

# United States Senate

WASHINGTON, DC 20510

February 28, 2020

The Honorable Mark T. Esper  
Secretary of Defense  
United States Department of Defense  
1000 Defense Pentagon  
Washington, D.C., 20301

Dear Secretary Esper:

We write to express alarm that President Trump has provided you with the authority to unilaterally strip labor rights from civilian federal employees at the Department of Defense (DoD). Specifically, the President's January 29, 2020 memo titled "Delegation of Certain Authority under the Federal Service Labor-Management Relations Statute" (the Memo) purports to provide you authority to "issue orders excluding Department of Defense agencies or subdivisions" from their responsibilities to workers under the Federal Service Labor-Management Relations Statute (FSLMRS).<sup>1</sup> The Memo not only undermines national security and the hardworking DoD civil servants that help keep the country safe, but also may violate the FSLMRS. We request that you commit, in writing, not to act on the authority that the Memo purports to delegate, and ensure civilian DoD workers maintain their rights under the FSLMRS. Your statutory role to protect our nation's security also requires that you protect the DoD civil servants that help keep the country safe.

There are 750,000 civilian employees working at the DoD,<sup>2</sup> many of whom are represented by one of twelve unions that the Federal Labor Relations Authority certified as their exclusive representatives.<sup>3</sup> The FSLMRS covers most federal workers,<sup>4</sup> including many civilian

---

<sup>1</sup> Executive Office of the President, Federal Register Notice, "Delegation of Certain Authority Under the Federal Service Labor-Management Relations Statute," February 21, 2020, <https://www.federalregister.gov/documents/2020/02/21/2020-03578/delegation-of-certain-authority-under-the-federal-service-labor-management-relations-statute>.

<sup>2</sup> Performance.gov, "Department of Defense," <https://www.performance.gov/defense/>.

<sup>3</sup> Unions include Association of Civilian Technicians (ACT), American Federation of Government Employees (AFGE), Federal Education Association (FEA), International Association of Machinists and Aerospace Workers (IAMAW), International Association of Fire Fighters (IAFF), International Federation of Professional and Technical Engineers (IFPTE), Laborers' International Union of North America (LIUNA), Metal Trades Department (MTD), National Association of Government Employees (NAGE), National Association of Independent Labor (NAIL), National Federation of Federal Employees (NFFE), and Seafarers International Union (SIUNA). Defense Civilian Personnel Advisory Service, "Labor and Employee Relations—Operations," <https://www.dcpas.osd.mil/LER/Operations>.

<sup>4</sup> 5 U.S.C. § 7103 definition of "agency" excludes the Government Accountability Office, the Federal Bureau of Investigation, the Central Intelligence Agency, the National Security Agency, the Tennessee Valley Authority, the Federal Labor Relations Authority, the Federal Service Impasses Panel; the United States Secret Service and the United States Secret Service Uniformed Division.

workers at the DoD, and provides “the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal,” and protection in exercising this right.<sup>5</sup> The statute specifies that this right includes the right “to engage in collective bargaining with respect to conditions of employment.”<sup>6</sup> The FSLMRS also provides procedures to resolve grievances,<sup>7</sup> defines prohibited “unfair labor practices,”<sup>8</sup> and requires the granting of official time.<sup>9</sup> The statute also identifies management rights that cannot be negotiated<sup>10</sup> and prohibits federal employees from striking.<sup>11</sup> These protections are important: they help ensure the expertise, independence, and authority of career civil servants that work alongside the troops to keep the country safe.

The FSLMRS provides the President conditional authority to exclude certain federal agencies or subdivisions from its requirements.<sup>12</sup> The Memo issued last month purports to delegate this authority under 5 U.S.C. § 7103(b) to you (and further to any Senate-confirmed appointee to whom you redelegate the authority), allowing you to “issue orders excluding Department of Defense agencies or subdivisions” from FSLMRS coverage.<sup>13</sup>

To justify this decision, the Memo states that “the national security interests of the United States require expedient and efficient decisionmaking” and that the DoD “requires maximum flexibility to respond to threats to carry out its mission of protecting the American people.”<sup>14</sup> It claims that “where collective bargaining is incompatible with these organizations’ missions, the Department of Defense should not be forced to sacrifice its national security mission and, instead, seek relief through third parties and administrative fora.”<sup>15</sup>

It is not clear that the designation in the President’s memo is consistent with FLSMRS requirements.

