the Senior Executive Service, and the rate of basic pay payable for which is equal to or greater than the rate payable for level V of the Executive Schedule, the career appointee may elect (at such time and in such manner as the Office may prescribe) to continue to have the provisions of this title relating to basic pay, performance awards, awarding of ranks, severance pay, leave, and retirement apply as if the career appointee remained in the Senior Executive Service position from which he was appointed. Such provisions shall apply in lieu of the provisions which would otherwise apply—

“(1) to the extent provided under regulations prescribed by the Office, and

“(2) so long as the appointee continues to serve under such Presidential appointment.

“(d) Appointment or removal of a person to or from any Senior Executive Service position in an independent regulatory commission shall not be subject, directly or indirectly, to review or approval by any officer or entity within the Executive Office of the President.

“§ 3393. Career appointments

“(a) Each agency shall establish a recruitment program, in accordance with guidelines which shall be issued by the Office of Personnel Management, which provides for recruitment of career appointees from—

“(1) all groups of qualified individuals within the civil service;

or

“(2) all groups of qualified individuals whether or not within the civil service.

“(b) Each agency shall establish one or more executive resources boards, as appropriate, the members of which shall be appointed by the head of the agency from among employees of the agency. The boards shall, in accordance with merit staffing requirements established by the Office, conduct the merit staffing process for career appointees, including—

“(1) reviewing the executive qualifications of each candidate for a position to be filled by a career appointee; and

“(2) making written recommendations to the appropriate appointing authority concerning such candidates

“(c) (1) The Office shall establish one or more qualifications review boards, as appropriate. It is the function of the boards to certify the executive qualifications of candidates for initial appointment as career appointees in accordance with regulations prescribed by the

Office. Of the members of each board more than one-half shall be appointed from among career appointees. Appointments to such boards shall be made on a non-partisan basis, the sole selection criterion being the professional knowledge of public management and knowledge of the appropriate occupational fields of the intended appointee.

“(2) The Office shall, in consultation with the various qualification review boards, prescribe criteria for establishing executive qualifications for appointment of career appointees. The criteria shall provide for—

“(A) consideration of demonstrated executive experience;

“(B) consideration of successful participation in a career executive development program which is approved by the Office; and

“(C) sufficient flexibility to allow for the appointment of individuals who have special or unique qualities which indicate a likelihood of executive success and who would not otherwise be eligible for appointment.

“(d) An individual’s initial appointment as a career appointee shall become final only after the individual has served a 1-year probationary period as a career appointee.

“(e) Each career appointee shall meet the executive qualifications of the position to which appointed, as determined in writing by the appointing authority.

“(f) The title of each career reserved position shall be published in the Federal Register.

“§ 3394. Noncareer and limited appointments

“(a) Each noncareer appointee, limited term appointee, and limited emergency appointee shall meet the qualifications of the position to which appointed, as determined in writing by the appointing authority.

“(b) An individual may not be appointed as a limited term appointee or as a limited emergency appointee without the prior approval of the exercise of such appointing authority by the office of Personnel Management.

“§ 3395. Reassignment and transfer within the Senior Executive Service

“(a) (1) A career appointee in an agency—

“(A) may, subject to paragraph (2) of this subsection, be reassigned to any Senior Executive Service position in the same agency for which the appointee is qualified; and

“(B) may transfer to a Senior Executive Service position in another agency for which the appointee is qualified, with the approval of the agency to which the appointee transfers.

“(2) A career appointee may be reassigned to any Senior Executive Service position only if the career appointee receives a written notice of the reassignment at least 15 days in advance of such reassignment.

“(b) (1) Notwithstanding section 3394(b) of this title, a limited emergency appointee may be reassigned to another Senior Executive Service position in the same agency established to meet a bona fide, unanticipated, urgent need, except that the appointee may not serve in one or more positions in such agency under such appointment in excess of 18 months.

“(2) Notwithstanding section 3394(b) of this title, a limited term appointee may be reassigned to another Senior Executive Service position in the same agency the duties of which will expire at the end of a term of 3 years or less, except that the appointee may not serve in one or more positions in the agency under such appointment in excess of 3 years.

“(c) A limited term appointee or a limited emergency appointee may not be appointed to, or continue to hold, a position under such an appointment if, within the preceding 48 months, the individual has served more than 36 months, in the aggregate, under any combination of such types of appointment.

“(d) A noncareer appointee in an agency—

“(1) may be reassigned to any general position in the agency for which the appointee is qualified; and

“(2) may transfer to a general position in another agency with the approval of the agency to which the appointee transfers.

“(e) (1) Except as provided in paragraph (2) of this subsection, a career appointee in an agency may not be involuntarily reassigned—

“(A) within 120 days after an appointment of the head of the agency; or

“(B) within 120 days after the appointment in the agency of the career appointee’s most immediate supervisor who—

“(i) is a noncareer appointee; and

“(ii) has the authority to reassign the career appointee.

“(2) Paragraph (1) of this subsection does not apply with respect to—

“(A) any reassignment under section 4314(b)(3) of this title; or

“(B) any disciplinary action initiated before an appointment referred to in paragraph (1) of this subsection.

“§ 3396. Development for and within the Senior Executive Service

“(a) The Office of Personnel Management shall establish programs for the systematic development of candidates for the Senior Executive Service and for the continuing development of senior executives, or require agencies to establish such programs which meet criteria prescribed by the Office.

“(b) The Office shall assist agencies in the establishment of programs required under subsection (a) of this section and shall monitor the implementation of the program. If the Office finds that any agency’s program under subsection (a) of this section is not in compliance with the criteria prescribed under such subsection, it shall require the agency to take such corrective action as may be necessary to bring the program into compliance with the criteria.

“(c) (1) The head of an agency may grant a sabbatical to any career appointee for not to exceed 11 months in order to permit the appointee to engage in study or uncompensated work experience which will contribute to the appointee’s development and effectiveness. A sabbatical shall not result in loss of, or reduction in, pay, leave to which the career appointee is otherwise entitled, credit for time or service, or performance or efficiency rating. The head of the agency may authorize in accordance with chapter 57 of this title such travel expenses (including

per diem allowances) as the head of the agency may determine to be essential for the study or experience.

“(2) A sabbatical under this subsection may not be granted to any career appointee—

“(A) more than once in any 10-year period;

“(B) unless the appointee has completed 7 years of service—

“(i) in one or more positions in the Senior Executive Service;

“(ii) in one or more other positions in the civil service the level of duties and responsibilities of which are equivalent to the level of duties and responsibilities of positions in the Senior Executive Service; or

“(iii) in any combination of such positions, except that not less than 2 years of such 7 years of service must be in the Senior Executive Service; and

“(C) if the appointee is eligible for voluntary retirement with a right to an immediate annuity under section 8336 of this title.

Any period of assignment under section 3373 of this title, relating to assignments of employees to State and local governments, shall not be considered a period of service for the purpose of subparagraph (B) of this paragraph.

“(3) (A) Any career appointee in an agency may be granted a sabbatical under this subsection only if the appointee agrees, as a condition of accepting the sabbatical, to serve in the civil service upon the completion of the sabbatical for a period of 2 consecutive years.

“(B) Each agreement required under subparagraph (A) of this paragraph shall provide that in the event the career appointee fails to carry out the agreement (except for good and sufficient reason as determined by the head of the agency who granted the sabbatical) the appointee shall be liable to the United States for payment of all expenses (including salary) of the sabbatical. The amount shall be treated as a debt due the United States.

“(d) The Office shall encourage and assist individuals to improve their skills and increase their contribution by service in a variety of agencies as well as by accepting temporary placements in State or local governments or in the private sector.

“§ 3397. Regulations

“The Office of Personnel Management shall prescribe regulations to carry out the purpose of this subchapter.”.

(b) The analysis for chapter 33 of title 5, United States Code, is amended by inserting after the item relating to section 3385 the following:

“SUBCHAPTER VIII—APPOINTMENT, REASSIGNMENT, TRANSFER, AND DEVELOPMENT IN THE SENIOR EXECUTIVE SERVICE

“Sec.

“3391. Definitions.

“3392. General appointment provisions.

“3393. Career appointments.

“3394. Noncareer and limited appointments.

“3395. Reassignment and transfer within the Senior Executive Service.

“3396. Development for and within the Senior Executive Service.

“3397. Regulations.”.

RETENTION PREFERENCE

SEC. 404. (a) Section 3501(b) of title 5, United States Code, is amended by striking out the period at the end thereof and inserting in lieu thereof: "or to a member of the Senior Executive Service."

(b) Chapter 35 of title 5, United States Code, is amended by adding at the end thereof the following new subchapter:

"SUBCHAPTER V—REMOVAL, REINSTATEMENT, AND GUARANTEED PLACEMENT IN THE SENIOR EXECUTIVE SERVICE

"§ 3591. Definitions

"For the purpose of this subchapter, 'agency', 'Senior Executive Service position', 'senior executive', 'career appointee', 'limited term appointee', 'limited emergency appointee', 'noncareer appointee', and 'general position' have the meanings set forth in section 3132(a) of this title.

"§ 3592. Removal from the Senior Executive Service

"(a) Except as provided in subsection (b) of this section, a career appointee may be removed from the Senior Executive Service to a civil service position outside of the Senior Executive Service—

"(1) during the 1-year period of probation under section 3393 (d) of this title, or

"(2) at any time for less than fully successful executive performance as determined under subchapter II of chapter 43 of this title,

except that in the case of a removal under paragraph (2) of this subsection the career appointee shall, at least 15 days before the removal, be entitled, upon request, to an informal hearing before an official designated by the Merit System Protection Board at which the career appointee may appear and present arguments, but such hearing shall not give the career appointee the right to initiate an action with the Board under section 7701 of this title, nor need the removal action be delayed as a result of the granting of such hearing.

"(b) (1) Except as provided in paragraph (2) of this subsection, a career appointee in an agency may not be involuntarily removed—

"(A) within 120 days after an appointment of the head of the agency; or

"(B) within 120 days after the appointment in the agency of the career appointee's most immediate supervisor who—

"(i) is a noncareer appointee; and

"(ii) has the authority to remove the career appointee.

"(2) Paragraph (1) of this subsection does not apply with respect to—

"(A) any removal under section 4314(b)(3) of this title or;

"(B) any disciplinary action initiated before an appointment referred to in paragraph (1) of this subsection.

"(c) A limited emergency appointee, limited term appointee, or noncareer appointee may be removed from the service at any time.

“§ 3593. Reinstatement in the Senior Executive Service

“(a) A former career appointee may be reinstated, without regard to section 3393 (b) and (c) of this title, to any Senior Executive Service position for which the appointee is qualified if—

“(1) the appointee has successfully completed the probationary period established under section 3393 (d) of this title; and

“(2) the appointee left the Senior Executive Service for reasons other than misconduct, neglect of duty, malfeasance, or less than fully successful executive performance as determined under subchapter II of chapter 43 of this title.

“(b) A career appointee who is appointed by the President to any civil service position outside the Senior Executive Service and who leaves the position for reasons other than misconduct, neglect of duty, or malfeasance shall be entitled to be placed in the Senior Executive Service if the appointee applies to the Office of Personnel Management within 90 days after separation from the Presidential appointment.

“§ 3594. Guaranteed placement in other personnel systems

“(a) A career appointee who was appointed from a civil service position held under a career or career-conditional appointment (or an appointment of equivalent tenure, as determined by the Office of Personnel Management) and who, for reasons other than misconduct, neglect of duty, or malfeasance, is removed from the Senior Executive Service during the probationary period under section 3393 (d) of this title, shall be entitled to be placed in a civil service position (other than a Senior Executive Service position) in any agency.

“(b) A career appointee—

“(1) who has completed the probationary period under section 3393 (d) of this title; and

“(2) who is removed from the Senior Executive Service for less than fully successful executive performance as determined under subchapter II of chapter 43 of this title;

shall be entitled to be placed in a civil service position (other than a Senior Executive Service position) in any agency.

“(c) (1) For purposes of subsections (a) and (b) of this section—

“(A) the position in which any career appointee is placed under such subsections shall be a continuing position at GS-15 or above of the General Schedule, or an equivalent position, and, in the case of a career appointee referred to in subsection (a) of this section, the career appointee shall be entitled to an appointment of a tenure equivalent to the tenure of the appointment held in the position from which the career appointee was appointed;

“(B) any career appointee placed under subsection (a) or (b) of this section shall be entitled to receive basic pay at the higher of—

“(i) the rate of basic pay in effect for the position in which placed;

“(ii) the rate of basic pay in effect at the time of the placement for the position the career appointee held in the civil service immediately before being appointed to the Senior Executive Service; or

“(iii) the rate of basic pay in effect for the career appointee immediately before being placed under subsection (a) or (b) of this section; and

“(C) the placement of any career appointee under subsection (a) or (b) of this section may not be made to a position which would cause the separation or reduction in grade of any other employee.

“(2) An employee who is receiving basic pay under paragraph (1) (B) (ii) or (iii) of this subsection is entitled to have the basic pay rate of the employee increased by 50 percent of the amount of each increase in the maximum rate of basic pay for the grade of the position in which the employee is placed under subsection (a) or (b) of this section until the rate is equal to the rate in effect under paragraph (1) (B) (i) of this subsection for the position in which the employee is placed.

“§ 3595. Regulations

“The Office of Personnel Management shall prescribe regulations to carry out the purpose of this subchapter.”.

(c) The chapter analysis for chapter 35 of title 5, United States Code, is amended by inserting the following new item:

“SUBCHAPTER V—REMOVAL, REINSTATEMENT, AND GUARANTEED PLACEMENT IN THE SENIOR EXECUTIVE SERVICE

“Sec.

“3591. Definitions.

“3592. Removal from the Senior Executive Service.

“3593. Reinstatement in the Senior Executive Service.

“3594. Guaranteed placement in other personnel systems.

“3595. Regulations.”.

PERFORMANCE RATING

Sec. 405. (a) Chapter 43 of title 5, United States Code, is amended by adding at the end thereof the following:

“SUBCHAPTER II—PERFORMANCE APPRAISAL IN THE SENIOR EXECUTIVE SERVICE

“§ 431L Definitions

“For the purpose of this subchapter, ‘agency’, ‘senior executive’, and ‘career appointee’ have the meanings set forth in section 3132(a) of this title.

“§ 4312. Senior Executive Service performance appraisal systems

“(a) Each agency shall, in accordance with standards established by the Office of Personnel Management, develop one or more performance appraisal systems designed to—

“(1) permit the accurate evaluation of performance in any position on the basis of criteria which are related to the position and which specify the critical elements of the position;

“(2) provide for systematic appraisals of performance of senior executives;

“(3) encourage excellence in performance by senior executives; and

“(4) provide a basis for making eligibility determinations for retention in the Senior Executive Service and for Senior Executive Service performance awards.

“(b) Each performance appraisal system established by an agency under subsection (a) of this section shall provide—

“(1) that, on or before the beginning of each rating period, performance requirements for each senior executive in the agency are established in consultation with the senior executive and communicated to the senior executive;

“(2) that written appraisals of performance are based on the individual and organizational performance requirements established for the rating period involved; and

“(3) that each senior executive in the agency is provided a copy of the appraisal and rating under section 4314 of this title and is given an opportunity to respond in writing and have the rating reviewed by an employee in a higher executive level in the agency before the rating becomes final.

“(c) (1) The Office shall review each agency's performance appraisal system under this section, and determine whether the agency performance appraisal system meets the requirements of this subchapter.

“(2) The Comptroller General shall from time to time review performance appraisal systems under this section to determine the extent to which any such system meets the requirements under this subchapter and shall periodically report its findings to the Office and to each House of the Congress.

“(3) If the Office determines that an agency performance appraisal system does not meet the requirements under this subchapter (including regulations prescribed under section 4315), the agency shall take such corrective action as may be required by the Office.

“(d) A senior executive may not appeal any appraisal and rating under any performance appraisal system under this section.

“§ 4313. Criteria for performance appraisals

“Appraisals of performance in the Senior Executive Service shall be based on both individual and organizational performance, taking into account such factors as—

“(1) improvements in efficiency, productivity, and quality of work or service, including any significant reduction in paperwork;

“(2) cost efficiency;

“(3) timeliness of performance;

“(4) other indications of the effectiveness, productivity, and quality of the employees for whom the senior executive is responsible; and

“(5) meeting affirmative action goals and achievement of equal employment opportunity requirements.

“§ 4314. Ratings for performance appraisals

“(a) Each performance appraisal system shall provide for annual summary ratings of levels of performance as follows:

“(1) one or more fully successful levels,

“(2) a minimally satisfactory level, and

“(3) an unsatisfactory level.

“(b) *Each performance appraisal system shall provide that—*

“(1) *any appraisal and any rating under such system—*

“(A) *are made only after review and evaluation by a performance review board established under subsection (c) of this section;*

“(B) *are conducted at least annually, subject to the limitation of subsection (c) (3) of this section;*

“(C) *in the case of a career appointee, may not be made within 120 days after the beginning of a new Presidential administration; and*

“(D) *are based on performance during a performance appraisal period the duration of which shall be determined under guidelines established by the Office of Personnel Management, but which may be terminated in any case in which the agency making an appraisal determines that an adequate basis exists on which to appraise and rate the senior executive's performance;*

“(2) *any career appointee receiving a rating at any of the fully successful levels under subsection (a) (1) of this section may be given a performance award under section 5384 of this title;*

“(3) *any senior executive receiving an unsatisfactory rating under subsection (a) (3) of this section shall be reassigned or transferred within the Senior Executive Service, or removed from the Senior Executive Service, but any senior executive who receives 2 unsatisfactory ratings in any period of 5 consecutive years shall be removed from the Senior Executive Service; and*

“(4) *any senior executive who twice in any period of 3 consecutive years receives less than fully successful ratings shall be removed from the Senior Executive Service.*

“(c) (1) *Each agency shall establish, in accordance with regulations prescribed by the Office, one or more performance review boards, as appropriate. It is the function of the boards to make recommendations to the appropriate appointing authority of the agency relating to the performance of senior executives in the agency.*

“(2) *The supervising official of the senior executive shall provide to the performance review board an initial appraisal of the senior executive's performance. Before making any recommendation with respect to the senior executive, the board shall review any response by the senior executive to the initial appraisal and conduct such further review as the board finds necessary.*

“(3) *Performance appraisals under this subchapter with respect to any senior executive shall be made by the appointing authority only after considering the recommendations by the performance review board with respect to such senior executive under paragraph (2) of this subsection.*

“(4) *Members of performance review boards shall be appointed in such a manner as to assure consistency, stability, and objectivity in performance appraisal. Notice of the appointment of an individual to serve as a member shall be published in the Federal Register.*

“(5) *In the case of an appraisal of a career appointee, more than one-half of the members of the performance review board shall consist*

of career appointees. The requirement of the preceding sentence shall not apply in any case in which the Office determines that there exists an insufficient number of career appointees available to comply with the requirement.

“(d) The Office shall include in each report submitted to each House of the Congress under section 3135 of this title a report of—

“(1) the performance of any performance review board established under this section,

“(2) the number of individuals removed from the Senior Executive Service under subchapter V of chapter 35 of this title for less than fully successful executive performance, and

“(3) the number of performance awards under section 5384 of this title.

“§ 4315. Regulations

“The Office of Personnel Management shall prescribe regulations to carry out the purpose of this subchapter.”.

(b) The analysis for chapter 43 of title 5, United States Code, is amended by inserting at the end thereof the following:

“SUBCHAPTER II—PERFORMANCE APPRAISAL IN THE SENIOR EXECUTIVE SERVICE

“Sec.

“4311. Definitions.

“4312. Senior Executive Service performance appraisal systems.

“4313. Criteria for performance appraisals.

“4314. Ratings for performance appraisals.

“4315. Regulations.”.

AWARDING OF RANKS

SEC. 406. (a) Chapter 45 of title 5, United States Code, is amended by adding at the end thereof the following new section:

“§ 4507. Awarding of ranks in the Senior Executive Service

“(a) For the purpose of this section, ‘agency’, ‘senior executive’, and ‘career appointee’ have the meanings set forth in section 3132(a) of this title.

“(b) Each agency shall submit annually to the Office recommendations of career appointees in the agency to be awarded the rank of Meritorious Executive or Distinguished Executive. The recommendations may take into account the individual’s performance over a period of years. The Office shall review such recommendations and provide to the President recommendations as to which of the agency recommended appointees should receive such rank.

“(c) During any fiscal year, the President may, subject to subsection (d) of this section, award to any career appointee recommended by the Office the rank of—

“(1) Meritorious Executive, for sustained accomplishment, or

“(2) Distinguished Executive, for sustained extraordinary accomplishment.

A career appointee awarded a rank under paragraph (1) or (2) of this section shall not be entitled to be awarded that rank during the following 4 fiscal years.

“(d) During any fiscal year—

“(1) the number of career appointees awarded the rank of Meritorious Executive may not exceed 5 percent of the Senior Executive Service; and

“(2) the number of career appointees awarded the rank of Distinguished Executive may not exceed 1 percent of the Senior Executive Service.

“(e) (1) Receipt by a career appointee of the rank of Meritorious Executive entitles such individual to a lump-sum payment of \$10,000, which shall be in addition to the basic pay paid under section 5382 of this title or any award paid under section 5384 of this title.

“(2) Receipt by a career appointee of the rank of Distinguished Executive entitles the individual to a lump-sum payment of \$20,000, which shall be in addition to the basic pay paid under section 5382 of this title or any award paid under section 5384 of this title.”

(b) The analysis for chapter 45 of title 5, United States Code, is amended by adding at the end thereof the following new item:

“4507. Awarding of Ranks in the Senior Executive Service.”

PAY RATES AND SYSTEMS

SEC. 407. (a) Chapter 53 of title 5, United States Code, is amended by adding at the end thereof the following new subchapter:

“SUBCHAPTER VIII—PAY FOR THE SENIOR EXECUTIVE SERVICE

“§ 5381. Definitions

“For the purpose of this subchapter, ‘agency’, ‘Senior Executive Service position’, and ‘senior executive’ have the meanings set forth in section 5132(a) of this title.

“§ 5382. Establishment and adjustment of rates of pay for the Senior Executive Service

“(a) There shall be 5 or more rates of basic pay for the Senior Executive Service, and each senior executive shall be paid at one of the rates. The rates of basic pay shall be initially established and thereafter adjusted by the President subject to subsection (b) of this section.

“(b) In setting rates of basic pay, the lowest rate for the Senior Executive Service shall not be less than the minimum rate of basic pay payable for GS-16 of the General Schedule and the highest rate shall not exceed the rate for level IV of the Executive Schedule. The payment of the rates shall not be subject to the pay limitation of section 5308 or 5373 of this title.

“(c) Subject to subsection (b) of this section, effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5305 of this title in the rates of pay under the General Schedule, each rate of basic pay for the Senior Executive Service shall be adjusted by an amount determined by the President to be appropriate. The adjusted rates of basic pay for the Senior Executive Service shall be included in the report transmitted to the Congress by the President under section 5305 (a) (3) or (c) (1) of this title.

“(d) The rates of basic pay that are established and adjusted under this section shall be printed in the Federal Register and shall supersede any prior rates of basic pay for the Senior Executive Service.

“§ 5383. Setting individual senior executive pay

“(a) Each appointing authority shall determine, in accordance with criteria established by the Office of Personnel Management, which of the rates established under section 5382 of this title shall be paid to each senior executive under such appointing authority.

“(b) In no event may the aggregate amount paid to a senior executive during any fiscal year under sections 4507, 5382, and 5384 of this title exceed the annual rate payable for positions at level I of the Executive Schedule in effect at the end of such fiscal year.

“(c) Except for any pay adjustment under section 5382 of this title, the rate of basic pay for any senior executive may not be adjusted more than once during any 12-month period.

“(d) The rate of basic pay for any career appointee may be reduced from any rate of basic pay to any lower rate of basic pay only if the career appointee receives a written notice of the reduction at least 15 days in advance of the reduction.

“§ 5384. Performance awards in the Senior Executive Service

“(a) (1) To encourage excellence in performance by career appointees, performance awards shall be paid to career appointees in accordance with the provisions of this section.

“(2) Such awards shall be paid in a lump sum and shall be in addition to the basic pay paid under section 5382 of this title or any award paid under section 4507 of this title.

“(b) (1) No performance award under this section shall be paid to any career appointee whose performance was determined to be less than fully successful at the time of the appointee’s most recent performance appraisal and rating under subchapter II of chapter 43 of this title.

“(2) The amount of a performance award under this section shall be determined by the agency head but may not exceed 20 percent of the career appointee’s rate of basic pay.

“(3) The number of career appointees in any agency paid performance awards under this section during any fiscal year may not exceed 50 percent of the number of Senior Executive Service positions in such agency. This paragraph shall not apply in the case of any agency which has less than 4 Senior Executive Service positions.

“(c) Performance awards paid by any agency under this section shall be based on recommendations by performance review boards established by such agency under section 4314 of this title.

(d) The Office of Personnel Management may issue guidance to agencies concerning the proportion of Senior Executive Service salary expenses that may be appropriately applied to payment of performance awards and the distribution of awards.

“§ 5385. Regulations

“The Office of Personnel Management shall prescribe regulations to carry out the purpose of this subchapter.”.

(c) The analysis of chapter 53 of title 5, United States Code, is amended by adding at the end thereof the following new items:

"SUBCHAPTER VIII—PAY FOR THE SENIOR EXECUTIVE SERVICE**"Sec.****"5381. Definitions.****"5382. Establishment and adjustment of rates of pay for the Senior Executive Service.****"5383. Setting individual senior executive pay.****"5384. Performance awards in the Senior Executive Service.****"5385. Regulations."****PAY ADMINISTRATION****SEC. 408. (a) Chapter 55 of title 5, United States Code, is amended—****(1) by inserting "other than an employee or individual excluded by section 5541(2) (xvi) of this section" immediately before the period at the end of section 5504(a) (B) ;****(2) by amending section 5541(2) by striking out "or" after clause (xiv), by striking out the period after clause (xv) and inserting "; or" in lieu thereof, and adding the following clause at the end thereof:****"(xvi) member of the Senior Executive Service." ;****and****(3) by inserting "other than a member of the Senior Executive service" after "employee" in section 5595 (a) (2) (i).****(b) (1) Section 5311 of title 5, United States Code, is amended by inserting " ; other than Senior Executive Service positions," after "positions".****(2) Section 5331 (b) of title 5, United States Code, is amended by inserting " ; other than Senior Executive Service positions," after "positions".****TRAVEL, TRANSPORTATION, AND SUBSISTENCE****SEC. 409. (a) Section 5723(a) (1) of title 5, United States Code, is amended by striking out " ; and" and inserting in lieu thereof "or of a new appointee to the Senior Executive Service ; and".****(b) Subchapter IV of chapter 57 of title 5, United States Code, is amended by adding at the end thereof the following new section:****"§ 5752. Travel expenses of Senior Executive Service candidates****"Employing agencies may pay candidates for Senior Executive Service positions travel expenses incurred incident to preemployment interviews requested by the employing agency."****(c) The analysis for chapter 57 of title 5, United States Code, is amended by inserting after the item relating to section 5751 the following new item:****"5752. Travel expenses of Senior Executive Service candidates."****LEAVE****SEC. 410. Section 6304 of title 5, United States Code, is amended—****(1) in subsection (a), by striking out "and (e)" and inserting in lieu thereof "(e), and (f)"; and****(2) by adding at the end thereof the following new subsection:****"(f) Annual leave accrued by an individual while serving in a position in the Senior Executive Service shall not be subject to the limitation on accumulation otherwise imposed by this section."**

DISCIPLINARY ACTIONS

SEC. 411. Chapter 75 of title 5, United States Code, is amended—

(1) by inserting the following in the chapter analysis after subchapter IV:

"SUBCHAPTER V—SENIOR EXECUTIVE SERVICE

"Sec.

"7541. Definitions.

"7542. Actions covered.

"7543. Cause and procedure.";

and

(2) by adding the following after subchapter IV:

"SUBCHAPTER V—SENIOR EXECUTIVE SERVICE

"§ 7541. Definitions

"For the purpose of this subchapter—

"(1) 'employee' means a career appointee in the Senior Executive Service who—

"(A) has completed the probationary period prescribed under section 3393(d) of this title; or

"(B) was covered by the provisions of subchapter II of this chapter immediately before appointment to the Senior Executive Service; and

"(2) 'suspension' has the meaning set forth in section 7501(2) of this title.

"§ 7542. Actions covered

"This subchapter applies to a removal from the civil service or suspension for more than 14 days, but does not apply to an action initiated under section 1206 of this title, to a suspension or removal under section 7532 of this title, or to a removal under section 3592 of this title.

"§ 7543. Cause and procedure

"(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

"(b) An employee against whom an action covered by this subchapter is proposed is entitled to—

"(1) at least 30 days' advance written notice, unless there is reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment can be imposed, stating specific reasons for the proposed action;

"(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

"(3) be represented by an attorney or other representative; and

"(4) a written decision and specific reasons therefor at the earliest practicable date.

"(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b) (2) of this section.

