

## Legislatively Overturning *Fort Stewart Schools*: The Trump Administration's Assault on Federal Employee Collective Bargaining

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In his Fiscal Year 2019 Budget Submission, President Trump noted that about 60 percent of Federal employees belong to a union and lamented that dealing with Federal employee unions ostensibly “consume[s] considerable management time and taxpayer resources, and may negatively impact efficiency, effectiveness, cost of operations, and employee accountability and performance.”<sup>1</sup> Although he acknowledged that Federal employee unions can negotiate over fewer matters than can unions in the private sector, he nonetheless claimed that collective bargaining contracts can negatively impact agency performance, workplace productivity, and employee satisfaction.<sup>2</sup> The President told Congress that “[a]gency managers will be encouraged to restore management prerogatives that have been ceded to Federal labor unions,”<sup>3</sup> and that “[t]he Administration sees an opportunity for progress on this front and intends to overhaul labor-management relations.”<sup>4</sup>

The Administration took such an opportunity this past April when it submitted proposed legislation to the House and Senate Armed Services Committees that would revamp the statutes that authorize the Department of Defense (DOD) to operate schools on bases in the United States and overseas for military dependents.<sup>5</sup> In 1990, the Supreme Court unanimously ruled in *Fort Stewart Schools v. Federal Labor Relations Authority* that teachers and other educational personnel in DOD's domestic dependents schools could collectively bargain over wages because, unlike the majority of Federal employees, their salaries are not set by statute.<sup>6</sup> DOD's new legislative proposal contains a provision that would statutorily overturn the *Fort Stewart Schools* decision by granting the Secretary of Defense sole and exclusive discretion to set compensation rates in the DOD dependents schools.

Under the Federal Labor-Management Relations Statute, the 1.2 million Federal employees represented by labor unions<sup>7</sup> have the right to “engage in collective

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1. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2019, STRENGTHENING THE FEDERAL WORKFORCE 73 (2018), <https://www.whitehouse.gov/omb/analytical-perspectives/> [<https://perma.cc/8MTZ-RPP5>].

2. *See id.*

3. *Id.* at 65.

4. *Id.* at 73–74.

5. A copy of the proposed legislation provided to and on file with the author by the Department of Defense Education Activity can be found at: Sec. \_\_\_\_ Revision and Consolidation of Laws Applicable to Childhood Education Programs of the Dept. of Defense, <https://drive.google.com/file/d/19csJcPvir5RpM76fF1-l4aLHhXLt4wOb/view?usp=sharing> [<https://perma.cc/RP58-JEYF>].

6. 495 U.S. 641, 650 (1990).

7. U.S. OFFICE OF PERSONNEL MANAGEMENT, EXEC. OFFICE OF THE PRESIDENT, OFFICIAL

bargaining with respect to conditions of employment.”<sup>8</sup> “Conditions of employment” is defined as “personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters . . . to the extent such matters are specifically provided for by Federal statute.”<sup>9</sup> The essential holding of *Fort Stewart Schools* was that wages are a “condition of employment” for Federal employees and, as such, are negotiable unless they are set by statute.<sup>10</sup> Most “white collar” Federal employees’ salaries are set by the Classification Act of 1949, and the salaries of employees in the skilled crafts and trades and unskilled labor positions are set by the Prevailing Rate Systems Act.<sup>11</sup> But depending on the degree of disaggregation, there are over forty other separate pay systems that vary considerably in numbers of employees covered and method of determining pay.<sup>12</sup> As of 2010, over 250,000 Federal employees were covered by pay plans unique to their agency.<sup>13</sup> To the extent that Congress has left the head of an agency with discretion to set salaries that is not sole and exclusive, the employees in that agency may collectively bargain over wages as a result of *Fort Stewart Schools*.

This article argues that those bargaining rights are at risk if the Administration succeeds in eliminating the right of teachers in DOD schools to bargain over pay. It will first explain that the right of some Federal employees to bargain over wages predated the enactment of the Federal Service Labor-Management Relations Statute (FSLMR Statute). This article will then describe the debate over whether Congress intended for Federal employees to bargain over pay when it enacted the statute as part of the Civil Service Reform Act of 1978, and how that debate was resolved by the Supreme Court in the *Fort Stewart Schools* case. It will then explain how the legislation proposed by the DOD will eliminate the right of DOD teachers to bargain over pay and will identify other groups of Federal employees who may stand to lose their bargaining rights if the Administration succeeds in rolling back the *Fort Stewart Schools* decision.

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TIME USAGE IN THE FEDERAL GOVERNMENT, FISCAL YEAR 2014, App. B at 8 (2017), <https://www.opm.gov/policy-data-oversight/labor-management-relations/reports-on-official-time/reports/2014-official-time-usage-in-the-federal-government.pdf> [<https://perma.cc/8V2Y-BTV2>].

8. 5 U.S.C. § 7102 (2017).

9. 5 U.S.C. § 7103(a)(14) (2017).

10. 495 U.S. at 645–50.

11. Codified in scatter sections of 5 U.S.C. § 5101; The Prevailing Rate Systems Act, 5 U.S.C. § 5343, provides that salaries of certain skilled craft workers “shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates” paid to similar crafts in the private sector.

12. *International Organization of Masters, Mates & Pilots v. Brown*, 698 F.2d 536, 539 (D.C. Cir. 1983).

13. CURTIS W. COPELAND, CONG. RESEARCH SERV., RL34685, THE FEDERAL WORKFORCE CHARACTERISTICS AND TRENDS 20 (2011), [https://digital.library.unt.edu/ark:/67531/metadc40238/m1/1/high\\_res\\_d/RL34685\\_2011Apr19.pdf](https://digital.library.unt.edu/ark:/67531/metadc40238/m1/1/high_res_d/RL34685_2011Apr19.pdf) [<https://perma.cc/VA56-G6JY>].

