SUPREME COURT OF THE UNITED STATES

Nos. 97–1184 AND 97–1243

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309, PETITIONER

97–1184 *v.*

DEPARTMENT OF THE INTERIOR ET AL.

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

97–1243 *v.*

DEPARTMENT OF THE INTERIOR ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[March 3, 1999]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE joins, and with whom JUSTICE SCALIA and JUSTICE THOMAS join as to Part I, dissenting.

The Court today ignores the plain meaning of the Federal Service Labor-Management Relations Statute (Federal Labor Statute or Statute) and erroneously concludes that when an agency responds to a judicial decision by abandoning its own interpretation of a statute and adopting that of the judicial forum this Court should defer to the agency's revised position, rather than evaluate whether the revised interpretation renders, in fact, the most plausible reading of the statute. I respectfully dissent.

I

The Federal Labor Statute plainly does not impose a general duty on agencies to bargain midterm. See *Social Security Administration* v. *FLRA*, 956 F. 2d 1280, 1281

(CA4 1992) *(SSA)*. Whether the language of a statute is plain or ambiguous is determined "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 341 (1997).

Here, the language of the Federal Labor Statute, as well as the specific and broader contexts in which that language is used, demonstrates that the Statute is unambiguous. The Federal Labor Statute specifies a few instances where midterm bargaining is required, see 5 U. S. C. §7106(b), but it contains no provision that expressly or implicitly imposes a *general* duty on agencies to bargain during the term of a collective bargaining agreement. Rather, Congress defined the general duty to bargain to include only a duty to "meet and negotiate in good faith for the purposes of *arriving at a collective bargaining agreement*," §7114(a)(4) (emphasis supplied), and obligated agencies to negotiate "with a sincere resolve to reach *a collective bargaining agreement*," §7114(b)(1) (emphasis supplied); see also, §7114(b)(5) (requiring parties "to take such steps as are necessary to implement such agreement"). The term "arrive" is commonly understood to mean "to reach a destination" or "to gain or achieve an end." See Webster's Third New International Dictionary 121 (1976). Thus, by its terms, the Federal Labor Statute requires an agency to "meet and negotiate in good faith" with unions only "for the purposes of" achieving an end: a comprehensive collective bargaining agreement. See also §7103(a)(8) (defining "collective bargaining agreement" as "an agreement" reached through collective bargaining); §7103(a)(12) (defining "collective bargaining," in part, as "to reach [an] agreement with respect to the conditions of employment").

The Court suggests that, because a midterm bargaining agreement is an end agreement of negotiation, the duty to bargain may encompass midterm agreements as well. See

ante, at 7. As the word "midterm" suggests, however, such agreements are only a "midpoint" in the term of the underlying collective bargaining agreement. Because such agreements do not stand alone but relate back to the primary collective bargaining agreement, a midterm agreement is most appropriately regarded as a modification of, or a supplement to, the primary agreement reached pursuant to the Federal Labor Statute. See, *e.g.*, 29 U. S. C. §158(d) (describing midterm bargaining agreements in private sector as "modification[s]" to the primary agreement). The Federal Labor Statute expresses no *general* duty on the part of agencies to negotiate modifications or supplements to an existing collective bargaining agreement. With respect to modifications and supplements, the Statute requires only that agencies bargain over a few specified topics. See 5 U. S. C. §7106(b).

Section 7106(b) *obligates* an agency to bargain midterm over specified agency initiatives, such as the creation of "procedures which management officials of the agency will observe in exercising any authority" under the Federal Labor Statute. §7106(b)(2); see also §7106(b)(3) (providing for bargaining over "appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials"); *American Federation of Government Employees, AFL–CIO, Local 2782* v. *FLRA*, 702 F. 2d 1183, 1186–1187 (CADC 1983). Because the Statute specifies a few, limited topics that are subject to midterm bargaining, it cannot be construed to require midterm bargaining generally. Such a construction, indeed, renders the specific and general obligations redundant. See, *e.g.*, *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 36 (1992).

