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JOB SECURITY AND BARGAINING RIGHTS OF FEDERAL GOVERNMENT EMPLOYEES

Mark D. Roth, Gony Frieder and Anne Wagner*

INTRODUCTION

From the beginning of his administration, President George Walker Bush undertook to curtail employment rights, particularly those previously enjoyed by federal government workers. In the wake of the September 11th attacks, however, the Bush Administration was able to launch a full-scale attack on federal employment rights under the guise of national security. While the expansion of government power in the name of national security has come under substantial media and political scrutiny, much of this attention has focused on the threat posed to individual rights. Increased federal power under the USA PATRIOT Act\(^1\) and other measures\(^2\) ostensibly intended to enhance capacity to identify, apprehend, and prosecute terrorists has indeed impacted civil liberties.\(^3\) However, a diminished core of civil liberties is not the only casualty. The federal government has used September 11th as a pretext for dismantling labor rights and workers’ unions as well.\(^4\) This is particularly ironic in light of the fact that

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While all the authors are attorneys for the American Federation of Government Employees (AFGE), a union representing 600,000 federal civilian employees, the views in this article are those of the authors, and not necessarily those of the AFGE or its membership. This paper was written for a presentation delivered on November 21, 2003, at the University of the District of Columbia David A. Clarke School of Law.

many of those who lost their lives—the hundreds of firefighters and police officers who died in the heroic performance of their duties that day—were union members. Part I of this article reviews the history of the Bush Administration's efforts to void or nullify labor and employment rights of federal employees, beginning shortly after President Bush's inauguration. Parts II and III show how the Bush Administration intensified these efforts after September 11, 2001. This article focuses particularly on the abrogation of basic employment rights of employees of the Transportation Security Administration and the Department of Homeland Security, warning of the danger that these policies will spread throughout the federal civilian workforce.

I. EFFORTS BY THE BUSH ADMINISTRATION TO ABOLISH LABOR AND EMPLOYMENT RIGHTS PREDATED THE TRAGEDY OF SEPTEMBER 11

Within days of President Bush's inauguration, he began his relentless attack on employee rights. In January 2001, the Bush Administration infuriated labor and employee rights advocates when he nominated Linda Chavez to be the new Secretary of the Department of Labor. The labor movement was concerned with earlier statements in which Ms. Chavez had criticized minimum wage laws, overtime protections, federal family leave laws, and anti-discrimination laws. For example, Ms. Chavez had asserted that minimum-wage law was an impediment to the labor market, and had characterized women who filed sexual harassment lawsuits as "crybabies." Ms. Chavez ultimately withdrew from the nomination, after allegations mounted that she had housed and employed an illegal alien without payment of Social Security taxes.

The labor movement had little time to celebrate Ms. Chavez's withdrawal from the nomination process when the Bush Administration kowtowed to corporate America by first postponing, then suspending, and finally eliminating a final rule that required federal agencies to review a company's record of compliance

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5 Technically, Linda Chavez was nominated to be Secretary of the Department of Labor on January 2, 2001, when Bush was still President Elect. See Bush picks Chavez for Labor, Abraham for Energy, Mineta for Transportation, CNN.com at http://www.cnn.com/2001/ALLPOLITICS/stories/01/02/bush.transition/ (Jan. 2, 2001).


7 Confirmation Questions, (PBS Newshour radio broadcast, Jan. 8, 2001) (Comment of Greg Tarpinian in an interview with Ray Suarez) (transcript on file with author).

8 AFL-CIO BUSHWATCH, supra note 6.


with specified areas of law, including labor and employment laws, before awarding the company a government contract. The rule implemented during the Clinton administration had "clarified what constitute[d] a 'satisfactory record of integrity and business ethics,'" a pre-existing criterion for awarding government contracts, by naming specific areas of compliance to be examined, as well as directing an emphasis on recent conduct. Dubbing the rule a "blacklist," business groups had opposed the rule when it was initially proposed, and several had also filed suit in the U.S. District Court for the District of Columbia attempting to block its implementation. References to this litigation were included in the Civilian Agency Acquisition Council Letter initially postponing the rule's implementation, as well as every government memorandum and Federal Register notice vis-à-vis the rule, thereafter, until its elimination.

On February 17, 2001, President Bush then stunned the labor movement with the issuance of four executive orders diminishing labor rights. Two of these revoked existing executive orders protecting workers' rights, and two affirmatively granted or clarified employer rights. President Bush touted these four executive orders as "based on the principles of fair and open competition, neutrality in government contracting, effective and efficient use of tax dollars and the

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11 The rule covered labor and employment, tax, antitrust, environmental, and consumer protection laws.
13 Id.
15 Id.
legal right of workers to be notified of how their dues may be used."19 Needless to say, not all agreed with Bush's portrayal of the executive orders' accomplishments. With five short sentences, Executive Order 13,203 nullified thirty-two years of work in the federal sector towards cooperative programming between management and its workforce.20 Before the issuance of Executive Order 13,203, federal executive agencies were required to create labor-management partnerships through which labor representatives could meet with management to discuss a plethora of concerns with the hope that unfair labor practice allegations, grievances, administrative complaints and lawsuits could be nipped in the bud. Similarly, management could meet with labor representatives to talk over their concerns so that changes in workers' terms and/or conditions of employment could be effected expeditiously and without violating any regulations, negotiated contracts, and/or laws. While President Bush asserted that the order would save taxpayer dollars, American Federation of Government Employees (AFGE) then National President Bobby Harnage responded:

In one day, President Bush has torn apart what has taken years to craft—the development of a government workplace that is people-driven, highly flexible, creative and responsive to the changing needs of the American people. It is the American taxpayers who will suffer as a result of Bush's actions. Partnerships have led to increased efficiency and service to the public. Costs have been reduced while customer service has dramatically improved, and so has employee morale. It is apparent that Bush wants to return to the outmoded and arcane top-down, decision-making management theories developed in the late 1800's. Bush's willingness to allow his advisors to carry out personal agendas and vendettas to tear down something both management and labor supported is a clear signal that he is not the "uniter" he professed to be during the campaign.21

Executive Orders 13,201, 13,202, and 13,204 targeted private-sector workers employed by contractors to the federal government and the unions representing those workers. Executive Order 13,201 required companies with certain government contracts to inform workers of their right to refrain from joining a union or

paying certain union fees—what is commonly referred to as General Motors and Beck rights. Contractors were required to post notices stating that, under federal law, “employees cannot be required to join a union or maintain membership in a union in order to retain their jobs.” Contractors who did not comply with the order faced cancellation of current government contracts, as well as disqualification from future consideration. President Bush justified the order as “promoting economy and efficiency in Government procurement,” because “[w]hen workers are better informed of their rights... their productivity is enhanced.” This particular notification, however, stands in stark contrast to other legally required notices such as those mandated by anti-discrimination laws, family friendly laws, or medical leave laws. These other laws require that employers notify employees of their rights with respect to their employers, rather than their rights with respect to their unions. As such, the notification was a direct slap at unions.

