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Civil Service Reform: Analysis of the National Defense Authorization Act for FY2004

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Civil Service Reform: Analysis of the National Defense Authorization Act for FY2004

Summary

The National Defense Authorization Act for FY2004, H.R. 1588, passed the House of Representatives, amended, on May 22, 2003. Title XI of the bill includes provisions on personnel management that would apply government-wide as well as provisions for a National Security Personnel System for the Department of Defense (DOD). Many of the provisions had been included in H.R. 1836, the Civil Service and National Security Personnel Improvement Act, as reported to the House, amended. The Senate version of the defense authorization bill, S. 1050, as passed by the Senate, amended, on May 22, 2003, does not include these Title XI personnel management provisions. On June 4, 2003, the Senate struck all after the enacting clause and substituted the text of S. 1050 in H.R. 1588. The Senate then passed H.R. 1588, amended, by voice vote the same day. Senator Susan Collins introduced S. 1166, the National Security Personnel System Act, on June 2, 2003. The Senate Committee on Governmental Affairs marked-up the bill on June 17, 2003, and on a 10 to 1 roll call vote ordered S. 1166, as amended, to be reported to the Senate. Section 2 of S. 1166 would authorize establishment of a Department of Defense National Security Personnel System. H.R. 1588 as passed by the Senate includes several personnel provisions not in the House-passed version of the bill or in S. 1166.

Subtitle A of Title XI of H.R. 1588 includes amendments to the government-wide policies for the federal employee overtime pay cap, military leave, and Senior Executive Service pay, and would create a Human Capital Performance Fund to reward the highest-performing and most valuable employees in an agency. Subtitle B authorizes the Secretary of Defense and the Director of the Office of Personnel Management to establish a new human resources management system for DOD's civilian employees. Like H.R. 1588, S. 1166 would authorize the Secretary of Defense and the Director of the Office of Personnel Management to jointly prescribe regulations for the new human resources management system. The bill differs from H.R. 1588 in that it would not authorize the Secretary to waive the requirement for joint regulations for reasons of national security. S. 1166 would include provisions, not in H.R. 1588, providing that Subchapter V of Chapter 55 of Title 5 on premium pay and Chapter 71 of Title 5 on labor management and employee relations could not be waived, modified, or otherwise affected by the new human resources management system and that the new personnel system would be phased in beginning with up to 120,000 civilian DOD employees in FY2004. Under S. 1166, the Secretary of Defense would be authorized to establish an appeals process which provides DOD employees with fair treatment and due process and requires consultation with the Merit Systems Protection Board. An employee who is adversely affected by a final decision of the DOD appeals process would have a right to petition the Merit Systems Protection Board, rather than an independent review panel as in H.R. 1588, for a review of that decision. S. 1166 does not include the provisions in H.R. 1588 on the Human Capital Performance Fund.

This report analyzes each of the provisions in Title XI of H.R. 1588, as passed by the House, and in Title XI as passed by the Senate, and in S. 1166.

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Civil Service Reform: Analysis of the National Defense Authorization Act for FY2004

Introduction

In April 2003, the Department of Defense (DOD) sent a proposal entitled “The Defense Transformation for the 21st Century Act” to Congress.¹ The proposal is principally directed to changes in the uniformed military personnel and acquisition systems. However, it also would change the statutory bases for much of DOD’s civilian personnel system. Some 730,000 civilian personnel are directly employed by DOD. Those staff constitute about 26% of federal civilian personnel worldwide.

The House of Representatives passed H.R. 1588, the National Defense Authorization Act for FY2004, amended, on May 22, 2003, on a 361 to 68 (Roll No. 221) vote.² As reported to the House, H.R. 1588 included personnel management provisions that would apply government-wide at Subtitle A of Title XI. The bill also included provisions for a National Security Personnel System at DOD at Subtitle B. Many of the provisions had originated in DOD’s April 2003 proposal and had been included in H.R. 1836, the Civil Service and National Security Personnel Improvement Act, reported to the House, amended (H.Rept. 108-116, part 1), by the Committee on Government Reform on May 19, 2003.³ The provisions were added to H.R. 1588 during Armed Services Committee markup.⁴ Several additional amendments were made to the personnel management provisions during House consideration and passage of H.R. 1588. The Senate version of the defense authorization bill, S. 1050, as passed by the Senate, amended, on May 22, 2003, on a 98 to 1 (No. 194) vote, does not include these Title XI personnel management provisions (but includes other personnel provisions at Title XI). On June 4, 2003, the

¹ The text of the DOD proposal can be accessed at [<http://www.defenselink.mil/dodgc/lrs/docs/Transformation.pdf>], visited June 10, 2003.

² H.R. 1588 was introduced by Representative Duncan Hunter, by request, on April 3, 2003, and was referred to the House Committee on Armed Services. The Committee marked up the bill on May 9 and May 14, 2003. H.R. 1588 was reported to the House, amended (H.Rept. 108-106) on May 16, 2003.

³ U.S. Congress, House Committee on Government Reform, *Civil Service and National Security Personnel Improvement Act*, report to accompany H.R. 1836, 108th Cong., 1st sess., H.Rept. 108-116, part 1 (Washington: GPO, 2003). Hereafter referred to as H.Rept. 108-116, part 1.

⁴ H.R. 1836 was introduced by Representative Tom Davis on April 29, 2003, and was referred to the House Committees on Armed Services, Government Reform, and Science. The Government Reform Committee marked up the bill on May 7, 2003.

Senate struck all after the enacting clause and substituted the text of S. 1050 in H.R. 1588. The Senate then passed H.R. 1588, amended, by voice vote the same day.⁵

Senator Susan Collins introduced S. 1166, the National Security Personnel System Act, on June 2, 2003, and it was referred to the Senate Committee on Governmental Affairs. The committee conducted a hearing on the bill on June 4, 2003, and marked-up the bill on June 17, 2003. The same day the committee ordered S. 1166 to be reported to the Senate, amended, on a 10 to 1 roll call vote. During the mark-up, the committee agreed to an amendment offered by Senator Joseph Lieberman which would clarify the intent of the bill's provisions on collective bargaining and an amendment offered by Senator George Voinovich which would exclude 10 DOD laboratories from the National Security Personnel System. Both amendments were agreed to by voice vote.

Section 2 of S. 1166 would authorize establishment of a Department of Defense National Security Personnel System. Like H.R. 1588, S. 1166 would authorize the Secretary of Defense and the Director of the Office of Personnel Management to jointly prescribe regulations for the new human resources management system. The bill differs from H.R. 1588 in that it would not authorize the Secretary to waive the requirement for joint regulations for reasons of national security. S. 1166 would include provisions, not in H.R. 1588, providing that Subchapter V of Chapter 55 of Title 5 on premium pay and Chapter 71 of Title 5 on labor management and employee relations could not be waived, modified, or otherwise affected by the new human resources management system and that the new personnel system would be phased in beginning with up to 120,000 civilian DOD employees in FY2004. Under S. 1166, the Secretary of Defense would be authorized to establish an appeals process which provides DOD employees with fair treatment and due process and requires consultation with the Merit Systems Protection Board. An employee who is adversely affected by a final decision of the DOD appeals process would have a right to petition the Merit Systems Protection Board, rather than an independent review panel as in H.R. 1588, for a review of that decision. S. 1166 does not include the provisions in H.R. 1588 on the Human Capital Performance Fund.

Senator Collins, Chairman of the Senate Governmental Affairs Committee is a conferee on the conference committee for H.R. 1588. She and Senators Voinovich and Carl Levin (an H.R. 1588 conferee), among others, expressed the hope that the provisions of S. 1166, as amended, would be seriously considered by the conference as an alternative to the provisions in H.R. 1588 on the National Security Personnel System.

H.R. 1588, as passed by the Senate, includes, at Title XI, personnel provisions on pay authority for critical positions, the experimental personnel program for scientific and technical personnel, and personnel investigations that are not included in the House-passed version of the bill or S. 1166.

⁵ S. 1050 was introduced by Senator John Warner and reported to the Senate (S.Rept. 108-46) by the Committee on Armed Services on May 13, 2003. Earlier, on May 7 and 8, 2003, the Armed Services Committee marked up the bill.

This report analyzes each of the provisions in Title XI of H.R. 1588, as passed by the House, and in Title XI as passed by the Senate, and in S. 1166. Section numbers refer to H.R. 1588, as passed by the House, or S. 1166, as ordered reported in the Senate, unless otherwise noted. For discussion of the background to the provisions and side-by-side comparisons of the provisions with current law, see CRS Report RL31805, *Authorization and Appropriations for FY2004: Defense*, by Amy Belasco and Stephen Daggett; CRS Report RL31924, *Civil Service Reform — H.R. 1836, Homeland Security Act, and Current Law*, by Barbara L. Schwemle and Thomas J. Nicola; and CRS Report RL31916, *Defense Department Original Transformation Proposal: Compared to Existing Law*, by Robert L. Goldich, Gary J. Pagliano, Barbara L. Schwemle, and Thomas J. Nicola.

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Department of Defense Civilian Personnel Generally — Title XI, Subtitle A, of H.R. 1588 (House Passage) and S. 1166

The provisions at Subtitle A of Title XI of H.R. 1588 would apply to federal civilian employees government-wide. The only government-wide provision duplicated in S. 1166 is that on military leave for mobilized federal civilian employees (Section 3).

Modification of the Overtime Pay Cap

Section 1101 would amend 5 U.S.C. 5542(a)(2) which covers the computation of overtime rates of pay. Current law provides that an employee whose basic pay rate exceeds GS-10, step 1 (including any locality pay or special pay rate) receives overtime at a rate of one and one-half times the hourly rate for GS-10, step 1 (150% of GS-10, step 1). The proposed amendment would provide that such an employee would receive overtime at a rate which would be the greater of one and one-half times the hourly rate for GS-10, step 1, or his or her hourly rate of basic pay.

For employees whose regular pay is greater than the 150% of GS-10, step 1 cap, current law results in overtime pay at a rate less than their regular hourly rate. This amendment would address this circumstance and the situation in which managers and supervisors, whose overtime rate is capped at 150% of GS-10, step 1, receive less compensation for overtime work than employees who are subordinate to them. The Congressional Budget Office (CBO) determined that the provision would affect employees above GS-12, step 5.⁶

⁶ H.Rept. 108-116, part 1, p. 54.

Military Leave for Mobilized Federal Civilian Employees

Section 1102 of H.R. 1588 and Section 3 of S. 1166 would amend 5 U.S.C. 6323 to authorize military leave for an individual who performs full-time military service as a result of a call or order to active duty in support of a contingency operation.⁷ Under military leave, the individual receives leave without loss of, or reduction in, pay, leave to which he or she is otherwise entitled, credit for time or service, or performance or efficiency rating, for up to 22 workdays in a calendar year. The provision would apply to military service performed on or after the act's enactment date.

