

# EXECUTIVE POWER, NATIONAL SECURITY & FEDERAL EMPLOYEE COLLECTIVE BARGAINING RIGHTS: THE NEW DEPARTMENT OF HOMELAND SECURITY

## I. INTRODUCTION

It is the responsibility of the United States Federal Government to protect the welfare of its citizens.<sup>1</sup> The challenges that the federal government faces in fighting the war against terrorism are daunting. The September 11<sup>th</sup> terrorist attacks on our nation demonstrated the new threats to our national security and the critical need for a flexible government to defend against them. As a result of the terrorist attacks, the federal government has been forced to reevaluate how it operates to ensure that it will be able to preserve the security of America and protect its citizens in the future. Much of the debate has focused on the structure of the government agencies that are responsible for homeland security.<sup>2</sup> Specifically, it addressed the flexibility granted to the President and, derivatively, to executive branch officials, which enables them to effectively direct the federal workforce tasked with the mission of protecting the homeland.<sup>3</sup>

Unlike private sector employees, whose rights and obligations regarding the authority to collectively bargain and organize, are set out in the National Labor Relations Act,<sup>4</sup> federal employees are covered and governed by the Federal Service Labor-Management Relations Statute (“FSLMRS”).<sup>5</sup> In fact, the rights of federal employees are more narrow

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1. U.S. CONST. pmbl.

2. *See* Press Statement, Senator Joseph Lieberman, Chairman, United States Senate Committee on Governmental Affairs, Lieberman Calls for Homeland Security Vote Warns Against GOP Pork, Special Interest Projects, (Nov. 13, 2002) [hereinafter Lieberman Calls for Homeland Security Vote] (on file with authors).

3. *See id.*

4. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2000).

5. Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101–7135 (2000).

in scope than that of their private sector counterparts.<sup>6</sup> This note focuses on Chapter 71 of the Civil Service Reform Act, which is the FSLMRS.

As of 2002, of the 1.7 million federal executive branch employees, more than one million were represented by unions.<sup>7</sup> Of the federal employees that have collective bargaining rights, a significant number of them are involved in domestic security.<sup>8</sup> Recently, as a result of the September 11<sup>th</sup> terrorist attacks, policymakers have raised questions as to whether our domestic defenses are hampered due to these collective bargaining rights. In particular, issues have been raised as to whether the collective bargaining rights of federal employees inhibit the operational flexibility of agencies involved in national security.<sup>9</sup>

These concerns have surfaced because the threats to our national security have been redefined in the post-September 11<sup>th</sup> environment. The threats to our national security are no longer limited to nation-states that use conventional weapons to achieve their objectives. Rather, the threats in today's environment are dispersed, not easily identifiable nor detectable.

In section 7103(b) of the FSLMRS, the President is granted the authority, for national security reasons, to exempt parts of agencies and even entire agencies within the federal government from collective bargaining.<sup>10</sup> This provision of the FSLMRS was closely scrutinized when both Congress and the administration developed a Department of Homeland Security in the federal government. The Department took twenty-two separate federal agencies that were in existence, which employed over 170,000 federal employees, and combined them into one department based on their common mission characteristics.<sup>11</sup> The administration's restructuring effort was designed to combine the disparate subdivisions of agencies within the federal government involved in domestic security in order to promote efficiency and communication, and most importantly, improve overall effectiveness. Of those federal employees that were transferred into the new department, over 43,000 are represented by unions.<sup>12</sup>

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6. See RICHARD C. KEARNEY, *LABOR RELATIONS IN THE PUBLIC SECTOR* 60 (2d ed. 1992).

7. OFFICE OF PERS. MGMT., *UNION RECOGNITION IN THE FEDERAL GOVERNMENT* (2002).

8. *Id.*

9. See Lieberman Calls for Homeland Security Vote, *supra* note 2.

10. 5 U.S.C. § 7103(b)(1)(A)–(B) (2000).

11. *Snags on the Homeland Front*, N.Y. TIMES, Aug. 7, 2002, at A16.

12. Letter from Joseph Lieberman, Chairman of United States Senate Committee on Governmental Affairs, to all members of the U.S. Senate (Aug. 29, 2002) (on file with authors).

The manner in which the national security exemption would be applied to the Department of Homeland Security resulted in an impasse in the passage of the legislation that lasted for several months.<sup>13</sup> The impasse was finally resolved when the Democrats lost majority control of the Senate in the 2002 elections.<sup>14</sup> Essentially, the Democrats in the Senate wanted to restrict the broad language of the national security exemption that granted the President with the authority to remove certain groups of federal employees from the FSLMRS.<sup>15</sup> Opponents were concerned that President Bush wanted to use both the Homeland Defense Bill and the issue of national security as a vehicle to diminish the collective bargaining rights of federal employees.<sup>16</sup> This note will argue that this impasse was a struggle based on politics and not on whether the collective bargaining rights of federal employees inhibit the flexibility and efficiency of the federal workforce in addressing threats to our national security.

First, this note will provide a historical background on the evolution of federal employees' organizational and collective bargaining rights. Second, it will present a comparison of federal employee rights with those of private sector employees and give a brief explanation for the differences. Third, the note will address the application of the national security exemption from its origin up until today. Fourth, it will discuss the legislative history of the Department of Homeland Security Act and the impact it will have on federal employee collective bargaining rights in the future. For example, this note will briefly discuss the first battle in preserving federal employee collective bargaining rights in the post-September 11<sup>th</sup> environment, which involves the Transportation Security Administration ("TSA"). In this battle, the airport screeners of the TSA were the first employees of the Department of Homeland Security to be excluded from collective bargaining because of national security reasons. Finally, there will be a discussion on the statutory interpretation of federal employee collective bargaining rights under the FSLMRS to determine and distinguish between those bargaining items that are permissive from those that are compulsory to the parties. This analysis will demonstrate the limited scope of the issues that federal employees can actually collectively bargain over with their employer. Moreover, this

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13. See Julie Hirschfeld Davis, *Senate Votes for Homeland Security Department*, BALT. SUN, Nov. 20, 2002, at 1A.

14. See *id.*

15. See *id.*

16. AM. FED'N OF GOV'T EMPLOYEES ("AFGE"), YOU ALREADY HAVE THE FLEXIBILITY YOU SEEK 3 (2002).

limitation establishes that compulsory collective bargaining rights do not inhibit the efficiency and effectiveness of the federal workforce in addressing national security threats.

This statutory analysis will demonstrate that the protections afforded to federal employees do not affect the flexibility and capability of these agencies to effectively respond to national security threats. Moreover, the note will show that the President, even without the national security exemption authority, has the power to address these threats. This will be proven by discussing the limited scope of collective bargaining rights and the broad rights granted to management in the FSLMRS. It will be demonstrated that the debate was based more on political rhetoric than on the fact that the current system of unionized federal employees impedes the federal government's ability to protect the nation. Therefore, federal employees that are part of the new Department of Homeland Security should retain their right to collectively bargain.

## II. THE EVOLUTION OF FEDERAL LABOR ORGANIZATIONS AND FEDERAL EMPLOYEE COLLECTIVE BARGAINING RIGHTS

### *A. The Origin of Federal Labor Organizations*

To understand the policy and politics surrounding the current debate regarding federal employee collective bargaining rights, it is important to know the history behind their development. The origin of labor organizations in the federal sector can be traced back to the early 1800s, where their first significant impact was felt in federal shipyards.<sup>17</sup> During this period, skilled public employees sought parity with their private sector counterparts who had successfully won the ten-hour workday.<sup>18</sup> In 1836, federal workers achieved equality with their private sector counterparts on this issue when President Andrew Jackson personally granted federal employees the ten-hour workday.<sup>19</sup> Ironically, presidential involvement would continue to exist in federal labor relations until the passage of the Civil Service Reform Act of 1978 ("CSRA").<sup>20</sup> Additionally, when labor organizations in both the private and public sector be-

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17. KEARNEY, *supra* note 6, at 10.

18. *Id.* at 3.

19. *Id.* at 10.

