

The Battle Over Employee Rights to Unionize and Bargain Collectively in The Department of Homeland Security:

**Necessary to Prevent Political Pretext or More Red Tape from the Cesspool of
Bureaucratic Politics?**

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Intro

When the Homeland Security Act of 2002 (HSA) was introduced to Congress, it was met with much resistance. One of the major issues which held up the passage of the HSA was whether the president should have broad discretion in creating a labor management system and whether to exclude employees from unionizing in the department of homeland security. This paper examines the turmoil created over this issue by first examining the position of the Bush administration and the Republican members of Congress. The paper then moves on to look at the position and opinions of the Democratic members of Congress. In both sections, I examine the reason behind the perspective of the party. I then explain why some members of the party feel the opposing party was turning this issue into a stalemate. From there, the paper then goes on to explore the union views and perspectives. The paper concludes by looking at the aftermath of the HSA. I look at the legal issues surrounding the passage of the bill. I then close the paper by engaging in a discussion on how the HSA is the precursor for continued debate on reforming the entire civil service system.

Perspective of the Republican Party¹ on the Exclusion of the Right to Unionize and Bargain Collectively in the Department of Homeland Security

Bush Administration

The President

When it was agreed that the best approach was to create a new department, the position of the Bush Administration has always been that the labor management system at the DHS must be “flexible” in order to manage the department effectively². The Administration believed that in order to protect the homeland, they need the authority to “put the right person in the right place at the right time”.³ In their view, the current procedures laid out in the civil service system are inefficient in the management of labor; they place an undue burden on management’s ability to manage the department effectively and efficiently.⁴ “The enemy doesn’t care about these rules,” Bush said. “The Senate does and it bothers me”⁵. Bush iterated to Congress that if he was not given the flexibility he asked for, he would not be able to effectively protect the homeland⁶. He threatened to veto “any plan which has a thick book of bureaucratic rules all aimed at protecting special interests”⁷. Bush criticized the senate stating that they were more

¹ The position of Republicans on this issue was fairly straight down party lines. There were a few Republicans that were more supportive of a compromise but the Republicans stuck together and voted as a party. (Example: Senator Arlen Specter (R-PA) sided with the Democrats on this issue)

² Tom Ranstack. “Unionization of Department of Homeland Security Sparks Legislative Debate”. [Knight Rider Tribune Business News](#). September 10, 2002. Online. [Proquest](#), at 1

³ “Bush Continues Campaign for DHS Flexibility”. [Federal Human Resources Week](#). Vol. 9, No. 19. August 26, 2002. Online. [LexisNexis Academic](#), at 1

⁴ Christopher Lee and Stephen Barr. “New Agency, New Rules – and a Cost; Bush Gets Management Freedom, and a Measure of Mistrust Among Workers”. [The Washington Post](#). Page A31. November 14, 2002. Online. [LexisNexis Academic](#), at 1-2

⁵ Associated Press. “Battle for Homeland Security Bill”. September 26, 2002. [Fox News Channel](#). www.foxnews.com/printer_friendly_story/0,3566,64179,00.html, at 1

⁶ “Bush Continues Campaign for DHS Flexibility”, supra note 3, at 1

⁷ “Bush Continues Campaign for DHS Flexibility”, supra note 3, at 1

worried about their “‘political turf and jurisdictional turf,’ rather than creating a department to protect American lives”⁸.

Bush said that the DHS needs the ability to pay people according to their accomplishments on the job and that employees need to be held accountable for their actions, whether they are good or bad⁹. In holding employees accountable, the Administration will not accept the idea that individuals in important security positions could walk off of the job because of a labor dispute.¹⁰ The Administration also claims that it will need the flexibility to shift people around in order to keep up with the ever-changing threat of terrorism¹¹. Kay Coles James, director of the Office of Personnel Management, “warned against ‘well-meaning people’ who ‘cling to the old systems’ that could have unintended consequences for national security.”¹²

Bush criticized Congress for holding up passage of the bill over protections for union employees.¹³ He urged Congress to take action because every day that the issue was debated was another day that an attack could occur on the homeland; the department needed to be created with urgent haste in order to provide security to the American people.¹⁴ “‘The reality is, to put this thing together and to put it (together) quick, which is what America expects us to do, we’re going to run into unforeseen management challenges,’ said Mark Holman, Ridge’s longtime chief of staff. ‘But none of that – none of that – should threaten the workers.’”¹⁵

⁸ “Bush Continues Campaign for DHS Flexibility”, supra note 3, at 1

⁹ “Bush Continues Campaign for DHS Flexibility”, supra note 3, at 1

¹⁰ “Presidential Power: Has Bush overstepped his authority in fighting terrorism?”. The CQ Researcher. Vol. 12, No. 40, November 15, 2002, at 959

¹¹ Id. at 959

¹² “AFGE Says Bush Has Needed Flexibility”. Federal Human Resources Week. Vol. 9. No. 21. September 10, 2002. Online. LexisNexis Academic, at 1

¹³ Associated Press, supra note 9, at 1

¹⁴ “Presidential Power: Has Bush overstepped his authority in fighting terrorism?”, supra note 94, at 959

¹⁵ Lara Jakes Jordan. “Homeland Security Chief Walks Fine Line Between National Defense and Labor”. The Associated Press. September 18, 2002. Online. LexisNexis Academic, at 1

Bush has made many public promises stating that he will continue to provide worker protections in the new department.¹⁶ “I’m absolutely confident and know that this department will protect federal worker’s rights. . . But I need flexibility to be able to run this department.”¹⁷ Bush has promised that workers will retain protections that will safeguard against willful discrimination and provide whistleblower protections.¹⁸ Bush officials have said that the president does not intend to encroach on the collective bargaining rights of the employees at Department of Homeland Security by using “national security” as a pretext¹⁹. The Administration states that the “mistrust stemmed, in part, from the fact that the administration offered only a vague plan in June. ‘Our proposals gave our opponents lots of room to assume the worst about our intentions,’ a senior administration official acknowledged.”²⁰

