

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William Alsup, Judge

AMERICAN FEDERATION OF)
GOVERNMENT EMPLOYEES, AFL-CIO,)
et al.,)

Plaintiffs,)

VS.)

NO. 25-cv-01780-WHA

UNITED STATES OFFICE OF)
PERSONNEL MANAGEMENT, et al.,)
Defendants.)

San Francisco, California
Thursday, March 13, 2025

TRANSCRIPT OF PROCEEDINGS

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Thursday - March 13, 2025

8:01 a.m.

P R O C E E D I N G S

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THE COURTROOM DEPUTY: All rise. Court is now in session. The Honorable William Alsup is presiding.

THE COURT: Good morning, everyone.

ALL: Good morning, Your Honor.

THE COURT: Please be seated.

THE COURTROOM DEPUTY: Calling Civil Action 25-1780, American Federation of Government Employees, et al. v. U.S. Office of Personnel Management, et al.

This hearing -- people on the Zoom -- attendees -- no recording, whether by audio or video or screenshot, is allowed. It's prohibited -- it's prohibited.

THE COURT: That was unclear. You said "allowed."

THE COURTROOM DEPUTY: No. No recording.

THE COURT: You said "prohibited." Which is it?

THE COURTROOM DEPUTY: No recording, audio or screenshots, are allowed.

Counsel, please approach the podium and state your appearances for the record, beginning with counsel for plaintiffs.

MS. LEONARD: Good morning, Your Honor. Danielle Leonard, Altshuler Berzon, for the plaintiffs. With me at counsel table are Stacey Leyton and Eileen Goldsmith from

Altshuler Berzon, Norm Eisen from the State Democracy Defenders Fund, and Tera Heintz from the Attorney General's Office of the State of Washington.

THE COURT: Welcome.

MR. HELLAND: And good morning, Your Honor. Assistant United States Attorney Kelsey Helland for the Government.

THE COURT: Thank you. Welcome.

All right. We're here on a motion for preliminary injunction, and we'll hear some argument.

Are there any other items that we need to address? Let's hear first from plaintiffs.

MS. LEONARD: Thank you, Your Honor.

I'm happy to provide argument on the preliminary injunction. I do think that there are some additional items to address that we can --

THE COURT: Well, just --

MS. LEONARD: -- get to after we --

THE COURT: -- let me hear what -- let's make a list of whatever it is you have in mind. I don't want to hear the arguments on them yet, but let's -- tell me what needs to be decided.

MS. LEONARD: We have a pending request that a certain additional declaration be struck from the record that was filed yesterday.

We also --

1 THE COURT: Is that Noah Peters?
 2 MS. LEONARD: Yes, Your Honor.
 3 THE COURT: All right. So let's -- what else?
 4 MS. LEONARD: There is also the issue of Mr. Ezell's
 5 failure to appear in response to your court order that he
 6 appear on Monday.
 7 THE COURT: What else? There was some --
 8 MS. LEONARD: That's --
 9 THE COURT: -- somebody from the IRS wanted to come
 10 and testify but wanted immunization, which I can't give. So
 11 I -- is that person here and wants to testify or is that moot?
 12 MS. LEONARD: So it's not moot, Your Honor. But just
 13 for clarification, it wasn't necessarily immunization. It was
 14 just a court order enforcing the subpoena to provide --
 15 THE COURT: No, you don't need a court order to
 16 enforce a subpoena. That's what the subpoena itself is.
 17 MS. LEONARD: Your Honor, there's --
 18 THE COURT: No. I'm not going to do that.
 19 MS. LEONARD: Okay.
 20 THE COURT: I know what's going on there. Some lawyer
 21 wants to be able to say that Judge Alsup has immunized her and
 22 given her a blank check to say whatever she wants and not be
 23 punished for it. No. If she wants to come and testify, I will
 24 hear what she has to say. But, no, you don't need a court
 25 order. I'm not going to do that.

1 MS. LEONARD: Okay. I very much appreciate that
 2 clarification, Your Honor, but I also for -- just to clarify,
 3 that the person wanted protection against retaliation.
 4 THE COURT: I can't give her that in advance.
 5 MS. LEONARD: Okay.
 6 THE COURT: Do you understand that?
 7 MS. LEONARD: I --
 8 THE COURT: This is a sideshow. Why are you going of
 9 into a sideshow?
 10 MS. LEONARD: Because we --
 11 THE COURT: All right. Is she here and does she want
 12 to testify?
 13 MS. LEONARD: She's not here today.
 14 THE COURT: Okay, then it's moot. All right. Let's
 15 move on.
 16 What else is on your list?
 17 MS. LEONARD: I think that's it, Your Honor.
 18 THE COURT: All right. We will deal with Noah Peters
 19 and Ezell's failure to appear in the course of general
 20 argument. You get to go first.
 21 MS. LEONARD: Thank you, Your Honor.
 22 Your Honor, many of the issues that are raised by our
 23 request for a preliminary injunction have already been
 24 addressed in your Court's -- in the orders thus far in the
 25 case, including the order resolving the TRO and the recent --

1 more recent order on granting leave to amend.
 2 And so those legal issues I'm happy to address further if
 3 there is a need, but I'm going to try to keep this focused on
 4 the issues that are still in play.
 5 And what we have before the Court is record evidence that
 6 conclusively establishes that OPM directed the terminations at
 7 issue. We have a very unusual circumstance where the
 8 Government has not mounted -- has attempted to say they
 9 factually dispute that. But as Your Honor is very familiar
 10 with the course of events here, have actually withdrawn the
 11 declaration by which they were attempting to dispute that. And
 12 there is no record evidence on the other side by which they've
 13 disputed this fact and the mountain of evidence that Your Honor
 14 recognized at the TRO stage.
 15 THE COURT: Well, but then they substituted Noah
 16 Peters. So what is the -- your opinion on that and what is the
 17 law that backs it up?
 18 MS. LEONARD: So they have not substituted Mr. Peters'
 19 declaration, Your Honor, because he -- that testimony was not
 20 presented for cross-examination and should not be considered by
 21 the Court. It was presented with an *ex parte* motion to stop
 22 this hearing today, Your Honor. That is the purpose for which
 23 they presented that declaration, to slide it into the record.
 24 Out of an abundance of caution, we asked them to withdraw
 25 that declaration because they are not making Mr. Peters

1 available to be cross-examined, just like all of the other
 2 Government witnesses that we tried to present to the Court to
 3 have the truth of what has happened come out and that they have
 4 refused and blocked from appearing here. They have not
 5 presented --
 6 THE COURT: I tend to agree with you on that. And the
 7 Government, I believe, has tried to frustrate the Judge's
 8 ability to get at the truth of what happened here and then set
 9 forth sham declarations to -- a sham declaration -- they
 10 withdrew it, then substitutes another. That's not the way it
 11 works in the U.S. District Court. I'm going to talk to the
 12 Government about that in a minute.
 13 I had expected to have an evidentiary hearing today in
 14 which these people would testify. And if they wanted to get
 15 your people on the stand, I was going to make that happen too.
 16 It would be fair. But, instead, we've been frustrated in that.
 17 But I still -- we're here on a preliminary injunction.
 18 And if you want me to just wait until months go by, until we
 19 ever get the evidentiary hearing, I will do that. But we do
 20 have a record here, and I'd like to hear your views on what
 21 relief should be issued today -- T-O-D-A-Y -- today.
 22 MS. LEONARD: Thank you, Your Honor.
 23 We are aligned in wanting that to happen, as well, and
 24 believing that these issues are a distracting sideshow, however
 25 important the truth is.

1 The record before Your Honor absolutely supports the
2 issuance of a preliminary injunction today. And the reason is,
3 even if the Peters' declaration's considered, which it
4 shouldn't be for all those reasons, it's not credible. There's
5 a mountain of evidence before the Court that OPM directed it.
6 OPM's actions were unlawful. The plaintiffs have standing.
7 And there is irreparable harm that is occurring every minute.
8 And it is snowballing.

9 So the real question here, Your Honor, is remedy. And we
10 are happy to go straight to that point rather than repeating
11 some --

12 THE COURT: All right. Tell me what remedy you want.

13 MS. LEONARD: Okay. So my colleague, Ms. Leyton, is
14 actually going to address the remedy issues, so I'm going to
15 turn it over to her.