In response to Executive Order 13,201, the UAW-Labor Employment and Training Corp. ("UAW") and three unions filed suit in the United States District Court for the District of Columbia, seeking to enjoin the executive order.

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22 Referring to the requirements articulated in NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963).
24 The Notification was required to include the following text:
Notice to Employees Under Federal law, employees cannot be required to join a union or maintain membership in a union in order to retain their jobs. Under certain conditions, the law permits a union and an employer to enter into a union-security agreement requiring employees to pay uniform periodic dues and initiation fees. However, employees who are not union members can object to the use of their payments for certain purposes and can only be required to pay their share of union costs relating to collective bargaining, contract administration, or grievance adjustment. If you do not want to pay that portion of dues or fees used to support activities not related to collective bargaining, contract administration, or grievance adjustment, you are entitled to an appropriate reduction in your payment. If you believe that you have been required to pay dues or fees used in part to support activities not related to collective bargaining, contract administration, or grievance adjustment, you may be entitled to a refund and to an appropriate reduction in future payments. For further information concerning your rights, you may wish to contact the National Labor Relations Board (NLRB) either at one of its Regional offices or at the following address: National Labor Relations Board, Division of Information, 1099 14th Street, NW, Washington, DC 20570. To locate the nearest NLRB office, see NLRB's website at www.nlrb.gov. The last sentence of the Notice, however, shall be omitted in notices posted in the plants or offices of carriers subject to the Railway Labor Act, as amended (45 U.S.C. 152 et seq.).

25 Id. at § 2(a)(2).
26 Id. at § 1(a).
27 Id.
The plaintiffs claimed that the order was preempted by the National Labor Relations Act ("NLRA"), and that the President had exceeded his authority when issuing the executive order. The district court found for the plaintiffs, holding that the NLRA prohibited obligating employers to post such notices and preempted Executive Order 13,201. The district court issued a permanent injunction barring enforcement of the Executive Order. The Department of Labor appealed the decision, and the ruling was reversed. Although the appellate court rejected the government's argument that the rule merely inserted "conditions into a contract that businesses voluntarily accept" but did not set a broad policy, the court nevertheless found that the Executive Order was not preempted by the NLRA and that President Bush did not exceed his authority under the Procurement Act. The unions filed a petition for a rehearing en banc, as well as a petition for certiorari to the Supreme Court. However, the executive order remained in effect while the petition was pending, and ultimately both petitions were denied.

Executive Order 13,202 barred federal agencies or any government contractor seeking subcontractors from requiring project labor agreements on federally funded construction projects. In response to criticism, the White House amended Executive Order 13,202 in April 2001 to require contractors who had already begun work under a pre-existing project labor agreement to adhere to the terms of the agreement. Executive Order 13,204, the last of the February 17th executive orders, revoked Executive Order 12,933. The revoked order had aimed to protect the working poor employed by a federal contractor that provided mainte-

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31 Id. at *8.
32 Id. at *1, *9-10.
33 UAW-Labor Employment and Training Corp. v. Chao, 325 F.3d 360 (D.C. Cir. 2003).
34 Id. at 362.
35 Id. at 363.
39 Id.
41 The older order required that when the government changed maintenance contractors for jobs such as janitorial service, food service, landscaping, or laundry, the new service provider must hire qualified displaced workers before hiring additional new staff. As explained in the preamble of the executive order, this provision was included to benefit both affected workers and the government agencies receiving building services. The order protected workers by giving them a first right of refusal for maintenance positions with the new contractor when faced by layoffs from their previous
nance and building services in federal facilities, if the government contract expired without renewal or was terminated.

America's workers were struck another blow on March 21, 2001, when President Bush signed a congressional repeal of a final Occupational Safety & Health Administration (OSHA) rule establishing an ergonomics standard scheduled to take effect in October 2001. Although the rule had been promulgated during the Clinton administration, it had begun as a Republican initiative and had taken more than ten years to develop. Utilizing the Congressional Review Act in a manner never used before, the repeal also prohibited OSHA from issuing a similar standard in the future without congressional approval. The standard had focused on preventing repetitive stress injuries. OSHA had estimated that the standards would prevent 460,000 workers from getting hurt on the job each year. The agency calculated that the $9 billion a year saved by businesses due to reduced leave, improved employee retention, reduced medical expenses, and reduced workers' compensation would more than cover the estimated $4.5 billion it would cost to implement the standards. However, a coalition of some 250 businesses estimated the cost at more than $100 billion. Two business groups filed petitions for judicial review of the standards, and the U.S. Chamber of Commerce and the National Association of Manufacturers voiced their desire for the standards' elimination. President Bush characterized the OSHA standards as "unduly burdensome and overly broad," and signed the bill repealing the standards.

By April 2001, the Bush Administration had already delivered a clear message that it was opposed to what had previously been considered the most basic workers' rights. Speaking at a press conference on April 4, 2001, the late Senator Paul Wellstone exclaimed:

Based on the President's track record so far, it seems that in the next four years Americans will see harsh policies rolling back workers' rights and pro-
II. September 11 Demands the Ultimate Sacrifice from Many Union Workers

On September 11, 2001, the people of the United States of America awoke to tragedy as a large, commercial passenger airplane crashed into the first of the World Trade Center (WTC) twin towers. Flight 11, traveling at an estimated 400 miles per hour, struck the north tower at 8:46 a.m., and set it on fire. It was quickly apparent that the crash was not a result of accident, but instead a coordinated act of violence. Flight 176, another large commercial passenger airplane, hit the south tower of the WTC at 9:03 a.m. As the world was coming to understand that something was horribly amiss in New York City (NY City), its attention was abruptly shifted to Washington, D.C., when, at 9:37 a.m., Flight 77 crashed into the Pentagon. The horrors continued in quick succession: at 9:59 a.m. the south tower of the WTC collapsed; at 10:03 a.m. Flight 93 crashed in Shenksville, Pennsylvania (approximately 11 minutes from the intended Washington, D.C. airspace); at 10:10 a.m., a portion of the Pentagon collapsed; and, at 10:28 a.m., the north tower of the WTC collapsed and enshrouded NY City with smoke and ash. When asked at a 2:30 p.m. news conference about the estimated number of people killed, Mayor Giuliani responded, "I don't think we want to speculate about that—more than any of us can bear."49

While most Americans were paralyzed by the reports, America's emergency responders were mobilizing. Within four minutes of Flight 11's crash into the north tower, the first of the New York Fire Department's (NYFD) fire trucks arrived on the scene. Two minutes after Flight 176's crash into the south tower, the NYFD issued its second alarm and deployed trucks to the south tower. At 9:26 a.m., the Federal Aviation Administration (FAA) ordered a national "groundstop" that grounded all civilian aircraft in the United States, regardless of destination. At 9:45 a.m., the FAA ordered a shutdown of all U.S. airspace, requiring some 4,500 airborne planes to land as soon as possible. The shutdown was the first unplanned mass shutdown in American history. By the evening, more than fifty NYFD companies had been deployed, the NY Police Department reported that seventy-eight officers were missing, and concerns for the fire fighters who were first to respond were mounting. In total, twenty-three city police

officers and 343 city firefighters were killed responding to the 9/11 terrorist attacks.