Secretary Ridge

Tom Ridge, Secretary of the Department of Homeland Security, has backed the position of the president stating, “A time of war is no time to limit the president’s ability to protect national security.”²¹ However, Ridge promised that worker’s rights will be protected and that employees will have a voice in the creation of the new labor management system.²² “We will – I will emphasize this again – we will eagerly solicit and consider advice from the men and women who work in the new department, not only about professional matters, not only about the

¹⁶ “Homeland Security: Questions & Answers”. American Federation of Government Employees. <http://www.afge.org/Index.cfm?Page=QuestionsAnswers>, at 1

¹⁷ “Bush Continues Campaign for DHS Flexibility”, supra note 7, at 1

¹⁸ “Bush Continues Campaign for DHS Flexibility”, supra note 3, at 1

¹⁹ Christopher Lee and Stephen Barr. “New Agency, New Rules – and a Cost; Bush Gets Management Freedom, and a Measure of Mistrust Among Workers”. The Washington Post. Page A31. November 14, 2002. Online. LexisNexis Academic, at 4

²⁰ *Id.* at 2

²¹ Associated Press, supra note 9, at 1

²² Stephen Barr. “Plenty of Tough Issues at New Homeland Security Department.” The Washington Post. January 21, 2003, Page B02. Online. <http://www.washingtonpost.com/ac2/wp-dyn/A1957-2003Jan20?language=printer>, at 1

new human resources management system, but also about how to improve day-to-day operations that they're involved in and have been involved in professionally for years, if not decades”²³

Ridge has been criticized by unions for supporting the president's demand for flexibility; after all, he is a former member of a union himself.²⁴ “He treated us with decency, and dignity, and respect, and was more than fair to state employees at the collective bargaining table,’ Council 13 executive director Ed Keller said commenting about his service as governor. ‘His administration hardly did anything on a unilateral basis, without setting down with the union and labor management teams’”.²⁵ According to Bill Samuel, legislative director for the AFL-CIO, Ridge has a long history of being very cooperative and friendly, at least for a republican, towards unions.²⁶ Defending Ridge, Senator Arlen Specter stated, “If the president takes Position A and he [Ridge] may feel Position b, he's going to be bound by the president”²⁷

Senate

The Republican senators supported the Bush Administration in their quest for “flexibility”. Under the current law, changes in personnel take too long to implement because of all the restrictions and procedures that management must follow.²⁸ The hiring process currently takes about five months, which includes the entire process from writing the description to interviewing the candidates.²⁹ Employees who are poor performers are given a year to improve before they are terminated and if the employee appeals the termination, that process takes an average of eighteen months.³⁰ “If the government was a company, it would go out of business

²³ Id. at 1

²⁴ Lara Jakes Jordan, supra note 15, at 2

²⁵ Id. at 2

²⁶ Jordan, supra note 15, at 2

²⁷ Jordan, supra note 15, at 2

²⁸ Ramstack, supra note 2, at 1

²⁹ Ramstack, supra note 2, at 3

³⁰ Ramstack, supra note 2, at 3

because it would be very inefficient. It is inefficient because the regulations in Title 5 do not provide management with the flexibility to manage effectively.”³¹

In the past, other agencies have been given broad authority, similar to the authority requested by the Bush Administration, to modify their labor management system.³² Given the unique demands of the agency’s workforce, The Federal Aviation Administration was granted authority in 1996 to create a new labor management system what shall “provide for greater flexibility in the hiring, training, compensation, and location of personnel”.³³ In 1998, Congress granted the Internal Revenue Service flexibility in the areas of performance evaluations, classification and pay, and adverse actions.³⁴ Many agencies have asked for title 5 waivers, not because they are interested in treating their employees unfairly, but because many dollars and much energy could be saved if all of the red tape was cut out of the civil service.³⁵

Senate Republicans believed that if a new department was to be created, the president needed the authority to run that department effectively. “I believe we’re setting ourselves up for failure if we don’t give the secretary flexibility to manage the department,’ [Senator Fred] Thompson said.”³⁶ “‘We cannot give the president a law that will not get the job done,’ said Senator Phil Gramm. ‘We can’t give him this beautiful, shiny pickup truck with no steering wheel.’”³⁷

The Republicans state that they believe employees should be protected from adverse actions by management; however, they also believe that unions can slow down the management

³¹ Tisne, Philip. Legislative Correspondent for Senator Peter Fitzgerald. Interview. Dirksen Senate Office Building. March 13, 2003 & April 11, 2003.

³² Mike Dovilla, Professional Staff Member for Senator Voinovich (R-OH). Subcommittee on Oversight of Government Management, The Federal Workforce and The District of Columbia. Interview. Hart Senate Office Building. March 13, 2003.

³³ Mike Dovilla. “Personnel Flexibilities Afforded the Federal Aviation Administration”. Work Product, at 1

³⁴ Mike Dovilla. “Personnel Flexibilities Afforded the Internal Revenue Service”. Work Produce, at 1

³⁵ Id. at 1

³⁶ Ramstack, supra note 2, at 1

³⁷ Associated Press, supra note 9, at 2

process.³⁸ A department charged with securing the nation should not be hindered in managing its employees by requiring it to follow current Title 5 provisions³⁹. To illustrate this, Senator Phil Gramm pointed out that on September 18, just one week after the attack on the Trade Center, the National Treasury Employees Union submitted a complaint involving the administration of the system that the administration uses to rate the terror threat in America.⁴⁰ Gramm said “the complaint to the Federal Labor Relations Authority showed the obstacles that unions⁴¹ can pose”⁴² The general belief of the republican party was that the department needed to be created and it needed to be created now.⁴³

Political Motivation in the Creation of the Department

Just about everything done on the Hill is politically motivated in one-way or another and the actions of Congress surrounding the passage of the HSA were no exception. The unions saw the Bush Administration as a “union buster” and the Democrats were not completely convinced that the president should have as much authority over the labor management system as he was requesting.⁴⁴ Republicans believed that the Democrats arguments against the bill had little merit as they were attempting to change laws which have existed for over forty years.⁴⁵

The view of some Republicans is that the Democrats used this issue as a political stunt to gain support for the upcoming elections as many of the large contributors to the Democratic

³⁸ Tisne, supra note 31

³⁹ Tisne, supra note 31

⁴⁰ Associated Press, supra note 9, at 2

⁴¹ The union president states that the complaint was filed to remind the Customs Service that the union is to be briefed in advance about changes affecting its members and the example given by Gramm is exacerbates the reality of the situation. Associated Press, supra note 9, at 2.