20. *Id.* The FSLMRS is Chapter 71 of the CSRA. 5 U.S.C. §§ 7101–7135 (2000).

gan to bargain for an eight-hour workday, it was the federal government that was the first employer to grant it.<sup>21</sup>

The mid-1800s also marked a period during which federal employees began to join labor unions. Postal workers were one of the first significant groups of federal employees to join these unions.<sup>22</sup> However, their efforts to join labor unions were not well received. In 1895, Postmaster General William L. Wilson issued an order that prohibited postal employees from lobbying the federal government and threatened them with being fired if they violated the order.<sup>23</sup>

During the same period, Congress passed the Pendleton Act of 1883,<sup>24</sup> one of the most significant pieces of federal employee legislation of its time. This established the federal merit system and gave Congress the authority to regulate wages, hours and working conditions of federal employees.<sup>25</sup> Nonetheless, federal employees were not able to collectively bargain regarding these terms and conditions of employment. This was due to the fact that both Presidents Theodore Roosevelt and William Howard Taft issued executive orders that prohibited federal employees from lobbying Congress for improved working conditions or wages.<sup>26</sup>

However, the postal workers and other federal employees pursued a campaign against these executive orders, with the assistance of the American Federation of Labor (“AFL”) union. This effort gained the support of Congress, which passed the Lloyd-LaFollette Act of 1912.<sup>27</sup> This act preserved for federal employees their First Amendment right to organize and petition Congress.<sup>28</sup> However, in a compromise made to ensure passage of the Lloyd-LaFollette Act, federal employees could only join organizations that did not engage in strikes against the federal government.<sup>29</sup> As a result of their success with the Lloyd-LaFollette Act, federal employees began to push for similar rights granted to private employees.<sup>30</sup>

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21. KEARNEY, *supra* note 6, at 3.

22. *Id.* at 10.

23. *Id.* at 10–11.

24. Pendleton Act, 22 Stat. 403 (1883).

25. CHARLES J. COLEMAN, *MANAGING LABOR RELATIONS IN THE PUBLIC SECTOR* 61–62 (1990).

26. KEARNEY, *supra* note 6, at 55.

27. *Id.*

28. *See id.*

29. *Id.*

30. *Id.*

*B. Pre-Civil Service Reform Act Executive Orders Governing Federal Employee Collective Bargaining Rights*

President Kennedy's Executive Order 10,988 established for federal employees the right to form and join unions and to collectively bargain.<sup>31</sup> Executive Order 10,988 granted to federal employees some of the rights granted to private sector employees in the NLRA.<sup>32</sup> It provided for a determination of a bargaining unit and established a set of ground rules to govern the interactions between unions and management.<sup>33</sup> The Order encompassed almost all federal employees with the exception of those involved in national security.<sup>34</sup> Specifically, section 16 of Executive Order 10,988 excluded the Central Intelligence Agency ("CIA") and Federal Bureau of Investigations ("FBI"), since their primary mission was "performing intelligence, investigative, or security functions."<sup>35</sup> In addition to these two agencies, the Executive Order left open the possibility that, in the future, other agencies or subdivisions with similar mission responsibilities could be excluded.<sup>36</sup> For other agencies to be excluded, this Order required that the head of an agency determine that the "provisions of the order could not be applied in a manner consistent with national security requirements and considerations."<sup>37</sup> These were the grounds for the exclusion of the CIA and FBI.<sup>38</sup>

The rights granted to federal agency management officials by the Executive Order received much criticism from unions.<sup>39</sup> Labor organizations believed that the rights provided employers with too much authority and undermined the ability of federal employees to effectively bargain.<sup>40</sup> One of the main criticisms leveled against the Executive Order was that the rights granted to management severely restricted what fed-

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31. Exec. Order No. 10,988, 27 Fed. Reg. 551 (Jan. 19, 1962).

32. *Id.*

33. *Id.*

34. *Id.* See also 5 U.S.C. § 7103(a)(3)(A)-(H). In 1978, through the Federal Service Labor-Management Relations Statute many parts of Executive Order 10,988 were codified. In fact, the statute excluded from the definition of "employee organization" both the Central Intelligence Agency and Federal Bureau of Investigations and in addition, added the General Accounting Office, National Security Agency, Tennessee Valley Authority, Federal Labor Relations Authority, Federal Service Impasses Panel and the United States Secret Service. *Id.*

35. Exec. Order No. 10,988, 27 Fed. Reg. 551 (Jan. 19, 1962).

36. *Id.*

37. *Id.*

38. *Id.*

39. See KEARNEY, *supra* note 6, at 57.

40. *Id.*

eral employees could actually bargain over.<sup>41</sup> In particular, unions complained about the severe restrictions created by the management rights provision in that it prohibited bargaining over wages, benefits and union security provisions.<sup>42</sup> For example, some of the management rights established by Executive Order 10,988 included: (1) to direct employees of the agency; (2) to hire, promote, transfer, assign and retain employees in positions within the agency, and to suspend, demote, discharge or take disciplinary action; (3) to relieve employees from duties because of lack of work or for other legitimate reasons; (4) to maintain the efficiency of government operations entrusted to them; (5) to determine the methods, means and personnel by which such operations are to be conducted; and (6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency.<sup>43</sup> By explicitly defining these management rights, federal employees were effectively excluded from collectively bargaining over these areas of employment. Of note, many, if not all, of these areas are open to negotiation in the private sector.

Executive Order 10,988 provided the legal framework that governed labor-management relations in the federal government until the late 1970s, when it came under attack.<sup>44</sup> As noted, unions complained that the scope of the bargaining rights granted to federal employees in the Executive Order was too narrow. In addition, labor organizations complained that federal employees were prohibited from striking and that they were left with no other bargaining leverage alternative.<sup>45</sup> Furthermore, the ultimate resolution of any employee grievance remained with the head of the department in which it originated.<sup>46</sup> Unions argued that the balance of power weighed too heavily in favor of the federal government agencies. President Nixon attempted to address these criticisms through Executive Order 11,491<sup>47</sup> of October 1969. In particular, two presidential committees studied and identified the deficiencies of Executive Order 10,988, one appointed by President Johnson and the other by President Nixon.<sup>48</sup> Executive Order 11,491 changed the manner in which bargaining impasses and grievance disputes were addressed.<sup>49</sup> Moreover, the Order authorized binding arbitration and established the

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41. *Id.*

42. *Id.*

43. Exec. Order No. 10,988, 27 Fed. Reg. 551 (Jan. 19, 1962).

44. *See* KEARNEY, *supra* note 6, at 57.

45. *See id.*

46. *Id.*

47. Exec. Order No. 11,491, 34 Fed. Reg. 17,605 (Oct. 31, 1969).

48. KEARNEY, *supra* note 6, at 57.

49. Exec. Order No. 11,491, 34 Fed. Reg. 17,605 (Oct. 31, 1969).

right of a third party to overrule agency heads and resolve impasses over contract negotiations.<sup>50</sup>

Two executive orders that strengthened federal employee collective bargaining rights are Executive Order 11,616 and Executive Order 11,838. In August 1971, President Nixon issued Executive Order 11,616,<sup>51</sup> which amended Executive Order 11,491. For the purposes of this note, this executive order resulted in one notable change. Specifically, it made negotiated grievance procedures for resolving contract disputes mandatory for labor organizations and federal employees.<sup>52</sup> In February 1974, President Ford issued Executive Order 11,838,<sup>53</sup> the last in a series of executive orders that had governed labor-management relations in the federal sector for nearly a quarter of a century.<sup>54</sup> Noteworthy impacts of this executive order are that it slightly broadened the scope of collective bargaining and implemented procedural changes involving contract negotiations.<sup>55</sup> Collective bargaining rights are not only essential to federal employees, but they are also essential to the efficiency of the government. These collective bargaining rights give federal employees a voice that allows them to improve working conditions and assist management in promoting a more efficient and effective working environment.

Thus, unlike the private sector that had been governed by statute, the early basis of federal employee labor-management relations was governed by executive orders. This government policy had the advantage of being flexible, since changes could be more easily made through a presidential order modifying federal labor-management policy, rather than a statute that required the consensus of Congress.<sup>56</sup> However, after years of union pressure, Congress codified federal employee rights by passing the CSRA.

### C. Civil Service Reform Act of 1978

The CSRA is regarded as one of the most important pieces of legislation regarding federal employment since the Pendleton Act.<sup>57</sup> It codi-

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50. *Id.*

51. Exec. Order No. 11,616, 36 Fed. Reg. 17,319 (Aug. 28, 1971).

52. *Id.*

53. See Exec. Order No. 11,838, 40 Fed. Reg. 5,743,7391 (Feb. 7, 1974).

54. See KEARNEY, *supra* note 6, at 58.

55. Exec. Order No. 11,838, 40 Fed. Reg. 5,743,7391 (Feb. 7, 1974).

56. KEARNEY, *supra* note 6, at 58.

57. *Id.* at 59.

fied many of the federal employee labor rights that were established by Executive Order 10,988 and subsequent executive orders. One of the areas of the CSRA that this note will focus on is the FSLMRS, which includes provisions governing labor-management relations. In particular, this note focuses on the President's power to remove federal employees from collective bargaining.<sup>58</sup> In addition, it will also examine the interaction between management rights and employee rights, and its impact on the operation of government.