16 THE COURT: Okay.

17 MS. LEYTON: Thank you, Your Honor.

18 As a remedy, we would request vacatur of the OPM action,
19 rescission of the directive to the agencies, and rescission of
20 the terminations that were carried out pursuant to that
21 directive.

22 OPM issued the directive. Our belief is that the evidence
23 in the record establishes that. There is no credible contrary
24 evidence that it's caused the widespread loss and deterioration
25 of Federal Government services, including, as documented by the

1 declarations, habitat and conservation harms, national parks
2 harms, veterans' services, a variety of harms that are
3 illustrated by the tens of declarations that we have submitted.
4 And it's causing injury to a variety of plaintiffs.

5 So the only appropriate relief is to order both OPM to
6 rescind its directives and the agencies to rescind the actions
7 that they took pursuant to the unlawful directive in
8 implementation of that directive.

9 The voluntary cessation cases, which we cited in our reply
10 brief, provide some guidance. There, the question there is
11 whether the Government has done enough that the Court should
12 no -- no longer need act in order to remedy the relevant
13 injuries.

14 The first prong of the voluntary cessation injury is about
15 a different subject. It's about whether we can be assured --

16 THE COURT: All right. Well, let me ask you --

17 MS. LEYTON: Yes.

18 THE COURT: -- this.

19 Are there -- I've read through some of the papers
20 submitted to me that some of the people who were terminated
21 were rehired; is that true?

22 MS. LEYTON: Yes, Your Honor. After this Court issued
23 an order, some were rehired pursuant to that, and then there
24 has been some public outcry over things like the loss of the
25 nuclear safety people.

1 THE COURT: All right. But have there been others who
2 were terminated who have not yet been rehired?

3 MS. LEYTON: Most have not been rehired, Your Honor.

4 THE COURT: Can you give me some examples?

5 MS. LEYTON: The examples where they were rehired
6 included the Department of Labor rescinded the terminations
7 that had not taken effect. All of the other agencies that we
8 have documented -- the Forest Service, the Department of
9 Agriculture, the Department of Education, the Department of
10 Labor -- most of the agencies have not rehired people.

11 The ones where we are aware, where the probationary
12 employees were rehired, were the National Science Foundation,
13 which occurred fairly quickly after this Court's order; the CDC
14 rescinded some of the terminations; the Department of Labor
15 rescinded terminations that had not yet happened; the
16 Department of Agriculture has taken steps but has not yet
17 rescinded the -- has not yet brought people back to work, is
18 our understanding. And that was addressed in some of the
19 declarations that we submitted earlier this week.

20 THE COURT: All right. Where does it stand with
21 relief being sought from the Merit Systems Protection Board by
22 terminated employees?

23 MS. LEYTON: The Merit Systems Protection Board
24 initially addressed six individual employees and ordered those
25 employees back to work. Then there was a class of Department

1 of Agriculture employees -- 6,000 Department of Agriculture
2 employees -- who were ordered back to work. That's what our
3 most recently submitted declarations address.

4 Our understanding is that those people are not yet back to
5 work. The Office of Special Counsel, Hampton Dellinger, was
6 terminated after that order issued, after he sought that class
7 relief, and so we are not aware that those individuals have
8 actually been brought back to work to restore the services that
9 they were providing, which is the injury that this Court is
10 seeking to redress.

11 THE COURT: I'm going to have some more questions
12 later about that whole process, but I want to hold up for a
13 moment and stick with the main things.

14 Okay. What else by way of relief are you seeking today?

15 MS. LEYTON: That is the key relief.

16 We would also ask that there be a compliance report from
17 the Federal Government. Our understanding, as this Court noted
18 in its order, is that OPM should have a list of all of the
19 probationary employees who were terminated. And so we would
20 like confidential reports from OPM as to which probationary
21 employees have been brought back to their job so that those
22 Government services can be restored. We would ask for a
23 timeline and for reports to this Court.

24 Under either our *ultra vires* claim or the APA claim, the
25 appropriate remedy is to restore the status quo. Vacatur is

1 supposed to unwind the unlawful agency action, and injunctive
2 relief is available under both the APA and our *ultra vires*
3 claim in order to redress the injuries that have occurred.

4 And in order to do that, this Court needs to be assured
5 that those actions that were taken pursuant to the unlawful
6 order have been fully unwound, meaning that people have been
7 brought back to work so that the services can be restored.

8 THE COURT: All right. Thank you.

9 Let's hear from the Government.

10 MS. LEYTON: Thank you, Your Honor.

11 MR. HELLAND: Thank you, Your Honor.

12 I didn't hear counsel address any of the evidence that we
13 submitted yesterday, including contemporaneous statements from
14 agency heads saying that they were the ones who made the
15 decision to terminate probationary employees.

16 We submitted, yesterday, press releases from the VA, from
17 the Department of Defense, from the USDA, including statements
18 from the Senate-confirmed officials or high-ranking career
19 officials in those departments saying these were tough
20 decisions, but ultimately it's the right thing to do. Or the
21 USDA press release. USDA is pursuing an aggressive workforce
22 optimization plan.

23 This is set against the backdrop of the
24 February 11th Executive Order, where the President directed
25 agencies to dramatically improve workforce efficiency to shrink

1 the size of the Federal Government, and the White House fact
2 sheet from that same date, February 11th, that said that
3 shrinking the size of the federal workforce is one of the
4 Administration's top priorities.

5 At the TRO hearing, Your Honor was, I think, looking for a
6 reason, other than OPM's mandate, that all of these agencies
7 would be taking this same action at the same time. I submit
8 that this backdrop, including the evidence that we submitted
9 yesterday, shows the obvious alternative explanation.

10 This was a priority for the Administration. The political
11 leadership of these agencies were taking this action
12 themselves. In fact, we previously pointed out to Your Honor
13 that on February 7th, before the OPM communications that
14 plaintiffs have put at the center of this case, the SBA had
15 already started terminating probationary employees. That was
16 reported in the media.

17 I don't think plaintiffs have yet acknowledged this
18 evidence that these were the actions of the political
19 leadership of these agencies in response to a priority -- a
20 clearly communicated public priority -- of the Administration
21 rather than an order from OPM.

22 That's first, Your Honor. Your Honor, has -- may I speak
23 to a couple of questions that Your Honor had?

24 THE COURT: Go ahead.

25 MR. HELLAND: So, first, Your Honor, with respect to

1 the MSPB actions, it's my understanding that there's not just
2 one class petition pending, but there are several from
3 almost -- I don't know if it's almost all, but many of the
4 agencies that are here. There's a website, in fact, that lists
5 the class petitions by agency. So many of the agencies
6 involved here are covered by those.

7 As far as I know, Your Honor, the MSPB has not yet decided
8 whether to accept those as class actions, but those requests
9 are pending. There's still time for that to play out.

10 And then going to the probationary employees who were
11 reinstated, Your Honor, I think NSF here is the exception that
12 proves the rule. All of these other agencies -- after
13 receiving Your Honor's order, after OPM amended its guidance on
14 March 4th to clarify that it hadn't been and still was not
15 directing terminations -- virtually all of them decided not to
16 bring back the probationary employees that their leadership had
17 decided to terminate. NSF did bring them back. That was
18 within its prerogative do so. But virtually no other agency
19 did. Maybe a couple others. So I think that that actually
20 shows that --

21 THE COURT: Well, maybe that's why we need an
22 injunction that tells them to rehire them. You will not bring
23 the people in here to be cross-examined. You're afraid to do
24 so because you know cross-examination would reveal the truth.

25 MR. HELLAND: Respectfully --

1 THE COURT: This is the U.S. District Court. Whenever
2 you submit declarations, those people should be submitted to
3 cross-examination, just like the plaintiffs' side should be.
4 And we -- then we get at the truth of whether that's what --
5 your story is actually true. I tend to doubt it. I tend to
6 doubt that you're telling me the truth whenever we hear all the
7 evidence eventually.

8 Why can't you bring your people in to be cross-examined or
9 to be deposed at their convenience? I said two hours for
10 Mr. Ezell, a deposition, at his convenience. And you withdrew
11 his declaration rather than do that? Come on. That's a sham.

12 Go ahead. I'm -- it upsets me. I want you to know that.
13 I've been practicing or serving in this court for over
14 50 years, and I know how we get at the truth. And you're not
15 helping me get at the truth. You're giving me press releases,
16 sham documents.