I. HOW CONGRESS CAME TO GRANT SOME FEDERAL EMPLOYEES THE RIGHT  
TO BARGAIN OVER PAY

The phrase “personnel policies, practices, and matters . . . affecting working conditions” that defines negotiable conditions of employment in the FSMLR Statute and that was at issue in *Fort Stewart Schools* was adopted verbatim from the earlier Executive orders governing collective bargaining in the Federal sector. The FSMLR Statute created the Federal Labor Relations Authority to administer the statute.<sup>14</sup> Its predecessor, the Federal Labor Relations Council, held that wages were a negotiable working condition for employees whose compensation was not set by statute.<sup>15</sup> The legislative history of the 1978 FSLMR Statute demonstrates that Congress’s primary intent was to codify the practices that arose under the Executive orders that had governed labor relations in the Federal sector without any diminution in the scope of bargaining.

In 1961, President Kennedy appointed a task force, chaired by Secretary of Labor Arthur Goldberg, to formulate recommendations on a governmentwide labor-relations policy.<sup>16</sup> The task force recommended a governmentwide labor-relations program that would permit bargaining over wages if not otherwise set by statute. “Specific areas that might be included among subjects for consultation and collective negotiations include . . . where permitted by law the implementation of policies relative to rates of pay and job classification.”<sup>17</sup> In a statement accompanying the published version of the task force report, President Kennedy directed that an Executive Order be prepared to effectuate the task force’s recommendations and noted “that where salaries and other conditions of employment are fixed by the Congress these matters are not subject to negotiation.”<sup>18</sup> Thus, those who developed the first governmentwide labor-relations program intended that “salaries” were to be among the negotiable “conditions of employment” unless they were set by Congress. The Executive Order ultimately issued by President Kennedy authorized negotiations over “personnel policy and practices and matters affecting working conditions”<sup>19</sup>—the same language that now appears in the FSLMR Statute.

President Nixon issued an Executive Order revising the government’s labor-relations program. This order also required agencies to negotiate “with respect to personnel policies and practices and matters affecting working conditions, so far as

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14. 5 U.S.C. § 7104 (2017).

15. See *United Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy*, 1 F.L.R.C. 211 (1972); *Overseas Education Association, Inc. and Department of Defense Dependents Schools*, 6 F.L.R.C. 231 (1978).

16. *Memorandum from the President addressed to heads of departments and agencies on the subject of Employee-Management Relations in the Federal Service, June 22, 1961* reprinted in *House Comm. On Post Office And Civil Service, 96th Cong., Legislative History Of The Federal Service Labor-Management Relations Statute*, at 1184 (1979).

17. *President’s Task Force On Employee-Management Relations In The Federal Service, A Policy For Employee-Management Cooperation In The Federal Service (1961)* reprinted in *House Comm. On Post Office And Civil Service, 96th Cong., Legislative History Of The Federal Service Labor-Management Relations Statute*, at 1201 (1979).

18. *Id.* at 1178.

19. EXEC. ORDER NO. 10,988, § 6(b), 27 Fed. Reg. 551, 553 (1962), reprinted in 1962 U.S.C.C.A.N. 4269, 4271.

may be appropriate under applicable laws and regulations.”<sup>20</sup> The Nixon Executive Order established the Federal Labor Relations Council (FLRC)—comprised of the Chairman of the Civil Service Commission, the Secretary of Labor, and an official of the Office of Management and Budget—and authorized it to resolve disputes governing the negotiability of collective bargaining proposals.<sup>21</sup> In 1972 the FLRC was called upon to resolve a dispute concerning the Department of Commerce’s obligation to negotiate over a wage increase for professors at the U.S. Merchant Marine Academy. In *United Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy*, the FLRC found that instructors at the academy were exempt from the Classification Act that set white collar civil servants’ salaries and that their salary proposals did not conflict with other federal law, as the Department of Commerce claimed. The FLRC specifically held that the two wage proposals at issue were “negotiable as personnel policies and practices and matters affecting working conditions under section 11(a) of the Order.”<sup>22</sup>

In another case, the FLRC held that several pay proposals made by the union that represents the teachers in DOD’s overseas dependents schools were negotiable because they did not conflict with the Overseas Teachers Pay and Personnel Practices Act,<sup>23</sup> which mandates that the compensation for teachers in schools on the overseas military bases shall be equal to the average of the range of rates of compensation in urban school districts in the United States with 100,000 or more population.<sup>24</sup>

When it enacted the FSLMR Statute in 1978, Congress intended to preserve any and all collective bargaining rights that Federal employees enjoyed under the Executive orders—including, in limited circumstances, the right to bargain over wages. When referring to the existing right of certain prevailing-rate employees to negotiate over pay, Representative Ford stated, “we should not now be narrowing the preexisting collective bargaining practices of any group of Federal employees.”<sup>25</sup> The Senate Report stated that “[t]he scope of negotiations under this section is the same as under section 11(a) of Executive Order 11491.”<sup>26</sup> Representative Derwinski stated that the statute was intended to codify the existing bargaining practices that developed under the Executive orders.<sup>27</sup>

20. EXEC. ORDER NO. 11,491, §11, 34 Fed. Reg. 17,605 (1969).

21. *Id.*

22. 1 F.L.R.C. 211, 218 (1972) (internal quotation omitted).

23. 25 U.S.C. § 2012(g)(1) (2017).

24. Overseas Education Association, Inc. and Department of Defense Dependents Schools, 6 F.L.R.C. 231 (1978).

25. 124 CONG. REC. 25,722 (1978).