The committee report accompanying H.R. 1836 explained the need for the provision:

This section would help Federal civilian employees whose military pay is less than their Federal civilian salary "transition" to military service by allowing them to receive 22 additional workdays of military leave when mobilized. Such leave would help alleviate the difference in pay for the first month of service by enabling them to receive the difference between their Federal civilian pay and their military pay. Current law only entitles Reserve component members to the additional military leave.⁸

Common Occupational and Health Standards for Differential Payments as a Consequence of Exposure to Asbestos

Section 1103 would amend 5 U.S.C. 5343(c)(4), which authorizes blue-collar employees to receive pay differentials for unusually severe working conditions or unusually severe hazards, and 5 U.S.C. 5545(d), which authorizes pay differentials for unusual physical hardship or hazard for General Schedule employees. The amendment would provide that pay differentials for any hardship or hazard related to asbestos would be determined by applying occupational safety and health standards consistent with the permissible exposure limit promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970. Subject to any vested constitutional property rights, any administrative or judicial determination after the act's enactment date concerning backpay for a differential under 5 U.S.C. 5343(c)(4) or 5545(d) would be based on occupational safety and health standards under the Occupational Safety and Health Act of 1970.

The Congressional Budget Office (CBO) explained the provision in its cost estimate for H.R. 1836. According to CBO, the provision would provide that

⁷ Contingency operation is defined as a military operation that is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force. It also could be a military operation that results in the call or order to, or retention on, active duty of members of the uniformed services during a war or during a national emergency declared by the President or Congress.

⁸ H.Rept. 108-116, part 1, p. 34. The language in H.R. 1588, as passed by the House of Representatives, is identical to the language in Sec. 203 of H.R. 1836, as reported.

federal wage-grade employees would be subject to the same standards as general schedule employees when determining eligibility for environmental differential pay (EDF) due to exposure to asbestos. Under current law, general schedule employees are entitled to 8 percent hazard differential pay if they are exposed to asbestos that exceeds the permissible exposure limits established by OSHA. The current EDF standard for wage-grade employees entitles them to the same 8 percent of pay but does not set an objective measure for determining the level of asbestos exposure necessary to qualify for EDF. In several instances when wage-grade employees have sought back pay for EDF, arbitrators have found in favor of the employees when asbestos levels were below those consistent with OSHA standards.⁹

Increase in Annual Student Loan Repayment Authority

Section 1104 would amend 5 U.S.C. 5379(b)(2)(A) to provide that student loan repayments to an employee could not exceed \$10,000 in any calendar year, replacing the up to \$6,000 per calendar year that the current law allows.

Given the increasingly larger burdens of debt that graduates are assuming, this amendment could provide additional flexibility to managers and agencies wanting to offer student loan repayments to their employees. Federal agencies have said that they would need additional appropriations to fund such incentives as student loan repayments.

Authorization for Cabinet Secretaries, Secretaries of Military Departments, and Heads of Executive Agencies to be Paid on a Biweekly Basis

Section 1105 would “allow cabinet secretaries, secretaries of military departments and heads of executive agencies to be paid bi-weekly like most Federal employees. This proposal would save time and cost resources by relieving civilian pay and disbursing operations from having to utilize special manual procedures to accommodate these personnel.”¹⁰

Section 5504 of Title 5 would be modified by consolidating the definition of employee for the purpose of the section so that the same groups are covered by the requirement for a bi-weekly pay period and by the methods for converting annual rates of pay into hourly, daily, weekly, or biweekly rates. Currently “employee” is defined under each of these provisions and both exclude groups of people excluded from the definitions of employees in 5 U.S.C. 5541 on premium pay. H.R. 1588 would continue that exclusion, but add a provision that an agency could elect to have excluded employees be paid on the bi-weekly basis. It should be noted that under the

⁹ H.Rept. 108-116, part 1, pp. 53-54. The language in H.R. 1588, as passed by the House of Representatives, is identical to the language in Sec. 204 of H.R. 1836, as reported. The complete Congressional Budget Office cost estimate is at pp. 51-58 of H.Rept. 108-116, part 1.

¹⁰ H.Rept. 108-116, part 1, p. 35. The language in H.R. 1588, as passed by the House of Representatives, is identical to the language in Sec. 206 of H.R. 1836, as reported.

current provisions, employees in the judicial branch are covered under the conversion language, but are not included in the proposed language. It is not known if that omission was by intent or if the latitude for discretionary inclusion was assumed to apply to that class of employee.

Senior Executive Service and Performance

Section 1106 would effect changes to basic pay and locality pay for members of the Senior Executive Service (SES), and individuals in certain other positions. Regarding basic pay, this section would replace 5 U.S.C. 5382. The new language would require the establishment of a range of rates of basic pay for the SES, subject to regulations prescribed by OPM. Each senior executive would be paid at one of the rates within the range, based on individual performance, contribution to the agency's performance, or both. Currently, Section 5382 requires the establishment of at least five rates of basic pay; each senior executive is paid at one of the rates. Section 1106 also would raise the cap on basic pay from level IV of the Executive Schedule (\$134,000 in 2003) to level III of the Executive Schedule (\$142,500). The cap on basic pay would increase to level II of the Executive Schedule (\$154,700) for any agency whose performance appraisal system is certified as making meaningful distinctions based on relative performance. This provision is similar to Section 1322 of P.L. 107-296, the Homeland Security Act,¹¹ which established a similar mechanism — certification of a performance appraisal system — for allowing the cap on total compensation (which includes awards and bonuses) to move from level I of the Executive Schedule (\$171,900) to the Vice President's salary (\$198,600) for senior executives and individuals in certain other positions governmentwide. OPM has not yet released regulations or guidance for implementing Section 1322. Language in Section 1106 would protect any senior executive who transfers from a certified agency to a noncertified agency by prohibiting a reduction in pay.

Instituting a pay band and shifting the cap on basic pay from level IV to level III might help to ease pay compression, at least temporarily, within the Senior Executive Service. A shift to level II would provide additional relief. However, until OPM issued regulations for implementing this initiative, the consequences for senior executives, besides the opportunity to earn more pay, are unclear. Many believe this provision has the potential for interjecting more accountability into the SES. Others are concerned that in an effort to develop and apply a performance appraisal system that is based on meaningful distinctions, agencies might create and impose a forced distribution of performance ratings.

Section 1106 would amend 5 U.S.C. 5304 so that the following positions would no longer be eligible for locality pay: positions in the SES; positions in the Federal Bureau of Investigation (FBI) and Drug Enforcement Administration (DEA) SES; and positions in a system equivalent to the SES, as determined by the President's pay agent. The legislation does not address whether this change would be prospective or retrospective. Considering the changes made to the cap on total compensation, and the proposed changes to the cap on basic pay, which result, or would result, in the establishment of caps at levels I, II, and III of the Executive Schedule, the elimination

¹¹ 116 Stat. 2137; Nov. 25, 2002.

of locality pay might be viewed as a practical matter. However, senior executives employed by an agency whose performance appraisal system is not certified could be adversely affected by the loss of locality pay.

Post-Employment Restrictions

Section 1106(b) would apply the post-employment conflict of interest provision commonly known as the one-year “cooling off” period (18 U.S.C. 207(c)(1)) to (in addition to those paid on the Executive Schedule) those not paid on the Executive Schedule but who are compensated at a rate of pay equal to, or greater than, 96% of the rate of basic pay for level II of the Executive Schedule (\$148,512 in 2003), or, for two years after the enactment of this Act, those persons who would have been covered by the restriction the day before the Act was passed (those compensated at a base rate of pay equal to or greater than a level 5 for the Senior Executive Service, \$134,000 for 2003). The provision would amend 18 U.S.C. 207(c)(2)(A)(ii).

Design Elements of Pay-for-Performance Systems in Demonstration Projects

Section 1107 would amend 5 U.S.C. Chapter 47 which covers the conduct of personnel research programs and demonstration projects. The amendment would specify certain elements which would have to be present in a demonstration project’s pay-for-performance system. The eight elements would be:

- adherence to merit system principles under 5 U.S.C. 2301;
- a fair, credible, and transparent employee performance appraisal system;
- a link between elements of the pay-for-performance system, the employee performance appraisal system, and the agency’s strategic plan;
- a means for ensuring employee involvement in the design and implementation of the system;
- adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the pay-for-performance system;
- a process for ensuring ongoing performance feedback and dialogue between supervisors, managers, and employees throughout the appraisal period, and setting timetables for review;
- effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance; and
- a means for ensuring that adequate agency resources are allocated for the design, implementation, and administration of the pay-for-performance system.

These eight elements address longstanding concerns expressed by employees, their unions, and representatives about the pay-for-performance component of demonstration projects.

Federal Flexible Benefits Plan Administrative Costs

Section 1108 would prohibit federal agencies that offer a flexible spending account (FSA) option from imposing fees on employees to defray administrative costs. It also would require agencies to forward to OPM (or an entity it designates) amounts to offset the administrative costs. OPM would be required to submit reports to the House Committee on Government Reform and the Senate Committee on Governmental Affairs no later than March 31, 2004, on the administrative costs associated with the governmentwide program for FY2003 and the projected administrative costs for each of the five fiscal years thereafter. At the end of each of the first three calendar years in which an agency offers a flexible spending account option, the agency would be required to submit a report to the Office of Management and Budget on the employment tax savings from the option, net of administrative fees paid.

The federal government is offering flexible spending account options to its employees starting in July, 2003 for most agencies. Section 525 of Title 5 provides that agency heads may establish procedures under which employees are permitted to make allotments and assignments out of their pay for such purposes as the agency head considers appropriate. The new benefit would allow employees to put pretax money aside for unreimbursed health care or dependent care expenses in exchange for receiving lower pay. For example, employees might elect to reduce their pay by \$50 each pay period in exchange for having \$1,300 (i.e., \$50 x 26 pay periods in a year) placed in their health care FSA. When they incur unreimbursed health care expenses (e.g., copayments and deductibles, or dental expenditures not covered by insurance) they will be reimbursed from their account. FSA reimbursements are exempt from federal income and employment taxes as well as state income taxes; thus, employees electing these options can save on taxes they otherwise would have incurred had they instead used take-home pay for the expenses. Information about the new federal FSAs can be found at [<http://www.fsafeds.com>].

FSAs involve administrative costs, particularly for determining the eligibility of submitted claims. OPM, which has contracted with SHPS, Inc., to administer the FSAs, originally intended to have participating employees pay \$4 a month for their health care FSA and 1.5% annually of the amount set aside for their dependent care FSA. H.R. 1588, as passed, would require participating agencies to pay the administrative costs and prohibit the government from charging employees fees. The legislation would also require OPM to report to Congress on FSA administrative costs, while participating agencies would report to the Office of Management and Budget (OMB) on their employment tax savings (i.e., the Social Security and Medicare tax they otherwise would have had to pay), net of administrative costs.

One argument for having employees pay FSA administrative costs is that they are the principal beneficiaries; if the government were to pay, the cost might be partially borne by employees without FSAs or by other programs or even taxpayers generally. However, imposing fees on employees could discourage participation. Few private sector or other employers impose FSA fees on participants; most pay for the administrative costs out of their employment tax savings.

Clarification of Hatch Act

Section 1109 would exempt a federal employee or individual who was employed by the DOD Inspector General's office before the Act's enactment date and transferred to a Special Court sponsored by the United Nations from the provisions of 5 U.S.C. 7326. Section 7326 authorizes an employee's removal from position or 30 days' suspension without pay for violating the prohibitions on federal employee political activities. The exemption would no longer apply if the employee or individual subsequently became reemployed in the civil service.

