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Legal Sidebar

National Security Exclusions from the Federal Service Labor-Management Relations Statutes

September 15, 2025

On March 27, 2025, President Donald J. Trump issued an executive order that excluded 40 agencies and subdivisions from coverage under the Federal Service Labor-Management Relations Statute and the Foreign Service Labor-Management Relations Statute (individually and collectively known as FSLMRS), federal laws that recognize a right to engage in collective bargaining for most federal employees. As a result of Executive Order 14251 (EO 14251), *Exclusions from Federal Labor-Management Relations Programs*, management officials at the relevant agencies and subdivisions will not be required to engage in collective bargaining over their employees' conditions of employment. President Trump, citing both constitutional and statutory authorities, explained that the exclusions were necessary because he determined that the agencies and subdivisions "have as a primary function intelligence, counterintelligence, investigative, or national security work" and that the FSLMRS cannot be applied in a manner consistent with national security requirements and considerations. On August 28, 2025, President Trump amended EO 14251 to include more agencies, such as the National Weather Service.

EO 14251 was quickly challenged in federal court in separate actions brought by the National Treasury Employees Union (NTEU), the American Federation of Government Employees (AFGE), and the American Foreign Service Association (AFSA), among others, and, within a day of the EO's issuance, the Trump Administration filed lawsuits seeking a declaratory judgment on the legality of terminating collective bargaining agreements (CBAs) in accordance with the EO.

This Legal Sidebar reviews the President's statutory authority to exclude agencies from FSLMRS coverage; it then reviews EO 14251 and guidance issued by the Office of Personnel Management (OPM) to implement the order. The Sidebar also discusses past orders that similarly excluded agencies from FSLMRS coverage. Last, the Sidebar explores some of the legal challenges to and on behalf of EO 14251 and related considerations for Congress.

Background

Section 7102 of Title 5 provides federal employees with the right "to form, join, or assist any labor organization" and "to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees" pursuant to the statute. While the FSLMRS applies to most federal agencies, several agencies are specifically excluded from coverage. The FSLMRS defines the term "agency" for coverage purposes to exclude specified agencies, including the Federal Bureau of Investigation, the Central Intelligence Agency, and the National Security Agency.

Section 7103(b) also authorizes the President to exclude additional agencies and subdivisions from coverage if he determines that an agency or subdivision "has as a primary function intelligence, counterintelligence, investigative, or national security work" and the statute cannot be applied "in a manner consistent with national security requirements and considerations." Similarly, Section 4103(b) of Title 22, which governs employees of the foreign service, authorizes exclusion of "any subdivision" for national security reasons.

In 1979, President Jimmy Carter first exercised this authority to exclude numerous agencies and agency subdivisions from FSLMRS coverage, including the Defense Intelligence Agency and the General Services Administration's Information Security Oversight Office. Subsequent Presidents have exercised the authority provided by Section 7103(b) to exclude additional agencies and agency subdivisions, including the Department of Justice's Office of Intelligence and the National Nuclear Security Administration.

Pursuant to his authority under Sections 7103(b) and 4103(b), President Trump excluded more than 40 more agencies and agency subdivisions from FSLMRS coverage. The President maintains that this exclusion "enhance[s] the national security of the United States." Some of the agencies and subdivisions identified in EO 14251 appear to be similar to those that have been excluded from coverage in the past; the order excludes, for example, the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency and the Nuclear Regulatory Commission. EO 14251, however, appears to be broader in scope and also excludes agencies such as the Food and Drug Administration, the Bureau of Land Management, and the International Trade Commission. The order does not describe how the excluded agencies and subdivisions are engaged in the relevant work. NTEU, which represents employees at several of the agencies and subdivisions identified in the order, contends that "[n]one of the NTEU-represented agencies swept up by this order has a primary function of intelligence, counterintelligence, investigative or national security work."