### III. A COMPARISON OF FEDERAL AND PRIVATE SECTOR EMPLOYEE COLLECTIVE BARGAINING RIGHTS

The National Labor Relations Act of 1935 ("Wagner Act"), which was subsequently amended by both the Labor Management Relations Act of 1947 ("Taft-Hartley Act") and the Labor Management Reporting and Disclosure Act of 1959 ("Landrum-Griffin Act"), governs private sector collective bargaining and labor organizations.<sup>59</sup> The National Labor Relations Board is responsible for administering labor policy in the private sector.<sup>60</sup> It is also responsible for investigating and adjudicating claims of unfair labor practices.<sup>61</sup> It provides guidelines for the make-up of an employee bargaining unit and the selection of a union as the representative for the bargaining unit.<sup>62</sup> The purpose of these legislative acts was to encourage workers to form and join unions and collectively bargain with their employers.<sup>63</sup> The Taft-Hartley Act balanced the power granted to unions through the Wagner Act by putting restrictions on union conduct and procedures.<sup>64</sup> The Landrum-Griffin Act, on the other hand, rooted out corruption in unions and protected union members by regulating internal affairs for unions and requiring an accounting for expenditures and financial records.<sup>65</sup>

While private sector employees were granted statutory labor rights in both the Wagner and Taft-Hartley Acts, federal employees received little mention. In fact, the only mention was in the Taft-Hartley Act section 305, which prohibited federal employees from striking.<sup>66</sup> Federal

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58. 5 U.S.C. § 7103(b) (2000).

59. KEARNEY, *supra* note 6, at 54–55.

60. 29 U.S.C. § 151(3) (2000).

61. *Id.*

62. § 151(1).

63. *Id.*

64. KEARNEY, *supra* note 6, at 55.

65. *Id.*

66. Labor-Management Relations (Taft-Hartley) Act, ch. 120 § 305, 29 U.S.C. § 188 (1952)

employees attempted to achieve parity or at least recognition for their organizations through the Rhodes-Johnson Bill, which repeatedly failed in Congress.<sup>67</sup> It was not until the 1960s, when President Kennedy, who received strong support from labor organizations, created a presidential task force to recommend a labor-management relations program for the federal government.<sup>68</sup> The task force's recommendations were incorporated into Executive Order 10,988,<sup>69</sup> which formed the foundation for our current day labor policy regarding federal employees.

The advancement of federal employee rights and labor organizations did not proceed at the same pace as those of the private sector. In fact, federal employees have not achieved parity with their private sector counterparts. As noted, private sector employees received statutory recognition of their rights in the 1930s, and it was not until the 1960s that federal employees would begin to make similar progress. In particular, the 1960s marked a significant advancement and growth in public sector employee rights. There are three main reasons for this: (1) the growth of the government; (2) the private sector experience; and (3) changes in the public sector legal environment.<sup>70</sup> First, from 1960 to 1970 the number of government jobs nearly doubled.<sup>71</sup> Although most of the growth was in the state and local governments, the increase in the number of government employees provided an opportunity for union organizers to recruit new members, and they capitalized upon it.<sup>72</sup> This growth ultimately resulted in an increase in the strength of unions in the public sector.<sup>73</sup> Moreover, the growth of government led to the bureaucratization of government service.<sup>74</sup> Government employees, due to the complex organizational structure and lack of communication, felt the need for unions to act as their voice for their interests in negotiations with management.<sup>75</sup> Having a voice in the organization they work for was and continues to be viewed as a victory for government employees.

Second, federal employees noticed the success that unions had in improving wages, work conditions and benefits for private employees

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(repealed 1955).

67. KEARNEY, *supra* note 6, at 55.

68. *Id.*

69. Exec. Order No. 10,988, 27 Fed. Reg. 551 (Jan. 19, 1962).

70. KEARNEY, *supra* note 6, at 15.

71. *Id.*

72. *Id.* at 15–16.

73. *Id.*

74. *Id.* at 16.

75. *Id.*

and sought their assistance.<sup>76</sup> Federal employees were frustrated with the complex and burdensome process that addressed their demands, and believed that labor organizations would be a more effective means to represent their interests, as they had proven to be successful in the private sector.<sup>77</sup>

Third, changes in the legal environment helped to foster the advancement of public sector labor laws. As noted, one of the most significant events that provided the foundation for future public sector labor laws was President Kennedy's Executive Order 10,988 of 1962. Even though the Order restricted the scope of collective bargaining for federal employees relative to their private sector counterparts, this was a major step in federal employee rights. This Executive Order finally marked government recognition of federal employee collective bargaining rights.

Although federal employees did not receive parity with their private sector counterparts, the rights they were granted are substantial and concrete. This recognition not only required federal employers to recognize federal employee collective bargaining units, but it also provided for a formal collective bargaining procedure.

#### IV. PRESIDENTIAL USE OF THE NATIONAL SECURITY EXEMPTION

Section 7103(b)(1) of the FSLMRS provides the President with the authority to exclude federal employees from collective bargaining when their jobs involve issues of national security.<sup>78</sup> Specifically, the President can exclude an agency or a subdivision of an agency from coverage under the FSLMRS if the President determines that:

- (1) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and
- (2) the provisions of the Federal Labor Management Relations Program cannot be applied to that agency or subdivision in a manner consistent with the national security requirements and considerations.<sup>79</sup>

President Kennedy established this national security exemption in 1962 with Executive Order 10,988.<sup>80</sup> This exemption was codified in the

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76. *Id.* at 17.

77. *Id.*

78. 5 U.S.C. § 7103(b)(1) (2000).

79. *Id.*

80. Exec. Order No. 10,988, 27 Fed. Reg. 551 (Jan. 19, 1962).

CSRA of 1978.<sup>81</sup> Historically, in order to exempt an agency or a subdivision of an agency for national security reasons, a President had to issue an executive order, citing to section 7103(b)(1) as authority. These executive orders have not included an extensive explanation or justification to exclude an agency. Past executive orders to exclude an agency have only provided as justification the language set forth in section 7103(b)(1).<sup>82</sup> Since passage of the CSRA, five different Presidents have issued a total of eleven executive orders excluding agencies or subdivisions from coverage under the FSLMRS due to national security reasons.<sup>83</sup> There has only been one occasion where the President's authority under this section has been challenged. In *AFGE, AFL-CIO v. Reagan*,<sup>84</sup> the Court of Appeals for the District of Columbia held that the national security section "does not expressly call upon the President to insert written findings into an exempting order, or indeed to utilize any particular format for such an order."<sup>85</sup> The court further held that when the President exercises any authority that is delegated to him, he is presumed to have properly exercised his authority in accordance with the law.<sup>86</sup> Based on this holding, the President need not provide any further justification other than claiming national security as the basis for this exemption.

Even without the authority granted to the President in the national security exemption set forth in section 7103(b), Congress has provided other numerous safeguards to ensure that federal employee protections

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81. § 7103(b).

82. Exec. Order No. 12,171, 44 Fed. Reg. 66565 (Nov. 19, 1979); Exec. Order No. 12,338, 47 Fed. Reg. 1,369 (Jan. 11, 1982); Exec. Order No. 12,410, 48 Fed. Reg. 13,143 (Mar. 28, 1983); Exec. Order No. 12,559, 51 Fed. Reg. 18,761 (May 20, 1986); Exec. Order No. 12,632, 53 Fed. Reg. 9,852 (Mar. 23, 1988); Exec. Order No. 12,666, 54 Fed. Reg. 1,921 (Jan. 12, 1989); Exec. Order No. 12,671, 54 Fed. Reg. 11,157 (Mar. 14, 1989); Exec. Order No. 12,681, 54 Fed. Reg. 28,997 (July 6, 1989); Exec. Order No. 12,693, 54 Fed. Reg. 40,629 (Sept. 29, 1989); Exec. Order No. 13,039, 62 Fed. Reg. 12,529 (Mar. 11, 1997); Exec. Order No. 13,252, 67 Fed. Reg. 1,601 (Jan. 7, 2002).

83. See Exec. Order No. 12,171, 44 Fed. Reg. 66565 (Nov. 19, 1979); Exec. Order No. 12,338, 47 Fed. Reg. 1,369 (Jan. 11, 1982); Exec. Order No. 12,410, 48 Fed. Reg. 13,143 (Mar. 28, 1983); Exec. Order No. 12,559, 51 Fed. Reg. 18,761 (May 20, 1986); Exec. Order No. 12,632, 53 Fed. Reg. 9,852 (Mar. 23, 1988); Exec. Order No. 12,666, 54 Fed. Reg. 1,921 (Jan. 12, 1989); Exec. Order No. 12,671, 54 Fed. Reg. 11,157 (Mar. 14, 1989); Exec. Order No. 12,681, 54 Fed. Reg. 28,997 (July 6, 1989); Exec. Order No. 12,693, 54 Fed. Reg. 40,629 (Sept. 29, 1989); Exec. Order No. 13,039, 62 Fed. Reg. 12,529 (Mar. 11, 1997); Exec. Order No. 13,252, 67 Fed. Reg. 1,601 (Jan. 7, 2002). See *infra* Appendix A for a list of all agencies and subdivisions that have been excluded from coverage under the FSLMRS.