The provision would provide that once employees in this specific category leave government service they would no longer be covered by the Hatch Act restrictions on political activities by federal employees.¹² H.R. 1509, which would have applied this provision to a broader category of employees, was introduced by Representative Tom Davis on March 31, 2003 and referred to the House Committee on Government Reform.¹³

Employee Surveys

Section 1110 would mandate annual surveys of employees by federal executive departments, government corporations, and independent establishments. OPM would issue regulations prescribing survey questions that would appear on all agency surveys so as to allow a comparison of results across agencies. Questions unique to an agency also could be included on the survey. The surveys would address leadership and management practices that contribute to agency performance. Employee satisfaction with leadership policies and practices, work environment, rewards and recognition for professional accomplishment and personal contributions to achieving organizational mission, opportunity for professional development and growth, and opportunity to contribute to achieving organizational mission also would be surveyed. Agency results would be available to the public. They also would be posted on the respective agency's website unless the agency head determined that doing so would jeopardize or negatively affect national security.

From time to time, OPM has conducted surveys of federal employees, but the surveys authorized by this provision would be conducted by agencies and particularly focus on their leadership and performance and employee contribution to agency mission. The provision does not mandate any remedial actions that an agency might want to take once the survey results are known. As to not posting survey results for reasons of national security, the term "national security" is not defined. OPM could address this issue in its regulations.

¹² See also, Stephen Barr, "Hatching a Plan to Stop Prosecution of Former Worker, Failed Candidate," *The Washington Post*, June 12, 2003, p. B2.

¹³ For a statement upon introduction of H.R. 1509 by Representative Davis, see Hon. Tom Davis, "Clarifying the Enforcement Provisions of the Hatch Act," *Congressional Record*, daily edition, March 31, 2003, p. E627.

Human Capital Performance Fund

Section 1111 would amend Part III, Subpart D of Title 5 *United States Code* by adding a new Chapter 54 entitled Human Capital Performance Fund. The legislation states that the purpose of the provision is to promote greater performance in the federal government. According to H.R. 1588, the fund will reward the highest performing and most valuable employees in an agency and offer federal managers a new tool for recognizing employee performance that is critical to an agency achieving its mission.

Organizations eligible for consideration to participate in the fund would be executive departments, government corporations, and independent agencies. The General Accounting Office would not be covered by the chapter. The fund could be used to reward General Schedule, Foreign Service, and Veterans Health Administration employees; prevailing rate employees; and employees included by OPM following review of plans submitted by agencies seeking to participate in the fund. Executive Schedule (or comparable rate) employees; SES members; administrative law judges; contract appeals board members; administrative appeals judges; and individuals in positions which are excepted from the competitive service because of their confidential, policy-determining, policy-making, or policy-advocating character would not be eligible to receive payments from the fund.

OPM would administer the fund which would be authorized a \$500,000,000 appropriation for FY2004. Such sums as may be necessary to carry out the provision would be authorized for each subsequent fiscal year. In the first year of implementation, \$50,000,000 (up to 10% of the appropriation) would be available to participating agencies to train supervisors, managers, and other individuals involved in the appraisal process on using performance management systems to make meaningful distinctions in employee performance and on using the fund.

Agencies seeking to participate in the fund would submit plans to OPM for approval. The plans would have to incorporate the following elements:

- adherence to merit principles under 5 U.S.C. 2301;
- a fair, credible, and transparent performance appraisal system;
- a link between the pay-for-performance system, the employee performance appraisal system, and the agency's strategic plan;
- a means for ensuring employee involvement in the design and implementation of the system;
- adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the pay-for-performance system;
- a process for ensuring ongoing performance feedback and dialogue between supervisors, managers, and employees throughout the appraisal period, and setting timetables for review;
- effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance; and
- a means for ensuring that adequate agency resources are allocated for the design, implementation, and administration of the pay-for-performance system.

An agency would receive an allocation of monies from the fund once OPM, in consultation with the Chief Human Capital Officers Council, reviews and approves its plan.¹⁴ Ninety percent of the remaining amount appropriated to the fund (\$405,000,000) could be allocated to the agencies. An agency's prorated distribution could not exceed its prorated share of executive branch payroll. (Agencies would provide OPM with necessary payroll information.) If OPM were not to allocate an agency's full prorated share, the remaining amount would be available for distribution to other agencies.

Ten percent of the remaining amount appropriated to the fund (\$45,000,000) as well as the amount of an agency's prorated share not distributed because of the agency's failure to submit a satisfactory plan, would be allocated among agencies with exceptionally high-quality plans. Such agencies would be eligible to receive a distribution in addition to their full prorated distribution.

Agencies, in accordance with their approved plans, could make human capital performance payments to employees based on exceptional performance contributing to the achievement of the agency mission. In any year, the number of employees in an agency receiving payments could not be more than the number equal to 15% of the agency's average total civilian full-time and part-time permanent employment for the previous fiscal year. A payment could not exceed 10% of the employee's basic pay rate. The employee's aggregate pay (basic, locality pay, human capital performance pay) could not exceed Executive Level IV (\$134,000 in 2003).

A human capital performance payment would be in addition to annual pay adjustments and locality-based comparability payments. Such payments would be considered basic pay for purposes of Civil Service Retirement System, Federal Employees' Retirement System, life insurance, and for such other purposes (other than adverse actions) which OPM determines by regulation. Information on payments made and the use of monies from the fund would be provided by the agencies to OPM as specified.

Initially, agencies would use monies from the fund to make the human capital performance payments. In subsequent years, continued financing of previously awarded payments would be derived from other agency funds available for salaries and expenses. Under current law, 5 U.S.C. 5335 authorizes agencies to pay periodic within-grade increases to employees performing at an acceptable level of competence. Presumably, funds for such within-grade increases could be used to pay human capital performance payments. Monies from the fund could not be used for new positions, for other performance-related payments, or for recruitment or retention incentives.

OPM would issue regulations to implement the new Chapter 54 provisions. Those regulations would include criteria governing:

¹⁴ The Chief Human Capital Officers Council would include an evaluation of the formulation and implementation of agency performance management systems in its annual report to Congress.

- an agency's plan;
- allocation of monies from the fund to the agencies;
- the nature, extent, duration, and adjustment of, and approval processes for, payments to employees;
- the relationship of agency performance management systems to the Human Capital Performance Fund;
- training of supervisors, managers, and other individuals involved in the process of making performance distinctions; and
- the circumstances under which funds could be allocated by OPM to an agency in amounts below or in excess of the agency's pro rata share.

The Human Capital Performance Fund is proposed by President George Bush in his FY2004 budget. According to the budget, the fund "is designed to create performance-driven pay systems for employees and reinforce the value of employee performance management systems."¹⁵ The effectiveness of agency performance management systems and whether the performance ratings would be determined according to preconceived ideas of how the ratings would be arrayed across the particular rating categories are among the concerns expressed by federal employees and their unions and representatives. Other concerns are that the fund could take monies away from the already reduced locality-based comparability payments and that the performance award amounts would be so small as to not serve as an incentive.

Department of Defense National Security Personnel System — Title XI, Subtitle B, of H.R. 1588 (House Passage) and S. 1166

Section 1121(a)(1) of H.R. 1588, as passed by the House, would amend Part III, Subpart I, of Title 5 *United States Code* by adding a new Chapter 99 entitled Department of Defense (DOD) National Security Personnel System. Section 2 of S. 1166, as ordered reported in the Senate, would provide the same. Unless otherwise noted, a provision discussed as part of the H.R. 1588 proposal represents language in both bills. Differences between H.R. 1588, as passed by the House, and S. 1166 are noted in the sections below. **Table 4** in the Appendix compares the contents of both bills. The new system would cover some 730,000 DOD civilian employees.

Section 9901. Definitions

This section defines terms for the new chapter. "Director" means the Director of the Office of Personnel Management (OPM) and "Secretary" means the Secretary of Defense.

¹⁵ U.S. Executive Office of the President, Office of Management and Budget, *Budget of the United States Government Fiscal Year 2004 Appendix* (Washington: GPO, 2003, p. 973).

Section 9902. Establishment of Human Resources Management System

In General. The new Section 9902(a) of H.R. 1588 would provide that notwithstanding any other provision of Part III, the Secretary of Defense could, in regulations prescribed jointly with the OPM Director, establish, and from time to time adjust, a human resources management (HRM) system for some or all of the organizational or functional units of the Department of Defense. This requirement for a joint regulation or adjustment could be waived by the Secretary, subject to the President's decision, if he certified that issuance or adjustment of a regulation, or the inclusion, exclusion, or modification of a particular provision therein, is essential to the national security. (The legislation does not define "national security.")

The new Section 9902(a) of S. 1166 would provide that notwithstanding any other provision of this part, the Secretary of Defense could, in regulations prescribed jointly with the Director of the Office of Personnel Management, establish a human resources management system for some or all of the organizational or functional units of the Department of Defense. The human resources system established under authority of Section 2 of S. 1166 would be referred to as the National Security Personnel System.

Requirements for the HRM System. The HRM system would be flexible and contemporary. The new Section 9902(b) would provide that it could not waive, modify, or otherwise affect:

- the public employment principles of merit and fitness at 5 U.S.C. 2301, including the principles of hiring based on merit, fair treatment without regard to political affiliation or other non-merit considerations, equal pay for equal work, and protection of employees against reprisal for whistleblowing;
- any provision of 5 U.S.C. 2302, relating to prohibited personnel practices;
- any provision of law referred to in 5 U.S.C. 2302(b)(1)(8)(9); or any provision of law implementing any provision of law referred to in 5 U.S.C. 2302(b)(1)(8)(9) by providing for equal employment opportunity through affirmative action; or providing any right or remedy available to any employee or applicant for employment in the public service.

Various subparts and chapters of Part III of Title 5 *United States Code* which could not be waived, modified, or otherwise affected in the new HRM system are listed at the new Section 9902(c) as follows:

Subpart A — General Provisions, including Chapter 21 Definitions; Chapter 23 Merit System Principles; Chapter 29 Commissions, Oaths, Records, and Reports;

Subpart B — Employment and Retention, including Chapter 31 Authority for Employment; Chapter 33 Examination, Selection, and Placement; Chapter 34 Part-time Career Employment Opportunities; Chapter 35 Retention Preference (RIF), Restoration, and Reemployment;

Subpart E — Attendance and Leave, including Chapter 61 Hours of Work; Chapter 63 Leave;

Subpart G — Insurance and Annuities, including Chapter 81 Compensation for Work Injuries; Chapters 83 and 84 Retirement; Chapter 85 Unemployment Compensation; Chapter 87 Life Insurance; Chapter 89 Health Insurance; Chapter 90 Long Term Care Insurance;

Subpart H — Access to Criminal History Record Information, including Chapter 91 for individuals under investigation;

Chapter 41 — Training;

Chapter 45 — Incentive Awards;

Chapter 47 — Personnel Research Programs and Demonstration Projects;

Chapter 55 — Pay Administration, including biweekly and monthly pay periods and computation of pay, advanced pay, and withholding of taxes from pay, except that Subchapter V of Chapter 55 on premium pay (overtime, night, Sunday pay) could be waived or modified [S. 1166 would provide that Subchapter V of Chapter 55 could not be waived or modified];

Chapter 57 — Travel, Transportation, and Subsistence;

Chapter 59 — Allowances, which includes uniforms, quarters, overseas differentials;

Chapter 71 — Labor Management and Employee Relations [This provision is included in S. 1166 and would provide that this chapter could not be waived or modified. H.R. 1588 does not include this provision];

Chapter 72 — Antidiscrimination, Right to Petition Congress, including minority recruitment, antidiscrimination on the basis of marital status and handicapping condition, furnishing information to Congress;

Chapter 73 — Suitability, Security, and Conduct, including security clearance, political activities (Hatch Act), misconduct (gifts, drugs, alcohol);

Chapter 79 — Services to Employees, including safety program, protective clothing and equipment; or

any rule or regulation prescribed under any provision of law referred to in any of the statements in bullets immediately above.