“(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

“(e) Copies of the notice of proposed action, the answer of the employee when written, and a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Merit Systems Protection Board upon its request and to the employee affected upon the employee’s request.”

RETIREMENT

SEC. 412. (a) Section 8336 of title 5, United States Code, is amended by redesignating subsection (h) as subsection (i) and inserting immediately after subsection (g) the following new subsection:

“(h) A member of the Senior Executive Service who is removed from the Senior Executive Service for less than fully successful executive performance (as determined under subchapter II of chapter 43 of this title) after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to an annuity.”

(b) Section 8339(h) of title 5, United States Code, is amended by striking out “section 8336(d)” and inserting in lieu thereof “section 8336 (d) or (h)”.

CONVERSION TO THE SENIOR EXECUTIVE SERVICE

SEC. 413. (a) For the purpose of this section, “agency”, “Senior Executive Service position”, “career appointee”, “career reserved position”, “limited term appointee”, “non-career appointee”, and “general position” have the meanings set forth in section 3132(a) of title 5, United States Code (as added by this title), and “Senior Executive Service” has the meaning set forth in section 2101a of such title 5 (as added by this title).

(b) (1) Under the guidance of the Office of Personnel Management, each agency shall—

(A) designate those positions which it considers should be Senior Executive Service positions and designate which of those positions it considers should be career reserved positions; and

(B) submit to the Office a written request for—

(i) a specific number of Senior Executive Service positions; and

(ii) authority to employ a specific number of noncareer appointees.

(2) The Office of Personnel Management shall review the designations and requests of each agency under paragraph (1) of this subsection, and shall establish interim authorizations in accordance with sections 3133 and 3134 of title 5, United States Code (as added by this Act), and shall publish the titles of the authorized positions in the Federal Register.

(c) (1) *Each employee serving in a position at the time it is designated as a Senior Executive Service position under subsection (b) of this section shall elect to—*

(A) *decline conversion and be appointed to a position under such employee's current type of appointment and pay system, retaining the grade, seniority, and other rights and benefits associated with such type of appointment and pay system; or*

(B) *accept conversion and be appointed to a Senior Executive Service position in accordance with the provisions of subsections (d), (e), (f), (g), and (h) of this section.*

The appointment of an employee in an agency because of an election under subparagraph (A) of this paragraph shall not result in the separation or reduction in grade of any other employee in such agency.

(2) *Any employee in a position which has been designated a Senior Executive Service position under this section shall be notified in writing of such designation, the election required under paragraph (1) of this subsection, and the provisions of subsections (d), (e), (f), (g), and (h) of this section. The employee shall be given 90 days from the date of such notification to make the election under paragraph (1) of this subsection.*

(d) *Each employee who has elected to accept conversion to a Senior Executive Service position under subsection (c) (1) (B) of this section and who is serving under—*

(1) *a career or career-conditional appointment; or*

(2) *a similar type of appointment in an excepted service position, as determined by the Office;*

in a position which is designated as a Senior Executive Service position shall be appointed as a career appointee to such Senior Executive Service position without regard to section 3393 (c) and (d) of title 5, United States Code (as added by this title).

(e) *Each employee who has elected conversion to a Senior Executive Service position under subsection (c) (1) (B) of this section and who is serving under an excepted appointment in a position which is not designated a career reserved position in the Senior Executive Service, but is—*

(1) *a position in Schedule C of subpart C of part 213 of title 5, Code of Federal Regulations;*

(2) *a position filled by noncareer executive assignment under subpart F of part 305 of title 5, Code of Federal Regulations; or*

(3) *a position in the Executive Schedule under subchapter II of chapter 53 of title 5, United States Code, other than a career Executive Schedule position;*

shall be appointed as a noncareer appointee to a Senior Executive Service position.

(f) *Each employee who has elected conversion to a Senior Executive Service position under subsection (c) (1) (B) of this section, who is serving in a position described in paragraph (1), (2), or (3) of subsection (e) of this section, and whose position is designated as a career reserved position under subsection (b) of this section shall be appointed as a noncareer appointee to an appropriate general position in the Senior Executive Service or shall be separated.*

(g) Each employee who has elected conversion to a Senior Executive Service position under subsection (c) (1) (B) of this section, who is serving in a position described in paragraph (1), (2), or (3) of subsection (e) of this section, and whose position is designated as a Senior Executive Service position and who has reinstatement eligibility to a position in the competitive service, may, on request to the Office be appointed as a career appointee to a Senior Executive Service position. The name of, and basis for reinstatement eligibility for, each employee appointed as a career appointee under this subsection shall be published in the Federal Register.

(h) Each employee who has elected conversion to a Senior Executive Service position under subsection (c) (1) (B) of this section and who is serving under a limited executive assignment under subpart F of part 305 of title 5, Code of Federal Regulations, shall—

(1) be appointed as a limited term appointee to a Senior Executive Service position if the position then held by such employee will terminate within 3 years of the date of such appointment;

(2) be appointed as a noncareer appointee to a Senior Executive Service position if the position then held by such employee is designated as a general position; or

(3) be appointed as a noncareer appointee to a general position if the position then held by such employee is designated as a career reserved position.

(i) The rate of basic pay for any employee appointed to a Senior Executive Service position under this section shall be greater than or equal to the rate of basic pay payable for the position held by such employee at the time of such appointment.

(j) Any employee who is aggrieved by any action by any agency under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of title 5, United States Code (as added by this title). An agency shall take any corrective action which the Board orders in its decision on an appeal under this subsection.

(k) The Office shall prescribe regulations to carry out the purpose of this section.

LIMITATIONS ON EXECUTIVE POSITIONS

SEC. 414. (a) (1) (A) The following provisions of section 5108 of title 5, United States Code, relating to special authority to place positions at GS-16, 17, and 18 of the General Schedule, are hereby repealed:

(i) paragraphs (2), (4) through (11), and (13) through (16) of subsection (c), and

(ii) subsections (d) through (g).

(B) Notwithstanding any other provision of law (other than section 5108 of such title 5), the authority granted to an agency (as defined in section 5102 (a) (1) of such title 5) under any such provision to place one or more positions in GS-10, 17, or 18 of the General Schedule, is hereby terminated.

(C) Subsection (a) of section 5108 of title 5, United States Code, is amended to read as follows:

“(a) The Director of the Office of Personnel Management may establish, and from time to time revise, the maximum numbers of posi-

tions (not to exceed an aggregate of 10,777) which may at any one time be placed in—

“(i) GS-16, 17, and 18; and

“(ii) the Senior Executive Service, in accordance with section 3133 of this title.

A position may be placed in GS-16, 17, or 18, only by action of the Director of the Office of Personnel Management. The authority of the Director under this subsection shall be carried out by the President in the case of positions proposed to be placed in GS-16, 17, and 18 in the Federal Bureau of Investigation.”.

(D) Subsection (c) of section 5108 of title 5, United States Code, is amended—

(i) by redesignating paragraph (3) as paragraph (2) and by inserting “and” at the end thereof; and

(ii) by redesignating paragraph (12) as paragraph (3) and by striking out the semicolon at the end and inserting in lieu thereof a period.

(2) (A) Notwithstanding any other provision of law (other than section 3104 of title 5, United States Code), the authority granted to an agency (as defined in section 5102 (a) (1) of such title 5) to establish scientific or professional positions outside of the General Schedule is hereby terminated.

(B) Section 3104 of title 5, United States Code, is amended by striking out subsections (a) and (b) and inserting in lieu thereof the following:

“(a) (1) The Director of the Office of Personnel Management may establish, and from time to time revise, the maximum number of scientific or professional positions (not to exceed 517) for carrying out research and development functions which require the services of specially qualified personnel which may be established outside of the General Schedule. Any such position may be established only by action of the Director.

“(2) The provisions of paragraph (1) of this subsection shall not apply to any Senior Executive Service position (as defined in section 3132 (a) of this title).

“(3) In addition to the number of positions authorized by paragraph (1) of this subsection, the Librarian of Congress may establish, without regard to the second sentence of paragraph (1) of this subsection, not more than 8 scientific or professional positions to carry out the research and development functions of the Library of Congress which require the services of specially qualified personnel.”.

(C) Subsection (c) of such section 3104 is amended—

(i) by striking out “(c)” and inserting in lieu thereof “(b)”;

and
(ii) by striking out “to establish and fix the pay of positions under this section and section 5361 of this title” and inserting in lieu thereof “to fix under section 5361 of this title the pay for positions established under this section”.

(3) (A) The provisions of paragraphs (1) and (2) of this subsection shall not apply with respect to any position so long as the individual occupying such position on the day before the date of the enactment of this Act continues to occupy such position.

(B) The Director—

(i) in establishing under section 5108 of title 5, United States Code, the maximum number of positions which may be placed in GS-16, 17, and 18 of the General Schedule, and

(ii) in establishing under section 3104 of such title 5 the maximum number of scientific or professional positions which may be established,

shall take into account positions to which subparagraph (A) of this paragraph applies.

(b) (1) Section 5311 of title 5, United States Code, is amended by inserting "(a)" before "The Executive Schedule," and by adding at the end thereof the following new subsection:

"(b) (1) Not later than 180 days after the date of the enactment of the Civil Service Reform Act of 1978, the Director shall determine the number and classification of executive level positions in existence in the executive branch on that date of enactment, and shall publish the determination in the Federal Register. Effective beginning on the date of the publication, the number of executive level positions within the executive branch may not exceed the number published under this subsection.

"(2) For the purpose of this subsection, 'executive level position' means—

"(A) any office or position in the civil service the rate of pay for which is equal to or greater than the rate of basic pay payable for positions under section 5316 of this title, or

"(B) any such office or position the rate of pay for which may be fixed by administrative action at a rate equal to or greater than the rate of basic pay payable for positions under section 5316 of this title;

but does not include any Senior Executive Service position, as defined in section 3132(a) of this title."

(2) The President shall transmit to the Congress by January 1, 1980, a plan for authorizing executive level positions in the executive branch which shall include the maximum number of executive level positions necessary by level and a justification for the positions.

EFFECTIVE DATE; CONGRESSIONAL REVIEW

SEC. 415. (a) (1) The provisions of this title, other than sections 413 and 414(a), shall take effect 9 months after the date of the enactment of this Act.

(2) The provisions of section 413 of this title shall take effect on the date of the enactment of this Act.

(3) The provisions of section 414(a) of this title shall take effect 180 days after the date of the enactment of this Act.

(b) (1) The amendments made by sections 401 through 412 of this title shall continue to have effect unless, during the first period of 60 calendar days of continuous session of the Congress beginning after 5 years after the effective date of such amendments, a concurrent resolution is introduced and adopted by the Congress disapproving the continuation of the Senior Executive Service. Such amendments shall cease to have effect on the first day of the first fiscal year beginning after the date of the adoption of such concurrent resolution.

(2) *The continuity of a session is broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 60-day period.*

(3) *The provisions of subsections (d), (e), (f), (g), (h), (i), (j), and (k) of section 5305 of title 5, United States Code, shall apply with respect to any concurrent resolution referred to in paragraph (1) of this subsection, except that for the purpose of this paragraph the reference in such subsection (c) to 10 calendar days shall be considered a reference to 30 calendar days.*

(4) *During the 5-year period referred to in paragraph (1) of this subsection, the Director of the Office of Personnel Management shall include in each report required under section 3135 of title 5, United States Code (as added by this title) an evaluation of the effectiveness of the Senior Executive Service and the manner in which such Service is administered.*

TITLE V—MERIT PAY

PAY FOR PERFORMANCE

SEC. 501. Part III of title 5, United States Code, is amended by inserting after chapter 53 the following new chapter:

"CHAPTER 54—MERIT PAY AND CASH AWARDS

"Sec.

"5401. Purpose.

"5402. Merit pay system.

"5403. Cash award program.

"5404. Report.

"5405. Regulations.

"§ 5401. Purpose

"(a) It is the purpose of this chapter to provide for—

"(1) a merit pay system which shall—

"(A) within available funds, recognize and reward quality performance by varying merit pay adjustments;

"(B) use performance appraisals as the basis for determining merit pay adjustments;

"(C) within available funds, provide for training to improve objectivity and fairness in the evaluation of performance; and

"(D) regulate the costs of merit pay by establishing appropriate control techniques; and

"(2) a cash award program which shall provide cash awards for superior accomplishment and special service.

"(b) (1) Except as provided in paragraph (2) of this subsection, this chapter shall apply to any supervisor or management official (as defined in paragraphs (10) and (11) of section 7103 of this title, respectively) who is in a position which is in GS-13, 14, or 15 of the General Schedule described in section 5104 of this title.

"(2) (A) Upon application under subparagraph (C) of this paragraph, the President may, in writing, exclude an agency or any unit of an agency from the application of this chapter if the President

considers such exclusion to be required as a result of conditions arising from—

“(i) the recent establishment of the agency or unit, or the implementation of a new program,

“(ii) an emergency situation, or

“(iii) any other situation or circumstance.

“(B) Any exclusion under this paragraph shall not take effect earlier than 30 calendar days after the President transmits to each House of the Congress a report describing the agency or unit to be excluded and the reasons therefor.

“(C) An application for exclusion under this paragraph of an agency or any unit of an agency shall be filed by the head of the agency with the Office of Personnel Management, and shall set forth reasons why the agency or unit should be excluded from this chapter. The Office shall review the application and reasons, undertake such other review as it considers appropriate to determine whether the agency or unit should be excluded from the coverage of this chapter, and upon completion of its review, recommend to the President whether the agency or unit should be so excluded.

“(D) Any agency or unit which is excluded pursuant to this paragraph shall, insofar as practicable, make a sustained effort to eliminate the conditions on which the exclusion is based.

“(E) The Office shall periodically review any exclusion from coverage and may at any time recommend to the President that an exclusion under this paragraph be revoked. The President may at any time revoke, in writing, any exclusion under this paragraph.

“§ 5402. Merit pay system

“(a) In accordance with the purpose set forth in section 5401 (a) (1) of this title, the Office of Personnel Management shall establish a merit pay system which shall provide for a range of basic pay for each grade to which the system applies, which range shall be limited by the minimum and maximum rates of basic pay payable for each grade under chapter 53 of this title.

“(b) (1) Under regulations prescribed by the Office, the head of each agency may provide for increases within the range of basic pay for any employee covered by the merit pay system.

“(2) Determinations to provide pay increases under this subsection—

“(A) may take into account individual performance and organizational accomplishment, and

“(B) shall be based on factors such as—

“(i) any improvement in efficiency, productivity, and quality of work or service, including any significant reduction in paperwork;

“(ii) cost efficiency;

“(iii) timeliness of performance; and

“(iv) other indications of the effectiveness, productivity, and quality of performance of the employees for whom the employee is responsible;

“(C) shall be subject to review only in accordance with and to the extent provided by procedures established by the head of the agency; and

“(D) shall be made in accordance with regulations issued by the Office which relate to the distribution of increases authorized under the subsection.

“(3) For any fiscal year, the head of any agency may exercise authority under paragraph (1) of this subsection only to the extent of the funds available for the purpose of this subsection.

“(4) The funds available for the purpose of this subsection to the head of any agency for any fiscal year shall be determined before the beginning of the fiscal year by the Office on the basis of the amount estimated by the Office to be necessary to reflect—

“(A) within-grade step increases and quality step increases which would have been paid under subchapter III of chapter 53 of this title during the fiscal year to the employees of the agency covered by the merit pay system if the employees were not so covered; and

“(B) adjustments under section 5305 of this title which would have been paid under such subchapter during the fiscal year to such employees if the employees were not so covered, less an amount reflecting the adjustment under subsection (c)(1) of this section in rates of basic pay payable to the employees for the fiscal year.

“(c)(1) Effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5305 of this title, the rate of basic pay for any position under this chapter shall be adjusted by an amount equal to the greater of—

“(A) one-half of the percentage of the adjustment in the annual rate of pay which corresponds to the percentage generally applicable to positions not covered by the merit pay system in the same grade as the position; or

“(B) such greater amount of such percentage of such adjustment in the annual rate of pay as may be determined by the Office.

“(2) Any employee whose position is brought under the merit pay system shall, so long as the employee continues to occupy the position, be entitled to receive basic pay at a rate of basic pay not less than the rate the employee was receiving when the position was brought under the merit pay system, plus any subsequent adjustment under paragraph (1) of this subsection.

“(3) No employee to whom this chapter applies may be paid less than the minimum rate of basic pay of the grade of the employee's position.

“(d) Under regulations prescribed by the Office, the benefit of advancement through the range of basic pay for a grade shall be preserved for any employee covered by the merit pay system whose continuous service is interrupted in the public interest by service with the armed forces, or by service in essential non-Government civilian employment during a period of war or national emergency.

“(e) For the purpose of section 5941 of this title, rates of basic pay of employees covered by the merit pay system shall be considered rates of basic pay fixed by statute.

§ 5403. Cash award program

“(a) The head of any agency may pay a cash award to, and incur necessary expenses for the honorary recognition of, any employee covered by the merit pay system who—

“(1) by the employee’s suggestion, invention, superior accomplishment, or other personal effort, contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paperwork; or

“(2) performs a special act or service in the public interest in connection with or related to the employee’s Federal employment.

“(b) The President may pay a cash award to, and incur necessary expenses for the honorary recognition of, any employee covered by the merit pay system who—

“(1) by the employee’s suggestion, invention, superior accomplishment, or other personal effort, contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paperwork; or

“(2) performs an exceptionally meritorious special act or service in the public interest in connection with or related to the employee’s Federal employment.

A Presidential cash award may be in addition to an agency cash award under subsection (a) of this section.

“(c) A cash award to any employee under this section is in addition to the basic pay of the employee under section 5402 of this title. Acceptance of a cash award under this section constitutes an agreement that the use by the Government of any idea, method, or device for which the award is made does not form the basis of any claim of any nature against the Government by the employee accepting the award, or the employee’s heirs or assigns.

“(d) A cash award to, and expenses for the honorary recognition of, any employee covered by the merit pay system may be paid from the fund or appropriation available to the activity primarily benefiting, or the various activities benefiting, from the suggestion, invention, superior accomplishment, or other meritorious effort of the employee. The head of the agency concerned shall determine the amount to be contributed by each activity to any agency cash award under subsection (a) of this section. The President shall determine the amount to be contributed by each activity to a Presidential award under subsection (b) of this section.

“(e) (1) Except as provided in paragraph (2) of this subsection, a cash award under this section may not exceed \$10,000.

“(2) If the head of an agency certifies to the Office of Personnel Management that the suggestion, invention, superior accomplishment, or other meritorious effort of an employee for which a cash award is proposed is highly exceptional and unusually outstanding, a cash award in excess of \$10,000 but not in excess of \$25,000 may be awarded to the employee on the approval of the Office.

“(f) The President or the head of an agency may pay a cash award under this section notwithstanding the death or separation from the service of an employee, if the suggestion, invention, superior accomplishment, or other meritorious effort of the employee for which the award is proposed was made or performed while the employee was covered by the merit pay system.

“§ 5404. Report

“The Office of Personnel Management shall include in each annual report required by section 1308(a) of this title a report on the operation of the merit pay system and the cash award program established under this chapter. The report shall include—

“(1) an analysis of the cost and effectiveness of the merit pay system and the cash award program; and

“(2) a statement of the agencies and units excluded from the coverage of this chapter under section 5401(b)(2) of this title, the reasons for which each exclusion was made, and whether the exclusion continues to be warranted.

“§ 5405. Regulations

“The Office of Personnel Management shall prescribe regulations to carry out the purpose of this chapter.”.

INCENTIVE AWARDS AMENDMENTS

SEC. 502. (a) Section 4503(1) of title 5, United States Code, is amended by inserting after “operations” the following: “or achieves a significant reduction in paperwork”.

(b) Section 4504(1) of title 5, United States Code, is amended by inserting after “operations” the following: “or achieves a significant reduction in paperwork”.

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 503. (a) Section 4501(2)(A) of title 5, United States Code, is amended by striking out “; and” and inserting in lieu thereof “, but does not include an employee covered by the merit pay system established under section 5402 of this title; and”.

(b) Section 4502(a) of title 5, United States Code, is amended by striking out “\$5,000” and inserting in lieu thereof “\$10,000”.

(c) Section 4502(b) of title 5, United States Code, is amended—

(1) by striking out “Civil Service Commission” and inserting in lieu thereof “Office of Personnel Management”;

(2) by striking out “\$5,000” and inserting in lieu thereof “\$10,000”; and

(3) by striking out “the Commission” and inserting in lieu thereof “the Office”.

(d) Section 4506 of title 5, United States Code, is amended by striking out “Civil Service Commission may” and inserting in lieu thereof “Office of Personnel Management shall”.

(e) The second sentence of section 5332(a) of title 5, United States Code, is amended by inserting after “applies” the following: “, except an employee covered by the merit pay system established under section 5402 of this title,”.

(f) Section 5334 of title 5, United States Code (as amended in section 801(a)(3)(G) of this Act), is amended—

(1) in paragraph (2) of subsection (c), by inserting “, or for an employee appointed to a position covered by the merit pay system established under section 5402 of this title, any dollar amount,” after “step”; and

(2) by adding at the end thereof the following new subsection:

“(f) In the case of an employee covered by the merit pay system established under section 5402 of this title, all references in this section to ‘two steps’ or ‘two step-increases’ shall be deemed to mean 6 percent.”.

(g) Section 5335 (e) of title 5, United States Code, is amended by inserting after “individual” the following: “covered by the merit pay system established under section 5402 of this title, or,”.

(h) Section 5336 (c) of title 5, United States Code, is amended by inserting after “individual” the following: “covered by the merit pay system established under section 5402 of this title, or,”.

(i) The table of chapters for part III of title 5, United States Code, is amended by inserting after the item relating to chapter 53 the following new item:

“54. Merit Pay and Cash Awards..... 5401”.

EFFECTIVE DATE

Sec. 504. (a) The provisions of this title shall take effect on the first day of the first applicable pay period which begins on or after October 1, 1981, except that such provisions may take effect with respect to any category or categories of positions before such day to the extent prescribed by the Director of the Office of Personnel Management.

(b) The Director of the Office of Personnel Management shall include in the first report required under section 5404 of title 5, United States Code (as added by this title), information with respect to the progress and cost of the implementation of the merit pay system and the cash award program established under chapter 54 of such title (as added by this title).

TITLE VI—RESEARCH, DEMONSTRATION, AND OTHER PROGRAMS

RESEARCH PROGRAMS AND DEMONSTRATION PROJECTS

Sec. 601. (a) Part III of title 5, United States Code, is amended by adding at the end of subpart C thereof the following new chapter:

“CHAPTER 47—PERSONNEL RESEARCH PROGRAMS AND DEMONSTRATION PROJECTS

“Sec.

“4701. Definitions.

“4702. Research programs.

“4703. Demonstration projects.

“4704. Allocation of funds.

“4705. Reports.

“4706. Regulations.

“§ 4701. Definitions

“(a) For the purpose of this chapter—

“(1) ‘agency’ means an Executive agency, the Administrative Office of the United States Courts, and the Government Printing Office, but does not include—

“(A) a Government corporation;

“(B) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof which is designated by the President and which has as its principal function the conduct of foreign intelligence or counterintelligence activities; or

“(C) the General Accounting Office;

“(2) ‘employee’ means an individual employed in or under an agency;

“(3) ‘eligible’ means an individual who has qualified for appointment in an agency and whose name has been entered on the appropriate register or list of eligibles;

“(4) ‘demonstration project’ means a project conducted by the Office of Personnel Management, or under its supervision, to determine whether a specified change in personnel management policies or procedures would result in improved Federal personnel management; and

“(5) ‘research program’ means a planned study of the manner in which public management policies and systems are operating, the effects of those policies and systems, the possibilities for change, and comparisons among policies and systems.

“(b) This subchapter shall not apply to any position in the Drug Enforcement Administration which is excluded from the competitive service under section 201 of the Crime Control Act of 1976 (5 U.S.C. 5108 note; 90 Stat. 2425).

“§ 4702. Research programs

“The Office of Personnel Management shall—

“(1) establish and maintain (and assist in the establishment and maintenance of) research programs to study improved methods and technologies in Federal personnel management;

“(2) evaluate the research programs established under paragraph (1) of this section;

“(3) establish and maintain a program for the collection and public dissemination of information relating to personnel management research and for encouraging and facilitating the exchange of information among interested persons and entities; and

“(4) carry out the preceding functions directly or through agreement or contract.

“§ 4703. Demonstration projects

“(a) Except as provided in this section, the Office of Personnel Management may, directly or through agreement or contract with one or more agencies and other public and private organizations, conduct and evaluate demonstration projects. Subject to the provisions of this section, the conducting of demonstration projects shall not be limited by any lack of specific authority under this title to take the action contemplated, or by any provision of this title or any rule or regulation prescribed under this title which is inconsistent with the action, including any law or regulation relating to—

“(1) the methods of establishing qualification requirements for, recruitment for, and appointment to positions;

“(2) the methods of classifying positions and compensating employees;

“(3) the methods of assigning, reassigning, or promoting employees;

“(4) the methods of disciplining employees;

“(5) the methods of providing incentives to employees, including the provision of group or individual incentive bonuses or pay;

“(6) the hours of work per day or per week;

“(7) the methods of involving employees, labor organizations, and employee organizations in personnel decisions; and

“(8) the methods of reducing overall agency staff and grade levels.

“(b) Before conducting or entering into any agreement or contract to conduct a demonstration project, the Office shall—

“(1) develop a plan for such project which identifies—

“(A) the purposes of the project;

“(B) the types of employees or eligibles, categorized by occupational series, grade, or organizational unit;

“(C) the number of employees or eligibles to be included, in the aggregate and by category;

“(D) the methodology;

“(E) the duration;

“(F) the training to be provided;

“(G) the anticipated costs;

“(H) the methodology and criteria for evaluation;

“(I) a specific description of any aspect of the project for which there is a lack of specific authority; and

“(J) a specific citation to any provision of law, rule, or regulation which, if not waived under this section, would prohibit the conducting of the project, or any part of the project as proposed;

“(2) publish the plan in the *Federal Register*; and

“(3) submit the plan so published to public hearing;

“(4) provide notification of the proposed project, at least 180 days in advance of the date any project proposed under this section is to take effect—

“(A) to employees who are likely to be affected by the project; and

“(B) to each House of the Congress;

“(5) obtain approval from each agency involved of the final version of the plan; and

“(6) provide each House of the Congress with a report at least 90 days in advance of the date the project is to take effect setting forth the final version of the plan as so approved.

“(c) No demonstration project under this section may provide for a waiver of—

“(1) any provision of chapter 63 or subpart G of this title;

“(2) (A) any provision of law referred to in section 2302(b)(1) of this title; or

“(B) any provision of law implementing any provision of law referred to in section 2302(b)(1) of this title by—

“(i) providing for equal employment opportunity through affirmative action; or

“(ii) providing any right or remedy available to any employee or applicant for employment in the civil service;

“(3) any provision of chapter 15 or subchapter III of chapter 73 of this title;

“(4) any rule or regulation prescribed under any provision of law referred to in paragraph (1), (2), or (3) of this subsection; or

“(5) any provision of chapter 23 of this title, or any rule or regulation prescribed under this title, if such waiver is inconsistent with any merit system principle or any provision thereof relating to prohibited personnel practices.

“(d)(1) Each demonstration project shall—

“(A) involve not more than 5,000 individuals other than individuals in any control groups necessary to validate the results of the project; and

“(B) terminate before the end of the 5-year period beginning on the date on which the project takes effect, except that the project may continue beyond the date to the extent necessary to validate the results of the project.

“(2) Not more than 10 active demonstration projects may be in effect at any time.

“(e) Subject to the terms of any written agreement or contract between the Office and an agency, a demonstration project involving the agency may be terminated by the Office, or the agency, if either determines that the project creates a substantial hardship on, or is not in the best interests of, the public, the Federal Government, employees, or eligibles.

“(f) Employees within a unit with respect to which a labor organization is accorded exclusive recognition under section 7111 of this title shall not be included within any project under subsection (b) of this section—

“(1) if the project would violate a collective bargaining agreement (as defined in section 7103(8) of this title) between the agency and the labor organization, unless there is another written agreement with respect to the project between the agency and the organization permitting the inclusion; or

“(2) if the project is not covered by such a collective bargaining agreement, until there has been consultation or negotiation, as appropriate, by the agency with the labor organization.

“(g) Employees within any unit with respect to which a labor organization has not been accorded exclusive recognition under section 7111 of this title shall not be included within any project under subsection (b) of this section unless there has been agency consultation regarding the project with the employees in the unit.

“(h) The Office shall provide for an evaluation of the results of each demonstration project and its impact on improving public management.

“(i) Upon request of the Director of the Office of Personnel Management, agencies shall cooperate with and assist the Office, to the ex-

tent practicable, in any evaluation undertaken under subsection (h) of this section and provide the Office with requested information and reports relating to the conducting of demonstration projects in their respective agencies.

“§ 4704. Allocation of funds

“Funds appropriated to the Office of Personnel Management for the purpose of this chapter may be allocated by the Office to any agency conducting demonstration projects or assisting the Office in conducting such projects. Funds so allocated shall remain available for such period as may be specified in appropriation Acts. No contract shall be entered into under this chapter unless the contract has been provided for in advance in appropriation Acts.

