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*Is Osama bin Laden a Terrorist or a Labor Lawyer?*

**How the Senate Is Threatening the  
National Security Powers of Presidents –  
*All Presidents, Not Just This President***

*Summary*

5 U.S.C. §7103(b) allows a President to exclude an agency or office from the collective bargaining provisions of Federal law if the agency or office does primarily national security work and the labor-management provisions “cannot be applied” to that agency or office “in a manner consistent with national security requirements and considerations.” These provisions have been part of Federal statutory law since 1978 when the law was first signed by President Carter. Before that, even broader provisions had been effective by executive order, starting with President Kennedy’s executive order in 1962. *Every President who has had this national security authority has used it.*

The Lieberman Amendment, now pending on the Senate floor, will effectively revoke the President’s power within the Department of Homeland Security.

Senator Lieberman’s “Dear Colleague” letter of August 29 says, “I have not yet heard a single satisfactory argument supporting the contention that union rights of . . . Customs inspectors or Border Patrol inspectors are incompatible with their ability to serve their country as best as they possibly can.” Senator Lieberman seems to think he is in an argument with the Bush Administration, but in truth his argument is with the Kennedy and Carter Administrations – and with every President of the United States since at least 1962.

The Lieberman Amendment would give a President *less* power at the Department of Homeland Security than he has in any other office or agency of the Federal Government! Such a result is more than ironic, it dangerous and risky. Is this Congress going to be the first to take such a risk – and is it going to do so in a Department whose very purpose is to protect our Homeland?

This paper reviews the President’s national security powers under 5 U.S.C. §7103(b), and the threat that is created by the Lieberman Amendment.

## **I. The Background of 5 U.S.C. §7103(b)**

The Lieberman Amendment runs counter to history.

President John F. Kennedy, President Jimmy Carter, President Bill Clinton, the 95<sup>th</sup> Congress (led by Robert C. Byrd in a Senate with 61 Democrats and “Tip” O’Neill in a House of Representatives with 292 Democrats), and a large assortment of other Democrats all have supported section 7103(b).

President Ronald Reagan, President George H.W. Bush, and a large assortment of other Republicans all have supported section 7103(b).

The current President of the United States, and a bipartisan majority of the United States House of Representatives, support section 7103(b).

The Lieberman Amendment, on the other hand, would make section 7103(b) a nullity within the Department of Homeland Security (DHS).

**Labor - Management Relations in Federal Service, and the National Security.** Chapter 71 of Title 5 of the United States Code sets out the rules for labor-management relations in the Federal Government. The chapter makes it clear that Federal employees can “form, join, or assist any labor organization” and can “engage in collective bargaining with respect to conditions of employment.” These provisions of law were passed by the Democrat-controlled 95<sup>th</sup> Congress and enacted into law when President Jimmy Carter signed the Civil Service Reform Act of 1978 (CSRA) on October 13, 1978, Public Law 95-454, 92 Stat. 1111.

Chapter 71 does *not* cover all Federal employees, however. There are various reasons that an employee may not be covered, but many employees engaged in the work of national security (or related work) are *not* covered, and the law gives a President the power to exclude other employees who are not now excluded.

**The Roots of Current Law - Executive Action of Presidents Kennedy, Nixon, and Carter.** The statutory law goes back to 1978. However, before Congress acted, Presidents Kennedy and Nixon had acted unilaterally to extend bargaining rights to Federal employees. The most direct ancestor for CSRA was President Kennedy’s Executive Order 10988 of January 17, 1962. Much of the language and many of the concepts of CSRA can be traced to that order.

Section 16 of President Kennedy’s executive order read, “This order . . . shall not apply to the Federal Bureau of Investigation, the Central Intelligence Agency, or any other agency, or to any office, bureau or entity within an agency, primarily performing intelligence, investigative, or security functions if

the head of the agency determines that the provisions of this order cannot be applied in a manner consistent with national security requirements and considerations. . . .”

President Kennedy’s executive order was based on the recommendations of a distinguished six-member task force chaired by then-Secretary of Labor, Arthur J. Goldberg. That task force also urged an exception for national security work. Its report (titled *A Policy for Employee-Management Cooperation in the Federal Service*) said, “While these [general principles that the task force recommended] should be regarded as government-wide standards, the Task Force recognizes that investigatory and intelligence units present special problems in this field. The same standards cannot always be applied to these organizations as to others in the Government.”

This statement from the “Goldberg Commission” is the best rationale for the national security exemption that we have found. The felt need for such an exemption seems to have been so widely acknowledged that no extended argument was ever necessary.