In the following days, hundreds of unionized trade workers assisted in the search for survivors. So many construction workers volunteered, in fact, that a construction union hiring hall ran a full-page newspaper advertisement encouraging workers to return to work, as every large-scale construction job in NY City had shut down. Ultimately, the crews who staffed the monumental clean up of Ground Zero were union crews.

President Bush, in a proclamation on September 11, ordered the flag of the United States to be flown at half-staff "[a]s a mark of respect for those killed by the heinous acts of violence." This was the first of numerous proclamations, remarks, and speeches in which the President honored those who were victims of the attacks, as well as those workers who assisted with the aftermath. From the combined tragedies in NY City, Washington, DC, and Pennsylvania, more than 1,000 union members died.

Notwithstanding the President's accolades on behalf of workers—workers who were or are union members—the President soon resumed his plunder of workers' rights and organized labor. This time, however, the President capitalized on the climate of fear consuming the nation. Instead of predating these take-aways on neutrality in contracting and economic concerns, the President based his actions on the need to promote national security at a time of war.

51 Id.
53 See, e.g., President George W. Bush, Remarks at National Day of Prayer and Remembrance Service, PUB. PAPERS (Sept. 17, 2001), available at http://www.whitehouse.gov/news/releases/2001/09/20010914-2.html ("Now come the names, the list of casualties we are only beginning to read. ... They are the names of rescuers, the ones whom death found running up the stairs and into the fires to help others. We will read all these names. We will linger over them, and learn their stories, and many Americans will weep. ... We see our national character in rescuers working past exhaustion. ..."), President George W. Bush, Remarks to Police, Firemen, and Rescue workers at the World Trade Center Site in New York City, PUB. PAPERS (Sept. 17, 2001), available at http://www.whitehouse.gov/news/releases/2001/09/20010914-9.html ("I want you all to know that America today ... is on bended knee in prayer for the people whose lives were lost here, for the workers who work here. ..."), President George W. Bush, Remarks by the President on Arrival at the White House, PUB. PAPERS (Sept. 24, 2001) available at http://www.whitehouse.gov/news/releases/2001/09/20010916-2.html; President George W. Bush, Remarks to Employees in the Dwight D. Eisenhower Executive Office Building, PUB. PAPERS (Sept. 24, 2001), available at http://www.whitehouse.gov/news/releases/2001/09/20010917.html.
III. Bush Administration Seeks to Abolish Labor and Employment Rights After the Tragedy of September 11

In the wake of the horrific events of September 11, America appeared to be willing to accept government-imposed restrictions on liberty in the name of national security. Relying on a President who promised to lead us to a safer world through a war on terrorism, a traumatized nation did not particularly question the purpose or scope of the federal government’s response.

In the name of national security, some of those diminished freedoms have included citizens being held without charges, bail or counsel; restrictions on academic scientific research, especially in the area of infectious diseases; and the creation of secret military tribunals. Just as disturbing, or perhaps more so, is an annual survey, released by the First Amendment Center shortly before the one year anniversary of September 11, which found for the first time that about half of those surveyed believed it was appropriate to limit academic freedom; would support the curtailment of the right of free speech by placing a ban on criticizing the military; and would endorse the government to monitor religious groups in the name of national security, even if it violated the group’s religious freedom.

With a public apparently willing to accept the government’s expansive view of its powers to ensure national security, President Bush deployed his anti-labor agenda with little meaningful resistance. Specifically, his administration has slashed the right to collective bargaining, eliminated civil service protections and

56 Abrams, supra, note 55.
60 Meyer & Volk, supra note 54. As do the authors of this article, Meyer and Volk argue that Bush has used 9/11 and America’s desire for national security as a pretext for furthering its original policy goals. The authors argue that the Bush administration has, since the beginning, pursued an anti-environmental policy. To support their thesis, Meyer and Volk point to the Administration’s attack on the Endangered Species Act for the purposes of military training exercises, drilling in Alaska for the purposes of self-sufficiency, and the attack on the federal civilian workforce that monitors environmental sites, law and policy.
benefits for thousands of employees, and promised the wholesale reduction of thousands of government civilian positions through layoffs and contracting out.61

This attack has been couched as an effort to achieve the management "flexibility" necessary to meet the heightened threat to national security. Notwithstanding the immediate and heroic response of the unionized New York police and fire departments, and the Federal Emergency Management Administration on September 11, 2001, the Bush Administration has boldly maintained that government cannot be truly responsive to terrorist attack if it has to negotiate with unions.

What Bush downplays—and the American public fails to recognize—is that, for the purpose of national security, every presidential administration already has flexibility over its staff in executive agencies. The Federal Service Labor Management Relations Statute (FSLMRS),62 which governs labor relations in the federal sector, explicitly excludes a small number of agencies from coverage for security reasons.63 It further authorizes the President to exclude additional agencies upon determining that the agency performs intelligence or national security work and that the statute "cannot be applied to that agency in a manner consistent with national security requirements and considerations."64 Finally, the FSLMRS provides that in times of national crisis:

The President may issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security.65

In addition, the Federal Labor Relations Authority, which has exclusive authority to determine appropriate bargaining units, is authorized to exclude employees who are "engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security."66

Despite the fact that the FSLMRS plainly provides sufficient flexibility to manage a workforce while accommodating bona fide claims of national security, the Bush administration has undertaken a campaign to eviscerate the labor law entirely. On January 7, 2002, President Bush issued Executive Order 13,252, ex-

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61 See infra Section A.
cluding a thousand employees of the Department of Justice from the law’s coverage, with no explanation of, much less support for, the presumption that their functions were incompatible with national security.\(^{67}\) At the same time, he summarily fired seven members of the Federal Service Impasses Panel, effectively halting review of disagreements in bargaining that have come to deadlock.\(^ {68}\)