“§ 4705. Reports

“The Office of Personnel Management shall include in the annual report required by section 1308(a) of this title a summary of research programs and demonstration projects conducted during the year covered by the report, the effect of the programs and projects on improving public management and increasing Government efficiency, and recommendations of policies and procedures which will improve such management and efficiency.

“§ 4706. Regulations

“The Office of Personnel Management shall prescribe regulations to carry out the purpose of this chapter.”.

(b) The table of chapters for part III of title 5, United States Code, is amended by inserting after the item relating to chapter 45 the following new item:

“47. Personnel Research Programs and Demonstration Projects..... 4707”.

INTERGOVERNMENTAL PERSONNEL ACT AMENDMENTS

SEC. 602. (a) Section 208 of the Intergovernmental Personnel Act of 1970 (42 U.S.C. 4728) is amended—

(1) by striking out the section heading and inserting in lieu thereof the following:

“TRANSFER OF FUNCTIONS AND ADMINISTRATION OF MERIT POLICIES”;

(2) by redesignating subsections (b), (c), (d), (e), and (f) as subsections (c), (d), (e), (f), and (g), respectively, and by inserting after subsection (a) the following new subsection:

“(b) In accordance with regulations of the Office of Personnel Management, Federal agencies may require as a condition of participation in assistance programs, systems of personnel administration consistent with personnel standards prescribed by the Office for positions engaged in carrying out such programs. The standards shall—

“(1) include the merit principles in section 2 of this Act;

“(2) be prescribed in such a manner as to minimize Federal intervention in State and local personnel administration.”; and

(3) by striking out the last subsection and inserting in lieu thereof the following new subsection:

“(h) Effective one year after the date of the enactment of the Civil Service Reform Act of 1978, all statutory personnel requirements established as a condition of the receipt of Federal grants-in-aid by State and local governments are hereby abolished, except—

“(1) requirements prescribed under laws and regulations referred to in subsection (a) of this section;

“(2) requirements that generally prohibit discrimination in employment or require equal employment opportunity;

“(3) the Davis-Bacon Act (40 U.S.C. 276 et seq.); and

“(4) chapter 15 of title 5, United States Code, relating to political activities of certain State and local employees.”.

(b) Section 401 of such Act (84 Stat. 1920) is amended by striking out “governments and institutions of higher education” and inserting in lieu thereof “governments, institutions of higher education, and other organizations”.

(c) Section 403 of such Act (84 Stat. 1925) is amended by inserting “(a)” after “403.”, and by adding at the end thereof the following new subsection:

“(b) Effective beginning on the effective date of the Civil Service Reform Act of 1978, the provisions of section 314(f) of the Public Health Service Act (42 U.S.C. 246(f)) applicable to commissioned officers of the Public Health Service Act are hereby repealed.”.

(d) Section 502 of such Act (42 U.S.C. 4762) is amended in paragraph (3) by inserting “the Trust Territory of the Pacific Islands,” before “and a territory or possession of the United States.”.

(e) Section 506 of such Act (42 U.S.C. 4766) is amended—

(1) in subsection (b) (2), by striking out “District of Columbia” and inserting in lieu thereof “District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, and the Virgin Islands”; and

(2) in subsection (b) (5), by striking out “and the District of Columbia” and inserting in lieu thereof “, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, and the Virgin Islands”.

AMENDMENTS TO THE MOBILITY PROGRAM

SEC. 603. (a) Section 3371 of title 5, United States Code, is amended—

(1) by inserting “the Trust Territory of the Pacific Islands,” after “Puerto Rico,” in paragraph (1) (A); and

(2) by striking out “and” at the end of paragraph (1), by striking out the period at the end of paragraph (2) and inserting a semicolon in lieu thereof, and by adding at the end thereof the following:

“(3) ‘Federal agency’ means an Executive agency, military department, a court of the United States, the Administrative Office of the United States Courts, the Library of Congress, the Botanic Garden, the Government Printing Office, the Congressional Budget Office, the United States Postal Service, the Postal Rate Commission, the Office of the Architect of the Capitol, the Office of Technology Assessment, and such other similar agencies

of the legislative and judicial branches as determined appropriate by the Office of Personnel Management; and

“(4) ‘other organization’ means—

“(A) a national, regional, State-wide, area-wide, or metropolitan organization representing member State or local governments;

“(B) an association of State or local public officials; or

“(C) a nonprofit organization which has as one of its principal functions the offering of professional advisory, research, educational, or development services, or related services, to governments or universities concerned with public management.”

(b) Sections 3372 through 3375 of title 5, United States Code, are amended by striking out “executive agency” and “an executive agency” each place they appear and inserting in lieu thereof “Federal agency” and “a Federal agency”, respectively.

(c) Section 3372 of title 5, United States Code, is further amended—

(1) in subsection (a) (1), by inserting after “agency” the following: “, other than a noncareer appointee, limited term appointee, or limited emergency appointee (as such terms are defined in section 3132(a) of this title) in the Senior Executive Service and an employee in a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character.”;

(2) in subsection (b) (1), by striking out “and”;

(3) in subsection (b) (2), by striking out the period after “agency” and inserting in lieu thereof a semicolon;

(4) by adding at the end of subsection (b) the following:

“(3) an employee of a Federal agency to any other organization; and

“(4) an employee of an other organization to a Federal agency.”; and

(5) by adding at the end thereof (as amended in paragraph (4) of this subsection) the following new subsection:

“(c) (1) An employee of a Federal agency may be assigned under this subchapter only if the employee agrees, as a condition of accepting an assignment under this subchapter, to serve in the civil service upon the completion of the assignment for a period equal to the length of the assignment.

“(2) Each agreement required under paragraph (1) of this subsection shall provide that in the event the employee fails to carry out the agreement (except for good and sufficient reason, as determined by the head of the Federal agency from which assigned) the employee shall be liable to the United States for payment of all expenses (excluding salary) of the assignment. The amount shall be treated as a debt due the United States.”

(d) Section 3374 of title 5, United States Code, is further amended—

(1) by adding at the end of subsection (b) the following new sentence: “The above exception shall not apply to non-Federal employees who are covered by chapters 83, 87, and 89 of this title by virtue of their non-Federal employment immediately before assignment and appointment under this section.”;

(2) in subsection (c) (1), by striking out the semicolon at the end thereof and by inserting in lieu thereof the following: “, except to the extent that the pay received from the State or local government is less than the appropriate rate of pay which the duties would warrant under the applicable pay provisions of this title or other applicable authority;”; and

(3) by striking out the period at the end of subsection (c) and inserting in lieu thereof the following: “, or for the contribution of the State or local government, or a part thereof, to employee benefit systems.”.

(e) Section 3375(a) of title 5, United States Code, is further amended by striking out “and” at the end of paragraph (4), by redesignating paragraph (5) as paragraph (6), and by inserting after paragraph (4) the following:

“(5) section 5724a(b) of this title, to be used by the employee for miscellaneous expenses related to change of station where movement or storage of household goods is involved; and ”.

TITLE VII—FEDERAL LABOR-MANAGEMENT RELATIONS

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

SEC. 701. So much of subpart F of part III of title 5, United States Code, as precedes subchapter II of chapter 71 thereof as amended to read as follows:

“Subpart F—Labor-Management and Employee Relations

“CHAPTER 71—LABOR-MANAGEMENT RELATIONS

“SUBCHAPTER I—GENERAL PROVISIONS

“Sec.

“7101. Findings and purpose.

“7102. Employees' rights.

“7103. Definitions; applications.

“7104. Federal Labor Relations Authority.

“7105. Powers and duties of the Authority.

“7106. Management rights.

“SUBCHAPTER II—RIGHTS AND DUTIES OF AGENCIES AND LABOR ORGANIZATIONS

“Sec.

“7111. Exclusive recognition of labor organizations.

“7112. Determination of appropriate units for labor organization representation.

“7113. National consultation rights.

“7114. Representation rights and duties.

“7115. Allotments to representatives.

“7116. Unfair labor practices.

“7117. Duty to bargain in good faith; compelling need; duty to consult.

“7118. Prevention of unfair labor practices.

“7119. Negotiation impasses; Federal Service Impasses Panel.

“7120. Standards of conduct for labor organizations.

“SUBCHAPTER III—GRIEVANCES, APPEALS, AND REVIEW

“Sec.

“7121. Grievance procedures.

“7122. Exceptions to arbitral awards.

“7123. Judicial review; enforcement.

"SUBCHAPTER IV—ADMINISTRATIVE AND OTHER PROVISIONS

"Sec.

"7131. Official time.

"7132. Subpenas.

"7133. Compilation and publication of data.

"7134. Regulations.

"7135. Continuation of existing laws, recognitions, agreements, and procedures.

"SUBCHAPTER I—GENERAL PROVISIONS

"§ 7101. Findings and purpose

"(a) The Congress finds that—

"(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain in collectively, and participate through labor organizations of their own choosing in decisions which affect them—

"(A) safeguards the public interest,

"(B) contributes to the effective conduct of public business, and

"(C) facilitates and encourages the amicable settlement of disputes between employees and their employers involving conditions of employment; and

"(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

"(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient government.

"§ 7102. Employees' rights

"Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

"(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

"(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

"§ 7103. Definitions; application

"(a) For the purpose of this chapter—

"(1) 'person' means an individual, labor organization, or agency;

“(2) ‘employee’ means an individual—

“(A) employed in an agency; or

“(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;

but does not include—

“(i) an alien or noncitizen of the United States who occupies a position outside the United States;

“(ii) a member of the uniformed services;

“(iii) a supervisor or a management official;

“(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the Agency for International Development, or the International Communication Agency; or

“(v) any person who participates in a strike in violation of section 7311 of this title;

“(3) ‘agency’ means an Executive agency (including a non-appropriated fund instrumentality described in section 2105(c) of this title and the Veterans’ Canteen Service, Veterans’ Administration), the Library of Congress, and the Government Printing Office, but does not include—

“(A) the General Accounting Office;

“(B) the Federal Bureau of Investigation;

“(C) the Central Intelligence Agency;

“(D) the National Security Agency;

“(E) the Tennessee Valley Authority;

“(F) the Federal Labor Relations Authority;

or

“(G) the Federal Service Impasses Panel;

“(4) ‘labor organization’ means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment, but does not include—

“(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political official, marital status, or handicapping condition;

“(B) an organization which advocates the overthrow of the constitutional form of government of the United States;

“(C) an organization sponsored by an agency;

or

“(D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;

“(5) ‘dues’ means dues, fees, and assessments;

“(6) ‘Authority’ means the Federal Labor Relations Authority described in section 7104(a) of this title;

“(7) ‘Panel’ means the Federal Service Impasses Panel described in section 7119(c) of this title;

“(8) ‘collective bargaining agreement’ means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;

“(9) ‘grievance’ means any complaint—

“(A) by any employee concerning any matter relating to the employment of the employee;

“(B) by any labor organization concerning any matter relating to the employment of any employee; or

“(C) by any employee, labor organization, or agency concerning—

“(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

“(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

“(10) ‘supervisor’ means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term ‘supervisor’ includes only those individuals who devote a preponderance of their employment time to exercising such authority;

“(11) ‘management official’ means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency;

“(12) ‘collective bargaining’ means 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;

“(13) ‘confidential employee’ means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

“(14) ‘conditions of employment’ means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

“(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

“(B) relating to the classification of any position; or
 “(C) to the extent such matters are specifically provided for by Federal statute;

“(15) ‘professional employee’ means—

“(A) an employee engaged in the performance of work—

“(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);

“(ii) requiring the consistent exercise of discretion and judgment in its performance;

“(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

“(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

“(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A) (i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph;

“(16) ‘exclusive representative’ means any labor organization which—

“(A) is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of this title; or

“(B) was recognized by an agency immediately before the effective date of this chapter as the exclusive representative of employees in an appropriate unit—

“(i) on the basis of an election, or

“(ii) on any basis other than an election, and continues to be so recognized in accordance with the provisions of this chapter;

“(17) ‘firefighter’ means any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment; and

“(18) ‘United States’ means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

“(b) (1) *The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that—*

“(A) *the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and*

“(B) *the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.*

“(d) *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 and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security.*

“§ 7104. **Federal Labor Relations Authority**

“(a) *The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party. No member shall engage in any other business or employment or hold another office or position in the Government of the United States except as otherwise provided by law.*

“(b) *Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office. The President shall designate one member to serve as Chairman of the Authority.*

“(c) (1) *One of the original members of the Authority shall be appointed for a term of 1 year, one for a term of 3 years, and the Chairman for a term of 5 years. Thereafter, each member shall be appointed for a term of 5 years.*

“(2) *Notwithstanding paragraph (1) of this subsection, the term of any member shall not expire before the earlier of—*

“(A) *the date on which the member's successor takes office, or*

“(B) *the last day of the Congress beginning after the date on which the member's term of office would (but for this subparagraph) expire.*

An individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced.

“(d) *A vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority.*

“(e) *The Authority shall make an annual report to the President for transmittal to the Congress which shall include information as to the cases it has heard and the decisions it has rendered.*

“(f) (1) *The General Counsel of the Authority shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The General Counsel may be removed at any time by the President. The General Counsel shall hold no other office or position in the Government of the United States except as provided by law.*

“(2) *The General Counsel may—*

“(A) *investigate unfair labor practices under this chapter,*

“(B) *file and prosecute complaints under this chapter, and*

“(C) exercise such other powers of the Authority as the Authority may prescribe.

“(3) The General Counsel shall have direct authority over, and responsibility for, all employees in the office of General Counsel, including employees of the General Counsel in the regional offices of the Authority.

“§ 7105. Powers and duties of the Authority

“(a) (1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

“(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

“(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

“(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

“(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

“(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

“(E) resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title;

“(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

“(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

“(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

“(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

“(b) The Authority shall adopt an official seal which shall be judicially noticed.

“(c) The principal office of the Authority shall be in or about the District of Columbia, but the Authority may meet and exercise any or all of its powers at any time or place. Except as otherwise expressly provided by law, the Authority may, by one or more of its members or by such agents as it may designate, make any appropriate inquiry necessary to carry out its duties wherever persons subject to this chapter are located. Any member who participates in the inquiry shall not be disqualified from later participating in a decision of the Authority in any case relating to the inquiry.

“(d) The Authority shall appoint an Executive Director and such regional directors, administrative law judges under section 3105 of this title, and other individuals as it may from time to time find necessary for the proper performance of its functions.

“(e) (1) The Authority may delegate to any regional director its authority under this chapter—

“(A) to determine whether a group of employees is an appropriate unit;

“(B) to conduct investigations and to provide for hearings;

“(C) to determine whether a question of representation exists and to direct an election; and

“(D) to supervise or conduct secret ballot elections and certify the results thereof.

“(2) The Authority may delegate to any administrative law judge appointed under subsection (d) of this section its authority under section 7118 of this title to determine whether any person has engaged in or is engaging in an unfair labor practice. The Authority may delegate to officers and employees appointed under subsection (d) authority to perform such duties and make such expenditures as may be necessary.

“(f) If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not otherwise undertake to grant review of the action under this subsection within 60 days after the later of—

“(1) the date of the action; or

“(2) the date of the filing of any application under this subsection for review of the action;

the action shall become the action of the Authority at the end of such 60-day period.

“(g) In order to carry out its functions under this chapter, the Authority may—

“(1) hold hearings;

“(2) administer oaths, take the testimony or deposition of any person under oath, and issue subpoenas as provided in section 7133 of this title; and

“(3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

“(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

“(i) In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

“§ 7106. Management rights

“(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

“(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

“(2) in accordance with applicable laws—

“(A) 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 against such employees;

“(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

“(C) with respect to filling positions, to make selections for appointments from—

“(i) among properly ranked and certified candidates for promotion; or

“(iii) any other appropriate source; and

“(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

“(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

“(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

“(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

“(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

“SUBCHAPTER II—RIGHTS AND DUTIES OF AGENCIES AND LABOR ORGANIZATIONS

“§ 711L Exclusive recognition of labor organizations

“(a) An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

“(b) If a petition is filed with the Authority—

“(1) by any person alleging—

“(A) in the case of an appropriate unit for which there is no exclusive representative, that 30 percent of the employees in the appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative, or

“(B) in the case of an appropriate unit for which there is an exclusive representative, that 30 percent of the employees in the unit allege that the exclusive representative is no longer the representative of the majority of the employees in the unit; or

“(2) by any person seeking clarification of, or an amendment to, a certification then in effect or a matter relating to representation; the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall

conduct an election on the question by secret ballot and shall certify the results thereof. An election under this subsection shall not be conducted in any appropriate unit or in any subdivision thereof within which, in the preceding 12 calendar months, a valid election under this subsection has been held.

“(c) A labor organization which—

“(1) has been designated by at least 10 percent of the employees in the unit specified in any petition filed pursuant to subsection (b) of this section;

“(2) by any person seeking clarification of or an amendment collective bargaining agreement for the unit; or

“(3) has submitted other evidence that it is the exclusive representative of the employees involved;

may intervene with respect to a petition filed pursuant to subsection (b) of this section and shall be placed on the ballot of any election under such subsection (b) with respect to the petition.

“(d) The Authority shall determine who is eligible to vote in any election under this section and shall establish rules governing any such election, which shall include rules allowing employees eligible to vote the opportunity to choose—

“(1) from labor organizations on the ballot, that labor organization which the employees wish to have represent them; or

“(2) not to be represented by a labor organization.

In any election in which no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted between the two choices receiving the highest number of votes. A labor organization which receives the majority of the votes cast in an election shall be certified by the Authority as the exclusive representative.

“(e) A labor organization seeking exclusive recognition shall submit to the Authority and the agency involved a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives.

“(f) Exclusive recognition shall not be accorded to a labor organization—

“(1) if the Authority determines that the labor organization is subject to corrupt influences or influences opposed to democratic principles;

“(2) in the case of a petition filed pursuant to subsection (b) (1) (A) of this section, if there is not credible evidence that at least 30 percent of the employees in the unit specified in the petition wish to be represented for the purpose of collective bargaining by the labor organization seeking exclusive recognition;

“(3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless—

“(A) the collective bargaining agreement has been in effect for more than 3 years, or

“(B) the petition for exclusive recognition is filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement; or

"(4) if the Authority has, within the previous 12 calendar months, conducted a secret ballot election for the unit described in any petition under this section and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative.

"(g) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules or decisions of the Authority.

"§ 7112. Determination of appropriate units for labor organization representation

"(a) (1) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of, the agency involved.

"(b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes—

"(1) except as provided under section 7135(a)(2) of this title, any management official or supervisor;

"(2) a confidential employee;

"(3) an employee engaged in personnel work in other than a purely clerical capacity;

"(4) an employee engaged in administering the provisions of this chapter;

"(5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

"(6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

"(7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

"(c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization—

"(1) which represents other individuals to whom such provision applies; or

"(2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

"(d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without

an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

“§ 7113. National consultation rights

“(a) (1) If, in connection with any agency, no labor organization has been accorded exclusive recognition on an agency basis, a labor organization which is the exclusive representative of a substantial number of the employees of the agency, as determined in accordance with criteria prescribed by the Authority, shall be granted national consultation rights by the agency. National consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to any labor organization’s eligibility for, or continuation of, national consultation rights shall be subject to determination by the Authority.

“(b) (1) Any labor organization having national consultation rights in connection with any agency under subsection (a) of this section shall—

“(A) be informed of any substantive change in conditions of employment proposed by the agency, and

“(B) be permitted reasonable time to present its views and recommendations regarding the changes.

“(2) If any views or recommendations are presented under paragraph (1) of this subsection to an agency by any labor organization—

“(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

“(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

“(c) Nothing in this section shall be construed to limit the right of any agency or exclusive representative to engage in collective bargaining.

“§ 7114. Representation rights and duties

“(a) (1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

“(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

“(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

“(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—

“(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

“(ii) the employee requests representation.

“(3) Each agency shall annually inform its employees of their rights under paragraph (2) (B) of this subsection.

"(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

"(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employce from—

"(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

"(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal provisions negotiated by this chapter.

"(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

"(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

"(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any conditions of employment;

"(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

"(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

"(A) which is normally maintained by the agency in the regular course of business;

"(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

"(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

"(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

"(c) (1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

"(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

"(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative

subject to the provisions of this chapter and any other applicable law, rule, or regulation.

“(4) A local agreement subject to a national or other controlling agreement at a high level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

“§ 7115. Allotments to representatives

“(a) If an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment shall be made at no cost to the exclusive representative or the employee. Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year.

“(b) An allotment under subsection (a) of this section for the deduction of dues with respect to any employee shall terminate when—

“(1) the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee; or

“(2) the employee is suspended or expelled from membership in the exclusive representative.

“(c) (1) Subject to paragraph (2) of this subsection, if a petition has been filed with the Authority by a labor organization alleging that 10 percent of the employees in an appropriate unit in an agency have membership in the labor organization, the Authority shall investigate the petition to determine its validity. Upon certification by the Authority of the validity of the petition, the agency shall have a duty to negotiate with the labor organization solely concerning the deduction of dues of the labor organization from the pay of the members of the labor organization who are employees in the unit and who make a voluntary allotment for such purpose.

“(2) (A) The provisions of paragraph (1) of this subsection shall not apply in the case of any appropriate unit for which there is an exclusive representative.

“(B) Any agreement under paragraph (1) of this subsection between a labor organization and an agency with respect to an appropriate unit shall be null and void upon the certification of an exclusive representative of the unit.

“§ 7116. Unfair labor practices

“(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

“(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

“(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

“(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

"(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

"(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

"(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

"(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

"(8) to otherwise fail or refuse to comply with any provision of this chapter.

"(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

"(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

"(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

"(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

"(4) to discriminate against an employee with regards to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

"(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

"(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

"(7) (A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

"(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

"(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

"(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure—

"(1) to meet reasonable occupational standards uniformly required for admission, or

“(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

“(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under sections 7121 (e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

“(e) The expression of any personal view, argument, opinion or the making of any statement which—

“(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

“(2) corrects the record with respect to any false or misleading statement made by any person, or

“(3) informs employees of the Government’s policy relating to labor-management relations and representation,
shall not if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

“§ 7117. Duty to bargain in good faith; compelling need; duty to consult

“(a) (1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

“(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

“(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

“(b) (1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a) (3) of this section which is then in effect and which governs any matters at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

"(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

"(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

"(B) the Authority determines that a compelling need for a rule or regulations does not exist.

"(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

"(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

"(c) (1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

"(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—

"(A) filing a petition with the Authority; and

"(B) furnishing a copy of the petition to the head of the agency.

"(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2) (B) of this subsection, the agency shall—

"(A) file with the Authority a statement—

"(i) withdrawing the allegation; or

"(ii) setting forth in full its reasons supporting the allegation; and

"(B) furnish a copy of such statement to the exclusive representative.

"(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3) (B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

"(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

"(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

"(d) (1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed

by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

"(2) A labor organization having consultation rights under paragraph (1) of this subsection shall—

"(A) be informed of any substantive change in conditions of employment proposed by the agency, and

"(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

"(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization—

"(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

"(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

"§ 7118. Prevention of unfair labor practices

"(a) (1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

"(2) Any complaint under paragraph (1) of this subsection shall contain a notice—

"(A) of the charge;

"(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the Authority and designated for such purpose); and

"(C) of the time and place fixed for the hearing.

"(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

"(4) (A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

"(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of—

"(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

"(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period, the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

"(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

"(6) *The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.*

"(6) *If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order—*

"(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

"(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

"(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

"(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of an employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

"(7) *If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.*

"(b) *In connection with any matter before the Authority in any proceeding under this section, the Authority may request, in accordance with the provisions of section 7105 (i) of this title, from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or other policy directives issued by the Office of Personnel Management.*

"§ 7119. Negotiation impasses; Federal Service Impasses Panel

"(a) *The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what manner it shall provide services and assistance.*

“(b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse—

“(1) either party may request the Federal Service Impasses Panel to consider the matter, or

“(2) The parties may agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by the Panel.

“(c) (1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

“(2) The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations.

“(3) Of the original members of the Panel, 2 members shall be appointed for a term of 1 year, 2 members shall be appointed for a term of 3 years, and the Chairman and the remaining members shall be appointed for a term of 5 years. Thereafter each member shall be appointed for a term of 5 years, except that an individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. Any member of the Panel may be removed by the President.

“(4) The Panel may appoint an Executive Director and any other individuals it may from time to time find necessary for the proper performance of its duties. Each member of the Panel who is not an employee (as defined in section 2105 of this title) is entitled to pay at a rate equal to the daily equivalent of the maximum annual rate of basic pay then currently paid under the General Schedule for each day he is engaged in the performance of official business of the Panel, including travel time, and is entitled to travel expenses as provided under section 5703 of this title.

“(5) (A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either—

“(i) recommend to the parties procedures for the resolution of the impasse; or

“(ii) assist the parties in resolving through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

“(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may—

“(i) hold hearings;

“(ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpoenas as provided in section 7133 of this title; and

“(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

“(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

“§ 7120. Standards of conduct for labor organizations

“(a) An agency shall only accord recognition to a labor organization that is free from corrupt influences and influences opposed to basic democratic principles. Except as provided in subsection (b) of this section, an organization is not required to prove that it is free from such influences if it is subject to governing requirements adopted by the organization or by a national or international labor organization or federation of labor organizations with which it is affiliated, or in which it participates, containing explicit and detailed provisions to which it subscribes calling for—

“(1) the maintenance of democratic procedures and practices including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization, to receive fair and equal treatment under the governing rules of the organization, and to receive fair process in disciplinary proceedings;

“(2) the exclusion from office in the organization of persons affiliated with communist or other totalitarian movements and persons identified with corrupt influences;

“(3) the prohibition of business or financial interests on the part of organization officers and agents which conflict with their duty to the organization and its members; and

“(4) the maintenance of fiscal integrity in the conduct of the affairs of the organization, including provisions for accounting and financial controls and regular financial reports or summaries to be made available to members.

“(b) Notwithstanding the fact that a labor organization has adopted or subscribed to standards of conduct as provided in subsection (a) of this section, the organization is required to furnish evidence of its freedom from corrupt influences or influences opposed to basic democratic principles if there is reasonable cause to believe that—

“(1) the organization has been suspended or expelled from, or is subject to other sanction, by a parent labor organization, or federation of organizations with which it had been affiliated, because it has demonstrated an unwillingness or inability to comply with governing requirements comparable in purpose to those required by subsection (a) of this section; or

“(2) the organization is in fact subject to influences that would preclude recognition under this chapter.

“(c) A labor organization which has or seeks recognition as a representative of employees under this chapter shall file financial and other reports with an Assistant Secretary of Labor for Labor-Management Relations, provide for bonding of officials and employees of the organization, and comply with trusteeship and election standards.

“(d) The Assistant Secretary shall prescribe such regulations as are necessary to carry out the purposes of this section. Such regulations shall conform generally to the principles applied to labor organizations in the private sector. Complaints of violations of this section shall be filed with the Assistant Secretary. In any matter arising under this section, the Assistant Secretary may require a labor organization to cease and desist from violations of this section and require it to take such action as he considers appropriate to carry out the policies of this section.

“(e) This chapter does not authorize participation in the management of a labor organization or acting as a representative of a labor organization by a management official, a supervisor, or a confidential employee, except as specifically provided in this chapter, or by an employee if the participation or activity would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee.

“(f) In the case of any labor organization which by omission or commission has willfully and intentionally, with regard to any strike, work stoppage, or slowdown, violated section 7116(b)(7) of this title, the Authority shall, upon an appropriate finding by the Authority of such violation—

“(1) revoke the exclusive recognition status of the labor organization, which shall then immediately cease to be legally entitled and obligated to represent employees in the unit; or

“(2) take any other appropriate disciplinary action.

“SUBCHAPTER III—GRIEVANCES

“§ 7121. Grievance procedures

“(a) (1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

“(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

“(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

“(1) be fair and simple,

“(2) provide for expeditious processing, and

“(3) include procedures that—

“(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

“(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

“(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

“(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

“(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

“(2) retirement, life insurance, or health insurance;

“(3) a suspension or removal under section 7532 of this title;

“(4) any examination, certification, or appointment; or

“(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

“(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

“(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

“(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

“(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7702 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

“§ 7122. Exceptions to arbitral awards

“(a) *Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator’s award pursuant to the arbitration (other than an award relating to a matter described in section 7121 (f) of this title). If upon review the Authority finds that the award is deficient—*

“(1) *because it is contrary to any law, rule, or regulation;*

“(2) *on other grounds similar to those applied by Federal courts in private sector labor-management relations;*
the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

“(b) *If no exception to an arbitrator’s award is filed under subsection (a) of this section during the 30-day period beginning on the date of such award, the award shall be final and binding. An agency shall take the actions required by an arbitrator’s final award. The award may include the payment of backpay (as provided in section 5596 of this title).*

“§ 7123. Judicial review; enforcement

“(a) *Any person aggrieved by any final order of the Authority other than an order under—*

(1) *section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or*

“(2) *section 7112 of this title (involving an appropriate unit determination),*

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority’s order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

“(b) *The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.*

“(c) *Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority’s order unless the court specifically orders the stay. Review of the Authority’s order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the*

record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

“(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief or restraining order. Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

“SUBCHAPTER IV—ADMINISTRATIVE AND OTHER PROVISIONS

“§ 7131. Official time

“(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

“(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.

