



UNITED STATES SENATE  
**REPUBLICAN  
POLICY COMMITTEE**

Larry E. Craig, Chairman  
Jade West, Staff Director

October 16, 2002

*Homeland Security After the Nelson Amendment*

## **Gutting a President's Exclusive National Security Powers**

The Homeland Security bill remains stuck in the Senate. Some Senators are insisting that the national security powers of Presidents be weakened. On the other hand, nearly every Republican Senator continues to support the House-passed provision or the Gramm-Miller Amendment which will protect long-standing presidential powers.

At bottom, the opponents of the House-passed bill and the Gramm-Miller Amendment *do not want to allow* future Presidents to retain the statutory power that former Presidents have had since 1978. (Before that date, Presidents had even greater powers.) They want national security decisions of Presidents to be *appealable*. They want to give a panel of bureaucrats the power to review the *national security* decisions of a President of the United States, whether that President is a Republican, a Democrat, or an independent.

Opponents of the Gramm-Miller Amendment are deeply concerned that some President might, in the interests of national security, make a decision that would decrease the clout of a federal labor union.

The Nelson-Chafee-Breaux Amendment, which is the leading alternative to the Gramm-Miller Amendment, will deprive all future Presidents of the power they now have under current law. If that amendment is adopted, Presidential authority will *not* apply within the Department of Homeland Security (DHS) as it does in *every other* department and agency of the Federal Government.

Under current law, a President may act unilaterally to protect the national security. If the Nelson-Chafee-Breaux Amendment becomes law, a Presidential order will *not* go into effect *unless two additional* conditions exist.

**These new requirements add to a President’s burdens, and they shift decision-making power away from a President. The Nelson-Chafee-Breaux Amendment allows a President’s national security order to be appealed to a “higher authority” than the President of the United States.**

## **I. Background**

The Constitution of the United States “vests” “the executive power” in “a President of the United States of America.” It provides that the “President shall be Commander in Chief of the Army and Navy of the United States.” It requires him to swear that he will “faithfully execute” his office and “preserve, protect, and defend” the Constitution. And, it obliges him to “take care” that the laws of the United States “be faithfully executed.”

The Civil Service Reform Act (CSRA) was enacted in 1978. CSRA gave statutory bargaining rights to Federal employees, but a section of that law allows a President to exclude offices and agencies in the interests of national security. Every President who has had that power – Republican and Democrat alike – has used it. The law says:

“The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that – (A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and (B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.” 5 U.S.C. §7103(b)(1).

The two Democratic Presidents who have had this authority each used it once. President Carter used his authority to exclude *dozens* of agencies and offices from the labor-management provisions of federal law. Those offices range from the Information Security Oversight Office of the General Services Administration to the Foreign Science and Technology Center of the U.S. Army to the Office of Auditor General of the Agency for International Development (Executive Order No. 12171, Nov. 19, 1979). President Clinton acted once and excluded just one “office,” the Naval Special Warfare Development Group (Executive Order No. 13039, March 11, 1997).

Within just those offices or agencies excluded by Democratic Presidents, some employees use keyboards and calculators and others use swim fins and firearms. Some national security workers wear business suits and others wear ghillie suits.

In exercising their authority, Presidents Carter and Clinton and their Republican counterparts used the same language, language that is typical of executive orders: “By the authority vested in me as

President by the Constitution and statutes of the United States of America, including Section 7103(b) of Title 5, United States Code,” the agencies and offices listed in this executive order “are hereby excluded from coverage under Chapter 71 of Title 5 of the United States Code.”

## II. The Nelson-Chafee-Breaux Amendment

The Nelson-Chafee-Breaux Amendment will deprive all future Presidents of the power they now have under Section 7103(b). If that amendment is adopted, Section 7103(b) will *not* apply within the Department of Homeland Security (DHS) as it does in *all* other departments and agencies of the Federal Government. **Within DHS, a President’s powers will be diminished – and those diminished powers will be subject to bureaucratic review.** The Nelson-Chafee-Breaux Amendment reads:

“No agency or subdivision of an agency which is transferred to the Department [of Homeland Security] 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.” Senate Amendment No. 4740, §731(a)(1).

