

# National Treasury Employees Union v. Federal Labor Relations Authority: Who Is Determining Our National Labor Policy?

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# NATIONAL TREASURY EMPLOYEES UNION v. FEDERAL LABOR RELATIONS AUTHORITY: WHO IS DETERMINING OUR NATIONAL LABOR POLICY?

Administrative agencies were created by Congress in an attempt to facilitate the management of a variety of statutes.<sup>1</sup> To meet this challenge successfully, each agency is vested with a degree of discretion and autonomy<sup>2</sup> based on its expertise in a specific field.<sup>3</sup> The function of each agency is to further the ends of its

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<sup>1</sup> See G. ROBINSON, E. GELLHORN & E. BRUFF, *THE ADMINISTRATIVE PROCESS* 11 (2d ed. 1980). As early as 1789, the first session of Congress recognized the need for an administrative structure and passed the first three statutes conferring such powers. B. SCHWARTZ, *ADMINISTRATIVE LAW* § 7, at 16 (1976). Congress may decide to create a new agency for a variety of reasons. These include: 1) a desire "not to legislate in detail because of the heavy burdens such an approach would impose on Congress;" 2) "the need for frequent statutory amendments as conditions change"; and 3) "the frequent presence of technical matters on which Congress is not knowledgeable." G. ROBINSON, E. GELLHORN & E. BRUFF, *supra*, at 11.

Congress is faced with the need to address a wide array of problems. One commentator suggests that the congressional decision to create an agency is in direct response to this need:

When searching for government solutions to specific problems it is often found that a specialized information gatherer and expert decisionmaker is necessary. Often this condition leads to the decision to constitute an agency . . . Sensitivity to the special problems of a group is necessary for those who intend to regulate or serve them.

1 C. KOCH, *ADMINISTRATIVE LAW AND PRACTICE* § 1.26, at 47 (1985). Another commentator has observed that "early agencies were created because practical men were seeking practical answers to immediate problems." K. DAVIS, *HANDBOOK ON ADMINISTRATIVE LAW* § 3, at 10 (1951).

<sup>2</sup> See Administrative Procedure Act, 5 U.S.C. § 571 (1982) (arrangements through which agencies and outside organizations can cooperate to protect fully the public interest).

This delegation has been held proper in a variety of cases since the late 1930's. Although two pieces of New Deal legislation were struck down in 1935, see *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935), the Court has since upheld a variety of legislation with delegation clauses so broad as to require only that acts be in the public interest. *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-27 (1943); see *United States v. Southwestern Cable Co.*, 392 U.S. 157, 180-81 (1968); *SEC v. Chenery Corp.*, 332 U.S. 194, 208 (1947); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 404 (1940). Despite this apparent approval of administrative autonomy, the courts have also pointed out the need for Congress to "set[] forth some meaningful standards to guide administrators." K. WARREN, *ADMINISTRATIVE LAW IN THE AMERICAN POLITICAL SYSTEM* 93 (1982).

<sup>3</sup> C. KOCH, *supra* note 1, at 47. Agencies are recognized for expertise in their assigned

enabling statute by resolving disputes that arise thereunder and to enforce regulations promulgated to further those ends.<sup>4</sup> One such agency, the Federal Labor Relations Authority ("FLRA" or "Authority"),<sup>5</sup> oversees issues that arise in the area of public employment.<sup>6</sup> This agency, by enforcing the Federal Service Labor-Man-

fields. It is through this expertise that they can accurately administer highly technical statutes. An agency can, to some extent, base a change in policy on the experience and expertise it has acquired during the course of its existence. *Ryder Truck Lines v. United States*, 716 F.2d 1369, 1385 (11th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984).

To assure independence, many statutes require that agency leaders serve staggered terms and come from different political parties. *See* 5 U.S.C. § 7104 (1982); G. ROBINSON, E. GELLHORN, & H. BRUFF, *supra* note 1, at 7-8. Furthermore, most agency leaders are protected from arbitrary discharge without cause. *Id.*

Congress created agencies to be responsible for specific areas of the law. This allows the level of expertise to increase continually. *See id.* at 11-12.

<sup>4</sup> *See* B. SCHWARTZ, *supra* note 1, at 5. (agencies have authority to decide "what shall or shall not be done in a given situation" and many have the authority to regulate the exercise of certain rights as well).

The Administrative Procedure Act, 5 U.S.C. § 551(2)(a) (1982), "defines an agency as each governmental authority other than the legislature or the courts." B. SCHWARTZ, *supra* note 1, at 7. Realistically, many of the responsibilities of administrative agencies overlap with those of the courts and Congress. *See id.* at 8.

<sup>5</sup> 5 U.S.C. § 7104 (1982).