“(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

“(d) Except as provided in the preceding subsections of this section—

“(1) any employee representing an exclusive representative, or

“(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

“§ 7132. Subpenas

“(a) Any member of the Authority, the General Counsel, or the Panel, any administrative law judge appointed by the Authority under section 3105 of this title, and any employee of the Authority designated by the Authority may—

“(1) issue subpoenas requiring the attendance and testimony of witnesses and the production of documentary or other evidence from any place in the United States; and

“(2) administer oaths, take or order the taking of depositions, order responses to written interrogatories, examine witnesses, and receive evidence.

No subpoena shall be issued under this section which requires the disclosure of intramanagement guidance, advice, counsel, or training within an agency or between an agency and the Office of Personnel Management.

“(b) In the case of contumacy or failure to obey a subpoena issued under subsection (a) (1) of this section, the United States district court for the judicial district in which the person to whom the subpoena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

“(c) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

“§ 7133. Compilation and publication of data

“(a) The Authority shall maintain a file of its proceedings and copies of all available agreements and arbitration decisions, and shall publish the texts of its decisions and the actions taken by the Panel under section 7119 of this title.

“(b) All files maintained under subsection (a) of this section shall be open to inspection and reproduction in accordance with the provisions of sections 552 and 552a of this title.

“§ 7134. Regulations

“The Authority, the General Counsel, the Federal Mediation and Conciliation Service, the Assistant Secretary of Labor for Labor Management Relations and the Panel shall each prescribe rules and regulations to carry out the provisions of this chapter applicable to each of them, respectively. Provisions of subchapter II of chapter 5 of this title shall be applicable to the issuance, revision, or repeal of any such rule or regulation.

“§ 7135. Continuation of existing laws, recognitions, agreements, and procedures

“(a) Nothing contained in this chapter shall preclude—

“(1) the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or a lawful agreement between an agency and an exclusive representative of its employees, which is entered into before the effective date of this chapter; or

“(2) the renewal, continuation, or initial according of recognition for units of management officials or supervisors represented by labor organizations which historically or traditionally represent management officials or supervisors in private industry and which hold exclusive recognition for units of such officials or supervisors in any agency on the effective date of this chapter.

“(b) Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838, or under any other Executive order, as in effect on the effective date of this chapter, shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter.”

BACKPAY IN CASE OF UNFAIR LABOR PRACTICES AND GRIEVANCES

SEC. 702. Section 5596 (b) of title 5, United States Code is amended to read as follows:

“(b) (1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all a part of the pay, allowances, or differentials of the employee—

“(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

“(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

“(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, shall be awarded in accordance with standards established under 7701 (g) of this title; and

“(B) for all purposes, is deemed to have performed service for the agency during that period, except that—

“(i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee

and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and

“(ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

“(2) This subsection does not apply to any reclassification action nor authorize the setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.

“(3) For the purpose of this subsection, ‘grievance’ and ‘collective bargaining agreement’ have the meanings set forth in section 7103 of this title, ‘unfair labor practice’ means an unfair labor practice described in section 7116 of this title, and ‘personnel action’ includes the omission or failure to take an action or confer a benefit.”.

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 703. (a) Subchapter II of chapter 71 of title 5, United States Code, is amended—

(1) by redesignating sections 7151 (as amended by section 312 of this Act), 7152, 7153, and 7154 as sections 7201, 7202, 7203, and 7204, respectively;

(2) by striking out the subchapter heading and inserting in lieu thereof the following:

“CHAPTER 72—ANTIDISCRIMINATION; RIGHT TO PETITION CONGRESS

“SUBCHAPTER I—ANTIDISCRIMINATION IN EMPLOYMENT

“Sec.

“7201. Antidiscrimination policy; minority recruitment program.

“7202. Marital status.

“7203. Handicapping condition.

“7204. Other prohibitions.

“SUBCHAPTER II—EMPLOYEES’ RIGHT TO PETITION CONGRESS

“7211. Employees’ right to petition Congress.”;

and

(3) by adding at the end thereof the following new subchapter:

“SUBCHAPTER II—EMPLOYEES’ RIGHT TO PETITION CONGRESS

“§ 7211. Employees’ right to petition Congress

“The right of employees, individual or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.”.

(b) The analysis for part III of title 5, United States Code, is amended by striking out—

"Subpart F—Employee Relations

"71. Policies **7101".**
and inserting in lieu thereof—

"Subpart F—Labor-Management and Employee Relations

"71. Labor-Management Relations..... **7101**
"72. Antidiscrimination; Right to Petition Congress..... **7201".**

(2) *Section 3302(2) of title 5, United States Code, is amended by striking out "and 7154" and inserting in lieu thereof "and 7204".*

(c) (1) *Section 2105(c) (1) of title 5, United States Code, is amended by striking out "7152, 7153" and inserting in lieu thereof "7202, 7203".*

(3) *Sections 4540(c), 7212(a), and 9540(c) of title 10, United States Code, are each amended by striking out "7154 of title 5" and inserting in lieu thereof "7204 of title 5".*

(4) *Section 410(b) (1) of title 39, United States Code, is amended by striking out "chapters 71 (employee policies)" and inserting in lieu thereof the following: "chapters 72 (antidiscrimination; right to petition Congress)".*

(5) *Section 1002(g) of title 39, United States Code, is amended by striking out "section 7102 of title 5" and inserting in lieu thereof "section 7211 of title 5".*

(d) *Section 5315 of title 5, United States Code, is amended by adding at the end thereof the following clause:*

"(124) Chairman, Federal Labor Relations Authority."

(e) *Section 5316 of such title is amended by adding at the end thereof the following clause:*

"(145) Members, Federal Labor Relations Authority (2) and its General Counsel."

MISCELLANEOUS PROVISIONS

Sec. 704. (a) Those terms and conditions of employment and other employment benefits with respect to Government prevailing rate employees to whom section 9(b) of Public Law 92-392 applies which were the subject of negotiation in accordance with prevailing rates and practices prior to August 19, 1972, shall be negotiated on and after the date of the enactment of this Act in accordance with the provisions of section 9(b) of Public Law 92-392 without regard to any provision of chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph.

(b) The pay and pay practices relating to employees referred to in paragraph (1) of this subsection shall be negotiated in accordance with prevailing rates and pay practices without regard to any provision of—

(A) chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph;

(B) subchapter IV of chapter 53 and subchapter V of chapter 55 of title 5, United States Code; or

(C) any rule, regulation, decision, or order relating to rates of pay or pay practices under subchapter IV of chapter 53 or subchapter V of chapter 55 of title 5, United States Code.

TITLE VIII—GRADE AND PAY RETENTION

GRADE AND PAY RETENTION

SEC. 801. (a)(1) Chapter 53 of title 5, United States Code, relating to pay rates and systems, is amended by inserting after subchapter V thereof the following new subchapter:

“SUBCHAPTER VI—GRADE AND PAY RETENTION

“§ 5361. Definitions

“For the purpose of this subchapter—

“(1) ‘employee’ means an employee to whom chapter 51 of this title applies, and a prevailing rate employee, as defined by section 5342(a)(2) of this title, whose employment is other than on a temporary or term basis;

“(2) ‘agency’ has the meaning given it by section 5102 of this title;

“(3) ‘retained grade’ means the grade used for determining benefits to which an employee to whom section 5362 of this title applies is entitled;

“(4) ‘rate of basic pay’ means, in the case of a prevailing rate employee, the scheduled rate of pay determined under section 5343 of this title;

“(5) ‘covered pay schedule’ means the General Schedule, any prevailing rate schedule established under subchapter IV of this chapter, or the merit pay system under chapter 54 of this title;

“(6) ‘position subject to this subchapter’ means any position under a covered pay schedule; and

“(7) ‘reduction-in-force procedures’ means procedures applied in carrying out any reduction in force due to a reorganization, due to lack of funds or curtailment of work, or due to any other factor.

“§ 5362. Grade retention following a change of positions or reclassification

“(a) Any employee—

“(1) who is placed as a result of reduction-in-force procedures from a position subject to this subchapter to another position which is subject to this subchapter and which is in a lower grade than the previous position, and

“(2) who has served for 52 consecutive weeks or more in one or more positions subject to this subchapter at a grade or grades higher than that of the new position,

is entitled, to the extent provided in subsection (c) of this section, to have the grade of the position held immediately before such placement be considered to be the retained grade of the employee in any position he holds for the 2-year period beginning on the date of such placement.

“(b) (1) Any employee who is in a position subject to this subchapter and whose position has been reduced in grade is entitled, to the extent provided in subsection (c) of this section, to have the grade of such position before reduction be treated as the retained grade of such employee for the 2-year period beginning on the date of the reduction in grade.

“(2) The provisions of paragraph (1) of this subsection shall not apply with respect to any reduction in the grade of a position which

had not been classified at the higher grade for a continuous period of at least one year immediately before such reduction.

"(c) For the 2-year period referred to in subsections (a) and (b) of this section, the retained grade of an employee under such subsection (a) or (b) shall be treated as the grade of the employee's position for all purposes (including pay and pay administration under this chapter and chapters 54 and 55 of this title, retirement and life insurance under chapters 83 and 87 of this title, and eligibility for training and promotion under this title) except—

"(1) for purposes of subsection (a) of this section,

"(2) for purposes of applying any reduction-in-force procedures,

"(3) for purposes of determining whether the employee is covered by the merit pay system established under section 5402 of this title, or

"(4) for such other purposes as the Office of Personnel Management may provide by regulation.

"(d) The foregoing provisions of this section shall cease to apply to an employee who—

"(1) has a break in service of one workday or more;

"(2) is demoted (determined without regard to this section) for personal cause or at the employee's request;

"(3) is placed in, or declines a reasonable offer of, a position the grade of which is equal to or higher than the retained grade; or

"(4) elects in writing to have the benefits of this section terminate.

"§ 5363. Pay retention

"(a) Any employee—

"(1) who ceases to be entitled to the benefits of section 5362 of this title by reason of the expiration of the 2-year period of coverage provided under such section;

"(2) who is in a position subject to this subchapter and who is subject to a reduction or termination of a special rate of pay established under section 5303 of this title; or

"(3) who is in a position subject to this subchapter and who (but for this section) would be subject to a reduction in pay under circumstances prescribed by the Office of Personnel Management by regulation to warrant the application of this section; is entitled to basic pay at a rate equal to (A) the employee's allowable former rate of basic pay, plus (B) 50 percent of the amount of each increase in the maximum rate of basic pay payable for the grade of the employee's position immediately after such reduction in pay if such allowable former rate exceeds such maximum rate for such grade.

"(b) For the purpose of subsection (a) of this section, 'allowable former rate of basic pay' means the lower of—

"(1) the rate of basic pay payable to the employee immediately before the reduction in pay; or

"(2) 150 percent of the maximum rate of basic pay payable for the grade of the employee's position immediately after such reduction in pay.

"(c) The preceding provisions of this section shall cease to apply to an employee who—

- “(1) has a break in service of one workday or more;*
- “(2) is entitled by operation of this subchapter or chapter 51, 53, or 54 of this title to a rate of basic pay which is equal to or higher than, or declines a reasonable offer of a position the rate of basic pay for which is equal to or higher than, the rate to which the employee is entitled under this section; or*
- “(3) is demoted for personal cause or at the employee’s request.*

“§ 5364. Remedial actions

“Under regulations prescribed by the Office of Personnel Management, the Office may require any agency—

“(1) to report to the Office information with respect to vacancies (including impending vacancies);

“(2) to take such steps as may be appropriate to assure employees receiving benefits under section 5362 or 5363 of this title have the opportunity to obtain necessary qualifications for the selection to positions which would minimize the need for the application of such sections;

“(3) to establish a program under which employees receiving benefits under section 5362 or 5363 of this title are given priority in the consideration for or placement in positions which are equal to their retained grade or pay; and

“(4) to place certain employees, notwithstanding the fact their previous position was in a different agency, but only in circumstances in which the Office determines the exercise of such authority is necessary to carry out the purpose of this section.

“§ 5365. Regulations

“(a) The Office of Personnel Management shall prescribe regulations to carry out the purpose of this subchapter.

“(b) Under such regulations, the Office may provide for the application of all or portions of the provisions of this subchapter—

“(1) to any individual reduced to a grade of a covered pay schedule from a position not subject to this subchapter;

“(2) to individuals to whom such provisions do not otherwise apply; and

“(3) to situations the application to which is justified for purposes of carrying out the mission of the agency or agencies involved.

“§ 5366. Appeals

“(a) (1) In the case of the termination of any benefits available to an employee under this subchapter on the grounds such employee declined a reasonable offer of a position the grade or pay of which was equal to or greater than his retained grade or pay, such termination may be appealed to the Office of Personnel Management under procedures prescribed by the Office.

“(2) Nothing in this subchapter shall be construed to affect the right of any employee to appeal—

“(A) under section 5112(b) or 5346(c) of this title, or otherwise, any reclassification of a position; or

“(B) under procedures prescribed by the Office of Personnel Management, any reduction-in-forec action.

“(b) For purposes of any appeal procedures (other than those described in subsection (a) of this section) or any grievance procedure negotiated under the provisions of chapter 71 of this title—

“(1) any action which is the basis of an individual’s entitlement to benefits under this subchapter, and

“(2) any termination of any such benefits under this subchapter, shall not be treated as appealable under such appeals procedures or grievable under such grievance procedure.”.

(2) Sections 5334(d), 5337, and 5345 of title 5, United States Code, are hereby repealed.

(3) (A) Chapter 53 of title 5, United States Code, is amended—

(i) by redesignating subchapter VI as subchapter VII, and

(ii) by redesignating sections 5361 through 5365 as sections 5371 through 5375, respectively.

(B) (i) The analysis of chapter 53 of title 5, United States Code, is amended by striking out the items relating to subchapter VI thereof and inserting in lieu thereof the following:

“SUBCHAPTER VI—GRADE AND PAY RETENTION

“Sec.

“5361. Definitions.

“5362. Grade retention following a change of positions or reclassification.

“5363. Pay retention.

“5364. Remedial actions.

“5365. Regulations.

“5366. Appeals.

“SUBCHAPTER VII—MISCELLANEOUS PROVISIONS

“Sec.

“5371. Scientific and professional positions.

“5372. Administrative law judges.

“5373. Limitation on pay fixed by administrative action.

“5374. Miscellaneous positions in the executive branch.

“5375. Police force of National Zoological Park.”.

(ii) The analysis of such chapter is further amended by striking out the items relating to sections 5337 and 5345, respectively.

(iii) Sections 559 and 1305 of title 5, United States Code, are each amended by striking out “5362,” each place it appears and inserting “5372,” in lieu thereof.

(C) Section 3104(b) of title 5, United States Code, as redesignated by this Act, is amended by striking out “section 5361” and inserting “section 5371” in lieu thereof.

(D) Section 5102(c)(5) of title 5, United States Code, is amended by striking out “section 5365” and inserting “section 5375” in lieu thereof.

(E) Sections 5107 and 8704(d)(1) of title 5, United States Code, are each amended by striking out “section 5337” and inserting in lieu thereof “subchapter VI of chapter 53”.

(F) Section 5334(b) of title 5, United States Code, is amended by striking out “section 5337 of this title” each place it appears and inserting in lieu thereof “subchapter VI of this chapter”.

(G) Section 5334 of title 5, United States Code, is amended by redesignating subsections (e) and (f) as subsections (d) and (e), respectively.

(H) Section 5349(a) of title 5, United States Code, is amended—

(i) by striking out “section 5345, relating to retention of pay,” and inserting in lieu thereof “subchapter VI of this chapter, relating to grade and pay retention,”;

(ii) by striking out “section 5345 of this title” and inserting in lieu thereof “subchapter VI of this chapter”; and

(iii) by striking out “paragraph (2) of section 5345(a)” and inserting in lieu thereof “section 5361(1)”.

(I) Sections 4540(c), 7212(a), and 9540(c) of title 10, United States Code, are each amended by inserting after “of title 5” the following: “and subchapter VI of chapter 53 of such title 5”.

(J) Section 1416(a) of the Act of August 1, 1968 (Public Law 90-448; 15 U.S.C. 1715(a)), and section 808(c) of the Act of April 11, 1968 (Public Law 90-284; 42 U.S.C. 3608(b)), are each amended by striking out “5362,” and inserting in lieu thereof “5372.”

(4) (A) The amendments made by this subsection shall take effect on the first day of the first applicable pay period beginning on or after the 90th day after the date of the enactment of this Act.

(B) An employee who was receiving pay under the provisions of section 5334(d), 5337, or 5345 of title 5, United States Code, on the day before the effective date prescribed in subparagraph (A) of this paragraph shall not have such pay reduced or terminated by reason of the amendments made by this subsection and, unless section 5362 of such title 5 (as amended by subsection (a) (1) of this section) applies, such an employee is entitled to continue to receive pay as authorized by those provisions (as in effect on such date).

(b) (1) Under regulations prescribed by the Office of Personnel Management, any employee—

(A) whose grade was reduced on or after January 1, 1977, and before the effective date of the amendments made by subsection (a) of this section under circumstances which would have entitled the employee to coverage under the provisions of section 5362 of title 5, United States Code (as amended by subsection (a) of this section) if such amendments had been in effect at the time of the reduction; and

(B) who has remained employed by the Federal Government from the date of the reduction in grade to the effective date of the amendments made by subsection (a) of this section without a break in service of one workday or more;

shall be entitled—

(i) to receive the additional pay and benefits which such employee would have been entitled to receive if the amendments made by subsection (a) of this section had been in effect during the period beginning on the effective date of such reduction in grade and ending on the day before the effective date of such amendments, and

(ii) to have the amendments made by subsection (a) of this section apply to such employee as if the reduction in grade had occurred on the effective date of such amendments.

(2) No employee covered by this subsection whose reduction in grade resulted in an increase in pay shall have such pay reduced by reason of the amendments made by subsection (a) of this section.

(3) (A) For purposes of this subsection, the requirements under paragraph (1) (B) of this subsection, relating to continuous employment following reduction in grade, shall be considered to be met in the case of any employee—

(i) who separated from service with a right to an immediate annuity under chapter 83 of title 5, United States Code, or under another retirement system for Federal employees; or

(ii) who died.

(B) Amounts payable by reason of subparagraph (A) of this paragraph in the case of the death of an employee shall be paid in accordance with the provisions of subchapter VIII of chapter 55 of title 5, United States Code, relating to settlement of accounts in the case of deceased employees.

(4) The Office of Personnel Management shall have the same authority to prescribe regulations under this subsection as it has under section 5365 of title 5, United States Code, with respect to subchapter VI of chapter 53 of such title, as added by subsection (a) of this section.

TITLE IX—MISCELLANEOUS

STUDY ON DECENTRALIZATION OF GOVERNMENTAL FUNCTIONS

SEC. 901. (a) As soon as practicable after the effective date of this Act, the Director of the Office of Management and Budget shall conduct a detailed study concerning the decentralization of Federal governmental functions.

(b) The study to be conducted under subsection (a) of this section shall include—

(1) a review of the existing geographical distribution of Federal governmental functions throughout the United States, including the extent to which such functions are concentrated in the District of Columbia; and

(2) a review of the possibilities of distributing some of the functions of the various Federal agencies currently concentrated in the District of Columbia to field offices located at points throughout the United States.

Interested parties, including heads of agencies, other Federal employees, and Federal employee organizations, shall be allowed to submit views, arguments, and data in connection with such study.

(c) Upon completion of the study under subsection (a) of this section, and in any event not later than one year after the effective date of this Act, the Director of the Office of Management and Budget shall submit to the President and to the Congress a report on the results of such study together with his recommendations. Any recommendation which involves the amending of existing statutes shall include draft legislation.

SAVINGS PROVISIONS

SEC. 902. (a) Except as otherwise provided in this Act, all executive orders, rules, and regulations affecting the Federal service shall continue in effect, according to their terms, until modified, terminated,

superseded, or repealed by the President, the Office of Personnel Management, the Merit Systems Protection Board, the Equal Employment Opportunity Commission, or the Federal Labor Relations Authority with respect to matters within their respective jurisdictions.

(b) No provision of this Act shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.

(c) No suit, action, or other proceeding lawfully commenced by or against the Director of the Office of Personnel Management or the members of the Merit Systems Protection Board, or officers or employees thereof, in their official capacity or in relation to the discharge of their official duties, as in effect immediately before the effective date of this Act, shall abate by reason of the enactment of this Act. Determinations with respect to any such suit, action, or other proceeding shall be made as if this Act had not been enacted.

AUTHORIZATION OF APPROPRIATIONS

SEC. 903. There are authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, such sums as may be necessary to carry out the provisions of this Act.

POWERS OF PRESIDENT UNAFFECTED EXCEPT BY EXPRESS PROVISIONS

SEC. 904. Except as otherwise expressly provided in this Act, no provision of this Act shall be construed to—

(1) limit, curtail, abolish, or terminate any function of, or authority available to, the President which the President had immediately before the effective date of this Act; or

(2) limit, curtail, or terminate the President's authority to delegate, redelegate, or terminate any delegation of functions.

REORGANIZATION PLANS

SEC. 905. (a) Any provision in either Reorganization Plan Numbered 1 or 2 of 1978 inconsistent with any provision in this Act is hereby superseded.

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 906. (a) Title 5, United States Code, is amended—

(1) in section 5347, 8713, and 8911, by striking out "Chairman of the Civil Service Commission" and inserting in lieu thereof "Director of the Office of Personnel Management";

(2) in sections 1301, 1302, 1304, 1308, 2105, 2951, 3110, 3304a, 3308, 3312, 3314, 3318, 3324, 3325, 3344, 3351, 3363, 3373, 3502, 3504, 4102, 4106, 4113-4118, 5102, 5103, 5105, 5107, 5110-5115, 5303, 5304, 5333, 5334, 5335(b), 5336, 5338, 5343, 5346, 5347, 5351, 5352, 5371 (as redesignated in section 801(a)(3)(A)(ii) of this Act), 5372 (as redesignated in such section 801(a)(3)(A)(ii)), 5374 (as redesignated in such section 801(a)(3)(A)(ii)), 5504,

5533, 5545, 5548, 5723, 6101, 6304-6306, 6308, 6311, 6322, 6326, 7203 (as redesignated in section 703 (a) (1) of this Act), 7204 (as redesignated in such section 703(a) (1), 7312, 8151, 8331, 8332, 8334, 8337, 8339-8343, 8345, 8346, 8347(a), 8348 8501, 8701-8712, 8714, 8714a, 8716, 8901-8903, 8905, 8907-8910, and 8913, by striking out "Civil Service Commission" and inserting in lieu thereof "Office of Personnel Management";

(3) in sections 1302, 1304, 1308, 2951, 3304a, 3308, 3312, 3317b, 3318, 3324, 3351, 3363, 3504, 4106, 4113-4115, 4117, 4118, 5105, 5107, 5110-5112, 5114, 5333, 5343, 5346, 5545, 5548, 5723, 6304, 6405, 7312, 8331, 8332, 8337, 8339-8343, 8345, 8346, 8347(a)-(c) and (e)-(h), 8348, 8702, 8704-8707, 8709-8712, 8714a, 8716, 8901-8903, 8905, 8907, 8909, 8910, and 8913 (as such sections are amended in paragraph (2) of this subsection), by striking out "Commission" each place it appears and inserting in lieu thereof "Office";

(4) in sections 1303, 8713 (as amended in paragraph (1) of this subsection), and 8911 (as amended in such paragraph), by striking out "Commission" and inserting in lieu thereof "Office";

(5) in section 3304(d), by striking out "a Civil Service Commission board of examiners" and inserting in lieu thereof "the Office of Personnel Management";

(6) in sections 1505-1508 and 3383, by striking out "Civil Service Commission" and "Commission" each place they appear and inserting in lieu thereof "Merit Systems Protection Board" and "Board", respectively;

(7) in section 1504, by striking out "Civil Service Commission. On receipt of the report, or on receipt of other information which seems to the Commission to warrant an investigation, the Commission shall" and inserting in lieu thereof the following: "Special Counsel. On receipt of the report or on receipt of other information which seems to the Special Counsel to warrant an investigation, the Special Counsel shall investigate the report and such other information and present his findings and any charges based on such findings to the Merit Systems Protection Board, which shall".

"(8) in section 5335(c)—

"(A) by striking out "Commission" the first place it appears and inserting in lieu thereof "Office of Personnel Management";

"(B) by striking out "Commission" the second place it appears and inserting in lieu thereof "Merit Systems Protection Board";

"(C) by striking out "Commission" the third place it appears and inserting in lieu thereof "Office"; and

"(D) by striking out "Commission" the fourth place it appears and inserting in lieu thereof "Board";

(9) in section 8347(d), by striking out "Commission" the first place it appears and inserting in lieu thereof "Merit Systems Protection Board" and by striking out "Commission" the second time it appears and inserting in lieu thereof "Board";

(10) in section 552(a)(4)(F)—

(A) by striking out “Civil Service Commission” and “Commission” each place they appear and inserting in lieu thereof “Special Counsel”; and

(B) by striking out “its” and inserting in lieu thereof “his”;

(11) in section 1303—

(A) by striking out “Civil Service Commission” and inserting in lieu thereof “Office of Personnel Management, Merit Systems Protection Board, and Special Counsel”; and

(B) in paragraph (1), by striking out “Commission” and inserting in lieu thereof “Office of Personnel Management”;

(12) in section 1305, by striking out “For the purpose of sections 3105, 3344, 4301(2)(E), 5362, and 7521 of this title and the provisions of section 5335(a)(B) of this title that relate to administrative law judges the Civil Service Commission may” and inserting in lieu thereof “For the purpose of section 3105, 3344, 4301(2)(D), and 5372 of this title and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, the Office of Personnel Management may, and for the purpose of section 7521 of this title, the Merit Systems Protection Board may”;

(13) in section 1306, to read as follows: “The Director of the Office of Personnel Management and authorized representatives of the Director may administer oaths to witnesses in matters pending before the Office.”;

(14) in section 8344(a), by striking out “Commission” and inserting in lieu thereof “Office of Personnel Management”;

(15) in section 8906, by striking out “Commission” each place it appears and inserting in lieu thereof “Office of Personnel Management” the first time it appears and “Office” the other times it appears;

(16) in the section heading for section 2951 and in the item relating to section 2951 in the analysis for chapter 29, by striking out “Civil Service Commission” and inserting in lieu thereof “Office of Personnel Management”; and

(17) in the section heading for section 5112 and in the item relating to section 5112 in the analysis for chapter 51, by striking out “Civil Service Commission” and inserting in lieu thereof “Office of Personnel Management”.

(b)(1) Section 5109(b) of title 5, United States Code, is hereby repealed.

(2) Section 5109 of such title is further amended by redesignating subsection (c) as subsection (b).

(c)(1) Subchapter VIII of chapter 33 of title 5, United States Code (as in effect immediately before the date of the enactment of this Act) is amended—

(A) by striking out the subchapter heading and inserting in lieu thereof the following:

**"CHAPTER 34—PART-TIME CAREER EMPLOYMENT
OPPORTUNITIES**

"Ser.

"3401. Definitions.

"3402. Establishment of part-time career employment programs.

"3403. Limitations.

"3404. Personnel ceilings.

"3405. Nonapplicability.

"3406. Regulations.

"3407. Reports.

"3408. Employee organization representation.";

and

(B) by redesignating sections 3391 through 3398 as sections 3401 through 3408, respectively.

(2) (A) Section 3401 of such title 5 (as redesignated by this section) is amended by striking out "subchapter".

(B) Section 3402 of such title 5 (as redesignated by this section) is amended—

(i) in subsection (a) (1) (B), by striking out "section 3393" and inserting in lieu thereof "section 3403";

(ii) in subsection (b) (1)—

(I) by striking out "Civil Service Commission" and inserting in lieu thereof "Office of Personnel Management"; and

(II) by striking out "subchapter" and inserting in lieu thereof "chapter"; and

(iii) in subsection (b) (2), by striking out "Commission" and inserting in lieu thereof "Office".

(C) Sections 3405 and 3406 of such title 5 (as redesignated by this section) are amended by striking out "subchapter" each place it occurs and inserting in lieu thereof "chapter".

(D) Section 3407(a) of such title 5 (as redesignated by this section)—is amended—

(i) by striking out "Civil Service Commission" and inserting in lieu thereof "Office of Personnel Management";

(ii) in paragraph (1), by striking out "section 3392" and inserting in lieu thereof "section 3402"; and

(iii) in paragraph (2), by striking out "subchapter" and inserting in lieu thereof "chapter".

(E) Section 3407(b) of such title 5 (as redesignated by this section) is amended—

(i) by striking out "Commission" and inserting in lieu thereof "Office"; and

(ii) by striking out "subchapter" each place it appears and inserting in lieu thereof "chapter".