Bush’s administrative agencies have followed his lead in minimizing the reach of the FSLMRS. On January 28, 2003, the Director of the National Imaging and Mapping Agency (NIMA), James R. Clapper, Jr., invoked 10 U.S.C. § 461(c) to terminate collective bargaining rights of employees in units represented by two AFGE locals, which had represented NIMA employees for over twenty years, on the grounds that the agency had added new intelligence-related duties to all NIMA positions.\(^ {69}\) Section 461(c)(2) provided that the determination could “not be reviewed by the Federal Labor Relations Authority or any court of the United States.” AFGE opposed the termination of collective bargaining rights to these federal employees, arguing that union representation will not jeopardize security. In support thereof, AFGE argued that the fact that private-sector contractor employees perform the same duties as the federal employees at the same location under the same supervision, and their right to union representation is not seen as a threat to national security, belies NIMA’s position that union representation for federal employees is a threat. Furthermore, despite its stance that collective bargaining somehow undermines national security, NIMA apparently had no

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68 In a press release, AFGE National President Bobby Harnage stated, “Though Bush may have the lawful right to dump all seven members of the Panel with less than a day’s notice, his refusal to announce replacement members is an abuse of authority and renders the labor laws passed by Congress moot. . . . Bush’s actions are a disservice to management officials, trying to reach agreement on effective work place changes, and a disincentive to both labor and management when attempting to reach agreement on important collective bargaining issues. . . . Imagine if disaster struck at the Supreme Court and the President simply refused to appoint new justices. In many regards, this is our Supreme Court. Bush has a responsibility to keep the Impasses Panel operating.” Press Release, AFGE, AFGE Blasts Bush Banishment of FSIP Members (Jan. 11, 2002), available at http://www.afge.org/index.cfm?Page=PressReleases&PressReleaseID=96.

69 Section 461(c) stated:

1) If the Director of the National Imagery and Mapping Agency determines that the responsibilities of a position within a collective bargaining unit should be modified to include intelligence, counterintelligence, investigative, or security duties not previously assigned to that position and that the performance of the newly assigned duties directly affects the national security of the United States, then, upon such a modification of the responsibilities of that position, the position shall cease to be covered by the collective bargaining unit and the employee in that position shall cease to be entitled to representation by a labor organization accorded exclusive recognition for that collective bargaining unit.

qualms when it contracted out much of its security-related work to a corporation
that had no previous experience in defense mapping.\textsuperscript{70}

Similarly, after the AFGE filed a petition with the FLRA seeking to clarify a
bargaining unit within the Social Security Administration (SSA) to include three
categories of employees: (1) Electronics Technicians, (2) Physical Security Spe-
cialists, and (3) Employee Services Specialists, the SSA argued that the positions
should be excluded from the bargaining unit on national security grounds, pursuant
to section 7112(b)(6).\textsuperscript{71} The Regional Director, however, determined that the
contested positions were not excludable on the basis of national security, based
on Department of Energy, Oak Ridge Operations.\textsuperscript{72} Oak Ridge stated that, in
order to exclude an employee from a unit under this section, an agency “must
show (1) that the individual employee is engaged in the designated work, and (2)
that the work directly affects national security.”\textsuperscript{73} The Regional Director found
that “while these duties can certainly be construed as engaging these employees
in security work, there is no evidence that any of these has a ‘straight bearing or
unbroken connection that produces a material influence or alteration’ of national
security.”\textsuperscript{74}

The SSA appealed the decision, linking the need to preserve economic
strength with national security interests, and expressing a need to re-examine the
definition of national security post-9/11.\textsuperscript{75} Thereafter, the FLRA invited all in-
terested persons to file briefs as \textit{amici curiae} addressing the question “whether,
and how, security work ‘directly affects national security’ as that phrase is defined
in \textit{Dep’t of Energy, Oak Ridge}.”\textsuperscript{76}

The SSA contended that, based on recently adopted legislation and executive
orders, the FLRA should broadly expand the definition of “national security
beyond that adopted in Oak Ridge.\textsuperscript{77} It insisted that “national security” was no
longer limited to notions of “national defense.” Rather, national security in-

\textsuperscript{70} AFGE Press Release, Statement of AFGE National President Bobby L. Harnage on
NIMA’s Decision to Terminate the Collective Bargaining Rights of 1,322, (Feb. 3, 2003), \textit{available at

\textsuperscript{71} Soc. Sec. Admin. and AFGE, 58 F.L.R.A. 170 (2002).

\textsuperscript{72} \textit{Dep’t of Energy, Oak Ridge Operations v. AFGE}, 4 F.L.R.A. 644 (1980).

\textsuperscript{73} \textit{Id.} at 655.

\textsuperscript{74} Soc. Sec. Admin. v. AFGE, 58 F.L.R.A. at 171.

\textsuperscript{75} \textit{Id.} at 173.


\textsuperscript{77} Soc. Sec. Admin. and AFGE, 59 F.L.R.A. No. 26, 6 (Sept. 12, 2003) (SSA assertion of need
to expand definition of “national security” based upon “The Homeland Security Act of 2002, §§ 891,
892, and 1706; the Critical Infrastructures Protection Act of 2001, 42 U.S.C. § 5195c, incorporated as
§ 1016 of the USA PATRIOT Act; Executive Order 13,228, 66 Fed. Reg. 51816 (Oct. 8, 2001) and
13,138 provides that “certain national infrastructures are so vital that their incapacity or destruction
would have a debilitating impact on the defense or economic security of the United States. These
critical infrastructures include . . . continuity of government.”}
cluded any position whose activities "related to the protection and preservation of the economic and productive strength of the United States from illegal acts that did not adversely affect the ability of the United States to defend itself, or that the term 'national defense' include defense against acts of terrorism." The SSA further asserted that the FLRA should hold that when an agency determines a position is "sensitive," the agency decision "establishes as a matter of law that the position ‘directly affects national security’ within the meaning of § 7112(b)(6)."

Amicus briefs were submitted by multiple groups and government agencies, including, but not limited to, the Department of Defense (DoD) and the Treasury Department.

In its decision, the FLRA agreed with the DoD that, in determining whether a position should be included in a bargaining unit for the purposes of collective bargaining, the "focus must be on the type and nature of the work performed." Thus, while having a security clearance did not control, it might be indicative of the sensitivity of the position. The FLRA then reviewed the nature of the work involved and found that the positions "perform work that involves the design, analyzing or monitoring of security systems for the security of, and access to, SSA’s databases and physical facilities." The FLRA also found that "these systems are directly related to the protection of the economic and productive strength of the Nation, including the security of the Government from sabotage, particularly its databases and physical facilities." Therefore, the FLRA held that the positions were excludable from the bargaining unit due to national security needs.