The Court reasons that §7106(b) does not define a limited duty to bargain midterm because it merely defines exceptions to §7106(a), which, in turn, defines managerial rights that are themselves exceptions to the duties out-

lined in the Statute. Moreover, because the section's introductory language "indicates only that the delegation of certain rights to management . . . shall not *preclude* negotiations about certain related matters," see *ante,* at 11, the Court suggests that §7106(b) defines a permissive exception to an exception rather than an obligation. It thus follows from the structure and text of §7106(b) that "the duty to bargain midterm finds its source elsewhere in the Statute." *Ante,* at 12.

The Court's reliance on §7106(b)'s introductory language is misplaced because the subparts of §7106(b) indicate that this section defines an obligation, not a permissive exception. Specifically, although §7106(b)(1) provides that an agency at its election can initiate bargaining on working conditions, §§7106(b)(2) and (b)(3) are mandatory, *requiring* that agencies bargain midterm over the matters specified. At the very least, §§7106(b)(2) and (b)(3) demonstrate that Congress intended to impose only a limited duty on agencies to bargain midterm. Even assuming §7106(b) is permissive, there is no basis for the Court's conclusion that this section demonstrates that a generalized duty to bargain midterm emanates from another statutory source; indeed, there is no other provision of the Statute from which such a duty could emanate. See *ante,* at 12. Accordingly, it is plain from its language and structure that a general duty to engage in midterm bargaining is not prescribed by the Federal Labor Statute.

That the Federal Labor Statute contemplates a single end agreement, and not supplementary agreements or modifications, is also demonstrated by a comparison of it to the National Labor Relations Act (NLRA), the Statute's private-sector counterpart. The duty to bargain, as defined in the NLRA, includes "the negotiation of an agreement, *or any question arising thereunder*." 29 U. S. C. §158(d) (emphasis supplied). This broad definition of the duty, which clearly contemplates negotiation of midterm

agreements, stands in stark contrast to the duty defined in the Federal Labor Statute, to "arriv[e] at a collective bargaining agreement." 5 U. S. C. §7114(a)(4). The NLRA also contains a proviso limiting this broad duty to negotiate when there is "in effect a collective-bargaining contract covering employees in an industry" and a party desires to "modify" that contract. 29 U. S. C. §158(d). For example, there is no duty to engage in midterm bargaining over matters already "contained in" the existing collective bargaining agreement. *Ibid*. As noted above, the Federal Labor Statute lacks any comparable language. Because, at the time it drafted the Statute, Congress knew that the NLRA defined a duty to bargain midterm, see *NLRB* v. *Jacobs Mfg. Co.*, 196 F. 2d 680, 684 (CA2 1952), this omission indicates that Congress did not intend to include a similar duty in the Federal Labor Statute.

The Court concludes, nevertheless, that this omission is irrelevant because the Federal Labor Statute and the NLRA, as well as collective bargaining in the public and private sectors, are different. See *ante*, at 7; see also *Fort Stewart Schools* v. *FLRA*, 495 U. S. 641, 648 (1990) (observing that the Federal Labor Statute and the NLRA should not be read *in pari materia*). To be sure, there are differences between the acts, but that fact does not render a comparison of them irrelevant. It is well established that "the interpretation of a doubtful statute may be influenced by language of other statutes which are not specifically related, but which apply to similar persons, things, or relationships." 2 B N. Singer, Sutherland on Statutory Construction §53.03, p. 233 (rev. 5th ed. 1992). Employing this principle, the Court has previously compared non-analogous statutes to aid its interpretation of them. See *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 131–132 (1943) (using Federal Employers' Liability Act to aid interpretation of Fair Labor Standards Act of 1938 even though the two Acts were *not* strictly analogous). In light

of these principles of construction, the NLRA may be used to aid our interpretation of the Federal Labor Statute. See also *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U. S. 89, 92–93, 96–97 (1983) (analogizing the Federal Labor Relations Authority (FLRA) to the National Labor Relations Board).

