

ORAL ARGUMENT SCHEDULED FOR APRIL 6, 2006

Nos. 05-5436, 05-5437

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NATIONAL TREASURY EMPLOYEES UNION, et al.,

Plaintiffs-Appellees/Cross-Appellants,

v.

MICHAEL CHERTOFF, SECRETARY,  
DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants-Appellants/Cross-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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**REPLY BRIEF FOR THE UNION APPELLEES/CROSS-APPELLANTS**

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**SUMMARY OF ARGUMENT**

I. In our opening brief, we explained that the cumulative result of the regulations promulgated by the Secretary of the Department of Homeland Security ("DHS") and the Director of the Office of Personnel Management ("OPM") ("the Agencies") is a system that violates the Homeland Security Act's ("HSA") mandate to ensure employees' rights to bargain collectively. As alleged in Count 1 of our complaint, the regulations accomplish this result by: 1) providing DHS with effectively unfettered authority to repudiate agreements it has entered; 2) coupling a

dramatically narrowed scope of bargaining with a grant of unlimited management authority to take additional matters off the table unilaterally by declaring that such action "may be necessary to carry out the Department's mission" or by issuing a directive, regulation, or policy; and 3) putting DHS management's heavy hand on the scale by relegating labor-management disputes to resolution by a management-controlled board that is required to grant DHS "great deference" in interpreting the scope of its own managerial authority.

The Unions' cross-appeal on Count 1 seeks review of the district court's decision insofar as it: 1) did not specifically invalidate the regulations that authorize DHS to take matters off the bargaining table by fiat; 2) sanctioned the dramatic new regulatory limitations on the scope of bargaining; and 3) approved the use of the Homeland Security Labor Relations Board ("HSLRB") to resolve bargaining disputes and impasses. The Unions contend that these features of the new system are irreconcilable with the statutory directive to ensure employees' collective bargaining rights.

The government's contentions in response to the Unions' cross-appeal are meritless. Its regulations are not entitled to deference under Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984), because the labor relations regime they create is at best a system of collective consultation, rather

than collective bargaining, and therefore violates the clear statutory mandate. See Amalgamated Transit Union v. Donovan, 767 F.2d 939, 944 (D.C. Cir. 1985). Further, the government's particularized attacks upon the justiciability of the Unions' claims in Count 1 of their complaint, including those that are at issue on cross-appeal, are misguided. In Count 1, the Unions identified specific components of the regulations that are individually inconsistent with the statutory mandate to ensure collective bargaining rights and also argued that their cumulative effect skews the relative powers of the parties so heavily in favor of management as to destroy any semblance of the "delicate balance of countervailing power" that is required in a system of "collective bargaining." See Brown v. Pro Football, Inc., 50 F.3d 1041, 1051, 1052 (D.C. Cir.), reh'g and reh'g en banc denied, 50 F.3d 1041 (1995). Under well-settled precedent, the injuries the Unions suffer as a result of this skewed system are immediate, and their challenge is clearly justiciable.

The government's argument that the Unions have overstated the breadth of the authority the regulations provide DHS to unilaterally take matters off the bargaining table is inconsistent with the language of the regulations and the intent of their drafters (as demonstrated by the administrative record). Similarly, the government fails to rebut our

contention that the scope of matters subject to bargaining under the regulations is so insubstantial as to violate the statutory mandate to ensure collective bargaining, especially in conjunction with the other components of the scheme that the Unions challenge.

The government does not rebut our argument that a system of collective bargaining requires the use of a neutral party, rather than an arm of management, to adjudicate bargaining disputes and resolve impasses. Its argument that the HSLRB's neutrality is assured by a provision in the regulations that states that the individual members of the HSLRB may only be removed for cause is unconvincing. The members of the HSLRB are appointed exclusively by the Secretary, who is the very entity whose compliance with the regulations they are supposed to be judging, and they must grant "great deference" to the Secretary in adjudicating cases. Finally, the Secretary has the exclusive discretion to appoint an unlimited number of additional members to the HSLRB, thereby effectively circumventing any restrictions upon his authority to remove incumbent members.

**II.** On cross-appeal, we showed that the district court erred when it held that the Agencies had the authority to direct an independent agency, the Federal Labor Relations Authority ("FLRA"), to adjudicate unfair labor practices that arise under the regulations, under the Agencies' timetable, and subject to

the HSLRB's unreviewable jurisdictional determinations. We showed that the HSA nowhere mentions the FLRA, much less provides the Agencies with the extraordinary authority they claim to modify the FLRA's statutory jurisdiction, which is limited to matters arising under Chapter 71 of Title 5. The government's response, which relies upon negative implications drawn from 5 U.S.C. § 9701(b)(3), a clause that prohibits the agencies from "waiving, modifying, or otherwise affecting" other statutory provision, is highly unpersuasive as well as constitutionally dubious.