Other requirements for the HRM system include that it would:

- ensure that employees could organize, bargain collectively as provided for in the proposed Chapter 99, and participate through labor organizations of their own choosing in decisions that affect them, subject to the provisions of the proposed Chapter 99 and any exclusion from coverage or limitation on negotiability established pursuant to law [S. 1166 does not include this provision];
- not be limited by any specific law or authority under Title 5 that is waivable under the proposed Chapter 99 or any rule or regulation prescribed under Title 5 that is waivable under the proposed Chapter 99, except as specifically provided for in the proposed Section 9902 [S. 1166 would provide that the requirements for the HRM system not be limited by any specific law, authority, rule, or regulation prescribed under Title 5 that is waived in regulations prescribed under the proposed new Chapter 99]; and
- include a performance management system. Such a system would incorporate these elements: adherence to the merit principles of 5 U.S.C. 2301; a fair, credible, and transparent employee performance appraisal system; a link between the performance management system and the agency's strategic plan; and a means for ensuring employee involvement in the design and implementation of the system. Other elements the system would have to incorporate are: adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the performance management system; a process for ensuring ongoing performance feedback and dialogue between supervisors, managers, and employees throughout the appraisal period, and setting timetables for review; effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance; and a means for ensuring that adequate agency resources are allocated for the design, implementation, and administration of the performance management system [S. 1166 includes a similar provision at new Section 9902(g), below].

Limitations Relating to Pay. Nothing in Section 9902 would constitute authority to modify the pay of any employee who serves in an Executive Schedule position. Except for this provision, the total amount of allowances, differentials, bonuses, awards, or other similar cash payments paid under Title 5 in a calendar year to any employee who is paid under 5 U.S.C. 5376 (senior-level pay) or 5383 (Senior Executive Service pay) or under Title 10 or other comparable pay authority established for DOD senior executives or equivalent employees could not exceed the total annual compensation payable to the Vice President (\$198,600).

H.R. 1588 would provide that to the maximum extent practicable, the rates of compensation for civilian DOD employees would be adjusted at the same rate, and in the same proportion, as are rates of compensation for members of the uniformed services. This provision is not included in S. 1166.

The Executive Schedule is the pay system for the heads of federal departments and agencies. As of January 2003, pay for the five levels of the Executive Schedule ranged from \$125,400 to \$171,900. This provision would appear to authorize pay, for individual employees, which could exceed that of the department or agency heads. Under current law, OPM is required to certify that an agency has an acceptable performance management system in place before salaries for these employees could range up to the Vice President's salary. Since the proposals would not amend 5 U.S.C. 5307, it remains to be determined if OPM certification of the DOD policy would be required.

Pay-for-Performance Evaluation System. The new Section 9902(f) of S. 1166 would provide that the National Security Personnel System established in accordance with the proposed new Chapter 99 would include a pay-for-performance evaluation system to better link individual pay to performance and provide an equitable method for appraising and compensating employees. The implementing regulations would

- group employees into pay bands in accordance with the type of work that such employees perform and their level of responsibility;
- establish a performance rating process, which shall include, at a minimum, rating periods, communication and feedback requirements, performance scoring systems, a system for linking performance scores to salary increases and performance incentives, a review process, a process for addressing performance that fails to meet expectations, and a pay-out process;
- establish an upper and lower salary level for each pay band;
- ensure that performance objectives are established for individual position assignments and position responsibilities; and
- establish performance factors to be used to evaluate the accomplishment of performance objectives and ensure that comparable scores are assigned for comparable performance, while accommodating diverse individual objectives.

For FY2004 through FY2008, the overall amount allocated for compensation of the civilian employees of an organizational or functional unit of DOD that is included in the National Security Personnel System would not be less than the amount of civilian pay that would have been allocated to such compensation under the General Schedule system. The amount would be based on the number and mix of employees in such an organizational or functional unit prior to the conversion of such employees to the National Security Personnel System; and adjusted for normal step increases and rates of promotion that would have been expected had such employees remained in the General Schedule system.

The regulations implementing the National Security Personnel System would provide a formula for calculating the overall amount to be allocated for fiscal years after FY2008 for compensation of the civilian employees of an organizational or

functional unit of DOD that is included in the National Security Personnel System. The formula would ensure that such employees are not disadvantaged in terms of the overall amount of pay available as a result of conversion to the National Security Personnel System, while providing flexibility to accommodate changes in the function of the organization, changes in the mix of employees performing those functions, and other changed circumstances that might impact pay levels.

Funds allocated for compensation of the civilian employees of an organizational or functional unit of DOD in accordance with the two paragraphs immediately above could not be made available for any other purpose unless the Secretary determines that such action is necessary in the national interest and submits a reprogramming notification in accordance with established procedures.

Under the new Section 9902(c) in H.R. 1588, DOD would be authorized to make changes in Title 5 Chapters 43 (Performance Appraisal) and 53 (Pay Rates and Systems) in establishing the new HRM system. H.R. 1588 does not provide any further detail on the design and operation of that new pay system.

Performance Management System. The new Section 9902(g) of S. 1166 would provide that the Secretary of Defense would develop and implement for organizational and functional units included in the National Security Personnel System a performance management system that includes:

- adherence to merit principles under 5 U.S.C. 2301;
- a fair, credible, and equitable system that results in meaningful distinctions in individual employee performance;
- a link between the performance management system and the agency's strategic plan;
- a means for ensuring employee involvement in the design and implementation of the system;
- adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the performance management system;
- a process for ensuring ongoing performance feedback and dialogue between supervisors, managers, and employees throughout the appraisal period, and setting timetables for review;
- effective transparency and accountability measures to ensure that the management of the system is fair, credible, and equitable, including appropriate independent reasonableness, reviews, internal grievance procedures, internal assessments, and employee surveys; and
- a means for ensuring that adequate agency resources are allocated for the design, implementation, and administration of the performance management system.

This provision is similar to that in H.R. 1588 on performance management system requirements, stated above under Section 9902(b).

Department of Defense Research Laboratories. Under an amendment offered by Senator Voinovich and agreed to by voice vote by the Senate Governmental Affairs Committee during mark-up of S. 1166, 10 DOD research

laboratories would not be included in the National Security Personnel System (NSPS). The laboratories, currently being operated under demonstration project authority, are the Army Research Laboratory; Aviation and Missile Research, Development, and Engineering Center; Communications-Electronics Command; Engineer Research and Development Center; Medical Research and Materiel Command; Soldier and Biological Command; Naval Research Laboratory; Naval Sea Systems Command Centers; Office of Naval Research; and Air Force Research Laboratory.

According to Senator Voinovich's office, the amendment would continue the authority of the reinvention laboratories to use various personnel flexibilities that DOD has found to be successful. The provisions in H.R. 1588 and S. 1166 might reduce these personnel flexibilities at the laboratories if they were to be included in NSPS said his office. In an article on the Governmental Affairs Committee mark-up, *The Washington Post* quoted a DOD official who said that the provision "while designed to protect existing flexibilities at the labs, would prevent the Pentagon from increasing those flexibilities."¹⁶

Discussion of the Provisions. Several key chapters of Part III of Title 5 *United States Code* could be waived, modified, or otherwise affected as the new human resources management system is developed. These are:

- Chapter 43 — Performance Appraisal
- Chapter 51 — Position Classification
- Chapter 53 — Pay Rates and Systems
- Chapter 71 — Labor Management and Employee Relations (H.R. 1588 only)
- Chapter 75 — Adverse Actions
- Chapter 77 — Appeals

The Chapters 71, 75, and 77 changes are discussed below. As for the Chapters 43 (Performance Appraisal), 51 (Position Classification), and 53 (Pay Rates and Systems) changes, DOD has provided few details about its plans for the new HRM system. During testimony before the House Subcommittee on Civil Service and Agency Organization at its April 29, 2003 hearing on the proposed National Security Personnel System of the Defense Transformation for the 21st Century Act, however, David S. C. Chu, Under Secretary of Defense for Personnel and Readiness, discussed DOD's Best Practices Initiative. He referred Members of Congress to an April 2, 2003 *Federal Register* notice for additional details on the types of human resources management flexibilities the department is implementing at its science and technology reinvention laboratories.¹⁷

¹⁶ Stephen Barr, "Senate Committee Backs Plan for Overhaul of Pentagon Pay, Rules," *The Washington Post*, June 18, 2003, p. B2.

¹⁷ Statement of David S. C. Chu, Under Secretary of Defense for Personnel and Readiness, April 29, 2003, p. 5. (unpublished)

On April 2, 2003, DOD published notice in the *Federal Register* of amendment of demonstration project plans covering personnel at eight science and technology reinvention laboratories.¹⁸ Such demonstration projects are currently ongoing at:

- Department of the Army — Army Research Laboratory; Aviation and Missile Research, Development, and Engineering Center; Communications-Electronics Command Research, Development, and Engineering Community; Engineer Research and Development Center; and Medical Research and Materiel Command;
- Department of the Navy — Naval Research Laboratory; Naval Sea Systems Warfare Centers; and
- Department of the Air Force — Air Force Research Laboratory

The *Federal Register* notice provides details about performance appraisal, position classification, and pay flexibilities that DOD is implementing at the reinvention laboratories. This information may provide some insight into what DOD is contemplating for these aspects of a new human resources management system for the department. The following discusses each of these aspects of HRM *at the reinvention laboratories*.

Performance Appraisal. Currently, Title 5 *United States Code* provides that each executive branch agency must develop performance appraisal systems to periodically appraise the job performance of employees and to encourage employee participation in establishing performance standards. Appraisals are to be used to train, reward, reassign, promote, reduce in grade, retain, and remove employees. The Office of Personnel Management (OPM) prescribes regulations on establishing standards for accurately evaluating job performance on the basis of objective criteria, as required by law.

Performance management includes both individual and group performance to improve organizational effectiveness in accomplishing an agency's mission and goals. Agencies are authorized to establish performance appraisal systems and may use one of eight patterns of summary levels of performance. These patterns range from a pass/fail system with two summary levels (unacceptable and fully successful) to a system with five summary levels (unacceptable, less than fully successful, fully successful, exceeds fully successful, and outstanding).

The reinvention laboratories will have their own pay-for-performance (PFP) evaluation system. Various features of the system are listed in **Table 3** in the Appendix.

Position Classification. At present, the technique of position classification is used to craft the federal government's civilian white-collar pay system, called the General Schedule (GS). Federal jobs are arranged into classes on the basis of the kind of work involved, its level of difficulty, responsibility, and the qualifications

¹⁸ U.S. Department of Defense, "Science and Technology (S&T) Reinvention Laboratory Personnel Management Demonstration Project; Notice of Amendment of Demonstration Project Plans," *Federal Register*, vol. 68, April 2, 2003, pp. 16119-16142.

necessary to perform it. Rates of pay are then attached to each specific class. The pay structure is a job hierarchy. As an employee progresses through it, salary increases. Positions at the GS-12 level, for instance, are said to demand more in terms of knowledge and skill, responsibility, and expected results than those at the GS-11 level, and therefore, have both a higher classification and rate of pay related to them.

