

# Report for Congress

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## **Collective Bargaining and Homeland Security**

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# Collective Bargaining and Homeland Security

## Summary

This report discusses the personnel provisions of recent proposals to create a new Department of Homeland Security. H.R. 5005, the Homeland Security Act of 2002, has generated concern among some members of the labor community who have questioned the possible denial of collective bargaining rights for the estimated 170,000 employees affected by the homeland defense reorganization. S. 2452, the National Homeland Security and Combating Terrorism Act of 2002, would restrict the President's ability under 5 U.S.C. § 7103(b)(1) to exclude the new Department and transferred agencies from coverage under chapter 71 of title 5, U.S. Code.

The President's existing authority under 5 U.S.C. § 7103(b)(1) to exclude the employees of certain agencies from the ability to bargain collectively is also discussed in this report. The report provides a legislative history of this exclusion provision. In addition, the report reviews the concept of successorship, whereby a union may retain its status as the exclusive representative of employees acquired by a new employer. Successorship could be an issue for the eighteen unions that represent employees affected by the reorganization.

This report reflects legislative action up through House passage of H.R. 5005. The report will be updated as events warrant.

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# Collective Bargaining and Homeland Security

On June 18, 2002, the President transmitted to Congress his proposal to create a new Department of Homeland Security. Introduced, by request by Rep. Richard K. Arney, as H.R. 5005, the proposal has generated concern among some members of the labor community. The measure, which provides for the consolidation of twenty-two federal agencies into the new department, would allow the Secretary of Homeland Security, in regulations prescribed jointly with the Director of the Office of Personnel Management, to establish a new human resources management system for the organizational units of the department.<sup>1</sup> While Tom Ridge, Director of the White House Office of Homeland Security, maintains that the Secretary's authority to establish a new human resources management system is necessary to make the agency more agile and better able to deal with personnel challenges, at least two unions have questioned the possible denial of collective bargaining rights for the estimated 170,000 employees affected by the homeland defense reorganization.<sup>2</sup>

This report discusses the personnel provisions of H.R. 5005, the Homeland Security Act of 2002, as well as the personnel provisions of S. 2452, the National Homeland Security and Combating Terrorism Act of 2002.<sup>3</sup> On July 26, 2002, the House passed H.R. 5005 by a vote of 295-132. S. 2452 was introduced by Sen. Joseph I. Lieberman on May 2, 2002 and reported by the Senate Committee on Governmental Affairs on June 24, 2002. A substitute version of S. 2452 was filed by Sen. Lieberman on July 19, 2002. That version was amended by the Senate Committee on Governmental Affairs on July 24-25, 2002.

In addition, the report discusses the President's existing authority under 5 U.S.C. 7103(b)(1) to exclude the employees of certain agencies from the ability to bargain collectively. The report provides a legislative history of this exclusion provision. Finally, the report reviews the concept of successorship, whereby a union may retain its status as the exclusive representative of employees acquired by a new

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<sup>1</sup> H.R. 5005, 107<sup>th</sup> Cong. § 761(a)(2) (2002). For additional information on the proposed Department of Homeland Security, see CRS Report RL31493, *Homeland Security: Department Organization and Management*, by Harold C. Relyea.

<sup>2</sup> See Nick Anderson & Richard Simon, *Democrats Attack Item in Bush's Security Plan Politics*, L.A. Times, June 21, 2002, at A26; Stephan Barr, *Separate Personnel System Envisioned for Homeland Security*, Wash. Post, June 19, 2002, at B02.

<sup>3</sup> For additional discussion of the homeland security proposals and employment issues, see CRS Report RS21268, *Homeland Security: Data on Employees and Unions Potentially Affected*, by Gail McCallion; CRS Report RL31500, *Homeland Security: Human Resources Management*, by Barbara L. Schwemle.

employer. Successorship could be an issue for the eighteen unions that represent employees affected by the reorganization.