**III.** On cross-appeal, we argued that the regulations requiring the Merit Systems Protection Board ("MSPB") to review the decisions of an internal management board in cases involving "mandatory removal offenses" are inconsistent with the MSPB's organic statute. We showed that the Board itself has interpreted 5 U.S.C. § 1204(a)(1) as withholding from it the authority to sit as an intermediate appellate body. Douglas v. Veterans Admin., 5 M.S.P.R. 280 (1981).

There is no merit to the government's argument that the Unions lack standing to challenge the role the Board plays in mandatory removal cases. The Unions collectively represent over 60,000 DHS employees, all of whom are subject to the Board's illegal jurisdiction upon being charged with a mandatory removal offense. On the merits, the government does not address the

Board's ruling in Douglas, and fails to rebut our argument that, because Section 1204(a) contemplates that the MSPB will take "final action" on all matters before it, it cannot sit as an intermediate appellate body.

### ARGUMENT

#### A. The Government's Reliance on Chevron Is Unavailing

In its response to our cross-appeal, the government contends that the principles of deference set forth in Chevron, 467 U.S. 837, insulate the one-sided regime it has designed from legal challenge. See Gov't Reply Br. 11-12. This contention is erroneous. The first step in a Chevron analysis requires the Court to use the "traditional tools of statutory construction" to determine whether Congress has spoken directly to an issue. 467 U.S. at 842. The Court owes the Agencies no deference in defining the scope of their statutory authority. American Bar Association v. FTC, 430 F.3d 457, 468 (D.C. Cir. 2005); see also Arent v. Shalala, 70 F.3d 610, 615 (D.C. Cir. 1995) (Chevron focused on discerning boundaries of Congress' delegation of authority to agency); Amalgamated Transit Union, 767 F.2d 939 at 944 n.7 (scope of agency authority subject to judicial review under step one of Chevron). Further, Chevron does not require this Court to "rubber stamp" the Agencies' regulations where, as here, they are "inconsistent with a statutory mandate" and "frustrate the congressional policy underlying the statute."

NTEU v. FLRA, 856 F.2d 293, 296 (1988), vacated on other grounds, 910 F.2d 964 (D.C. Cir. 1990) (en banc) (quoting Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 97 (1983)).

In the HSA, Congress gave the Agencies the authority to establish a new system of collective bargaining tailored to DHS' statutory mission. It did not delegate authority to create a system that, in reality, is not collective bargaining at all. The statutory language and legislative history are unambiguous on that point: Section 9701(b)(4) of the HSA requires the Agencies to "ensure" employees' rights to "bargain collectively." See Amalgamated Transit Union, 767 F.2d at 946 (Secretary of Labor may not certify labor agreement that does not meet statutory requirement to ensure collective bargaining rights "simply because he believes that, on balance, the agreement is fair").

Further, as we argued in opening brief (at 30, 37-38, 39-41, 45-47, 49-51), and as this Court held in Amalgamated Transit Union, 767 F.2d at 949, when Congress uses the phrase "collective bargaining" "generically," as under the HSA, it is "not acting on a clean slate." Rather, it is "incorporating within the statute the commonly understood meaning of 'collective bargaining.'" Id.

The system established by the Agencies does not comport with the "commonly understood meaning of 'collective

bargaining.'" It is, at best, a system of collective consultation, rather than a system of collective bargaining. Like similar regulations promulgated by OPM and the Secretary of Defense under similar statutory authority, the design of these regulations "taken as a whole" "rest on the mistaken premise that Congress intended flexibility to trump collective bargaining rights." American Fed'n of Gov't Employees v. Rumsfeld, No. 05-2183, slip op. at 75 (D.D.C. Feb. 27, 2006). Under Chevron, the Agencies are owed no deference because this result is contrary to the express terms of the statute. See Amalgamated Transit Union, 767 F.2d at 947 (Secretary of Labor's discretion under statute does not include the discretion "to ignore the statute's requirements and certify a labor agreement that does not provide for the continuation of collective bargaining rights).

**B. The Regulations' Expansive Managerial Authority To Take Matters off the Bargaining Table Is Inconsistent with the Statutory Mandate To Ensure Employees' Rights To Bargain Collectively**

The regulations in Subpart E purport to reserve to DHS management virtually unfettered authority to take matters off the bargaining table at any time by declaring that such action "may be necessary to carry out the Department's mission" or by issuing a regulation or policy. See 5 C.F.R. §§ 9701.511(a)(2), 9701.518(d)(1). The Agencies' defense of these regulations is

based on two meritless arguments: 1) that the Unions' claims are not justiciable and 2) that the regulations should not be read literally. See Gov't Reply at 23 (claiming Unions "overstate . . . the breadth of DHS's powers" under the regulations).

1. First, the government's argument that the Unions will not be injured until management actually exercises its power to declare matters non-negotiable is both legally erroneous and inconsistent with its recognition elsewhere that the Unions may immediately challenge the other aspects of the regulations that narrow the scope of bargaining. See Gov't Reply at 5 (conceding Unions "may presently challenge regulations that by their own force restrict the scope of permissible bargaining"). In addition, the government's contention that it is only the exercise of such managerial authority that injures the Unions betrays a fundamental misunderstanding of the dynamics of a collective bargaining relationship as well as the Unions' claims in this case.