26. S. REP. NO. 95-969, at 104 (1978), reprinted in 1978 U.S.C.C.A.N. 2826.

27. 124 CONG. REC. 29,188 (1978). As the bill worked its way through the legislative process, the scope of bargaining was actually expanded in certain respects. During early debate, Representative William Ford termed the expansion in the scope of bargaining “a very modest, incremental step.” 124 CONG. REC. 25,777 (1978). In later debate he stated that “the scope of bargaining would be substantially broadened from that permitted agency management under the [Executive] order.” 124 CONG. REC. 29,198 (1978). Representative Clay stated “the committee intended that the scope of collective bargaining under the act would be greater than that under the order as interpreted by the [Federal Labor Relations] Council.” 124 CONG. REC. 29,187 (1978).

Similarly, the legislative history reaffirmed the principle, recognized as early as 1961 by the Goldberg task force, that any matters not specifically provided for by statute are negotiable. Representative Clay stated during debate that “where a statute merely vests authority over a particular subject with an agency official with the official given discretion in exercising that authority, the particular subject is not excluded by this subsection from the duty to bargain over conditions of employment.”<sup>28</sup>

During debate some sponsors and proponents of the FSLMR Statute stated that it would not open the door to bargaining over compensation. When read in both their immediate and historical context, it is clear that the statements were merely assurances that, as a general rule, wages would continue to be nonnegotiable for the overwhelming majority of federal employees whose pay is set by statute. Immediately preceding Representative Udall’s statement that “[w]e do not permit bargaining over pay,” Mr. Udall also stated that the statute “gives Federal employees greater rights in labor relations than they have heretofore enjoyed.”<sup>29</sup> Similarly, although Representative Clay stated that “employees still . . . cannot bargain over pay,” he also stated immediately afterward that the statute adopted a position that “moves slightly beyond” existing bargaining practices.<sup>30</sup> Although Senator Sasser stated that “Federal employees may not bargain over pay or fringe benefits,” he was describing, however mistakenly, the practice under Executive Order 11,491, *not* the new FSLMR Statute.<sup>31</sup> Although the Senate report states that the new statute “excludes bargaining on economic matters,” the paragraphs immediately preceding that statement in the Senate report make clear that the new statute codifies “[t]he basic, well-tested provisions, policies and approaches of Executive Order 11491 [that] have provided a sound and balanced basis for cooperative and constructive relationships between labor organizations and management officials.”<sup>32</sup>

## II. THE *FORT STEWART SCHOOLS* DECISION AFFIRMED THAT PAY CAN BE NEGOTIATED

In the years immediately following the enactment of the FSLMR Statute, the DOD and other agencies balked at negotiating over pay and monetary fringe benefits.<sup>33</sup> These agencies seized upon the isolated statements in the legislative

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28. 124 CONG. REC. 29,187 (1978).

29. 124 CONG. REC. 25,716 (1978).

30. 124 CONG. REC. 24,286 (1978).

31. 124 CONG. REC. 27,549 (1978).

32. S. REP. NO. 95-969, 124 CONG. REC. 25,722, at 12 (1998).

33. The FSLMR Statute established what is supposed to be an expedited procedure for the Federal Labor Relations Authority to resolve disputes over whether an agency is legally obligated to negotiate over the substance of a particular union bargaining proposal, known as a negotiability appeal. 5 U.S.C. § 7117(c) (2017). The FLRA’s decision in a negotiability appeal can be reviewed in the U.S. Court of Appeals. 5 U.S.C. § 7123 (2017). The FLRA does not decide whether the agency must agree to the union’s bargaining proposal in a negotiability appeal. If the FLRA directs the agency to bargain over the proposal, and the parties cannot come to an agreement, the impasse is resolved by the Presidentially-appointed Federal Service Impasses Panel, whose decisions are not directly judicially reviewable. 5 U.S.C. § 7119 (2017).

history that pay bargaining would not be permitted to argue that compensation could not be a negotiable “condition of employment” within the meaning of the FSLMR Statute. The FLRA rejected this reliance on the legislative history and ordered the agencies to bargain over pay when the agency had discretion to set wage compensation rates. “[T]hat history is at best ambiguous” wrote the FLRA, and “the definition of the scope of bargaining which is embodied in the Statute is perfectly clear.”<sup>34</sup> The FLRA reasoned that the statements upon which DOD relied “specifically tie the prohibition on bargaining over pay and fringe benefits to the existence of other laws which govern those subjects,” and that Congress did not intend to deviate from the practice under the Executive Order.<sup>35</sup>

In addition, the DOD schools argued that they were effectively required to set salaries comparable to those in the public schools surrounding the military installations because their authorizing statute required them to provide an education that was comparable to that provided in those local schools. Most of the DOD schools in the United States are located on military bases in the South and were opened following the integration of the armed forces so that military children could attend integrated schools where local schools remained segregated.<sup>36</sup> Section 6 of Public Law No. 81-874 directed the Commissioner of Education to arrange for the education of military dependents where (euphemistically speaking) “local agencies cannot provide facilities” to educate the children of the integrated armed forces.<sup>37</sup> “To the maximum extent practicable” such arrangements were to ensure that the education provided was “comparable to free public education provided for children in comparable communities in the State,” and the per pupil expense in the dependents schools was to be limited to “the per pupil cost of free public education provided for children in comparable communities in the State.”<sup>38</sup> In order to provide such education, Section 6 provided that personnel may be employed, and their compensation and other incidents of employment set, without regard to the laws that established the pay and certain other conditions of employment of other Federal employees.<sup>39</sup> In 1981, the authority to operate what had come to be known as “Section 6 schools” was transferred to the Secretary of Defense.<sup>40</sup>

A different statute authorized the Secretary of Defense to operate schools for the dependents of military personnel stationed overseas.<sup>41</sup> As noted earlier, the Overseas Teachers Pay and Personnel Practices Act requires the Secretary to pay teachers in the overseas schools “at rates equal to the average of the range of rates of basic

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34. American Fed’n of Gov’t Emp., Local 1897 and Dep’t. of the Air Force, Elgin Air Force Base, 24 F.L.R.A. 377, 382–83 (1986).