Section 761(a)(2) of H.R. 5005 would amend title 5 of the U.S. Code to add a new section on the establishment of a human resources management system for the Department of Homeland Security. Under the new section 9701(a), the Secretary of Homeland Security, in regulations prescribed jointly with the Director of the Office of Personnel Management, may “establish, and from time to time adjust, a human resources management system for some or all of the organizational units of the Department of Homeland Security.”<sup>4</sup> Section 9701(b)(3)(D) provides that the human resources management system may not waive, modify, or otherwise affect specified provisions of title 5, U.S. Code.<sup>5</sup>

Chapter 71 of title 5, which governs federal labor management relations, is not among those provisions that may not be waived, modified, or otherwise affected. This chapter identifies who may engage in collective bargaining and defines appropriate subjects of bargaining. For example, 5 U.S.C. § 7102(2) provides that each employee shall have the right to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under the chapter. The term “employee” is defined in chapter 71 to not include a supervisor or management official.<sup>6</sup> The phrase “conditions of employment” is defined to not include policies, practices, and matters “to the extent such matters are specifically provided for by Federal statute.”<sup>7</sup> Pay rates, established by chapter 53 of title 5, are generally not negotiable.

Section 9701(b)(4) provides that a new human resources management system shall ensure that employees may “organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them, subject to any exclusion from coverage or limitation on negotiability established by law.”<sup>8</sup> To the extent that the new system permits waiver of chapter 71, it would seem that restrictions on who may engage in collective bargaining and limitations on what may be negotiated, contained in or flowing from chapter 71, could be made inapplicable to the employees of the new department. Under section 9701(b)(4), it appears that employees could organize, bargain collectively, and participate in all “decisions which affect them.”

Section 9701(e) provides, with respect to any proposed human resources management system or any adjustment to such system, that the Secretary of

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<sup>4</sup> H.R. 5005, 107<sup>th</sup> Cong. § 761(a)(2) (2002).

<sup>5</sup> *Id.* Section 9701(c) identifies subparts and chapters of title 5, U.S. Code that could not be waived, modified, or otherwise affected by the new system. Subparts A, B, E, G, and H of part III of title 5, and chapters 41, 45, 47, 55, 57, 59, 72, 73, 79 could not be waived, modified, or otherwise affected. In addition, the new chapter 97 could not be waived, modified, or otherwise affected by the new system.

<sup>6</sup> 5 U.S.C. § 7103(a)(2)(B)(iii).

<sup>7</sup> 5 U.S.C. § 7103(a)(14)(C).

<sup>8</sup> H.R. 5005, 107<sup>th</sup> Cong. § 761(a)(2) (2002).

Homeland Security and Director of the Office of Personnel Management must provide a written description of the proposed system or adjustment to each employee representative, must give each representative at least 60 days to review and make recommendations, and must give any recommendations full and fair consideration in deciding whether and how to proceed with the proposal.<sup>9</sup> Before implementation of a proposal, the Secretary and Director must give each employee representative details of the decision to implement the proposal, together with the information upon which the decision was based, must give each representative an opportunity to make recommendations with respect to the proposal, and must give such recommendations full and fair consideration. If a proposal is implemented, the Secretary and Director shall develop a method for each employee representative to participate in any further planning or development which might become necessary.

The timing for the creation of a new human resources management system is not clear. Administration officials have offered no timetable for establishing the system if H.R. 5005 is enacted.<sup>10</sup> Officials have indicated that federal unions and their collective bargaining agreements would move intact to the new department.<sup>11</sup> However, after a year or so, it is expected that the Secretary and the OPM Director would begin to consider the question of union rights and representation.<sup>12</sup>

H.R. 5005 would also condition the President's ability to exclude a transferred agency or subdivision of an agency from coverage under chapter 71 of title 5. Under section 762(a)(1), an agency or subdivision could not be excluded unless its mission and responsibilities have materially changed, and a majority of the its employees have as their primary duty intelligence, counterintelligence, or investigative work directly related to terrorism investigation.<sup>13</sup> Section 762(b)(1) provides that an appropriate bargaining unit shall continue to be so recognized unless the unit's mission and responsibilities have materially changed, and a majority of its employees have as their primary duty intelligence, counterintelligence, or investigative work directly related to terrorism investigation. Under section 762(b)(2), no position or employee within an appropriate bargaining unit shall be excluded from the unit following transfer to the department unless the primary job duty of the position or employee has materially changed and now consists of intelligence, counterintelligence, or investigative work directly related to terrorism investigation.

