



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 30, 2008

The Honorable Henry A. Waxman
Chairman
Committee on Oversight and
Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The Department of Justice (DOJ) has reviewed H.R. 3774, the "Senior Executive Service Diversity Assurance Act." This bill would, among other things, require the Director of the Office of Personnel Management (OPM) to establish within OPM the Senior Executive Service Resource Office to make recommendations to the Director with respect to regulations, and to provide guidance to agencies, concerning the structure, management, and diverse composition of the Senior Executive Service (SES). H.R. 3774 would also require each agency to establish one or more SES evaluation panels, with respect to any SES position for which a vacancy announcement is posted, to: (1) review the qualifications of each candidate for a position which is to be filled by a career appointee; and (2) certify to the executive resources board the names of the best qualified candidates. In addition to sharing similar concerns expressed by the Office of Personnel Management in their letter, we have substantial and fundamental constitutional objections to this bill, as summarized below. We also include in this letter our responses to questions raised regarding the applicability of *Philips v. General Service Administration* to H.R. 3774. In light of all the foregoing concerns, the Department strongly opposes enactment of H.R. 3774.

Equal Protection

Several provisions of the bill are highly objectionable on fundamental equal protection grounds.

A. Section 3(a) of the bill requires the establishment, in all Federal agencies, of "Senior Executive Service evaluation panels" (SES Panels) that would have authority "(A) to review the executive qualifications of each candidate for a position which is to be filled by a career appointee; and (B) to certify to the appropriate executive resources board the names of candidates

who, in the judgment of the panel, are best qualified for such position." Section 3(a) of the bill further provides: "(B) Each panel shall consist of 3 members, of whom at least 1 shall be a woman and 1 other shall be a member of a racial or ethnic minority group." We believe this provision would impose an unconstitutional racial/ethnic quota -- as well as a constitutionally objectionable gender quota, *see generally United States v. Virginia*, 518 U.S. 515, 533 (1996) (sex-based government classifications must be supported by an "exceedingly persuasive justification" in order to comply with equal protection requirements) -- in violation of the equal protection requirements imposed on the Federal Government under the Due Process Clause of the Fifth Amendment. *See generally Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). There can be no doubt that a requirement that "at least" one out of three members of a government body such as the SES Panels "be a member of a racial or ethnic minority" constitutes a racial or ethnic quota as that term is used in the equal protection context. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 335 (2003) ("Properly understood, a 'quota' is a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups,'" quoting from *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989)). For reasons established by the Supreme Court, we believe the provisions of section 3(b) would likely be held unconstitutional on equal protection grounds because they establish a quota that would not satisfy the narrow tailoring requirement of strict scrutiny. *See, e.g., Grutter*, 539 U.S. at 334; *Croson*, 488 U.S. at 507-08 ("the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing"). We would stress, moreover, that constituting panels that will exercise significant or decisive influence upon the selection of SES members throughout the Federal Government on the basis of racial, ethnic, and gender quotas is especially objectionable, because it would infect the merit selection system with the appearance and the risk of preference or favoritism.

B. The provisions governing the functions and authorities of the Senior Executive Service Resource Office (SESRO) under section 2 of the bill raise additional equal protection concerns. Section 2 directs the SESRO, *inter alia*, to: (1) "establish and maintain lists" that record "the race, ethnicity, [and] gender" of persons who have been certified as having the executive qualifications necessary for initial appointment as a career SES appointee "in a form that renders them useful to appointing authorities;"; (2) collect and maintain statistics showing the racial, ethnic, and gender composition of the SES and publish annually in the Federal Register additional racial, ethnic, and gender information relating to the candidates for and composition of the SES; and (3) "conduct a continuing program for the recruitment of women [and] members of racial and ethnic minority groups" for SES positions. Federal courts, including the United States Supreme Court, have long recognized the equal protection concerns that attend Government efforts to prioritize or preference certain groups based on their race or gender. In addition, at least one federal circuit, the D.C. Circuit, has held that preferential outreach efforts akin to those at issue here violate equal protection. As the court explained in *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002), government programs that compel federal agencies "to redirect their necessarily finite