As this Court has held, collective bargaining is a "bilateral process" that is "characterized" by a "delicate balance of countervailing power" between the two parties. Brown, 50 F.3d at 1051, 1052; see also NTEU, 856 F.2d at 301 (federal sector labor statute establishes "delicate balance of power"). When one of the two parties to the collective

bargaining relationship is given additional power, or deprived of the power it once enjoyed, the balance is upset. See, e.g., Brown, 50 F.3d. at 1051 (granting workers a "powerful new weapon" to sue employers under antitrust laws would unlawfully disrupt the balance established by the National Labor Relations Act). For these reasons, the courts have held that labor and management have standing to challenge legal provisions whose effect is to skew the balance of power in the collective bargaining relationship. See, e.g., Chamber of Commerce v. Reich, 57 F.3d 1099, 1100 (D.C. Cir. 1995); Employers Ass'n v. United Steelworkers of America, 32 F.3d 1297, 1299-1300 (8th Cir. 1994); see also Association of Flight Attendants v. PBGC, 372 F. Supp. 2d 91, 102 (D.D.C. 2005); Aeronautical Indus. Dist. Lodge 91 v. United Technologies Corp, 87 F. Supp. 2d 116, 134 (D. Conn.), aff'd 230 F.3d 569 (2d Cir. 2000) (parties may suffer irreparable injury arising out of loss of bargaining leverage).<sup>1</sup>

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<sup>1</sup> In Reich, the Chamber of Commerce filed suit challenging an Executive Order under which the Secretary of Labor could disqualify employers who hire permanent striker replacements from receiving federal contracts. This Court held the challenge ripe even though the Secretary had discretion to exempt some contractors from the rule, explaining that the Chamber's members were injured by "the mere existence of the Order," which "alters the balance of bargaining power between employers and employees" by depriving employers of a significant economic weapon in the collective bargaining process. 57 F.3d at 1100. Accord Employers Ass'n, 32 F.3d at 1299-1300 (state law prohibiting hiring of permanent striker replacements ripe for review because

In this case, the regulations at issue on cross-appeal give management a new weapon that allows it, but not the union, to take matters off the bargaining table unilaterally. Management's possession of this potent weapon, like the other new prerogatives preserved to it under the regulations, clearly changes the dynamic between the parties, whether or not such authorities are ever exercised. See, e.g., Decl. of Jonathan Levine, Supp. App. ("SA") 6-9; Decl. of NTEU President Colleen Kelley, Jt. App. ("JA") 40-44 (describing changes in bargaining relationship resulting from regulations). The skewing of the bargaining relationship caused by these and related regulations work an immediate injury to the Unions and their members that refutes the government's argument that the Unions' claims are not justiciable. See Rumsfeld, No. 05-2183, slip op. at 33 (following district court's decision below and rejecting same justiciability arguments in case concerning new labor relations scheme for Department of Defense employees).

2. On the merits, the Agencies argue that the Unions "erroneously assume that the discretionary authorities at issue are unbounded, and that DHS will exercise those authorities

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law "dispossesses" employers of "potent weapon which they once held in reserve" so that weapon "would no longer form the backdrop to labor-management discussions," thereby "permanently and substantially shift[ing] the terms of bargaining in favor of the union").

without restraint." Gov't Reply at 24. The Unions' argument, however, is not based upon "assumptions;" it is based upon the plain language of the regulations as well as the Agencies' own pronouncements.

Thus, the "management rights" regulation at 5 C.F.R. § 9701.511(a) enumerates a lengthy list of non-negotiable management prerogatives. Subsection (2) of that provision concludes with a catch-all giving DHS the right to take "whatever other actions may be necessary" to carry out the agency's mission. Id. (emphasis supplied). The expansiveness of the authority this provision reserves to management is obvious from the actual words employed, encompassing "whatever" other action "may be" necessary, as well as from the overall regulatory purposes, which the Agencies themselves emphasize is to maximize managerial "flexibility" to take unilateral action. See, e.g., 5 C.F.R. § 9701.501 (entitled "purpose" and stating that Subpart E "must be interpreted with the Department's mission foremost in mind"); id. at §§ 9701.106(a)(2), 9701.502 ("each provision" of Subpart E "must be construed to promote the swift, flexible, effective day-to-day accomplishment of [DHS'] mission, as defined by the Secretary or his designee;")

therefore, "the interpretation of the regulations in this part by DHS and OPM must be accorded great deference").<sup>2</sup>

The government's suggestion that there might be a limiting construction that would narrow the broad catch-all regarding management's right to take "whatever" actions "may be" necessary is not based upon the regulatory language itself. Instead, the government purports to base its argument upon the related interpretive canons of noscitur a sociis and ejusdem generis, which the government contends require that "other actions" be interpreted to include only those "similar in kind and importance" to the management rights listed. Gov't Reply at 17.