Based on the FLRA's expansive reading of national security, one wonders which federal government positions would not fall into the category of "national security."

In addition to the Administration's effort to reduce federal employee rights to union protections in the guise of national security, President Bush has also continued his efforts to cut the number of federal employees. Before September 11, he had promised to do away with 425,000 civil servants by contracting out their

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78 Id.
79 Id.
80 In its amicus brief, the Department of Defense (DoD) argued that the term "directly affects" should include "those situations whereby the adverse effect to national security is foreseeable and a natural consequence, even though some matters are yet to occur to further those adverse effects." Id. at 7. DoD also argued that "national security" should be expanded to include positions that (1) do not require security clearances, and (2) work to protect the lives of citizens. Id. at 8. In the same vein, the Treasury Department argued that "national security" should not be linked to the presence or absence of classified information.
81 Id. at 16.
82 Id.
83 Id.
84 Id.
positions. Even while the American public was pressing for the federalization of the airport screening staff, based on their belief that security was a government function, the Bush Administration was pushing for the competitive outsourcing of many security functions. After Thanksgiving 2001, the Department of the Interior sent an e-mail to all employees informing them of the Department's intent to contract out 5% of jobs in the short term, and up to 50% within the next five years.

Even functions the public viewed as clearly governmental were regarded as expendable. On June 6, 2002, President Bush issued an executive order that eliminated the designation of air-controller tasks as inherently governmental. This order paved the way for the privatization of Federal Aviation Administration (FAA) air controllers; it therefore surprised few when Bush began to press the FAA in the summer of 2003 to privatize air traffic control at sixty-nine control towers. On October 4, 2002, the Secretary of the Army, Thomas E. White, directed his management officials, in the name of national security, to submit plans by December 20, 2002, to privatize or outsource approximately two-thirds of the civilian workforce employed by the army. In response to these sweeping moves toward privatization of federal government services, thirty-five senators signed a letter to the Office of Management and Budget expressing their "strong concerns over the Administration's unprecedented plan to privatize the jobs of


86 In the Congressional debate over the Transportation Security Administration, Senator Hollings made an impassioned speech against privatization of federal personnel in sensitive areas such as air traffic control and defense, citing grave security concerns. Within a few months of the speech, however, the Bush administration sought to privatize the very air traffic controllers and Department of Defense personnel whose privatization Senator Hollings had considered absolutely unthinkable. "We would not think for a second of privatizing the air traffic controllers . . . . They wanted to privatize over at the Defense Department and they said: You are not privatizing anything over here. We are engaged in security. They cannot be made contract employees." 147 Cong. Rec. S10129 (daily ed. Oct. 3, 2001).


90 Christopher Lee, Army Weighs Privatizing Close to 214,000 Jobs; One in Six Workers Could Be Affected, WASH. POST, Nov. 3, 2002, at A1; Associated Press, Army Considers Privatizing More than 200,000 Jobs, ST. LOUIS POST-DISPATCH, Nov. 4, 2002, at A.3. However, since the resignation of Secretary White in April 2003, the Army has indefinitely suspended the plan, which had been nicknamed the Third Wave of contracting out. See Christopher Lee, Army Outsourcing Put on Hold; Plan for Jobs Came to Halt After White's Resignation, WASH. POST, Jan. 5, 2004, at A15.
850,000 federal employees—nearly half of the federal workforce." But this opposition, lacking a majority, has not stopped the Bush Administration, which continues to push its competitive outsourcing goals.

A. Transportation Security Administration Employees Lack Basic Labor Rights

The creation of the Transportation Security Administration (TSA) and the resulting condition of its workforce is perhaps the most obvious example of the Bush Administration's use of the terrorist attacks as a pretext for an assault on employee rights. After September 11, 2001, Americans clearly recognized the failures of the private sector screening workforce and responded by calling for the federalization of those functions. President Bush opposed the federalization of the entire screening workforce. After all, his campaign promise was to reduce the size of the federal civilian workforce; the federalization of the entire screening workforce would increase considerably the size of the federal government workforce and be contrary to the goals of competitive outsourcing. Instead, he supported the Young amendment, which would give federalized employees oversight of the private screening force. This was one of the rare instances after September 11, however, where the public held firm, notwithstanding the desires of the Bush Administration. As a result, a compromise was reached: the entire screening workforce would be federalized until November 2004. Thereafter, the airports would have the right to "opt out" of a federalized workforce.

1. Legislative History

In creating the Transportation Security Administration, Congress identified the lack of a dedicated and trained screening workforce as the underlying cause of a compromised airport security. As Senator John McCain (R-Az) pointed out:

The average turnover, because of the low pay in salary and benefits, at major airports is 125 percent per year. At one airport it is as high as 400 percent per year, but that is because the people who now are employed as

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screeners can make more money by going down and working at a concession at the same airport . . . [and screeners] are low paid, and they are ill-trained.93

Representative Allen (D-Me.) made the same point in the House:

What we have here across the country is a system with private companies hiring people at the lowest possible wages with no benefit [sic]. The system is broken, it does not work, and the public knows that . . . [T]he turnover in these screening positions is 126 percent a year. That means the average screener is on the job for 9 months. It is not possible to have a well-trained, well-educated work force with that kind of turnover . . . . [I]n Portland, Maine, where I come from, they have not been able to hire enough security screeners to deal with the crush of people because they pay $7.50 an hour and they will not pay a penny more. It needs to change.94

Congress resolved that committed and qualified personnel were necessary for the improvement of screening security. Senator Paul Sarbanes (D-Md) averred:

Federalizing security operations throughout U.S. airports is the best answer for improving screener performance. It would raise wages, lower employee turnover, promote career loyalty among screeners, create uniform training among security personnel, and, as a result, strengthen the performance of screeners to discover dangerous objects.95

It was believed that improving the working conditions of screeners would have a direct, positive result upon security. Because private companies were not providing a quality workforce due to poor work conditions, Congress concluded that allowing the screeners to remain privatized was harmful for national security. Thus, it decided the best means for improving these employment conditions was to federalize the workforce.