84. 870 F.2d 723 (D.C. Cir. 1989).

85. *Id.* at 727.

86. *Id.*

do not inhibit the federal government's ability to protect our nation's security. A statutory analysis of the FSLMRS will demonstrate that even without the national security exemption, the President has the necessary power to ensure an effective and flexible government that is capable of responding to threats to our national security. Arguably, section 7103(b) is unnecessary when the FSLMRS is analyzed as a whole.

#### V. LEGISLATIVE HISTORY OF THE DEPARTMENT OF HOMELAND SECURITY

As noted earlier, the impetus that led to the creation of a Department of Homeland Security was the September 11, 2001 terrorist attacks on the United States. However, initially, President Bush and his administration did not push, nor outwardly support, the creation of a Department of Homeland Security.<sup>87</sup> Rather, Senate Democrats, led by Senator Joseph Lieberman (D-Conn.) started the legislative process that would eventually lead to the creation of a Department of Homeland Security.<sup>88</sup> As a result of this process, a national debate and a fierce political battle began, especially since the 2002 Congressional elections were on the horizon and both parties wanted to present an image as being the political party protecting America's security.<sup>89</sup> One of the issues that arose out of the political debate about whether a new government department should be created was the issue of federal employee collective bargaining rights.<sup>90</sup>

The Senate Democrats brought the collective bargaining issue to the forefront on May 2, 2002, when Senator Lieberman, as Chairman of the Senate Committee on Governmental Affairs, introduced S. 2452,<sup>91</sup> a bill in the Senate proposing the establishment of the Department of Homeland Security and the National Office for Combating Terrorism.<sup>92</sup> The section of S. 2452 that created the issue for this note was section 108.<sup>93</sup>

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87. Lieberman Calls for Homeland Security Vote, *supra* note 2.

88. *Id.* See also S. 1534, 107th Cong. (2001).

89. Lieberman Calls for Homeland Security Vote, *supra* note 2, at 2-3.

90. *Id.* at 6.

91. S. 2452, 107th Cong. (2002).

92. Lieberman Calls for Homeland Security Vote, *supra* note 2 at 2.

93. S. 2452 § 108(f)(2). This section provides:

(2) EMPLOYEE RIGHTS. —

(A) IN GENERAL. — The Department or the subdivision within the Department shall not be excluded under section 7103(b)(1) of title 5, United States Code, from coverage under chapter 71 of that title unless the President determines that a majority of employees within the Department or applicable subdivision have, as their primary job duty, intelligence, counterintelligence, or investigative work directly related to terrorism investi-

Democrats drafted this section to ensure that federal employees who would be transferred to the Department of Homeland Security would retain their collective bargaining rights unless their job changed and there was an actual national security basis for taking their rights away. However, the proposed legislation did provide that collective bargaining rights could be withdrawn from employees at the Department if their primary duties consisted of intelligence, counterintelligence or investigative duties that were directly related to terrorism investigation, and if it was demonstrated that collective bargaining would adversely affect national security.<sup>94</sup>

The administration strongly opposed this proposed legislation, arguing that bargaining over certain issues would restrict the President's authority and the ability of the federal government to defend against threats to the nation's security. For example, the President argued that under the FSLMRS, the Immigration and Naturalization Service ("INS") would be unable to transfer border patrol agents from one region to another when necessary to protect national security.<sup>95</sup> Thus, if the INS received a report indicating that terrorists were planning on entering the United States at a given border location, INS officials would be prevented from rapidly shifting border patrol agents to the vulnerable area.

In particular, the administration argued that the provision dealing with employee rights in section 108 would severely restrict the President's authority under section 7103(b)(1)(A)-(B) of the FSLMRS, authority that was granted to five previous Presidents. As noted, under section 7103, the President has the authority to exempt parts of and even entire agencies within the federal government from collective bargaining for national security reasons. However, S. 2452 would have restricted that authority and placed additional burdens on the President to exempt agencies and subdivisions of agencies from collective bargaining. Specifically, S. 2452 required the President to demonstrate that the federal

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gation.

(B) NATIONAL SECURITY POSITIONS. — Employees transferred under this title shall not be considered to perform work which directly affects national security within the meaning of section 7112(b)(6) of title 5, United States Code, unless their primary job duty involves intelligence, counterintelligence, or investigative duties directly related to terrorism investigation. All employees transferred under this title who are not in the counterterrorism positions described in the preceding sentence shall continue to be afforded the full rights and protections under chapter 71 of title 5, United States Code. *Id.*

94. *Id.*

95. Press Release, United States Senate Committee on Governmental Affairs, Fact v. Fiction: Setting the Record Straight on "Silly Union Rules" (Oct. 3, 2002) (on file with authors).

employee's job involved investigative duties directly related to terrorism investigation.

In June 2002, in response to S. 2452, the President introduced a proposal to create a Department of Homeland Security.<sup>96</sup> The President's proposal did not contain a Labor-Management provision.<sup>97</sup> By leaving such a provision out, the administration argued that the President would retain the authority granted to him under section 7103(b)(1)(A)-(B) in the FSLMRS.

In support of the President's proposal, Congressman Richard Arme (R-Tex.), Chairman of the Select Committee on Homeland Security of the House of Representatives, introduced H.R. 5005.<sup>98</sup> The purpose of the bill was to establish a Department of Homeland Security, which was similar to the President's proposal with some additional improvements. The section of H.R. 5005 that is the focus of this note is section 762, which addressed Labor-Management Relations.<sup>99</sup>

Unlike S. 2452, H.R. 5005 included a presidential waiver for homeland security. The purpose of the waiver was to provide the President with the authority and flexibility needed to address homeland security issues in the least burdensome manner. However, this waiver required a written explanation that was not previously required under section 7103(b)(1).<sup>100</sup> Although the level of justification required for the written explanation was not specified, this waiver, if unchallenged, could provide the President with the same flexibility and authority that existed under section 7103(b)(1). Specifically, all that may be necessary is the issuance of a document similar to executive orders issued under section

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96. The President's Proposal to Create a Homeland Security Department (proposed June 18, 2002) at <http://hsc.house.gov/legislation/proposal.asp> (on file with authors).

97. *Id.*

98. H.R. 5005, 107th Cong. (2002).

99. H.R. 5005, § 762(a). This section provides:

(a) LIMITATION ON EXCLUSIONARY AUTHORITY. —

(1) IN GENERAL. — No agency or subdivision of an agency which is transferred to the Department pursuant to this Act shall be excluded from the coverage of chapter 71 of title 5, United States Code, as a result of any order issued under section 7103(b)(1) of such title 5 after June 18, 2002, unless —

(A) the mission and responsibilities of the agency (or subdivision) materially change; and

(B) a majority of the employees within such agency (or subdivision) have as their primary duty intelligence, counterintelligence, or investigative work directly related to terrorism investigation. *Id.*

100. *Id.* § 762(c). This section provides:

(c) HOMELAND SECURITY. — Subsections (a), (b) and (d) of this section shall not apply in circumstances where the President determines in writing that such application would have a substantial adverse impact on the Department's ability to protect homeland security. *Id.*

7103(b), which includes standard boilerplate language. The House of Representatives passed H.R. 5005 on July 31, 2002.

However, due to differences that could not be resolved between H.R. 5005 and S. 2452, a political stalemate occurred. As noted, the issue of federal employee collective bargaining rights, mentioned above, was one of the major issues that stalled the legislation and became a critical issue in the 2002 Congressional elections. However, the legislative gridlock was finally broken when Republicans were able to regain majority control of the Senate and retain control of the House of Representatives when they successfully campaigned on the issue that Democrats were more concerned about union rights than homeland security.<sup>101</sup>

After the election, the House of Representatives introduced H.R. 5710,<sup>102</sup> nother bill to establish the Department of Homeland Security. Like H.R. 5005, section 842 of H.R. 5710 addressed the area of labor-management relations.<sup>103</sup> Specifically, H.R. 5710 section 842 included a Presidential waiver that provided:

WAIVER — If the President determines that the application of subsections (a), (b), and (d) would have a substantial adverse impact on the ability of the Department to protect homeland security, the President may waive the application of such subsections 10 days after the President has submitted to Congress a written explanation of the reasons for such determination.<sup>104</sup>

The labor-management relations section of H.R. 5710 was identical to that of H.R. 5005 with one exception. The presidential waiver in H.R. 5710 required that the President wait ten days after submitting the waiver to Congress to exempt federal employees from collective bargaining. H.R. 5710 was passed by the House of Representatives on November 13, 2002 and forwarded to the Senate. On November 19, 2002, the Senate passed Senate Amendment 4901, which substituted text essentially the same as H.R. 5710 in H.R. 5005.<sup>105</sup> The House of Representatives agreed to the Senate amendment on November 22, 2002. This proposed legislation was submitted to the President and, upon his signature, the

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101. See Carl Huse, *Its Eyes Fixed on Terrorism, Congress Put Off Many Bills*, N.Y. TIMES, Nov. 21, 2002, at A34; Lieberman Calls for Homeland Security Vote, *supra* note 2.