⁴² Associated Press, supra note 9, at 2

⁴³ “Senate Votes Cloture, Then Handily Passes Homeland Security Bill”. Senate NAICS:921120. Vol. 58. Issue 47. Page 23. December 23, 2002. Online. Proquest, at 1

⁴⁴ Dovilla, supra note 32

⁴⁵ Dovilla, supra note 32

Party have ties to unions.⁴⁶ A possible theory is that the Democrats fought hard for union rights in hopes that the unions would “repay” them through contributions to their campaign fund.⁴⁷ Much to the surprise of Dovilla, who believed that the labor management issue would be another boring and straightforward section in the bill, the right to unionize became a major issue held up the passage of the HSA.⁴⁸

Republicans have also criticized Senator Joseph Lieberman for using this bill to gain him public relations for his presidential campaign.⁴⁹ “At the time this bill was being considered, Lieberman had not announced that he was running for office,” Michael Dovilla said. “However, everyone knew that he was going to run.”⁵⁰ Lieberman pulled hard in order to bring the bill before committee on which he is the ranking member, the Committee on Governmental Affairs.⁵¹ The bill should not have technically gone to this committee; however, the authority of the committee was written broadly enough that it allowed this bill to come before the committee.⁵² Dovilla believes that Lieberman used his position on this bill in order to gain a public relations wild card that he can pull out when campaigning for the presidency.⁵³

⁴⁶ Dovilla, supra note 32 and Tisne, supra note 31

⁴⁷ Dovilla, supra note 32

⁴⁸ Dovilla, supra note 32

⁴⁹ Dovilla, supra note 32

⁵⁰ Dovilla, supra note 32

⁵¹ Dovilla, supra note 32

⁵² Dovilla, supra note 32

⁵³ Dovilla, supra note 32

Perspective of the Democratic Party on the Exclusion of the Rights to Unionize and Bargain Collective in the Department of Homeland Security⁵⁴

Senate

The Democrats in the Senate were not completely supportive of the House version of the Homeland Security Act of 2002 because they felt that employees at the DHS needed to be afforded worker protections.⁵⁵ They criticized the bill saying that it was hastily thrown together.⁵⁶ Senator Robert Byrd said, “Senators feel that they are under great pressure from the administration to pass this bill that is before us [sic] bill that contains 484-pages.’ . . . ‘Here it is. This 484-page bill that was passed by the House of Representatives – a new bill, passed by the House quickly, without adequate debate, dumped into the laps of senators.’”⁵⁷

One of the main issues the Democrats had with the bill was the fact that the Department of Homeland Security is going to be massive⁵⁸ and that employees of some of these agencies are union employees and have been union employees for many years.⁵⁹ With the president asking for flexibility, including the right to suspend collective bargaining, the fear was that the president could use “national security” as a pretext to effectively deny thousands of employees the right to collective bargaining.⁶⁰ Employees needed to be protected as they “deserve the right to

⁵⁴ The Democratic Party stuck together and resisted the Republicans on this issue. Some members of the party were more willing to give up more in order to reach a compromise, but the issue as a whole fell along party lines. (Example: Senator Zell Miller (D-GA) sided with the Republicans on this issue)

⁵⁵ “Senate Democrats, Unions Push for Workplace Protections”. Federal Human Resources Week. Vol. 9. No. 17. August 12, 2002. Online. LexisNexis Academic, at 1

⁵⁶ “Senate Votes Cloture, Then Handily Passes Homeland Security Bill”. Senate NAICS: 921120. Vol. 58. Issue 47. December 23, 2002. Online. Proquest, at 1

⁵⁷ *Id.* at 1

⁵⁸ Scott Payne, Legislative Correspondent for Senator John Breaux (D-LA). Interview. Hart Senate Office Building. April 4, 2003

⁵⁹ *Id.*

⁶⁰ *Id.*

collective bargaining, a fair grievance system, equitable pay and protection from retaliation for disclosing waste, fraud and abuse,” said Senator Daniel Akaka (D-HI).⁶¹

The Democratic Party felt that the right to bargain collectively was one of great importance. One of the reasons that the Civil Service Reform Act was enacted was to get rid of the spoils system in the Civil Service and insure that employees would be treated professionally rather than politically.⁶² Senator Barbara Mikulski rose in opposition of the Bush Administration stating that the “core freedoms of federal workers” needed to be preserved.⁶³ “Removing the collective bargaining rights of unions would expose federal agencies to corruption and politicization. By doing this, Bush would be taking a step away from democracy and everything that the department of Homeland Security strives to protect.”⁶⁴ Steny Hoyer (D-MD), a supporter of the civil service, has always believed, “the Bush administration’s stance on homeland security management flexibilities was ‘a rubric’ for achieving a goal of stripping away federal employee rights”.⁶⁵

The Democrats attempted to make sure it was well known that the issue at stake was to protect DHS employee rights and not because they did not think that the creation of the DHS was important.⁶⁶ The thing that really bothered Senator Lieberman, along with many other Democratic Senators, was why the right to bargain collectively should be denied whenever the jobs of those union employees will not change.⁶⁷ He did not understand by just moving them into a department with the word “security” in its title justified using “national security” as a