35. *Id.*

36. John Helmik & Lisa Hudson, DEFENSE MANPOWER DATA CENTER REPORT NO. 97-013, A STUDY OF SCHOOLS SERVING MILITARY FAMILIES IN THE U.S.: EDUCATION QUALITY, FEDERAL ADMINISTRATION, AND FUNDING 2 (1997) [www.dtic.mil/get-tr-doc/pdf?AD=ADA372911](http://www.dtic.mil/get-tr-doc/pdf?AD=ADA372911) [<https://perma.cc/EF6Y-JKYM>].

37. *Id.*

38. 20 U.S.C. § 241 (repealed 1994).

39. *Id.*

40. Omnibus Reconciliation Act of 1981, Pub. L. No. 97-35 § 505(c), 95 Stat. 357 (1981).

41. 20 U.S.C. §§ 921–932 (2017).

compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population.”<sup>42</sup>

The FLRA held in a series of negotiability appeals filed by the unions that represented the teachers and other school personnel in the stateside dependents schools that the DOD had an obligation to negotiate pay proposals. The FLRA rejected the DOD’s claim that it was required to pay its teachers the same as in local public schools in surrounding communities because Section 6 limited its per pupil expenditures to that in comparable public schools.<sup>43</sup> The FLRA reasoned that “compensation is only one aspect of total per pupil cost [and] . . . the Agency has not demonstrated that a comparable overall per pupil cost cannot be attained through appropriate adjustments to other elements in the budget.”<sup>44</sup> In a subsequent negotiability appeal, the FLRA also rejected the schools’ claim that the pay proposals at issue infringed the agency’s right to determine its budget, which is one of the rights reserved to management under the FSLMR Statute and outside the duty to bargain.<sup>45</sup> The FLRA found that the pay proposals did not require the agency to include a particular amount in its budget, nor did the DOD demonstrate that the pay proposal would result in a significant and unavoidable increase in costs that was not offset by corresponding benefits.<sup>46</sup>

The Court of Appeals for the District of Columbia and for the Sixth Circuit initially set aside decisions of the FLRA that held pay proposals made by the teachers’ unions at Fort Bragg and Fort Knox were negotiable.<sup>47</sup> In its decision, written by Circuit Judge Kenneth Starr, the D.C. Circuit concluded that there was “powerful evidence of Congressional intent to *exclude* wages from the duty to bargain . . . in the legislative history.”<sup>48</sup> The Sixth Circuit decision relied heavily of the reasoning of an earlier Third Circuit decision, which set aside a decision of the FLRA that pay for civilian mariners employed by the Military Sealift Command was negotiable.<sup>49</sup> The Fourth Circuit initially held that the FLRA erred when it found that a proposal that the support staff at the Fort Bragg Schools be paid the same as other

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42. 20 U.S.C. § 903(c) (2017).

43. Fort Bragg Unit, N.C. Ass’n. of Educators, Nat’l Education Ass’n. and Fort Bragg Dependents Schools, 12 F.L.R.A. 519, 521–22 (1983).

44. *Id.*

45. Fort Stewart Ass’n of Educators and Fort Stewart Schools, 28 F.L.R.A. 547, 552 (1987) (discussing 5 U.S.C. § 7106(a)(1) (2017)).

46. *Id.* at 552. In a later case, the FLRA found that although the employees of the Nuclear Regulatory Commission could bargain over pay because the Atomic Energy Act gave the Commission the discretion to set its employees’ salaries, the NRC had demonstrated that the particular pay proposal at issue, which equaled 12% of the agency’s entire budget, interfered with the NRC’s right to determine its budget because it entailed a significant and unavoidable increase in cost and was not offset by corresponding benefits. Nat’l Treasury Emps. Union and U. S. Nuclear Regulatory Comm’n, 47 F.L.R.A. 980 (1993).

47. Dep’t. of Defense Dependents Schools v. FLRA, 863 F.2d 988 (D.C. Cir. 1988); Fort Knox Dependent Schools v. FLRA, 875 F.2d 1179 (6th Cir. 1989).

48. Dep’t. of Defense Dependents Schools, 863 F.2d at 992 (emphasis in original).

49. Fort Knox Dependent Schools, 875 F.2d at 1180–81; (relying on Dep’t. of the Navy, Military Sealift Command v. FLRA, 836 F.2d 1409 (3rd Cir. 1988)).