<sup>6</sup> 5 U.S.C. § 7105 (1982). The Civil Service Reform Act of 1978 includes the Federal Service Labor-Management Relations Statute ("FSLMRS" or "Statute"). 5 U.S.C. §§ 7101 - 7135 (1982). This was enacted to remedy perceived weaknesses in its predecessor, Executive Order 11,491. 3 C.F.R. § 861 (1966-70); *see* *Defense Logistics Agency v. FLRA*, 754 F.2d 1003, 1008 (D.C. Cir. 1985). FSLMRS codified amendments to Executive Order 11,491 which were recommended by the Federal Labor Relations Council. *Id.* at 1008; *see also* FEDERAL CIVIL SERVICE LAW AND PROCEDURES 5-61 (E. Bussey ed. 1984) (federal labor management relations had developed under executive orders and needed codification and reorganization). Each of the executive orders made improvements, but a number of areas remained to be addressed. This led to the passage of the FSLMRS. *See* Coleman, *The Civil Service Reform Act of 1978: Its Meaning and Its Roots*, 31 LAB. L.J. 200, 201 (1980); Note, *Status Quo Ante Remedies Under the Federal Service Labor-Management Relations Statute*, 35 HASTINGS L.J. 353, 358-59 & n.39 (1983) ("Statute, unlike the Order, explicitly encourages collective bargaining.").

The FSLMRS was drafted to parallel most sections of the National Labor Relations Acts. 29 U.S.C. §§ 141-187 (1982). H.R. REP. No. 1403, 95th Cong., 2d Sess. 41-42 (1978); *see* Note, *supra*, at 353 ("The Authority performs essentially the same functions that are performed by the National Labor Relations Board in the private sector.").

The Federal Labor Relations Authority ("FLRA") is a neutral, bipartisan body with the full-time commitment of its members. 5 U.S.C. § 7104 (1982); *see* Coleman, *supra*, at 202-03. Section 7104 established the FLRA and describes it as an independent executive agency primarily responsible for the administration and enforcement of the policies reflected in the FSLMRS. H.R. REP. No. 1403, *supra*, at 41; *see* *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-01 (1978) (agency is expert charged with implementing and developing policies); Es-treicher, *The Second Circuit and the NLRA 1980-1981: A Case Study in Judicial Review of Agency Action*, 48 BROOKLYN L. REV. 1063, 1071 (1982) ("The expectation was that the Board would apply its familiarity with labor relations and collective bargaining and its sen-

agement Relations Statute ("FSLMRS" or "Statute"), is the initial arbiter of disagreements between public employees—through their unions—and their respective employers.<sup>7</sup> To facilitate the functioning of the FLRA, Congress defined the scope of judicial review in accordance with section 706 of title V of the Administrative Procedures Act ("APA"),<sup>8</sup> which restricts a court from overturning an agency decision unless it was found to be "arbitrary, capricious, [or] an abuse of discretion."<sup>9</sup> To further the intent of Congress in drafting the APA, the United States Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*<sup>10</sup> created a two

sitivity to the regulatory problems in the field to resolving some of the open questions in the statute").

The FSLMRS has not provided so expansive a list of bargainable topics as are available to employees in the private sector. Whereas, federal employees may bargain over conditions of employment, 5 U.S.C. § 7106(2) (1982), employees in the private sector are covered by mandatory bargaining over wages, hours, and terms and conditions of employment, 29 U.S.C. § 151 (1982). Rights of employees in the private sector extend into a wide range of negotiable topics. Public employees may bargain over these types of topics *only* when they are raised by the Agency. 5 U.S.C. § 7106 (1983). It is not up to the authorized representative of the employees to raise them. *See Coleman, supra*, at 205.

The most important difference between public and private sector collective action is that employees in the private sector can exert economic pressure on their employers through a strike. 29 U.S.C. § 163 (1982). This alternative is statutorily prohibited for public employees. 5 U.S.C. § 7116 (b)(7)(A) (1982); *see Coleman, supra*, at 204-05.

<sup>7</sup> 5 U.S.C. § 7105 (1982).

<sup>8</sup> 5 U.S.C. § 706 (1982); *see* 5 U.S.C. § 7123(c) (1982) ("Review of the Authority's order shall be on the record in accordance with section 706 of this title."); H.R. REP. NO. 1403, *supra* note 6, at 57 ("Review of Authority orders is on the record and the scope of review by the court is governed by section 706 of title 5").

<sup>9</sup> 5 U.S.C. § 706(2)(A) (1982). The statute provides in pertinent part:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

....

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional rights, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

....

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706 (1982); *see infra* note 51 for a review of cases interpreting section 706(2)(A).

<sup>10</sup> 467 U.S. 837 (1984).

step test to be used by courts in reviewing agency determinations.<sup>11</sup> Recently, however, in *National Treasury Employees Union v. FLRA*,<sup>12</sup> the Court of Appeals for the D.C. Circuit circumvented the dictates of *Chevron* and thereby stripped the FLRA of its discretionary authority by mandating a Retroactive Bargaining Order ("RBO")<sup>13</sup> in a situation where the FLRA had

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<sup>11</sup> See *id.* at 842-43. Justice Stevens, writing for a unanimous Court, set out the test: First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*Id.*

Application of *Chevron* has led to considerable controversy. Professor Richard J. Pierce Jr. argues for an expansive reading of *Chevron*, seeing *Chevron* as a vehicle leading to positive results in the policy making process in the administrative state. See Pierce, *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 303-04 (1988). Professor Pierce draws a distinction between determining law and determining policy and argues that administrative policy determinations should not be subject to particularized review. *Id.* at 304-07. He argues further that too many judges embark on complex and overreaching attempts at statutory construction simply to justify their determination of a policy issue and that by engaging in such "creative statutory interpretation" they are usurping the policy making authority vested in the agency. *Id.*

Agencies have been set up to determine policy based on their expertise. A proper balance must be achieved to prevent both the courts and the agencies from overstepping their bounds. Accordingly, the courts must not "rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983).