Under current law, a President may act unilaterally to protect the national security. **If the Nelson-Chafee-Breaux Amendment becomes law, a President still may issue an order unilaterally – but that order will *not* become efficacious unless both of the following additional conditions also are present:**

- The “mission *and* responsibilities” of the office have “*materially* changed,” and
- A “*majority* of the employees within such” office “have as their *primary* duty intelligence, counterintelligence, or investigative work *directly related* to terrorism *investigation*.”

**This second set of requirements not only adds to a President’s burdens, but shifts decision-making power away from a President. The Nelson-Chafee-Breaux Amendment allows a national security order under 5 U.S.C. §7103(b)(1) to be appealed to a “higher authority” than the President of the United States!**

### **III. Smuggling the FLRA Into the Oval Office**

#### **A. The Work of the Federal Labor Relations Authority In General**

The amendment must be read carefully. The meaning is discernable, although some may wonder if the words weren't assembled in a camouflage pattern. Note that the amendment does *not* merely add two additional requirements to Section 7103(b). Instead, the Nelson-Chafee-Breaux Amendment says, "No agency or subdivision . . . 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)* . . . unless" the two additional conditions are met.

Suppose, however, that some future President issues an order that recites the two requirements of current law *and* the two additional requirements of the Nelson-Chafee-Breaux Amendment. Would that order be definitive and efficacious? No.

That presidential order would be appealed through the Federal Service Impasses Panel, and the general counsel and regional directors, administrative law judges, and board of the Federal Labor Relations Authority (FLRA). Those administrative officers would have to determine (1) if there had been a "material change" and (2), if a majority of an office's employees do certain kinds of work. The FLRA regularly makes such determinations under another section of the law, 5 U.S.C. §7112(b)(6), and it does so employee-by-employee, job-by-job.

#### **B. A Recent Case Showing the FLRA's Work**

In a recent, relevant case, the FLRA reviewed and affirmed the regional director's decision that 84 employees should be excluded from a bargaining unit because they were engaged in national security work. The union had, of course, fought to keep the Department of Justice from making those classifications. *U.S. Department of Justice and American Federation of State, County, and Municipal Employees, Local 3719, AFL-CIO*, 52 FLRA 1093 (No. 111, March 14, 1997). That case involved six major departments of the Criminal Division of the United States Department of Justice which is, of course, a civilian agency. In each office and for each employee, the union argued that the employees were *not* engaged in national security work, but the FLRA disagreed and the employees were excluded from the bargaining unit:

- In the Management Information Staff of the Office of Information, which develops and maintains automated information systems to handle sensitive and classified information, the FLRA excluded computer specialists, operators, programmers, and analysts, and a database administrative assistant, a telecommunications specialist, and a program manager.
- In the Narcotics and Dangerous Drugs Section, which investigates and prosecutes narcotics offenses, the FLRA excluded a clerk-typist, secretaries, and legal technicians.

- In the Office of Enforcement Operations, which oversees the investigative activities of the agency including electronic surveillance and witness protection, the FLRA excluded security specialists, clerk-typists, a legal data technician, a legal technician, and numerous paralegals.
- In the Terrorism and Violent Crimes Section, which investigates and prosecutes international terrorist incidents, the FLRA excluded secretaries and paralegals.
- In the Office of International Affairs, which formulates and executes the agency's international criminal justice enforcement policies, the FLRA excluded a case management technician and 11 clerical and paralegal positions.
- In the Internal Security Section, which investigates and prosecutes crimes related to espionage and the unlawful export of technology and strategic materials, the FLRA excluded 14 legal specialists and secretaries.

With respect to individual employees within the various offices, the Regional Director reviewed their duties, employee-by-employee. For example, the employees shown below were distinguished because the employee in the left-hand column handled classified material while the employees in the right-hand column handled only sensitive material. Even that basis for decision was objected to by the union, which argued that *more* than mere access to, and use of, classified information was necessary before a national security exclusion could be justified.

**Excluded From Bargaining Unit**

(The Office of Enforcement Operations includes the Freedom of Information [Act] and Privacy Act Unit which handles inquiries under those two laws. This Unit handles both sensitive and classified information.)