The current system of classification standards established by OPM will be used by the reinvention laboratories to determine the occupational series and position titles for white-collar jobs. The OPM designations of such jobs as professional, administrative, technical, clerical, or other also will be used. References in the classification standards to the GS grades which are defined in statute (5 U.S.C. 5104) will not be used. Instead, descriptors for nonsupervisory and supervisory jobs will be prepared and used to compare individual positions for the purposes of determining the appropriate pay band levels. The nonsupervisory descriptors will derive from OPM's Primary Standard for the Factor Evaluation System, which provides for comparisons among factors necessary to perform a particular job.

Pay. The current pay system for federal civilian white-collar occupations at DOD (and government-wide) is the General Schedule. It is comprised of 15 grades with 10 steps in each grade. The pay grades are defined in statute at 5 U.S.C. 5104. An employee progresses through the steps of a pay grade after serving a specified amount of time¹⁹ at a particular level and having at least an acceptable level of performance.

At the reinvention laboratories DOD will replace the GS system with a pay banding system. Under the new system, pay bands would be associated with each of five career groups (CG) — CG 1, Scientific and Engineering Research; CG 2, Professional and Administrative Management; CG 3, Engineering, Scientific, and Medical Support; CG 4, Business and Administrative Support; and CG 5, College Cooperative Education Program. Descriptors of the pay band levels for nonsupervisory employees will state the characteristics of the positions at the top of the pay band level and will be established by the Under Secretary of Defense (Civilian Personnel Policy). **Table 1** in the Appendix shows the career groups and their associated pay band levels for nonsupervisory employees.

Career groups CG 1 through CG 4 will apply to supervisory employees. Descriptors of the pay band levels for supervisory employees will define limited supervision (supervisor A), first-level (supervisor B), second-level (supervisor C), and third-level managerial (supervisor D). A supervisory position's career group and pay band level are predicated upon the career group and pay band level of the subordinate workforce. A position must meet the narrative criteria in the descriptor and perform supervisory functions a significant portion of the time to be assigned a supervisory pay band level. The descriptors will be established by the Under

¹⁹ An employee must wait 52 calendar weeks to be advanced to steps 2, 3, and 4 of a pay grade; 104 calendar weeks to be advanced to steps 5, 6, and 7 of a pay grade; and 156 calendar weeks to be advanced to steps 8, 9, and 10 of a pay grade. (5 U.S.C. 5335)

Secretary of Defense (Civilian Personnel Policy). **Table 2** in the Appendix shows the career groups and their associated pay band levels for supervisory employees.

Proponents of pay banding emphasize that it increases the discretion of managers to set and adjust pay rates for individual employees. Skeptics who express concern about pay banding emphasize the need for strong internal controls to prevent escalating salary costs at the top levels of the pay bands.

DOD has not provided information on how the pay system for its blue-collar workers covered by the Federal Wage System might be changed by the new HRM system.

Provisions to Ensure Collaboration With Employee Representatives. (See discussion of S. 1166 provisions below.) H.R. 1588 would add a new Section 9902(e) requiring the Secretary of Defense and the Director of the Office of Personnel Management to provide a written description of the proposed human resources management system or adjustments to such system to the labor organizations representing employees in the department. The bill uses the term “employee representatives” to describe these organizations. The employee representatives would be given at least 30 calendar days to review and make recommendations with respect to the proposal, unless extraordinary circumstances require earlier action. Such recommendations would have to be given full and fair consideration by the Secretary and the Director. Section 9902(e)(B)(i) would require the Secretary and the Director to notify Congress of those parts of the proposal for which recommendations were made, but not accepted.

Section 9902(e)(B)(ii) would require the Secretary and the Director to meet and confer with the employee representatives for not less than 30 calendar days to attempt to reach agreement on whether and how to proceed with those parts of the proposal for which recommendations were made, but not accepted. At the Secretary’s option, or if requested by a majority of the employee representatives participating, the Federal Mediation and Conciliation Service could assist with the discussions. After 30 calendar days following notification and consultation, the Secretary could implement any or all of the disputed parts of the proposal if it was determined that further consultation and mediation was unlikely to produce agreement. However, such implementation could occur only after 30 days following notice to Congress of the decision to implement the part or parts involved. Implementation could occur immediately for those parts of the proposal that did not generate recommendations from the employee representatives, and where the Secretary and the Director accepted the recommendations of the employee representatives.

If a human resources management proposal was implemented, the Secretary and the Director would have to develop a method for employee representatives to participate in any further planning or development which might become necessary. In addition, employee representatives would have to be given adequate access to information to make participation productive.

Under existing law, a labor organization which is the exclusive representative of a substantial number of employees of an agency shall be granted national consultation rights by the agency if no labor organization has been accorded

exclusive recognition on an agency basis.²⁰ When a labor organization holds national consultation rights, the agency must give the organization notice of any proposed substantive changes to the agency's personnel policies and an opportunity to comment on the agency's proposals. The labor organization is permitted "reasonable time" to present views and recommendations regarding the proposals.²¹ The agency must consider the recommendations before taking final action, but is not required to act in accordance with the recommendations. However, the agency must provide the labor organization a written statement of the reasons for taking the final action. Further, a labor organization's national consultation rights do not limit any collective bargaining rights that labor organizations may have.²²

Although Section 9902(b)(4) would require the new human resources management system to ensure the ability to organize and bargain collectively in accordance with the new Chapter 99, the new system would not have to comply with chapter 71 of the U.S. Code, which sets forth a labor-management relations structure for the federal government. The new system may waive the application of this chapter. Consequently, national consultation rights and the ability to review proposed changes to the department's personnel policies may not be available. The collaboration required by Section 9902(e) appears to be restricted to the development of the new human resources management system and "any further planning or development which might become necessary." Collaboration on general proposals to change the department's personnel policies does not appear to be required.

Provisions Regarding National Level Bargaining. The new Section 9902(f)(1) of H.R. 1588 would allow any human resources management system implemented or modified under Section 9902(e) and the new Chapter 99 established by H.R. 1588 to include employees from any bargaining unit with respect to which a labor organization has been accorded exclusive recognition. The Secretary would be permitted to bargain at an organizational level above the level of exclusive recognition for any of the bargaining units under Section 9902(f)(2). Such bargaining would be binding on all subordinate bargaining units and the department and its subcomponents; would supercede all other collective bargaining agreements, except as otherwise determined by the Secretary; would not be subject to further negotiations for any purpose, except as provided for by the Secretary; and would not be subject to review or statutory third-party dispute resolution procedures outside of the department, except as otherwise specified by Chapter 99. Because organizational bargaining would likely focus on the larger issues affecting all employees, other topics may not be considered, including concerns that are significant only to a particular bargaining unit. Proponents of organizational bargaining, however, would likely contend that it allows for more expeditious bargaining.

S. 1166 and Labor-Management and Employee Relations. (See discussion of S. 1166 provisions below.) Although S. 1166 would establish a new human resources management system for civilian employees of DOD, that system

²⁰ 5 U.S.C. § 7113(a).

²¹ 5 U.S.C. § 7113(b)(1)(B).

²² 5 U.S.C. § 7113(c).

could not waive, modify, or otherwise affect Chapter 71 of Title 5. Chapter 71 sets forth a labor-management relations structure for the federal government. The provisions of Chapter 71 that define the collective bargaining process and provide for national consultation rights would continue to apply to the department after adoption of the new system.

The bill includes provisions that would ensure collaboration with employee representatives during the development of the new personnel system. These provisions are similar to those in H.R. 1588. S. 1166 also would provide for bargaining at an organizational level above the level of exclusive recognition. However, unlike H.R. 1588, S. 1166 specifies that such bargaining could be used only for “issues impacting more than 1 bargaining unit.” In addition, organizational level bargaining would appear to be subject to dispute resolution procedures, such as those involving the Federal Mediation and Conciliation Service and the Federal Service Impasses Panel (FSIP), if needed.

Finally, S. 1166 would amend Sections 7105, 7118, and 7119 of Title 5 to identify the amount of time the Federal Labor Relations Authority (FLRA) and FSIP would have to take final action on a case or to complete its assigned tasks with respect to the department. For example, Section 2(c)(1) of S. 1166 would provide for the amendment of 5 U.S.C. 7105(a) to require the FLRA to take final action within 180 days after the filing of a charge unless there is express approval of the parties to extend the 180-day period or a case raises “significant issues” involving the agencies and employees of the department. Similarly, Section 2(c)(5) of S. 1166 would amend 5 U.S.C. 7119 to require the FSIP to take final action on an impasse between the department’s agencies and employees within 180 days after being presented with the impasse, unless express approval to extend the time period is provided by the parties.

Amendment to Clarify Collective Bargaining Provisions. During the mark-up of S. 1166, an amendment offered by Senator Joseph Lieberman was agreed to by the Senate Committee on Governmental Affairs. The amendment would further clarify the national level bargaining provisions of the bill. The amendment would make clear that the Secretary may bargain with a labor organization at an organizational level above the level of exclusive recognition, and that such bargaining would be binding on all subordinate bargaining units of the labor organization. Moreover, the bargaining would supercede all other collective bargaining agreements of the labor organization.

Provisions Relating to Appellate Procedures. (See discussion of S. 1166 provisions below.) The new Section 9902(g) of H.R. 1588 would (1) direct the Secretary of Defense to (A) establish an appeals process which would provide that DOD employees are entitled to fair treatment in any appeals that they bring in decisions relating to their employment; and (B) in prescribing regulations for any such appeals process, the Secretary would be required to (i) ensure that DOD employees are afforded the protections of due process; and (ii) toward that end, would have to consult with the Merit Systems Protection Board (MSPB) before issuing any such regulations. (2) Any regulations establishing the appeals process (1) that relate to any matters within the purview of Title 5 Chapter 77 “Appeals” would have to (A) provide for a presidentially appointed independent review panel which

may not include the Secretary of Defense or Assistant Secretary or their subordinates; (B) be issued only after notifying the House Committee on Government Reform and the Senate Committee on Governmental Affairs and consulting with the MSPB and the Equal Employment Opportunity Commission; and (C) ensure the availability of procedures that (i) are consistent with the requirements of due process; and (ii) provide, to the maximum extent practicable, for the expeditious handling of matters involving DOD; and (iii) modify Chapter 77 procedures only insofar as those modifications are designed to further the fair, efficient, and expeditious resolution of matters involving DOD employees.

Chapter 77 is one of the chapters of Title 5 that is subject to waiver or modification by the Secretary of Defense in establishing a human management resources management system for DOD. Section 7701 of Title 5 grants employees and applicants for employment a right to appeal to the Merit Systems Protection Board from any action which is appealable to the board under any law, rule, or regulation. An appellant has a right to a hearing at which a transcript will be kept and to be represented by an attorney or other representative.

Section 7702 of Title 5 prescribes special procedures for any case in which an employee or applicant who has been affected by an action appeals to the board and alleges that a basis for the action was discrimination. The board first decides both the appealable action and the issue of discrimination within 120 days after it is filed. In any action before an agency which involves an appealable action and discrimination, the agency must resolve the matter within 120 days. An agency decision is judicially reviewable unless the employee appeals the matter to the board.