102. H.R. 5710, 107th Cong. (2002).

103. H.R. 5710 § 842.

104. H.R. 5710 § 842 (b)(2)(c).

105. S. AMEND. 4901, 107th Cong. (2002).

Department of Homeland Security was finally created on November 25, 2002 as Public Law No. 107-296.<sup>106</sup>

The President can easily circumvent the requirements that the mission of an agency within the Department of Homeland Security materially change and that the work of the agency's employees be directly related to combating terrorism through the use of a presidential waiver.<sup>107</sup> Effectively, the presidential waiver allows the President to exclude employees of the Department of Homeland Security from collective bargaining if he believes that their collective bargaining rights will adversely impact the Department's ability to protect the homeland.<sup>108</sup> However, as argued throughout this note, such a waiver is unnecessary due to the limited scope of federal employee collective bargaining rights under the FSLMRS. In addition, the numerous statutory safeguards included in the FSLMRS strengthen the case that it is unnecessary to exempt federal employees from collective bargaining.

*A. The First Battle in Preserving Federal Employee Collective Bargaining Rights in the Post-September 11<sup>th</sup> World—Transportation and Security Administration*

The first battle after the passage of the Department of Homeland Security Act occurred in January 2003 when the TSA Administrator, Admiral James Loy, denied collective bargaining rights to his agency's airport screeners for national security reasons.<sup>109</sup> The American Federation of Government Employees ("AFGE") challenged Admiral Loy's determination.<sup>110</sup> Both the Federal Labor Relations Authority ("FLRA") and the District Court for the District of Columbia upheld the decision to exclude the agency's airport screeners from collective bargaining.<sup>111</sup>

However, based on an interpretation of the FSLMRS, this exclusion is unnecessary; the TSA has all the flexibility it needs to properly execute its mission. Federal employee collective bargaining rights do not negatively impact TSA's ability to preserve national security. The AFGE argues that national security is being used as a pretext for "union bust-

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106. Department of Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

107. H.R. 5710 § 842(a)(1)(A)–(B).

108. H.R. 5710 §842(c).

109. AFGE v. Loy, No. CIV.A.03-0043 (RMC), 2003 WL 22076475, at \*1 (D.D.C. Sept. 5, 2003).

110. *Id.* at \*1.

111. *Id.* at \*4.

ing” by the Bush administration.<sup>112</sup> In giving the Bush administration the benefit of the doubt, one possible reason for the administration’s policy is that it misinterprets the extent to which the FSLMRS provides it with the flexibility it needs to manage federal employees in order to preserve America’s security.

Unfortunately, the valuable role that unions play for federal employees is often overlooked when national security is used to take away federal employee collective bargaining rights. For example, despite the exceptional job of Admiral Loy in organizing and managing the TSA, the newly formed agency still has many organizational deficiencies that adversely affect its airport screeners.<sup>113</sup> John Gage, National President of the AFGE has argued that “TSA managers are ill-prepared to manage the federal government’s airport screener workforce. As a result, TSA screeners face unsafe working conditions, abusive supervisors, discrimination and unfairly applied standards. Most screeners are fearful of pointing out potentially dangerous practices for fear of immediate dismissal.”<sup>114</sup> Without collective bargaining rights, unions will not be able to protect against potential abuses such as these.<sup>115</sup>

Congress has continued to recognize the importance of labor unions in the federal government. It provided for collective bargaining rights of federal employees in the FSLMRS.<sup>116</sup> In addition, Congress, in the passage of the Department of Homeland Security Act, ultimately determined that federal employees within that Department should retain these rights.<sup>117</sup> More recently, Congressman Robert Andrews (D-N.J.) introduced a Sense of the Congress Resolution<sup>118</sup> in response to the FLRA’s decision in *AFGE v. Loy*.<sup>119</sup> This Resolution argued that airport screeners should retain their collective bargaining rights.<sup>120</sup> Labor experts have also argued the same. For example, Drexel Shostak, who taught for 25 years at the George Meany Center for Labor Studies, argues that unionization actually increases productivity in government agencies.<sup>121</sup>

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112. *AFGE Fights for Collective Bargaining for Screeners*, FED. HUM. RESOURCES WK., June 27, 2003, at Vol. 10, No. 11.

113. *AFGE Praises House Resolution Proving Collective Bargaining Rights for TSA Screeners*, PR NEWSWIRE, Sept. 9, 2003, <http://www.prnewswire.com>.

114. *Id.*

115. Tim Barker, *Push to Unionize Screeners Turns into a Political Battle*, ORLANDO SENTINEL TRIB., May 18, 2003, at ph. H1.

116. 5 USC §§ 7101–7135 (2000).

117. Pub. L. No. 107-296, § 842, 116 Stat. 2135 (2002).

118. H.R. Con. Res. 275, 107th Cong. (2003).

119. 2003 WL 22076475, at \*1.

120. H.R. Con. Res. 275.

121. Barker, *supra* note 115, at ph. H1.

There is a need for concern that in the post-September 11<sup>th</sup> environment, federal employee collective bargaining rights could be taken away for the wrong reasons. Whether the purpose is to weaken unions or out of a fear that the government will not be able to protect America's security, these collective bargaining rights are an integral part of the employees' abilities to perform their duties. Although national security is a valid concern, federal employee collective bargaining rights do not inhibit the government's ability to protect America.

## VI. STATUTORY ANALYSIS OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

### A. Congressional Purpose

First and foremost, similar to their private sector counterparts, federal employees are provided with the right to "organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them."<sup>122</sup> The codification of these rights was a major victory for federal employees because their collective bargaining rights were formally recognized. Congress had three main objectives in creating these statutory rights: (1) to safeguard the public interest; (2) to contribute to the effective conduct of business in the public sector; and (3) to foster settlements of disputes between employers and employees involving conditions of employment.<sup>123</sup> Experience and success in both the private and public sectors, through the NLRA and Executive Order 10,988 respectively, demonstrated that labor organizations and collective bargaining for federal employees were in the public's interest.<sup>124</sup>

Contrary to arguments made that federal employee organizational and collective bargaining rights inhibit federal government operations and create inefficiencies, the FSLMRS, which grants these rights, explicitly requires that the interpretation of them be consistent with the administration of an efficient and accountable government.<sup>125</sup> Historically, the courts in applying the FSLMRS have adhered to Congress' desired statutory interpretation and intent. For example, the United States Court of Appeals for the Ninth Circuit in *Navy Public Works v. FLRA*<sup>126</sup> held

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122. 5 U.S.C. § 7101(a)(1) (2000).

123. § 7101(a)(1)(A)-(C).

124. § 7101(a)(2).

125. § 7101(b).

126. 678 F.2d 97 (9th Cir. 1982).

that a union could not negotiate contractual immunity from discipline for federal employees who refused to respond and remained silent to a supervisor during a disciplinary investigation.<sup>127</sup> The court was concerned that not requiring a duty to respond during disciplinary investigations could severely reduce management's ability to discipline employees.<sup>128</sup> One of the principles on which the court based its holding in this case was in carrying out the intent of Congress in enacting the FSLMRS. As stated explicitly in the statute itself and as the court was guided in this case, the provisions in the statute are to be interpreted in a manner consistent to make government "more efficient and accountable."<sup>129</sup> This case clearly illustrates the intent of Congress that collective bargaining rights afforded to federal employees should not be interpreted to interfere with governmental missions and operations. Although Congress understood the need for federal employees to have collective bargaining rights, it never intended for these civil protections to interfere with the effectiveness of the federal government, especially the responsibility to protect our nation's security.

To understand the breadth of the FSLMRS and the impact that its provisions have on the efficiency and effectiveness of government, one must initially be familiar with its terms and their interpretation and application. First, it is important to understand which employees and employers are covered by the FSLMRS. Second, an understanding of the terms "collective bargaining" and, more importantly, "terms and conditions of employment" are critical, since their meaning and interpretation are main factors that shape the scope of collective bargaining between employees and a federal agency.