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<sup>9</sup> *Id.*

<sup>10</sup> See Barr, *supra* note 2.

<sup>11</sup> *Id.* See H.R. 5005, 107<sup>th</sup> Cong. § 812(a)(1) (2002) (An agency's personnel actions, agreements, and contracts shall not be affected by the enactment of the Homeland Security Act of 2002 or by the transfer of such agency to the Department, but shall continue in effect until amended, modified, superseded, terminated set aside, or revoked in accordance with law by an officer of the United States, a court of competent jurisdiction, or by operation of law.).

<sup>12</sup> Barr, *supra* note 2.

<sup>13</sup> Section 762(c) does allow for avoiding this requirement: "Subsections (a), (b), and (d) of this section shall not apply in circumstances where the President determines in writing that such application would have a substantial adverse impact on the Department's ability to protect homeland security."

Under S. 2452, all recognitions of labor organizations and all collective bargaining agreements in effect at the time Division A of the National Homeland Security and Combating Terrorism Act of 2002 takes effect would continue to be enforced until modified, terminated, superseded, set aside, or revoked.<sup>14</sup> The Department, or a subdivision of the Department, including a transferred agency or subdivision, could not be excluded from coverage under chapter 71 pursuant to 5 U.S.C. § 7103(b)(1).<sup>15</sup> A transferred employee could not be excluded from an appropriate bargaining unit unless the employee's primary job duty has materially changed after the transfer, the employee's new duties consist of intelligence, counterintelligence, or investigative duties directly related to the investigation of terrorism, and it is clearly demonstrated that membership in the unit and coverage under chapter 71 cannot be applied in a manner that would not have a substantial adverse effect on national security.<sup>16</sup> An employee of the Department who is primarily engaged in carrying out a function transferred to the Department or a function substantially similar to a function so transferred could not be excluded from an appropriate unit unless the function was performed by an excluded employee prior to the transfer.<sup>17</sup>

**Exclusion From Collective Bargaining Under 5 U.S.C. § 7103(b)(1).** 5 U.S.C. § 7103(b)(1), added by the Civil Service Reform Act of 1978 ("CSRA"), authorizes the President to exclude any agency or subdivision of any agency from the ability to bargain collectively if the agency or subdivision has a primary function of intelligence, counterintelligence, investigative, or national security work, and application of the labor-management relations provisions of the CSRA cannot be applied in a manner consistent with national security requirements and considerations. Similar exclusionary language appeared in two Executive Orders that preceded the passage of the CSRA and in the civil service reform bills passed by the House and Senate prior to the enactment of the CSRA.

In 1962, Executive Order 10988 established the first federal labor-management relations policy.<sup>18</sup> Executive Order 10988 provided most employees of the federal government with the ability to "form, join, and assist any employee organization or

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<sup>14</sup> S. 2452, 107<sup>th</sup> Cong. § 187(a) (2002) (Lieberman substitute).

<sup>15</sup> S. 2452, 107<sup>th</sup> Cong. § 187(f)(1)(A) (2002) (Lieberman substitute). Under § 187(f)(1)(D)(i) of S. 2452, it appears that a new subdivision created by the Act could be excluded from coverage under chapter 71 if it has a primary function of intelligence, counterintelligence, or investigative duties directly related to terrorism investigation, and the provisions of chapter 71 cannot be applied in a manner consistent with national security.

<sup>16</sup> S. 2452, 107<sup>th</sup> Cong. § 187(f)(1)(B) (2002) (Lieberman substitute). Under § 187(f)(1)(D)(ii) of S. 2452, it appears that a new employee of the Department, subject to §§ 187(f)(1)(B) and 187(f)(1)(C) of the Act, could be excluded from an appropriate unit if the employee's primary job duty consists of intelligence, counterintelligence, or investigate duties directly related to the investigation of terrorism, and it is clearly demonstrated that membership in a unit and coverage under chapter 71 cannot be applied in a manner that would not have a substantial adverse effect on national security.