⁶¹ Stephen Barr. “Plenty of Tough Issues at New Homeland Security Department”. The Washington Post. Page B02, January 21, 2003. Online. <http://www.washingtonpost.com/ac2/wp-dyn/A19575-2003Jan20?language=printer>, at 1

⁶² Payne, supra note 58

⁶³ “Senate Democrats, Unions Push for Workplace Protections”, supra note 55, at 1-2

⁶⁴ Jennifer Lozano. “Bush Should Compromise to Pass Security Bill”. The Battalion. September 23, 2002. Online. LexisNexis Academic, at 2

⁶⁵ “AFGE Says Bush Has Needed Flexibility”. Federal Human Resources Week. Vol. 9, No. 21. September 10, 2002. Online. LexisNexis Academic, at 2

⁶⁶ Payne, supra note 58

⁶⁷ “Senate Democrats, Unions Push for Workplace Protections”, supra note 55, at 1

reason for excluding them from collective bargaining.⁶⁸ “‘Union rights aren’t the problem here,’ Lieberman said. ‘Those who seek to strip away workers’ security under the pretense of homeland security are the problem’”.⁶⁹

Some Democrats believed the president should have the authority to abrogate the right to collective bargaining; however, the employees should also have the opportunity to make the case that they do not deal with national security issues and should retain collective bargaining rights.⁷⁰ Senator Breaux states “‘if you transfer 40,000 people to a new department and immediately take away their collective bargaining rights because of national security, that may be necessary, but at least the workers ought to have the opportunity to make their case that they’re not part of a national security enterprise. And that’s all we’re asking for.’”⁷¹

The issue of collective bargaining was important to resolve, as it was one of the last things that was holding up the passage of this bill.⁷² The Senate agreed with 85 to 90 percent of the version of the bill that was supported by the administration.⁷³ Senator Breaux sponsored a compromise amendment in an attempt to settle this issue so that the bill could be passed.⁷⁴ The amendment essentially gave the president everything that he wanted as he retained the right to remove the right to bargain collectively from units if it was in the interest of national security.⁷⁵ The added provision was that this suspension was reviewable; however, the president had control over the review process, as he would be given the authority to appoint the panel that would be

⁶⁸ “Senate Democrats, Unions Push for Workplace Protections”, supra note 55, at 1

⁶⁹ “Senate Democrats, Unions Push for Workplace Protections”, supra note 55, at 1

⁷⁰ Payne, supra note 58

⁷¹ “Media Stakeout With Senator John Breaux After Meeting With President Bush”. Federal News Service. September 18, 2002. Online. LexisNexis Academic, at 2

⁷² Philip Tisne, Legislative Correspondent for Senator Peter Fitzgerald (R-IL). Interview. Dirksen Senate Office Building. March 13, 2003

⁷³ Lozano, supra note 64, at 2

⁷⁴ Payne, supra note 58

⁷⁵ Payne, supra note 58

hearing the challenges of the suspension.⁷⁶ This amendment contained “relatively minor changes intended only to provide employees a minimal level of protection against the loss of hard-won union rights.”⁷⁷ This compromise failed by a vote that was mostly down party lines.⁷⁸

Political Motivation in the Creation of the Department

The view of the Democrats is that politics played into some of the motivation in the passage of this bill. Both sides stood firm and refused to budge until the bill was finally passed on November 19, 2002.⁷⁹ The Republicans were shouting “national security” and they kept reiterating the fact that this department is needed to protect the American people.⁸⁰ The spin that the Republicans tried to put on the issue was that the Democrats were against securing the homeland.⁸¹ The Republicans tried to make themselves out to be the good guys because they were the ones that were fighting for the safety of America.⁸²

The Republican Party was able to use the issues surrounding the passage of the HSA to take seats away from the Democrats in the Senate.⁸³ Senator Max Cleland lost his seat in the 2002 elections because he stood up for employee rights and resisted pressure from the Republicans to pass this bill.⁸⁴ The Republican Party responded by spending tremendous amounts of campaigning efforts in to labeling him as “unpatriotic” because he did not support

⁷⁶ Payne, supra note 58

⁷⁷ Associated Press. “Battle for Homeland Security Bill”. September 26, 2002. [Fox News Channel](http://www.foxnews.com/printer_friendly_story/0,3566,64179,00.html). www.foxnews.com/printer_friendly_story/0,3566,64179,00.html, at 2

⁷⁸ Payne, supra note 58

⁷⁹ “Senate Votes Cloture, Then Handily Passes Homeland Security Bill”, supra note 56, at 2

⁸⁰ Payne, supra note 58

⁸¹ Payne, supra note 58

⁸² Payne, supra note 58

⁸³ Payne, supra note 58

⁸⁴ Barr, supra note 61, at 2

national security⁸⁵. Even though such was not the case, the Republicans successfully used the stereotype to remove him from office.⁸⁶

Scott Payne believes that this issue is a wonderful example of how political parties can take an issue and turn it into a campaign advertisement. He believes that the Democrats suffered a blow in the last election because the Republicans were able to take this issue and portray it in a way that it supported their party.⁸⁷ “The Republicans did an excellent job of taking a largely Democratic issue, turning it into a Republican issue, and then beating the Democrats over the head with it.”⁸⁸ The Democrats felt that after losing seats because of this issue, it was time to move on; enough had given up hope to provide the necessary sixty votes to invoke cloture and pass the bill.⁸⁹

Payne states that the Republicans were crafty even before the elections approached. Shortly after the attack on the World Trade Center, an FBI agent came forward and “blew the whistle” on the breakdown of communication within the FBI and that had such a breakdown not occurred, it was possible the attack could have been avoided.⁹⁰ At almost the exact same time, not believed by Payne to be a coincidence, the Bush Administration publicly announced the need for a Department of Homeland Security so that information could be easily shared and used to protect the nation.⁹¹ This is believed to be a cleverly crafted political stunt to take the heat off of the Bush Administration and the breakdown in the FBI.⁹² The stunt successfully took the fault off of the administration and placed it on the need for government reorganization.⁹³