“Denise K-----, Legal Technician, is the first to review incoming mail in the unit which includes FOIA and PA requests and is largely responsible for case management of such cases. In this regard, K----- determines how to process the requests, what components of the Agency have to be searched, and what records have to be searched to satisfy the request. K----- is not involved in the actual processing of the requests. Documents which K----- receives in connection with the FOIA / PA unit

**Included In Bargaining Unit**

(The Office of Enforcement Operations includes the Legal Support Unit which responds to inquiries from U.S. Attorneys about wiretaps and grand jury disclosures, and from the FOIA / PA Unit. This Unit handles sensitive information but not classified information.)

“Deborah S---- and Angela C--- work as secretaries in the Legal Support Unit and they type sensitive materials which include responses to inquires from U.S. Attorneys and Federal agencies as to whether a wiretap has been done on a particular person and responses to requests for the disclosure of material under seal which was used for Grand Jury

processing of the requests are sometimes classified and she places such documents in a series of safes to which she has the combinations. She keeps a monthly or annual report of the number of FOIA / PA requests.

“Based upon the foregoing, I find that Denise K----- is engaged in security work which directly affects national security and that she should be excluded from the unit. . . .” Decision and Order of the Regional Director, *infra* next column, at 22.

indictments, or for tax disclosures. They do not handle classified information in performing their duties.

“Under these circumstances, I find that Deborah S---- and Angela C--- are not involved in security work which directly affects national security within the meaning of [the statute] and that they should be included in the unit.” Decision and Order of the Regional Director at 24, *U.S. Department of Justice and American Federation of State, County, and Municipal Employees*, Washington Regional Office, Jan. 31, 1995 (Case Nos. WA-CU-20211 & WA-CU-20401), *affirmed by FLRA* in case cited in main text, *supra*.

#### IV. The Future Under the Nelson-Chafee-Breaux Amendment

In future cases under the Nelson-Chafee-Breaux Amendment, the FLRA will be making similar assessments about individuals employees with DHS. **Some future presidential order will be appealed, and the FLRA will make a judgment about the work of the file clerks, typists, secretaries, computer operators and programmers, paralegals, drivers, administrative assistants, technicians, guards, and others employed at the Department of Homeland Security to see if a majority of employees “have as their primary duty intelligence, counterintelligence, or investigative work directly related to terrorism investigation,” and if their duties have changed. If not, then under the express terms of the Nelson-Chafee-Breaux Amendment, a President’s national security order must fail.**

A President *could not use his national security powers to exclude* a 100-person office where *all* of the employees “have as their primary duty intelligence, counterintelligence, or investigative work” but *not “directly related to terrorism investigation.”*

A President *could not use his national security powers to exclude* a 100-person office in which 40 employees spend all of their time on work directly related to intelligence and terrorism investigation; 20 employees spend 18 hours per week on work directly related to intelligence and terrorism investigation (so it is not their “primary duty”); 10 employees spend all of their time on duties *indirectly* related to intelligence and terrorism investigation; and 30 employees spend all of their time on intelligence and counterintelligence and investigative work but *not* related to terrorism investigation.

Yesterday, October 15, 2002, all officers of the Cabinet wrote to the Senate leaders and said, “We do not believe that it is logical, especially in this time of war, for the President to have this critical national security authority for each of the 14 existing Cabinet departments, but to have that authority effectively stripped from him when it comes to the department created for the very purpose of protecting the homeland.” The same point was made in a letter of September 26, 2002, from President Carter’s National Security Advisor, Zbigniew Brzezinski, and President Reagan’s National Security Advisor, Richard V. Allen. They, too, wrote that the Nelson-Chafee-Breaux Amendment “unwisely chooses to sharply curtail this [presidential] authority in an Act establishing a Department whose primary mission is to protect the homeland against terrorist attacks. It defies logic that the President would have less authority vested in the Department of Homeland Security than he has in every other department and agency of the federal government today.”

We live in a world of new dangers. At such a time, is Congress going to bind future Presidents when acting within the Department of Homeland Security, and then make the President’s national security decisions subject to bureaucratic review? If the Nelson-Chafee-Breaux Amendment is enacted, the answer to that question is an emphatic *yes*.

---

Written by Lincoln Oliphant, 224-2946