Under the FSLMRS, the President must meet two requirements in order to exempt a Federal agency or subdivision from the FSLMRS. First, the President must demonstrate that “the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work.”<sup>16</sup> Excluding an entire department or divisions within a department from collective bargaining is incompatible with this statutory framework. Congress expressly excluded some agencies from collective bargaining,<sup>17</sup> and chose to confer only limited authority

---

<sup>5</sup> 5 U.S.C. § 7102.

<sup>6</sup> *Id.*

<sup>7</sup> 5 U.S.C. § 7121.

<sup>8</sup> 5 U.S.C. § 7116.

<sup>9</sup> 5 U.S.C. § 7131.

<sup>10</sup> 5 U.S.C. § 7106.

<sup>11</sup> 5 U.S.C. § 7311.

<sup>12</sup> 5 U.S.C. § 7103(b).

<sup>13</sup> Executive Office of the President, Federal Register Notice, “Delegation of Certain Authority Under the Federal Service Labor-Management Relations Statute,” February 21, 2020, <https://www.federalregister.gov/documents/2020/02/21/2020-03578/delegation-of-certain-authority-under-the-federal-service-labor-management-relations-statute>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> 5 U.S.C. § 7103(b)(1)(A).

<sup>17</sup> 5 U.S.C. § 7103(a)(3).

on the executive branch to exclude discrete offices that have as their primary function “intelligence, counterintelligence, investigative, or national security work.”<sup>18</sup> While, in the past, Presidents have exercised this limited authority as to specific DoD offices, this statutory framework makes clear that Congress did not intend for wholesale or sweeping exclusion of DoD itself or large segments of DoD. The standard could not be met for most DoD components.

Second, the President must show that the provisions of the FSLMRS “cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.”<sup>19</sup> The Memo is essentially an anti-union rant, and its argument for exemption is asserted without justification or precedent<sup>20</sup> and seems to be generated by an ideological desire to weaken unions rather than a concern with national security. The Memo appears to rationalize an ongoing, uniform exemption of DoD from all FSLMRS requirements – which is clearly not what Congress intended when it provided for limited and specific exemption authority.

The assertion that employees’ collective bargaining rights are “incompatible” with the mission of the DoD, and that civil servants’ ability to advocate for safe, improved working conditions could somehow “sacrifice [DoD’s] national security mission” is erroneous.

Unions have long existed in national security agencies—DoD civilian federal employees have had their right to collective bargaining recognized in statute since 1978,<sup>21</sup> and the first Executive Order issued under 5 U.S.C. §7103(b) authority excluded specific agencies outside the DoD and only subdivisions of the DoD, not the entire department.<sup>22</sup>

Representatives from the DoD have testified before Congress that strong engagement between management and unions supports the agency mission, allowing the DoD to have “earlier identification of ... challenges” and “a structure to attack the problem.”<sup>23</sup> Unionized workers at the DoD have helped produce critical changes that support mission-readiness and the safety and

---

<sup>18</sup> 5 U.S.C. § 7103(b)(1)(A).

<sup>19</sup> 5 U.S.C. § 7103(b)(1)(B).

<sup>20</sup> None of the Executive Orders issued in the past four decades relying on section 7103(b) of title 5 have named “collective bargaining” as a threat to national security. Executive Order 12171, November 19, 1979; Executive Order 12338, January 11, 1982; Executive Order 12391, November 4, 1982; Executive Order 12410, March 28, 1983; Executive Order 12559, May 20, 1986; Executive Order 12632, March 23, 1988; Executive Order 12666, January 12, 1989; Executive Order 12671, March 14, 1989; Executive Order 12681, July 6, 1989; Executive Order 12693, September 29, 1989; Executive Order 13039, March 11, 1997; Executive Order 13252, January 7, 2002; Executive Order 13480, November 26, 2008; Executive Order 13741, September 29, 2016; Executive Order 13760, January 12, 2017; Executive Order 13764, January 17, 2017; Executive Order 13869, April 24, 2019; Executive Order 13870, May 2, 2019; all available at <https://www.federalregister.gov/presidential-documents/executive-orders>.

<sup>21</sup> Civil Service Reform Act of 1978, Public Law 95-454. Available at:

<https://www.govinfo.gov/content/pkg/STATUTE-92/pdf/STATUTE-92-Pg1111.pdf>.

<sup>22</sup> Executive Office of the President, Federal Register Notice, “Executive Order 12171—Exclusions from the Federal Labor-Management Relations Program,” November 19, 1979, <https://www.archives.gov/federal-register/codification/executive-order/12171.html>.