⁸⁵ Payne, supra note 58

⁸⁶ Payne, supra note 58

⁸⁷ Payne, supra note 58

⁸⁸ Payne, supra note 58

⁸⁹ Payne, supra note 58

⁹⁰ Payne, supra note 58

⁹¹ Payne, supra note 58

⁹² Payne, supra note 58

⁹³ Payne, supra note 58

**The Perspective of the American Federation of Government Employees on
the Right to Unionize and Bargain Collectively in the Department of
Homeland Security**

The American Federation of Government Employees (AFGE) is the union that represents more than half of the union workers that will become part of the DHS.⁹⁴ Unions have been very cautious of the administration and their desire to have flexibility when dealing with employees in the DHS. Unions see the administration almost as a “union buster” and they feel that the rights of DHS workers could be compromised due to the authority that has been given to the president and management in the creation of the Department of Homeland Security.⁹⁵ “Unions currently represent more than 50,000 workers in the new department, and all 170,000 employees in the department can now be denied their rights to union representation and collective bargaining, even when they are continuing in the same job that has enjoyed union protection for more than 50 years.”⁹⁶

Part of that fear comes from the fact that in January of 2002, the president issued an order which excluded 500 employees of the Department of Justice from the right to join a union or bargain collectively⁹⁷. This exclusion not only included the attorneys who worked on issues of national security, but also the secretaries and janitors who had nothing to do with national security⁹⁸. The Administration has also denied airport security screeners and employees at the National Imagery and Mapping Agency the right to unionize⁹⁹. Given these recent actions, union members have a cause for concern with the President’s demand for flexibility to manage the

⁹⁴ Gail McCallion. “Homeland Security: Data on Employees and Unions Potentially Affected”. Congressional Research Service Report for Congress. July 29, 2002. Order Code RS21268. at CRS-3&4

⁹⁵ Michael D. Dovilla, Professional Staff Member, Subcommittee of Oversight of Government Management, The Federal Workforce, and The District of Columbia. Interview. Hart Senate Office Building. March 13, 2003.

⁹⁶ AFL-CIO Executive Council Statement. “The Relentless Assault on Federal Workers and Their Rights to Union Representation”. February 27, 2003. http://www.afge.org/Index.cfm?Page=Legislation&file=2003_02_27_AFL-CIOStatement.htm, at 1

⁹⁷ See Executive Order 13252, January 7, 2002

⁹⁸ Dovilla, *supra* note 95

⁹⁹ AFL-CIO Executive Council Statement, *supra* note 96, at 1

DHS. The Administration has effectively used the term “national security” to encroach upon the right to unionize, a right that had been afforded these employees for many years.¹⁰⁰ Such actions raise concern with unions in granting the Administration broad authority to manage employees.¹⁰¹

As one could probably assume, almost every decision made by a politician involves some political motive. In an attempt to remove the spoils system from the American government, Congress realized that “an experienced, professional and independent civil service was essential to preventing corruption, ending machine politics and saving massive amounts of tax dollars from abuse and waste”.¹⁰² Civil service protections, such as the right to join a union, were implemented so that as administrations changed, federal civil service employees would be protected from becoming victim to political games¹⁰³.

The AFGE views the position of the Bush Administration as a threat to unions.¹⁰⁴ They claim the Administration “has put each of these century-old victories [civil service protections] at risk”¹⁰⁵. Now that the Republicans control both Congress and the White House, a possible concern of the AFGE is that the Administration could assimilate its power to dismantle protections for federal employees. This fear comes from Bush’s recent order to suspend the collective bargaining rights of Justice Department employees.¹⁰⁶ Bush said he was doing so in order to prevent employees from striking; however, AFGE sees this as an absurd argument since

¹⁰⁰ Statement by American Federation of Government Employees, AFL-CIO before The House Select Committee on Homeland Security Regarding Personnel Issues in Establishing the New Department July 17, 2002 (“Statement before Committee on Homeland Security”), at 6

¹⁰¹ Dovilla, *supra* note 95

¹⁰² AFL-CIO Executive Council Statement, *supra* note 96, at 1

¹⁰³ AFL-CIO Executive Council Statement, *supra* note 96, at 1

¹⁰⁴ AFL-CIO Executive Council Statement, *supra* note 96, at 1

¹⁰⁵ AFL-CIO Executive Council Statement, *supra* note 96, at 1

¹⁰⁶ Statement before Committee on Homeland Security, *supra* note 100, at 6

Title 5 prohibits federal employees from striking.¹⁰⁷ AFGE would argue, based on the timing and recent events, as well as the fact that union representation has never raised a concern in the US Attorney's office before, that the Administration took these rights away in order to halt a union organizing drive by workers in a Miami field office¹⁰⁸. In response to the alleged attack on employee rights by the Bush Administration, The AFGE continues to fight for the right to unionize because a union provides "a responsible, accountable and effective government . . . in the interest of all workers"¹⁰⁹.

The Right to Unionize at the Department of Homeland Security

The Administration assumes that "maintaining worker's fundamental right to union representation is incompatible with the war against terror"¹¹⁰. Bobb Harnage, Executive President of the American Federation of Government Employees, states that the right to unionize did not interfere with the management of union employees at the Department of Defense during World War II, the Korean conflict, Vietnam, and the Gulf war¹¹¹. Harnage goes on to state that no one has been able to give an example where the right to unionize has interfered with maintaining national security; the Department of Defense was able to successfully wage war on other nations even though its employees were union members.¹¹² In Harnage's mind, he does not see a difference between national security and homeland security¹¹³. If unions did not interfere in the ability of the Department of Defense to wage war, then it would seem that the

¹⁰⁷ Statement before Committee on Homeland Security, supra note 100, at 6

¹⁰⁸ Statement before Committee on Homeland Security, supra note 100, at 6

¹⁰⁹ Statement before Committee on Homeland Security, supra note 100, at 7

¹¹⁰ AFL-CIO Executive Council Statement, supra note 96, at 1

¹¹¹ "'Buchanan and Press' Transcript". American Federation of Government Employees Web Page <http://www.afge.org/Index.cfm?Page=LegislativeFight&File=BuchananPress.htm>, at 1