On March 27, 2025, OPM issued guidance on the implementation of EO 14251 for agency heads. The guidance states that the covered agencies and subdivisions are no longer subject to the FSLMRS's collective bargaining requirements and should "cease participating" in procedures or practices that may be addressed in collective bargaining agreements but do not align with the Trump Administration's workforce priorities. For example, the guidance provides that, to implement the order, "agencies should cease participating in [negotiated] grievance procedures after terminating their [collective bargaining agreements]." The guidance also directs the agencies to "swiftly implement" the President's in-person work directive after terminating their agreements.

Administration-Initiated Litigation to Implement Executive Order

The executive branch proactively filed two separate actions to implement EO 14251. On March 28, 2025, the Department of the Treasury (Treasury) filed a complaint in the U.S. District Court for the Eastern District of Kentucky seeking that the court declare that the Administration "does have the power and authority under the Executive Order to rescind or repudiate" the national CBA of NTEU and other supplemental agreements—arguing that the agreements include terms that "materially restrict" the Administration's ability to govern its workforce, including a requirement to provide twelve-month notice to the union before implementing a reduction in force. The complaint emphasized that Section 7103(b)(1) empowers the President to exclude "any agency or subdivision thereof," if it has as "a primary function intelligence, counterintelligence, investigative, or national security work" and that the President had "determined that the entire U.S. Department of the Treasury, except the Bureau of Engraving and Printing, has such primary functions."

On May 20, 2025, the U.S. District Court for the Eastern District of Kentucky dismissed Treasury's suit for declaratory judgment for lack of Article III standing, primarily because the court found that the complaint was filed less than twenty-four hours following the Executive Order, that Treasury could point to no specific facts that it had begun enforcement efforts prior to filing the complaint, and that Treasury's injuries were "too speculative." The court emphasized that "*[t]his decision says nothing of the merits of the case*." Treasury appealed this decision to the U.S. Court of Appeals for the Sixth Circuit and, as of the date of this writing, the appeal remains pending.

Several agencies also jointly filed suit against AFGE District 10 and local chapters representing employees from eight federal agencies in the U.S. District Court for the Western District of Texas. The plaintiffs were requesting declaratory judgment regarding the authority to rescind CBAs. The defendants in the Texas case filed a motion to dismiss, similarly arguing that the government lacks standing; they contend that Article III "does not permit the government to turn to the courts for 'legal certainty' in advance of a contemplated action." The government plaintiffs in turn argued that their "inability to manage their workforces as they wish without facing substantial legal uncertainty—and its attendant costs—constitutes a cognizable injury to [p]laintiffs." On July 23, 2025, the Texas district court dismissed the case for lack of subject matter jurisdiction because the plaintiff agencies were seeking "an impermissible advisory opinion." The court likened the lawsuit to those seeking nationwide injunctions and urged judicial restraint.

Union Challenges to the Executive Order

Precedent: *American Federation of Government Employees, AFL-CIO v. Reagan*

Prior to the recent legal challenges to EO 14251, unions representing federal employees had challenged at least one other executive order that sought to exclude certain U.S. Marshals Service subdivisions from FSLMRS coverage. In *American Federation of Government Employees, AFL-CIO v. Reagan*, the unions argued that Executive Order 12559 was invalid because the subdivisions' marshals did not engage in national security work. The U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) upheld the order, concluding that it was entitled to a presumption of regularity. The court explained that the presumption applies when a public officer exercises an authority confided to him by law, and that the presumption is that the officer has properly discharged his duties, absent clear evidence to the contrary. Observing that the unions had not identified any irregularity in the President's fact-finding process or actions, the D.C. Circuit maintained that it could not "allow a breach of the presumption of regularity by an unwarranted assumption that the President was indifferent to the purposes and requirements of the Act, or acted deliberately in contravention of them." The court further observed that the presumption of regularity had been applied in a variety of contexts and "is clearly applicable to the case at bar."