17 All right. I'm getting mad at you and I shouldn't.
18 You're trying to do your best, and I apologize.

19 All right. Go ahead. I do have a question, though. I
20 want you to answer on the --

21 MR. HELLAND: Thank you, Your Honor.

22 THE COURT: Just a minute. I'm going to let you
23 respond.

24 But all of those -- see, they give me so much stuff, I
25 can't find the thing that I wanted now. But the letter that --

1 that template letter, which I don't have here anymore -- the
2 template letter said to the employees that got terminated that
3 "You may" -- it didn't say "you do," it said, "You may have
4 rights to appeal to the MSP." "You may have" -- I'll quote it
5 now. I have it here. Quote, "You may have a right to file an
6 appeal with the Merit Systems Protection Board" -- may have --
7 "on the limited" -- limited -- "grounds set forth in 5 C.F.R.
8 315806."

9 Well, I looked at that to see what that was, and it is
10 limited to circumstances that existed prior to their
11 employment. Did you realize that when you told me that they
12 had the right to go to the MSPB?

13 MR. HELLAND: Well, Your Honor, these probationary
14 employees -- many of them -- are going to the MSPB, including
15 on grounds that --

16 THE COURT: Yes, but the letter -- your own letter
17 says that they have only a right to do so on grounds that
18 things that existed prior -- if the termination was based on
19 something prior to their employment.

20 MR. HELLAND: I cannot speak to whether the letter
21 that you're referring to is limited in advising these --

22 THE COURT: Here. I'll let you look at it. It is
23 limited. Take a look at it. The appeal rights that were
24 referred to there just call out that one thing. And when you
25 actually look at the regulation, it has nothing to do with this

1 case. It's a sham, in my opinion.

2 Now, it could be that some employees are trying -- it is
3 true that some employees have tried to go to the MSPB. That is
4 true. And some relief -- and, by the way, the President fired
5 the special counsel; true?

6 MR. HELLAND: I believe that's true.

7 THE COURT: Yeah, he fired him. So there is no
8 special counsel anymore for the MSPB. And then one of the --
9 one of the members was either fired or retired.

10 In the prior Administration in 2017 to 2022 -- or 2020 --
11 there was not a quorum of the MSPB. Do you remember that? So
12 there was no way to get relief from the MSPB during that
13 four-year period. I have a feeling that's where it's headed
14 now, is to decimate the MSPB, get rid of the special counsel,
15 and these employees will have no recourse even under that
16 limited sentence.

17 That troubles me. It makes me wonder whether I got misled
18 on saying there was no jurisdiction because I relied on you.
19 You said there was a remedy at the MSPB; and, therefore, I said
20 the unions didn't have subject-matter jurisdiction. I question
21 that. I'm going to ask for briefing on that after today,
22 because I believe I got misled by the U.S. Government on the
23 efficacy of the MSPB.

24 Yes, in statute theory, it may be. But based on that
25 regulation and based on that letter and based on the

1 cannibalization of the Office of Special Counsel and the MSPB
2 today, I -- there's not much of a remedy there. Possibly I'm
3 wrong, but I'm going to ask for briefing on it.

4 But I'll let you give me your response to that concern.
5 Please go ahead.

6 MR. HELLAND: Thank you, Your Honor.

7 I am aware that employees have been reinstated pursuant to
8 MSPB orders. I believe there was a widespread stay issued as
9 against the Department of Agriculture that affected a large
10 number of probationary employees at that agency. So I do not
11 think it is the case that the MSPB is without ability to grant
12 relief to affected probationary employees. I think that's
13 happening.

14 I do not know what's going to happen down the road. And
15 that may well be an appropriate subject for further briefing or
16 reconsideration. But as it stands now, Your Honor, I think the
17 MSPB is capable of granting this relief.

18 I --

19 THE COURT: Just a minute. Just a second.

20 The Administration has -- the member of the -- on
21 March 5th, 2025, board member, Cathy Harris, granted a second
22 45-day stay request on probationary employees at USDA. So
23 you're correct about that; however, the President has attempted
24 to fire her, but Judge Rudolph Contreras granted summary
25 judgment in her favor and held that the removal by the

1 Administration was unlawful. Is that correct?

2 MR. HELLAND: I have no reason to doubt that.

3 THE COURT: Well, we won't decide the efficacy of the
4 MSPB today, but we're going to have to look at that again. And
5 maybe we do have subject-matter jurisdictions after these
6 unions if there's -- if the channel through which Congress
7 sought to move those grievances by employees has been
8 decimated.

9 MR. HELLAND: Your Honor, briefly.

10 THE COURT: Yes.

11 MR. HELLAND: The unions, of course, would go through
12 the FLRA, not the MSPB, so --

13 THE COURT: Not the unions, yes, but the employees --

14 MR. HELLAND: Sure.

15 THE COURT: -- the employees who they represent.
16 Okay.

17 MR. HELLAND: May I respond to Your Honor's concerns
18 about the declarations and --

19 THE COURT: Please, yes. I'd like to hear it.

20 MR. HELLAND: Thank you.

21 Your Honor, I respectfully disagree that we have submitted
22 false evidence or have withdrawn evidence in an attempt to
23 frustrate Your Honor's efforts to find the truth.

24 We prepared the Ezell declaration within the two days that
25 we had to respond to the TRO thinking that that would be an

authoritative statement of the agency's position of what happened.

If you review that declaration again -- I understand that it's stricken. I'm not relying on it for its truth. But if you review that declaration again, he says, in the opening paragraph, that the materials reflected therein were based on his personal knowledge as well information provided to him. We were presenting it in his capacity as the acting director of that agency.

The paragraphs in that declaration talking about the February communications do not say that Mr. Ezell personally said anything or took any action. Those paragraphs are framed as coming from OPM. That's in contrast to the January 20th memo that he did personally author and send out. So, again, we put that forward in the TRO context on expedited briefing.

We understood coming out of the TRO hearing that Your Honor wasn't interested in the agency's summary of what happened. Your Honor wanted to know what was actually communicated on the February 13th call or February 14th call.

Well, Mr. Ezell was not on those calls. He was not on the February 13th call at all. And from what we understand, he was at the beginning of the February 14th call and then left. So he is not the person with firsthand knowledge of those events. Others are, and we -- I -- I expect Your Honor will be frustrated to hear this, but we continue to look forward to

presenting our case in terms of what was actually communicated on those calls.

But this is an APA case, Your Honor. There's a procedure for generating an administrative record, which we are working on and have started to submit to Your Honor, including the February 12th email, which I understand was basically read as a script on the February 13th call.

THE COURT: You know, your Noah Peters declaration -- nowhere does he -- does he ever say he was personally present during the call?

MR. HELLAND: Noah Peters is on the list of participants of the February 13th call that we shared with plaintiffs' counsel.

THE COURT: That's not the same thing. Does he say under oath that he was on the call? No.

MR. HELLAND: Honestly, Your Honor, I thought that he did. And it may not be in that declaration.

THE COURT: Oh, maybe I read it too quickly.

MR. HELLAND: So, Your Honor, we are in the process of compiling the administrative record. The procedure in APA cases is for the agency to prepare a record, for gaps in that record to be litigated, to be supplemented by oral testimony if necessary. The Government believes that that's the procedure to follow here.

We're not trying to frustrate the ability to find the

truth. We think that this is an APA case. And the way the record is developed in APA cases is through the process that I just described.

THE COURT: Yes, but you haven't given me any administrative record, and I -- so I have to go based -- they need emergency relief.

And I have a few words to say about administrative records. Would you like to hear those?

MR. HELLAND: I will just submit, Your Honor, that we have said the things that we filed yesterday as documentary evidence will be in the administrative record, including the February 12th email, the February 14th email, the FAQs that followed those. This is the essence of the administrative record that is being compiled.

THE COURT: I'm going to tell you, I think this is a good point because this is a recurring problem in APA cases -- about the administrative record. The rest of -- I see people in the gallery -- their eyes are glazing over because they hear something called "administrative record" and it just puts them to sleep. Well, it's exceedingly important.

It is generally true that under the Administrative Procedure Act, if you sue to set aside agency action, the agency provides the record on which the decision was made, and then the Court looks at that and decides -- rules according to the law based on that record. And there -- that is the normal

rule. And sometimes you get to go outside that and take additional discovery, but most cases are decided on the administrative record.