¹¹² Id. at 1

¹¹³ Id. at 1

Department of Homeland Security could effectively protect the homeland while still allowing employees to unionize.¹¹⁴

The AFGE claims that the right to unionize and bargain collectively is important because it is critical to the success of the department.¹¹⁵ Employees have an incentive to speak out against problems with the department if the union is able to help insure that whistleblower protections, which prohibit retaliation from management against an employee who has “blown the whistle”, are observed.¹¹⁶ Mark Hall, a border patrol agent who was retaliated against for blowing the whistle on border security inadequacies, said that he would have never exposed the problem had he not been a union member with full whistleblower protection rights.¹¹⁷ In such a way, employees are the “watch dogs” for Congress and the American public ensuring that the department is being effective in protecting the homeland.¹¹⁸

Protections Afforded to Workers

Denying employees the right to unionize also calls to question the protections and provisions that employees should be afforded.¹¹⁹ Employees should be afforded their statutory protections to insure that they treated fairly in hiring and firing decisions, compensated fairly, and given protection from retaliation or adverse actions from management; however, without a union to help defend the rights of the worker, employees can be intimidated as these protections may not be enforced.¹²⁰ The Administration has expressed that they need flexibility in order to

¹¹⁴ “‘Buchanan and Press’ Transcript”, supra note 111, at 1

¹¹⁵ Statement before Committee on Homeland Security, supra note 100, at 7

¹¹⁶ Statement before Committee on Homeland Security, supra note 100, at 7

¹¹⁷ “Senate Democrats, Unions Push for Workplace Protections”. Federal Human Resources Week. Vol. 9, No. 17. August 12, 2002. Online. LexisNexis Academic, at 2

¹¹⁸ Statement before Committee on Homeland Security, supra note 100, at 5

¹¹⁹ Leland Warren, Union Representative for International Brotherhood of Electrical Workers. Telephone Interview. April 26, 2003. – Note: A representative from the AFGE could not be reached for comment. Mr. Warren does not represent the views of the AFGE; however, he stated that the fact that management pays more attention to workers who are in a union is true in both the private and public sectors.

¹²⁰ Id.

manage the workforce to efficiently defend the homeland. This flexibility has the possibility of being the demise of protections for federal employees and the reintroduction of the spoils system.

In creating a personnel system for the DHS, the Bush Administration proposed allowing the Secretary of Homeland Security “to establish a personnel management system that will be ‘flexible’, ‘contemporary’, and ‘grounded in the public employment principles of merit and fitness’”¹²¹. AFGE believes that such language gives Bush unprecedented broad authority in creating a new labor management system.¹²² AFGE views “the word ‘flexible’ as an attempt to make it easier to arbitrarily demote or dismiss federal employees. We [AFGE] view ‘contemporary’ as a code word for a mind-set that would undermine civil service’s pay, health insurance, and retirement systems, merit-based hiring, firing appeal rights, whistle-blower protection rights, and rights to organize and bargain collectively.”¹²³ AFGE believes that the Administration’s proposal is too vague and it calls to question the idea of expanding management’s authority and diminish the rights of federal employees.¹²⁴

Role of the AFGE in the Creation of the Department of Homeland Security

The AFGE strongly apposes the Bush Administration’s position on the creation of a new labor management system for the Department of Homeland Security. Their position is that stripping rights away from employees is not going to make the homeland more secure.¹²⁵ “Our security depends on the daily hard work and commitment of government workers, and when those workers have a voice at work through their union, they can be more productive, receive

¹²¹ Zall, Milt. “Diminishing Civil Service” Federal Computer Week. Vol 16, Issue 27. August 5, 2002. Online. Proquest, at 1

¹²² Statement before Committee on Homeland Security, *supra* note 100, at 1

¹²³ Statement before Committee on Homeland Security, *supra* note 100, at 1

¹²⁴ Statement before Committee on Homeland Security, *supra* note 100, at 1

¹²⁵ AFL-CIO Executive Council Statement, *supra* note 96, at 1

better training and skills enhancement and gain the recognition and rewards they deserve. This makes all of us safer.”¹²⁶ As demonstrated through their statements, the AFGE is determined to fight in order to insure that federal employees will retain their rights.

The position of AFGE is that management and the Administration already has the flexibility it needs in order to run the DHS efficiently. In their report You Already Have the Flexibility You Seek, the AFGE gives a detailed account of how the authority currently retained by management is sufficient to manage the DHS effectively. The employee protections in the Civil Service Reform Act were written in order to protect employees from political motives of the current administration.¹²⁷ The AFGE states, “federal employee protections have never jeopardized national security”.¹²⁸ In fact, the AFGE claims that just the opposite is true. If the DHS wants to hire the most qualified and efficient employees, then those employees are going to want worker protections.¹²⁹ “Only with a secure workforce – protected from politics – can our homeland be secure. Denying federal employees their basic freedoms at work will not make the U.S. safer – just less democratic”¹³⁰

Retaining workers rights may not come without a fight. Worried about possible exclusions that might be included in the new management system, Bobby Harnage sent a letter to Secretary Ridge asking for assurance that Ridge and the Administration would not use “national security” as an excuse to strip collective bargaining rights from employees who currently have that rights.¹³¹ He has also asked for assurance that employee protections would be retained by

¹²⁶ AFL-CIO Executive Council Statement, supra note 96, at 1

¹²⁷ Dovilla, supra note 95

¹²⁸ American Federation of Government Employees. You Already Have the Flexibility You Seek: A Report by the American Federation of Government Employees On the Rights of Federal Managers in Structuring The New Department of Homeland Security, at 3

¹²⁹ Id. at 3

¹³⁰ Id. at 3

¹³¹ “AFGE Letter to Governor Ridge”. American Federation of Government Employees. January 16, 2003. http://www.afge.org/Index.cfm?Page=HomelandSecurity&File=2003_01_16_Letter.htm, at 1

employees beyond the first year of the DHS's existence.¹³² Harnage requested of Ridge to not indulge in a "union-busting crusade" but to honor his commitment to federal employees.¹³³

Even though the HSA did not include all of the provisions the AFGE had hoped, there is still hope that workers will not be stripped of their rights.¹³⁴ By putting up a fight, the AFGE has successfully brought the rights of federal employees into the public view causing President Bush to make a number of public promises stating that workers will be treated fairly and given protections¹³⁵. Tom Ridge has said that he will cooperate with unions as he viewed them as a critical component to the DHS and has assured the AFGE that they will have a say in the redesign of any current laws¹³⁶.