<sup>23</sup> Senate Committee on Homeland Security and Governmental Affairs, “Labor-Management Forums in the Federal Government,” October 11, 2011, <https://www.govinfo.gov/content/pkg/CHRG-112shrg72488/html/CHRG-112shrg72488.htm>.

security of our military.<sup>24</sup> The Department of Homeland Security (DHS), which also has a national security mission, recognized in their Labor-Management Forum Charter that “that the primary resource of DHS is the knowledge, skill, wisdom, and experience of its employees and that it is necessary to encourage the active involved participation of employees to effectively accomplish the DHS mission.”<sup>25</sup>

Unions strengthen national security by providing stability for workers and ensuring a strong, well-trained, professional workforce—a critically important role given DoD’s recruitment challenges and staffing shortages in critical areas, including cybersecurity and medical care.<sup>26</sup> Unions create safer workplaces that facilitate problem-solving and information sharing, and improve workers’ quality of life—all of which benefit employees’ capacity to meet and advance the mission of the department.<sup>27</sup> Congress acknowledged this role in the FSLMRS, finding that “the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations” both “safeguards the public interest” and “contributes to the effective conduct of public business” and that “labor organizations and collective bargaining in the civil service are in the public interest.”<sup>28</sup>

In the 2006 case *Firstline Transportation Security, Inc. and International Union, Security, Police, and Fire Professions of America*, the National Labor Relations Board (NLRB) reviewed 60 years of relevant precedent on “issues concerning national security and national defense” and concluded: “We can find no case in which our protection of employees’ Section 7 rights had an adverse impact on national security or defense.”<sup>29</sup> Further, the NLRB wrote that “with regard to national security and defense, employee ‘self-organization for collective bargaining is not incompatible with efficient and faithful performance of duty.’”<sup>30</sup>

President Trump’s decision to allow you to bust DoD workers’ unions appears to be motivated purely by an anti-union bias and will harm national security.<sup>31</sup> The DoD’s unionized civilian federal workforce provides key support to the DoD’s mission and the military forces that carry it out, and stripping away these workers’ rights would result in profound damage to them

---

<sup>24</sup> American Federation of Government Employees, “AFGE Urges Congress to Prevent Trump from Ending Unionization at DoD,” February 18, 2020, <https://www.afge.org/article/afge-urges-congress-to-prevent-trump-from-ending-unionization-at-dod/>.

<sup>25</sup> Department of Homeland Security, “DHS Labor-Management Forum Charter,” November 4, 2010, <https://www.dhs.gov/sites/default/files/publications/labor-management-forum-charter.pdf>.

<sup>26</sup> Federal News Network, “Despite sluggish rollout, DoD vows to expand new hiring system for cyber personnel,” Jared Serbu, February 27, 2019, <https://federalnewsnetwork.com/defense-main/2019/02/despite-sluggish-rollout-dod-vows-to-expand-new-hiring-system-for-cyber-personnel/>; Military.com, “The Pentagon Must Do More to Attract and Keep Good Dentists and Doctors, GAO Finds,” Dorothy Mills-Gregg, January 21, 2020, <https://www.military.com/daily-news/2020/01/21/pentagon-must-do-more-attract-and-keep-good-dentists-and-doctors-gao-finds.html>.

<sup>27</sup> Economic Policy Institute, “How today’s unions help working people,” August 24, 2017, <https://www.epi.org/publication/how-todays-unions-help-working-people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy/>.

<sup>28</sup> 5 U.S.C. § 7101.


<sup>29</sup> *Firstline Transportation Security, Inc. and International Union, Security, Police, and Fire Professions of America* 347 N.L.R.B. 447 (2006).

<sup>30</sup> *Id.*

<sup>31</sup> Politico, “White House memo details divide-and-conquer labor strategy,” Ian Kullgren, October 4, 2019, <https://www.politico.com/news/2019/10/04/federal-employees-white-house-memo-028954>.

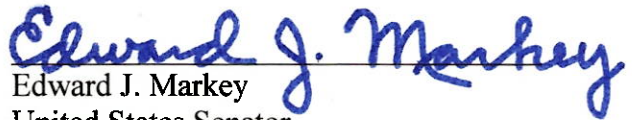
and to the DoD's national security mission. We ask that you commit to not act on the President's Memo, and request your response by March 12, 2020.

Sincerely,




---

Elizabeth Warren  
United States Senator




---

Edward J. Markey  
United States Senator



---

Sherrod Brown  
United States Senator



---

Bernard Sanders  
United States Senator



---

Kirsten Gillibrand  
United States Senator