Federal employees was negotiable.<sup>50</sup> The court agreed with the DOD that Section 6 required that the employees' pay be set comparable to the local school districts instead.<sup>51</sup> The Fourth Circuit later vacated its initial decision when, the day after a petition for rehearing was filed, the DOD notified the court that it was, indeed, already paying its support staff at the Fort Bragg Schools the standard Federal employee wage rates as the union had proposed, rather than the same as the support staff in local public schools.<sup>52</sup>

On the other side of the ledger, the Second Circuit enforced a decision of the FLRA that the dependents school at the U.S. Military Academy at West Point was required to bargain over pay with its teachers' union.<sup>53</sup> The Eleventh Circuit also enforced the FLRA's order that the schools at Fort Stewart, Georgia bargain over a proposal to increase teachers' wages by 13.5 percent.<sup>54</sup> The court wrote, "although some legislators' remarks baldly assert that wages are not negotiable . . . the legislators merely were assuring their peers that the FSLMR would not supplant specific laws which set wages and benefits."<sup>55</sup> The Fourth Circuit also enforced an FLRA decision requiring the Nuclear Regulatory Commission to bargain over wages with its employees because the Atomic Energy Act gave the Commission the discretion to determine its employees' wage rates.<sup>56</sup>

The Supreme Court granted the DOD's petition for certiorari in the *Fort Stewart Schools* case in order to resolve the dramatic split among the circuits. In a unanimous decision written by Justice Scalia, the Court affirmed the FLRA's and the Eleventh Circuit's decisions.<sup>57</sup> This allowed Justice Scalia an opportunity to engage in two of his most favored judicial pastimes: exercising *Chevron* deference<sup>58</sup> (in this case, to the FLRA's interpretation of the meaning of the phrase "conditions of employment") and dismissing the value of legislative history. The Court's opinion rejected the DOD's argument that conditions of employment "includes insisted-upon prerequisites for continued employment, but does not include the insisted-upon prerequisite *par excellence*, wages."<sup>59</sup> It further stated:

[T]his new unheard-of meaning, petitioner contends, is so "unambiguously expressed," that we must impose it upon the agency initially responsible for interpreting the statute, despite the deference

50. U.S. Dep't. of Defense Dependent Schools, Fort Bragg, North Carolina v. FLRA, No. 87-3061, 1988 WL 426040 (4th Cir. Feb. 3, 1988).

51. *Id.*

52. U.S. Dep't. of Defense Dependent Schools, Fort Bragg, North Carolina v. FLRA, 838 F.2d 129 (4th Cir. 1988).

53. West Point Elementary School Teachers Ass'n. v. FLRA, 855 F.2d 936, 942-44 (2nd Cir. 1988).

54. Fort Stewart Schools v. FLRA, 860 F.2d 396, 402 (11th Cir. 1988).

55. *Id.*

56. Nuclear Regulatory Comm'n v. FLRA, 859 F.2d 302 (4th Cir. 1988).

57. Fort Stewart Schools v. FLRA, 495 U.S. 641 (1990).

58. See The Honorable Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511 (1989).

59. *Id.* at 647.



otherwise accorded under *Chevron*. To describe this position is sufficient to reject it.<sup>60</sup>

Justice Scalia's opinion noted that many of the statements in the legislative history upon which the DOD relied "display the erroneous belief that the wages and fringe benefits of *all* Executive Branch employees were set by statute."<sup>61</sup> He added, "There is no conceivable persuasive effect in legislative history that may reflect nothing more than the speakers' incomplete understanding of the world upon which the statute will operate."<sup>62</sup>

The opinion also rejected the DOD's claim that the comparability language in Section 6 effectively requires it to pay the same wages as the local schools:

The statute requires equivalence ("[t]o the maximum extent practicable") in total per pupil expenditure, not in each separate element of educational cost. An agency may well decide to pay teachers more or less than teachers in local schools, in order that it may expend less or more than local schools for other needs of the educational program.<sup>63</sup>

The Court also upheld the FLRA's determination that the DOD failed to demonstrate that the union's pay proposals interfered with the agency's right to determine its budget.<sup>64</sup> Noting that DOD "failed to submit any evidence on that point," the Court wrote that the agency "asks us to hold that a proposal calling for a 13.5% salary increase would necessarily result in a 'significant and unavoidable' increase in the agency's overall costs. We cannot do that without knowing even so rudimentary a fact as the percentage of the agency's budget attributable to teachers' salaries."<sup>65</sup>

The Court subsequently granted the FLRA's petition for *certiorari* and vacated the Sixth Circuit's decision in the Fort Knox case.<sup>66</sup> The D.C. Circuit had previously granted rehearing en banc in its Fort Bragg case and subsequently vacated the panel's earlier decision as a result of *Fort Stewart Schools*.<sup>67</sup>

The FLRA later limited the application of the *Fort Stewart Schools* decision in one important respect. It held that when Congress grants an agency head "sole and exclusive" discretion to set wages or other conditions of employment, they are not negotiable.<sup>68</sup>

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60. *Id.* at 647.

61. *Id.* at 649 (emphasis in original).

62. *Id.*, at 50

63. *Id.* at 656 (internal citations omitted).

64. *Id.* at 653.

65. *Id.*

66. *Fort Knox Dependent Schools v. FLRA*, No. 89-736, 496 U.S. 901 (1990) (Order).

67. *Dep't. of Defense Dependent Schools v. FLRA*, 911 F.2d 743 (D.C. Cir. 1990) (per curiam).

68. *Nat'l Treasury Emps. Union and U.S. Dep't of the Treasury Office of the Comptroller of the Currency*, 59 F.L.R.A. 815, 818 (2004); *see also* *Am. Fed'n of Gov't Emps. and U.S. Dep't. of the Treasury*, 47 F.L.R.A. 884 (1993), *aff'd*, 46 F.3d 73 (D.C. Cir. 1995).