However, some are not convinced that employee rights will actually be protected. Ridge has met with union leaders in an attempt to assure union members that their rights will be protected.¹³⁷ "The meetings with Ridge were a waste of time," said Bobby Harnage, president of the American Federation of Government Employees. . . 'He's in lockstep with the president. And although he has a good record in the past of working with unions, he's made absolutely no effort to work with unions in this case.'"¹³⁸ At this moment, it is unknown what employee protections and rights will be afforded to the employees of the new department. However, one thing is for sure; the AFGE is prepared to fight hard should the need arise to do so in order to enforce or defend worker's rights¹³⁹.

¹³² Id. at 1

¹³³ Id. at 1

¹³⁴ "Homeland Security: Questions & Answers". American Federation of Government Employees. <http://www.afge.org/Index.cfm?Page=QuestionsAnswers>, at 1

¹³⁵ Id. at 1

¹³⁶ Id. at 2

¹³⁷ Id. at 1

¹³⁸ Lara Jakes Jordan. "Homeland Security Chief Walks Fine Line Between National Defense and Labor". The Associated Press. September 18, 2002. Online. LexisNexis Academic, at 2

¹³⁹ "Homeland Security: Questions & Answers", supra note 139, at 1

The Aftermath of The Homeland Security Act of 2002

Winners and Losers – Unionization at the DHS?

Homeland Security Act

The Homeland Security Act of 2002 gives the secretary the flexibility to create new policies for hiring, firing, and promotion within the workforce; the president also retained the authority to exclude the right to collective bargaining if he/she determined that the union adversely impacts homeland security.¹⁴⁰ Before the right to unionize can be denied, the president must notify Congress of his/her intent to deny workers the right to unionize and the reasoning behind the exclusion ten days before issuing the order.¹⁴¹

The president was given one year to create the DHS; however, proponents say that such a massive government reorganization will likely take years.¹⁴² The bill requires the secretary to submit the proposed labor management structure to union representatives and allow those representatives thirty days to look over the proposal and make recommendations.¹⁴³ A White House source says that the secretary is “required to give the union representatives’ recommendations full and fair consideration”.¹⁴⁴ However, after the secretary has submitted the proposal for review, he/she is not under any statutory requirement to consider the union’s recommendations; if there is a dispute, the secretary can basically do whatever he wants after the thirty days.¹⁴⁵

¹⁴⁰ Sharon Otterman. “Senate Passes Homeland Security Bill”. United Press International. November 19, 2002. Online. LexisNexis Academic, at 2

¹⁴¹ Jake Thompson. “Bush Wins Homeland Agency OK Midlands Senators Add Their Yes Votes on the Massive New Security Department”. Omaha World Herald. Page 1a. November 20, 2002. Online. LexisNexis Academic, at 1

¹⁴² Otterman, supra note 144, at 2

¹⁴³ Michael D. Dovilla, Professional Staff Member for Senator Voinovich (R-OH), Subcommittee on Oversight of Government Management, The Federal Workforce, and The District of Columbia. Interview. March 13, 2003.

¹⁴⁴ Mitchell Prothero. “Dems Reject Bush Homeland Security Plan”. United Press International. November 12, 2002. Online. LexisNexis Academic, at 2

¹⁴⁵ Dovilla, supra note 143

Legal Issues

Employment lawyers have begun to examine the HSA to determine what rights employees at the DHS will retain.¹⁴⁶ One area where Attorneys have expressed concern is with the appeals process for workers who believe they have been unjustly fired or suspended.¹⁴⁷ The concern is that workers have been stripped of basic due-process rights “by denying them access to the administrative review system available to most federal employees”.¹⁴⁸ Currently, federal employees who feel they have been targeted by adverse disciplinary actions have the ability to appeal to the U.S. Merit Systems Protection Board (“MSPB”), an independent agency made up of 70 administrative judges who hear cases involving job termination, demotion in pay or rank and suspensions of more than 14 days.¹⁴⁹ “According to the MSPB’s annual report, the agency reversed 291, or 9 percent of the 3,160 disciplinary actions that were appealed to it in 2001.”¹⁵⁰

Employees in the new Department of Homeland Security may not be afforded the protection of the MSPB anymore.¹⁵¹ The HSA guarantees DHS employees the right to appeal to the MSPB in whistleblower cases and access to the Equal Employment Opportunity Commission to file claims involving discrimination; however, all other types of appeals are to be handled via an internal system to be created by Secretary Ridge and the director of the OPM.¹⁵² “By restricting it [employee appeals] to the in-house review, you’re going to assure in almost every case that the discipline will stand,” says Robert Atkins, an employment attorney in Berkeley, CA.¹⁵³ Mary Dryovage, a San Francisco employment attorney, states “it’s as if you [a DHS

¹⁴⁶ Alexei Oreskovic. “Employment Lawyers Study Homeland Security Act for Flaws”. Broward Daily Business Review. Vol. 44; No. 4; Pg. A9. December 12, 2002. Online. LexisNexis Academic, at 1