In 1969, President Nixon repealed the Kennedy order but recodified and expanded the rules and procedures for labor - management relations in the Federal service. That order also contained an exception for agencies and offices doing national security work, and allowed the head of the agency to invoke the exception. Executive Order No. 11491, §3(b), 3 C.F.R. §861 (1966-1970) (issued Oct. 29, 1969).

The current statute was signed by President Carter. He concurred with the language that the House and Senate presented to him, but he did not have to be persuaded that a President needed authority to exempt agencies or offices because of national security considerations. Section 101(a)-“2301(a)(2)” of his own bill, which he had sent to Congress earlier in 1978, also contained an exemption for national security work.

## **II. How 5 U.S.C. §7103(b) Works**

As pointed out above, Chapter 71 does *not* cover *all* Federal employees, and one of the important groups that are exempted are workers engaged in the work of national security (or related work). Generally, there are four ways in which such employees are (or can be) excluded:

**First**, Foreign Service employees who work in the Departments of State, Commerce, or Agriculture, or at AID or the International Communication Agency are excluded from the statute’s definition of “employee” and are not covered. 5 U.S.C. §7103(a)(2)(iv); see also, 22 U.S.C. §4103.

**Second**, the statute excludes all employees in the departments of (A) the General Accounting Office (3,247 employees); (B) the Federal Bureau of Investigation (25,952 employees); (C) the Central Intelligence Agency (number of employees classified);

(D) the National Security Agency (number of employees classified); (E) the Tennessee Valley Authority (13,430 employees); (F) the Federal Labor Relations Authority and (G) the Federal Service Impasses Panel (combined 184 employees); and (H) the United States Secret Service and the United States Secret Service Uniformed Division (combined 5,232 employees). 5 U.S.C. § 7103(a)(3).

**Third**, the statute allows the President unilaterally to exclude other agencies and offices. For agencies and operations within the United States, section 7103(b)(1) empowers the President to “issue an order excluding any agency or subdivision thereof from coverage under [Chapter 71] 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 [Chapter 71] cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.”

*This provision is the subject of this paper and the key to a President’s national security powers with respect to labor-management relations; it is the provision that the Lieberman Amendment changes and diminishes.*

The **fourth** way is found in section 7112(b)(6) which provides that no bargaining unit shall include “any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security.” This provision *also is substantially changed and diminished by the Lieberman Amendment*, see subparagraphs 187(f)(1)(B), (1)(C), and (1)(D)(ii) of the amendment. However, these provisions – although highly important to the current debate – are not addressed in this paper because they are not directly related to presidential power.

**The Use of Current Law by Presidents Carter, Reagan, Bush, Clinton, and Bush.**

*Beginning with President Carter himself, every President has exercised his power under section 7103(b)(1), and today there are dozens of offices and agencies that have been excluded from Chapter 71 by order of the Chief Executive.* The exclusions have been made by executive order, and the sum of the presidential exclusions appear in Executive Order No. 12171, as amended, reprinted at 5 U.S.C.A. §7103 note. Table 1, which was prepared by RPC and appears on the next page, shows the number of subparts of that executive order that are attributable to each President.

**Table 1.**  
**Exclusions From the Federal Labor-Management Relations Program**  
**That Have Been Made by Presidents Under Authority of 5 U.S.C. 7103(b)(1),**  
**Listed by President, Department or Agency,**  
**And Number of Subsections in Executive Order 12171, As Amended**

Department or Agency	Carter (1 e.o.)	Reagan (5 e.o.'s)	Bush-41 (3 e.o.'s)	Clinton (1 e.o.)	Bush-43 (1 e.o.)
GSA	1				
Library of Congress	1				
Treasury	8				
Army	6				
Navy	8			+1	
Air Force	15	+2			
Defense Intelligence (all)	1				
Defense Investigative (all)	1				
Justice	1	+1			+5
Energy	1	+1			
AID	4				
Joint Chiefs of Staff		+22			
FAA			+2		
FEMA			+20		
Defense Mapping (all)			+1		
DEA-outside U.S. (§(b)(2))	1				
Totals	48	+26	+23	+1	+5

Note: The numbers in Table 1 are derived from Executive Order No. 12171, as amended, reprinted at 5 U.S.C.A. §7103 note, and the texts of the 11 individual executive orders that are cited there (from Nov. 1979 through Jan. 2002). The table shows subsections of the Executive Order. A subsection may encompass thousands of employees and more than one office or one relatively small office. The “plus signs” indicate that each President after Mr. Carter added to the total number of sections in the order. The numbers in the chart differ slightly from counts that have been made by others, but keep in mind that this chart shows *subsections* of the executive order, not offices affected.