### III. THE TRUMP ADMINISTRATION NOW SEEKS LEGISLATION TO END BARGAINING OVER PAY IN THE DEPARTMENT OF DEFENSE SCHOOLS

The National Defense Authorization Act of 1995 revised and re-codified the statute authorizing DOD to operate the domestic dependents schools in the United States and overseas territories. It again permitted the Secretary of Defense to fix the compensation of school personnel without regard to other Federal employee pay laws.<sup>69</sup> The new statute instructed the Secretary to “consider” the compensation paid to comparable employees in certain school districts in the state and surrounding communities when establishing pay rates for employees in its stateside schools. The Secretary was simply instructed to “determine the level of compensation required to attract qualified employees” for the DOD schools in Guam and Puerto Rico.<sup>70</sup> But, to ensure that there was no confusion about whether these new standards were intended take away the right to bargain over wages that the teachers had recently won in *Fort Stewart Schools*, Congress included a savings clause that provided nothing in the new law “shall be construed as affecting the right[ ] . . . to negotiate or bargain collectively with the Secretary with respect to wages, hours, and other terms and conditions of employment.”<sup>71</sup>

Since President Trump’s election, the DOD has exhibited growing antipathy to pay bargaining. In one of its last decisions, the Obama-appointed Federal Service Impasses Panel ordered the DOD and the union that represents the teachers in the four DOD dependents schools in Puerto Rico to adopt a contract that provided those teachers with a retroactive pay increase that would bring their base salaries up to par with those in most DOD schools in the continental United States.<sup>72</sup> The DOD has refused to comply with the FSIP’s order and refuses to execute or implement this new agreement. The General Counsel of the FLRA subsequently issued an unfair labor practice complaint against the DOD schools, and an Administrative Law Judge has ruled that DOD violated the FSLMR Statute by failing to implement the FSIP decision.<sup>73</sup> Although decisions of the FSIP are not directly reviewable, the DOD is attempting to obtain indirect review of the FSIP decision by appealing the ALJ’s decision to the three-member FLRA appointed by President Trump, alleging, among other things, that the retroactivity of the pay raise violates sovereign immunity.<sup>74</sup>

69. 10 U.S.C. § 2164(e) (2017).

70. 10 U.S.C. § 2164(e) (2017).

71. 10 U.S.C. § 2164 (2017); *see generally* Antilles Consol. Educ. Ass’n and U.S. Dep’t of Defense Educ. Activity, Antilles Consol. School Sys., Fort Buchanan, Puerto Rico, 56 F.L.R.A. 664 (2000); Nat’l Educ. Ass’n, Fort Bragg Ass’n of Educ. and U.S. Dep’t of Defense, Dep’t of Defense Domestic Dependents, Elementary and Secondary Schools, Fort Bragg, North Carolina, 53 F.L.R.A. 898, 902–905, 919 (1997).

72. Dep’t. of Defense Domestic Elementary and Secondary Schools, Fort Buchanan and Ramey Annex, Puerto Rico and Antilles Consol. Educ. Ass’n., No. 16 F.S.I.P. 052 at \*10–12 (2017).

73. Dep’t. of Defense Domestic Elementary and Secondary Schools, Fort Buchanan, Puerto Rico and Antilles Cons. Educ. Ass’n., No. BN-CA-17-0170 (FLRA Oct. 31, 2017).

74. If the FLRA had not previously ruled during the course of bargaining that a particular provision in dispute is negotiable, an agency may indirectly obtain review of whether the contract provision imposed by the FSIP is negotiable under the FSLMR Statute by disapproving the agreement within thirty days, after which the union can initiate a negotiability appeal. DOD did not do so in this case. Alternatively, the agency can refuse to execute or

Last April, the Administration submitted a legislative proposal to Congress that would repeal the separate authorizing statutes for the domestic and overseas schools and replace them with one unified law.<sup>75</sup> Among other things, this unified law would establish consistent eligibility requirements for enrollment in the DOD schools; extend to the domestic schools the authority to operate a school lunch program; and abolish the local school boards in the domestic schools elected by parents. There is no savings provision this time as there was when the authorizing statute was overhauled in 1995. Instead, included in this proposal is a provision that will eliminate pay bargaining for the teachers in the schools in the continental United States, Guam, and Puerto Rico.<sup>76</sup>

The unified law would also repeal the Overseas Teachers Pay and Personnel Practices Act, which requires DOD to conduct a survey of urban school districts in the United States and to use that as a basis for setting salaries in the overseas schools.<sup>77</sup> Section 1805 of the proposal would, instead, grant the Secretary of Defense “sole and exclusive discretion to fix the rates of basic pay for educator positions” in both the domestic and overseas schools.<sup>78</sup> Such rates are to be set “in relation to the rates of pay provided for comparable positions in the Department of Defense,” despite the fact that there are no such comparable positions since the new law covers all 8700 DOD elementary and secondary educators.<sup>79</sup> The precise inclusion of the term “sole and exclusive” would unequivocally place teacher pay outside the scope of bargaining.<sup>80</sup> And, although the teachers in the overseas schools do not now bargain over pay because their salaries are set by a survey of pay rates in urban school districts, those rates are in some measure a proxy for collectively bargained pay rates. Locals of the National Education Association and the American Federation of Teachers—the parent unions of the two unions that represent the teachers in the overseas DOD schools—collectively bargain over pay in many of those urban school districts.<sup>81</sup>

The DOD’s legislative proposal would, ironically, grant the Secretary of Defense “sole and exclusive” discretion to set the pay rates of teachers in the Bureau of Indian Affairs schools operated on Indian reservations by the Department of the Interior.<sup>82</sup> Presently, the law that governs the BIA schools provides that educators in those schools are to be paid the same as the pay established for “comparable positions in the overseas schools under the Defense Department Overseas Teachers Pay and

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implement the agreement, in which case the union would presumably file an unfair labor practice charge which would be adjudicated by the FLRA in a decision that can be reviewed by the U.S. Court of Appeals. *Nat’l Treasury Emps. Union*, 47 F.L.R.A. at 995 (1993).

75. Proposed Legislation, *supra* note 5.

76. *Id.* at 12.

77. *Id.* at 18.

78. *Id.* at 12.

79. *Id.*

80. *See Nat’l Treasury Emps. Union*, 59 F.L.R.A. 815 (2014).