As the Supreme Court has frequently cautioned, however, "the rule of ejusdem generis, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty." Harrison, Reg. Admin., EPA v. PPG Indus., 446 U.S. 578, 588 (1980) (internal quotations omitted)

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<sup>2</sup> Indeed, in the preamble to the regulations, the Agencies claim that the bargaining process itself impairs DHS' ability to accomplish its mission because bargaining supposedly places unreasonable demands upon the time of DHS management. 70 Fed. Reg. 5279 (February 1, 2005) ("the demand on DHS' frontline managers and supervisors to engage in constant post implementation negotiations would divert them, and other critical resources, from accomplishing the agency's mission"). This Court has recognized, however, that the duty to bargain "would practically be non-existent" if agencies were excused from bargaining whenever bargaining would place burdens on agency managers' time. See American Fed'n of Gov't Employees v. FLRA, 785 F.2d 333, 338 (D.C. Cir. 1986) (per curiam), quoted in Nat'l Fed'n of Fed. Employees, Local 951 v. FLRA, 412 F.3d 119, 124-25 (D.C. Cir. 2005).

(emphasis supplied); see also Ohio Ass'n of Community Action Agencies v FERC, 654 F.2d 811, 819 (D.C. Cir. 1981). The doctrine "'may not be used to defeat the obvious purpose'" of the regulations or "to render general words meaningless." United States v. Alpers, 338 U.S. 680, 683 (1950) (internal citations omitted). The maxim does not apply here because the language of Section 9701.511(a)(2) is not uncertain. Compare Harrison, 446 U.S. at 588 (refusing to apply doctrine of ejusdem generis to narrow phrase "any other final action" because of clear expansive language, and observing that phrase "must be construed to mean exactly what it says, namely, any other final action") (original emphasis), and Ohio Ass'n of Community Action Agencies, 654 F.2d at 819 (declining to apply maxim to exemption where text and history combine to show clear intent to read exemption broadly).<sup>3</sup>

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<sup>3</sup> Further, and in any event, the doctrine of ejusdem generis is not applicable here because the supposedly limited class of actions that the government suggests would be covered by the phrase "whatever other actions may be necessary" (i.e., other "operational decisions") appears to already be exhausted by the lengthy enumerated list of "operational" rights in Sections 9711.501(a)(1) and (a)(2). See 2A Sutherland, Statutes and Statutory Construction § 47:18, at 287 (6<sup>th</sup> ed. 2002) (doctrine of ejusdem generis does not apply where class is exhausted by the enumeration). Nor is a narrower construction of this specific management rights provision suggested by other general provisos in the regulations which purport to guarantee employees rights to engage in collective bargaining and to enforce agreements, and which describe collective bargaining agreements as "binding" on DHS. See Gov't Reply at 17-18. The regulations themselves explicitly qualify these general guarantees. See,

3. The regulatory language of 5 C.F.R. § 9701.518(d)(1) is similarly irreconcilable with the government's argument that there are meaningful limitations on DHS' authority to take matters off the bargaining table by issuing implementing directives, policies, or regulations. As the district court recently held in Rumsfeld, supra, regulations granting the Secretary of Defense the authority to take matters off the bargaining table through "implementing issuances" are inconsistent with collective bargaining because "they permit DoD to continuously and completely eliminate collective bargaining." Rumsfeld, No. 05-2183, slip op. at 53. Further, contrary to government's argument (Gov't Reply at 19-21, 23), under Section 9701.518(d)(1) managers may take matters off the bargaining table based on "other policies and regulations," as well as on the basis of "implementing directives."<sup>4</sup> The government's brief does not address the extremely expansive scope of this authority, which, in contrast to the language of the regulations DHS initially proposed (69 Fed. Reg. 8043, 8064 (February 20,

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e.g., 5 C.F.R. § 9701.515(d)(3) (agreements are "binding" upon DHS "only if consistent with . . . the regulations in this part").

<sup>4</sup> Similar to an "implementing issuance" in the DoD system, an "implementing directive" is a directive issued at the department-wide level by the Secretary himself (or a designee) that purportedly gives effect to the regulations themselves. See 5 C.F.R. § 9701.103.

2004)), does not even require that such policies and regulations be issued at the department-wide level.

As we described in our opening brief (at 35 n.14), documented federal sector experience shows that the reservation of this kind of authority to agencies--even when limited to rules and policies issued at the agency-wide level--enables them to gut meaningful collective bargaining obligations. For that reason, the Federal Sector Labor-Management Relations Statute ("FSLMRS") provides that agency rules must be supported by a compelling need in order to trump the bargaining obligation. See 5 U.S.C. §§ 7116(a)(7), 7117(a)(2).