However, "an agency acting within its authority to make policy choices consistent with the congressional mandate should receive considerable deference from courts, provided, of course, that its actions conform to applicable procedural requirements and are not 'arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with the law.'" *Id.* at 98 n.8.

<sup>12</sup> 856 F.2d 293 (D.C. Cir. 1988).

<sup>13</sup> See *id.* at 296. The court determined that to effect the goals of the statute, it was required to award the fullest measure of relief available. *Id.* at 301. The court remanded with instructions for "redetermination not inconsistent with this opinion." *Id.* (emphasis added).

In his dissent, Judge Silberman was troubled by the majority's interpretation. *Id.* at 305 (Silberman, J., dissenting). He did not find it clear that "Congress allowed (much less required) the Authority to order retroactivity of an agreement . . . yet to be agreed upon by the parties." *Id.* (Silberman, J., dissenting). The majority made a number of statements indicating it had adopted an arguably erroneous interpretation: "according to the majority, the statute requires an RBO to be used routinely." *Id.* (Silberman, J., dissenting); FLRA was not asked to consider the appropriateness of an RBO, but was told to apply it. *Id.* at

determined that such an order was not required.<sup>14</sup>

In *National Treasury*, the Internal Revenue Service ("IRS") notified the National Treasury Employees Union ("NTEU" or "Union") of a plan to relocate two IRS offices to a suburban office.<sup>15</sup> Although the IRS bargained with the Union over a number of aspects of the move,<sup>16</sup> it refused to bargain over parking arrangements at the new location because, in the IRS's opinion, "no material change in working conditions had occurred with the relocation."<sup>17</sup> The Union filed an unfair labor practice charge with the FLRA claiming the IRS had breached its duty to bargain in good faith under section 7116(a)(5) of the FSLMRS<sup>18</sup> and requested an order mandating that the IRS bargain over the parking issue.<sup>19</sup> The Authority determined that the IRS had in fact unlawfully refused to bargain and ordered it to do so, but the Authority denied the Union's request that the order be retroactive.<sup>20</sup> The Authority justified its determination as "preserv[ing] the parties' flexibility

306 (Silberman, J., dissenting).

<sup>14</sup> *Id.* at 296.

<sup>15</sup> *Id.* at 295.

<sup>16</sup> *Id.* at 296.

<sup>17</sup> *Id.* at 295. The IRS reached the conclusion that it had no obligation to bargain based on the Travel Expense Act, 5 U.S.C. §§ 5701-5752 (1982), and the Federal Travel Regulations, 41 C.F.R. Part 101-7 (1987). *National Treasury*, 856 F.2d at 302 (Silberman, J., dissenting). These statutes, "as interpreted by the Comptroller General, [mandate that] federal employees must bear as personal commuting expenses all costs of transportation including parking fees." *Id.* (Silberman, J., dissenting) (emphasis in original). In an earlier FLRA decision, the Authority found that a proposal by the American Federation of Government Employees ("AFGE") which requested a guarantee that no employee would "suffer[] financial loss due to increased commuting, transportation cost i.e., higher parking fees" was inconsistent with federal law and, therefore, non-negotiable. *Id.* (Silberman, J., dissenting) (quoting *AFGE v. General Servs. Admin.*, 9 F.L.R.A. 825, 827 (1982)). The House Report prior to passage of the Statute indicates that "disputes concerning the negotiability of proposals . . . be resolved through the filing and processing of unfair labor practice charges under section 7116 and section 7118." H.R. REP. NO. 1403, *supra* note 6, at 50.

<sup>18</sup> *National Treasury*, 856 F.2d at 295. Section 7116 provides:

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—  
 . . . .

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter; . . . .

5 U.S.C. § 7116 (a)(5)(1982).

<sup>19</sup> See *National Treasury*, 856 F.2d at 295.

<sup>20</sup> See *id.* The FLRA relied upon the decision in *EPA v. American Fed'n of Gov't Employees*, 21 F.L.R.A. 786, 788 (1986), which stated:

[a] prospective bargaining order is neither inadequate nor inherently restrictive of the parties rights to address the effects on unit employees . . . . The parties might be less reluctant and more expeditious in reaching an overall agreement if they retain the flexibility to determine which provisions will be given retroactive effect. *Id.*

by allowing them to adopt a variety of terms while leaving them free to agree to retroactive application."<sup>21</sup> On appeal, however, the D.C. Circuit found the failure of the Authority to order such retroactive relief to be an abuse of the Authority's discretion.<sup>22</sup>

Judge Mikva, writing for the court, held that an RBO should have been issued by the Authority.<sup>23</sup> The court determined that where an employer unlawfully refuses to bargain, it becomes necessary, in order "to effect the deterrent and remedial goals of the Statute," for the Authority to "award the fullest measure of 'make whole' relief."<sup>24</sup> Interpreting section 7105(g)(3)<sup>25</sup> and section 7118(a)(7)(D)<sup>26</sup> of the FSLMRS, the court concluded that, upon

<sup>21</sup> *National Treasury*, 856 F.2d at 295.