¹⁴⁷ Id. at 1

¹⁴⁸ Id. at 1

¹⁴⁹ Id. at 1

¹⁵⁰ Id. at 1

¹⁵¹ Id. at 1

¹⁵² Id. at 2

¹⁵³ Id. at 2

employee] were suddenly classified as a prisoner of war, when you're a valued employee of the federal government'".¹⁵⁴ The details of the appeals system at the DHS are unclear; however many employment attorneys are convinced the system will not be favorable to employees.¹⁵⁵

The Future of the Civil Service

The Department of Homeland Security

At this moment, the exact protections and rights that will be afforded to employees of the new department, other than those protections that are statutory, are unknown. A design team of sixty individuals representing perspectives of both management and employees just began conducting research on creating a new management system on April 1, 2003.¹⁵⁶ The task force will research and consider many different options and release a preliminary report in late summer or early fall.¹⁵⁷ Ridge said the design team must focus on two things when they create the new labor management system.¹⁵⁸ "The first is to protect America and our way of life, and the second is to protect the rights of employees and have a work environment that enhances the first."¹⁵⁹ He has also said that trying "to 'relieve and eliminate any anxiety' among workers is his 'first priority.'"¹⁶⁰ One thing that is for sure, both President Bush¹⁶¹ and Secretary Ridge¹⁶² have promised that "national security" will not be used as a pretext to strip workers of their

¹⁵⁴ Oreskovic, supra note 146, at 2

¹⁵⁵ Oreskovic, supra note 146, at 2

¹⁵⁶ Steven R. Cohen, Advisor on Homeland Security, Office of Personnel Management. Telephone Interview. April 4, 2003.

¹⁵⁷ Id.

¹⁵⁸ Stephen Barr. "Work Begins on Rules for New Department – and Perhaps All of Government". The Washington Post. Pg B02. April 2, 2003. Online. LexisNexis Academic, at 1-2

¹⁵⁹ Id. at 2

¹⁶⁰ Mimi Hall, "New Homeland Security Dept. Faces Challenges". USA Today. Pg. 2A. November 26, 2002. Online. LexisNexis Academic, at 2

¹⁶¹ "Bush Continues Campaign for DHS Flexibility". Federal Human Resources Week. Vol. 9, No. 19. August 26, 2002. Online. LexisNexis Academic, at 1

¹⁶² Richard Tomkins. "Ridge, Cabinet Urge Congress on Homeland". United Press International. October 15, 2002. Online. LexisNexis Academic, at 1

rights. Only time will tell what is in store for union employees at the new department and if the public promises made by Bush and Ridge will be kept.

The Government

Many individuals feel that the civil service needs to be reformed to provide a better means for managing the federal workforce. Michael Dovilla expects the DHS to be a “testing ground” for revamping the civil service system.¹⁶³ He does not expect to see major groundbreaking changes come about; however, he does feel that the management system should adapt to the department.¹⁶⁴ He feels that the civil service system should be updated as more efficient means of managing employees are introduced.¹⁶⁵

Senator George Voinovich (R-OH) plans on introducing legislation that would make it easier for other agencies to experiment with their labor management systems.¹⁶⁶ He says that allowing the DHS “to revamp its personnel and pay systems would spur other agencies, such as the Defense Department and the National Aeronautics and Space Administration, to seek similar flexibilities”.¹⁶⁷

“‘Five years from now, we will not have the current civil service system except in the far reaches of government,’ said [Paul] Light, director of the Brookings Institution’s Center for Public Service.”¹⁶⁸ Soon, other departments will be granted flexibilities similar to those given to the DHS.¹⁶⁹ Light welcomes the changes, as the civil service recruitment system has not been

¹⁶³ Dovilla, supra note 143

¹⁶⁴ Dovilla, supra note 143

¹⁶⁵ Dovilla, supra note 143

¹⁶⁶ Stephen Barr. “Flexible Pay Systems Shouldn’t be Limited to Homeland Security Agency, Voinovich Says”. The Washington Post. Page B02. December 9, 2002. Online. LexisNexis Academic, at 1

¹⁶⁷ Id. at 1

¹⁶⁸ “Light: DHS Marks ‘Beginning of the End’ of GS System”. Federal Human Resources Week. Vol. 9. No. 32. December 5, 2002. Online. LexisNexis Academic, at 1

¹⁶⁹ Id. at 1

revamped in almost 30 years.¹⁷⁰ “‘What remains to be seen now is what role Congress will play in civil service reform,’ Light said. ‘In regards to the DHS, Congress punted to the administration because they didn’t know what to do. That is not how it has traditionally been done in the past.’”¹⁷¹

Beth Moten, legislative director for the AFGE, is not as eager to jump on the bandwagon stating, “it is too soon to tell what impact the DHS legislation will have governmentwide [sic]”.¹⁷² She states that the passage of the HSA has proven that there needs to be a strong debate over revamping the civil service system.¹⁷³ Moten claims that just because the DHS has been given flexibility does not mean that the rest of the government will follow.¹⁷⁴ She goes on to state that the AFGE will strongly object to expanding labor management flexibility to other agencies.¹⁷⁵

The long-term implications of allowing the DHS to have flexibility in designing their labor management system are unknown at this time as the system is still being created. Many believe that eventually the civil service system will be reformed. Just recently Donald Rumsfeld, Secretary of Defense, sent a bill to Congress asking for the authority to have flexibility to modify the current labor management system at the Department of Defense.¹⁷⁶ Only time will tell what the future of the civil service system will look like. However, if the current trend keeps up, a government wide reorganization may be in the near future.

¹⁷⁰ Light, supra note 168, at 2

¹⁷¹ Light, supra note 168, at 2

¹⁷² Light, supra note 168, at 1

¹⁷³ Light, supra note 168, at 1

¹⁷⁴ Light, supra note 168, at 1

¹⁷⁵ Light, supra note 168, at 1

¹⁷⁶ Christopher Lee. “Rumsfeld Urges Overhaul of Pentagon Civil Service”. *The Washington Post*. Page A33. April 23, 2003. Online. <http://www.washingtonpost.com/ac2/wp-dyn/A17789-2003Apr22?language=printer>, at 1

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