Any decision of the board in an appealable action where discrimination has been alleged is judicially reviewable as of the date the board issues its decision if an employee or the applicant does not file a petition for consideration by the Equal Employment Opportunity Commission. Within 30 days after a petition is filed, the commission must decide whether to consider the board's decision. If the commission decides to consider such a decision, within 60 days it must concur in the board's decision or issue a written decision which differs from it. Within 30 days after receiving a commission decision that differs from the board's initial decision, the board must consider the commission's decision and either concur in whole in it or reaffirm its initial decision or reaffirm its initial decision with appropriate revisions. A board decision to concur and adopt in whole a commission decision is judicially reviewable.

If the board reaffirms its initial decision or reaffirms it with revisions that it determines appropriate, the matter must immediately be certified to a special panel comprised of one individual appointed by the President, one board member, and one commission member. Within 45 days after certification, the special panel is required to review the record, decide the disputed issues on the basis of the record, and issue a final decision, which is judicially reviewable. The special panel must refer its decision to the board, which is required to order the agency involved to take any appropriate action to carry out the panel's decision. The panel must permit the employee or applicant who brought the complaint and the agency to appear before it to present oral arguments and to present written arguments.

If prescribed time periods for action by an agency, board, or commission are not met, an employee is entitled to file a civil action in district court under some antidiscrimination statutes. If an agency does not resolve a matter appealable to the board where discrimination has been alleged within 120 days, the employee may appeal the matter to the board. Nothing in section 7702 of Title 5 "Actions Involving Discrimination" shall be construed to affect the right to trial de novo in district court under named antidiscrimination statutes after a judicially reviewable action.

Under Section 7703 of Title 5, any employee or applicant who is 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. Except in cases involving allegations of discrimination, a petition to review a final board order or decision must be filed with the United States Court of Appeals for the Federal Circuit within 60 days after the petitioner received notice of the final order or decision. Cases involving discrimination must be filed in district court under procedures prescribed in antidiscrimination statutes within 30 days after the individual filing the case received notice of a judicially reviewable action. In any case filed with the Federal Circuit Court of Appeals, the court is required to 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 regulations having been followed; or (3) unsupported by substantial evidence, except that in the case of discrimination brought under named antidiscrimination statutes, an employee or applicant has a right to have the facts heard in a trial de novo by a reviewing court.

S. 1166 and Appellate Procedures. S. 1166 would add a new Section 9902(i) of Title 5 to authorize the Secretary of Defense to establish an appeals process that provides employees of DOD organizational and functional units that are included in the National Security Personnel System fair treatment in any appeals that they bring in decisions relating to their employment. In prescribing regulations for any such appeals process, the Secretary would be required to ensure that employees in the National Security Personnel System are afforded the protections of due process. Toward that end, the Secretary would be required to consult with the Merit Systems Protection Board before issuing such regulations.

Regulations implementing the appeals process could establish legal standards for adverse actions to be taken on the basis of employee misconduct or performance that fails to meet expectations. Such standards would have to be consistent with public employment principles of merit and fitness set forth in 5 U.S.C. 2301. Legal standards and precedents applied before the effective date of enactment of this section by the board and the courts under Chapters 75 and 77 of Title 5 would be required to apply to employees of organizational and functional units included in the National Security Personnel System, unless such standards and precedents are consistent with legal standards established under this paragraph.

An employee who is adversely affected by a final decision under the appeals process established by the Secretary would have the right to petition the board for review of that decision. The board would be authorized to dismiss any petition that, in the view of the board, does not raise substantial questions of fact or law. No

personnel action could be stayed and no interim relief could be granted during the pendency of the board's review, unless specifically ordered by the board.

The board would be required to order such corrective action as it considers appropriate if the board determines that the decision of the National Security Personnel System for the Department of Defense was — (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) obtained without procedures required by law, rule, or regulation having been followed; or (C) unsupported by substantial evidence.

An employee who is adversely affected by a final order or decision of the board would be able to obtain judicial review of the order or decision as provided in 5 U.S.C. 7703. The Secretary would be able to obtain judicial review of any board final order or decision under the same terms and conditions as provided for the Director of the Office of Personnel Management under Section 7703.

Nothing in the new Section 9902(i) of Title 5 could be construed to authorize the waiver of any provision of law, including an appeals provision, providing a right or remedy under Section 2302(b)(1), (8), or (9), that is not otherwise waivable under Section 9901(a). Section 2302(b)(1) makes it a prohibited personnel practice to discriminate for or against any employee on such bases as race, color, religion, sex, or national origin, age, handicapping condition under relevant statutes or marital status or political affiliation under any law, rule, or regulation. Section 2302(b)(8) prohibits personnel actions for whistleblowing. Section 2302(b)(9) prohibits personnel actions for such things as exercising any right of appeal, complaint, or grievance; cooperating with or disclosing information to the Inspector General or Special Counsel; or refusing to obey an order that would require an individual to violate a law.

Provisions Related to Separation and Retirement Incentives. Under current law, a federal agency that is restructuring or downsizing can, with the approval of OPM, offer voluntary early retirement to employees in specific occupational groups, organizational units, or geographic locations who are age 50 or older and have at least 20 years of service, or who are any age and have at least 25 years of service. Also with the approval of OPM, a federal agency may offer voluntary separation incentive payments of up to \$25,000 to employees who retire or resign. The full amount must be repaid if individual is re-employed by the federal government within five years.

H.R. 1588 would create a new Section 9902(h) and S. 1166 would create a new Section 9902(k) of Title 5 that would authorize the Secretary of Defense, without review by OPM, to offer (1) early retirement to employees who are age 50 or older with 20 years of service or any age with 25 years of service and (2) separation incentive pay of up to \$25,000 to DOD employees who retire or resign. It would prohibit re-employment within DOD for 12 months after receipt of separation pay unless the prohibition were waived by the Secretary on a case-by-case basis. It would require anyone who is re-employed by the federal government within five years of receiving separation pay to repay the full amount to the DOD.

Provisions Relating to Reemployment. Under current law, a retired federal employee who is re-employed by the federal government may not receive a federal retirement annuity and a federal salary simultaneously. Sections 8344 (Civil Service Retirement System (CSRS)) and 8468 (Federal Employees' Retirement System (FERS)) of Title 5 provide that if a retired federal employee who is receiving an annuity from the Civil Service Retirement and Disability Fund is re-employed by a federal agency, an amount equal to the annuity shall be deducted from his or her pay. If re-employment lasts more than one year, the individual will be eligible for a supplemental annuity for the period of re-employment when he or she retires.

H.R. 1588 would create a new Section 9902(i) of Title 5 that would provide that if a retired federal employee who is receiving an annuity from the Civil Service Retirement and Disability Fund were to be employed by the Department of Defense, his or her annuity would continue. The employee would not accrue additional credit under either CSRS or FERS during this period of re-employment. (Note: It may be that this section of the bill was drafted incorrectly. Under current law, a re-employed annuitant's annuity continues during the period of re-employment. His or her pay is reduced by the amount of his or her annuity.)

S. 1166 does not include this provision.

Additional Provisions Relating to Personnel Management. Notwithstanding Section 9902(c), the new Section 9902(j) of H.R. 1588 would provide that the Secretary could exercise authorities that would otherwise be available to him under 5 U.S.C. 4703(a)(1), (3), and (8). Chapter 47 of Title 5 *United States Code* covers the conduct of personnel research programs and demonstration projects. The provision at 5 U.S.C. 4703(a) provides that the conduct of demonstration projects is not limited by any lack of specific authority under Title 5 to take the action contemplated, or by any provision of Title 5 or any rule or regulation prescribed under Title 5 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
- (3) the methods of assigning, reassigning, or promoting employees
- (8) the methods of reducing overall agency staff and grade levels

S. 1166 includes a similar provision. The new Section 9902(l), entitled Provisions Relating to Hiring, would provide that notwithstanding the new Section 9902(c), the Secretary could exercise any hiring flexibilities that would otherwise be available to him under 5 U.S.C. 4703(a)(1). Veterans would be offered preference in hiring.

This proposed provision could increase the flexibility of the Secretary of Defense to hire personnel and to manage the current allocation of the workforce.

Phase-In. Under the new Section 9902(j) of S. 1166, the Secretary of Defense would be authorized to apply the National Security Personnel System to organizational or functional units including:

- up to 120,000 civilian employees of DOD in FY2004;
- up to 240,000 civilian employees of DOD in FY2005; and
- more than 240,000 civilian employees in a fiscal year after FY2005, if the Secretary determines that DOD has in place a performance management system that meets the criteria specified under §9902(g); and a pay formula that meets the criteria specified under §9902(f).

Civilian employees in organizational or functional units participating in DOD personnel demonstration projects would be counted as participants in the National Security Personnel System for the purpose of the limitations established above.

This provision is not included in H.R. 1588.

Section 9903 (S. 1166) and Sections 426, 805 (H.R. 1588). Contracting for Personal Services

The proposed new Section 9903 (Title 5, *United States Code*) in S. 1166 would allow the Secretary of Defense to contract with individuals for services to be performed outside of the United States, as determined by the Secretary to be necessary and appropriate for supporting the activities and programs of the Department of Defense outside the United States. This section does not refer to any accord or relationship with existing law (5 U.S.C. 3109), so it is unclear as to whether or not the Secretary of Defense would be bound by such a requirement.

Section 9903 would contrast sharply with several existing provisions in the *United States Code* that prohibit, or limit, the ability of the federal government to enter into contracts for services that are to be performed outside of the United States, and show a preference for products and services of domestic origin. The Buy American Act (BAA),²³ enacted in 1933, is the principal domestic preference statute governing most procurement by the federal government; while the Berry Amendment, enacted on the eve of World War II, governs DOD procurement only. The BAA seeks to protect domestic labor by giving preference to domestically produced, manufactured, or home-grown products in government purchases, with certain exceptions. The Berry Amendment overrides many of these exceptions, notably for food, clothing, and specialty metals. Section 9903 does not give a preference to domestic labor, but would allow the procurement of foreign-sourced labor.

Section 805(a) of the FY2004 Defense Authorization bill, H.R. 1588, grants the Secretary of Defense a wide and unfettered authority to enter into personal service contracts. It would eliminate any requirement to follow Title 5 Section 3109, and gives the Secretary of Defense powers granted to few, if any, other federal executive branch agency heads. In this proposed section, the Secretary of Defense would be authorized to enter into personal services contracts with any individuals, regardless of their nationality, outside of the United States. Further, this provision would give

²³ 41 U.S.C. 10a through 10d. For further discussion of the Buy American Act, see CRS Report 97-765, *The Buy American Act: Requiring Government Procurements to Come from Domestic Sources*, by Cary Skolnik and John Luckey.

the contracting officer the responsibility for ensuring that a personal services contract is the appropriate tool for carrying out the purpose of the personal services contracts.

Section 426 of H.R. 1588, as passed by the House, would permit the Secretary of Defense to enter into personal services contracts in the United States if the personal services directly support the mission of a defense intelligence element as defined in statute. (A similar authority is provided for personal services that directly support the mission of the special operations command.)