<sup>22</sup> *See id.* at 295-96.

<sup>23</sup> *See id.* at 296, 301. The retroactive bargaining order ("RBO"), as ordered by the majority, allows the parties to negotiate the substance of the agreement, but mandates that the terms be applied retroactively to remedy any losses incurred by employees as a result of the employers' initial refusal to bargain. *Id.* at 296-97. This remedy is used when specific, individualized injury cannot be determined. *Id.* When an employer has acted unilaterally, the preferred approach is *status quo ante* ("SQA") relief. *Id.* An SQA order returns each individual to the position they would have been in had no unilateral action been taken. *Id.*; see *Defense Logistics Agency v. FLRA*, 754 F.2d 1003, 1013 (D.C. Cir. 1985). *See generally*, Note, *supra* note 6, at 358-61 (discussing SQA remedies under the FSLMRA).

<sup>24</sup> *National Treasury*, 856 F.2d at 296; see Note, *supra* note 6, at 355-56, 377-78 (concluding that Authority had failed to exercise its power to award make-whole relief to extent intended by Congress).

<sup>25</sup> 5 U.S.C. § 7105(g)(3) (1982). The relevant text provides:

(g) In order to carry out its functions under this chapter, the Authority —

(3) may require an agency or labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

*Id.* (emphasis added).

<sup>26</sup> 5 U.S.C. § 7118(a)(7)(D) (1982) provides in part:

If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order—

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

....

(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of

finding an unlawful refusal to bargain, an agency must impose an RBO, provided "such an order would not unduly disrupt federal agency administration."<sup>27</sup> Judge Mikva distinguished *Chevron* on the ground that the "authority's construction of the Statute failed to implement the clear intent of Congress."<sup>28</sup> The court's interpretation of section 7118(a)(7)(D), which allows for retroactive relief, was based in large measure on a speech by Representative Ford<sup>29</sup> the day after the Statute was passed. Ford's speech was "intended to supplement the 'less than helpful' conference documents that accompanied a bill passed during the end-of-session rush."<sup>30</sup> Furthermore, the majority determined that the language of section 7118(a)(7)(D) could be properly read to allow such retroactive relief irrespective of whether the Authority had mandated the terms to which the parties must agree.<sup>31</sup>

Judge Silberman, in a powerful dissent, attacked the majority for "misappropriat[ing] a policy choice that Congress delegated to the FLRA."<sup>32</sup> Recognizing the high degree of deference typically afforded agency determinations,<sup>33</sup> Judge Silberman found the ac-

*this chapter.*

*Id.* (emphasis added).

<sup>27</sup> *National Treasury*, 856 F.2d at 296. The FSLMRS offers the Authority its choice of several enumerated remedies, or the Authority may fashion the remedy it deems appropriate to further the aims of the Statute. See 5 U.S.C. §§ 7101, 7118 (1982).

<sup>28</sup> *National Treasury*, 856 F.2d at 296.

<sup>29</sup> 124 CONG. REC. 38,713 (daily ed. Oct. 14, 1978)(statement of Rep. Ford).

<sup>30</sup> *National Treasury*, 856 F.2d at 299-300 (quoting 124 CONG. REC. 38, 713 (daily ed. Oct. 14, 1978) (statement of Rep. Ford)).

<sup>31</sup> *National Treasury*, 856 F.2d at 300; see 5 U.S.C. § 7118 (a)(7)(D) (1982). The language of § 7118 (a)(7)(B) is applicable when the Authority order includes renegotiation by the parties to reach a specified result. *Id.* at § 7118 (a)(7)(B). When this predetermined result is reached, retroactivity may be required. *Id.* For further discussion of SQA remedies, see *supra* note 23 and accompanying text. The language of § 7105(a)(2) appears to leave the determination of the appropriate remedy to the discretion of the Authority. See 5 U.S.C. § 7105 (a)(2).

<sup>32</sup> *National Treasury*, 856 F.2d at 301 (Silberman, J., dissenting). Judge Silberman analogized the action of the majority to a "taking," noting that "if private property rather than regulatory authority were at stake, just compensation would be owed." *Id.* (Silberman, J., dissenting).

<sup>33</sup> See *id.* (Silberman, J., dissenting); *American Fed'n of Gov't Employees v. FLRA*, 840 F.2d 925, 928 (D.C. Cir. 1988). The court's review of FLRA determinations "is highly deferential, and [the court] will uphold a remedial order of the FLRA 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" *Id.* (quoting *Professional Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 585 (D.C. Cir. 1982)). See generally Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 292-93, 312 (1986)(obligation of federal courts to defer to agency's reasonable construction of statutes administered by that agency).



tion by the majority to have "effectuated a major and far reaching amendment to the FLRA."<sup>34</sup> Further, the dissent contended that the words of section 7118(a)(7)(B) grant the FLRA power to mandate substantive terms<sup>35</sup> and apply these terms retroactively, but do not indicate that the FLRA may mandate retroactivity on terms yet to be negotiated by the parties.<sup>36</sup> Judge Silberman also pointed out that the post-enactment legislative history relied on by the majority departed from the standards of interpretation clearly set out in *Chevron*.<sup>37</sup> Finally, the dissent argued that, by ordering the result the FLRA was required to reach,<sup>38</sup> rather than allowing the Authority to reconsider its order based on the concerns of the majority,<sup>39</sup> the court was remanding in name only.