Now, back when I was in the Justice Department -- this was in '78, '79, and '80, in the Stone Age -- I was in the Solicitor General's Office. I reviewed a lot of administrative records. And then, in those days, everything that was before the agency or at least those people -- not just the decision-maker but the people reporting to the decision-maker -- even the bad memos -- those -- or deliberative memos -- those were all included. Now, as time goes on, though, that became inconvenient to very -- in future years.

And to fast-forward, in recent years, sometimes the Government lawyers present a sanitized record. It only has the good stuff that supports the agency action. It omits all of the bad stuff.

You think I'm making this up. It's absolutely true.

Now, whenever President Obama was President, I had a case. And it just -- and there was a question about the adequacy of the record. And it turned out that your department, the Justice Department, had actually put out a good memo that required the agencies to include much more than just the stuff that the decision-maker saw. I don't know, that's probably been deep-sixed by now. But that was the rule back around

1 2008. And so that gave a little bit of sunshine into what had
2 actually happened in the agency.

3 But after that, we went back to the Dark Ages, and there's
4 nothing -- these agency records are just sanitized to allow the
5 decision to be upheld with only the documents that support it
6 and none of the other material that would undercut the agency
7 action that was in play in the agency at the time the thing was
8 being decided.

9 So I say to you, I have -- I want you -- if you're going
10 to give me an administrative record, let's do an honest one and
11 a complete one and not one that is sanitized. That's my advice
12 to the Government.

13 And that history, I believe you'll find, is actually
14 100 percent true as I have -- so I have some frustration with
15 administrative records. And I'm skeptical of them, because I
16 think they go to some trouble to sanitize and not give me the
17 true administrative record.

18 Okay. But right now, even if you gave me a perfect
19 administrative record, you have it. And these people over here
20 want immediate relief. And they are entitled to get a ruling
21 on the record that I do have. So that's the answer on that
22 part.

23 MR. HELLAND: May I speak to that briefly, Your Honor?

24 THE COURT: Yes, you may. Please go ahead.

25 MR. HELLAND: We, as you know, have offered to

1 stipulate to continue the TRO pending further development of
2 the factual record.

3 So, furthermore, our position being that OPM didn't and
4 hasn't been, since the TRO, direct these terminations. We
5 don't see the urgency demanding relief that plaintiffs are
6 putting forward. We think that the Court's order from the TRO
7 is clear, that agencies have been complying with it, and that
8 provides time for further factual development.

9 THE COURT: Well, that's not quite true. I don't
10 quite agree with what you just said.

11 All right. What else would you like to say?

12 MR. HELLAND: I want to pause just for one more moment
13 on Acting Director Ezell, just because I think the agency's
14 reasons for not wanting him to submit to a deposition are
15 broader than just the limited facts of the TRO that we put
16 forward.

17 Every Presidential Administration in modern history has
18 jealously guarded their agency heads against being forced to
19 give testimony. That's since the *Morgan* case about 80 years
20 ago now. So that is not something unique to this
21 Administration. It is not something about Secretary Ezell's
22 testimony. That is just an Executive Branch prerogative to --

23 THE COURT: Is he a secretary?

24 MR. HELLAND: He's an acting director.

25 THE COURT: Director -- acting director -- but he's

1 not a secretary of the Department?

2 MR. HELLAND: No, correct.

3 THE COURT: Okay.

4 MR. HELLAND: But I think he is the highest-level
5 official at that Department.

6 THE COURT: At that agency?

7 MR. HELLAND: At that agency.

8 THE COURT: Yes, okay. All right.

9 MR. HELLAND: The only other thing, then, I --

10 THE COURT: Yes, but you chose to submit his
11 declaration.

12 MR. HELLAND: Yes, in the context of the TRO.

13 THE COURT: And then you said, "No, but he can't be
14 cross-examined." So you must submit -- you can't just give
15 me -- you can't just say, "Here's the declaration. You have to
16 accept it without question whenever there is a question."

17 MR. HELLAND: Absolutely, Your Honor. And so the --
18 as you know, the purpose of a TRO is an expedited process.
19 Both sides put together what evidence they can in a very short
20 time frame. And then the period between the issuance of the
21 TRO and the further preliminary injunction is supposed to flesh
22 out the facts.

23 So that is the stage that we are in now. We're compiling
24 the administrative record. We've publicly filed several of the
25 documents that would go into that administrative record.

1 Our purpose, again, for submitting the declaration for the
2 TRO was to submit an authoritative statement from the agency in
3 very expedited circumstances. But it is not supposed to shield
4 the agency from review of its actions. It's to articulate and
5 provide some evidence for a TRO decision on a couple days'
6 notice.

7 I note my opposing counsel discussed relief very briefly,
8 Your Honor, and I want to speak to that.

9 THE COURT: I want to hear your argument. Please go
10 ahead.

11 MR. HELLAND: Thank you.

12 Well, so, first of all, again, we have stipulated that the
13 TRO can continue as a preliminary injunction as is. So we
14 agree already, to that extent, of further relief.

15 I don't think that ordering the rescissions of the
16 terminations is an appropriate thing either on this record or
17 for Your Honor to be granting. Again, the MSPB, the FLRA --
18 those administrative agencies have the authority to stay
19 terminations, to order reinstatements, to issue that form of
20 relief. I don't think that that's appropriate there. I
21 certainly don't think it's appropriate when the agencies that
22 were added as parties two days ago have not had the chance to
23 file any briefing or to -- plaintiffs have not even moved for
24 relief against those new defendants. They moved against OPM
25 two weeks ago.

1 So I think there's a further process that would have to
2 happen, which would include briefing on the authority for
3 Your Honor to even issue that relief.

4 To the extent any further relief beyond the TRO is
5 appropriate in the near term, we would submit that it should be
6 limited to something like each agency performing an independent
7 review of the decisions previously made, reaffirming that they
8 were done under the agency's authorities, not OPM's direction.
9 I think that's more appropriate and consistent with
10 Your Honor's authority and jurisdiction as well as the factual
11 record here.

12 THE COURT: Okay.

13 Response?

14 MS. LEONARD: The terminations were not done at the
15 agency's discretion, and they were not done properly in
16 accordance with the law on the basis of performance,
17 Your Honor.

18 The suggestion that opposing counsel just made, that
19 somehow the agency should be able to rereview the decision to
20 fire probationary employees on mass at the direction of OPM is
21 somehow an appropriate remedy is divorced from reality and the
22 record that's before this Court.

23 But to address some specific -- to pointedly address some
24 of the specific points that -- and quickly -- that opposing
25 counsel made, there was an exchange about appeal rights to the

1 MSPB. And I think this is incredibly important, Your Honor,
2 because from the very first moment -- on the first day of this
3 Administration -- that OPM started directing agencies through
4 the January 20th memorandum to collect and list -- something
5 that had never happened before in the history of this
6 country -- compile and submit to OPM a list of all your
7 probationary employees so you can get ready to fire them. They
8 told them they don't have appeal rights. "We are firing them
9 because they don't have appeal rights." That's how insidious
10 this action was.

11 THE COURT: Read that -- where do you get that? I'm
12 trying to remember where I saw that before. Read that to me
13 again.

14 MS. LEONARD: Yes. That's in the January 20th memo,
15 which was originally attached, Your Honor, as an attachment to
16 the now withdrawn Ezell declaration. But they've just
17 resubmitted all the documents that he submitted without a
18 declaration. But we don't contest that that's actually what --

19 THE COURT: Read to me the sentence you're talking
20 about.

21 MS. LEONARD: [As read]:

22 "Probationary periods are an essential tool for
23 agencies to assess performance. Employees on
24 probationary periods can be terminated during that
25 period without triggering appeal rights to the Merit

1 Systems Protection Board."

2 That is Mr. Ezell --

3 THE COURT: Is that an exact quote?

4 MS. LEONARD: That is an exact quote.

5 THE COURT: From the January 20 memo by who?

6 MS. LEONARD: By Mr. Ezell, OPM, to the agencies.
7 This has been the plan from the very beginning: Fire them all
8 because they can't appeal, Your Honor. That is what OPM has
9 consistently said to the agencies in every single communication
10 that's before this Court.

11 It was not just a February 13th phone call and a
12 February 14th CHCO meeting. And they say, "Oh, but Mr. Ezell
13 was not on that." We don't know if that's true or not,
14 Your Honor. We would like to get to the truth. But what's in
15 front of this Court is every single communication, including
16 the ones that they have now belatedly tried to say are the
17 administrative record.