Section 504 of S. 1025, the Senate version of the FY2004 Intelligence Authorization bill, also would provide authority for funds available to intelligence agencies or elements in DOD to be expended on personal services contracts “necessary to carry out the mission of the covered component, including personal services without regard to limitations on types of persons to be employed.” The accompanying report (S.Rept. 108-44) notes that this authority is similar to that available to the CIA in accordance with the provisions of the CIA Act of 1949 (50 USC 403j(a)(1)). A similar provision is also included as Section 503 of the House version of the FY2004 Intelligence Authorization bill, H.R. 2417. The accompanying House Report (H.Rept. 108-163) notes that DOD intelligence elements “frequently have a temporary need for additional personnel with specific expertise to meet unanticipated yet significant operational requirements requiring a bolstering of organizational and personnel efforts created by world events. Current examples include experts on al-Qa’ida, the countries of the Middle East, chemical and biological warfare, and Islamic militant personalities, along with linguists to support interrogation of detainees and review of captured documents.”

H.R. 1588 and H.R. 2417 authorize personal services contracts “in the United States”; the versions in S. 1025 and the Senate version of H.R. 1588 include no such limitation.

Section 9903 (H.R. 1588) and Section 9904 (S. 1166). Attracting Highly Qualified Experts

The new Section 9903/9904 would authorize the Secretary of Defense to carry out a program in order to attract highly qualified experts in needed occupations, as determined by him. Under the program, the Secretary could appoint personnel from outside the civil service and uniformed services (as such terms are defined in 5 U.S.C. 2101) to positions in DOD without regard to any provision of Title 5 governing the appointment of employees to positions in DOD. The Secretary also could prescribe the rates of basic pay for positions to which employees are appointed at rates not in excess of the maximum rate of basic pay authorized for senior-level positions under 5 U.S.C. 5376, as increased by locality-based comparability payments, notwithstanding any provision of Title 5 governing the rates of pay or classification of employees in the executive branch. The Secretary could pay any employee appointed under this section payments in addition to basic pay within the limits applicable to the employee as discussed below.

The service of an employee under an appointment made pursuant to this section could not exceed five years. The Secretary could, however, in the case of a particular employee, extend the period to which service is limited by up to one additional year

if he determines that such action is necessary to promote DOD's national security missions.

The total amount of the additional payments paid to an employee under this section for any 12-month period could not exceed the lesser of \$50,000 in FY2004, or an amount equal to 50% of the employee's annual rate of basic pay. The \$50,000 could be adjusted annually thereafter by the Secretary, with a percentage increase equal to one-half of one percentage points less than the percentage by which the Employment Cost Index, published quarterly by the Bureau of Labor Statistics, for the base quarter of the year before the preceding calendar year exceeds the Employment Cost Index for the base quarter of the second year before the preceding calendar year.

An employee appointed under this section would not be eligible for any bonus, monetary award, or other monetary incentive for service except for payments authorized under this section. Notwithstanding any other provision of this subsection or of 5 U.S.C. 5307, no additional payments could be paid to an employee in any calendar year, if, or to the extent that, the employee's total annual compensation will exceed the maximum amount of total annual compensation payable to the Vice President.

In the event that the Secretary terminates this program, the following would occur. In the case of an employee who on the day before the termination of the program is serving in a position pursuant to an appointment under this section, the termination of the program does not affect the employee's employment in that position before the expiration of the lesser of the period for which the employee was appointed or the period to which the employee's service is limited, including any extension made under this section before the termination of the program. The rate of basic pay prescribed for the position could not be reduced as long as the employee continues to serve in the position without a break in service.

S. 1166, unlike H.R. 1588, would provide that the number of highly qualified experts appointed and retained by the Secretary would not exceed 300 at any time.

The committee report which accompanied H.R. 1836 stated that "The authority [in this provision] is consistent with that now available to the Defense Advanced Research Projects Agency and Military Departments for hiring scientists and engineers."²⁴

Section 9904 (H.R. 1588). Employment of Older Americans

Generally, under 5 U.S.C. 8344 (CSRS) and 8468 (FERS) a retired federal employee who is re-employed by the federal government may not receive a federal retirement annuity and a federal salary simultaneously. The individual's annuity continues without interruption during the period of re-employment, but his or her salary is reduced by the amount of the annuity. If the period of re-employment lasts

²⁴ H.Rept. 108-116, Part 1, p. 33. This provision in H.R. 1588, as passed by the House of Representatives, is found in Sec. 102(a) of H.R. 1836, as reported.

a year or more, the individual is entitled to receive a supplemental annuity after separating from the period of re-employment.

Under section 203 of the Social Security Act (42 U.S.C. 403), an individual under age 65 who receives Social Security benefits and who also works for pay is subject to an "earnings test." In 2003, a Social Security recipient under age 65 has his or her Social Security benefit reduced by \$1 for each \$2 of earnings in excess of \$11,520.

The new Section 9904 would allow the Secretary of Defense to appoint American citizens age 55 or older into positions in the excepted service (i.e., not part of the competitive civil service) for a period not to exceed two years (plus a possible additional two-year reappointment.) The appointed individual must not displace another DOD employee or be in reduction-in-force status from an equivalent job in DoD, and must be qualified for the job, "as determined by the Secretary." An individual appointed to such a position who is receiving an annuity, pension, Social Security, retired pay or similar payment would not have such payment reduced as a result of the appointment; consequently, individuals employed under this section would not be subject to the Social Security earnings test. It is not clear from the language of the bill whether the intent is to allow an individual receiving an annuity under CSRS or FERS who is re-employed under proposed section 9904 to receive both the annuity and a federal salary simultaneously. The bill provides that an individual appointed under section 9904 who is "receiving an annuity, pension, social security payment, retired pay, or other similar payment shall not have the amount of said annuity, pension, social security, or other similar payment reduced as a result of such employment." As noted above, however, under current law a retired federal employee who is re-employed by the federal government does not have his or her annuity reduced during a period of re-employment; rather, the individual's pay is offset by the amount of his or her annuity.

S. 1166 does not include this provision.

Section 9905. Special Pay and Benefits for Certain Employees Outside the United States

The new Section 9905 of H.R. 1588 and S. 1166 would authorize the Secretary of Defense to provide to certain civilian DOD employees assigned to activities outside the United States, as determined by the Secretary to be in support of DOD activities abroad hazardous to life or health or so specialized because of security requirements as to be clearly distinguishable from normal government employment, allowances and benefits. Such allowances and benefits would be comparable to those provided by the Secretary of State to members of the Foreign Service under Chapter 9 of Title I of the Foreign Service Act of 1980 or any other provision of law; or comparable to those provided by the Director of Central Intelligence to personnel of the Central Intelligence Agency (CIA). Special retirement accrual benefits and disability in the same manner provided for by the CIA Retirement Act and in Section 18 of the CIA Act of 1949 also would be provided.

Impact on Department of Defense Civilian Personnel

Section 1121(b) of H.R. 1588 and Section 2(b) of S. 1166 would provide that any exercise of authority under the proposed new Chapter 99, including under any system established under that chapter, would be in conformance with the requirements of this subsection. No other provision of this act or of any amendment made by this act could be construed or applied in a manner so as to limit, supersede, or otherwise affect the provisions of this section, except to the extent that it does so by specific reference to this section.

Department of Defense Civilian Personnel Policy — Title XI of H.R. 1588 (Senate Passage)

H.R. 1588, as passed by the Senate, includes three provisions related to federal personnel policy. The provisions were included in S. 1050, as introduced, reported, and passed by the Senate. They are not included in H.R. 1588, as passed by the House, or S. 1166.

Section 1102. Pay Authority for Critical Positions

Section 1102 would amend 10 U.S.C. Chapter 81 by adding a new Section 1599e on pay authority for critical positions. When the Secretary of Defense seeks a grant of authority under 5 U.S.C. 5377 for critical pay for one or more positions within DOD, the Director of the Office of Management and Budget could fix the rate of basic pay, notwithstanding 5 U.S.C. 5377(d)(2) and 5307, at any rate up to the Vice President's salary (\$198,600 as of January 2003). Notwithstanding 5 U.S.C. 5307, no allowance, differential, bonus, award, or similar cash payment could be paid to any employee receiving critical pay at a rate fixed under the above authority, in any calendar year if, or to the extent that, the employee's total annual compensation would exceed the maximum amount of total annual compensation for the Vice President.

Temporary Streamlined Critical Pay Authority. The Secretary of Defense could establish, fix the compensation of, and appoint persons to positions designated as critical administrative, technical, or professional positions needed to carry out DOD's functions. This authority could be exercised only if the following conditions were met:

- the position requires expertise of an extremely high level in an administrative, technical, or professional field;
- the position is critical to the successful accomplishment of an important DOD mission;
- the exercise of the authority is necessary to recruit or retain a person exceptionally well qualified for the position;
- the number of all positions covered by the exercise of the authority does not exceed 40 at any one time;

- in the case of a position designated as a critical administrative, technical, or professional position by an official other than the Secretary of Defense, the designation is approved by the Secretary;
- the term of appointment to the position is limited to not more than four years;
- the appointee to the position was not a DOD employee before the date of the enactment of the National Defense Authorization Act for FY2004;
- the total annual compensation for the appointee to the position does not exceed the highest total annual compensation for the Vice President; and
- the position is excluded from collective bargaining units.

The authority for temporary streamlined critical pay could be exercised without regard to the pay authority for critical positions; the provisions of Title 5 *United States Code* governing appointments in the competitive service or the Senior Executive Service; and 5 U.S.C. Chapters 51 and 53, relating to position classification and pay rates. The authority could not be exercised after the date that is 10 years after the enactment date of the National Defense Authorization Act for FY2004.

For so long as a person continues to serve without a break in service in a position to which appointed under this subsection, the expiration of authority would not terminate the position, terminate the person's appointment in the position before the end of the term for which appointed, or affect the compensation fixed for the person's service in the position during such term of appointment. Subchapter II of Chapter 75 of Title 5 (on removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less) would not apply to an employee during a term of service in a critical administrative, technical, or professional position to which the employee is appointed under this subsection.

Section 1103. Extension, Expansion, and Revision of Authority for Experimental Personnel Program for Scientific and Technical Personnel

Section 1103 would amend Subsection (e)(1) of Section 1101 of the Strom Thurmond National Defense Authorization Act for FY1999 (P.L. 105-261; 112 Stat. 2139; 5 U.S.C. 3104 note) to extend the experimental personnel program for scientific and technical personnel until September 30, 2008 (the annual report would be required in 2009). The limitation on the number of appointments to scientific and engineering positions that could be made to the program would be increased from 40 to 50.

Section 1104. Transfer of Personnel Investigative Functions and Related Personnel of the Department of Defense

Section 1104 would authorize the transfer of the personnel security investigations functions and associated personnel from the Department of Defense Security Service (DSS) to the Office of Personnel Management (OPM). The

functional transfer is contingent on acceptance by both the Secretary of Defense and the Director of OPM. If so agreed, the transfer of DSS investigative personnel is mandatory, while the transfer of support personnel is at the discretion of the Secretary and the Director. If the transfer is made, the Secretary is to review all functions initially performed by DSS and make a written determination as to “whether each function is inherently governmental or is otherwise inappropriate for performance by contractor personnel.” Such functions may not be contracted to private contractors unless and until the Secretary determines that these are *not* inherently governmental or otherwise inappropriate for contractor performance. If so, the contracting would be governed by the requirements of OMB Circular A-76.