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<sup>34</sup> *National Treasury*, 856 F.2d at 302 (Silberman, J., dissenting). Judge Silberman argued that the refusal to bargain was not a unilateral removal of a benefit previously available, and therefore there was no *status quo* to which the parties could return. *Id.* at 303 (Silberman, J., dissenting).

<sup>35</sup> 5 U.S.C. § 7118 (a)(7)(B) (1982). This is a major difference between the public and private sectors. As a result of the limitations on bargainable terms, as well as the strict prohibition against strikes in the public sector, *see supra* note 6, § 7118(a)(7)(B) allows the agency to fashion substantive terms. In contrast, regardless of the degree of bad faith, or egregious conduct, the NLRB may not compel either side to agree to substantive terms. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99, 109 (1970) ("it is the job of Congress . . . to decide when . . . to allow . . . compulsory submission to one side's demands").

<sup>36</sup> *National Treasury*, 856 F.2d at 305 (Silberman, J., dissenting); *see* 5 U.S.C. § 7118(a)(7)(B) (1982). It is submitted that to mandate retroactivity in cases where the outcome is uncertain will force parties to bear potentially staggering costs and will chill the bargaining effort. Further, it seems naive to suggest that awareness of the retroactive application of terms will not affect the bargaining process. Congressional intent that neither party be forced to agree to a proposal, or to make a concession is clear. *See* H.R. REP. NO. 1403, *supra* note 6, at 40.

<sup>37</sup> *National Treasury*, 856 F.2d at 305-08 (Silberman, J., dissenting); *see Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). If "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . [but] the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* On review, the court need not find the agency construction to be the only interpretation, nor need it be the one the court would have reached *de novo*. The court must decide only whether the result reached by the agency "is based on a permissible construction of the statute." *Id.* at 843 & n.11; *see also* Note, *A Framework for Judicial Review of an Agency's Statutory Interpretation: Chevron U.S.A. v. Natural Resources Defense Council*, 1985 DUKE L.J. 469, 477-96 (1985) (*Chevron* set out coherent framework for structuring review of agency determinations).

<sup>38</sup> *National Treasury*, 856 F.2d at 305, 308 (Silberman, J., dissenting). Judge Silberman noted that the D.C. Circuit Court had previously been reversed for enlarging an agency order rather than remanding to the agency for reconsideration. *Id.*; *see NLRB v. Food Store Employees Union Local 347*, 417 U.S. 1, 10 (1974).

<sup>39</sup> *National Treasury*, 856 F.2d at 305, 308 (Silberman, J., dissenting). Judge Silberman maintained that the order of the majority was phrased in such a way that the FLRA was told what it had to do and stripped of its discretion to reconsider the issues. *See id.* at 306

It is submitted that by mandating retroactive relief in all situations involving a good faith refusal to bargain, the D.C. Circuit has impermissibly usurped the legitimate policy-making authority of the FLRA. The necessary balance between the judiciary and the administrative agency is crucial to the successful operation of the FLRA as well as other federal agencies. This Comment will suggest that the court's failure to defer to the legitimate finding of the FLRA that retroactive relief was unnecessary distorts both the intent of Congress in enacting the FSLMRS and the appropriate standard of judicial review set out in the APA. Furthermore, this Comment will assert that the appropriate role for the court is the role defined by *Chevron*, which, assures deference where appropriate.

#### ADMINISTRATIVE AGENCIES AS POLICY-MAKERS

Once created, an agency is vested with the authority to shape policy within the sphere of its expertise.<sup>40</sup> This delegation of authority by Congress has repeatedly been held proper.<sup>41</sup> When agency authority is judicially questioned, the court's role is to determine if "agency action is: (a) pursuant to a statute that is constitutional (b) authorized by statute (c) based on fair procedures [and] (d) substantively rational."<sup>42</sup>

The FLRA, designed to emulate the National Labor Relations Board,<sup>43</sup> is deemed the expert on questions of national labor policy relating to public employees.<sup>44</sup> Public employees have limited protection in comparison to their counterparts in the private sector.<sup>45</sup> It is suggested that policy determinations must be made by a single entity in order to insure the fullest degree of bargaining strength under the FSLMRS and to assure nationwide uniformity.

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(Silberman, J., dissenting).

<sup>40</sup> See *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983) (agency is expected to gain expertise in its field during its existence); *Ryder Truck Lines v. United States*, 716 F.2d 1369, 1385 (11th Cir. 1983) (same); see also C. KOCH, *supra* note 1, at 41, 47; K. WARREN, *supra* note 2, at 36, 80.

<sup>41</sup> See *supra* note 2.

<sup>42</sup> G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 1, at 27.

<sup>43</sup> H.R. REP. NO. 1403, *supra* note 6, at 41; see Coleman, *supra* note 6, at 202; Frazier, *Labor-Management Relations in the Federal Government*, 30 LAB. L.J. 131, 133 (1979).