National Treasury Employees Union v. Trump

While the D.C. Circuit's decision in *AFGE v. Reagan* might arguably suggest that the President's presumption of regularity in exercising the authority in Section 7103(b)(1) is difficult to overcome, in examining EO 14251, the U.S. District Court for the District of Columbia found that the presumption of regularity can be rebutted. In *National Treasury Employees Union v. Trump*, the court declared that NTEU had rebutted the presumption by providing "clear evidence" that (1) the EO and its "surrounding statements are at odds with Congress's findings in the FSLMRS"; (2) a White House fact sheet issued with the EO shows a "retaliatory motive"; and (3) the OPM guidance shows "that the invocation of Section 7103(b)(1) was in furtherance of unrelated policy goals rather than based on the statutory criteria." Having determined that the presumption of regularity had been rebutted, the district court concluded that NTEU was likely to prevail on its claim that the exercise of 7103(b)(1) authority was *ultra* *vires* (outside of the permitted legal scope of authority). Based on this rationale, the district court ruled in favor of NTEU.

The government appealed, and on May 16, 2025, a three-judge panel for the U.S. Court of Appeals for the D.C. Circuit, with one judge dissenting, granted the government's request to stay the district court's injunction. The majority of the panel found that NTEU had not met its burden to demonstrate irreparable harm to justify an injunction, because OPM had issued internal guidance instructing agencies not to terminate CBAs until the conclusion of litigation and because NTEU's financial injury based on lost dues was speculative. The panel's majority found the government would be harmed under the injunction by not being able to prepare to implement the EO. The panel's majority further proclaimed that tying the government's hands is "more problematic, where, as here, we are operating in the national security context." The appeal of the preliminary injunction on the merits remains pending and the parties have filed cross motions for summary judgment in district court.

AFSA v. Trump

EO 14251 relied on Section 4103(b) of the FSLMRS to exclude components of the Foreign Service from its coverage. AFSA filed a complaint in the U.S. District Court for the District of Columbia, arguing that the Foreign Service statute permits only the exclusion of *subdivisions* (emphasis added) of the Department of State, not the exclusion of entire agencies. The complaint alleges that the EO and subsequent actions by the Administration were *ultra vires* in violation of both statute and the Constitution.

AFSA's *ultra vires* claim is different from claims in the other cases discussed in this Sidebar: AFSA claims that "the President subverted the plain language and intent of the statute by listing and excluding each and every subdivision in the Department of State and USAID that employs Foreign Service Members" and that such action is "tantamount to repealing the entire statute." The district court granted a preliminary injunction and determined that AFSA was likely to succeed on the merits of its arguments that the presumption of regularity had been rebutted, its arguments that the EO was *ultra vires*, and its demonstration of irreparable harm because, among other things, "the loss of bargaining power and statutory protections for the right to collectively bargain represent irreparable harm." The court did not reach AFSA's First Amendment claims.

On June 20, 2025, a panel for the D.C. Circuit stayed the preliminary injunction, underscoring circuit precedent that *ultra vires* claims are limited only to cases where "the agency contravened a 'clear and specific statutory mandate' and [] its statutory construction is 'utterly unreasonable.'" The panel observed that the President is not an agency, that the relevant statute gives the President discretion, and that any review must be "exceedingly deferential" because the discretion at issue relates to national security. Citing to the Department of State's national security mission, the panel found the government likely to succeed on the merits and the remaining factors to support a stay of the injunction. The appeal of the preliminary injunction remains pending.

AFGE v. Trump

AFGE and other labor organizations also sought declaratory and injunctive relief from the EO in the U.S. District Court for the Northern District of California, alleging in part that the EO was *ultra vires* and retaliatory in violation of their First Amendment right to free speech and petitioning. On June 24, 2025, the district court granted a preliminary injunction for the plaintiffs, enjoining the implementation of Section 2 of EO 14251 against the plaintiffs or their members. In granting the injunction, the court similarly looked to the White House fact sheet and used it not to "sit in judgment of the President's national security determinations," but as "evidence in the record of a serious and plausible First Amendment question." With regard to the presumption of regularity, the court determined that there was sufficient likelihood that the plaintiffs could rebut the presumption by "actual irregularity." The court further found that the plaintiffs had demonstrated irreparable harm through the reduction of high percentages of dues, loss of experience through layoffs, reduction of work hours and union offices, and loss of collective bargaining rights. Finally, in finding that the public interest weighed in favor of the injunction, the court emphasized that "Congress has declared that 'labor organizations and collective bargaining in the civil service are in the public interest'" (quoting Section 7101(a) of the FSLMRS).