The government attempts to justify the regulation by asserting that it would be "untenable" to subject "critical department-wide human resources policies to modification" through separate negotiations with each recognized bargaining unit. Gov't Reply at 19 (quoting 70 Fed. Reg. 5310). The defect in the regulations, however, is that they provide DHS with unlimited authority to issue policies that take matters off the bargaining table; that authority is not tailored to encompass only "critical" or "compelling" matters, as, for example, under the current labor statute.<sup>5</sup>

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<sup>5</sup> To the extent that DHS is expressing a general dissatisfaction with its obligation to bargain with multiple unions across numerous bargaining units, it may invoke established procedures for consolidating units, as appropriate. See 5 C.F.R. §

C. Along with the Other Defects in Its System, the Agencies' Drastic Restriction of the Scope of Bargaining Contravenes the Statute

In its brief (at 12-13), the government contends that the Unions have overstated the extent to which the regulations restrict the subjects of bargaining. But, the government cannot seriously dispute that the regulations prohibit all meaningful negotiations over day-to-day working conditions. See Levine Decl., SA 9-11; Kelley Decl., JA 40-43; Decl. of Michael Randall, National President, National Ass'n of Agriculture Employees, JA 124-128 (describing excluded matters and adverse effect upon employee work lives). Contrary to the government's argument (Gov't Reply 15), "'impact' bargaining over appropriate arrangements, see 5 U.S.C. § 7106(b)(3)," does not "remain[] largely available under the DHS and OPM regulations." DHS is only obligated to bargain over procedures and arrangements for employees affected by the exercise of management rights on employee-specific personnel issues, such as removals or reductions-in-force. Even that limited bargaining may take

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9701.514. Otherwise, DHS is merely expressing a policy preference for unilateral decision-making that Congress rejected when it guaranteed DHS employees the right to bargain collectively. It is also reserving an authority that is inconsistent with the statutory requirement that adjustments in the scope of bargaining be accomplished through the prescribed joint collaboration process (see Union Br. at 41-43), an issue the government addresses only by reiterating its implausible narrowing construction of the regulation. See Gov't Reply at 24.

place after changes in conditions of employment have already occurred, as management has no obligation to provide advance notice of the exercise of its authority.<sup>6</sup> See 5 C.F.R. § 9701.511(d). Further, as described above (at 8-16), any "obligation" to bargain exists on paper only because DHS has the authority to take more matters off the bargaining table at any time and to repudiate agreements by fiat (see, supra, at 8, 11-16), and because enforcement is available only through a management-controlled board that is required to give DHS' determinations "great deference" (see Union Br. at 47-52).

Finally, the Agencies have failed to provide a reasonable defense and credible explanation "supportable on the record" for their decision to eliminate all bargaining related to "operational" matters. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 395 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974). See also McGregor Printing Corp. v. Kemp, 20 F.3d 1188, 1196 (D.C. Cir. 1994) (agencies must explain the basis for the

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<sup>6</sup> "Appropriate arrangements" for employees adversely affected by the exercise of one of management's many "operational" rights are limited to situations where there is a "significant and substantial impact" on the bargaining unit or affected employees that has exceeded, or will exceed, 60 days. 5 C.F.R. § 9701.511(e)(2)(i). Even more important, the types of proposals are limited to those concerning "personal hardships and safety measures" or reimbursement of "out of pocket expenses." Id. § 9701.511(e)(2)(i)(A)-(B). They may not include critical matters such as "the routine assignment to specific duties, shifts, or work on a regular or overtime basis." Id. § 9701.511(e)(2)(i)-(ii).

determinations they make during the rulemaking process). To meet APA requirements, agencies must provide a "contemporaneous explanation of the reasoning process, detailing the facts, assumptions and inferences, and scientific, technical, and policy considerations." Kenneth Culp Davis, Administrative Law of the Eighties 201 (1989 Supp.) (citing National Lime Ass'n v. EPA, 627 F.2d 416 (D.C. Cir. 1980)). There must be "substantial evidence" in support of the major assumptions an agency makes in a rulemaking (see Natural Res. Def. Council, Inc. v. Herrington, 768 F.2d 1355, 1421 (D.C. Cir. 1985), and the agency must conduct the fact-finding necessary to provide the courts a sufficient record for review. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971). Courts have routinely invalidated regulations when the agency has failed to satisfy this burden.<sup>7</sup>

In this case, the record reveals little more than unsupported assertions in support of the Agencies' elimination of all bargaining over "operational matters" and the other restrictions placed upon impact and implementation bargaining. While the preamble to the regulations is replete with general references to DHS' "operational needs," the few examples the

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<sup>7</sup> See, e.g., McGregor Printing, 20 F.3d at 1194; International Bhd. of Teamsters v. United States, 735 F.2d 1525 (D.C. Cir. 1984); Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972).

Agencies supply to illustrate how negotiated procedures regarding the assignment of work have "hindered day-to-day operations" simply lack credibility.