<sup>44</sup> See Frazier, *supra* note 43, at 133-34. Frazier writes that upon the FLRA's creation, even the President could no longer say what the FSLMRS meant since this became the role of the FLRA. *Id.* at 134.

<sup>45</sup> See *supra* note 6.

The appointment of dedicated and experienced practitioners and the evolution of numerous decisions indicate that the FLRA's determination of policy questions must be accorded appropriate deference.<sup>46</sup> In addition, section 7118 affords the Authority a variety of alternative remedies, all phrased as discretionary.<sup>47</sup> To effectuate this delegation of policy-making authority, the APA has vested reviewing courts with limited discretion when faced with an agency decision on appeal.<sup>48</sup>

In *National Treasury*, the Authority determined that the IRS should be required to bargain over the disputed issue, and so ordered.<sup>49</sup> The FLRA further determined that nothing in the FSLMRS required an RBO in a situation involving a good faith disagreement over bargainability.<sup>50</sup> It is submitted that the Authority's finding of an unfair labor practice and its choice of a prospective bargaining order were within the scope of its expertise and discretion.

#### ROLE OF THE COURTS IN REVIEWING AGENCY DECISIONS

Section 706 of the APA was promulgated to guide reviewing courts.<sup>51</sup> Thus, where an agency makes a determination under its enabling statute, the court is to defer to that decision unless it is

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<sup>46</sup> See *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984); K. WARREN, *supra* note 2, at 42-43 (noting that courts have neither time nor expertise to review more than small fraction of administrative decisions).

<sup>47</sup> See 5 U.S.C. § 7118 (1982).

<sup>48</sup> See 5 U.S.C. § 706 (1982); *Federal Election Comm'n v. Democratic Senatorial Campaign Comm'n*, 454 U.S. 27, 39 (1981) (question for court is whether agency construction is "sufficiently reasonable," not whether it is sole possibility); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978) (judicial role is narrow: rule adopted by Board is judicially reviewable for consistency with the Act, and for rationality; if supported by substantial evidence on the record taken whole, it must be enforced); *Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (*per curiam*)(determination must be based on administrative record, and be vacated and remanded only if unsupported on that record.).

Justice Scalia has argued that the majority's statements in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)(Scalia, J., concurring), are flatly inconsistent with well established standards because the implication is: "courts may substitute their interpretation of a statute for that of an agency whenever, '[e]mploying traditional tools of statutory construction', they are able to reach a conclusion as to the proper interpretation of the statute." *Id.* at 454 (Scalia, J., concurring); see also Note, *Judicial Review of Labor Board Decisions and the Midwest Piping Doctrine*, 60 N.Y.U. L. Rev. 499, 502 (1985) (judicial review is not designed to replace the Board; rather, the court owes agency special deference.).

<sup>49</sup> *National Treasury*, 856 F.2d at 295.

<sup>50</sup> *Id.*

<sup>51</sup> See *supra* note 8 and accompanying text.

"arbitrary, capricious, [or] an abuse of discretion."<sup>52</sup> The FSLMRS was enacted with the express expectation that this limited scope of review would apply to decisions made by the FLRA.<sup>53</sup>

Courts and agencies have been likened to partnerships.<sup>54</sup> The court's function is not to supervise but to operate within the system of checks and balances,<sup>55</sup> insuring consideration of all relevant factors.<sup>56</sup> It is suggested that although the congressional intent underlying the creation of a specialized agency to administer public employee labor relations was to allow policy determinations to rest within that agency, the *National Treasury* court substituted its judgment for that of the FLRA.<sup>57</sup>

The legislative history of the FSLMRS indicates congressional choice that questions of bargainability be handled as unfair labor practices upon one party's refusal to bargain.<sup>58</sup> However, the *Na-*

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<sup>52</sup> 5 U.S.C. § 706(2)(A) (1982). The courts have defined the terms "arbitrary," "capricious," and "abuse of discretion" in a multitude of cases. Although each varies slightly, the pattern is one of deferral to agency decision making. See *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (to survive challenge in court, agency must articulate valid explanation connecting facts to results); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971) ("arbitrary and capricious standard" of APA is "highly deferential" and presumes validity of agency action); *Guste v. Verity*, 853 F.2d 322, 327 (5th Cir. 1988) (where agency "considers the factors and articulates a rational relationship between the facts found and the choice made, its decision is not arbitrary or capricious") (citing *Watkins Motor Lines, Inc. v. ICC*, 641 F.2d 1183, 1188 (5th Cir. 1981)); *United Food & Comm'l Workers v. NLRB*, 852 F.2d 1344, 1347 (D.C. Cir. 1988) (board given great discretion and will be affirmed unless order is a direct attempt to achieve ends other than those to "effectuate policies of the act"); *Env'tl. Defense Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981) (standard is highly deferential and court must affirm if "a rational basis for the agency's decision is presented"); *Assure Competitive Transp., Inc. v. United States*, 635 F.2d 1301, 1307 (7th Cir. 1980) (must affirm if "rational basis exists for the agency decision").

<sup>53</sup> H.R. REP. NO. 1403, *supra* note 6, at 57.