### *B. Federal Employee Collective Bargaining Rights*

A federal employee is a person employed by an agency of the federal government, or a person who has been terminated by an agency, as a result of an unfair labor practice as defined in section 7116 and has not obtained equivalent employment.<sup>130</sup> Section 7103(a)(2)(B)(i)-(v) explicitly lists those individuals who are not considered employees under the FSLMRS.<sup>131</sup>

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127. *Id.* at 101.

128. *Id.*

129. *Id.*

130. 5 U.S.C. § 7103(a)(2)(A)-(B) (2000).

131. § 7103(a)(2)(B)(i)-(v). This provision provides, in relevant part:  
(i) an alien or noncitizen of the United States who occupies a position outside the United States;

Federal employee rights are defined in section 7102 of the FSLMRS.<sup>132</sup> Federal employees have the right to “form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal.”<sup>133</sup> Moreover, one of the main areas addressed in this note is that federal employees may engage in collective bargaining regarding the conditions of employment through representatives chosen by the employees of the agency.<sup>134</sup> Collective bargaining is defined as:

the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting such employees.<sup>135</sup>

This statutory right provides a formal process for employees to communicate with their employer. Without this critical right, federal employees would have no voice in determining the terms and conditions of their employment. If they so choose, a federal employee also has the right to act as a representative for a labor organization in advocating positions of the organization to Congress and to other groups involved in effecting labor-management relations policy.<sup>136</sup>

### *C. Federal Employers Covered*

Federal employers are defined under the statute as agencies.<sup>137</sup> An agency includes all executive agencies within the federal government, including the Library of Congress and the Government Printing Office.<sup>138</sup> However, this provision explicitly excludes from coverage the General Accounting Office, FBI, CIA, National Security Agency, Ten-

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(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

(iv) an officer or employee in the foreign service of the United States employed in Department of State, the International Communication Agency, the United States International Development Cooperation Agency, the Department of Agriculture, or the Department of Commerce; or

(v) any person who participates in a strike in violation of § 7311 of this title. *Id.*

132. § 7102.

133. § 7102.

134. § 7102(2).

135. 5 U.S.C. § 7103(a)(12) (2000).

136. § 7102(1).

137. *See* § 7103(a)(3).

138. *Id.*

nessee Valley Authority, FLRA, Federal Service Impasses Panel and the United States Secret Service.<sup>139</sup> In addition, the section also provides the President of the United States with the authority to exclude any agency or subdivision from coverage of the FSLMRS under section 7103(b).<sup>140</sup>

#### D. Conditions of Employment

For a federal employer to be required to negotiate with a collective bargaining unit, the issue to be bargained over must be a condition of employment. Section 7117 of the FSLMRS requires the labor organization and the federal agency to bargain in good faith over conditions of employment.<sup>141</sup> Conditions of employment include “personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions.”<sup>142</sup> However, as explicitly stated in the statute, “conditions of employment” do not include policies, practices and matters that “relat[e] to the classification of any position” or “to the extent such matters are specifically provided for by Federal statute.”<sup>143</sup>

First, in deciding whether a proposal involves a condition of employment, the FLRA considers: “(1) whether the matter proposed to be bargained pertains to bargaining unit employees; and (2) the nature and extent of the effect of the matter proposed to be bargained on working conditions of those employees.”<sup>144</sup> In order for a proposal to be a condition of employment, the facts of the record must support that there is a direct link between the proposal and the work situation or employment relationship.<sup>145</sup> For example, in *AFGE, AFL-CIO, Local 2094 v. FLRA*,<sup>146</sup> the United States Court of Appeals for the District of Columbia held that the Veterans’ Administration Medical Center in New York had no duty to bargain over the union-initiated proposal that allowed employee use of recreational facilities while on an off-duty status.<sup>147</sup> The court reasoned that the union’s proposal was outside the “conditions of employment” because there was no direct relationship between the pro-

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139. § 7103(a)(3)(A)–(H).

140. § 7103(b)(1).

141. 5 U.S.C. §§ 7103(a)(12), 7117 (2000).

142. § 7103(a)(14).

143. § 7103(a)(14)(A)–(C).

144. *Antilles Consol. Educ. Ass’n v. FLRA*, 22 F.L.R.A. 235, 237 (1986).

145. *See Local 2094 v. FLRA*, 833 F.2d 1037, 1043 (D.C. Cir. 1987). *See, e.g., Int’l Ass’n of Fire Fighters, Local F-116 v. Dep’t of the Air Force*, 7 F.L.R.A. 123 (1981).

146. 833 F.2d 1037 (D.C. Cir. 1987).

147. *Id.* at 1039, 1046.

posal and the work situation or employment relationship.<sup>148</sup> The FLRA has consistently determined that proposals that relate to non-work related activities while employees are in a non-duty status do not create a duty to bargain for an employer, unless a direct relationship can be established between the union's proposal and the work situation or employment relationship.<sup>149</sup>

A second factor that must be considered in whether a proposal involves a condition of employment is whether the proposal addresses an area that is specifically provided for by a federal statute. All federal agencies are established through enabling statutes passed by Congress.<sup>150</sup> An enabling statute establishes an agency's mission and its essential functions.<sup>151</sup> In particular, if the union proposal addresses an area provided for by a federal statute, then it is not a "condition of employment," and, therefore, a federal agency is not required to bargain over the proposal.<sup>152</sup> This is another example that demonstrates the limited scope and restrictions placed on the areas that federal employees can collectively bargain over with their employer relative to their private sector counterparts.

For example, in *National Federation of Federal Employees, Local 1623 v. FLRA*,<sup>153</sup> the United States Court of Appeals for the District of Columbia held that a federal statute, the National Guard Technicians Act ("NGTA"),<sup>154</sup> precluded a union proposal from being a condition of employment.<sup>155</sup> In this case, the union represented National Guard technicians who performed maintenance and training in the South Carolina National Guard.<sup>156</sup> National Guard technicians are both civilian employees and enlisted members in the National Guard.<sup>157</sup> The NGTA required that when a technician's military and civilian positions became incompatible, the member "shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned."<sup>158</sup> A technician's status becomes incompatible when his military and civilian posi-

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148. *Id.*

149. *See id.*

150. ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 46 (1997).

151. *Id.*

152. 5 U.S.C. § 7103(a)(14)(C) (2000).

153. 852 F.2d 1349 (1988).

154. 32 U.S.C. § 709 (1982).

155. *Local 1623*, 852 F.2d at 1350.

156. *Id.*

157. *Id.*

158. §709(e)(1). *See also* *Local 1623*, 852 F.2d at 1351.

tions are no longer comparable in rank.<sup>159</sup> In response, the union made a proposal that the technician's civilian supervisors would be able to intervene when changes in the technician's military status put their civilian job in jeopardy.<sup>160</sup> The union further proposed that changes in military status that could result in job loss for the technicians be subject to appeal before termination.<sup>161</sup> The South Carolina National Guard refused to bargain and the FLRA agreed, holding that the proposal did not concern "conditions of employment" and, therefore, was not bargainable.<sup>162</sup> The FLRA reasoned, compatibility is a matter "specifically provided for by federal statute" and therefore, not a bargainable "condition of employment."<sup>163</sup>

Federal employees of other agencies, including the newly formed Department of Homeland Security, are restricted in the areas in which they can collectively bargain over based on section 7117. Federal employees are limited to bargaining over personnel policies, practices, and matters established by agency rule or regulation affecting working conditions. However, other provisions of the FSLMRS, which will be discussed later, can limit these bargaining areas. Such provisions include management rights and the duty to bargain. Congress created all of these safeguards to ensure that government operations and responsibilities would not be adversely impacted. Therefore, it is a hollow claim that federal employee collective bargaining rights inhibit the federal government in its ability to provide for our national security.

### *E. Management Rights*

The purpose of the Management Rights provision of the FSLMRS is to remove certain management rights from a federal agency's duty to bargain.<sup>164</sup> Such rights are removed in order to promote the efficiency of the federal government.<sup>165</sup> The rights reserved to management officials in section 7106(a) are considered essential to the ability of management to execute its responsibilities.<sup>166</sup> These rights include, but are not limited to, the right to determine the mission of the agency, the right to assign

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159. Local 1623, 852 F.2d at 1351.

160. *Id.* at 1350.

161. *Id.*

162. *Id.*

163. *Id.* at 1352.

164. 5 U.S.C. § 7106(a) (2000).

165. *See* Navy Charleston Shipyard v. FLRA, 885 F.2d 185, 187 (4th Cir. 1989); Dep't of Health & Human Servs. v. FLRA, 844 F.2d 1087, 1091 (4th Cir. 1988).