For example, the Agencies assert that "in redeploying personnel from a seaport to an airport to meet an unexpected operational need, port directors today must draw from a pre-established pool of volunteers, even if in doing so they would under staff other critical line functions." 70 Fed. Reg. 5279. However, as the agreement between the Bureau of Customs and Border Protection ("CBP") and NTEU reveals, contractual provisions for the assignment of work in the federal sector simply establish procedures for selecting among equally qualified employees. Such procedures cannot result in "under staffing" of "critical line functions" because it is the employer who determines, in its sole discretion, the work group from which volunteers for redeployment will be selected. See SA 58-59 (Art. 20, § 5 of NTEU-CBP Agreement). Indeed, the substantive management right to assign work (5 U.S.C. § 7106(a)(2)(B)) precludes the kind of interference with managerial flexibility cited in the single example provided in the administrative record. National Fed'n of Fed. Employees v. FLRA, 412 F.3d 119, 121-122 (D.C. Cir. 2005) (citations omitted) ("the right to assign work" includes "the authority to determine the particular duties to be assigned [to an employee], when work

assignments will occur, and to whom or what positions . . . duties will be assigned").

Similarly unpersuasive is the Declaration of Robert M. Smith, CBP's Assistant Commissioner for Human Resources, prepared in connection with this litigation. Mr. Smith asserts, with no explanation, that "in the wake of the September 11th tragedy," CBP was "impair[ed]" in its "ability to achieve its central mission of preventing terrorist attacks on the United States" by having to undergo what he calls "a lengthy process of determining" which particular individuals would be reassigned, considering such factors as seniority, allegedly "regardless of manpower or other operational considerations." JA 106.

Even assuming this Court can consider Mr. Smith's declaration (which is not part of the administrative record), his assertion is completely unsubstantiated. It is not plausible that reviewing a list of employees' names to determine who to reassign could "impair" CBP's accomplishment of its mission. Further, his assertion that CBP's response to the terrorist attacks was hindered by its contractual obligations is inherently not credible. Under Chapter 71, CBP had the authority to take whatever actions it deemed necessary during the September 11th terrorist attacks, which were clearly an "emergency" under existing law. 5 U.S.C. § 7106(a)(2)(D).

In short, the administrative record provides no justification for relieving DHS, on a wholesale basis, of the obligation to bargain over procedures and arrangements for employees adversely affected by the exercise of an operational right. The district court, therefore, erred in approving the radically curtailed scope of bargaining provided under the regulations.

**D. The Regulations Fail To Provide for the Neutral Resolution of Bargaining Disputes and Impasses**

The Unions argue that to ensure collective bargaining rights, bargaining disputes and negotiations impasses must be resolved by a neutral body, not one that is controlled by management. Contrary to the government's argument (Gov't Reply at 25) it is clear that parties having a direct interest in the HSLRB's discharge of its functions have standing to challenge whether the HSLRB meets that requirement. See National Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control, 711 F.2d 1071, 1074 n.2 (D.C. Cir. 1983) (persons having a direct interest in the work of a federal advisory committee have standing to challenge whether the committee is "fairly balanced," as required by the Federal Advisory Committee Act); Public Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods, 886 F.2d 419, 433 (D.C. Cir. 1989) (Edwards, J., concurring in part and dissenting in

part) (justiciability of claims involving "fairly balanced" requirement not an open issue in this circuit).

On the merits, while labeling the seemingly obvious proposition "dubious" (Gov't Reply at 26), the government does not rebut our argument (Union Br. at 47-52) that a system of collective bargaining requires the use of a neutral adjudicator. Rather, it states that the HSLRB meets that requirement because the regulations state that the Secretary may not remove its members absent "cause"--i.e., for inefficiency, neglect of duty, or misconduct. Id. at 25-26 (citing Mistretta v. United States, 488 U.S. 361 (1989), and Morrison v. Olsen, 487 U.S. 654 (1988)). The existence of this "one procedural safeguard" does not transform the HSLRB into an independent adjudicatory body. Rumsfeld, No. 05-2183, slip op. at 63 (evaluating a similarly constructed board governing labor disputes at the Defense Department and sharing the concerns of the district judge in this case that such boards are not independent).

Moreover, the government makes an unpersuasive comparison (Gov't Reply at 26) between this purported, albeit apparently unenforceable, restriction on the Secretary's power of removal and the restrictions that are placed upon President's authority to remove members of the FLRA and other heads of independent agencies, such as the now-defunct Independent Counsel. Unlike members of the FLRA, who are appointed by the President and

subject to Senate confirmation, or the Independent Counsel, who was appointed by the judiciary, the members of the HSLRB are appointed exclusively by the Secretary, the very entity whose compliance with the regulations they will ultimately be required to investigate and adjudicate. Once appointed, they are required to grant the Secretary "great deference" in reviewing his interpretation of the regulations by which he is purportedly bound. The very Supreme Court precedent the government cites establishes that the Secretary's exclusive appointment and reappointment power, especially in conjunction with the deferential standard of review, is inconsistent with the role the HSLRB has been assigned. See Morrison, 487 U.S. at 692-693 (Congress concluded that, to ensure its independence, it was "essential" to vest the power to appoint the Independent Counsel outside the Executive Branch); see also Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252, 268 (1991) (Board of Review is agent of legislative branch where Congress effectively controls appointment of members as well as their removal).