(F) Sections 8347(g), 8716(b) (3), 8913(b) (3), and 8906(b) (3) of such title 5 are each amended by striking out "section 3391(2)" and inserting in lieu thereof "section 3401(2)".

(G) Section 8716(b) (3) of such title 5 is amended by striking out "section 3391(2)" and inserting in lieu thereof "section 3401(2)".

(H) Section 8913(b) (3) of such title 5 is amended by striking out "section 3391(2)" and inserting in lieu thereof "section 3401(2)".

(3) *Section 5 of the Federal Employees Part-Time Career Employment Act of 1978 is amended by striking out "section 3397 (a)" and inserting in lieu thereof "section 3407 (a)".*

(4) *The analysis for chapter 33 of title 5, United States Code is amended by striking out the items (as in effect immediately before the date of the enactment of this Act) following the item relating to section 3385.*

(5) *The chapter analysis for part III of title 5, United States Code is amended by inserting after the item relating to chapter 34 the following new item:*

"34. Part-time career employment opportunities----- 3401."

EFFECTIVE DATE

Sec. 907. Except as otherwise expressly provided in this Act, the provisions of this Act shall take effect 90 days after the date of the enactment of this Act.

And the House agree to the same.

**ROBERT N. C. NIX,
MO UDALL,
JIM HANLEY,
WILLIAM D. FORD,
WILLIAM CLAY,
PAT SCHROEDER,
EDWARD J. DERWINSKI,
JOHN H. ROUSSELOT,
GENE TAYLOR,
Managers on the Part of the House.
ABRAHAM RIBICOFF,
TOM EAOLETON,
LAWTON CHILES,
JIM SASSER,
MURIEL HUMPHREY,
CHARLES H. PERCY,
JACOB JAVITS,
TED STEVENS,
CHARLES MCC. MATHIAS Jr.,
Managers on the Part of the Senate**

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE ON CONFERENCE

The managers on the part of the Senate and the House at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2640), The Civil Service Reform Act of 1978, submit the following joint statement to the House and the Senate in explanation of the effect of the major actions agreed upon by the managers and recommended in the accompanying report:

FINDINGS AND STATEMENT OF PURPOSE

The conference substitute in section 3 combines the findings and purposes of both the Senate bill and the House amendment. It adopts the Senate language which states as one of the policies of the United States that the right of Federal employees to organize and bargain collectively, and participate through labor organizations in decisions which affect them, with full regard for the public interest and the effectual conduct of public business, should be specifically recognized in statute. A provision in the House amendment was modified to provide that research programs and demonstration projects will be subject to congressional oversight.

TITLE I

EXCLUSIONS FROM COVERAGE OF THE MERIT SYSTEM PRINCIPLES AND PROHIBITED PERSONNEL PRACTICES

The Senate bill applies the merit system principles and prohibited personnel practices to (A) an executive agency; (B) the Administrative Office of the U.S. Courts; and (C) the Government Printing Office. The Senate bill excludes from coverage (A) a Government corporation; (B) the Federal Bureau of Investigation, the Defense Intelligence Agency, the National Security Agency, certain positions in the Drug Enforcement Administration, and, as determined by the President, an executive agency or unit thereof whose principal function is the conduct of foreign intelligence or counterintelligence activities; (C) the General Accounting Office; and (D) any position excluded by the President based upon determination by him that it is necessary or warranted by conditions of good administration or because of its confidential, policymaking, policy-determining or policy-advocating character.

The House excludes only the U.S. Postal Service, the Postal Rate Commission and a limited number of Legislative Branch agencies from merit system principles. The House amendment excludes from coverage of the prohibited personnel practice (i) a Government corporation; (ii) the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, or any executive agency

or unit thereof designated by the President which conducts foreign intelligence or counterintelligence activities. It also excludes from the application of prohibited personnel practices an action taken against an employee in a position which is excepted from the competitive service because of its confidential, policy-determining or policy-advocating character. Although the House amendment does not exclude the FBI from coverage of the prohibited personnel practices, it provides that functions of the Special Counsel relating to the enforcement of the section with respect to the Bureau must be carried out by the President or his designee. It also provides that disclosure described in section 2302(b)(3)(A) (disclosures of Government wrongdoing) shall be made to the Attorney General or his designee. The Attorney General is required to issue rules and regulations to protect employees and applicants for employment in the FBI from taking or failure to take any personnel action as a reprisal for such disclosure.

The conference substitute in section 2301 adopts the House provisions concerning the application of merit system principles. Unless a law, rule or regulation implementing or directly concerning the principles is violated (as under section 2302(b)(11)), the principles themselves may not be made the basis of a legal action by an employee or agency.

The conference substitute in section 2302 adopts the Senate approach to exclusions from the prohibited personnel practices with some modifications. The Drug Enforcement Agency and Foreign Service officers are not excluded from coverage of the prohibited personnel practices. In developing procedures under this bill for the consideration of alleged prohibited personnel practices and adverse action appeals, involving Foreign Service personnel, efforts should be made to achieve maximum compatibility with the Foreign Service Act, and to avoid either duplication or fragmentation of remedies. It is the committee's intent that full effect should be given to the laws applicable to Federal employees generally and also to those dealing specifically with the Foreign Service.

The conference substitute excludes the FBI from coverage of the prohibited personnel practices, except that matters pertaining to protection against reprisals for disclosure of certain information described in section 2302(b)(8) would be processed under special procedures similar to those provided in the House bill. The President, rather than the Special Counsel and the Merit Board, would have responsibility for enforcing this provision with respect to the FBI under section 2303.

ADMINISTRATION OF THE MERIT SYSTEM PRINCIPLES

The Senate bill authorizes the President, pursuant to his authority under this title, to take such actions, including the issuance of such rules, regulations, and directives as necessary to assure that personnel management in the agencies covered by the section is based on and embodies the merit system principles.

The House amendment contains a similar authorization for the President to take actions, including the issuance of rules, regulations, or directives to carry out the merit system principles. Since the House

amendment contains no exclusions from coverage of the merit system principles, the President's authority to administer the provision is broader than the Senate version.

The conference substitute in section 2301 (c) provides that in administering the provisions of this chapter the President shall have the same authority as contained in the Senate bill to take action to insure that personnel management is based on and embodies the merit system principles. With respect to any entity in the executive branch which is excluded under section 2302, the head of that entity must, pursuant to authority otherwise available, and subject to the inherent executive power of the President, take action which is consistent with the provisions of this title and which the agency head determines is necessary to insure that personnel management in that entity is based on and embodies the merit system principles.

CONTENT OF THE PRINCIPLES

One of the merit system principles listed in the Senate bill is that equal pay should be provided for work of equal value . . . with appropriate consideration of both national and local rates paid by non-Federal employers. The House amendment contains a similar principle but specifies that consideration should be of both national and local rates paid by "private sector" employers.

The conference substitute in section 2301 (b) (3) adopts the House language. This wording makes clear that this act is not intended to change law concerning the appropriate employers surveyed in determining comparability pay for Federal employees.

The conference substitute in section 2301 (b) (9) also adopts a modified House provision which says that employees should be protected against reprisal for lawful disclosure of certain kinds of information. The term "lawful disclosure" refers to the kinds of information listed in section 2302 (b) (8) of the title.

PERSONNEL ACTIONS

The Senate bill's definition of personnel action is similar to the House amendment with respect to most provisions. The Senate bill, however, refers to any other substantial change in duties that are inconsistent with an employee's salary or grade level. The House wording refers to a change which "may reasonably be expected to result in a reduction in pay or grade."

The conference substitute in section 2302 (a) (2) (x) is the same as the Senate bill. By adopting this wording, the conferees have no intention of returning to or restoring the concept of reduction in rank. To be covered under this provision a personnel action must be significant, but it need not be expected to result in a reduction in pay or grade. It must also be inconsistent with an employee's salary or grade level. Thus, for example, if an individual is currently employed and assigned duties or responsibilities consistent with the individual's professional training or qualifications for the job, it would constitute a personnel action if the individual were detailed, transferred, or re-assigned so that the employee's new overall duties or responsibilities

were inconsistent with the individual's professional training or qualifications. Or, if an individual holding decisionmaking responsibilities or supervisory authority found that such responsibilities or authority were reduced so that the employee's responsibilities were inconsistent with his or her salary or grade level, such an action could constitute a personnel action within the meaning of this subsection.

This is not intended to interfere with management's authority to assign individuals in accordance with available work, the priorities of the agency, and the needs of the agency for individuals with particular skills or to establish supervisory relationships. Moreover, it is the overall nature of the individual's responsibilities and duties that is the critical factor. The mere fact that a particular aspect of an individual's job assignment has been changed would not constitute a personnel action, without some showing that there has been a significant impact as described above on the overall nature or quality of his responsibilities or duties. If, for example, an employee working on a particular agency rulemaking proceeding is assigned comparable responsibilities with respect to a different rulemaking proceeding, that new assignment would not constitute a personnel action.

REPRISALS FOR DISCLOSURE OF INFORMATION

The Senate bill provides that it is a prohibited personnel practice to take or fail to take a personnel action as a reprisal for disclosure of certain information if such disclosure is not specifically prohibited by statute or Executive Order 11652, or any related amendments thereto. Among the kinds of information described in the Senate bill is information which the employee reasonably believes evidences a gross waste of funds.

The House provision refers to a waste of funds, not "gross" waste. It also provides that an employee would not be protected against reprisal for a disclosure of information if such disclosure is specifically prohibited by law or if such information is specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs. The House amendment also makes it a prohibited personnel practice to take a reprisal action against an employee or applicant for disclosure of certain information to the Special Counsel of the Merit Systems Protection Board or the Inspector General of an agency or another employee designated by the Board to receive such information.

The conference substitute in section 2302(b) (8) adopts the Senate provision concerning gross waste. It adopts the House provision concerning disclosures not specifically prohibited by law in the interest of national defense or the conduct of foreign affairs. The reference to disclosures specifically prohibited by law is meant to refer to statutory law and court interpretations of those statutes. It does not refer to agency rules and regulations.

The conference report also adopts the House provision concerning reprisals for disclosure to the Special Counsel, an Inspector General of an agency, or another employee of an agency designated by the head of the agency to receive information outlined in the conference report.

CONDUCT UNRELATED TO JOB PERFORMANCE

The Senate bill contains no express provision concerning nonperformance related conduct of an employee or applicant.

The House amendment specifies that it is a prohibited personnel practice to discriminate for or against any employee or applicant on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others. The bill also provides, though, that nothing in the paragraph shall prohibit an agency from taking into account any conviction of the employee or applicant for any crime of violence or moral turpitude when determining suitability or fitness.

The conference report in section 2302(b)(10) adopts the House provision modified so that conviction of a crime may be taken into account when determining fitness or suitability of an employee or applicant. This provision is not meant as an encouragement to take conviction of a crime into account when determining the suitability or fitness of an employee or applicant for employment. Nor is it to be inferred that conviction of a crime is meant to disqualify an employee or an applicant from employment. The conferees intend that only conduct of the employee or applicant that is related to the duties to be assigned to an employee or applicant or to the employee's or applicant's performance or the performance of others may be taken into consideration in determining that employee's suitability or fitness. Conviction of a crime which has no bearing on the duties to be assigned to an employee or applicant or on the employee's or applicant's performance or the performance of others may not be the basis for discrimination for or against an employee or applicant.

VIOLATION OF LAW, RULE OR REGULATION IMPLEMENTING MERIT SYSTEM PRINCIPLES

The Senate bill makes it a prohibited personnel practice to take a personnel action in violation of a law, rule, or regulation implementing or relating to the merit system principles in section 2301.

The House amendment contains no comparable provision.

The conference substitute in section 2302(b)(11) adopts the Senate provision modified so that the law, rule, or regulation must "directly concern," a merit system principle in order to be actionable as a prohibited personnel practice. This provision would make unlawful the violation of a law, rule, or regulation implementing or directly concerning the merit system principles but which do not fall within the first 10 categories of prohibited personnel practices. Such actions may lead to appropriate discipline. For example, should a supervisor take action against an employee or applicant without regard for the individual's privacy or constitutional rights, such an action could result in dismissal, fine, reprimand, or other discipline for the supervisor.

DISCLOSURE OF INFORMATION TO CONGRESS

The Senate bill provides that this section of the bill shall not be construed to authorize the withholding of information from Congress

or the taking of any personnel action against an employee who discloses information to Congress.

The House amendment has no comparable provision.

The conference substitute in 2302 adopts the Senate provision. The provision is intended to make clear that by placing limitations on the kinds of information any employee may publicly disclose without suffering reprisal, there is no intent to limit the information an employee may provide to Congress or to authorize reprisal against an employee for providing information to Congress. For example, 18 U.S.C. 1905 prohibits public disclosure of information involving trade secrets. That statute does not apply to transmittal of such information by an agency to Congress. Section 2302(b) (8) of this act would not protect an employee against reprisal for public disclosure of such statutorily protected information, but it is not to be inferred that an employee is similarly unprotected if such disclosure is made to the appropriate unit of the Congress. Neither title I nor any other provision of the act should be construed as limiting in any way the rights of employees to communicate with or testify before Congress.

TITLE II

TERM OF THE DIRECTOR OF THE OFFICE OF PERSONNEL MANAGEMENT

The Senate bill provides that the Director of the Office shall have a 4-year term coterminous with that of the President, and that the Director may be removed only for inefficiency, neglect of duty, or malfeasance in office.

The conference substitute deletes the limitation on the President's removal power contained in the Senate bill, making the Director removable at the will of the President. In order to provide the Director with a measure of independence from the President in performing his duties, though, the conference substitute provides that the Director have a 4-year term, and deletes the Senate requirement that the term be coterminous with that of the President.

SENATE CONFIRMATION OF CHAIRMAN OF THE MSPB

The Senate bill requires confirmation of the Chairman of the Merit Systems Protection Board as chairman of the Board. The House amendment has no comparable provision.

The conference substitute in section 1203 adopts the Senate provision. This would mean that a sitting member of the Board who is nominated for the chairmanship must be confirmed by the Senate for that position. If the President appoints a person who is not serving on the Board to the chairmanship, that person could be confirmed simultaneously as both Chairman and a member of the Board.

STAYS OF AGENCY PERSONNEL ACTIONS

The Senate bill specifies procedures for the MSPB to issue temporary and permanent stays of agency personnel actions involving Hatch Act reprisals, reprisals against whistleblowers, or reprisals for the exercise of appeal rights. It authorizes the Special Counsel to peti-

tion the Merit Systems Protection Board for a stay of such personnel actions.

The House amendment allows the Special Counsel to order a stay of up to 30 days of any prohibited personnel practice. The MSPB may extend the Special Counsel's stay beyond 30 days.

The conference substitute in section 1208 adopts the Senate approach that the Board, as a quasi-judicial body, is the appropriate authority to issue the stay. The conference substitute provides that the Board give great deference to the recommendation of the Special Counsel that a stay is needed. The substitute adopts the House provision making the stay procedure available for all prohibited personnel practices, not just the three instances cited in the Senate bill. The conference substitute also requires that if the Board does not act upon the Special Counsel's request for a stay within 3 days of that request, the stay will automatically go into effect at the expiration of the 3-day period. That stay, however, could last no longer than 15 calendar days.

APPOINTMENT OF PERSONNEL BY THE MSPB AND SPECIAL COUNSEL

The Senate bill authorizes the Chairman of the Board and the Special Counsel to appoint personnel. It provides that an appointment to a confidential, policy-determining, policy-advocating or policymaking position, or to a position in the Senior Executive Service, must comply with the provisions of this title, except that the appointment shall not be subject to the approval or supervision of OPM or the Executive Office of the President. The House amendment contains no comparable provisions.

The conference substitute in sections 1205(j) and 1206(j) adopts a modified Senate approach. It provides that with certain exceptions, dealing with qualifications of employees, the appointments would not be subject to the approval or supervision of OPM or the Executive Office of the President. The purpose of these provisions is to prevent "political clearance" of appointments to the independent Merit Board and Office of the Special Counsel. The conferees believe that it would be inappropriate for any unit of the White House or the Office of Personnel Management to screen such candidates. The individuals appointed to these positions, though, must have the qualifications and meet the standards specified elsewhere in this title.

ANNUAL REPORT OF THE MERIT SYSTEMS PROTECTION BOARD

The Senate requires the Board to submit an annual report to the President and Congress on its activities which must include a description of significant actions taken by the Board to carry out its functions. The report must also review the activities of OPM, including whether or not the actions of OPM are in accord with merit system principles.

The conference substitute in section 1209 adopts the Senate provision, but provides that the Board need only report on those OPM activities it decides are "significant." It is expected that the Board will conduct an evaluation and review of the significant activities of the OPM, but it should not, in connection with the annual report, conduct an investigation into all internal operations of OPM and its employees.

SPECIAL COUNSEL INVESTIGATION OF PROHIBITED PERSONNEL PRACTICES

The Senate bill provides that if the Special Counsel determines that there are prohibited personnel practices that require corrective action, the Special Counsel must report his findings to the MSPB and the OPM and may report the findings to the President. The Special Counsel may include in the report suggestions as to what corrective action should be taken, but the final decision on corrective action would be made by the agency involved.

The House amendment is similar to the Senate bill except that the Merit Systems Protection Board, rather than the agency involved, would make the final decision concerning what corrective action is to be taken.

The conference substitute in section 1206(d) requires the Special Counsel to report his determination, along with any recommendations concerning corrective action, to the head of the agency involved. If the agency has not taken the recommended corrective action within a reasonable period, the Special Counsel may request the Board to consider the matter. It is expected that the Special Counsel and the agencies involved will, whenever practicable, resolve questions concerning proper corrective action without resorting to the Merit Systems Protection Board. If the matter is presented to the MSPB, however, the Board will make the final decision concerning the corrective action to be taken.

SPECIAL COUNSEL TERMINATION OF AN INVESTIGATION

The conference substitute in section 1206(a)(1) adopts the House provision which requires the Special Counsel to notify a person when the Special Counsel terminates an investigation based on that person's allegation. The notification is required as a matter of courtesy to the person who goes to the Special Counsel with an allegation. The notification and the reasons for termination of the investigation, however, need not be detailed. The Special Counsel has complete discretion to decide what form the notice should take. All that this provision requires is a brief notification of and of the summary reasons for the termination of the Special Counsel's investigation.

INVESTIGATION OF EMPLOYEE COMPLAINTS OF ILLEGALITY OF IMPROPRIETY

Both the Senate bill and the House amendment contain provisions for Special Counsel receipt of information which concerns alleged illegal or improper agency activity.

A. Special Counsel action within 15 days after receiving information:

The Senate bill requires only that the Special Counsel promptly transmit the information to the agency concerned. There is no requirement that the Special Counsel determine the validity or otherwise review the information.

The House amendment requires the Special Counsel to determine whether the information "warrants" an investigation by the agency concerned. There is no requirement that all information be promptly transmitted to the agency concerned.

The conference substitute in section 1206(b) requires the Special Counsel to promptly transmit all information to the agency concerned. During the 15 days the Special Counsel is to conduct such review of the information as he deems practicable, and to determine whether he will require an investigation.

B. Standard for referring the information for agency investigation :

Under the Senate bill the Special Counsel determines whether there is a "substantial likelihood" that the information discloses illegal or improper agency activity.

Under the House bill the Special Counsel determines whether the information "warrants" an agency investigation.

The conference substitute in section 1206(b) adopts the "substantial likelihood" standard contained in the Senate bill.

C. Discretion of Special Counsel in requiring an agency investigation :

If the Special Counsel finds "substantial likelihood," he may require an agency investigation under the Senate bill. It intended that the Special Counsel require an investigation only of the more serious matters.

Under the House bill if the Special Counsel determines information "warrants" an investigation, he shall require an agency investigation.

The conference substitute adopts the Senate language.

D. Special Counsel review of agency reports :

1. The Senate bill does not require that the Special Counsel review the agency report. Copies of the report are required to be transmitted to the Congress, the President, and the Special Counsel. The reports are available to the public (there is an exception for classified information).

The House amendment requires the Special Counsel to review the report and determine whether: (a) findings of the agency head are reasonable; (b) the agency's investigation was complete and unbiased; and (c) the corrective action taken or planned is sufficient.

Under the conference substitute copies of the report will go to the Congress, the President, and the Special Counsel. The Special Counsel is required to review the report to determine whether: (a) it contains the specific information required by the act; and (b) whether the findings of the agency head appear reasonable. The Special Counsel may transmit his determinations to the Congress and President include such findings in the public report specified in a later provision of the bill. The Special Counsel's authority to report the agency's action to an employee or to include such information in a public report only extends to noncriminal matters. The Special Counsel should use his discretion in determining whether the names of individuals should be made publicly available or transmitted to the employee.

E. Source of information which may trigger investigation :

Under the Senate bill only information from present or past employees or applicants for employment in the agency involved may trigger an investigation.

Under the House amendment information from any employee or applicant may trigger an investigation.

The conference substitute merges the two provisions so that information from present or past employees or applicants in the agency involved, plus information from other employees which was obtained during the performance of those employees' duties and responsibilities may trigger an investigation. It is expected that the Special Counsel will inform the employee or applicant of the action taken by the Special Counsel and the agency involved concerning the individual's disclosure of information.

SPECIAL COUNSEL INVESTIGATIONS OF A PATTERN OF PROHIBITED PRACTICES

The Senate bill provides that if the Special Counsel believes that there is a pattern of prohibited personnel practices by any agency or employee and such practices involve matters which are not otherwise appealable to the Board under section 7701, the Special Counsel may seek corrective action by filing a written complaint with the Board. For example, there may be hiring or promotion practices which violate merit system principles but which may not give rise to an appealable action under this title. Similarly, competitive examinations may be administered in such a way as to constitute a violation of section 2302. Under this paragraph, the Special Counsel would have authority to seek corrective action, and the Board is empowered to order such corrective action as it finds necessary.

The House amendment contains no comparable provision.

The conference substitute in section 1206(h) adopts the Senate provision. By adopting this provision, the conferees do not intend to divest the Civil Service Commission's Bureau of Personnel Management Evaluation or its successor unit in the Office of Personnel Management of its present functions including its authority to order corrective actions. The Senate bill makes it a prohibited personnel practice to grant any preference or advantage not authorized by law, rule, or regulation to any person for the purpose of improving or injuring the prospects of any particular individual or "category of individuals." The substitute omits this phrase but it is expected that a pattern of activities disadvantaging a category of individuals would be actionable under this subsection.

SPECIAL COUNSEL INVESTIGATIONS OF ARBITRARY AND CAPRICIOUS WITHHOLDING OF INFORMATION

The Senate bill authorizes the Special Counsel to conduct an investigation of any alleged prohibited practice which consists of an arbitrary or capricious withholding of information prohibited under section 552 of this title.

The House amendment is similar to the Senate bill but adds the proviso that the Special Counsel may not investigate under this subsection any withholding of foreign intelligence or counterintelligence information the disclosure of which is specifically prohibited by law or Executive order.

The conference substitute in section 1206(e) adopts the House amendment. This provision retains the status quo regarding the au-

thority of an outside agency (currently the Civil Service Commission; the Special Counsel under this Act) to investigate withholdings of national security information. The status quo is to be maintained with respect to investigations of arbitrary or capricious withholding of other kinds of information as well; this provision is not intended to require that an administrative or court decision be rendered concerning withholding of information before the Special Counsel may investigate allegations of such a prohibited practice.

SPECIAL COUNSEL DISCLOSURE OF EMPLOYEES' IDENTITY

The Senate bill prohibits the Special Counsel from disclosing the identity of an employee or applicant who provides information about certain prohibited personnel practices or government wrongdoing, unless the Special Counsel determines that disclosure is "unavoidable." The comparable provision in the House amendment permits disclosure of the employee's identity only if it is "necessary to effectively carry out the investigation" initiated by the employee.

The conference substitute in section 1206(b) permits the Special Counsel to disclose the identity of an employee who provides certain information to the Special Counsel only if such disclosure is necessary to carry out the Special Counsel's functions. Although the rule is non-disclosure, this provision would allow the Special Counsel to exercise his discretion concerning when the employee or applicant's name might be disclosed. Thus, a major investigation might not be aborted solely to avoid disclosing the employee or applicant's name. At the same time, protection of employees is a primary function of the Special Counsel. It is expected that the Special Counsel will give great weight to this function in deciding whether it is necessary to permit disclosure of the employee or applicant's name. The fact that the Special Counsel finds it necessary to disclose the identity of an employee in no way relieves the Special Counsel of his obligation to protect the employee from reprisals.

APPEALS TO THE MERIT SYSTEMS PROTECTION BOARD

RIGHT TO A HEARING

The Senate bill provides that an employee is entitled to an evidentiary hearing before the Merit Systems Protection Board unless a motion for summary decision is granted. A motion for summary decision shall be granted if the presiding officer decides that there are no genuine and material issues of fact in dispute. The presiding officer may provide for discovery and oral representation of views, at the request of either party, in connection with a summary decision.

The House amendment contains no provision for summary decision. It provides that an employee has a right to a hearing before the MSPB for which a transcript will be kept and the right to be represented by an attorney or other representative.

The conference substitute in section 7701(a) adopts the House provision so that the employee is entitled to a hearing on appeal to the Merit Systems Protection Board. The hearing may be waived by the employee.

ADMINISTRATIVE LAW JUDGES AND MORE EXPERIENCED APPEALS OFFICERS

The Senate bill provides that, in cases of employee removals on appeal before the Merit Systems Protection Board, such cases be assigned to either an administrative law judge or a senior appeals officer, notwithstanding subsection 554 (a) (2) of this title.

The House amendment contains no such provision.

The conference substitute in section 7701 (b) provides that such removal cases be assigned to either an administrative law judge or a more experienced appeals officer. This provision reflects the conferee's intent that appeals from removal actions, which involve the most serious form of disciplinary action against an employee, be adjudicated by the most competent and able presiding officers available. Many complaints were heard during consideration of the Civil Service Reform Act of a lack of confidence in the ability of many hearing officers. For this reason, it was the preferred position at an early point in Senate consideration of the legislation that all removal cases be assigned to administrative law judges.

Because there is only one administrative law judge available within the Civil Service Commission, and because of the serious administrative problems that would ensue from requiring use of administrative law judges in all removal actions, however, the substitute provides that where the administrative law judge is available and a choice exists whereby a removal appeal may be assigned to any one of a number of appeals officers, the more experienced appeals officer be chosen where practicable. In this context, experience would involve having heard employee removal cases in the past, the seniority of the appeals officer, and other similar factors.

BURDEN OF PROOF

The Senate bill puts the burden of proof in cases of alleged employee misconduct on the employing agency. For actions based on unacceptable performance, the Senate provides that "the agency shall have the initial burden of proof subject to an opportunity for rebuttal by the employee," in establishing its case.

The House amendment places the burden of proof in both misconduct and performance cases on the employing agency.

The conference substitute in section 7701 adopts the House approach.

STANDARDS OF REVIEW

The Senate bill provides that for actions based upon unacceptable performance the agency action will be upheld unless "there is no reasonable basis on the record for the agency's decision." For actions based upon misconduct the standard in the Senate bill is "substantial evidence."

The House amendment provides that both for actions based on unacceptable performance and upon misconduct the agency's action shall be sustained only if its decision is supported by a preponderance of evidence introduced before the MSPB.

The conference substitute in section 7701(c) provides that the standard of proof in misconduct cases will be "preponderance of the evidence." The conferees agreed, though, that in performance cases a lower standard of proof should be required because of the difficulty of proving that an employee's performance is unacceptable. The conference substitute therefore provides that an agency's decision in performance cases shall be upheld if its action is supported by substantial evidence in the record before the MSPB. The substantial evidence test was adopted both because it is clearly a lower standard than now used in performance cases and because it is a generally understood term in administrative law.

APPEALABLE ACTIONS IN WHICH ALLEGATION OF DISCRIMINATION HAS BEEN RAISED

Both the Senate bill and the House amendment adopt special procedures for resolving appealable actions where an allegation of discrimination is raised. The Senate bill provides that, whenever an issue of discrimination is raised in the course of a hearing before the Board, the Board must notify the EEOC and the EEOC has the right to participate fully in the proceeding. After action by the Board, the EEOC has an opportunity to review the decision and revise it. The Board may then accept the EEOC's decision, or issue a new one. Where the two agencies are unable to agree, the matter is immediately certified to the court of appeals for resolution. Before the court of appeals, the expertise of both the MSPB and the EEOC is to be given weight in their respective areas of jurisdiction. While the matter is pending in the court, the EEOC is authorized to grant interim relief to the employee.

The House amendment allows the EEOC to delegate to the MSPB authority to make a preliminary determination in an adverse action in which discrimination has been raised, but it directs the EEOC to make the final determination in such cases. The decision of the EEOC constitutes final administrative determination in the matter, and there is no further review in the courts, unless the employee decides to appeal.