<sup>54</sup> See *Estreicher*, *supra* note 6, at 1063, 1064 & n.7 (1982). Quoting Judge Leventhal of the D.C. Circuit, the author analogized the relationship between administrative agencies and reviewing courts as a partnership: "[T]he process . . . combines judicial supervision with a salutary principal of judicial restraint, an awareness that agencies and courts together constitute a 'partnership' in furtherance of the public interest and are 'collaborative instrumentalities of justice.'" *Id.* (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)); see *Gardner, Federal Courts and Agencies: An Audit of the Partnership Books*, 75 COLUM. L. REV. 800, 800 (1975).

<sup>55</sup> See *Gardner*, *supra* note 54, at 800.

<sup>56</sup> See *Koch, Confining Judicial Authority Over Administrative Action*, 49 MO. L. REV. 183, 214-15 (1984). *Koch* advocates meticulous action by the courts to avoid judicial involvement in the policy-making delegated to agencies. *Id.* at 216. Some judges object to this restriction as they desire the final say in important policy decisions. *Horowitz, The Courts as Guardians of the Public Interest*, 37 PUB. ADMIN. REV. 150, 150 (1977).

<sup>57</sup> 856 F.2d at 300.

<sup>58</sup> See H.R. REP. NO. 1403, *supra* note 6, at 50. The IRS refused to bargain as a result

*tional Treasury* court, after searching the legislative history, chose to rely on post-enactment statements by the sponsor of the FSLMRS regarding the strength he envisioned the statute to have.<sup>59</sup> Judge Mikva, relying on these statements, determined that retroactivity should be ordered routinely.<sup>60</sup> It is submitted that this result counters the expressed intent of Congress and establishes precedent under which courts in the future may usurp the policy making discretion properly vested in a federal agency. It is further suggested that this court, by mandating retroactivity in all good faith bargaining refusals has chilled the free bargaining process; parties will be forced to bargain over arguably excluded topics to avoid potentially staggering retroactive liability.

Furthermore, the *National Treasury* decision requires an RBO whenever the goals of management deterrence and employee

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of a good faith disagreement as to whether the parking issue was negotiable. *National Treasury*, 856 F.2d at 302 (Silberman, J., dissenting). The committee report of the House of Representatives indicates that disputes concerning negotiability were to be handled as an unfair labor practice. H.R. REP. NO. 1403, *surpa* note 6, at 50. It is submitted that by utilizing the statutory machinery through which Congress sought to resolve a good faith disagreement as to bargainability, the IRS was penalized by being required to adopt retroactive terms on issues not yet decided.

<sup>59</sup> See *National Treasury*, 856 F.2d at 299-300; 124 CONG. REC. 38, 714 (daily ed. Oct. 14, 1978). Representative Ford stated, "the courts will oversee the work of the Authority in this area (as well as others) in order to insure that the Authority vigorously enforces the purposes and provisions of title VII by adopting remedies sufficiently strong and suitable to make real the promise of the title." *Id.*; see Mikva, *The Role of Legislative History in Judicial Interpretation: A Discussion Between Judge Kenneth W. Starr and Judge Abner J. Mikva: A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 385 (1987).

After the initial plain meaning interpretation, resort should be to Congressional Committee Reports. *Id.*; see Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 554 (1985) ("Going behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances.") (quoting *Patterson v. American Tobacco Co.*, 456 U.S. 63, 75 (1982) (quoting *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 26 (1977))); Wald, *The D.C. Circuit: Here and Now*, 55 GEO. WASH. L. REV. 718, 726 (1987) ("some judges see their job as earnestly searching all relevant legislative materials to find out what Congress really meant—inconclusive as those materials may often be"); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 895 (1982) ("what Congress enacts is precisely what Congress intends . . . [and] 'strict adherence' to the statute's chosen words has now become the new touchstone of statutory interpretation").

The majority justified their reliance on post enactment statements by deeming the comments consistent with the statutory language, and therefore meriting some attention. *National Treasury*, 856 F.2d at 300. It is submitted that these remarks were given significantly more than "some weight." It is suggested that the *National Treasury* court, by relying on statements made after passage of the statute, has circumvented *Chevron* in the search for clearly expressed legislative intent.

<sup>60</sup> See *National Treasury*, 856 F.2d at 297, 299, 302 (Silberman, J., dissenting).

recompense are best served.<sup>61</sup> It is suggested that the failure of the court to consider the good faith of the parties will have potentially far-reaching results. Although the D.C. Circuit remanded to the FLRA,<sup>62</sup> it did so with express instructions as to what result was required.<sup>63</sup> This gave the FLRA no opportunity to reconsider its initial determination, as would have been appropriate.<sup>64</sup>

### DEFERENCE AND THE *CHEVRON* STANDARD

In 1984, the United States Supreme Court unanimously reversed a decision of the D.C. Circuit in the landmark *Chevron* case.<sup>65</sup> The holding set out a two step analysis for courts to utilize when reviewing an agency's construction of its enabling statute.<sup>66</sup>

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<sup>61</sup> See *id.* at 302 (Silberman, J., dissenting). As Judge Silberman pointed out, the majority has stripped the Authority of its discretionary ability to determine when this remedy is to be imposed. *Id.*

<sup>62</sup> *Id.* at 301 (Silberman, J., dissenting).

<sup>63</sup> *Id.* at 301, 305 (Silberman, J., dissenting).