18 They have said: Terminate everyone who's not mission
19 critical because they cannot appeal. That's the plan. That's
20 what OPM has done here, and that is profoundly --

21 THE COURT: How many employees -- probationary
22 employees -- were terminated on or about February 14th?

23 MS. LEONARD: We don't know, Your Honor. We
24 believe --

25 THE COURT: Give me an estimate.

1 MS. LEONARD: I believe it is far higher than 10,000
2 employees, Your Honor. We know that at least by February 14th,
3 more than five agencies had terminated. On February 13th, the
4 VA terminated.

5 And the press releases that they have cited -- they were
6 in our complaint, Your Honor. He said we are not addressing
7 them? They were in our complaint, Your Honor, because they
8 actually show that this was a centralized effort.

9 The VA press release that they're saying shows agency
10 discretion says, I quote [as read]:

11 "The dismissals announced today are part of a
12 government-wide Trump Administration effort to make
13 agencies more efficient, effective, and responsive to
14 the American people."

15 OPM told them to do this, Your Honor. And we have proven
16 it on the record. They have not put anything in, in response
17 to that, other than press releases that actually support
18 plaintiffs. It's profoundly unlawful, Your Honor.

19 And with respect to the representations regarding the --
20 that's the importance of the appeal rights. It's twofold.
21 It's both a factual matter to show how centralized this was and
22 the reasons for it, which are incredibly disturbing, frankly,
23 for the U.S. Government to be terminating these employees
24 because they have no appeal rights.

25 But also it goes straight to the point that Your Honor is

1 raising about channeling. And we welcome -- and I was prepared
2 here to try to -- try to -- try to beg for one more chance,
3 Your Honor, to address this issue, because I think it is
4 absolutely right -- what Your Honor raised at the TRO
5 hearing -- the question about these mass actions with respect
6 to so many employees.

7 Is that really what Congress intended when it set up these
8 agencies? And now that it is, these agencies are being
9 dismantled. And, by the way, the President has fired the
10 members of the FLRA too. They say, "Oh, the unions can go to
11 the FLRA." The President fired them too.

12 THE COURT: How many members -- I didn't know about
13 that part.

14 MS. LEONARD: It's --

15 THE COURT: How many members are there on the FLRB or
16 whatever it is?

17 MS. LEONARD: So the MSPB I believe the President
18 removed one so that there is not a majority -- so it's a
19 one-one split. And that --

20 THE COURT: Well, that person --

21 MS. LEONARD: Got put back.

22 THE COURT: -- demoted them but did not remove them.
23 Demoted them from vice chair; right?

24 MS. LEONARD: But one was removed. That's now tied
25 up. And the Government is fighting in the D.C. Circuit to off

1 them.

2 And then the FLRA, I believe it's also one additional
3 member has been -- has been --

4 THE COURT: And one --

5 MS. LEONARD: I'm looking at my cocounsel, Mr. Eisen,
6 who might have better facts than I do on this.

7 But one member has been removed by the President to stymie
8 that agency from actually doing anything, Your Honor. And
9 they're fighting that in the D.C. Circuit. They're opposing
10 the orders that have -- that is an unlawful order. They're
11 fighting those orders to put those people back. The OSC is
12 gone.

13 THE COURT: All right. One out of three? One out of
14 five? How many -- how many?

15 MS. LEONARD: Three. One out of three removed.

16 THE COURT: All right. And this is the FL --

17 MS. LEONARD: RA. The Federal Labor -- the Federal
18 Labor Relations Authority, Your Honor, which is the board set
19 up by the FSLMRS, which is the labor relations statute for
20 federal employees. So they removed them.

21 The OSC is gone. The pattern is very clear. This is all
22 centralized action, of course, from this Administration. The
23 pattern is clear to -- there is no channel, Your Honor. There
24 is no channel.

25 THE COURT: All right. But let me ask you, Congress

1 did pass the Reduction in Force Act, which, by definition,
2 contemplates that there can be a reduction in force within an
3 agency; isn't that true?

4 MS. LEONARD: That's part of this -- there are
5 reduction in force statutes as part of the CSRA, absolutely.
6 But they're ignoring them and eviscerating them, Your Honor.

7 THE COURT: Well, I know you say they have not been
8 followed. And possibly that's true. But I wouldn't want
9 anyone listening to this call on the Zoom to think that this
10 case is about stopping the termination of anybody from the
11 Government, even when it's in the hundreds, because there is a
12 statute that allows that, called the Reduction in Force Act, if
13 the steps that are required by statute are followed.

14 MS. LEONARD: Absolutely, Your Honor.

15 THE COURT: That's true; isn't it?

16 MS. LEONARD: It is for agencies to decide to do
17 reduction in force. And what we have here absolutely,
18 Your Honor, on the record before the Court, is not agencies'
19 decisions to terminate anything. It's OPM's. And that's a
20 question for another day, whether OPM can order RIFs. That's a
21 question for another day, Your Honor. And maybe that day is
22 coming very soon. OPM cannot order those either. But agencies
23 can make those decisions. But OPM here ordered this.

24 THE COURT: All right. Maybe. But if it's done
25 right, there can be a reduction in force within an agency.

1 That has to be true.

2 MS. LEONARD: There's -- absolutely. There's a
3 statute that allows it and regs that set up the many steps,
4 including notice and notice to states and local governments who
5 are affected. There are many steps. And it requires -- it
6 takes years of planning, actually, Your Honor. It can't be
7 done in a day.

8 THE COURT: It can't be done in one day, but there's a
9 lot of ground between one day and years. So I -- okay. But
10 that, as you say, is for another day.

11 But Congress itself has said you can have -- an agency can
12 do a reduction in force if it's done correctly under the law.
13 So I -- I want everyone to be aware of that.

14 Your lawsuit is not challenging that proposition. Your
15 lawsuit is saying these terminations were in violation of other
16 laws and *ultra vires*, and that's a separate point.

17 All right.

18 MS. LEONARD: That is right.

19 THE COURT: What else would you like to say?

20 MS. LEONARD: Just one second to make sure I'm
21 covering all the -- I did want to clarify one other factual
22 point that I feel like we, in our TRO papers, perhaps didn't
23 present as clearly as we could have to the Court. And I think
24 it's incredibly important and don't want it to be lost.

25 It's not just employees who were hired right out of

1 college or at the outset of their careers who were affected by
2 these unlawful terminations. Anyone who received a promotion
3 is a probationary employee. Directors of entire departments
4 were gone in a day, Your Honor.

5 This action by OPM made swiss cheese of the federal
6 agencies at every level. That is why that is directly
7 connected to the level of harm that this is causing. Because
8 it's not just new folks -- they can go find a career somewhere
9 else -- it is -- they're the future of the American workforce,
10 and I don't mean to undermine their importance. But it is
11 people with decades of federal service. The most experienced
12 people. If they have been promoted from acting director to
13 director of their particular division, they were gone. That
14 is --

15 THE COURT: All right. You mean --

16 MS. LEONARD: -- the problem here.

17 THE COURT: -- they don't go back to their original
18 position? They're just terminated?

19 MS. LEONARD: They're gone, Your Honor, within hours.

20 THE COURT: How long were they terminated?

21 MS. LEONARD: Turn in your keys.

22 THE COURT: Even though they worked for 30 years?

23 MS. LEONARD: Even though they worked for 30 years,
24 Your Honor. That is why the harm is so widespread and so
25 profound. It is -- this action was intended to cripple these

1 agencies, and that is what it has done. And it is profoundly
2 problematic.

3 And we didn't want that to be lost on the Court, because I
4 think, in our TRO papers, we didn't -- we didn't make that as
5 prominent as we, perhaps, should have. And that is absolutely
6 established in the record here.

7 "Probationary" means -- and the formal director of OPM,
8 who submitted a declaration in support of this preliminary
9 injunction -- it's in that dec., as well, and other
10 declarations we've submitted in support -- it's anyone who was
11 new to their position, Your Honor, not just to the Federal
12 Government.