Further, unlike the FLRA, the MSPB, or any other independent adjudicatory body, the Secretary has the authority to appoint additional members to the HSLRB at his sole discretion. See 5 C.F.R. § 9701.508(a)(1). This power to "pack the court" effectively nullifies whatever theoretical

limitations exist on his authority to remove incumbent members of the HSLRB. He also possesses exclusive control over the HSLRB's budget and, presumably, the compensation of the HSLRB's members. The FLRA's budget, of course, is set by Congress, and its members' compensation is established by statute. Cf. Mistretta, 488 U.S. at 410 and n. 32 (independence of judicial members of Sentencing Commission ensured because, among other things, the President lacks the authority to reduce their compensation).

In short, the HSLRB bears no meaningful resemblance to an independent entity. Members of the HSLRB are simply temporary employees of the Secretary, albeit employees with a limited form of tenure. The use of such a management- controlled board to resolve bargaining disputes and impasses cannot be squared with the statutory requirement that employees bargaining rights be ensured.<sup>8</sup>

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<sup>8</sup> In our opening brief (at 51), we pointed out that the regulations also establish a discredited procedure under which the HSLRB acts both as investigator and adjudicator of unfair labor practices. The government responds that the FLRA also combines adjudicative and investigatory functions because the FLRA's General Counsel investigates unfair labor practices. Gov't Reply at 26 n. 2 (citing 5 U.S.C. § 7104(f)(2)(A)). The government misses the point. The General Counsel of the FLRA, like the General Counsel of the NLRB, is independently appointed by the President, confirmed by the Senate, and removable by the President. 5 U.S.C. § 7104(f). Unlike the HSLRB, the General Counsel does not serve the dual function of investigating and adjudicating unfair labor practices.

**E. The Agencies Lacked Statutory Authority To Assign the FLRA the Role of Adjudicating Disputes That Arise Under the Regulations**

In our opening brief (at 52-62), we argued that the Agencies lacked the statutory authority to conscript the FLRA, an independent agency, to adjudicate disputes that arise under the regulations. The district court agreed with our position in part, striking down the regulations assigning the FLRA an intermediate appellate function. It found this role to exceed what the court considered the Agencies' statutory authority to "modify" the FLRA's jurisdiction. JA 158-60. On the other hand, the district court concluded that the Agencies could make the FLRA responsible for adjudicating the resolution of unfair labor practices arising under the regulations, consistent with this power to "modify." JA 158.

The government's response misstates our challenge to this aspect of the district court's decision, contending that we argue that the Agencies lack authority to "waive" Chapter 71. See Gov't Reply at 27. On the contrary, we have consistently recognized that the new human resources system need not comport with Chapter 71 because 5 U.S.C. § 9701(a)(1) permits DHS to create a new human resources system "notwithstanding" provisions of Part III of Title 5, which includes Chapter 71. See Union Br. at 5.

The power at issue here is not the Agencies' authority to "waive" Chapter 71 or any of the other provisions of Part III of Title 5. The question here is whether the Agencies have the positive authority to amend Chapter 71 by expanding the FLRA's jurisdiction to enable it to adjudicate unfair labor practices arising under the regulations and by subordinating the FLRA's processes to the Agencies' control. Nothing in the HSA provides any indication that the Agencies were empowered to conscript the FLRA to decide disputes that arise outside of Chapter 71.<sup>9</sup>

Despite the absence of any reference to the FLRA in the HSA, the Agencies would derive the extraordinary authority they claim to amend Chapter 71 by negative implication in Section 9701(b)(3). They claim that the prohibitions set forth in that section against "waiv[ing], modify[ing] or otherwise affect[ing]" specified provisions of Part III of Title 5, give

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<sup>9</sup> The government misses the point in observing that Chapter 71 "remains intact and fully applicable" to employees outside of DHS. Gov't Reply at 29. An amendment is still needed to give the FLRA jurisdiction over the unfair labor practices created by the regulations because the FLRA's organic statute limits its jurisdiction to matters arising under Chapter 71. Therefore, the government's effort to distinguish Clinton v. New York, 524 U.S. 417 (1998), on the grounds that the Agencies' alteration of Chapter 71 was within the authority that Congress legitimately delegated to them is unavailing. Moreover, the government does not appreciate the central point of Clinton: that Congress could not, consistent with separation of powers principles, delegate to the executive branch the authority to amend or modify statutes, regardless of whether it provides an "intelligible principle" to guide the exercise of that authority. See Gov't Reply at 29 (quoting Whitman v. Trucking Association, 531 U.S. 457, 472 (2001)).

the Agencies the affirmative authority to "modify" or "otherwise affect" the FLRA's statutory jurisdiction. But a statutory clause that prohibits the exercise of particular authority (like Section 9701(b)(3)) does not, by implication, affirmatively grant new authority. Cf. United Gas Pipeline v. Mobile Serv. Gas Corp, 350 U.S. 332, 339-340 (1956) (declining to interpret a statutory clause prohibiting rate hikes "except after 30 days notice to the [Federal Energy Regulatory] Commission" as granting a gas company to raise rates when such notice has been given, noting that "on its face . . . [the statutory provision] is simply a prohibition, not a grant of power").