A comparison of the two statutes explains why a duty to bargain midterm was included in the NLRA but omitted from the Federal Labor Statute. Under the Statute, but not the NLRA, the Government must subsidize union negotiators. See 5 U. S. C. §7131(a). Consequently, there is little incentive for union negotiators to streamline their bargaining positions or to avoid extended midterm bargaining. Given this incentive structure, it is difficult to imagine that Congress would obligate Government agencies to bargain midterm, for such an obligation would likely cause perpetual collective bargaining. Continuous bargaining, however, is contrary to the goal of the FLRA: to promote "effective and efficient" Government, not Government stymied by perpetual bargaining. §7101(b). Indeed, it was this realization that initially motivated the FLRA to reject the contention that the Federal Labor Statute contained a duty to bargain midterm. See *Internal Revenue Service*, 17 F. L. R. A. 731, 736–737 (1985) (observing that midterm bargaining would cause continuous bargaining on an issue-by-issue basis).

A duty to bargain midterm was also excluded from the Statute because, in the context of the no-strike regime of federal labor relations, it would leave the agency-employer at an unfair disadvantage. In the NLRA context, the union that wants to obtain a midterm modification or supplement from an employer who is dead set against it must pay the price of a strike that is costly to it and its members. In the context of the Federal Labor Statute, the union that wants to obtain a midterm modification or supplement need only bargain to an impasse and then

hope that the Federal Service Impasses Panel will give it all (or at least some) of what it has requested. Demanding unreciprocated additional benefits is cost-free. Thus, a midterm bargaining requirement might motivate a union to "hold [a] matter off until the term agreement is done[,]. . . initiate the proposal as part of a single-issue negotiation," and, if an impasse results, force the agency to arbitrate. Ferris, Union-Initiated Mid-Term Bargaining: A Catalyst in Reshaping Conflict Patterns, 5 Negotiation J. 407, 411–412 (Oct. 1989). Again, it is obvious that this incentive structure does not promote "effective and efficient" government. §7101(b). Given the language and structure of the Federal Labor Statute, the context in which this language is used and the differences between the Statute and the NLRA, I would hold that the Federal Labor Statute plainly, and justifiably, does not impose a general duty to bargain midterm.

The FLRA argues, in the alternative, that even if the Federal Labor Statute does not impose a general obligation to bargain midterm, agencies nevertheless must bargain over union-initiated proposals to include in term agreements midterm bargaining provisions. In other words, unions may propose that agency-employers agree to obligate themselves contractually to bargain midterm. In the private sector, the duty to bargain means only that the employer and the exclusive representative bargain over something in good faith. In the public sector, however, the duty to bargain over a proposal can have very different consequences: Unions may force an agency into binding arbitration by bargaining to impasse. §7119(c)(5)(B)(iii). Therefore, by imposing a duty to bargain over midterm bargaining clauses, the FLRA is, at the very least, taking the choice of whether to bargain midterm out of a reluctant federal employer's hands, and placing it into the hands of the Federal Service Impasses Panel, a result that seems inconsistent with the Federal

Labor Statute's goals of promoting "effective and efficient Government." §7101(b).

There is, moreover, no statutory source for a duty to bargain over contractual requirements to bargain midterm. Section 7117(a)(1) directs an agency to bargain over "matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation" but only "to the extent not inconsistent with any Federal law." The FLRA has interpreted this section to impose a duty on agencies to bargain over only proposals relating to conditions of employment. See Brief for Petitioner FLRA in No. 97–1243, p. 37. It is not apparent, however, how bargaining over a contractual requirement to bargain midterm is a "matte[r] . . . affecting working conditions." See 5 U. S. C. §7103(a)(14) (defining "conditions of employment"). More important, because Congress, through the Federal Labor Statute, chose not to require agencies to bargain midterm, it is "inconsistent with . . . Federal law" for the FLRA to require bargaining over a contractual requirement to bargain midterm. As I read the Statute, Congress has clearly rejected such a requirement.

II

Even if I agreed with the Court that the Federal Labor Statute is ambiguous with respect to the duty to bargain midterm, I would not defer in this suit to the FLRA's interpretation of the Statute pursuant to *Chevron*. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984).