The conference substitute in section 7702 adopts the Senate approach at the administrative level, with some modifications, but it places an administrative tribunal, ad hoc in nature, at the apex of the administrative process, rather than depending upon the court of appeals to resolve conflicts between the two agencies. The conference substitute maintains the principle of parity between the MSPB and the EEOC and establishes an appropriate balance in regard to the enforcement of both the merit system principles of title 5 of the United States Code and title VII of the Civil Rights Act of 1964 and other laws prohibiting discrimination. At the same time it preserves for EEOC, as proposed in Reorganization Plan No. 1 of 1978, authority for issuing general policy directives implementing title VII of the Civil Rights Act. This preserves an important policy role for EEOC which it may invoke, consistent with the requirements of law, regardless of the outcome of a particular case. The conference substitute also protects the existing rights of an employee to trial de novo under the Civil Rights Act after a final agency action or if there is no administrative decision after a specified number of days.

APPEALS PROCEDURE

This section applies to both employees and applicants. In all mixed cases, that is, cases involving any action that could be appealed to the MSPB and which involve an allegation of discrimination, the MSPB will hold hearings and issue a decision on both the issue of discrimination and the appealable action. The EEOC will not participate in this proceeding. The term "decision" as used throughout this section includes any remedial order the agency or panel may impose under law.

It is expected that the Board will make adequate training and resources available for the training and supervision of these appeals officers provided for in section 7702(a) to avoid the possibility of inadequate preparation for the processing of those appeals matters which involve allegations of discrimination.

The decision of the Board shall be final agency action unless the employee files a petition with the EEOC to reconsider the case. In the case of class actions, the law generally governing the right of one or more members to appeal an initial decision shall be applicable in this case as well. If the EEOC decides to reconsider the MSPB decision, it may remand the case to the Board for further hearing or provide for its own supplemental hearing as it deems necessary to supplement the record. This amends the procedures established in the Senate bill which did not allow the EEOC to take additional evidence. In making a new decision, the EEOC must determine that: (1) the MSPB decision constitutes an incorrect interpretation of any law, rule, or regulation over which the EEOC has jurisdiction; or (2) the application of such law to the evidence in the record is unsupported by such evidence as a matter of law.

If the EEOC concurs in the decision of the Board, including the remedy ordered by the MSPB, then the decision of the Board shall be final agency action in the matter. If the EEOC decision differs from the MSPB decision, then the case must be referred back to the MSPB. The MSPB may accept the EEOC decision, or if the MSPB determines that the EEOC decision (1) constitutes an incorrect interpretation of any civil service law, rule, or regulation; or (2) the application of such law to the evidence in the record is unsupported by such evidence, as a matter of law, it may reaffirm its initial decision with such revisions as it deems appropriate.

If the Board does not adopt the order of the EEOC, the matter will immediately be certified to the special three-member panel. The panel will review the entire administrative record of the proceeding, and give due deference to the expertise of each agency in reaching a decision. The employee and the agency against whom the complaint was filed may appear before the panel in person, or through an attorney or other representative. The decision of the special panel will be the final agency action in the matter.

Upon application by the employee, the EEOC may, as in the Senate bill, issue certain interim relief as it determines appropriate, to mitigate any exceptional hardship the employee might incur. The bill establishes mandatory time limits to govern the maximum length of time the employing agency, the MSPB, the EEOC, or the Panel may take

to resolve the matter at each step in the process. The act makes compliance with these deadlines mandatory—not discretionary—in order to assure the employee the right to have as expeditious a resolution of the matter as possible. The conferees fully expect the agencies to devote the resources and planning necessary to assure compliance with these statutory deadlines. The bill imposes a statutory requirement that the delays that have been experienced in the past in processing discrimination complaints will be eliminated. Where an agency has not completed action by the time required by this statute it shall immediately take all necessary steps to rapidly complete action on the matter.

It is not intended that the employing agencies, the Board, the Commission, or the special panel would automatically lose jurisdiction for failing to meet these time frames. Congress will exercise its oversight responsibilities should there be a systematic pattern of any body failing to meet these time frames.

RIGHTS OF EMPLOYEES UNDER CIVIL RIGHTS ACT

The conference substitute fully protects the existing rights of employees to trial de novo under title VII of the Civil Rights Act of 1964 or other similar laws after a final agency action on the matter. Under the act's provisions, this final agency action must occur within 120 days after the complaint is first filed. After these 120 days, the employee may appeal to the Board or file a complaint in district court in those cases where the agency in violation of the law has not issued a final decision. If the employee files an appeal of the agency action with MSPB, the employee may file a suit in district court any time after 120 days if the Board has not completed action on the matter by that time. Finally, the act gives the employee the right to sue in district court 180 days after it petitions EEOC to review the decision of MSPB even if the administrative process is not completed by that time, as required by other provisions in the section. Once the employee files a petition with EEOC, however, it may not bring an action in district court until the end of this 180-day period, or until there is final agency action on the matter.

There are in all eight different times when the employee may have the right to bring suit in Federal district court. They are as follows:

1. 120 days after filing a complaint with the employing agency even if the agency has not issued a final decision by that time.
2. 30 days after the employing agency's initial decision.
3. 120 days after filing a petition with the MSPB if the MSPB has not yet made a decision.
4. 30 days after an MSPB decision. If the employee petitions EEOC to review the matter and EEOC denies the petition, the 30-day period in this case runs from the denial of such a petition by EEOC.
5. 30 days after the EEOC decision, if EEOC agrees with the MSPB.
6. 30 days after MSPB reconsideration if MSPB agrees with the EEOC.
7. 30 days after the special panel makes a decision.

8. 180 days after filing a petition with the EEOC for reconsideration of an MSPB decision, if a final agency decision by EEOC, MSPB, or the Panel has not been reached by that time.

If a suit is brought in district court, the rules of equity provide that minor procedural irregularities in the administrative process for which the employee is responsible should not predetermine the outcome of the case.

SPECIAL PANEL

The special panel will be comprised of one member of the EEOC designated on an ad hoc basis by the Chairman of the EEOC, one member of the MSPB designated on an ad hoc basis by the Chairman of the MSPB, and a permanent chairman who will be an individual from outside the Government. The members appointed by EEOC and MSPB to represent the agency in a particular case must be able to represent the views and decision of the majority of the Board or Commission in that particular case. The Chairman will be appointed by the President with the advice and consent of the Senate to a term of six years, and shall be removable only for cause.

The MSPB and the EEOC shall make available to the panel appropriate and adequate administrative resources to carry out its responsibilities under this act. The cost of such services must, to the extent practicable, be shared equally by EEOC and MSPB.

Because it is anticipated that the special panel will not have to be convened often, the conferees do not expect that it will need substantial resources or administrative support. For instance, the EEOC, because it is larger, could provide a convenient place for the panel to meet.

ATTORNEYS' FEES

The Senate bill authorizes attorneys' fees to be awarded in appeals cases by a hearing officer whenever the employee prevails and the officer determines that the agency's action was taken in bad faith or in cases where a discrimination under the Civil Rights Amendment of 1964 has occurred.

The House amendment authorizes attorneys' fees in any case where the officer determines that payment "is warranted" or in a case involving a discrimination under the Civil Rights Amendment of 1964.

The conference substitute (sections 7701(g) and 5596(b)(1)(A)(ii)) authorizes attorneys' fees in cases where employee prevails on the merits and the deciding official determines that attorneys' fees are warranted in the interest of justice, including a case involving a prohibited personnel practice or where the agency's action was clearly without merit. The reference to these two types of cases is illustrative only and does not limit the official from awarding attorneys' fees in other kinds of cases.

JUDICIAL REVIEW OF DECISIONS OF THE MERIT SYSTEMS PROTECTION BOARD

The Senate bill provides that, except for actions filed under the antidiscrimination laws, a petition to review a final order or decision of the Merit Systems Protection Board shall be filed in the U.S. Court of Appeals, or in the U.S. Court of Claims.

The House amendment substitutes "United States District Court" for the Senate's "United States Court of Appeals."

The conference substitute in section 7703(c) adopts the Senate provision, incorporating the traditional appellate mechanism for reviewing final decisions and orders of Federal administrative agencies.

EXECUTIVE PAY LEVEL OF PRESIDENTIAL APPOINTEES

The Senate bill provides the following pay levels for Presidential appointees under this act: Level III—Director of the Office of Personnel Management; level IV—Deputy Director of the Office of Personnel Management, Chairman of the Merit Systems Protection Board; level V—Associate Director of the Office of Personnel Management (five positions), Member of the Merit Systems Protection Board (two positions), Special Counsel; GS-18—General Counsel of the Federal Labor Relations Authority.

The House amendment placed each of these positions at one grade higher on the Executive pay scale.

The conference substitute adopts the House pay levels for Director of the Office of Personnel Management (level II); Chairman of the Merit Systems Protection Board and Deputy Director of the Office of Personnel Management (level III); Members of the Merit Systems Protection Board and Special Counsel (level IV); and General Counsel of the Federal Labor Relations Authority (level V). The substitute adopts the Senate pay level for the Associate Directors of the Office of Personnel Management (level V).

TITLE III

STAFFING

VETERANS' PREFERENCE

Definition of veteran

The Senate bill alters the definition of a veteran eligible for five-point preference in Federal employment to include certain veterans receiving discharges under other than honorable conditions from the military but who are eligible for veterans benefits under provisions of title 38, United States Code. The House amendment retains current law under which only veterans discharged under honorable conditions can qualify for hiring preference.

The conference substitute adopts the House provision.

Preference eligibility for widows and widowers

The Senate bill changes current laws under which all widows and widowers of eligible veterans receive 10-point preference, regardless of the conditions surrounding the veteran's death. Ten points would be limited to widows/widowers of disabled veterans or veterans who lost their lives in combat. The Senate also extends preference to widows/widowers of peacetime veterans who served from 1955 through 1964 who currently receive no preference. The House amendment retains current law.

The conference substitute adopts the House provision on this point.

Competitive examinations

The Senate bill allows any preference eligible, disabled or non-disabled, to reopen any competitive examination for which there is a list of eligibles. The House amendment retains current law, under which only a ten point preference eligible has the right to reopen competitive examinations.

The conference substitute adopts the House provision.

Notification to disabled veteran of physical requirements

The Senate bill provides that, where a disabled veteran is deemed ineligible for a Federal civil service position due to physical disability, the disabled veteran must be notified of this fact, given an opportunity to respond, and have this determination reviewed by the Office of Personnel Management. The House amendment has no comparable provision.

The conference substitute in section 307(b) accepted the Senate language on this point, though limiting notification and review rights to eligible disabled veterans of 30 percent disability or more. The 30 percent rule was adopted because (1) it was felt that without some limitation, the paperwork burden and the flood of relatively minor cases could well disrupt the efficient operation of OPM in this area, and (2) a 30 percent rule would better protect more seriously disabled veterans.

Notification of passover

The Senate bill requires that any disabled veteran an agency wishes to pass over in the course of hiring be notified of that fact, given an opportunity to respond, and have a final determination made by the Office of Personnel Management as to the propriety of the passover. In addition, OPM is forbidden from delegating its responsibility for reviewing passovers to any other agency of the Government. The House amendment contains no comparable provision.

The conference substitute in section 307(c) adopts the Senate provision with two changes. First, it applies the notification and other procedural protections only to disabled veterans of 30 percent disability or more. Second, it limits the prohibition against OPM delegation of passover functions only to those functions related to disabled veterans. Thus, OPM would be allowed to delegate passover functions related to nondisabled veterans, or disabled veterans of less than 30 percent disability. Again, the purpose of this substitute provision is to better protect the rights of more seriously disabled veterans, while avoiding excessive paperwork.

Retention preference for disabled preference eligibles

The Senate bill provides preference for disabled veterans with ten percent disability or more over any other preference eligibles in any reduction in force proceeding. The House amendment contains no such provision.

The conference substitute in section 307(d) adopts the Senate provision, but limits the additional reduction-in-force preference to disabled veterans of 30 percent disability or more.

Notification to disabled veterans in reduction in force

The Senate bill provides that where a disabled veteran is deemed ineligible for retention in a reduction in force proceeding due to physical disability, the veteran be so notified, given an opportunity

to respond, and a final determination be made by OPM. The House amendment contains no comparable provision.

The conference substitute in section 307(f) adopts the Senate provision. However, it limits notice and other procedural rights to disabled veterans of 30 percent disability or more.

MINORITY RECRUITMENT

The House amendment provides for a minority recruitment program. It directs the Equal Employment Opportunity Commission to determine, within categories of civil service employment, which minority group designations constitute a lower percentage of the total number of employees within the employment category than the percentage that the minority constituted within the labor force of the United States. It provides that not later than 60 days after enactment of the bill the EEOC will issue guidelines, make determinations as to under-representation and transmit these determinations to the OPM, to Federal agencies and to Congress. The House amendment further provides that the OPM will implement, by regulation, not later than 180 days after enactment of the bill, a minority recruitment program designed to eliminate the under-representation of the designated minorities. Each year the OPM is directed to report to Congress on the activities related to the minority recruitment program and furnish the data necessary for an evaluation of its effectiveness. The Senate bill contains no such provision.

The Conference substitute in section 310 accepted the House provision. It was the understanding and intention of the conferees, however, that this section will introduce no new appealable rights and that it is solely a recruitment program, and not a program which will determine and govern appointments. Further, this program must be administered consistent with the provisions of Reorganization Plan No. 1 of 1978.

LIMITATION ON EXECUTIVE BRANCH EMPLOYMENT

The House amendment provides that effective one year after the date of enactment and until January 20, 1981, the number of individuals employed in or under an executive agency shall not exceed the number of individuals so employed on January 1, 1977. This limitation would not apply during a time of war or national emergency declared by the Congress or the President. The Senate bill has no comparable provision.

The conference substitute in section 311 provides that the total number of civilian employees in the executive branch, excluding the Postal Service and the Postal Rate Commission, on September 30, 1979, 1980, and 1981 shall not exceed the number of such employees on September 30, 1977. This ceiling will apply to all full-time, part-time and intermittent employees, but excludes up to 60,000 employees in certain special categories such as students, disadvantaged youth, the temporary summer aid program and the Federal junior fellowship program and personnel participating in the worker-trainee opportunity program. Under the conference substitute the President may adjust the number of executive branch employees when he determines it is necessary in the national interest; however, the number of additional employees may not exceed the percentage increase in the population of the United States from September 30, 1978. The conferees note that this authority

relates only to adjustments in the total number of Federal employees. It does not authorize the President to waive any law which otherwise limits the employment of individuals for certain types of positions. For instance, the overall percentage of noncareer or limited term appointees to the Senior Executive Service would remain subject to the limitations established in section 3134.

NOTIFICATION OF VACANCIES IN EXECUTIVE AGENCIES

The House amendment requires executive agencies to notify the Office of Personnel Management of vacant agency positions. This information must then be transmitted to the U.S. Employment Service which is required to keep up-to-date listings of vacancies along with other relevant application information.

The conference substitute in section 309 provides that the Office of Personnel Management shall provide information to the U.S. Employment Service concerning opportunities to participate in competitive examinations. In addition, the conference substitute provides that each agency notify the OPM and the U.S. Employment Service of vacant positions in the agency which are in the competitive service and the Senior Executive Service and which are open to be filled by individuals outside the Federal Service. The conferees intend that an agency notify all U.S. Employment Service offices when there are vacant positions in an agency headquarters office. If a position in a regional office is vacant, the agency may notify all USES offices; however, notice to the USES offices in the region is sufficient.

TITLE IV

THE SENIOR EXECUTIVE SERVICE

SCOPE OF COVERAGE

Agency exclusion

The Senate bill excludes a Government corporation, the General Accounting Office, the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency and the National Security Agency from the scope of coverage of the Senior Executive Service. In addition, the Senate bill provides that the President may exempt an agency or unit whose principal function is the conduct of foreign intelligence or counterintelligence activity.

The House amendment is similar in that it provides an exemption for the same agencies which are named in the Senate bill; however, the House amendment does not limit the exemption for other agencies which conduct foreign intelligence or counterintelligence activity to those for which the activity is the principal function. In addition, the House amendment specifically includes the Administrative Office of the U.S. Courts and the Government Printing Office.

The conference substitute in section 3132(a)(1) is the same as the Senate bill.

Position exclusion

The Senate bill excludes Foreign Service Officers and certain positions in the Drug Enforcement Administration from the Senior Executive Service.

The House amendment excludes administrative law judge positions under section 3105 of title 5 United States Code and contains a broader

exemption for the Foreign Service by exempting all positions in the Foreign Service.

The conference substitute in section 3132(a)(2) combines the provisions of both the Senate bill and House amendment by exempting administrative law judges, positions in the Drug Enforcement Administration which are excluded from the competitive service under section 201 of the Crime Control Act of 1976, and positions in the Foreign Service of the United States.

Senior Executive Service positions

The Senate bill defines a "Senior Executive Service position" as one in which the employee directs the work of an organizational unit, is held accountable for the success of specific line or staff programs or projects, or supervises the work of employees other than personal assistants. In addition, the Senate bill includes individuals who monitor the progress of the organization toward goals and periodically evaluate and make appropriate adjustments to such goals, or exercise other important policymaking or executive functions.

The House amendment differs in that it does not include this latter category of individuals who monitor the progress of the organization or exercise policymaking or executive functions.

The conference substitute in section 3132(a)(2) includes individuals who monitor progress toward organizational goals and periodically evaluate and make appropriate adjustments to such goals, or who exercise important policymaking, policy-determining or other executive functions. Thus, the conferees agreed that the Senior Executive Service should include senior Government managers and other individuals who may not have direct management or supervisory responsibilities but occupy important policymaking, policy-determining or other executive positions in an agency.

Limitation on the Senior Executive Service

A. Establishment of Minimum of Career Reserved Positions.—The Senate provides that the number of career reserved positions in the SES may not be less than the number of positions which were authorized to be filled through competitive civil service appointment prior to the date of enactment. The Senate bill also provides that the Director of OPM may authorize a lesser number of career reserved positions upon determination that it is necessary to designate a position as a general position because: (A) it involves policymaking responsibilities requiring the advocacy or management of programs of the President and support of controversial aspects of such programs; (B) it involves significant participation in the major political policies of the President; or (C) it requires the SES executive to serve as a personal assistant of, or advisor to, a presidential appointee.

The House amendment contains no such requirement establishing a floor on career reserved positions.

The conference substitute in section 3133(e) adopts the Senate provision regarding the floor for career reserved positions, with an amendment that provides that the number of career reserved positions in the SES may not be less than the number of positions which, prior to enactment of the bill, were authorized to be filled through competitive civil service examination. The effect of this change from the original Senate wording is to allow a group of about 700 positions, which technically are filled through competitive appointment, but not through competitive examination, to be excluded from the career reserved floor.

B. *Prior Service in Civil Service.*—The House amendment provides that not more than 30 percent of the individuals serving at any time in SES positions may have served less than an aggregate of 5 years in the civil service, unless the President certifies to the Congress that the limitation would hinder the efficiency of the Government. The Senate bill contained no such limitation regarding the composition of the SES.

The conference adopted in section 3392(a)(2) the House provision with certain changes. The conference substitute provides that not more than 30 percent of the SES positions authorized may be filled by individuals who do not have 5 years of continuous service in the civil service immediately prior to their appointment of the SES, unless the President certifies to Congress that the limitation would hinder the efficiency of the Government.

C. *Limitation on Executive Positions.*—The House amendment repeals the specific authority of agencies to establish supergrade positions and provides that the total number of such positions, plus the SES, shall not exceed 10,920. This section also repeals the authority of agencies to establish professional and scientific positions outside of the General Schedule. In addition, the House amendment provides that, within 6 months of the date of enactment, the Director of OPM must determine the total number of executive level positions in the executive branch which are outside the SES, that this determination must be published in the Federal Register, and the number of such positions may not exceed the number which is published. By January 1980, the President is required to submit a plan to Congress for authorizing executive level positions. The plan must include the number of positions necessary and a justification.

The Senate bill differs from the House bill in that it only repeals preexisting authority for agencies to establish and provide for the rate of pay for positions designated to be in the SES.

The conference substitute in section 414 is similar to the House bill except that it retains the existing authority of legislative and judicial branch agencies under section 5108 of title 5, United States Code to establish positions outside the supergrade pool and, therefore, the substitute reduced the number of positions in the pool to 10,777. In addition, the conference substitute provides that future adjustments to the Federal Bureau of Investigation's supergrade allocation will be made by the President rather than the Director of the Office of Personnel Management.

It was the understanding of the conference, after assurance given by spokespersons for the President, that the administration has no current intention of reducing the number of supergrade positions for the Federal Bureau of Investigation or the Drug Enforcement Administration.

D. *Limited Term and Limited Emergency Appointees.*—The Senate bill and the House amendment provide for limited term and limited emergency appointments to the SES. The Senate bill and the House amendment both provide that the total number of noncareer appointees to the SES in all agencies shall not exceed 10 percent of the total number of SES positions authorized for all agencies. Neither the House nor the Senate bill makes clear whether the limited term and limited emergency appointments are within the 10 percent noncareer limitation.

The conference substitute in section 3134(e) provides that the total

number of limited term and limited emergency appointments may not exceed 5 percent of the total number of SES positions, thus, together with the 10 percent limitation on noncareer appointees, placing a ceiling of 15 percent on the potential number of noncareer, limited term and limited emergency appointees who may be in the SES at any given time.

Effective date of the Senior Executive Service

The Senate bill provides that 9 months after the date of enactment the Senior Executive Service will become effective except that the provisions relating to conversion of positions will become effective on the date of enactment and the provisions relating to the establishment of a minimum number of career reserved positions will become effective 120 days after the date of enactment.

The House amendment provides for an initial two year experimental application of the Senior Executive Service under which positions would be designated, authorized, and filled in only three executive departments designated by the Director of the Office of Personnel Management. Under the House amendment, the Senior Executive Service would become fully effective two full fiscal years following the date of enactment unless Congress adopts a concurrent resolution disapproving its continuance.

The conferees believe that the Senior Executive Service should be fully implemented and become operational on a Government-wide basis as early as is practicable following the date of enactment of the Civil Service Reform Act. Therefore, the conference substitute in section 415 provides that the Senior Executive Service will become effective nine months after the date of enactment except that the provisions relating to conversion in section 413 will become effective upon enactment, and the provisions of section 3133(e), relating to career reserved positions, will become effective by July 1, 1979, and the provisions of section 414(a), relating to supergrade positions, will become effective 180 days after enactment. The conference substitute also provides that 5 years from the effective date of the Senior Executive Service Congress may, by concurrent resolution, disapprove its continuance.

The conference substitute, therefore, establishes a program which is not in any way experimental in nature. The conferees felt that a limited or experimental application of the Senior Executive Service would impair the flexibility of the President and the agencies in managing Government programs, could substantially undermine its effectiveness, and would indicate a lack of congressional commitment to its success. Therefore, the conferees stress that they believe the Senior Executive Service to be an integral and permanent part of the civil service reforms and expect that it will be implemented rapidly by the Director of the Office of Personnel Management and that the number of agencies which are initially excluded from its application will be minimized in order that there be the widest possible pool of executive resources available from which to select talent to meet the needs of individual agencies. The conferees believe that after 5 full years of implementation sufficient information will be available on the effectiveness of this program and that Congress should retain the right to disapprove its continuance in the event of failure to meet its mission or abuse of the discretion granted to the Office of Personnel Management and the agencies.

Compensation for SES executives

1. *Pay Cap.*—The House amendment provides that the aggregate amount of compensation received in salary, awards and performance pay may not exceed 95 percent of the annual rate payable for level II of the Executive Schedule. The Senate bill does not establish a pay cap.

The conference substitute in section 5383(b) provides that the aggregate amount of compensation received in salary, lump sum payments and performance pay may not exceed the annual rate payable for level I of the Executive Schedule.

2. *Awards.*—The Senate bill provides that the receipt of a meritorious rank entitles an individual to receive an annual lump sum payment of \$2,500 for a period of 5 years; and receipt of the rank of Distinguished Executive to receive an annual lump sum payment of \$5,000 for a period of 5 years. The Senate bill also provides that no more than 5 percent of the members of the SES may be appointed to the rank of Meritorious Executive in a calendar year, that not more than 15 percent of the active duty members of the SES may hold the rank of Meritorious Executive, and that not more than 1 percent of the active duty members of the SES may hold the rank of Distinguished Executive.

The House amendment limits one-time lump sum payments to \$2,500 for Meritorious Rank and \$5,000 for the Distinguished Rank. The House amendment further provides that in any fiscal year, the number of career appointees awarded the rank of Meritorious Executive may not exceed 5 percent of the SES and the number of career appointees awarded the rank of Distinguished Executive may not exceed one percent.

The conference substitute in section 4507(e) provides for a lump sum payment of \$10,000 for the rank of Meritorious Executive and \$20,000 for the rank of Distinguished Executive. It provides that in any fiscal year the number of career appointees awarded the rank of Meritorious Executive may not exceed 5 percent of the SES and the number of career appointees awarded the rank of Distinguished Executive may not exceed 1 percent of the SES.

3. *Early Retirement.*—The House amendment provides for early retirement for those removed from the SES for less than fully successful performance. The Senate bill contains no such provisions.

The conference substitute in section 412 adopted the House amendment regarding early retirement.

4. *Comparability.*—The Senate bill gives the President discretionary authority to grant comparability pay increases to SES executives when such increases are given to other employees in the General Schedule. The House amendment specifically mandates that SES executives be given the same comparability increases given to other General Schedule employees.

The conference substitute is in section 5382(c) the same as the Senate bill.

5. *Sabbaticals.*—The Senate bill provides that an agency head may grant leave with half pay and full benefits to a career executive for a sabbatical period not exceeding 12 months or full pay and full benefits for 6 months. The House amendment provides that the head of an agency may grant a sabbatical with full pay and benefits for a period of 11 months. The Head of the agency may also authorize such travel

and per diem costs as the head of the agency determines to be essential for the study or experience of the sabbatical.

The House amendment further provides that any career appointee who is granted a sabbatical must agree, as a condition of accepting the sabbatical, to serve in the Civil Service for 2 consecutive years after his return from the sabbatical. If the person fails to carry out this agreement the appointee shall be liable to the United States for payment of all expenses (including salary) of the sabbatical. The Senate bill contains no such provision.

The conference substitute in section 3396(c) is the same as the House amendment.

TITLE V

MERIT PAY AND CASH AWARDS

COMPARABILITY PAY

The Senate bill grants discretion to the OPM, after consultation with the Office of Management and Budget, to determine the extent to which pay adjustments under the pay comparability system shall be extended to employees covered by merit pay. The House amendment directs that employees under the merit pay system be given the same annual comparability pay adjustments granted to all other Federal employees.

The conference substitute in section 5402 provides that employees covered by the merit pay system shall be given half of the amount of annual pay comparability adjustments, but allows the OPM discretion to either pass along additional portions of the full adjustment to all employees under the merit system or to use available funds for performance-related salary increases. The committee understands that all eligible managers may not be placed under merit pay until October 1, 1981.

TITLE VI

RESEARCH, DEMONSTRATION AND OTHER PROGRAMS

SCOPE OF COVERAGE

Agency exclusion

The Senate bill excludes a Government corporation, the General Accounting Office, the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, and the National Security Agency from the scope of coverage of title VI. In addition, the Senate bill provides that the President may exempt an agency or unit whose principal function is the conduct of foreign intelligence or counterintelligence activities. The House amendment is similar; however, it does not limit the exemption for agencies which conduct foreign intelligence or counterintelligence activity to those for which the activity is the principal agency function.

The conference substitute in section 4701(a) adopts the Senate provision.

Positions excluded

The Senate bill excludes Foreign Service Officers and certain positions in the Drug Enforcement Administration from coverage under chapter 47. The House amendment has no comparable provision.

The conference substitute in section 4701(b) excludes only those positions in the Drug Enforcement Administration which are excluded from the competitive service under section 201 of the Crime Control Act of 1976. It does not exclude Foreign Service officers.

Preconditions for demonstration projects

The Senate bill provides that the OPM, before entering into any agreement to conduct a demonstration project, must: (1) have notified, at least 6 months previously, the Congress and any employee who may be affected by the project; (2) have consulted with such affected employees; and (3) have provided Congress with a report on the proposed demonstration project at least three months in advance.

The House amendment provides in addition to advance notification, that a demonstration project may not be undertaken unless the plan has been approved by each agency involved; a copy has been submitted to each House of Congress; and the plan is not disapproved by either House of Congress during the first period of 60 calendar days of continuous session of Congress after the date on which the plan is transmitted to each House.

The conference substitute in section 4703(b) adopts the Senate provisions regarding notification and omits the congressional veto provision of the House.

VETERANS PREFERENCE

Research and demonstration projects

The Senate bill provides that no research and demonstration projects instituted by OPM may waive laws relating to veterans preference in creating experimental conditions for demonstration purposes. The House amendment contains no such provision.

The conference substitute adopts the House provision on this point. It was felt that the legislation contains enough other protections against abuse of research and demonstration project authority that the rights of veterans would be adequately protected without requiring the Senate prohibition.