<sup>17</sup> S. 2452, 107<sup>th</sup> Cong. § 187(f)(1)(C) (2002) (Lieberman substitute).

<sup>18</sup> Exec. Order No. 10988, 3 C.F.R. 521 (1959-1963).

to refrain from any such activity.”<sup>19</sup> The Order sought to allow unions to organize in a cooperative fashion rather than create an adversarial relationship between the unions and management in the federal sector.<sup>20</sup> Executive Order 10988 included an exclusion for certain agencies:

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.<sup>21</sup>

In 1969, President Nixon revoked Executive Order 10988 and issued Executive Order 11491.<sup>22</sup> Executive Order 11491 maintained the basic principles embodied in Executive Order 10988, but also established the Federal Labor Relations Council, a central authority that made final decisions on policy questions, and created new procedures for resolving negotiation impasses. Like Executive Order 10988, Executive Order 11491 excluded certain agencies from its application.<sup>23</sup>

In 1978, the federal labor-management relations policy developed by the Executive Orders was codified by the CSRA. Prior to the enactment of the CSRA, the House and Senate passed bills that included exclusionary language that resembled the language in the Executive Orders. H.R. 11280, the House-passed version of the CSRA, included exclusionary language that is identical to the language that currently exists.<sup>24</sup> The language was offered as part of a substitute to the bill that was reported by the House Committee on Post Office and Civil Service. The reported bill would have allowed the Federal Labor Relations Authority (“FLRA”) to exclude any agency or any unit of an agency from the application of the labor-management relations provisions of the bill if the agency or unit had a primary function of intelligence, counterintelligence, investigative, or security work.<sup>25</sup> The reason for authorizing the President, rather than the FLRA, to exclude agencies from these provisions is not

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<sup>19</sup> *Id.* An “employee organization” was defined to include “any lawful association, labor organization, federation, council, or brotherhood having as a primary purpose the improvement of working conditions among Federal employees.”

<sup>20</sup> See Michael R. McMillion, *Collective Bargaining in the Federal Sector: Has the Congressional Intent Been Fulfilled?*, 127 *Mill. L. Rev.* 169, 181 (1990).

<sup>21</sup> Exec. Order 10988, § 16, 3 C.F.R. 521 (1959-1963).

<sup>22</sup> Exec. Order 11491, 3 C.F.R. 861 (1966-1970).

<sup>23</sup> See Exec. Order 11491, § 3(b), 3 C.F.R. 861 (1966-1970) (“This Order . . . does not apply to – (1) the Federal Bureau of Investigation; (2) the Central Intelligence Agency; (3) any other agency, or office, bureau, or entity within an agency, which has as a primary function intelligence, investigative, or security work, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with national security requirements and considerations . . .”).

<sup>24</sup> See H.R. 11280, 95<sup>th</sup> Cong. § 701 (1978) (engrossed).

<sup>25</sup> H.R. 11280, 95<sup>th</sup> Cong. § 701 (1978) (reported).



certain. Neither the sectional analysis that accompanies the substitute language nor the debate surrounding the adoption of the substitute provide any insight into the change.<sup>26</sup>

S. 2640, the Senate-passed version of the CSRA, included exclusionary language that resembled the language in Executive Order 11491.<sup>27</sup> In the Senate report that accompanied S. 2640, the Senate Committee on Governmental Affairs referred specifically to Executive Order 11491: “[The language] specifies the agencies, subdivisions thereof and personnel to which this subchapter does not apply. It reflects current exclusions under Executive Order 11491.”<sup>28</sup>

It is not certain how the chambers came to adopt the exclusionary language as it appeared in the House-passed version of the CSRA. While the House and Senate filed separate conference reports for the CSRA, neither report explains how the chambers resolved the differences in the exclusionary language.<sup>29</sup>

If enacted, H.R. 5005 would seem to refine the President’s ability to exclude agencies under 5 U.S.C. § 7103(b)(1). With respect to an agency or subdivision transferred to the new department, the President would have to determine that the mission and responsibilities of the agency or subdivision have materially changed, and that a majority of the employees of the agency or subdivision has a primary job duty of intelligence, counterintelligence, or investigative work directly related to terrorism investigation. Under existing law, the finding of such a majority is not necessary.