13 THE COURT: I did not appreciate that point. Thank
14 you.

15 What else would you like to say?

16 MS. LEONARD: One more point of clarification about
17 the OSC because I think there's been a further implication,
18 perhaps, from something that opposing counsel said. Only the
19 OSC, who isn't there anymore --

20 THE COURT: OSC?

21 MS. LEONARD: Office of Special Counsel.

22 THE COURT: Oh, all right.

23 MS. LEONARD: -- can initiate a stay request with the
24 MSPB. Only the OSC can do that. The only class stay
25 request -- "stay" meaning reinstate the employees pending

1 resolution -- the only class one that was actually initiated by
2 Hampton Dellinger before he was fired was U.S. -- well, during
3 his period of reinstatement before he was then fired again by
4 the D.C. Circuit -- was with respect to USDA.

5 He did not -- the other six -- the other five agencies of
6 the original six employees -- there were not class requests
7 that had been filed yet. So the idea that those are pending
8 before the MSPB is not correct, Your Honor. There were no
9 class stay requests.

10 And with respect to the USDA, I want the record to be very
11 clear about what's happened. They are not complying with the
12 MSPB's order to reinstate. What they did was they put people
13 back on pay -- they just announced this, I believe, yesterday,
14 in a press release, a week after the reinstatement order --
15 they put people back on pay, but they haven't put them back in
16 their position.

17 So what they've done is they're waiting out the 45 days.
18 It's a temporary stay. It's going to expire. There's no OSC
19 to ask for it to be extended.

20 This is the announcement. This is the Forest Service
21 directly to the union: On March 5th, the MSPB issued a 45-day
22 stay of the termination of U.S. Department of Agriculture
23 probationary employees.

24 By Wednesday, March 12th, the Department will place all
25 terminated probationary employees in pay status and provide

1 them with backpay.

2 That's great. Happy about that.

3 The Department will quickly develop a phased plan for the
4 return to duty. And while those plans materialize, all
5 probationary employees will be paid.

6 We do not believe that they are going to return any of
7 these employees to actual service, Your Honor. They certainly
8 haven't yet. This is the record before the Court. They
9 haven't restored the services, Your Honor, when they were
10 directly ordered by the MSPB to reinstate those employees to
11 service.

12 THE COURT: In the Office of Special Counsel, are --
13 they got rid of Dellinger; right?

14 MS. LEONARD: Yes.

15 THE COURT: But are there other acting special
16 counsels that are --

17 MS. LEONARD: There's been one appointed, Your Honor,
18 and he is the head of the VA. The head of an agency is the new
19 whistleblower protector.

20 THE COURT: The head of the what?

21 MS. LEONARD: The Veterans Administration.

22 THE COURT: Has been moved over to be -- and is no
23 longer the head of the VA?

24 MS. LEONARD: No. He's also still the head of the VA.

25 THE COURT: All right.

1 MS. LEONARD: I don't understand how it could possibly
2 be that the head of the defendant agency is the person who is
3 supposed to protect the whistleblowers, Your Honor. But that
4 is what this Administration has done.

5 THE COURT: Are there subordinate lawyers in that
6 unit?

7 MS. LEONARD: In the OSC?

8 THE COURT: Yeah.

9 MS. LEONARD: I am sure that there are. He -- I'm
10 sure the OSC has people who work for him. They've probably
11 actually had all of their probationary employees fired too,
12 just like the FLRA did and the MSPB did.

13 But setting that aside, Your Honor -- that's true --

14 THE COURT: You don't know that --

15 MS. LEONARD: I --

16 THE COURT: You're just guessing at that.

17 MS. LEONARD: They're on the list. They're on the
18 list of people who had probationary employees, but -- and
19 they're on the CHCO directive from February 14th. There's a
20 representative of the small agency counsel -- the FLRA, MSPB,
21 OSC -- they're all part of that.

22 THE COURT: Well, are they -- were there -- were there
23 lawyers who were non-probationary working in the unit?

24 MS. LEONARD: I am sure that there are, Your Honor.

25 THE COURT: All right.

1 MS. LEONARD: I'm sure that there are. But they don't
2 have the authority to move for a stay. Only the OSC has that.

3 THE COURT: So you're telling me that a probationary
4 employee in some random agency cannot directly go to the MSPB?
5 Is that true?

6 MS. LEONARD: They can. They can file their
7 individual -- they can file their individual action against
8 their employer agency at the MSPB. Some of them can. Some of
9 the probationary employees -- this is very complicated.
10 It's -- who has the appeal rights where is exceptionally
11 complicated, depending on the category of service. Some of
12 them can only go to the OSC. A big portion of them can only go
13 to the OSC.

14 THE COURT: Well, what's the difference between those
15 that can only go to the OSC versus those that can go straight
16 to the Merit Systems Protection Board?

17 MS. LEONARD: It depends on the category of service,
18 Your Honor, and the reason that they're invoking. And the
19 best -- the best place that I have seen summarizing this --
20 people have been writing a lot of material about -- to try to
21 explain this. The best place is the OSC intake -- it's like --
22 as a union lawyer, I'm very familiar with the unfair labor
23 practice form at the NLRB where you check the boxes. The OSC
24 has the same thing.

25 And so the OSC has an intake form where -- it's like

1 three pages long -- where you have to identify all the sort of
2 ins and outs whether you qualify to go to the OSC or not. So I
3 cannot recite that here today, Your Honor, full candor. It
4 depends on whether you're in competitive service or in what
5 category and what you're basing your allegations on, if it's
6 discrimination or not. It's an incredibly complicated sort of
7 if then, who gets to go there or not. Some -- at a highest
8 level, some can go to the OSC, and that's their only avenue,
9 and now that avenue is gone.

10 We are very happy to brief this further if Your Honor
11 would like further briefing on -- particularly as you've
12 invited on the channeling issues, whether it's at this point.
13 We obviously do not want to delay any injunction. And what I
14 would -- we would propose is there is no need, Your Honor, for
15 purposes of this preliminary injunction, to reach the
16 channeling issue, even with respect to the unions.

17 We would invite and ask for another chance to convince
18 Your Honor that the channeling argument that was presented by
19 the Government and the representations were not correct. And
20 that the claims against OPM are not channeled, Your Honor, even
21 for my union clients. And we would invite another chance to
22 convince Your Honor of that.

23 But for purposes of the PI today, the other organizations
24 and the State of Washington have standing -- irreparable
25 harm -- more than enough to issue that PI without reaching and

1 making further law with respect to the channeling.

2 I would -- one further point about that, Your Honor. I do
3 believe that your TRO order actually extends the law further
4 than it has been in the Ninth Circuit. Not just applying it,
5 but extends it. No case has ever channeled a claim against OPM
6 over a Government-wide rule in the Ninth Circuit. No case has
7 ever channeled a procedural APA claim in the Ninth Circuit.
8 Your TRO order was the first, and we would respectfully welcome
9 another chance.

10 And we don't want that TRO decision to take on a life of
11 its own, Your Honor, and we would welcome another chance to try
12 to convince you that these claims are not channeled. Because,
13 as Your Honor has indicated here today, the channel's gone,
14 Your Honor.

15 THE COURT: Let me give the defendants a chance to
16 respond. You had a long talk there.

17 Go ahead. Please, let's hear from the defense.

18 MR. HELLAND: Thank you, Your Honor.

19 Taking the very last point first, I think the "in the
20 Ninth Circuit" caveat there is doing a lot of work. There's of
21 course many decisions from outside the Ninth Circuit, including
22 the D.C. Circuit, the Federal Circuit, the First Circuit.
23 These have been, you know, addressed in the papers on the TRO
24 briefing.

25 To the extent Your Honor is reconsidering its initial

1 channeling decision, we agree further briefing would be
 2 appropriate.

3 THE COURT: Yeah, that's -- I'm not going to do it
 4 today, but I want to raise the issue and ask for briefing. So
 5 I agree with you on that.

6 Go ahead.

7 MR. HELLAND: Thank you.

8 I come back to a point I made at the outset. The press
 9 releases that we've submitted show that the independent
 10 political appointment -- the political leadership of these
 11 agencies were taking credit publicly for the decisions.

12 We do not deny that OPM had a role in coordinating these
 13 efforts. I think the documents that we've put forward are very
 14 clear about that.

15 But plaintiffs' theory of this case isn't just that OPM
 16 coordinated this; it's that OPM ordered it. That the agencies
 17 didn't think that they had the authority not to do it. Well,
 18 if that's the case, why would the leaders of these agencies be
 19 issuing press releases the same day or shortly after these
 20 decisions were made? They wouldn't. The reason --

21 THE COURT: Well, I would like to see some depositions
 22 taken on that, but you stonewalled me on it. I would like to
 23 know -- maybe -- maybe the press release was an orchestrated
 24 thing. It wouldn't be the first time.