STATUS OF MEMBERS OF THE FEDERAL LABOR RELATIONS AUTHORITY

The Senate specifically states that any member of the Authority and the General Counsel may be removed by the President (section 7203 (c) and (g)). The House amendment provides for removal in both cases only after a hearing, and only for "misconduct, inefficiency, neglect of duty, or malfeasance in office" (section 7104 (b) and (f)).

The Senate recedes with respect to the members of the Authority. They will be removable only for cause. The conference report follows the Senate bill, however, with respect to the General Counsel, who will serve at the pleasure of the President.

ENFORCEMENT AND REVIEW OF ORDERS OF THE FEDERAL LABOR RELATIONS AUTHORITY

A. JUDICIAL ENFORCEMENT OF THE DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

1. House section 7123(b) authorizes the Authority to petition any appropriate U.S. Court of Appeals for the enforcement of any order of the Authority, and for temporary relief or restraining order pend-

ing review. The Senate bill contained no comparable provision. The Senate recedes.

2. House section 7123(d) authorizes the Authority to petition any U.S. District Court to obtain appropriate temporary relief or a restraining order when it receives an unfair labor practice complaint. There is no comparable Senate provision. The Senate recedes.

B. JUDICIAL REVIEW OF THE DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

The Senate bill made reviewable in court decisions of the Authority concerning unfair labor practices, including awards of arbitrators relating to unfair labor practices. Otherwise, the Senate provides that all decisions of the Authority are final and conclusive, and not subject to further judicial review except for questions arising under the Constitution. (Section 7204(1); section 7216(f); section 7221(j).) The Senate provides that decisions of arbitrators in adverse action cases would be appealable directly to the court of appeals or court of claims in the same manner as a decision by the MSPB (section 7221(b)).

In the House bill, unfair labor practice decisions are appealable as in the Senate. In addition, all other final decisions of the Authority involving an award by an arbitrator, and the appropriateness of the unit an organization seeks to represent are also appealable to the courts (section 7123(a)). Under the House bill decisions by arbitrators in adverse action cases are first appealable to the Authority before there may be an appeal to the court of appeals.

In the case of arbitrators awards involving adverse actions, the conferees elected to adopt the approach in the Senate bill. The decision of the arbitrator in such matters will be appealable directly to the court of appeals (or court of claims) in the same manner as a decision by MSPB.

In the case of those other matters that are appealable to the Authority the conference report authorizes both the agency and the employee to appeal the final decision of the Authority except in two instances where the House recedes to the Senate. As in the private sector, there will be no judicial review of the Authority's determination of the appropriateness of bargaining units, and there will be no judicial review of the Authority's action on those arbitrators awards in grievance cases which are appealable to the Authority. The Authority will only be authorized to review the award of the arbitrator on very narrow grounds similar to the scope of judicial review of an arbitrator's award in the private sector. In light of the limited nature of the Authority's review, the conferees determined it would be inappropriate for there to be subsequent review by the court of appeals in such matters.

ISSUES BETWEEN AGENCIES AND LABOR ORGANIZATIONS SUBJECT TO NEGOTIATION OR CONSULTATION RIGHTS

A. SPECIFIC AREAS EXCLUDED FROM NEGOTIATIONS

Both bills specified certain matters on which the parties may not negotiate under any circumstances and certain other matters on which the agency may, in its discretion, negotiate. The following are among the differences in the bills:

1. The Senate (section 7218(a)(2)(E)) prohibits negotiations on the methods and means by which agency operations are to be con-

ducted. The House permits—but does not require—the agency to negotiate on such matters (House section 7106(b)(1)). The Senate recedes. The conferees wish to emphasize, however, that nothing in the bill is intended to require an agency to negotiate on the methods and means by which agency operations are to be conducted.

There may be instances where negotiations on a specific issue may be desirable. By inclusion of this language, however, it is not intended that agencies will discuss general policy questions determining how an agency does its work. It must be construed in light of the paramount right of the public to as effective and efficient a Government as possible. For example, the phrase “methods and means” is not intended to authorize IRS to negotiate with a labor organization over how returns should be selected for audit, or how thorough the audit of the returns should be. It does not subject to the collective bargaining agreement the judgment of EPA about how to select recipients for the award of environmental grants. It does not authorize the Energy Department to negotiate with unions on which of the research and development projects being conducted by the Department should receive top priority as part of the Department’s efforts to find new sources of energy. Furthermore, an agency can, in providing guidance and advice to bargaining representatives, instruct them to approach any negotiations involving methods and means with careful attention to the impact any resulting agreements may have and under no circumstances agree to language impacting adversely on the efficiency and effectiveness of agency operations. Such guidance, and any requirement placed on negotiators to consult with higher authority before agreeing to any language concerning methods and means would not conflict with the conference report nor constitute evidence of an unfair labor practice.

In sum, the conference report fully preserves the right of management to refuse to bargain on “methods and means” and to terminate bargaining at any point on such matters even if it initially agrees to negotiations.

2. Senate section 7215(d) permits the agency in its discretion to negotiate on “the number of employees in an agency.” House section 7106(a)(1) prohibits negotiations on this issue under any circumstances. The Senate recedes.

3. Senate section 7218(a)(2)(D) requires the agency to retain the right to “maintain the efficiency of the Government operations entrusted to such officials.” The House has no comparable wording. The Senate recedes. The conferees do not intend thereby to suggest that agencies may not continue to exercise their lawful prerogatives concerning the efficiency of the Government.

4. House section 7106(a)(2)(B) requires the agency to retain the right to make determinations with respect to contracting out work. There is no comparable Senate wording. The Senate recedes.

B. EFFECT OF SUBSEQUENTLY ADOPTED RULES

Senate section 7218(a)(1) stated that in the administration of all matters covered by the collective bargaining agreement the officials and employees shall be governed by any future laws and regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual, and any subsequently published agency policies and regulations required by law or by the regulations of appropriate authority. The House amendment does not contain this provision.

Instead, House section 7116(a) (7) makes it an unfair labor practice for an agency

* * * to prescribe any rule or regulation which restricts the scope of collective bargaining or which is in conflict with any applicable collective bargaining agreement.

The conference report authorizes, as in the Senate bill, the issuance of governmentwide rules or regulations which may restrict the scope of collective bargaining which might otherwise be permissible under the provisions of this title. As in the House, however, the Act generally prohibits such governmentwide rule or regulation from nullifying the effect of an existing collective bargaining agreement. The exception to this is the issuance of rules or regulations implementing section 2302. Rules or regulations issued under section 2302 may have the effect of requiring negotiation of a revision of the terms of a collective bargaining agreement to the extent that the new rule or regulation increases the protection of the rights of employees.

C. GOVERNMENTWIDE RULES OR REGULATIONS

The Senate has no provision governing consultation on Governmentwide rules or regulations. House section 7117(d) gives any labor organization "which is the exclusive representative of a substantial number of employees" national consultation rights with respect to such rules or regulations whenever it affects "any substantive change in any condition of employment." The procedures for consultation are similar to those which govern national consultation rights in other areas. The conferees adopted the House provision.

RIGHTS AND DUTIES OF LABOR ORGANIZATIONS AND AGENCIES

A. WITHHOLDING OF DUES

Both Senate section 5231 and House section 7115(a) authorize an agency to deduct dues from the pay of members of a labor organization. The Senate makes the obligations of the agency to deduct dues from members of an exclusively recognized labor organization dependent upon its agreement to do so as part of a negotiated agreement. House section 7115(a) states that the agency shall make such deduction whenever it receives from an employee in the appropriate unit a written assignment authorizing it. Further, the House specifies that the allotment shall be made at no cost to the exclusively recognized labor organization or the employee. The Senate recedes.

B. RIGHT OF LABOR ORGANIZATION TO ATTEND MEETINGS BETWEEN MANAGEMENT AND AN EMPLOYEE

House sections 7114(a) (2) and (3) give a labor organization that has been certified as the exclusive representative the right to be present at the employee's request at any investigatory interview of an employee by an agency if the employee reasonably believes that the interview may result in disciplinary action against the employee. In addition, the House bill requires the agency to inform the employee of his right of representation at any investigatory interview of an employee concerning "misconduct" which "could reasonably lead" to suspension, reduction in grade or pay, or removal. The Senate bill contains no comparable provision.

The conferees agreed to adopt the wording in the House bill with an

amendment deleting the House provision requiring the agency to inform employees before certain investigatory interviews of the right to representation, and substituting a requirement that each agency inform its employees annually of the right to representation. The conferees further amended the provision so as to give the labor representative the right to be present at any examination of an employee by a representative of the agency in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action against the employee. The conferees recognize that the right to representation in examinations may evolve differently in the private and Federal sectors, and specifically intend that future court decisions interpreting the right in the private sector will not necessarily be determinative for the Federal sector.

C. EXPRESSION OF PERSONAL VIEWS

Senate section 7216(g) states that the expression of

* * * any personal views, argument, opinion, or the making of any statement shall not constitute an unfair labor practice or invalidate an election if the expression contains no threat of reprisal or force or promise of benefit or undue coercive conditions.

The House bill contains no comparable provision.

The House recedes to the Senate with an amendment specifying in greater detail the types of statements that may be made under this section. The provision authorizes statements encouraging employees to vote in elections, to correct the record where false or misleading statements are made, or to convey the Government's views on labor-management relations. The wording of the conference report is intended to reflect the current policy of the Civil Service Commission when advising agencies on what statements they may make during an election, and to codify case law under Executive Order 11491, as amended, on the use of statements in any unfair labor practice proceeding.

D. ILLEGAL STRIKES OR PICKETING

Senate section 7217(e) provides that any labor organization which "willfully and intentionally" condones any strike, work stoppage, slowdown, or any picketing of an agency that interferes with an agency's operations shall, upon an appropriate finding by the Authority, have its exclusive recognition status revoked. There is no comparable House provision.

The conference report adopts the Senate wording with an amendment. As agreed to by the conferees the provision will not apply to instances where the organization was involved in picketing activities. The amendment also specifies that the Authority may impose disciplinary action other than decertification. This is to allow for instances, such as a wildcat strike, where decertification would not be appropriate. In cases where the Authority finds that a person has violated this provision, disciplinary action of some kind must be taken. The authority may take into account the extent to which the organization made efforts to prevent or stop the illegal activity in deciding whether the organization should be decertified.

**PROCEDURES GOVERNING COMPLAINTS OR GRIEVANCES SUBJECT TO
COLLECTIVE BARGAINING AGREEMENTS**

A. EXCLUSIVITY OF GRIEVANCE PROCEDURE

Senate section 7221 (a) provides that, except for certain specified exceptions, an employee covered by a collective bargaining agreement must follow the negotiated grievance procedures rather than the agency procedures available to other employees not covered by an agreement. House section 7121 (a) does not limit the employee to the negotiated procedures in the case of any type of grievance.

The House recedes.

**B. ARBITRATOR'S AWARDS ON MATTERS THAT COULD HAVE BEEN APPEALED
TO MSPB**

1. Senate section 7221 (h) establishes procedures thea rbitrator must follow when considering a grievance involving an adverse action otherwise appealable to the MSPB. In these instances the arbitrator must follow the same rules governing burden of proof and standard of proof that govern adverse actions before the Board. The House contains no comparable requirement. The conferees adopted the Senate provision in order to promote consistency in the resolution of these issues, and to avoid forum shopping.

C. SCOPE OF GRIEVANCE PROCEDURES

The Senate provides that the coverage and scope of the grievance procedures shall be negotiated by the parties (section 7221 (a)). House section 7121 (a) does not authorize the parties to negotiate over the coverage and scope of the grievances that fall within the bill's provisions but prescribes those matters which would have to be submitted, as a matter of law, to the grievance procedures. The conference report follows the House approach with an amendment. All matters that under the provisions of law could be submitted to the grievance procedures shall in fact be within the scope of any grievance procedure negotiated by the parties unless the parties agree as part of the collective bargaining process that certain matters shall not be covered by the grievance procedures.

D. SUITS IN DISTRICT COURT

House section 7121 (c) authorizes any party to a collective bargaining agreement to directly seek a District Court order requiring the other party to proceed to arbitration rather than referring the matter to the Authority. The Senate has no comparable provision. The House recedes. All questions of this matter will be considered at least in the first instance by the Authority.

ADDITIONAL AMENDMENTS

1. Senate section 7210 (h) authorizes OPM to intervene in Authority proceedings and to request the Authority to reopen and reconsider a decision by the Authority. The House bill contains no comparable provision.

The conferees agreed to delete the specific provision in the Senate bill. However, this is not intended in any way to reduce the ability of the OPM or any other person to petition for intervention before the Authority or to petition for reconsideration by the Authority of its decisions.

2. Senate section 7213(b) requires that the views of an organization be "carefully considered." The House requires that the agency "consider" the views or recommendations of the organization, and further, that the agency shall provide the labor organization a written statement of the reasons for taking whatever final action it finally adopted (House section 7113(b)). The conferees adopt the House provision with the understanding that the required written statement of reasons need not be detailed. The conferees adopted similar House language in section 7111(d) with the same understanding.

3. Senate section 7218(b) provides that negotiations on procedures governing the exercise of authority reserved to management shall not unreasonably delay the exercise by management of its authority to act on such matters. Any negotiations on procedures governing matters otherwise reserved to agency discretion by subsection (a) may not have the effect of actually negating the authority as reserved to the agency by subsection (a). There are no comparable House provisions.

The conference report deletes these provisions. However, the conferees wish to emphasize that negotiations on such procedures should not be conducted in a way that prevents the agency from acting at all, or in a way that prevents the exclusive representative from negotiating fully on procedures. Similarly, the parties may indirectly do what the section prohibits them from doing directly.

4. Senate subsection (d) states that arbitration or third-party fact finding with recommendations to assist in the resolution of an impasse may be used by the parties only when "authorized or directed by the Panel." House subsection 7119(b) states that after voluntary arrangements prove unsuccessful, the parties may agree to a procedure for binding arbitration, rather than to require the services of the Federal Service Impasses Panel, "but only if the procedure is approved by the Panel." The Senate recedes.

5. The House provides that if no exception to an arbitrator's award is filed with the Authority, the award "shall be final and binding" (section 7122(b)). The Senate contained no comparable provision. The conferees adopted the House provision. The intent of the House in adopting this provision was to make it clear that the awards of arbitrators, when they become final, are not subject to further review by any other authority or administrative body, including the Comptroller General.

6. Both the House and Senate authorize negotiations except to the extent inconsistent with law, rules, and regulations (Senate sections 7215(c) and 7218(a); House sections 7103(a) (12) (14) and 7117(a) (1), (2), and (3)). The Senate specifically states that this included policies set forth in the Federal Personnel Manual. The House contained no comparable wording.

The conference report follows the House approach throughout this section and other instances where there are similar differences due to the Senate reference to policies, as well as rules and regulations. The conferees specifically intend, however, that the term "rules or regulations" be interpreted as including official declarations of policy of an agency which are binding on officials and agencies to which they apply.

The right of labor organizations to enjoy national consultation rights will also include such official declarations of policy which are binding on officials or agencies.

7. House section 7102 guarantees each employee the right to form, join, or assist any labor organization, or to refrain from any such activity. The Senate in addition provides that "no employee shall be required by an agreement to become or to remain a member of a labor organization, or to pay money to an organization." The conferees adopt the House wording. The conferees wish to emphasize, however, that nothing in the conference report authorizes, or is intended to authorize, the negotiations of an agency shop or union shop provision.

CERTAIN COLLECTIVE BARGAINING AGREEMENTS

Section 704(d) of the House bill provides certain savings clauses for employees principally in agencies under the Department of the Interior and the Department of Energy who have traditionally negotiated contracts in accordance with prevailing rates in the private sector of the economy and who were subject to the savings clauses prescribed in section 9(b) of Public Law 92-392, enacted August 19, 1972.

The Senate contains no comparable provision.

The conference report adopts the House provision with an amendment.

As revised, section 704(d) overrules the decision of the Comptroller General in cases number B-L89782 (Feb. 3, 1978) and B-L9L520 (June 6, 1978), relating to certain negotiated contracts applicable to employees under the Department of the Interior and the Department of Energy. This section also provides specific statutory authorization for the negotiation of wages, terms and conditions of employment and other employment benefits traditionally negotiated by these employees in accordance with prevailing practices in the private sector of the economy.

Section 704(d) (1) authorizes and requires the agencies to negotiate on any terms and conditions of employment which were the subject of negotiations prior to August 19, 1972, the date of enactment of Public Law 92-392. Section 704(d) (1) may not be construed to nullify, curtail, or otherwise impair the right or duty of any party to negotiate for the renewal, extension, modification, or improvements of benefits negotiated.

Section 704(d) (2) requires the negotiation of pay and pay practices in accordance with prevailing pay and pay practices without regard to chapter 71 (as amended by this conference report), subchapter IV of chapter 53, or subchapter V of chapter 55, of title 5, United States Code, in accordance with prevailing practices in the industry.

TITLE VIII

GRADE AND PAY RETENTION

Title VIII of the House amendment provides pay and grade retention for certain Federal employees who have been subject to reductions in grade as a result of grade reclassification actions or reductions in force due to reorganizations or other factors. Under the amendment, an employee whose position is reclassified to a lower grade would be entitled to retain the previous higher grade of his position so long as

he continues to serve in that position. An employee who is reduced in grade as a result of a reduction in force will be entitled to retain his grade for 2 years and his pay indefinitely thereafter. The employee's retained grade will be used for purposes of pay, retirement, and eligibility for promotion or training, but not for purposes of reduction-in-force retention. This amendment also provides for retroactive coverage in cases of reductions in grade which occurred between January 1, 1977 and the effective date of title VIII. The House also provides that the termination of benefits may not be appealed to the OPM. The Senate bill contains no such provision.

The conference substitute contains the provisions of title VIII of the House amendment except that the authorized period of grade retention in reclassification cases is limited to 2 years as in the case of reduction-in-force actions. Under the conference substitute, employees who are reduced in grade either as a result of reclassification actions or reductions in force will be entitled to retain their previous higher grades for a period of 2 years, and thereafter will be entitled to retain their existing rates of pay in those cases where the existing rate of pay exceeds the maximum rate of the new grade. The conference substitute adds language to make clear that the actual grade of the employee's position, and not the employee's retained grade, will be used for purposes of determining whether the employee is covered by the merit pay system applicable to supervisors and managers. Thus, an employee who is reduced from a GS-14 nonsupervisory position to a GS-13 supervisory position will retain the GS-14 grade but will be subject to the pay increase and cash award provisions of the merit pay system.

ROBERT N. C. NIX,
MO UDALL,
JIM HANLEY,
WILLIAM D. FORD,
WILLIAM CLAY,
PAT SCHROEDER,
EDWARD J. DERWINSKI,
JOHN H. ROUSSELOT,
GENE TAYLOR,
Managers on the Part of the House.

ABRAHAM RIBICOFF,
TOM EAGLETON,
LAWTON CHILES,
JIM SASSER,
MURIEL HUMPHREY,
CHARLES H. PERCY,
JACOB JAVITS,
TED STEVENS,
CHARLES McC. MATHIAS, Jr.,
Managers on the Part of the Senate.

[From 124 Cong. Rec. 13605
(daily ed. Oct. 14, 1978):]

STATEMENT OF MR. FORD OF MICHIGAN
ON CIVIL SERVICE REFORM
ACT OF 1978

(Mr. FORD of Michigan asked and was given permission to address the House for 1 minute and to revise and extend his remarks and include extraneous matter.)

Mr. FORD of Michigan. Mr. Speaker, yesterday, I was present with the other managers on S. 2640, the Civil Service Reform Act of 1978, as the President signed the legislation into law. The legislation is important and marks a significant accomplishment of the 95th Congress. The conferees on S. 2640 had our final meeting on October 3, and the conference report and statement of managers were completed on October 4 for Senate floor action later that day. Waiving the 3-day rule, the House completed action on the bill on October 6. Unfortunately, the complexity of the legislation and the understandable end-of-session rush to secure passage this Congress forced the conference documents to be less helpful than normal in elaborating the underlying intention of the managers on specific issues of the bill.

As a conferee on S. 2640, as a major participant in the fashioning of the House language on title VII, and as a long-time sponsor of collective-bargaining legislation for Federal employees, I would like to discuss some of the par-

ticular features of the bill signed by the President yesterday.

The approaches taken by the two Houses of Congress toward the labor-management program could not have been more divergent. As is made clear by the report of the Committee on Governmental Affairs, the Senate adopted the position that title VII should simply codify the existing practices and decisions of the current program under Executive Order 11491, Senate Report No. 95-989, at pages 99 to 114.

The House on the other hand, rejected the stifling experience under the order and its administrative entities and decreed a new beginning, free from the mistakes of the past, for labor-management relations in the Federal sector. The House approach to title VII is reflected in the substitute amendment worked out by Mr. UDALL, the administration, Mr. CLAY, and others especially interested in the title, and myself. During the House debate on September 13, Mr. CLAY and I articulated at great length the understandings embodied in and the intentions behind the Udall compromise. We did so in order that no one might claim surprise over the scope and approach implicit in the substitute language. During the debate on title VII, my colleague from Arizona noted that the House was "going to do something historic and far reaching and important for the country * * *"

After full debate, and after rejecting an alternative substitute embodying the Senate's approach, the Udall substitute was adopted by the House, 381 to 0.

I am pleased to report to my colleagues that the conference report adopted by both Houses late last week contains almost intact the House provisions on title VII as outlined in the September 13 debate. During the conference, there were moments when it seemed that agreement between the conflicting views on title VII threatened to destroy the entire bill. But under the statesmanship of the chairman of the conference committee, Mr. UDALL of Arizona, mutual understanding was obtained. I share with Mr. CLAY of Missouri, with whom I have had the privilege of working shoulder-to-shoulder for collective bargaining legislation for the last several Congresses, some of his doubts about the precise tack taken in this legislation. But everyone owes Mr. CLAY a debt of gratitude for his steadfast commitment and enormous contribution he has made on behalf of the ordinary worker who happens to be a Federal em-

ployee. I would also like to acknowledge the important contributions made by Mr. SOLARZ of New York throughout consideration of the bill by the House.

The House conferees were able, after meetings even longer than normal, to persuade the Senate that the new beginning for Federal labor relations mandated by the House bill was necessary, justified, and fully appropriate. Eventually, the conference committee shared the House acknowledgement that this new labor-management program with expanded rights for employees and their representatives was an essential response to the expansion of management prerogatives in other titles of the bill. Even where changes were accepted by the House conferees, these changes also embody the basic House approach outlined on September 13.

Section 7101 establishes the basic policy of the Government on labor-management relations and representation by including the congressional finding that labor organizations and collective bargaining serve the public interest. This section also includes general language about "governmental efficiency" placed here rather than as a separate management right to maintain the efficiency of Government operations. The statement of managers makes clear that agencies may exercise their "lawful prerogatives concerning the efficiency of the Government," but under title VII as revised by the conference committee, one of the agencies' lawful prerogatives is no longer the right to declare a bargaining proposal nonnegotiable because it is barred by the management right to maintain efficiency. The conference committee, by removing one barrier to effective collective bargaining, increases the likelihood that the Government's efficiency will be enhanced. It is the intention of the conference committee that agencies and employee representatives should spend their efforts resolving mutual problems and improving performance instead of litigating over barriers to negotiation.

Section 7103(a) (3) includes the Li-

[From 124 Cong. Rec. H 13606 (daily ed. Oct. 14, 1978):]

brary of Congress and the Government Printing Office among the agencies subject to title VII. Although these two agencies were not covered under the Executive order, each has had a labor-man-

agement program patterned after the order. In each instance, however, the chief management official retained final review authority over the program because of certain statutory anomalies. The temptations inherent in giving one side of the bargaining table ultimate authority proved irresistible and led the conference committee to adopt the House provision placing both agencies under title VII. It is our expectation that these agencies will now negotiate fully with their certified representatives to achieve a rapid and orderly transition to the complete enjoyment of those employee rights that led us to include them, especially the right to participate in a labor relations program that is genuinely bilateral, especially providing for third-party resolution of all negotiability disputes.

Because the Library is not subject to many personnel regulations applying to most other Federal agencies, the scope of collective bargaining at the Library has been significantly greater than that enjoyed by those other agencies under the Executive order. It is our firm intention that the Library will bargain, through impasse if necessary, over all conditions of employment except to the precise extent that the conditions are subject to specific requirements imposed on the Library by an outside agency that leaves the Library without authority to agree to a bargaining proposal.

The conference considered and rejected language aimed at narrowing the scope of bargaining from that previously existing at the Library. We noted that in over 2 years of collective bargaining, the Library has never asserted a compelling interest for any of its internal regulations.

In section 7103(a)(14) the conference committee expanded the scope of bargaining by removing an exception to the definition of "conditions of employment." As reported by the Committee on Post Office and Civil Service, conditions of employment did not include "policies, practices, and matters—relating to discrimination in employment . . ." The discussion drafts of the Udall substitute continued this limitation on the scope of collective bargaining.

During final negotiations over the Udall compromise, the language was changed to make clear that this prohibition against negotiations involving discriminatory practices did not apply to

the Library of Congress, because the Library is not subject to the Equal Employment Opportunity Commission (EEOC). Instead, the Librarian has final administrative review authority in civil rights matters involving the Library.

The committee participants in the drafting of the Udall substitute discussed at length this situation and the fact that virtually the only force pushing for genuine equal opportunity for all employees has been the labor organizations, especially the union in the Congressional Research Service. Although removing the Librarian's final review authority under 42 U.S.C. sec 2000e-16 was beyond the scope of the discussion, the drafters of the Udall compromise determined that the work of the Library unions in this important area should not be impeded. Hence, the language was changed in the Udall substitute as finally presented and adopted by the House.

In view of the efforts of the Library and other Federal sector unions to eliminate discrimination in employment, the conferees decided to remove the exclusion of discrimination matters from the definition of conditions of employment. The effect of the conferees' actions must be stated precisely.

The Equal Employment Opportunity Act of 1972, Public Law 92-261, codified at 42 U.S.C. sec. 2000e-16, requires that each Federal agency maintain an affirmative program of equal opportunity for all employees. Our examination of the act led to the conclusion that the act mandates a program of benefits for Federal employees. As such, the precise contours and contents of affirmative action and equal opportunity plans and programs is currently a mandatory subject of collective bargaining where employees have selected an exclusive representative. In order to avoid interference with EEOC's enforcement authority, the House originally precluded these negotiations in agencies subject to the Commission's jurisdiction.

The conferees, however, decided that under the new labor relations program, Federal sector unions should shoulder their full obligation to help achieve equality of employment opportunity in their agencies. It is the intention of the conferees that the removal of the discrimination exclusion would obligate both agencies and unions to bargain fully over the contents, procedures, and effects

will carry out the purpose of Title VII include, tailored to the violation, status quo ante orders as in *Fibreboard Paper Products Corp.*, 138 NLRB 550, 555, 51 LRRM 1101 (1962), enforced, 322 F. 2d 411, 53 LRRM 2666 (D.C. Cir. 1963), affirmed, 379 U.S. 203, 215-17, 57 LRRM 2609 (1964), *Town and Country Mfg. Co.*, 136 NLRB 1022, 1030, 49 LRRM 1918 (1962), enforced, 316 F. 2d 846, 53 LRRM 2054 (5th Cir. 1963), *North Western Publishing Co.*, 144 NLRB 1069, 1073, 54 LRRM 1182 (1963), enforced, 343 F. 2d 521, 58 LRRM 2759 (7th Cir. 1965), and *Richland, Inc.*, 180 NLRB No. 2, 73 LRRM 1017 (1969); make whole orders as in *Mooney Aircraft Co.* 156 NLRB 326, 61 LRRM 1071 (1965), enforced, 375 F. 2d 402, 64 LRRM 2837 (5th Cir. 1967), cert. denied 389 U.S. 859, 66 LRRM 2308 (1967), *Stackpole Components Co.*, 232 NLRB No. 117, 96 LRRM 1324 (1977), and *Baptist Memorial Hospital*, 229 NLRB No. 1, 95 LRRM 1043 (1977); and orders requiring, at the unions election, retroactive execution of an agreement as in *Huttig Sash & Door Co.*, 151 NLRB 470, 475, 58 LRRM 1433 (1965).

In addition, the conference report specifically allows, where title VII's purpose would be served, remedial orders like that banned under the National Labor Relations Act as interpreted by the Supreme Court in *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 73 LRRM 2561 (1970). Where a failure to bargain in good faith has prevented agreement on a provision, the Authority is fully empowered under section 7118(a)(7)(B) to issue an order requiring the violator to agree to the provision unless the charging party waives, in whole or part, agreement on the provisions during negotiations. (The language of this subsection was revised to insure that the charging party would have the opportunity to waive agreement if it deemed such a waiver advisable in light of continued negotiations.) The conference report took this position despite the presence in both title VII and the National Labor Relations Act of the statement that the bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession." By this action, we made clear our intention that remedies for employer violations under title VII (where the employer is always an official violating the policy of his employer—the Government—against unfair labor practices) will not be limited by the caseload development under the National Labor

Relations Act governing private employers.