166. *See* Dep't of Health & Human Servs., 844 F.2d at 1091.

and remove employees within the agency, and the right to take whatever actions may be necessary to carry out the agency mission during emergencies.<sup>167</sup> Therefore, these rights are exempted from bargaining.<sup>168</sup> However, an agency and a collective bargaining unit may bargain over items, such as the number of employees and the skill set assigned to a part of an agency, as well as the method and means by which the employees perform their jobs.<sup>169</sup> Additionally, it provides employees with a remedy if employers fail to comply with the collective bargaining requirements.<sup>170</sup> In granting management such broad rights, Congress effectively narrowed the scope of what federal employees could collectively bargain over. This is another example of a safeguard that Congress created to ensure that government operations would not be inhibited by federal employee collective bargaining rights.

Sections 7106(b)(2) and (b)(3) provide for the items that are mandatory subjects of negotiation. The FLRA uses the “direct interference” test to determine whether the substance of a union proposal constitutes a negotiable procedure under section 7106(b)(2).<sup>171</sup> If the proposal directly interferes with the agency’s management rights as set forth in section 7106(a), then the proposal is nonnegotiable.<sup>172</sup> If there is no such interference, the proposal is considered procedural and would therefore be negotiable.<sup>173</sup>

*AFGE, Local 2094 v. FLRA*<sup>174</sup> is an example of a union proposal, which was held not to constitute a procedure. In this case, the union proposed to have a union member on the agency’s Position Management Committee.<sup>175</sup> The FLRA determined that this proposal was nonnegotiable because to allow such a proposal would directly interfere with management’s right to “engage in free and open deliberations among themselves.”<sup>176</sup> Because the Position Management Committee is responsible for reviewing and recommending approval prior to the execution of all changes, including work design, occupational and grade distributions, staffing requirements and costs, the FLRA decided that it was not merely

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167. § 7106.

168. See Dep’t Health & Human Servs., 844 F.2d at 1091.

169. § 7106(b)(1)–(2).

170. 5 U.S.C. § 7106(b)(3) (2000).

171. See *I.N.S. v. FLRA*, 975 F.2d 218, 222 (5th Cir. 1992).

172. See *id.*

173. See *id.*

174. *Local 2094*, 833 F.2d 1037 (D.C. Cir. 1987).

175. *Id.* at 1039.

176. *Id.* at 1040.

a procedure that the agency employed in exercising its reserved rights.<sup>177</sup> The union argued that although the Position Management Committee is an essential part of the decision making process,<sup>178</sup> it is still only procedural and thus, falls within the exception under section 7106(b)(2).<sup>179</sup> The court agreed with the FLRA by applying the direct interference test.<sup>180</sup> The court held that the proposal actually inhibited the agency from exercising its management rights, amounting to direct interference.<sup>181</sup> The proposal was therefore found to be nonnegotiable.<sup>182</sup>

As discussed in *INS v. FLRA*<sup>183</sup> (“*INS I*”), section 7106(b)(3) addresses the effects of the exercise of authority granted to management in section 7106(a).<sup>184</sup> If a federal employee is adversely affected, this section allows the union to propose an arrangement to address the situation differently. This provides a safeguard for federal employees when they are adversely affected. The FLRA uses the “excessive interference” to determine whether a given union proposal constitutes an appropriate arrangement under section 7106(b)(3).<sup>185</sup> The FLRA first determines whether the proposal encompasses an arrangement for an adversely affected employee.<sup>186</sup> If the proposal constitutes an arrangement for an adversely affected employee, the FLRA next determines whether such an arrangement excessively interferes with management’s rights under section 7106(a).<sup>187</sup> The benefits afforded to the adversely affected employee under such a proposal are weighed against the burden on the management rights.<sup>188</sup>

In *INS I*, the union issued a proposal requesting that an employee be given up to forty-eight hours to speak with a union representative before the INS initiates questioning about a shooting incident.<sup>189</sup> The court found that the proposal did not fall within the exception granted in section 7106(b)(3).<sup>190</sup> In making this determination, the court adopted the “excessive interference test,” which requires that the proposal be aimed

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177. *Id.* at 1040.

178. This power is exercised under 5 U.S.C. § 7106(a).

179. Local 2094, 833 F.2d at 1040.

180. *Id.* at 1041.

181. *Id.*

182. *Id.* at 1045–46.

183. *I.N.S.*, 975 F.2d 218 (5th Cir. 1992).

184. *Id.*

185. *See id.* at 224.

186. *See id.*

187. *See id.*

188. 975 F.2d at 224.

189. *Id.* at 219

190. *Id.* at 225.

at an adversely affected employee.<sup>191</sup> Because the union proposal was not aimed solely at employees who are adversely affected by the INS' questioning, it did not fall within the exception granted in section 7106(b)(3).<sup>192</sup>

Historically, courts have interpreted the language of the Management Rights clause of the FSLMRS and relied on its legislative history to find that Congress intended the clause to be applied broadly in favor of management. For example, in *Dep't of Health & Human Servs. v. FLRA*,<sup>193</sup> the United States Court of Appeals for the Fourth Circuit reversed the order of the FLRA and found that a union proposal would violate the right to subcontract, granted exclusively in the Management Rights provision of the FSLMRS.<sup>194</sup> During collective bargaining between the Department of Health and Human Services and the AFGE, the union offered a proposal that would compel the Department to determine in advance which projects would be contracted out.<sup>195</sup> The Department refused to bargain with the union over this proposal, asserting that it would encroach upon the Department's explicit authority under the Management Rights and was, therefore, nonnegotiable.<sup>196</sup> The court found that Congress intended for the Management Rights clause to be applied broadly, and construed in a way that would strengthen management's rights.<sup>197</sup> This case illustrates the deference given to management and the limited scope of collective bargaining that federal employees actually have.

*INS v. FLRA ("INS II")*<sup>198</sup> is an example of how the authority granted to management ensures that it is capable of executing its mission, despite a union proposal. In this case, the union brought an unfair labor practice charge against the INS for implementing its new policy with respect to incidents involving the use of firearms.<sup>199</sup> At the time the charge was brought, the Federal Service Impasses Panel had not had an opportunity to decide on the negotiability of the union's proposal.<sup>200</sup> The FLRA determined that the proposal was nonnegotiable because it ad-

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191. *Id.*

192. *Id.* at 225–26.

193. 844 F.2d 1087 (4th Cir. 1988).

194. *Id.* at 1090.

195. *Id.*

196. *Id.* at 1088, 1089.

197. *Id.* at 1090–91.

198. 995 F.2d 46 (5th Cir. 1993).

199. *Id.* The union's proposal involved giving an employee up to forty-eight hours to speak with a union representative before questioning by the employer about a shooting incident.

200. *Id.* at 47.

dressed rights granted to the INS' management under section 7106(a).<sup>201</sup> The FLRA found that it was an unfair labor practice for the INS to implement its changes when it did, notwithstanding the negotiability of the union's proposals.<sup>202</sup> The United States Court of Appeals for the Fifth Circuit reversed the finding of the FLRA, holding that the INS did not commit an unfair labor practice. The court based its reasoning on the theory that management officials must be able to solely decide how to exercise their authority under section 7106, in order for their agency to be as efficient and effective as possible.<sup>203</sup> To hold otherwise would frustrate the policy behind the FSLMRS.<sup>204</sup>

Although the representatives of federal employees may not be able to bargain over as many items as their private sector counterparts, federal employees enjoy many more benefits without having to go through the trouble of bargaining.<sup>205</sup> Without the statutory safeguards that Congress included in the FSLMRS, unions would pose a challenge to the federal government's ability to manage.<sup>206</sup> There is a concern that the federal government should not employ a traditional collective bargaining scheme because to do so would impair the government's decision-making power to represent the public interest.<sup>207</sup> Certain subjects that so central to the decision-making process that they should only be determined unilaterally by management. As the cases discussed above demonstrate, the broad authority already granted to management officials is enough to ensure that the rights afforded to federal employees under the FSLMRS do not compromise national security.

#### *F. Duty to Bargain*

As stated earlier, the FSLMRS provides federal employees with the statutory right to collectively bargain. This right creates an obligation for both a member representing the employees and a representative from the agency to meet at reasonable times and bargain in good faith regarding conditions of employment that affect the employees.<sup>208</sup> It should be noted that the requirement to collectively bargain in good faith does not

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201. *Id.*

202. *Id.* at 48.

203. *Id.*

204. *Id.* at 47.

205. COLEMAN, *supra* note 25, at 9.

206. *Id.* at 5.