95 147 CONG. REC. S10446 (daily ed. Oct. 10, 2001) (statement of Sen. Paul Sarbanes); see also 147 Cong. Rec. H7773 (daily ed. Nov. 6, 2001) (statement of Rep. Wynn) ("If we want good screeners, we have to have good pay. We have to have benefits. It is clear that private companies, looking at the bottom line, will not provide this kind of pay, this kind of benefit, and provide us with the kind of quality screeners that we need.")
2. The Aviation Transportation Security Act Mandates that TSA Follow Federal Aviation Administration Personnel Procedures

On November 19, 2001, Congress passed the Aviation and Transportation Security Act (ATSA)\(^{96}\) primarily in order to federalize security-screening operations for passenger air transportation and intrastate air transportation. The ATSA explicitly mandated that, within a year, the TSA shall deploy “a sufficient number of Federal screeners” to conduct the screening of all passengers.\(^{97}\) Congress, intending to create a trained staff, itself enumerated employment and training standards. Regarding personnel management, the ATSA created a personnel system for the federal screeners that could be interpreted to exempt them from many civil service protections.

The ATSA explicitly mandated that the TSA would apply the personnel management system of the Federal Aviation Administration (FAA), as defined in 49 U.S.C. section 40122.\(^{98}\) While the FAA system does not afford employees full civil service protections enjoyed by other federal employees, it still preserves many primary protections. The FAA system expressly incorporates the provisions of Title 5 relating to labor-management relations.\(^{99}\) These include the right to form, join, or assist any labor organization, and the right to engage in collective bargaining.\(^{100}\) Additionally, the FAA’s personnel management system expressly incorporates the provisions of Title 5 relating to veterans’ preference; whistleblower protections; anti-discrimination protections; workers’ compensation protections; retirement, unemployment compensation, and insurance coverage; and appeal rights to the Merit Systems Protection Board for adverse personnel actions.\(^{101}\) The FAA is also bound by the Fair Labor Standards Act, (FLSA) and is subject to the Office of Personnel Management (OPM) for adjudication of alleged FLSA violations.\(^{102}\)

In addition, the ATSA preserved recognition of veterans’ preferences as part of the employment standards for screening personnel, particularly for hiring.\(^{103}\) Lastly, in a statutory note, the ATSA stated that “notwithstanding any other provision of law,” the TSA Administrator may “employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal

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97 Id. at §110(c)(1).
98 Id. at §101(n).
100 5 U.S.C. § 7102(1) and (2) (2004).
service for [airport screeners, and] shall establish levels of compensation and other benefits for individuals so employed."104

The TSA has argued in federal court and before the Federal Labor Relations Authority105 that the foregoing language signifies that while it follows FAA policies with respect to its employees in general, it is not bound to FAA policies with respect to security screeners. The TSA unabashedly argues this, notwithstanding the fact that security screeners are an overwhelming percentage of their agency. As a result, TSA has declared itself exempt from the FSLMRS, MSPB adjudication in all matters including whistle-blowing appeals, merit system promotion protections, OPM adjudication of compensation and leave, the Veterans Opportunity in Employment Act, and the FLSA.

3. Court Holds that TSA Employees Lack Right to Unionize

Based on TSA’s interpretation of section 111(d), set out as a statutory note to 49 U.S.C. § 44935, on January 8, 2003, then Under-Secretary Loy issued a directive that federally employed airport screeners “shall not, as a term or condition of their employment, be entitled to engage in collective bargaining or be represented for the purposes of engaging in such bargaining by any representative or organization.”106 Given that TSA had not been served with a request to bargain, the clear implication of the directive was that employees should not undertake to organize.107 Indeed, in many instances, TSA management officials interpreted the directive as proscribing otherwise permissible organizing activities; and the order has had an undeniable chilling effect on federal screeners’ constitutionally protected right to organize.108

In response to this directive, AFGE filed suit,109 seeking a declaration that the directive was ultra vires, was contrary to the ATSA, deprived affected federal employees of their constitutional rights to free speech and association under the First Amendment and to equal protection under the Fifth Amendment, and constituted an arbitrary and capricious agency action in violation of the Administrative Procedure Act.110 The TSA argued that the court was without jurisdiction to rule on the Loy directive on the grounds that the FSLMRS preempted judicial review by giving the FLRA exclusive authority to resolve the question. In the

107 Id. See AFGE’s Opposition to Defendant’s Motion to Dismiss, at 15 (on file with AFGE).
108 Declarations on file with AFGE.
110 Id.
next breath, however, TSA maintained that the FLRA was also without jurisdiction. In a footnote, the TSA explained that it regarded its decisions with respect to screeners' rights to bargain as unreviewable:

Plaintiffs cannot seek to override that congressionally established scheme by arguing that TSA denies the jurisdiction of the FLRA. TSA's argument that the FLRA lacks jurisdiction, properly understood, is perfectly consistent with the theory that this Court also has no jurisdiction. TSA has not argued that the FLRA is merely the wrong tribunal to consider AFGE's collective bargaining claims in the first instance. . . . TSA's argument is instead that, since section 111(d) exempts TSA from being required to bargain collectively, no tribunal can (properly) order such bargaining. If there is first-instance authority to order collective bargaining, that authority belongs to the FLRA or no one. That the correct answer is "no one" does not expand the question into multiple choice of fora.111

TSA also argued that its statutory construction interpretation of section 111(d), as exempting screeners from the few civil service protections guaranteed by the FAA personnel management system, was correct and entitled to deference.112

Opposing TSA's motion, AFGE argued that the FSLMRS did not preempt judicial review because the question of whether the Loy directive was lawful turned on statutory interpretation of the ATSA and constitutional interpretation, tasks not delegated to the FLRA.113 The court ultimately decided in favor of TSA, dismissing the statutory claim for lack of subject matter jurisdiction114 and the constitutional claims for failure to state a claim.115 AFGE appealed the dismissal to the U.S. Court of Appeals for the District of Columbia Circuit.

On May 14, 2004, the U.S. Court of Appeals for the District of Columbia issued a decision which completely ignored the issues AFGE presented: whether the head of TSA went beyond his authority when he issued the directive prohibiting screeners from collective bargaining.116 Instead, the Court agreed with the government that the FLRA had the right to first review whether the directive exceeded the agency's authority and/or violated the U.S. Constitution. The decision was not a complete loss, however, for AFGE, TSA screeners who would like to collectively bargain, or the labor movement. In an astounding paragraph, the Court continued to say that once the FLRA made such a review based on an election petition, but before conducting an election, the Court then could hear an

111 Id. at n.9 (emphasis added).
112 Defendant's Motion to Dismiss at 3, 16-22 (on file with AFGE); AFGE v. Loy, 281 F. Supp. 2d at 63.
113 Plaintiffs' Opposition to Defendant's Motion to Dismiss at 9 (on file with AFGE); AFGE v. Loy, 281 F. Supp. 2d at 63.
114 AFGE v. Loy, 281 F. Supp. 2d at 63.
115 Id. at 65.
With this ruling, the Court created law that conflicts with rulings in other parts of the country and expanded its right to review the FLRA. Nevertheless, until another case is procedurally posed to re-address the issue before the appellate court, the TSA security screeners remain bereft of the right to collective bargaining.