We observed in *Good Samaritan Hospital* v. *Shalala*, 508 U. S. 402 (1993), that when an agency alters its interpretation of a statute, its revised interpretation may be entitled to less deference than a position consistently held. We explained:

"The Secretary is not estopped from changing a view

> she believes to have been grounded upon a mistaken legal interpretation. Indeed, an administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes. On the other hand, the consistency of an agency's position is a factor in assessing the weight that position is due. As we have stated: 'An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is "entitled to considerably less deference" than a consistently held agency view.' *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 446, n. 30 (1987). How much weight should be given to the agency's views in such a situation, and in particular where its shifts might have resulted from intervening and possibly erroneous judicial decisions and its current position from one of our own rulings, will depend on the facts of individual cases." *Id.*, at 417 (some internal citations and quotation marks omitted).

See also *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 446–447 and n. 30 (1987) (rejecting agency interpretation of statute on ground that interpretation was not consistent with congressional intent, and agency's interpretation was not entitled to heightened deference because it had been inconsistent over time); *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U. S. 27, 37 (1981) (observing that the "thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling," but ultimately deferring to inconsistent agency position); see also *Watt* v. *Alaska*, 451 U. S. 259, 272–273 (1981) (holding that agency's interpretation of amendment

that was contemporaneous with amendment's passage was entitled to considerably more deference than agency's current, inconsistent interpretation).

Here, the FLRA changed its position on the precise matter that we have been asked to consider– whether agencies have a duty to bargain midterm under the Federal Labor Statute– and did so in response to a judicial decision. Initially, the FLRA determined that the Statute did not impose a duty to bargain midterm, see *Internal Revenue Service*, 17 F. L. R. A. 731 (1985), but it came to the opposite conclusion after the D. C. Circuit rejected this reading of the Statute, see *National Treasury Employees Union* v. *FLRA*, 810 F. 2d 295 (1987) (holding the Statute required midterm bargaining); *Internal Revenue Service*, 29 F. L. R. A. 162, 166 (1987) (adopting D. C. Circuit's reading of the Statute). At the time it reversed course, the FLRA offered only a scant explanation for its sudden interpretive shift. It merely stated that it agreed with the D. C. Circuit's holdings and concluded, "based on the court's decision and in agreement with the Administrative Law Judge," that the IRS had impermissibly refused to bargain over a midterm proposal. *Id.*, at 165–166, 168. The only apparent reason for the agency's shift in interpretation was the D. C. Circuit's decision. In this circumstance, the agency's interpretation of the Statute is entitled to less deference. See *Good Samaritan Hospital* v. *Shalala, supra,* at 417. This lesser standard of deference seems particularly appropriate here because we have recognized some limits on the FLRA's interpretive powers. See *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U. S., at 108. Accordingly, we should endeavor to find the most plausible construction of the Federal Labor Statute and examine the Secretary's current interpretation in light of this construction.

The FLRA currently interprets the Federal Labor Statute to impose a duty on federal agencies to negotiate

midterm those union-initiated proposals that are not covered in the term agreement unless the union has clearly waived its right to bargain midterm. See Brief for Petitioner FLRA in No. 97–1243, pp. 18–20; see *Department of Navy, Marine Corps Logistics Base* v. *FLRA*, 962 F. 2d 48, 56 (CADC 1992) (outlining FLRA position). This is not, however, the most plausible construction of the Statute. For the reasons previously discussed, there is no language in the Statute expressing a general duty to bargain midterm. Moreover, to the extent that the FLRA has codified exceptions to a generalized duty to bargain midterm, those exceptions are defined out of whole cloth; there is nothing in the text of the Federal Labor Statute that suggests limits on a duty to bargain midterm. For these reasons, even if there were some ambiguity in the Federal Labor Statute, I would hold that the agency's interpretation of the Federal Labor Statute is inferior to the natural, and most plausible, reading of that Statute– that there is no general duty to bargain midterm. See *Good Samaritan Hospital* v. *Shalala*, 508 U. S., at 417; *INS* v. *Cardoza-Fonseca*, 480 U. S., at 446–447, and n. 30. I respectfully dissent and would affirm the decision of the Fourth Circuit.