25 MR. HELLAND: It starts to sound a bit

1 conspiratorial --

2 THE COURT: Yeah.

3 MR. HELLAND: -- to think that these press releases
 4 coming out of multiple agencies when, again, the Administration
 5 has just put out Executive Orders and fact sheets making clear
 6 that this is an agenda priority for the Administration.

7 I think the pretty obvious alternative explanation is
 8 everybody knew the new Administration was prioritizing this.
 9 And the political appointments wanted to comply with that
 10 Administration priority.

11 THE COURT: Okay.

12 MR. HELLAND: Finally, Your Honor, the additional
 13 documents that we put forward, which, again, will be part of
 14 the administrative record in this case, including specifically
 15 the February 12th email, I invite you to look closely at the
 16 language of that. I think you'll see it is not an OPM order.
 17 The language of that reflects that OPM had asked agencies to
 18 prepare lists and asked them, with a please, "Separate those
 19 that you know you want to separate by a date certain." Right?
 20 It put it to the agencies, "those that you know you want to
 21 separate."

22 This was not an order from OPM. The Administration record
 23 will show, and it does show on the record that we've put before
 24 Your Honor, that OPM was coordinating this, was asking for
 25 information, was asking that action be taken by certain times,

1 but the decisions on these employment actions were made by the
 2 agencies and were fully endorsed by their political leadership.

3 Thank you, Your Honor.

4 THE COURT: Okay. Give me a moment.

5 The Court is going to grant some additional relief by way
 6 of preliminary injunction. I want to give some background.

7 Congress, in the Reduction in Force Act, makes it clear
 8 that an agency can engage in a reduction in force. So I want
 9 everyone to be completely aware that if an agency decides to do
 10 a reduction in force, it can do so, so long as it complies with
 11 the several requirements of the Reduction in Force Act.

12 So this should not -- the words that I give you today
 13 should not be taken as some kind of criticism that a wild and
 14 crazy judge in San Francisco has said that the Administration
 15 cannot engage in a reduction in force. I'm not saying that at
 16 all. Of course, if it does, it has to comply with the
 17 statutory requirements, the Reduction in Force Act, the Civil
 18 Service Act, the Constitution, maybe other statutes. But it
 19 can be done if it's done in accordance with the law.

20 This case is not about that. What this case is about is
 21 really an attempt to do a reduction in force, but to force it
 22 through the OPM, Office of Personnel Management, to have the
 23 OPM direct agencies to terminate probationary employees as an
 24 easy way to get a reduction in force underway.

25 Because, as counsel pointed out, its own memo says they

1 don't have appeal rights -- probationary employees don't have
 2 appeal rights -- and so let's get started with the process by
 3 just terminating all probationary employees except those that
 4 are mission critical.

5 Now, I went through the evidence last time. I'm not going
 6 to go through it quite as extensively, but I am going to touch
 7 on some of the points. Something new came in by the -- from
 8 the plaintiffs. It involved the Forest Service.

9 On February 13th, 2025, a Forest Service briefing paper
 10 from Human Resources Management at the Forest Service says
 11 this -- or said this -- quote (as read):

12 "All" -- that's spelled A-L-L -- "All federal
 13 agencies, including the Department of Agriculture,
 14 were notified on February 12th, 2025, by the Office
 15 of Personnel Management to terminate all employees
 16 who have not completed their probationary or trial
 17 period."

18 That then led to the termination of a lot of people, but
 19 one in particular I'll give as an example. Leandra Bailey was
 20 a physical science info specialist in Albuquerque. In
 21 September of last year, she had received a performance review
 22 in which she was, quote, "fully successful," closed quote, in
 23 every category. Not just some; every category. On
 24 February 13th, she was terminated using the OPM template
 25 letter.

1 In addition to directing these terminations, OPM gave a
2 proposed letter. The letter said -- I'm reading from it --
3 Memorandum for Leandra Bailey, February 13, from Deedra Fogle,
4 Director Human Source Management, U.S. Forest Service. This is
5 just one sentence, quote [as read]:

6 "The agency finds, based on your performance,
7 that you have not demonstrated that your further
8 employment at the agency would be in the public
9 interest," closed quote.

10 This despite the fact that her most recent review was
11 fully successful in every category.

12 Now, how could it be, you might ask, that the agency could
13 find that based on her performance when her performance had
14 been stellar? The reason that OPM wanted to put this based on
15 performance was, at least in part, in my judgment, a gimmick to
16 avoid the Reduction in Force Act. Because the law always
17 allows you to fire somebody for performance.

18 So OPM was thinking: Okay, if we tell them to use this
19 template letter, then that will give us an argument against the
20 Reduction in Force Act or maybe some other act -- Civil Service
21 Reform Act.

22 Now, this -- what I'm about to say is not the legal basis
23 for what I'm going to order today, but I just want to say, it
24 is sad -- a sad day -- when our Government would fire some good
25 employee and say it was based on performance when they know

1 good and well that's a lie.

2 Excellent in all -- fully -- what was the phrase? I don't
3 want to misstate it. "Fully successful in every category," yet
4 they terminate her based on performance. That should not have
5 been done in our country. It was a sham in order to try to
6 avoid statutory requirements.

7 It also happens to be that whenever you fire somebody
8 based on performance, then they can't get unemployment
9 insurance. So that makes it even worse, doesn't it?

10 And then it makes it even worse because the next employer
11 is going to say, "Well, have you ever been terminated based on
12 performance?" They're going to have to say, "Yes," to
13 thousands of people.

14 Now, the reason this is not a basis for the ruling today
15 is that the -- that is a grievance that goes to the employee,
16 and the -- and we still haven't decided -- I mean, I have
17 decided but I'm going to take another look at it, as to whether
18 they're channeled -- that grievance has to be channeled through
19 the Merit Systems Protection Board.

20 But it is illustrative of the manipulation that was going
21 on by OPM to try to orchestrate this Government-wide
22 termination of probationary employees.

23 I'm going to go back to what I read [as read]:

24 "All" -- this is from the Forest Service -- "All
25 federal agencies, including the Department of

1 Agriculture, were notified on February 12th by the
2 Office of Personnel Management to terminate all
3 employees who have not completed their probationary
4 or trial period."

5 Now, there's more evidence than that. Some of that I went
6 over last time.

7 Department of Energy sent a termination letter saying [as
8 read]:

9 "Per OPM instructions, Department of Energy
10 finds your further employment would not be in the
11 public interest."

12 Another termination letter from the Bonneville Power
13 Administration per OPM instructions, Civilian Personnel Policy
14 Counsel, Department of Defense in accordance with direction
15 from OPM and before Congress, Chief Human Capital Officer for
16 the Veterans Administration testified under oath recently,
17 February 25th [as read]:

18 "QUESTION: So nobody ordered you to carry out these
19 terminations? You did it on your own?

20 "WITNESS: There was direction from the Office of
21 Personnel Management, the USDA."

22 Quote, [as read]:

23 "Agencies were directed to begin providing
24 termination notices."

25 So the Court finds that OPM did direct all the agencies to

1 terminate probationary employees with the exception of
2 mission-critical employees. The Court rejects the Government's
3 attempt to use these press releases and to read between the
4 lines to say that the agency heads made their own decision with
5 no direction from OPM.

6 The relief that's going to be granted as is follows:

7 The temporary restraining order well be extended. In
8 addition, relief defendant Veterans Administration shall
9 immediately offer reinstatement to any and all probationary
10 employees terminated on or about February 13th and 14th, 2025.

11 This order finds that all such terminations were directed
12 by defendants' OPM and Acting Director Ezell and were unlawful
13 because OPM and Ezell had no authority to do so.

14 Further, relief defendant Veterans Administration shall
15 cease any and all use of the template termination notice
16 provided by defendant OPM and/or Acting Director Ezell to the
17 VA and to other agencies on or about February 13th and 14th and
18 shall immediately advise all probationary employees terminated
19 on or about February 13 and 14 that the notice and termination
20 have been found to be unlawful by the United States District
21 Court for the Northern District of California.

22 Relief defendant Veterans Administration shall cease any
23 termination of probationary employees at the direction of
24 defendants OPM and Acting Director Ezell.