4. TSA Working Conditions Reflect Lack of Bargaining Rights

Throughout 2002 and 2003, AFGE received an overwhelming response from TSA screeners around the country, describing working conditions that should not be tolerated in a modern civil service. These included: terminations for union activity; threats to terminate for union activity; terminations based on inaccurate suitability (criminal and credit history) determinations; inconsistent application of rules; cronyism; mandatory overtime without sufficient notice; late pay, wrong pay, or no pay; hazards to screener health; sexual harassment; no veterans’ preference; and major affronts to worker dignity. Many of these problems had no avenue of redress, as meaningful grievance processes available to other federal employees are unavailable to TSA screeners.

The fundamental unfairness of depriving federal screeners of the right to engage in collective bargaining over workplace conditions was highlighted by an incident that occurred one spring day after Loy issued the directive. The TSA employees worked side-by-side with employees of the Immigration and Naturalization Service (INS). The unionized INS employees, who were working in the same area as TSA baggage screeners, found that their dosimeters (instruments that measure exposure to radiation) were signaling elevated radiation levels. Pursuant to the INS and AFGE collective bargaining agreement, the INS employees notified their supervisor, who, pursuant to the agreement, ordered the INS employees to leave the area until it was established that it was safe to return. In contrast, the TSA screeners, who were not wearing dosimeters but who had been informed of the radiation alert by the INS employees, made the same appeal to their supervisors. The non-unionized TSA employees were ordered to stay at their posts.

a. TSA Employees Are Deprived of Compensation and Leave Adjudication

The Office of Personnel Management (OPM) adjudicates federal civilian employee claims against the United States involving compensation and leave. A claim may be submitted by a federal government employee or by the employee’s administrative agency on the employee’s behalf. The OPM website indicates that

117 Id. at 935-36.
118 Personal communication by an AFGE official who works at the INS with Ms. Gony Frieder, in Washington, D.C. (Feb. 21, 2003).
OPM generally adjudicates compensation and leave claims under either Title 5 of the United States Code or the Fair Labor Standards Act (FLSA). 119

OPM has refused, however, to adjudicate compensation and leave claims from TSA security screeners. Specifically, OPM refused to hear complaints arising from TSA’s refusal to pay screeners for the time spent in the required training and orientation, flatly stating that “OPM does not administer FLSA [sic] for TSA.” 120 Thus, TSA security screeners have no avenue for redress of pay concerns beyond internal mechanisms. Of course, had those internal mechanisms worked in the first place, the screeners would not have searched for external adjudication.

b. No Right to Representation for TSA Workers

On November 3, 2003, the Federal Labor Relations Authority (FLRA) determined that the head of TSA “may in his unfettered discretion, among other things, set the terms and conditions of employment for employees carrying out ‘screening functions’ of the TSA.” 121 Thus, the FLRA determined it did not have jurisdiction over AFGE’s representation petitions. The FLRA noted that “collective bargaining” was not limited to bargaining. Rather, it “addresses the full array of representational activities by an exclusive representative. As such . . . the Under Secretary’s action precludes the recognition of an exclusive representative for any and all representational activity permitted by chapter 71 of Title 5.” 122

With this determination, the FLRA eliminated all protections guaranteed by the FSLMRS, including, but not limited to, the right to have a representative at formal discussions. It is perhaps ironic, in this regard, that as the right to have a representative in the private sector has expanded to include not only employees represented by unions, but also those who are not so represented by unions, in the federal sector—as exemplified by TSA—the right to representation has been eliminated. 123 Indeed, TSA screeners who have attempted to act as representatives for their colleagues have been threatened with discipline.

119 Available at http://www.opm.gov/payclaims/index.asp.
120 In April 2003, Ms. Frieder, an attorney with AFGE, instructed all TSA screeners who called her regarding this matter to file complaints with OPM until, on April 25, 2003, OPM responded via telephone call that “OPM does not administer FLSA for TSA.”
122 Id. at 16.
123 Epilepsy Found. of N.E. Ohio v. NLRB, 268 F.2d 1095 (D.C. Cir. 2001) (finding employer’s denial of non-union employee’s request that co-worker be present at investigatory interview which employee reasonably believed might result in disciplinary action constituted an unfair labor practice pursuant to the National Labor Relations Act). See also Trompler, Inc. v. NLRB, 338 F.3d 747 (7th Cir. 2003) (finding employees at non-union machine shop were engaged in protected concerted activity pursuant to the National Labor Relations Act when they walked off the job to protest supervisor’s
c. Merit Systems Protection Board Refuses TSA Cases

The Merit Systems Protection Board (MSPB) was established to protect federal merit systems from prohibited personnel practices and to ensure adequate protection for employees against abuses by agency management. One of the primary functions of the MSPB is to adjudicate employee appeals of adverse personnel actions such as removals, suspensions of more than fourteen days, furloughs, and demotions that cause a monetary loss.

The MSPB Administrative Law Judge (ALJ), however, refused to take jurisdiction over an otherwise appealable adverse personnel action brought by a TSA screener. The TSA had demoted a screening supervisor after his Standard Form 50 stated that his probationary period had ended. In the letter of demotion, the TSA represented that the demotion had taken place during the probationary period, and that therefore the screener had no avenue of redress. Nevertheless, the screener appealed the demotion to the MSPB, asserting, in relevant part, that the demotion had occurred outside of his probationary period, and otherwise was not substantiated. The ALJ dismissed the appeal, citing lack of jurisdiction over TSA personnel decisions other than those based on whistleblower allegations. The ALJ ignored the dispute regarding the probationary period.

The appellant then petitioned the MSPB to review the ALJ’s finding of lack of jurisdiction. The MSPB upheld the underlying decision and similarly ignored the dispute as to whether the appellant was probationary or non-probationary. Specifically, it found that the TSA had the right to discipline and/or terminate a security screener without review by the MSPB pursuant to the statutory note granting the head of TSA authority to discipline and terminate security screeners.

The MSPB has also refused to review cases involving whistleblower retaliation. In Schott v. Department of Homeland Security, the MSPB declined to review individual rights of appeals brought by TSA security screeners alleging whistleblower retaliation. This decision eliminated the security screeners’ protection from whistleblower retaliation.