The mandatory language used in section 7118(a)(7) reflects the intention of the conferees that where a violation has been found, the Authority must issue a remedy appropriate to the violation, as in *Auto Workers v. NLRB (Omni Spectra, Inc.)*, 427 F.2d 1330, 74 LRRM 2481 (7th Cir. 1970), and *United Steelworkers v. NLRB*, 386 F.2d 981, 66 LRRM 2417 (D.C. Cir. 1967). The conferees thus rejected the approach reflected in *Ren-ton News Record*, 136 NLRB 1294, 1297-98, 49 LRRM 1972 (1962), and *New York Mirror*, 151 NLRB 834, 841-42, 58 LRRM 1468 (1965).

The conferees also adopted the approach to the management rights clause taken by the House, an approach which I could just barely support but that was essential to passage of the bill. Accepting the House's clear intention that FLRC decisions interpreting the Executive order's management rights provisions were to be ignored, even where the order's language is identical to that in title VII, was an essential threshold to resolution of the differences on this title and the entire bill. (This allowed the conferees to adopt language without the interpretative gloss added by the Council.) We were able to agree on inclusion of sometimes identical language because we fully intended that the new Authority will start its interpretation of that language with a clean slate. Moreover, the provision for judicial review insures that this understanding will be implemented.

In addition, the entire structure of the management rights clause is markedly different from that in the order. By the clear language of the bill itself, any exercise of the enumerated management rights is conditioned upon the full negotiation of arrangements regarding adverse effects and procedures. As is made clear by the absence of the phrase "at the election of the agency," procedures and arrangements are mandatory subjects of collective bargaining. Only after this obligation has been completely fulfilled is an agency allowed to assert that a retained management right bars negotiations over a particular proposal. This approach was dictated both by the FLRC's history of interpretative abuse of the order's management rights provisions and by logic itself.

In negotiating appropriate arrange-

ments for employees adversely affected by exercise of a management right, it may obviously be necessary to address the substance of the exercise itself. If, for example, an agency initially contemplates transferring 10 employees into quarters suitable for only half that number, an "appropriate arrangement" cannot be negotiated without changing (at least somewhat) the number of employees to be relocated. Thus, the need for giving first priority to negotiating the arrangements for the adversely affected employees even if these negotiations impinge on the management right to transfer. In the example cited, the agency enjoys a retained management right to transfer all 10 employees only after procedures and appropriate arrangements are agreed upon.

Because of the increased stature for "adverse effect" negotiations, and for other reasons, neither the conference report nor the statement of managers includes a de minimus proviso allowing an agency to escape from its bargaining obligation. It is fully the expectation that where the adverse effects are "de minimus" negotiations will occur but that both parties will see that they proceed with appropriate dispatch.

The House debate clearly set forth the interpretative principles embodied in the House management rights clause. Only bargaining proposals which directly related to the actual exercise of the enumerated management rights are to be ruled nonnegotiable. An indirect or secondary impact on a management right is insufficient to make a proposal nonnegotiable. This principle was followed by the Council in FLRC No. 71A-52, 1 FLRC 235, 244 (1972) and the Labor-Management Empire in his May 17, 1978 decision at pages 5, 6-7. These cases were discussed during the House debate. 124 CONGRESSIONAL RECORD H9638-39, H9649-50, H9651 (Sept. 13, 1968) (daily ed.) That the conference committee adopted this approach is reflected in the statement of managers that, in negotiations, "the parties may indirectly do what the (management rights) section prohibits them from doing directly." H-Rept. No. 95-1717 at page 158.

The "to decide or act" language of the Senate bill was omitted as redundant. The management authority in section 7106(a) and 7106(b) (1) is obviously the authority "to decide or act." Equally obviously, procedures and arrangements

are to be negotiated with regard to both the decisionmaking and implementation phases of any exercise of management's authority.

It should also be noted that procedures and arrangements are to be negotiated for the "permissible" subjects of bargaining in subsection 7106(b) (1), including both methods and means and the grades of employees or positions assigned to any organizational unit. This allows, for example, a labor organization to negotiate procedures insuring a fair grading of positions and employees based upon complete information as to the duties performed and qualifications required. Under section 7121(c) (1), a grievance may be filed regarding a classification that results in a reduction in pay or grade of an employee. This grievance may allege not only procedural violations but also improper classification criteria. In addition, where the criteria are applied in violation of the Equal Employment Opportunity Act of 1972, a discrimination grievance or appeal may also be filed.

The Senate version of title VII continued the order's reference to "personnel policies and practices and matters affecting working conditions." Because of council decision, virtually eliminating any obligation to bargain over "working conditions," the House framed the bargaining obligation in terms of "conditions of employment." This House expansion of bargaining beyond the limited term "working conditions" was accepted by the conferees.

Section 7112(b) in effect excludes certain employees from an appropriate unit. Subsection 7112(b) (7) excludes certain investigative (or audit) employees. Subsection 7112(b) (6) excludes employees engaged in investigation or security work which directly affects national security. It is our intention that, in order for an employee to be excluded under subsection 7112(b) (6) because of investigation work, that work must directly affect na-

[From 124 Cong. Rec. H 13608 (daily ed. Oct. 14, 1978):]

tional security. (If this had not been the case then the reference in subsection 7112(b) (7) to employees engaged in certain investigation functions would have been surplusage because these employees would already have been excluded by the preceding subsection.)

The conferees agreed that the written statement required of an agency under section 7113(b)(2)(B) or under 7117(d)(3)(B) need not be detailed, although the statement must make clear from its contents that the views of an organization with consultation rights were in fact considered.

As agreed upon by the conferees, section 7114(a)(5)(A) gives employees the right to be represented by a person other than the exclusive representative unless a grievance procedure has been negotiated. Under section 7121(b)(3), an employee must either be his own representative or select the exclusive representative when a negotiated grievance procedure is in effect.

House section 7114(a)(2), which only applied to misconduct cases, was dropped in the conference report in lieu of an annual notification to employees of their rights under this section. In adopting House section 7114(a)(3), there was considerable discussion by the conferees to the effect that the (a)(3) right should similarly be limited to misconduct cases. The conferees rejected this approach and continued to apply this right in both misconduct and nonperformance cases. Furthermore, in exchange for dropping the (a)(2) right, the term "investigatory interview" in (a)(3) was replaced by the term "examination," a much broader term that will encompass more situations.

In dropping the (a)(2) right, we want to make clear, however that agencies and employee representatives can continue to negotiate stronger rights into their contracts, such as the one in AFGE Local 2752 contract with the Defense Contract Administration. The need for codifying these rights was made necessary by the fact that agencies in some circumstances may be unable to bind investigators to this right by the collective bargaining contract when the investigators are from outside that agency or from outside the level of management at which the union has exclusive representation. This codification is intended particularly to cover these situations.

Section 7114(b)(4) requires that the agency provide certain information not otherwise prohibited by law relating to negotiations. There is no exemption from this requirement for information, whether or not deemed "confidential" by the agency unless that information constitutes guidance, advice, counsel, or training, each specifically related to collective bargaining.

Section 7114(c) was added to the House version of title VII by the conferees. Once again, the conferees adopted the general House approach of incorporating selected language from the Executive order while rejecting the interpretative gloss placed on that language by the Federal Labor Relations Council. This section must be read in conjunction with section 7114(b)(2) requiring that an agency be represented in collective bargaining by representatives fully prepared and empowered to negotiate. Nothing in section 7114(c) or in section 7106 gives an agency the right to frustrate negotiations by imposing a cumbersome consultation process between agency representatives and agency headquarters or by precluding negotiations in permissible areas without reference to the particularized context in which any proposal on a permissible subject is raised.

In section 7114(b)(2), agencies are placed on notice that they may not allow negotiations to proceed with untrained agency representatives while the agency relies on section 7114(c) to "save the day" by having the agency head refuse to approve the negotiated agreement. Furthermore, the agency head shall approve that agreement if it is in accordance with applicable law, rule, or regulation. Thus, the discretion to disapprove the agreement is a very limited discretion.

It is also our clear intention that agency regulations governing conditions of employment will not, as a general rule, be supported by a "compelling need" and therefore bar negotiations. The principal thrust of this title is to enlarge the rights of employees and their representative beyond that under Council interpretations of the Executive order. Since most "conditions of employment" are subjects of agency regulations—in well-managed agencies anyway—allowing most regulations to bar negotiations would totally defeat the purpose of title VII.

In general, agency negotiators are to be fully empowered to agree to exceptions to agency regulations concerning conditions of employment, including portions of agency regulations supported by compelling need where the need does not apply to the portion of the regulation. Moreover, section 7114(b)(2) requires that the agency "discuss" in the negotiations any proposal regarding conditions of employment even if that proposal is nonnegotiable. The agency is not required to "negotiate" over nonnegotiable proposals. It is, however, required to "dis-

cuss" them.

In this way, the conferees attempted to construct a statutory program where both labor and management will devote their efforts cooperatively to resolving mutual problems instead of having energies diverted into wasteful, continuous litigation of the management rights clause. Everyone—the employees, the agency, and the public—will benefit from these discussions and negotiations. Particularly in the public sector with its lack of a profit incentive, employee organizations are often the only group that effectively encourages management to rationalize its operations.

Agency management, unfortunately, is too often antiquated and satisfied to maintain the status quo. Supervisors are not asked often enough why they continue doing what they are doing—or not doing—even though the employees and the public suffer from their mismanagement. Full discussions and negotiations will help keep management "on its toes" and force it to reexamine its policies and procedures. In this way, the broadest scope of collective bargaining and discussing will facilitate the efficiency of Government operations.

Section 7116(b) (7) of the conference report adopts the House provision with respect to the circumstances under which picketing may form the basis of an unfair labor practice charge against a union. The House rejected the FLRC major policy statement on picketing and provided that only picketing which has in fact interfered with an agency's operations may be considered an unfair labor practice. There is, in other words, no "prior restraint" against proposed picketing which the agency, however reasonably, believes will interfere with its operations. Picketing is a well-recognized, long-established first amendment right. This fact must be kept in mind in assessing whether picketing has in fact "interfered" with an agency's operations. For example, embarrassment to the agency obviously does not constitute interference.

The language in section 7116(e) providing for the expression of personal views is intended to be narrowly construed. It was not the intention of the managers of this legislation to give agency management a license to become a party to an exclusive recognition election. Rather, it was intended to incorporate the policy under Executive Order

11491, as amended, which requires that agency management maintain a posture of neutrality in any representation election campaign. Antilles Consolidated School, Roosevelt Roads, Ceiba, Puerto Rico, A/SLMR No. 349 (1974).

The legislation permits agency management, acting as a neutral, to make nonpartisan statements which are intended to encourage employees to vote in elections as long as they do not attempt to coerce, or otherwise influence an employees' free choice. Moreover, they can make statements intended to clarify any misleading statements, as long as they do not use it as a means to act as a partisan. Finally, they can express the Government's view on labor-management relations which according to the statement of purpose in title VII is to recognize that collective bargaining is in the public interest.

Section 7117 of the conference report and paragraph 6 under "Additional amendments" in the statement of managers (H. Rept. No. 95-1717 at page 158) represents the final stage in the evolution of "government-wide rules and regulations" as a bar to negotiations. Throughout all versions of this section, from the House committee print, to the Udall substitute as adopted by the House and now the conference report, the intention as to the definition of "government-wide" has been constant and clear. The committee report states:

The term "Government-wide" shall be construed literally; only those regulations which affect the Federal civilian work force as a whole are "Government-wide" regulations. H. Rept. No. 95-1403 at P. 51.

During the debate on the Udall substitute, I stressed that the definition of "government-wide" remained the same and that even greater fidelity to that

[From 124 Cong. Rec. H 13609 (daily ed. Oct. 14, 1978):]

definition was required in view of the larger impact on negotiations that the substitute gave to "government-wide" regulations.

The Senate approved a different definition of "government-wide," and the issue of which definition to adopt received the attention of the conferees. The statement of managers correctly notes that the "conference report follows the House approach throughout this section * * *

The Senate wished to label the Federal Personnel Manual a "government-wide regulation" even though many, if not most, of the policies in the Manual do not apply to "the Federal civilian workforce as a whole." Those policies typically do not even cover all of the agencies covered under the House and conference version of title VII, let alone civilian employees outside those agencies.

The Senate was also concerned that "binding policies" be included within the definition of "government-wide rules and regulations." Eventually, the conferees were able to agree that genuinely binding policies imposed on officials and agencies by an outside agency—as defined in section 7103(a)(3) including the Authority—would be regarded as rules and regulations. The House definition of "government-wide," however, was left untouched.

Section 7118 sets forth the procedure for Authority actions specifically relating to unfair labor practices. The General Counsel is responsible for prosecuting unfair labor practice complaints, similar to the system at the National Labor Relations Board. As at the Board, it is our expectation that the charging party will be allowed—in part—to appear, introduce evidence, question witnesses, and make and file arguments on the case. The role of the charging party is especially important in view of the likely staffing difficulties in the first few years of the Authority. Even afterward, however, the charging party will play a crucial role in assuring the diligence of the General Counsel's efforts. In most cases—based on past history—the General Counsel will be a Government official "prosecuting" other Government officials. The temptations in such situations are obvious and the role of the charging party essential.

Furthermore, I fully expect the administration to seek additional moneys in the next Congress to assure a strong and effective labor relations program. The added responsibilities of the Authority, the creation of the office of General Counsel, and the fact that support services heretofore made available to FLRC by the Civil Service Commission must now be handled internally, all place a greater financial burden on this program.

Section 7118(a)(4) provides that no complaint shall issue on an unfair labor practice charge filed more than 6 months after the occurrence of the practice. This timelimit applies to unfair labor prac-

tices with a clearly definable date of occurrence; continuing unfair labor practices—such as continuing discriminatory practices under the civil rights laws—may be prosecuted upon a charge filed within 6 months of the last event in the continuing conduct.

Section 7118(a)(6) requires that a transcript be kept of the proceedings. It is our expectation that this transcript will be furnished to both the charging and responding parties without cost and in time for use in presenting post-hearing briefs.

Under section 7119(a)(5)(B)(iii), the Federal Services Impasses Panel is given full authority to resolve negotiation impasses. The conferees considered and rejected allowing appeals from the Panel to the Authority on negotiability issues. While the Panel must approve binding arbitration procedures other than those of the Panel itself, third-party mediation, including factfinding and recommendation may be entered into at the mutual agreement of the parties.

Section 7121 describes the negotiated grievance procedure that is required of the parties. The grievance procedure constitutes the single most important burden on a labor organization that has been selected as an exclusive representative. As the statement of managers makes clear, the conferees adopted the House approach requiring a broad scope for the grievance procedure through the definition of "grievance" found in section 7103(a)(9). Under the conference report, the negotiated grievance procedure replaces all statutory appeals procedures except for those concerning discrimination complaints under 2302(b)(1), adverse actions and actions based on unacceptable performance. Where a negotiated grievance procedure covers a matter which would also arise under the appeals procedures just listed, an employee has the option of which avenue to pursue.

The labor organization is required to meet a duty of fair representation for all employees, even if not dues-paying members, who use the negotiated grievance procedure. The costs involved in the procedure, which may well involve arbitration, are high. Although the basic House approach of stating in the statute the scope of the procedure was followed, the conferees also adopted a provision aimed solely at allowing the exclusive representative, at its option, to propose and

agree to a reduced coverage for the negotiated grievance procedure—perhaps for financial reasons. Of course, the union may also negotiate changes in the appeals procedure to the extent that the agency has the authority to revise that procedure, instead of replacing the appeals with a negotiated procedure.

We can analogize this situation to management's "permissible" areas of bargaining under section 7106(b)(1), except that permitting the reduction in the scope of the grievance procedure was included in the conference report as a means to insure union flexibility. That is, the union is free to propose a narrowed scope of grievances, is free to withdraw that proposal at any time, and is free to insist to impasse on the narrowed scope if the agency does not agree. An agency, however, may not insist to impasse that the union agree to a reduced scope of grievances under the negotiated procedure. The unions do not have to negotiate in those statutory appeals that will be replaced by a grievance and arbitration procedure; they may negotiate out certain or all of these appeals.

Section 7103(a)(9) includes within the definition of "grievance," "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." Under this definition as adopted by the conferees, so long as a rule or regulation "affects conditions of employment", infractions of that rule or regulation are fully grievable even if the rule or regulation implicates some management right. This interpretation of the definition is required both by the express language of the section and by the greater priority given the negotiability of procedures over the right of management to bar negotiations because of a retained management right.

Section 7121(d) authorizes an employee who has pursued a grievance involving discrimination to request the Equal Employment Opportunity Commission to review a final decision under the grievance procedure if the discrimination falls within the areas of EEOC enforcement. This section applies to both the so-called pure discrimination cases and the so-called mixed cases. Much of the conferees' attention was focused on the competing jurisdictional claims of EEOC and the MSPB in the "mixed" cases. In order solely to avoid an apparent denigration of the Board in the

"mixed" cases, the conferees agreed in section 7702 upon an elaborate and cumbersome appeals procedure for mixed cases that begin with a hearing before the Board—House Report 95-1717 at pages 139-142.

The statement of managers notes that arbitration on matters that could have been appealed to the Board is designed to replace the Board in the resolution of the covered matters. In order to promote consistency, the arbitrator is required, where lawful, to follow the same rules governing burden of proof and standard of proof that obtain before the Board—House Report No. 95-1717 at page 157. The Government is likely to derive significant savings and other benefits from the typically expedited arbitration procedures instead of the statutory hearing. It would have vitiated these benefits if the conferees had agreed to have "mixed" cases proceed from arbitration through the Board to the EEOC and, ultimately, to court.

Since the Board has already yielded its authority to an arbitrator under a negotiated grievance procedure—except for discretionary review—the conferees' action in allowing a "mixed" case to go directly to EEOC involves no derogation of the Board's authority. Section 7121(f) reflects this understanding of the conferees by providing that judicial review of section 7702 matters decided by an arbitrator shall occur "in the same manner and under the same conditions as if the matter had been decided by the Board." Since the conferees did not have the same concerns about the arbitrator's authority as they did about that of the Board, subjecting employees to the cumbersome, multi-step appellate procedure would have achieved no reasonable goal.

Thus, the procedure in "mixed" cases

[From 124 Cong. Rec. H 13610
(daily ed. Oct. 14, 1978):]

under a negotiated grievance procedure is that the employee gets a final decision under that procedure, then may request the EEOC to review the decision or may invoke judicial review including the right to a trial de novo. If EEOC is requested to review the decision, the normal time-limits for seeking judicial action apply.

Section 7121(e)(1) recognizes that some agencies, have internal appeals procedures similar to those applied to other

agencies in sections 4303 and 7512. Section 7121(e)(1) allows an employee to raise matters under the applicable internal appeals procedure or under a negotiated grievance procedure. The Authority has implicit power under section 7105(a)(2)(I) to hear appeals from these internal procedures. Again, if a union may negotiate a complete bypass, through the grievance procedure, of the internal appeals procedure, the union may also negotiate revision of the internal appeals procedure to the extent that the revisions are within the authority of the agency to implement.

Section 7131(b) of the act requires that activities of employees solely related to the internal business of a union be conducted while the employee is in a nonduty status. The House debate on this language made clear that any activities involving an "interface" with management, including preparation for such activities, were not the "internal business" of a union and thus could be performed on official time as negotiated between the parties pursuant to section 7131(d). Although the Senate also made this distinction, the House language was adopted by the conferees. Senate Report No. 95-969 at pages 112-113, interpreting section 7232 of S. 2640 as reported by the Committee on Governmental Affairs. The section remained the same as passed by the Senate on August 24.

In adopting the House language, the conferees did so with the understanding that "contract administration" was also an activity excluded from the definition of "internal business of a labor organization." The House provision was adopted also in order to make clear that neither defining "internal business" nor agreeing to grant official time for non-internal business was a matter of agency discretion. Instead, the granting of official time is subject to negotiations between the parties.

Section 7131(a) contains a statutory grant of official time for the exclusive representative in negotiating a collective bargaining agreement. The statutory grant is limited to the same number of employees for the union as management sends to the negotiations. However, the parties may agree to provide additional official time under section 7131(d).

Section 704 relating to certain prevailing wage rate employees was added by me during committee markup and

was retained in the House passed bill. There was no comparable Senate provision. After long and involved discussions with committee staff members, however, we agreed to accept the revised language in the conference report, but only after

certain assurances as to the intent of the revisions were made explicit.

Throughout the final discussions it was clearly understood that while we compromised on the cut-off date of August 19, 1972, for determining the scope of bargaining, section 704(a) in return should be read to provide that issues negotiated prior to that date would continue to be negotiated thereafter "without regard to whether any particular collective bargaining unit had bargained over all of these issues." While this specific language was in the statement of managers language submitted to me for final approval, I suspect that, along with numerous other typographical errors in the conference documents, this statement was inadvertently omitted in the rush to have the conference report prepared for Senate floor consideration a few short hours later. For example, the correct Comptroller General decisions overruled by this same section should read case numbers B-189782 and B-191520 and not as incorrectly cited in the report.

Although we understand the staffing problems involved, we have not been sanguine about the impending transfer of Council employees to the new Authority. This action increases the bureaucratic tendency, already present in any agency, simply to continue the old ways. It was this tendency in the civil service as a whole that led to the major reforms in this and other titles of the Civil Service Reform Act.

We hope that the mere existence of judicial review by the courts of appeals will encourage the new Authority to make the innovative decisions required by title VII. But if, in the beginning or later, the Authority refuses to follow its mandate, we expect the courts to vigorously defend the rights of employees and their representatives under title VII against misinterpretation or half-hearted enforcement by the Authority.

In the best sense, title VII is remedial legislation designed to give employees and their representatives rights that they have not enjoyed under the Executive order. Title VII also impose obligations on employee representatives that serve

both the public interest and the public business. The House debate makes clear that, as remedial legislation, title VII is to be construed broadly to achieve its remedial purposes. Exceptions to the legislation, such as those in the management rights clause, are to be construed narrowly. In the past, parties benefiting from remedial legislation have been able to enforce the remedial purposes even against the agency administering the legislation. We fully expect this to be the case with title VII as well. For this reason, we declined to bar judicial review of the remedial actions of the Authority.

Our ultimate hope is that, under prodding from the courts, the Authority will develop fidelity to title VII and the interpretative principles it embodied and that then, except for occasional lapses, parties will not need to seek judicial review of Authority decisions. But when a party arrives in court claiming a failure of the Authority to follow title VII, we expect the court to consider the party's claim and evaluate the Authority's decision thoroughly.

The House should be pleased by its work and that of its committee and conferees in establishing a statutory labor-management program for Federal employees. Title VII gives Federal agencies, employee representatives, the Federal Service Impasses Panel, and the new Federal Labor Relations Authority complete powers to implement a viable and productive labor relations program. We have precluded the intrusion of nonlabor relations entities, such as the Comptroller General, into the bargaining and dispute resolution process at both the agency and Authority levels. We have, in short, given Federal agencies and the new Authority the tools to get the job done. We have high hopes that the agencies and the Authority will adhere to the provisions of title VII and the legislative history interpreting those provisions.

We are, however, also realistic in our recognition that the Authority's task is far more difficult than that of the National Labor Relations Board. When the Authority is deciding an unfair labor practice charge against an employer, for example, it is weighing the possible misconduct of another Government agency. We are not blind to the sympathy that may develop between these two Federal entities. But we have made as clear as we can our expectation that the Authority is to perform vigorously its "special prosecutor" functions.

Moreover, in establishing judicial review we expect that the courts will scrutinize the actions of the Authority with less of the deference given other administrative agencies. This is especially important during the initial years of the Authority when it will have to establish superceding decisions mandated by title VII, departing from the experience with the Federal Labor Relations Council under the Executive order.

Finally, I would like to make a comment regarding title II of the act. This title sets forth procedures for disciplining and discharging employees, and for review of those actions by the MSPB. Under those procedures, if an agency charges an employee with inefficiency, it must prove that charge by substantial evidence before the Board. I emphasize, however, that the burden is on the agency to prove its case and that the employee has an absolute statutory right to a hearing, unless he or she waives that right. The conferees agreed that the term "substantial evidence" would be interpreted in light of the meaning given the term in administrative law.

Courts reviewing decisions of administrative bodies will reverse those decisions if they find that the decision is not supported by substantial evidence. In *Universal Camera v. NLRB*, 340 U.S. 474 (1951), the Supreme Court reversed a decision of the Board, and in so doing found that the substantial evidence standard in the National Labor Relations Act has the same meaning as that enunciated in the Administrative Procedure Act. The APA says that—

[From 124 Cong. Rec. 13611
(daily ed. Oct. 14, 1978):]

A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts cited by a party and supported by and in accordance with the reliable, probative and substantial evidence. (Section 556(d)).

Thus substantial evidence must be reliable. It must be probative. And it must be derived from the whole record.

In another case, *Consolidated Edison v. NLRB*, 305 U.S. 59 (1938), the Supreme Court held that substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Regarding the question of whether or not hearsay may constitute substantial

evidence, the Fifth Circuit Court of Appeals in *Cohen v. Perales*, 412 F.2d 44, 53 (1969), said that such evidence must have "rational probative force" to be admissible. The Court of Claims also examined that question in *Jacobowitz v. U.S.*, Ct. Cl. No. 134-68, (April 17, 1970). It held the Government's case to be based on insubstantial evidence because the hearsay on which the proof was based "was uncorroborated hearsay and was objected to by the plaintiff; it was contradicted by direct legal and competent evidence at the hearing; and it was not such relevant evidence as a reasonable mind might accept to support a conclusion."

Thus hearsay, to be accepted as substantial evidence, must have rational probative force. If it is uncorroborated, objected to, contradicted or irrelevant, it may not qualify as substantial evidence.

The application of the substantial evidence standard under the civil service reform bill is distinguishable from its use by Federal courts. In the courts, the test is generally used to review an existing record developed by a lower tribunal or administrative hearing. The courts will consider the lower court's record or the record of the administrative hearing as a whole to determine whether or not the decision is supported by "such relevant evidence as a reasonable mind might accept as adequate to support the conclusion." Under this act, there will be no decision and no record for the MSPB or an arbitrator to review. Thus, it is the responsibility of an administrative law judge, hearing officer or arbitrator to apply the substantial evidence standard as an initial trier of fact. Therefore, their burden in applying the standard is greater than that of an appellate body because they are the ones responsible for developing the record.

In reaching the decision, the administrative law judge, hearing examiner or arbitrator must decide prior to admitting evidence whether the evidence offered by an agency at the hearing is reliable, probative, and relevant. Then they must determine whether this evidence is adequate to persuade them that the employee's performance is in fact below acceptable standards.

In this manner the neutral decision-maker is to carefully weigh the evidence. "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951).

I have not discussed other House provisions discussed during the House debate. Those provisions, as well, have been adopted in the conference report with the underlying intent as expressed in the House debate.

[From 124 Cong. Rec. E 5724
(daily ed. Oct. 14, 1978):]

FEDERAL LABOR-MANAGEMENT
RELATIONS PROGRAM

HON. WILLIAM (BILL) CLAY

OF MISSOURI

IN THE HOUSE OF REPRESENTATIVES

Saturday, October 14, 1978

● Mr. CLAY. Mr. Speaker, I am pleased to note the statement by Mr. FORD of Michigan on the Civil Service Reform Act of 1978 with special focus on title VII of that act. Mr. FORD and I were House conferees on this bill and have both worked shoulder to shoulder over the years to insure a strong Federal labor-management relations program. Struggling with the major differences in conference between the Senate and the House on this detailed legislation was so time consuming that many of us feared we would be unable to come back with a conference report early enough to insure passage before adjournment. In fact, the conference documents were finished only hours before final Senate floor action.

With this in mind, we contented ourselves with a statement of managers that was not as complete as we would have preferred. Consequently, I am pleased that Mr. FORD, who has already made significant contributions to the understanding and enactment of title VII of this legislation during House debate, has offered a more detailed summary of the actions of the conference with particular focus on the statutory labor-management relations program. As my colleague from Arizona noted in the House debate on September 13, Mr. FORD, as a major contributor to title VII, is in a unique position to explain with thoroughness and understanding the work of

[From 124 Cong. Rec. E 5725
(daily ed. Oct. 14, 1978):]

the conference on title VII. It is my hope that this statement will help to guide others in understanding the important legislation.●

[From 124 Cong. Rec. E 5727
(daily ed. Oct. 14, 1978):]

CIVIL SERVICE REFORM

HON. PATRICIA SCHROEDER

OF COLORADO

IN THE HOUSE OF REPRESENTATIVES

Friday, October 13, 1978

● Mrs. SCHROEDER. Mr. Speaker, as a conferee on the Civil Service Reform bill and one who had a particular interest in several sections of the bill, including the labor relations portion, I was pleased to see Mr. Ford's statement today amplifying the intention of the conferees on title VII of that bill. In conference we were confronted with not only a long, but a particularly intricate bill, and because our work fell close to adjournment, we were forced to settle for a statement of managers that is somewhat brief.

As a former employee of the National Labor Relations Board, I found Mr. Ford's statement reflected a thorough understanding of the work of the conference on title VII. It is my hope that this statement will serve to complete the record about the actions of the conferees on S. 2460.●