To be sure, Congress might have accomplished the result the government seeks by itself amending 5 U.S.C. § 7105 to permit OPM and DHS to add to the FLRA's subject matter jurisdiction by regulation, or by specifying that the FLRA would adjudicate disputes arising under the new regulations. It did not, however, do so. There is nothing in the HSA that remotely suggests that Congress envisioned that the FLRA would have a role in the administration of the new scheme, much less one that compromises its independence.<sup>10</sup> The Agencies' effort to conscript the FLRA by negative implication should be rejected.<sup>11</sup>

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<sup>10</sup> The government argues that the Unions have not explained "how the FLRA, by adjudicating disputes under traditional standards of review, might arguably be placed in th[e] uncomfortable position" of having its independence and neutrality compromised.

**F. The Function Assigned to the MSPB in Mandatory Removal Cases Contravenes Its Organic Statute**

There is no merit to the government's contention that the Unions lack standing to challenge the role assigned to the MSPB to review so-called mandatory removal offenses. Gov't Reply at 10. The Unions collectively represent some 60,000 DHS employees. It is inevitable that some of these employees will be charged with committing a "mandatory removal offense" and therefore will be subject to the MSPB review procedure challenged here. The new process immediately replaces existing rules under which employees can use the negotiated grievance arbitration procedure or the established MSPB review procedures of Chapters 75 and 77 to challenge their removals.

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Gov't Reply 28. But the government ignores that the regulations also selectively assign functions to the FLRA, which it must discharge under an expedited timetable and under priorities established by the Agencies, and that the regulations make the FLRA's very jurisdiction subject to divestment by the HSLRB. See Union Br. at 56-57. In fact, the gist of the government's argument is that the Agencies have the authority to modify the FLRA's statutory functions as well as its internal procedures and priorities as they see fit.

<sup>11</sup> The regulations leave entirely intact certain FLRA functions under Chapter 71, such as its resolution of questions involving representation. See 5 C.F.R. § 9701.510(a). The Unions have not challenged the FLRA's exercise of this authority, although it certainly could be argued that the Agencies' decision to waive the applicability of Chapter 71 is an "all-or-nothing" proposition. Put another way, once the Agencies decided to create a system that deviates from Chapter 71, they forfeited the authority to enlist the FLRA's services to adjudicate any matters under their new system.

Because their members will necessarily be subject to this new adjudicatory procedure, the Unions thus have standing to challenge its lawfulness. See Buckley v. Valeo, 424 U.S. 1, 117 (1976) (litigants "have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights"); see also National Fed'n of Fed. Employees v. United States, 727 F. Supp. 17, 21 (D.D.C. 1989), aff'd, 905 F.2d 400 (D.C. Cir. 1990) (citing Committee for Monetary Reform v. Bd. of Governors for the Fed. Res. Sys., 766 F.2d 538 (D.C. Cir. 1985)) (litigants have standing so long as they are "directly subject to the governmental authority they seek to challenge").

On the merits, the government contends that Section 1204(a)(1) (a provision by which the Agencies remain bound) contemplates that the subject matter jurisdiction of the MSPB may be expanded by regulations issued jointly by DHS and OPM. See Gov't Reply at 32 n.4. On the contrary, the Federal Circuit has noted that it is an open question whether the reference to "any other law, rule, or regulation" in Section 1204(a)(1) encompasses regulations other than government-wide personnel regulations issued by OPM (Cowan v. United States, 710 F.2d 803, 805 n.7 (Fed Cir. 1985)), and the MSPB's own regulations governing its jurisdiction refer only to OPM-issued government-

wide regulations as source of jurisdiction. See 5 C.F.R. § 1201.3(a).

In any event, the government fails to address our central contention that, even if the Agencies could expand the subject matter jurisdiction of the MSPB by regulation, the intermediate appellate function the Agencies have prescribed for the MSPB is irreconcilable with Section 1204(a)(1). The mere fact that the regulations contemplate that the MSPB will issue a "final decision" on appeal in mandatory removal cases (see Gov't Reply at 32-33) does not bring the MSPB's role within the confines of Section 1204(a), which provides that it will take "final action" on matters before it. The phrase in Section 1204(a)(1) authorizing the MSPB to take "final action" means that Congress did not intend the MSPB to serve in an intermediate appellate role, but rather that it would be the final decision-maker in cases subject to its jurisdiction, whose own decisions would then be subject to judicial review under an appellate standard. Union Br. at 72 (citing Douglas).

**CONCLUSION**

On the basis of the foregoing and as set forth in our initial brief (at 78-79), this Court should affirm the district court's decision insofar as it granted summary judgment to the Unions on Counts 1 and 3 of their complaint, and partial summary judgment on Count 2, and reverse the decision dismissing Count 2 in part and Count 4 in its entirety.

Respectfully submitted,

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