25 To repeat, this order holds that OPM and Acting

1 Director Ezell have no authority whatsoever to direct, order,
2 or require in any way that any agency fire any employee.

3 Now, given the arguments and the facts in this case,
4 namely, that defendants have attempted to recast these
5 directives as mere guidance, this order further prohibits
6 defendants from giving guidance as to whether any employee
7 should be terminated.

8 Any terminations of agencies' employees must be made by
9 the agencies themselves, if made at all, and must be made in
10 conformity with the Civil Service Reform Act and the Reduction
11 in Force Act and any other Constitutional or statutory
12 requirement.

13 In seven calendar days, relief defendant VA shall submit a
14 list of all probationary employees terminated on or about
15 February 13th and 14th with an explanation as to each of what
16 has been done to comply with this order.

17 Now, this order so far has only mentioned the Veterans
18 Administration, but the same relief is extended -- and I'm not
19 going to repeat it, but I rely on the good faith of the
20 Government -- I'm extending the same relief to the Department
21 of Agriculture, Department of Defense, Department of Energy,
22 Department of the Interior, Department of Treasury. And those
23 are the ones where I believe the record is the strongest that
24 relief is necessary. And so it's the VA plus those other
25 agencies.

1 MSPB might have been in error because -- I'm not making a
2 ruling now -- I'm going to invite briefing -- because the whole
3 point of the January 20 memorandum was to say the probationary
4 employees have no appeal rights. And the letter that was
5 sent -- the template letter -- said, "You may have a right to
6 file an appeal with the Merit Systems Protection Board on the
7 limited grounds set forth in 5 C.F.R. 315806," which I looked
8 up, and that has nothing to do with this case. It gives you a
9 right to appeal if you get terminated based on something that
10 happened before your employment. Let's say that you were a
11 convicted felon and didn't disclose that. Well, that's not
12 this case.

13 So if there is no ability to appeal and get not just some
14 limited -- I mean, a real effective way to undo the harm to
15 these individual employees, I don't see how this could be
16 channeled. So the -- to the extent that the unions here were
17 seeking to vindicate the rights of their employees, you know,
18 like I thought you were, I may have made an error.

19 Now, I did rely upon the Government's representations that
20 the MSPB was an effective remedy. I thought it was. And I'm
21 not yet ready to say it wasn't. But I didn't know all this at
22 the time I made that ruling.

23 So I would like to give you each an opportunity to brief
24 this. I'll give you, say, one week to brief this. I'll give
25 you until the end of next week, to Friday at noon, to brief

1 And this is without prejudice to extending the relief
2 later in the future to other agencies and it's without
3 prejudice to shrinking the relief in the future upon a proper
4 showing.

5 Okay. I will try to get out a short memorandum opinion
6 that elaborates on this order, but this is the order and it
7 counts effective immediately. Please don't say, "Oh, I'm
8 waiting for the written order." This is the order from the
9 bench.

10 Okay. I want -- I'm giving the plaintiffs authority
11 promptly to depose, in Washington, Noah Peters, who submitted
12 this other declaration. I am -- discovery is now open. And,
13 within reason, you can, on both sides, take depositions and ask
14 for documents, but be reasonable.

15 The easiest mistake you plaintiffs can make is to be
16 unreasonably broad in your discovery. I promise you, I won't
17 allow that. But narrowly directed, reasonable discovery is in
18 order in this case to get at the truth because the Government
19 is saying one thing and you're saying another.

20 Right now your record is the strongest, and I think that
21 your position is correct on the facts. But it deserves to be
22 tested by discovery.

23 Finally, I believe that the channeling argument -- I
24 believe that the channeling argument that I relied on that says
25 that all employee grievances should be channeled through the

1 whether or not the unions have standing based upon the fact
2 that the channel has been destroyed. So no channeling because
3 no channel -- no effective channel.

4 Now, this -- and then if you want to make the same
5 argument for the Federal Labor Relations Board -- or
6 Authority --

7 MS. LEONARD: Authority.

8 THE COURT: -- whatever it is, you can brief that too,
9 all within the 10 pages.

10 I'm ordering the Government to make this guy, Noah,
11 available soon, within the next two weeks.

12 If you want to appeal to the Court of Appeals, God bless
13 you. I want you to because I'm tired of seeing you stonewall
14 on trying to get at the truth. Instead of giving me snippets,
15 I want somebody to go under oath and tell us what happened in
16 these phone calls and at other times was it really an agency --
17 so you can depose some people in the agencies if they really
18 are claiming they did it on their own and was not influenced by
19 OPM. We should get it, but be reasonable in the discovery.

20 The only one I'm ordering for sure is Noah Peters within
21 the next two weeks. You've got to go to Washington to take his
22 deposition. And it can be two hours. All right?

23 So, see, the way the Government does it, they want to come
24 in with an *ex parte* and just stall, stall, stall. Just go
25 ahead and take your appeal. We've got a preliminary injunction

1 now. I've ordered some discovery. Just go ahead and put it up
2 there on appeal and see if the Court of Appeals feels that what
3 I have done here today by way of relief is unjustified. I'm --
4 that's fine.

5 I'm doing the best I can with the record I got, and this
6 is a quick-moving time frame. These people have been
7 terminated. I want to make it clear that, right now, I'm just
8 ruling based on services -- these organizational plaintiffs --
9 and I'm not considering the State of Washington.

10 The organizational plaintiffs that got the TRO are
11 complaining about the deprivation of services by these agencies
12 and resources that they count on, and that is still the basis
13 for their standing and the basis for the subject-matter
14 jurisdiction. But I am raising the question whether or not the
15 additional subject-matter jurisdiction exists because the
16 channel that Congress wanted to be effective has been ruined.

17 All right. Anything further today?

18 MS. LEONARD: Yes, Your Honor. Two points of
19 clarification.

20 First of all, I believe Mr. Peters is a lawyer, and I
21 would ask for three hours, Your Honor. We all know how hard it
22 is to depose lawyers.

23 THE COURT: Three hours.

24 MS. LEONARD: Thank you.

25 THE COURT: Okay. But the three hours of airtime, all

1 right?

2 MS. LEONARD: Thank you. For our questioning?

3 THE COURT: For your questioning.

4 MS. LEONARD: Thank you, Your Honor.

5 But more seriously, actually, not that that's not a
6 serious issue, to clarify, the evidence that plaintiffs have
7 presented with respect to other agencies and the harm -- and I
8 know Your Honor's very familiar with the record -- I just want
9 to clarify because there is extensive irreparable harm with
10 respect to NOAA, NIH, FAA that is incredibly urgent. How do we
11 get in front of you the -- I have a list that we have prepared.
12 I'm happy to give to the Government a copy of every agency and
13 every plaintiff that they're connected with. And we're happy
14 to give you the declarations --

15 THE COURT: Can I see what you're talking about?

16 MS. LEONARD: Sure. It's every agency and every
17 plaintiff that has shown harm through the declarations with
18 respect to that agency.

19 And we're happy to submit this by later today with the
20 declaration cites. I believe we already have that prepared as
21 well. This was just my cheat sheet, Your Honor, if that would
22 assist you.

23 THE COURT: Well, does counsel object if I keep this
24 cheat sheet?

25 MR. HELLAND: No.

1 THE COURT: Thank you.

2 I -- this is not good enough for -- I mean, you'd have to
3 connect the dots better than this, but I see where you're
4 going.

5 You can submit more, but I am not promising -- I'm basing
6 it based on my understanding of the present record of who has
7 standing and who is suffering irreparable harm, so -- but I
8 could be wrong on one or two. I was wrong last time on one
9 issue, so I -- you can submit something more and we'll consider
10 it.

11 MS. LEONARD: Thank you very much, Your Honor.

12 THE COURT: Anything on your side?

13 MR. HELLAND: No. Thank you, Your Honor.

14 THE COURT: All right.

15 All right. I want to make it clear that I don't think
16 counsel for the Government has done anything dishonorable.
17 I've given him a hard time. He's doing the best he can with
18 the case he's got. And thank you for your service in the
19 Justice Department.

20 Okay. I think we're done for today.

21 THE COURTROOM DEPUTY: Court is adjourned.

22 (Proceedings adjourned at 9:30 a.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Thursday, March 13, 2025

Kendra Steppler

Kendra A. Steppler, RPR, CRR

Official Reporter, U.S. District Court