Appendix

**Table 1. Career Groups and Pay Bands for
Nonsupervisory Employees, Science and Technology
Reinvention Laboratories, Department of Defense**

Career Group	Pay Bands			
	Level 1	Level 2	Level 3	Level 4
CG 1, Science and Engineering Research	GS 5-12	GS 13-15	Above GS-15	Not Applicable
CG 2, Professional and Administrative Management	GS 5-11	GS 12-13	GS 14-15	Above GS-15
CG 3, Engineering, Scientific, and Medical Support	GS 1-4	GS 5-7	GS 8-11	GS-12 and above to CG2
CG 4, Business and Administrative Support	GS 1-4	GS 5-7	GS 8-10	GS-11 and above to CG2
CG 5, College Cooperative Education Program	GS 1-5	GS 6-8	GS 9-11	GS-12

Source: U.S. Department of Defense, "Science and Technology (S&T) Reinvention Laboratory Personnel Management Demonstration Program; Notice of Amendment of Demonstration Project Plans," *Federal Register*, vol. 68, April 2, 2003, pp. 16119-16142. Career groups are referenced in the table as CG. GS refers to the General Schedule pay system.

**Table 2. Career Groups and Pay Bands for
Supervisory Employees, Science and Technology
Reinvention Laboratories, Department of Defense**

Supervisory Level	Pay Bands			
	Level 1	Level 2	Level 3	Level 4
CG 1, Science and Engineering Research				
Supervisor A	Not Applicable ²⁵	Not Applicable	Not Applicable	Not in CG
Supervisor B	Not Applicable	\$61,241-\$129,498	Not Applicable	Not in CG
Supervisor C	Not Applicable	\$61,251-\$150,865, but capped at \$133,800 (SES level ES-4 in 2003)	Not Applicable	Not in CG
Supervisor D	Not Applicable	Not Applicable	Not Applicable	Not in CG
CG 2, Professional and Administrative Management				
Supervisor A	\$23,442-\$61,460	\$51,508-\$87,592	Not Applicable	Not Applicable
Supervisor B	\$23,442-\$66,961	\$51,508-\$94,098	\$72,381-\$129,498	Not Applicable
Supervisor C	\$23,442-\$79,629	\$51,508-\$110,682	\$72,381-\$150,865, but capped at \$133,800 (SES level ES-4 in 2003)	Not Applicable
Supervisor D	\$23,442-\$94,098	\$51,508-\$129,498	Not Applicable	Not Applicable

²⁵ "Not Applicable" means that establishment of supervisory positions at these levels is not anticipated. If a supervisory position were established at such a level, the maximum rate of pay would be 20% above the maximum rate for the base level supervised. Pay would not exceed SES level ES-4 (\$133,800 in 2003).

Supervisory Level	Pay Bands			
	Level 1	Level 2	Level 3	Level 4
CG 3, Engineering, Scientific, and Medical Support				
Supervisor A	\$15,214- \$28,868	\$23,442- \$40,014	\$32,158- \$61,460	Not in CG
Supervisor B	\$15,214- \$30,471	\$23,442- \$41,806	\$32,158- \$66,961	Not in CG
Supervisor C	Not Applicable	\$23,442- \$46,175	\$32,158- \$79,629	Not in CG
Supervisor D	Not Applicable	\$23,442- \$50,851	Not Applicable	Not in CG
CG 4, Business and Administrative Support				
Supervisor A	\$15,214- \$28,868	\$23,442- \$40,014	\$32,158- \$55,936	Not in CG
Supervisor B	\$15,214- \$30,471	\$23,442- \$41,806	\$32,158- \$61,021	Not in CG
Supervisor C	Not Applicable	\$23,442- \$46,175	\$32,158- \$66,961	Not in CG
Supervisor D	Not Applicable	\$23,442- \$50,851	Not Applicable	Not in CG

Source: U.S. Department of Defense, "Science and Technology (S&T) Reinvention Laboratory Personnel Management Demonstration Program; Notice of Amendment of Demonstration Project Plans," *Federal Register*, vol. 68, April 2, 2003, pp. 16119-16142.

Table 3. Selected Features of the Pay-for-Performance Evaluation System, Science and Technology Reinvention Laboratories, Department of Defense

<p>Allows for more employee involvement in the evaluation process, increases communication between supervisor and employee, promotes a clear accountability of contribution by each employee, facilitates employee progression by linking individual employee performance to mission accomplishment, and provides an understandable basis for salary and structural changes.</p>
<p>At the beginning of the rating cycle, employees and supervisors will jointly develop performance objectives that reflect the types of duties and responsibilities expected at the respective pay band level.</p>
<p>The performance objectives ... should be in place within 30 days from the beginning of each rating cycle.</p>
<p>Performance factors are used to evaluate accomplishment of performance objectives The DOD component has the discretion to weight performance factors based on the importance in accomplishing an individual's performance objectives.</p>
<p>The seven performance factors used to evaluate accomplishment of performance objectives are as follows: Technical Competence/Problem Solving; Cooperation/Teamwork; Communication; Customer Care; Resource Management; Leadership/Supervision; and Contribution to Mission Accomplishment.</p>
<p>Benchmark performance standards are descriptors that are used to measure, evaluate, and score each performance factor with regard to the accomplishment of performance objectives The descriptors for these benchmark performance standards indicate the level of performance appropriate for the high end of each score range for the performance factor. These performance standards will assist the supervisor in determining the percentage of the performance factor that the employee actually attained.</p>
<p>The duration of the rating cycle will be 12 months [October 1 through September 30].</p>
<p>The supervisor may provide on-going feedback as necessary to employees on how well they are accomplishing performance objectives.</p>
<p>At the end of the rating period, the supervisor may request that the employee provide narrative comments describing accomplishment of his/her performance objectives throughout the year.</p>
<p>Performance payouts will be funded from pay pools. The amount of money available within a pay pool for basic pay increases is determined by the general pay increase (GPI) and the money that would have been available for quality step increases, within-grade increases, and promotions between grades that are banded. Performance -- incentive payments are funded separately, but the amount of money available for performance incentive payments must be equivalent to a minimum of 1% of total salary dollars (typically 1.3% to 1.8 %).</p>
<p>Typically, pay pools may range from as small as 25 to as large as 500 employees. Each DOD component shall establish a pay pool manager for each pay pool. Generally supervisors will be placed in a pay pool separate from their employees.</p>

<p>Following a review of the employee's accomplishments, the supervisor will score each relevant performance factor by assigning a value to each performance factor. The overall score is the sum of the individual performance factor scores.</p>
<p>Score ranges and Shares for Payout: a score of 98-100 = 13, 14, 15, or 16 shares a score of 95-97 = 11 or 12 shares a score of 91-94 = 9 or 10 shares a score of 86-90 = 7 or 8 shares a score of 81-85 = 5 or 6 shares a score of 66-80 = 3 or 4 shares a score of 51-65 = 1 or 2 shares a score of 0-50 = 0 shares</p>
<p>The share value is calculated by first multiplying each individual employee's basic pay salary by the number of shares awarded to the employee. This can be referred to as (Salary x Shares). Then the amount of money in the pay pool is divided by the sum total of (Salary x Shares) for all employees to derive the share value.</p>
<p>An employee will receive a performance payout as a percentage of current basic pay. The employee's total performance payout is the share value multiplied by the employee's end-of-rating cycle basic pay salary multiplied by the number of shares earned by the employee.</p>
<p>A performance review board or an equivalent process for oversight will be established for reviewing supervisors' preliminary scores and recommendations for the number of shares to be granted to individual employees.</p>
<p>An employee may grieve the performance score.</p>
<p>Informal employee performance reviews will be provided on an on-going basis, so that corrective action, to include placing an employee on a performance improvement plan (PIP), may be taken at any time during the rating cycle.</p>

Source: The statements in the table are quotations from U.S. Department of Defense, "Science and Technology (S&T) Reinvention Laboratory Personnel Management Demonstration Program; Notice of Amendment of Demonstration Project Plans," *Federal Register*, vol. 68, April 2, 2003, pp. 16119-16142.

**Table 4. Comparison of Contents,
Title XI of H.R. 1588 and S. 1166**

H.R. 1588	S. 1166
Sec. 1101. Modification of the Overtime Pay Cap	No Similar Provision
Sec. 1102. Military Leave for Mobilized Federal Civilian Employees	Sec. 3. Military Leave for Mobilized Federal Civilian Employees
Sec. 1103. Common Occupational and Health Standards for Differential Payments as a Consequence of Exposure to Asbestos	No Similar Provision
Sec. 1104. Increase in Annual Student Loan Repayment Authority	No Similar Provision
Sec. 1105. Authorization for Cabinet Secretaries, Secretaries of Military Departments, and Heads of Executive Agencies to be Paid on a Biweekly Basis	No Similar Provision
Sec. 1106. Senior Executive Service and Performance	No Similar Provision
Sec. 1107. Design Elements of Pay-For-Performance Systems in Demonstration Projects	No Similar Provision
Sec. 1108. Federal Flexible Benefits Plan Administrative Costs	No Similar Provision
Sec. 1109. Clarification of Hatch Act	No Similar Provision
Sec. 1110. Employee Surveys	No Similar Provision
Sec. 1111. Human Capital Performance Fund	No Similar Provision
<i>Sec. 1121(a). Department of Defense National Security Personnel System</i>	<i>Sec. 2(a). Department of Defense National Security Personnel System</i>
Sec. 9901. Definitions	Sec. 9901. Definitions
Sec. 9902. Establishment of Human Resources Management System Sec. 9902(a) In General	Sec. 9902. Establishment of Human Resources Management System Sec. 9902(a) In General
Sec. 9902(b) Requirements for the HRM System	Sec. 9902(b) Requirements for the HRM System

H.R. 1588	S. 1166
Sec. 9902(c) Other Nonwaivable Provisions	Sec. 9902(c) Other Nonwaivable Provisions
Sec. 9902(d) Limitations Relating to Pay	Sec. 9902(d) Limitations Relating to Pay
Sec. 9902(e) Provisions to Ensure Collaboration With Employee Representatives	Sec. 9902(e) Provisions to Ensure Collaboration With Employee Representatives
Sec. 9902(f) Provisions Regarding National Level Bargaining	Sec. 9902(h) Provisions Regarding National Level Bargaining
Sec. 9902(g) Provisions Relating to Appellate Procedures	Sec. 9902(i) Provisions Relating to Appellate Procedures
Sec. 9902(h) Provisions Related to Separation and Retirement Incentives	Sec. 9902(k) Provisions Related to Separation and Retirement Incentives
Sec. 9902(i) Provisions Relating to Reemployment	No Similar Provision
Sec. 9902(j) Additional Provisions Relating to Personnel Management	Sec. 9902(l) Provisions Relating to Hiring
No Similar Provision	Sec. 9902(f) Pay-For-Performance Evaluation System
Similar provision at Sec. 9902(b)	Sec. 9902(g) Performance Management System
No Similar Provision	Sec. 9902(j) Phase-In
Sec. 9903. Attracting Highly Qualified Experts	Sec. 9904. Attracting Highly Qualified Experts
Title IV, Section 426 Title VIII, Section 805	Sec. 9903. Contracting for Personal Services
Sec. 9904. Employment of Older Americans	No Similar Provision
Sec. 9905. Special Pay and Benefits for Certain Employees Outside the United States	Sec. 9905. Special Pay and Benefits for Certain Employees Outside the United States
<i>Sec. 1121(b) Impact on Department of Defense Civilian Personnel</i>	<i>Sec. 2(b) Impact on Department of Defense Civilian Personnel</i>
No Similar Provision	<i>Sec. 2(c) External Third-Party Review of Labor-Management Disputes</i>

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