207. PUBLIC-SECTOR BARGAINING 191 (Benjamin Aaron, et al. eds., 1979).

208. 5 U.S.C. § 7103(12) (2000).

force either party to agree to a proposal or make concessions.<sup>209</sup> However, upon either party's request, the terms of the collective bargaining agreement must be incorporated into a written document.<sup>210</sup>

Section 7117 of the FSLMRS covers the federal government's duty to bargain in good faith.<sup>211</sup> The concept of good faith requires that the agency and the union each have a responsibility to negotiate with one another in ways that suggest that they are trying to actually reach an agreement.<sup>212</sup>

Section 7117(a)(1) excludes from negotiability any proposal that involves a government-wide rule or regulation, or a federal law.<sup>213</sup> The whole premise behind this subsection is that it would be inconsistent with public policy to allow agencies to bargain over proposals that are in conflict with federal law.<sup>214</sup> Section 7117(a)(2) provides that the duty to bargain generally does not extend to proposals that are the subject of an agency regulation, if it is determined that there is a "compelling need" for it.<sup>215</sup> However, section 7117(a)(3) holds that even when there is a "compelling need" for an agency regulation, the substance of it will be negotiable when it is determined that the regulation will cover a majority of the employees who are represented by an exclusive union.<sup>216</sup>

The FLRA has determined that a rule or regulation is a government-wide rule or regulation if it is "generally applicable throughout the Federal Government."<sup>217</sup> However, it need not be applicable to every federal employee.<sup>218</sup> To so require would render this provision of the FSLMRS meaningless. There does not seem to be any rule or regulation that affects every federal employee.<sup>219</sup>

In *Dep't of Military Affairs v. FLRA*,<sup>220</sup> the union submitted a proposal to the agency, involving the manner in which the agency would respond to the union's request for information about its employees under

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209. *Id.*

210. *Id.*

211. § 7117.

212. COLEMAN, *supra* note 25, at 99.

213. *See* *Dep't of Military Affairs v. FLRA*, 964 F.2d 26, 27 (D.C. Cir. 1992).

214. *See id.* 5 U.S.C. § 7117(a)(2) covers an agency regulation, rather than a government-wide rule or regulation.

215. 5 U.S.C. § 7117(a)(2) (2000).

216. § 7117(a)(3).

217. *See* *United States Customs Serv. v. FLRA*, 873 F.2d 1473, 1475 (D.C. Cir. 1989); *Overseas Educ. Ass'n, Inc. v. FLRA*, 827 F.2d 814, 816-17 (D.C. Cir. 1987).

218. *See* *Nat'l Treasury Employees Union v. IRS*, 3 F.L.R.A. 748, 7 (1980).

219. *See id.* at 10.

220. 964 F.2d 26 (D.C. Cir. 1992).

the Freedom of Information Act<sup>221</sup> (“FOIA”).<sup>222</sup> The agency refused to bargain with the union, asserting that such a proposal was nonnegotiable because it was inconsistent with FOIA, a federal law.<sup>223</sup> The FLRA held that the proposal was not inconsistent with FOIA and therefore was negotiable.<sup>224</sup> However, the United States Court of Appeals for the District of Columbia reversed the findings of the FLRA, holding that the union’s proposal was inconsistent with FOIA.<sup>225</sup> This case illustrates the impact that a federal statute has on federal employee collective bargaining rights under section 7117(a)(1). Because FOIA addressed the issue of personal employee information, it therefore precluded this issue from collective bargaining.

When the union’s proposal involves an agency rule or regulation, the agency has a duty to bargain over the subject proposal if the FLRA has not determined that there is a “compelling need” for such a rule or regulation.<sup>226</sup> In section 7117(b)(2) of the FSLMRS, Congress identified comprehensive procedures that should be used in the determination of whether a “compelling need” exists.<sup>227</sup> A compelling need for an agency rule or regulation exists unless the specific conditions set forth in section 7117(b)(2).<sup>228</sup>

Section 7117(b) sets forth the exclusive procedure for determining whether a compelling need for an agency rule or regulation exists.<sup>229</sup> In *FLRA v. Aberdeen Proving Ground*, the Supreme Court affirmed the holding that “the language of the Federal Labor-Management Relations Act persuades us that Congress [intended for] the § 7117(b) negotiability appeal to be the sole means of determining a compelling need question under the statute.”<sup>230</sup> Based on the Supreme Court’s holding in this case

221. 5 U.S.C. § 552 (2000).

222. Dep’t of Military Affairs, 964 F.2d at 26. The proposal provided: “[d]ata/information that the Union could receive from an employee, does not relieve the [agency] from providing that data/information to the Union.” *Id.*

223. *Id.* at 27–28.

224. *Id.* at 28.

225. *Id.*

226. 5 U.S.C. § 7117(a)(2) (2000).

227. § 7117(b)(1)–(2).

228. § 7117(b)(2) provides:

For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist. *Id.*

229. § 7117(b).

230. 485 U.S. 409, 412 (1988).

and the explicit language of the statute, there is a great deal of deference provided to the agency in determining whether a compelling need exists for the rule or regulation. Thus, the agency can, to a degree, effectively control the scope of collective bargaining of its federal employees by creating a rule or regulation. Before a union can assert that the agency has a duty to bargain over a proposal inconsistent with such rule or regulation, the FLRA must determine that there is no compelling need for the agency rule or regulation.<sup>231</sup> Without such a determination, the proposal is nonnegotiable.

Section 7117(a)(3) provides an exception to section 7117(a)(2). Even when a compelling need exists for an agency rule or regulation, the agency must bargain over a proposal involving such if an exclusive union represents at least a majority of the employees within the agency that are affected by that rule or regulation.<sup>232</sup> In *Ass'n of Civilian Technicians v. FLRA*,<sup>233</sup> the United States Court of Appeals for the District of Columbia held that under section 7117(a)(3), agency rules or regulations that have a compelling need are only subject to negotiation by the agency if a majority of the employees are affected by such rule or regulation and are represented by the same union.<sup>234</sup> To require negotiation otherwise would subject the agency to "piecemeal negotiations with numerous bargaining units throughout the agency."<sup>235</sup> This case demonstrates the extremely narrow exception that allows federal employees to collectively bargain over an agency rule or regulation when a compelling need for such rule or regulation exists.

Section 7117 is another statutory safeguard that provides the federal government with the flexibility it needs to preserve America's security. Therefore, there is no need to take away federal employee collective bargaining rights.

## VII. CONCLUSION

By applying the long established principle of statutory construction that a legislative act, in this case the FSLMRS, should be read as a whole to determine its effect, it has been demonstrated that the President has all the power he needs to address the threats to our national security. Even though Congress granted collective bargaining rights to federal employ-

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231. *See id.*; *United States Army Eng'g Ctr. v. FLRA*, 762 F.2d 409, 412 (4th Cir. 1985).

232. 5 U.S.C. § 7117(a)(3) (2000).

233. 756 F.2d 172 (D.C. Cir. 1985).

234. *Id.* at 178.

235. *Id.*

ees, it never intended that these rights interfere with the flexibility and effectiveness of the federal government. This has been proven not only by stating the explicit statutory purpose, but also by showing the numerous statutory safeguards that Congress included to ensure flexible government operations. The limited scope of bargaining, coupled with the broad management rights granted, ensures that the government is able to perform its missions in the most efficient manner. Therefore, it is a hollow claim that federal employee collective bargaining rights adversely impact the President's ability to preserve national security. This note has shown that section 7103(b) of the FSLMRS is more a provision of convenience, rather than one that is critical to ensure that collective bargaining rights do not inhibit the federal government's ability to protect America. Historically, this section has been overused.<sup>236</sup> Contrary to the beliefs of those who oppose federal employee collective bargaining rights, these rights are critical to an effectively functioning federal workforce. The collective bargaining rights of employees of the Department of Homeland Security should not be taken away. The President has all the power he needs.

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236. See Exec. Order No. 12,171, 44 Fed. Reg. 66,565 (Nov. 19, 1979); Exec. Order No. 12,338, 47 Fed. Reg. 1369 (Jan. 11, 1982); Exec. Order No. 12,410, 48 Fed. Reg. 13,143 (Mar. 28, 1983); Exec. Order No. 12,559, 51 Fed. Reg. 18,761 (May 20, 1986); Exec. Order No. 12,632, 53 Fed. Reg. 9,852 (Mar. 23, 1988); Exec. Order No. 12,666, 54 Fed. Reg. 1,921 (Jan. 12, 1989); Exec. Order No. 12,671, 54 Fed. Reg. 11,157 (Mar. 14, 1989); Exec. Order No. 12,681, 54 Fed. Reg. 28,997 (July 6, 1989); Exec. Order No. 12,693, 54 Fed. Reg. 40,629 (Sept. 29, 1989); Exec. Order No. 13,039, 62 Fed. Reg. 12,529 (Mar. 11, 1997); Exec. Order No. 13,252, 67 Fed. Reg. 1,601 (Jan. 7, 2002).

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