**Successorship.** The so-called “successorship doctrine” defines the rights of employees and the obligations of employers with respect to union representation when an entity changes ownership. When reorganization occurs in the federal government, the FLRA determines successorship; resolving issues concerning whether a new employing entity has a duty to recognize and bargain with a union that represents transferred employees.

In *Naval Facilities Engineering Service Center, Port Hueneme, California*, the FLRA established a three-factor test to determine whether a gaining entity is a

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<sup>26</sup> See 124 Cong. Rec. H9625-40 (daily ed. Sept. 13, 1978) (substitute language, sectional analysis, and debate).

<sup>27</sup> See S. 2640, 95<sup>th</sup> Cong. § 701(a) (1978) (“This chapter shall not apply to – (1) the Federal Bureau of Investigation; (2) the Central Intelligence Agency; (3) the National Security Agency; (4) any agency not described in paragraph (1), (2), or (3), or unit within any agency, which has as a primary function intelligence, investigative, or national security work, if the head of the agency determines, in the agency head’s sole judgment, that this chapter cannot be applied in a manner consistent with national security requirements and considerations.”).

<sup>28</sup> S.Rept. 95-969, at 98 (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2820.

<sup>29</sup> See H.Rept. 95-1717 (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2860; S.Rept. 95-1272 (1978).

successor employer.<sup>30</sup> In *Port Hueneme*, the FLRA considered the question of successorship after the Naval Civil Engineering Laboratory (“NCEL”) was disestablished and the Naval Facilities Engineering Service Center was established (“NFESC”).

The first factor of the FLRA’s test identifies three requirements: first, at least a portion of a recognized bargaining unit must be transferred to the new entity; second, the post-transfer unit must be an appropriate bargaining unit under 5 U.S.C. § 7112(a)(1); and third, the transferred employees must constitute a majority of the new unit. The FLRA noted that the post-transfer unit may be found appropriate even if it has expanded to include employees other than those transferred.<sup>31</sup> However, because a union is entitled to act as a unit’s exclusive representative only if it has been selected by a majority of employees, the new unit must consist of a majority of transferred employees who would have previously selected the union.

The second factor of the FLRA’s test requires that the gaining entity have substantially the same organizational mission as the losing entity, with the transferred employees performing substantially the same duties and functions under substantially similar working conditions in the gaining entity. The FLRA will not require that the missions of the gaining and losing entities be identical. Rather, the FLRA will consider the totality of the circumstances to determine whether this part of the test is satisfied.<sup>32</sup> In finding the NFESC to be the successor to the NCEL, the FLRA concluded that the reorganization had little effect on the working conditions of the former NCEL employees.<sup>33</sup> The former NCEL employees still performed the same type of work as they had prior to the integration of functions that occurred after the establishment of the NFESC.

The third factor of the FLRA’s test considers whether an election is necessary to determine representation. If an election is not necessary, the FLRA will find the third factor met. In *Port Hueneme*, the FLRA concluded that an election was not necessary to determine representation following the establishment of the NFESC.

The Administration’s statements concerning the recognition of federal unions and their existing collective bargaining agreements suggest that successorship may not be a significant issue. Under S. 2452, labor organizations would continue to be recognized following any transfer. H.R. 5005, however, does not appear to provide explicitly for such recognition. If H.R. 5005 was enacted and the new department refused to recognize existing labor organizations, the FLRA’s three-factor test would likely be administered to determine whether the department is a successor employer for purposes of collective bargaining.

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<sup>30</sup> 50 F.L.R.A. 363 (1995).

<sup>31</sup> *Port Hueneme*, 50 F.L.R.A. at 370.

<sup>32</sup> *Port Hueneme*, 50 F.L.R.A. at 373.

<sup>33</sup> *Port Hueneme*, 50 F.L.R.A. at 375.