<sup>64</sup> See *NLRB v. Food Stores Employees Union*, 417 U.S. 1, 10 (1974). When a reviewing court concludes that an agency's determination constituted an abuse of discretion, remand for reconsideration is generally the "proper course." *Id.* The *Food Stores* Court explained the value of a remand: "the congressional scheme invest[s] the Board and not the courts with broad powers to fashion remedies that will effectuate national labor policy." *Id.* The reviewing court is not to be "propel[led] . . . into the domain which Congress has set aside exclusively for the administrative agency." *Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976)(quoting *SEC v. Chenery Corp.*, 322 U.S. 194, 196 (1947)); see *Flynn v. Shultz*, 748 F.2d 1186, 1194 (7th Cir. 1984)("where a finding of 'abuse of discretion' is made, the remedy to be granted is a remand of the issue to the relevant agency and not a substitution of judgment by the court"), *cert. denied*, 474 U.S. 830 (1985); *Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1053 (D.C. Cir. 1981)(when reviewing court could not determine basis of agency's decision, it was compelled to remand rather than substitute its own judgment); *E.A.C. Eng'g v. United States*, 624 F. Supp. 569, 570 (Ct. Int'l Trade 1985)("a court remanding an action to an agency usually will allow the agency to determine the proper procedure or method to effectuate the court's order"); see also *Udall v. FPC*, 387 U.S. 428, 450 (1967)(on remand, agency is allowed to explore those phases of the case previously neglected).

<sup>65</sup> 467 U.S. 837, 866 (1984). This case focused on judicial review of the NRDC's interpretation of the statute governing industrial emissions. *Id.* at 840. Judge Ginsburg wrote the decision for the circuit court that was ultimately reversed by the Supreme Court. See *Natural Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718, 719 (D.C. Cir. 1982), *rev'd sub nom.* *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The circuit court had determined that the interpretation adopted by the council was contrary to congressional intent and adopted a different interpretation. *Id.* The Supreme Court held that the interpretation of the NRDC was permissible and that the action of the D.C. Circuit had exceeded its reviewing authority. *Chevron*, 467 U.S. at 845. It is suggested that Judge Mikva stepped into the role of administrative policy maker through his decision in *National Treasury*.

<sup>66</sup> *Chevron*, 467 U.S. at 842.

The test first requires a determination of whether Congress has expressly spoken on the issue in question, and, if so, that intent must be given effect.<sup>67</sup> If Congress has not spoken, the interpretation of the agency must be given effect as long as it is based on a permissible interpretation of the statute.<sup>68</sup> It is submitted that *Chevron* set out an objective format by which to determine whether the agency has acted within its discretionary authority.

Since the decision in *Chevron*, courts have routinely applied the two step test and allowed a variety of agency decisions to stand.<sup>69</sup> Yet, Judge Mikva avoided the second step of *Chevron* by his initial determination that the FLRA had acted in contravention of expressed legislative intent.<sup>70</sup> It is suggested that the *National Treasury* court made this determination in order to substitute its judgment for that of the Authority, thereby reaching its preferred result.

### CONCLUSION

This Comment has suggested that administrative agencies in general, and the FLRA in particular, have been vested with the authority to formulate policy. Appellate courts have been granted limited authority to upset determinations of federal agencies and may do so only if a decision is arbitrary, capricious, an abuse of discretion or counter to the clearly expressed intent of Congress. Yet, the D.C. Circuit has resorted to an unnecessary and inaccu-

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<sup>67</sup> *Id.* If congressional intent is clear, no further inquiry is needed, as the court and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* "The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Board of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986).

<sup>68</sup> *Chevron*, 467 U.S. at 842-43.

<sup>69</sup> See *Department of Defense v. FLRA*, 863 F.2d 988, 990 (D.C. Cir. 1988)(court need not reach step two if congressional intent is clear); *Sec. Indus. Ass'n v. Board of Governors of Fed. Reserve Sys.*, 847 F.2d 890, 894 (D.C. Cir. 1988)(legislative history deemed ambiguous, leading to analysis under step two of *Chevron* test); *Emerald Mines Co. v. Federal Mine Safety & Health Review Comm'n*, 863 F.2d 51, 53 (D.C. Cir. 1988)(where act is silent or ambiguous, court accords deference to reasonably defensible construction); *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 288 (D.C. Cir. 1988), *cert. denied*, 1989 U.S. LEXIS 2816 (1989)("If Congress did not have a specific intent, we ask whether the agency's construction of the statute is 'rational and consistent with the statute'"(quoting *NLRB v. United Food & Comm'l Workers Union Local 23*, 108 S. Ct. 413, 421, (1987)); *Chemical Mfrs. Ass'n v. EPA*, 859 F.2d 977, 984 (D.C. Cir. 1988)("Congressional silence is deemed an implicit delegation of power to an agency to make policy choices consistent with the statutory purpose").

<sup>70</sup> *National Treasury*, 856 F.2d at 299-300.

rate review of the legislative history of the FSLMRS to justify its decision. The court improperly substituted the result it preferred for that of the FLRA, the agency specifically designed to deal with such clear policy questions as the one presented in *National Treasury*. It is submitted that this decision not only usurped the power of the FLRA, but also may have a potentially chilling effect on the free bargaining process.

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