### **III. The Presidential Prerogative Has Been Challenged by Unions**

The statute clearly gives the Chief Executive unilateral authority to exclude an agency or office “if the President determines that” the agency or office has national security work “as a primary function” and the labor - management provisions of Title 5 “cannot be applied” to it “consistent with national security requirements and considerations.” Nevertheless, both Republican and Democratic Presidents have had to defend these unambiguous powers on at least three occasions in the courts; in each case, the American Federation of Government Employees was the complaining party.

In 1980, the American Federation of Government Employees (AFGE) tried to overturn President Carter’s determination under 5 U.S.C. §7301(b)(1) that the Criminal Enforcement Division of BATF should be excluded from the labor-management provisions of Chapter 71. The union’s rationale is not clear from the reported decision, but it appears that the union simply disagreed with the President’s determination regarding national security. The Federal Labor Relations Authority held that the President’s action had divested the Authority of jurisdiction, and it dismissed the union’s complaint. *U.S. Dept. of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, Boston District Office, Criminal Enforcement Division and American Federation of Gov’t Employees*, 3 FLRA 30 (No. 4) (1980).

In 1987, AFGE tried again, and it actually succeeded in having a Federal district court declare that President Reagan’s Executive Order No. 12559 was “invalid” because it didn’t follow what the court understood to be the technical requirements of 5 U.S.C. §7103(b)(1). *American Federation of Government Employees v. Reagan*, 665 F. Supp. 31 (D.D.C. 1987), reversed by American Federation of Government Employees v. Reagan, 870 F.2d 723 (D.C. Cir. 1989) (Wald, C.J., and Robinson and Starr, JJ.). Amazingly, the union challenged the President’s underlying determination that U.S. Marshals are engaged in protecting the national security. *Id.* at 725 n. 7. The union wanted the court to second-guess the President’s determination even though the statute gives exclusive power to the President.

Notwithstanding its two losses and the lack of legal merits, the AFGE keeps trying. This year, the union again challenged the President’s prerogatives. On January 7, 2002, President Bush signed Executive Order No. 13252 and thereby excluded five subdivisions of the Department of Justice from the operation of the labor-management provisions of Chapter 71. As all Presidents have done, President Bush’s order cited both his constitutional authority and his authority under 5 U.S.C. §7103(b)(1). The Administration was sued, and once again the Federal Labor Relations Authority held that it had no jurisdiction and dismissed the case. *United States Attorney’s Office, Southern District of Texas, Houston, Texas and American Federation of Government Employees Local 3966*, 57 FLRA 750 (No. 163) (April 25, 2002), 2002 WL 793197.

#### **IV. The President's Powers in the Homeland Security Bills Of the Senate and the House of Representatives**

**The President's National Security Prerogatives Will Be Cut Back By the Lieberman Amendment, and President Bush Strongly Opposes Such Changes.** The Senate language guts the President's prerogatives under 5 U.S.C. §7103(b)(1) for the new Department, and that language is totally unacceptable to the President. In the official Statement of Administration Policy on the Senate's Homeland Security Bill (issued September 3, 2002), the Office of Management and Budget says that "*the President will not sign the bill unless the new restrictions on the President's existing national security authorities are removed. . . .*"

A month ago, Governor Ridge, the President's Homeland Security Advisor, told the Senate Majority Leader that he (Ridge) would have to recommend a veto if the Lieberman amendment were presented to the President. Among other things, Governor Ridge objected to changes in Section 7103. He said:

"[The Lieberman Amendment] would significantly restrict the President's long-standing authority to exempt from the operation of the Federal Labor Relations Management Act particular agencies involved in important intelligence, investigative, or national security work, when necessary to protect national security. These vital authorities have been used with care and restraint by every President since Jimmy Carter. Any such limitation or impairment of the President's existing authority would be unwise and inconsistent in an Act establishing a Department whose primary mission is to protect the homeland against terrorist attack." Letter to Sen. Thomas Daschle from Gov. Tom Ridge, Aug. 1, 2002.

A bill creating a vast, new department charged with protecting the security of the American homeland seems a strange (and a wrong) place to diminish a presidential prerogative that has existed for decades. Nevertheless, that is the place that has been chosen by the authors of the Lieberman Amendment.