The government appealed. On August 1, 2025, a panel of the U.S. Court of Appeals for the Ninth Circuit granted the government's request to stay the injunction pending the appeal, finding that the government is likely to succeed on the merits. The panel questioned the appropriateness of assessing the exercise of the President's statutorily conferred national security authority. Rejecting the plaintiffs' First Amendment retaliation and targeting arguments, the panel noted that there was enough evidence in the EO and fact sheet to show that "the President would have issued the Order, regardless of the Plaintiffs' speech, based on the perceived impact of union activities and collective bargaining on the sound operation of agencies and subdivisions with national security-related missions." The panel also found the remaining stay factors to favor the government—noting the OPM direction to abstain from CBA termination pending litigation in the same guidance document relied on by the D.C. Circuit panel. The appeal of the preliminary injunction remains pending.

Administrative Procedure Act (APA) Claims

Two additional lawsuits have been filed by groups of labor organizations in D.C. federal district court. Both filings allege similar positions about *ultra vires* actions regarding EO 14251. These complaints also raise an additional cause of action under 5 U.S.C. § 706(2)(A)—that the actions of Secretary Hegseth in exempting certain agency subdivisions from the application of the EO were "arbitrary and capricious and contrary to law." The plaintiffs argue that the Secretary's unexplained and narrow application of this exemption should be set aside pursuant to the APA.

On August 14, 2025, the district court granted a preliminary injunction in one of these cases—*Federal Education Association (FEA) v. Trump*. While acknowledging the limited scope of *ultra vires* review, the district court judge rejected the government's arguments—many of which mirrored the D.C. Circuit panel's opinion in *AFSA*. The district court found that Section 7103(b) is not "broad," but includes specific limitations on the President's authority to apply the exemptions. Citing to numerous district court opinions regarding the presumption of regularity, the district court judge also concluded that "[i]n just six months, the President of the United States may have forfeited the right to [] a presumption of regularity." The court did not address the APA claims in the preliminary injunction because the plaintiffs did not assert these claims as a basis for seeking injunctive relief. The government appealed to the D.C. Circuit on August 19, 2025, and the D.C. Circuit administratively stayed the preliminary injunction pending consideration of the motion for emergency stay.

Considerations for Congress

All of the circuit court panel orders in these cases have focused on the President's national security discretion in the FSLMRS. The D.C. Circuit panel in *NTEU v. Trump* acknowledged how courts have recognized the President's "unique responsibility" in making determinations regarding national security. Courts have afforded the President's authority under Article II of the U.S. Constitution to make such determinations the "utmost deference." Here, Sections 7103(b) and 4103(b) provide a statutory vehicle for the President's exercise of his national security authority, allowing him to broadly exclude agencies from the FSLMRS. Although the statutory exemptions are grounded in the President's Article II powers, the Court has historically balanced areas of concurrent congressional and executive authority. In the current litigation, the circuit courts have largely avoided assessments of concurrent authority by pointing out the statutes' express grant of the President's discretion.

Congress could seek to expand or contract the President's statutory authority to exclude executive branch offices from the FSLMRS. Congress could also specify more excluded entities in statute. Conversely, Congress could expand the President's exclusionary authority by eliminating statutory restrictions for such a designation. The Supreme Court has previously interpreted "national security" in the context of a federal employment statute to "comprehend only those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression." A new definition for "national security" in the FSLMRS could replicate or change this understanding. Congress could also examine the FSLMRS to determine whether there are particular aspects of federal employment that should be excluded from bargaining.

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