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125 Standard Form 50 is a government form issued after a change in personnel status. It can indicate, for example, a change in grade or step, a change from temporary to permanent employment status, termination and/or resignation.
126 Whether an employee is a probationary employee or not is important in that it determines whether due process is required when the government takes an adverse personnel action.
d. Labor Department Fails to Adjudicate Veterans' Preference Violations

On January 14, 2002, Representative Evans, Ranking Member of the Committee on Veterans' Affairs, requested information on how veterans' preference would be administered in the TSA. In an April 9, 2002 response, the Secretary of Transportation responded that the TSA would apply both the traditional veterans' preference provisions outlined in Title 5 of the United States Code and the preference created in the ATSA itself, which defined "preference-eligible" in a manner different from Title 5.

However, many veterans reported either that the TSA did not apply veterans' preference, or that the preference was applied incorrectly in the hiring process and/or in the amount of leave benefits received, once employed. Typically, federal employees who believe their veterans' preference rights have been violated may seek information and/or file a complaint with the Department of Labor's Veterans' Employment and Training Service (VETS). Complaints must be filed in writing within sixty days of the alleged violation. Mr. Troy Moore, TSA Security Screener, reported that, despite complying with these requirements, the Department of Labor has closed his complaint without resolution because TSA refused to respond.

B. Bush Demands "Flexible" Personnel Policies in the Department of Homeland Security

On November 25, 2002, Congress enacted the Homeland Security Act (HSA), creating a new cabinet-level department. By combining twenty-two federal agencies and 170,000 employees into the massive new Department of Homeland Security (DHS), the Act launched the largest government reorganization since 1947.

A significant and hotly contested issue during the debate on creation of the new Department concerned the supposed need for additional personnel flexibility in connection with managing employees of the DHS. In July 2002, the President met with Congress to discuss his opinions on the future Department of Homeland Security. President Bush was candid and vocal about his insistence on manager flexibility in the new Department.

[A]s Congress debates the issue of how to set up this department, I'm confident they're going to look to me to say, well, is it being done right, after

130 Veterans' preference increases the rate of leave accrual.
131 Telephone conversation of Mr. Troy Moore with Ms. Gony Frieder (Sept. 24, 2003).
they got the bill passed. And, therefore, it is important that we have the managerial flexibility to get the job done right. We can’t be—we can’t be micro-managed. We ought to say, let’s make sure authority and responsibility are aligned so they can more adequately protect the homeland. The new Secretary must have the freedom to get the right people in the right job at the right time, and to hold them accountable. He needs the ability to move money and resources quickly in response to new threats, without all kinds of bureaucratic rules and obstacles. . . . The bill doesn’t have enough managerial flexibility, as far as I’m concerned. . . . [We need] to make sure that when we look back at what we’ve done we will have left behind a legacy, a legacy that will allow future Senators and future members of the House and a future President to say, I can better protect the homeland thanks to what was done in the year 2002.134

While politicians debated the formation of the Department of Homeland Security, the public wanted to be sure that the right hand knew what the left hand was doing. In March 2002, the media trumpeted the story that the Immigration and Naturalization Service (INS) had just approved visas for study at a Florida flight school—for Mohamed Atta and Marwan Alshehhi, two of the September 11 terrorists.135 Some Republican representatives quickly accused INS employees of being “completely and totally dysfunctional,”136 and of being unable “to enforce our laws and protect our borders.”137 But, in reality, the obviously suspect letters had been sent by Affiliated Computer Services, Inc., a private contractor to the INS.138 The vilification of federal employees quickly became the favorite pastime of some in Washington, D.C., and assisted the Bush administration’s efforts in eliminating important worker protections as part of one of the most far-reaching government reorganizations in American history.139


137 Id.

138 Id.

139 When it appeared that the Senate version of the bill would be passed without the flexibility President Bush had desired, Ari Fleischer stated at a press meeting: The President has made it very clear directly to the Congress . . . that he will refuse to accept a bill that limits the flexibility necessary to run the department of homeland security in a way
As demanded by the administration, the HSA strips workplace protections already extant in law in the name of managerial flexibility. Section 841 of the HSA authorized the establishment of a new Human Resource Management System and provides the Administration with the unfettered authority to modify Title 5 of the United States Code in each of the following areas: pay, job classification, performance, disciplinary actions, appeals, and labor-management relations.140

Because of forceful lobbying by unions representing federal employees, however, the HSA created a process that would allow employees, through their representing unions, to collaborate in the development of the new system, while leaving the Secretary of DHS with the final authority to impose changes, even over objections from unions or other employee representatives. Thus, after the passage of the Act, DHS officials began meeting with OPM and unions to develop a revised personnel system. As this issue goes to press, DHS management has abandoned the attempt to develop the new policies with union input through mediation facilitated by the Federal Mediation and Conciliation Service.141 Department representatives label the mediation a failure, and state that the policies should be developed by the Office of Personnel Management Director and DHS Secretary in direct negotiations with union leaders.142 Representatives of the National Treasury Employees Union drafted a letter to congressional leaders, seeking their help in bringing DHS back to the bargaining table.143 More than a year after the passage of the HSA, the new personnel system remains unestablished.

C. Policies of DHS and TSA May Spread

Like a domino effect, the gutting of personnel protections within TSA and DHS has caused the Department of Defense (DoD) to evaluate their personnel protections. On April 10, 2003, the DoD formally requested that Congress enact the proposed “Defense Transformation for the 21st Century Act of 2003” creating a so-called “National Security Personnel System” (NSPS) just for DoD. On November 12, 2003, the Senate followed the House in approving the 2004 De-

that protects the homeland. . . . The President is asking for the same flexibility that other agencies have, the same management flexibilities, same abilities to hire and fire as necessary, to have an agency that is a frontline agency able to carry out and fight and win a war to protect the American people on the homeland.


142 Id.

143 Id.
fense Authorization Act, giving DoD the requested, unprecedented personnel authority. The President soon thereafter signed the measure into law.\textsuperscript{144}

While ostensibly preserving employees' statutory right to engage in collective bargaining, the DoD Act in fact eliminates the union's ability to bargain effectively—particularly at the local level—through a variety of mechanisms. These include forcing some bargaining to the national level, eliminating the obligation to bargain over the implementation of operational decisions, and using national security as an excuse to take away the collective bargaining rights of many employees. It also limits employee challenges to personnel actions to an internal appeals process, thus depriving hundreds of thousands of employees of third-party review.\textsuperscript{145} After an outcry from federal employees and the unions representing them, in or about April 2004, Secretary Rumsfeld repealed a concept paper explaining the implementation of the NSPS and appointed a new officer to preside over the creation of a new concept paper.

**Conclusion**

There is no doubt that regardless of the administration, the events of September 11 would have caused any President to evaluate how to use its federal civilian workforce to best protect the interests and citizens of the United States. However, President Bush's evaluation smacks more of an acceleration of his previous anti-labor and anti-federal employee goals in the guise of national security than a true deliberation of how best to protect America.

\textsuperscript{145} Id.