81. This information is pulled from the author’s experience as counsel for various teacher unions. The process is described generally in a case litigated by the author involving an illegal freeze on these wages: *Federal Education Association v. United States*, 120 Fed. Cl. 791 (2015).

82. Proposed Legislation, *supra* note 5, at 23.

Personnel Practices Act.”<sup>83</sup> DOD’s proposal would amend the BIA school statute to eliminate the reference to the Overseas Teachers Pay and Personnel Practices Act (which the Administration proposes to repeal) but would still require the BIA to continue to pay its educators the same as the pay for comparable positions in the overseas schools.<sup>84</sup> Thus, the pay rates in the BIA schools would no longer be an average of the rates in large urban school districts, but rather whatever the Secretary of Defense deems appropriate for teachers in the overseas schools.

The Administration’s goal was to see this unified law enacted by Congress as part of the National Defense Authorization Act (NDAA) for Fiscal Year 2019.<sup>85</sup> However, it was not submitted to Congress until just weeks before the NDAA was to be marked up by the House and Senate Armed Services Committees. Although it was not included in the Fiscal Year 2019 NDAA, the Administration’s proposed unified law will be considered when the Fiscal Year 2020 NDAA is marked up in early 2019.

#### IV. UNIONS AT OTHER AGENCIES CONTINUE TO BARGAIN OVER PAY

If the Administration succeeds in eliminating its obligation to bargain over pay in DOD schools, other agencies that negotiate pay with their employees’ unions should be expected to seek similar legislation granting them “sole and exclusive” discretion to determine compensation. Among the agencies that have discretion to set pay under their authorizing statutes and, as a consequence, bargain over pay with their employee unions are the Securities and Exchange Commission,<sup>86</sup> the Commodities Futures Trading Commission,<sup>87</sup> and the Office of the Comptroller of the Currency.<sup>88</sup> Air Traffic Controllers negotiate their salaries with the Federal Aviation Administration.<sup>89</sup> The Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the National Credit Union Administration also bargain over pay with representatives of their employees.<sup>90</sup>

The salaries of employees in the skilled crafts and trades throughout the Federal government are set based on a wage survey of private sector salaries conducted

83. 25 U.S.C. § 2012(g)(1) (2017).

84. Proposed Legislation, *supra* note 5, at 23.

85. Email from Thomas Brady, Director of the Department of Defense Education Activity, to all DoDEA employees (May 1, 2017, 3:29 p.m.) (on file with author).

86. Securities and Exchange Comm. and Nat’l Treasury Emps. Union, No. 06 F.S.I.P. 054 (2006); Securities and Exchange Comm. v. FLRA, 568 F.3d 990 (D.C. Cir. 2009).

87. Commodities Futures Trading Comm’n. and Nat’l Treasury Emps. Union, No. 16 F.S.I.P. 120 (2017).

88. Dep’t. of the Treasury, Office of the Comptroller of the Currency, Washington, D.C. and Nat’l Treasury Emps. Union, No. 16 F.S.I.P. 013 (2016) (concerning Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010).

89. Eric Yoder, *FAA Controllers Extend Contract for 4 Years*, WASH. POST (Mar. 15, 2012), [https://www.washingtonpost.com/blogs/federal-eye/post/faa-controllers-extend-contract-for-4-years/2012/03/15/gIQAw7gcES\\_blog.html?noredirect=on&utm\\_term=.bcf387132f56](https://www.washingtonpost.com/blogs/federal-eye/post/faa-controllers-extend-contract-for-4-years/2012/03/15/gIQAw7gcES_blog.html?noredirect=on&utm_term=.bcf387132f56) [<https://perma.cc/J8Z7-2P9K>].

90. Joe Davidson, *Pay Freeze Doesn’t Leave All Workers Out in the Cold*, WASH. POST (Jan. 5, 2011, 8:14 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/05/AR2011010505506.html> [<https://perma.cc/Z7VW-B843>].

pursuant to the Prevailing Rate System Act of 1972.<sup>91</sup> However, section 9(b)<sup>92</sup> of that Act and section 704 of Civil Service Reform Act of 1978<sup>93</sup> contain a savings clause that permits employees who are covered by the Prevailing Rate Systems Act to continue to bargain over compensation if they had done so before 1972. Technicians, skilled craft workers, and laborers in various agencies continue to bargain over wages pursuant to this authority.<sup>94</sup>

Without bargaining rights, the pay of employees whose salaries are not set by statute can (and have been) set by political whim. Following the rise of the “Tea Party” and the loss of control of the House of Representatives in the 2010 mid-term election, President Obama proposed, and Congress enacted, a two-year (and eventually a three-year) freeze on Federal employee statutorily-enacted Federal employee pay rates. As Representative Moran explained to his colleagues:

I can understand why President Obama has chosen to freeze Federal pay for the next 2 years. From a political standpoint, it preempts what the Republicans would have tried to do next year, anyway, and it responds to an antigovernment attitude that was most profoundly reflected in this month’s congressional elections.<sup>95</sup>

President Obama then issued a memorandum to agency heads directing them to freeze the wages of those employees whose salaries were subject to administrative discretion.<sup>96</sup> But the U.S. Office of Personnel Management issued guidance to agencies, which advised that “[t]he pay freeze policy in the Presidential memorandum may not, as a matter of Federal sector labor law, apply to any increase that is required by a collective bargaining agreement that has already been executed and is in effect as of the date of the Presidential memorandum.”<sup>97</sup>

#### CONCLUSION

The attempt to legislatively overturn *Fort Stewart Schools* is not the Trump Administration’s first, and unfortunately not the last, attack on Federal employee collective bargaining rights. In what the Associated Press characterized as “what

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91. 5 U.S.C. § 5343 (2017).