**The Details of the Lieberman Amendment.** What does the Lieberman Amendment do? Subparagraph 187(f)(1)(A) contains the key provision, and *it eviscerates the President's powers in breathtaking ways*. It reads as follows:

"The Department, or a subdivision of the Department, that includes an entity or organizational unit, or subdivision thereof, transferred under this Act, or performs functions transferred under this Act shall not be excluded from coverage of chapter 71 of title 5, United States Code, as a result of any order issued under section 7103(b)(1) of title 5, United States Code, after July 19, 2002."

Section 187 of the Lieberman Amendment contains some of the most opaque legislative language ever seen, but it appears that subparagraph 187(f)(1)(A) means the following:

First, an “entity or organizational unit or subdivision thereof” that is *transferred into* the Department of Homeland Security is shielded from a President’s power under 5 U.S.C. §7103(b).

Second, an “entity or organizational unit or subdivision thereof,” that *performs functions* that were transferred to DHS under the Act is shielded from a President’s power under 5 U.S.C. §7103(b).

Third, the *entire* “Department or a subdivision of the Department” that *includes a transferred entity or an entity that performs a transferred function* is shielded from the President’s power under 5 U.S.C. §7103(b).

In sum, under the provisions of the Lieberman Amendment, an entity that comes into the Department without having formerly been excluded under Section 7103(b) can never be excluded – and any office or agency that includes such an entity can never be excluded. A President will have less discretion over DHS than over any other department of the Federal Government. Subparagraph 187(f)(1)(A) would be unacceptable to any President who cares about the prerogatives of the Executive Branch.

If there are any entities not covered by the foregoing provisions (*i.e.*, newly created offices that are not performing a transferred function), then the President may invoke 5 U.S.C. §7103(b), but he must use a new test that is set out in subparagraph 187(f)(1)(D)(i). The Lieberman Amendment just won’t leave the current law alone. First, it voids the current law for all transferred offices and functions, and then it changes and constricts current law for any newly created offices or agencies.

The new test of 187(f)(1)(D)(i) also may abolish the President’s *unilateral* authority to issue an efficacious order under Section 7103(b). Under current law, the President may issue an order “if the President determines that the agency or subdivision” meets the two statutory tests. Under the Lieberman Amendment’s language in subparagraph 187(f)(1)(D)(i), “a subdivision *shall not be excluded* from coverage under chapter 71 of title 5 . . . *unless*” the old and new statutory tests are met. This change may have been intended to set the stage for judicial review of a presidential order.

**What Did the House of Representatives Do?** In the House-passed bill, there are provisions that are similar to the provisions of the Lieberman Amendment, but the House added “a safety valve” that protects a President’s prerogatives (while adding somewhat to his burdens). Nevertheless, *the House language is said to be acceptable to the President.*

Under the House bill, the Lieberman-like changes in the law “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.” H.R. 5005, Section 762(c), as passed by the House on July 26, 2002.

In fact, as explained by Representative Shays, the House bill makes the President take one *additional* step. Under the House-passed language, to exclude an agency or subdivision from the provisions of Chapter 71 of Title 5, a President must make the two determinations required by 5 U.S.C. §7301(b)(1), and then he must “determine in writing that such application would have a substantial adverse impact on the Department’s ability to protect homeland security.”

The “safety valve” of the House bill was part of the Shays Amendment No. 17 which the House adopted by vote of 229 to 201. 148 Congressional Record H5800-5804 (daily ed. July 26, 2002). The Morella Amendment No. 18, which did not contain a “safety valve” but otherwise was identical to the Shays amendment, failed by vote of 208 to 222. *Id.* at H5804-5809. In urging his amendment, Representative Shays said:

“[T]his amendment is a matter of absolute national security. In creating the Department of Homeland Security, it would be dangerous to leave the President with less authority to act in the interest of national security than he has under current law. Management powers afforded every President since Jimmy Carter must be available to this President and to future Presidents to preserve the safety and defend the security of this great Nation.” *Id.* at H5801.

## **V. What Difference Does It All Make?**

Does any of this make a difference, or is it just so much legalistic (or political) wrangling as the fate of the Nation hangs in the balance?

Clicking [http://www.flra.gov/decisions/v57/v57\\_end.html](http://www.flra.gov/decisions/v57/v57_end.html) will take one to the site for recent decisions of the Federal Labor Relations Authority (FLRA). It is the FLRA that decides disputes between Federal employers and Federal employees (and their unions) over terms and conditions of employment. The disputes are numerous and varied, but here are typical examples:

- A dispute over discontinuing a night shift and reassigning employees.
- A dispute over the failure to select an employee for a new position.
- A dispute over a change to work schedules that included a 30-minute unpaid lunch time.
- A dispute over the number of union representatives that could attend a grievance hearing.
- A dispute over the responsibility of nurses for ensuring that patients don’t leave a hospital.
- A dispute over a refusal to grant a request for advance sick leave.
- A dispute over a wage differential for night-shift work.
- A dispute over which employees were in a bargaining unit after a reorganization.
- A dispute over a plan that was intended to improve a poor worker’s performance.

Presumably, each of these disputes was important to the affected worker and his union. We all must recognize, however – as Congress and Presidents have recognized in the past – that these sorts of

disputes – and the bargaining back and forth over how best to resolve them – can get in the way of the demanding and essential work of intelligence and counterintelligence, investigation, and national security. Here’s one concrete example; many others are available:

In 1995, the Immigration and Naturalization Service began putting together a new, unified policy for the “performance of body searches by [Border Patrol] Officers in the field.” “Border Patrol Officers are responsible for detecting, apprehending and processing those individuals who enter the United States illegally, and routinely search such individuals incident to their arrest because some who enter this country illegally conceal knives, razor blades, or other weapons in their clothing or on their persons.” The INS and union bargained over a new policy, but the INS eventually issued a new policy unilaterally in May 1997. The union filed a complaint because it had not agreed to the new policy. See, *U.S. Dept. of Justice, Immigration and Naturalization Service, Washington, D.C., and American Federation of Government Employees, National Border Patrol Council*, 56 FLRA 362 (1999) (administrative law judge).

The complaint was filed in November 1997 and a hearing was held in October 1998. At the hearing, *both parties agreed that* the INS had

“the right under § 6(a)(1) of the Statute to determine its internal security practices, and it exercised that right when it promulgated its body search policy. That is, the body search policy was a plan to secure or safeguard its personnel, physical property and/or operations against internal and external risks by issuing a formal policy designed to protect INS employees from physical harm and financial liability by prescribing when and how they should conduct body searches of individuals suspected of illegal entry into the United States. Respondent also was acting to protect its operations from lawsuits against INS for alleged violations of individuals’ constitutional rights arising from their detention and body searches. [The INS] has established a reasonable connection between the goal of safeguarding its personnel and operations and the practice designed to implement that goal. . . .” *Id.* at “Conclusions” part “B” ¶ 1.

Nevertheless, the union filed a charge against the INS because the agency didn’t fully “notify and negotiate with” the union over this change in “working conditions.”

The administrative law judge found for the union, as did the Federal Labor Relations Authority (FLRA). When the FLRA described the procedural situation of the case in its opinion of May 2000 (three years after the policy was issued), it said:

“This Unfair Labor Practice case is before the Authority on exceptions to the decision of the Administrative Law Judge filed by the Respondent [the INS], and cross-exceptions filed by the Charging Party [the Union]. The General Counsel filed an opposition to the Respondent’s exceptions. The Charging Party also filed an opposition to the Respondent’s exceptions, and the Respondent filed an opposition to the Charging Party’s cross-exceptions.” *U.S. Dept. of Justice, Immigration and Naturalization Service, Washington, D.C., and American Federation of Government Employees, National Border Patrol Council*, 56 FLRA 351 (No. 50) (2000).

**Now, the question is . . . is this any way to wage a war against terrorism? It might be, but only if Osama bin Laden were a law-abiding labor lawyer rather than a mass murderer and terrorist who has vowed to strike us again.**

If we are at war, and Congress and the President have said we are, then the Department of Homeland Security ought to be empowered to fight that war with such tools as will enable it to win – decisively and swiftly. A President may decide that some parts of DHS ought to be waging the war on terrorism rather than haggling over cross-exceptions to exceptions to complaints that are based only on the Department’s unwillingness to continue to debate and bicker when action clearly is called for.

The House gave the President less than he asked for, but he’s willing to fight with the tools the House provided. The Lieberman Amendment, on the other hand, proposes to take away tools that the President already can employ.

The presidential authority discussed in this paper belongs to the President of the United States – whoever he is. It does not belong to President Bush (or, if it does, it is only temporarily). This authority has been exercised by Mr. Bush’s predecessors and it will be claimed and exercised by his successors, whoever, and of whatever party or persuasion, they may be – unless the Lieberman Amendment strips this President and future Presidents of that long-standing prerogative.

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