92. 5 U.S.C. § 5343, note (2017).

93. Pub. L. No. 95-454, § 704, 92 Stat. 111, 1218 (1978) (set forth at 5 U.S.C. § 5343, note (2017)).

94. Dep’t of the Interior, Nat’ Park Serv., Washington Admin. Serv. Org., Lake Mead Nat’l Park Recreation Area and Local 3062, Am. Fed. of Gov’t Emps., No. 13 F.S.I.P. 054 (2013); Columbia Power Trades Council and U.S. Dep’t. of Energy, Bonneville Power Admin., 54 F.L.R.A. 189 (1998); Am. Fed’n of Gov’t Emps. Local 1418 and U.S. Info. Agency, 53 F.L.R.A. 1191 (1998).

95. 156 CONG. REC. H7651 (Nov. 30, 2010).

96. EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM ON FREEZING FEDERAL EMPLOYEE PAY SCHEDULES AND RATES THAT ARE SET BY ADMINISTRATIVE DISCRETION, 75 Fed. Reg. 81,829 (Dec. 22, 2010).

97. U.S. OFFICE OF PERSONNEL MANAGEMENT, ATTACHMENT THREE TO COMPENSATION POLICY MEMORANDUM 2010-24 at 6 (Dec. 30, 2010), [https://archive.opm.gov/oca/compmemo/2010/2011freeze\\_attach3.pdf](https://archive.opm.gov/oca/compmemo/2010/2011freeze_attach3.pdf) [<https://perma.cc/Q9ZV-XXG2>].

could be the first major labor showdown of the Trump Administration,” in July 2017 the National Weather Service unilaterally terminated its collective bargaining agreement with its employees’ union, with the approval of Commerce Secretary Wilbur Ross.<sup>98</sup> A Federal labor arbitrator later ruled that the agency’s termination of the contract was illegal and ordered the contract reinstated.<sup>99</sup> In March of 2018, the Department of Education unilaterally imposed a new, regressive collective bargaining agreement covering 3900 employees that had never been negotiated with their union and which had been rejected by the union’s membership in a ratification vote.<sup>100</sup> On May 25, 2018, the President issued a series of Executive Orders instructing agencies to reopen their labor contracts with Federal employee unions to significantly limit the amount of time Federal employees can be released from work to represent their union and employees, and to exclude from arbitration employee performance ratings, awards, and even removals.<sup>101</sup> Seventeen Federal employee unions brought suit in U.S. District Court for the District of Columbia, which issued a permanent injunction against enforcement of most of the provisions of these executive orders last August.<sup>102</sup>

When Congress enacted the FSLMR Statute, it found that:

[E]xperience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them safeguards the public interest, contributes to the effective conduct of public business, and facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment . . . Therefore, labor organizations and collective bargaining in the civil service are in the public interest.<sup>103</sup>

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98. Seth Borenstein, Associated Press, *National Weather Service Cancels Its Union Contract*, DETROIT TIMES (July 21, 2017, 9:47 PM), <https://phys.org/news/2017-07-national-weather-cancels-union.html> [<https://perma.cc/AML2-FV86>]; Press Release, NOAA Communications, U.S. Dep’t. of Commerce, *National Weather Service Renegotiating Collective Bargaining Agreement with Union* (July 21, 2017) (on file with author).

99. Nat’l Weather Ser., Nat’l Oceanic & Atmospheric Admin., Dep’t. of Commerce and Nat’l Weather Serv. Emps. Org., F.M.C.S. No. 170914-54764 (2018) (Evans, Arb.), *exceptions filed*, F.L.R.A. Docket No. O-AR-5363, [http://nwseo.org/Four%20Winds%202018/18\\_03\\_01\\_Evans\\_Decision.pdf](http://nwseo.org/Four%20Winds%202018/18_03_01_Evans_Decision.pdf) [<https://perma.cc/QW8H-AGW9>].

100. Joe Davidson, *Trump Administration Escalates Attack on Federal Unions with One-Sided ‘Agreement’ at Education*, WASH. POST (March 16, 2018), [https://www.washingtonpost.com/news/powerpost/wp/2018/03/16/trump-administration-escalates-attack-on-federal-unions-with-one-sided-agreement-at-education/?utm\\_term=.aedf7a37429e](https://www.washingtonpost.com/news/powerpost/wp/2018/03/16/trump-administration-escalates-attack-on-federal-unions-with-one-sided-agreement-at-education/?utm_term=.aedf7a37429e) [<https://perma.cc/S7LR-TJZY>].

101. Exec. Order No. 13,836, 83 Fed. Reg. 25,329 (June 1, 2018); Exec. Order No. 13,837, 83 Fed. Reg. 25,335 (June 1, 2018); Exec. Order No. 13,838, 83 Fed. Reg. 25,343 (June 1, 2018).

102. *Am. Federation of Gov’t Employees v. Trump*, 318 F.Supp.3rd 370 (D.D.C. 2018), *appeal docketed*, No. 18-5289 (D.C. Cir.).

103. 5 U.S.C. § 7101 (2017).

As Justice Scalia observed in *Fort Stewart Schools*, compensation is the “condition of employment” “*par excellence*.”<sup>104</sup> For collective bargaining to be truly meaningful and thus serve the public interest, an employee’s pay should be part of the discussion. In the final analysis, pay bargaining in the Federal government presents no fiscal risk, as Federal employees cannot strike, and bargaining impasses in the Federal sector are ultimately resolved by a Panel appointed by the President.

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104. *Fort Stewart Schools v. Federal Labor Relations Authority*, 495 U.S. 641, 647 (1990).