recruiting resources so as to generate a larger percentage of applications from minority candidates" are subject to strict equal protection scrutiny under *Adarand. Id.* at 20-21. Further, the provision of demographic information to hiring officials is likely to be construed as a means of impelling the consideration of race in hiring decisions. The described provisions of H.R. 3774, each of which includes a racial classification, are also vulnerable to strict equal protection scrutiny for the same reasons that the FCC program at issue in *MD/DC/DE* was invalidated in that case: because, inter alia, the provisions would "place pressure[]" on agencies "to recruit minorities without a predicate finding" that the agency in question "discriminated in the past or could reasonably be expected to do so in the future." 236 F.3d at 21. *See also Berkley v. United States*, 287 F.3d 1076, 1084 (Fed. Cir. 2002) (applying strict scrutiny and invalidating under equal protection Air Force promotion and retention program that imposed coercive accountability measures, where, inter alia, decision-makers "were advised that their actions would be reviewed by their superiors with regard to how the selection rates of minorities and females compared to the selection rates for all officers."). In the absence of a legislative record establishing a strong basis in evidence that the proposed program is narrowly tailored to further a compelling government interest, the foregoing provisions of section 2 raise substantial concerns on equal protection grounds.

Appointments Clause/Separation of Powers

A. The SESRO established under section 2 of the bill would exercise a variety of significant powers and responsibilities, including the authority to (1) "take such actions" as it "considers necessary to manage and promote an efficient, elite, and diverse corps of senior executives", including "creating *policies* for the management and improvement" of the SES; (2) "be responsible for the policy development, management, and oversight" of the SES pay system; and (3) "be responsible for the administration of the qualifications review board." Bill, section 2(b)-(c). We believe these authorities, as well as others given to the SESRO under the bill, would entail the kind of delegated sovereign authority, or significant governmental authority, that can only be exercised by Officers of the United States appointed in accordance with the Appointments Clause, U.S. Const. art. 2, sec. 2, cl. 2. *See* Memorandum Opinion for the General Counsels of the Executive Branch, from Stephen G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Officers of the United States Within the Meaning of the Appointements Clause; Buckley v. Valeo*, 424 U.S. 1, 126, 140-41 (1976). Although section 2(b) provides that the SESRO shall be "established" by the OPM Director within OPM, it does not provide for the appointment of the officials who would exercise the authority of the SESRO. On our understanding that all their authority would be subject to the supervision of the OPM Director, the members of the SESRO would appear to constitute "inferior officers" within the meaning of the Appointments Clause. In order to comply with the Appointments Clause, those members must either be Officers already appointed in accordance with the Appointments Clause; or be appointed by either the President or a Department Head. In the absence of clearer provision

for appointment procedures that satisfy the Constitution, section 2 raises concerns and complications under the Appointments Clause. Moreover, some of section 2's provisions could be construed to assign the SESRO authority that extends to SES practices and policies in other departments and agencies of the Federal Government. Such provisions constitute unwarranted congressional micromanagement of Executive Branch lines of authority and undermine the President's ability to supervise and manage the unitary Executive Branch in a manner that is inconsistent with sound separation of powers policy. *See Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 253-54 (1989).

B. Additional Appointments Clause concerns arise with respect to the members of the SES Panels established under section 3 of the bill. The SES Panels would be given authority to "certify to the appropriate executive resources board the names of the candidates who . . . are best qualified for such [SES] position." Bill section 3(a). In exercising this authority, the Panel members would play a significant role in the administration and execution of the federal civil service statutes. *See id.*; 5 U.S.C. 3393. Under section 3(b) of the bill, moreover, only candidates certified by the SES Panels would be reviewed by an Executive Resource Board under the revised provisions of 5 U.S.C. 3393(c)(1) for recommendation to the appropriate appointing authorities. We believe that the SES Panels' power to exercise this critical authority over the appointment of persons to the SES, tantamount to a veto authority in that respect, likely constitutes delegated sovereign authority of the kind requiring appointment in accordance with the Appointments Clause. *See generally Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (noting Federal Election Commission's authority to make determinations of eligibility for federal elective office as among the powers that rendered their appointment subject to the Appointments Clause); Memorandum for the General Counsels of the Executive Branch, *Re: Officers of the United States Within the Meaning of the Appointments Clause* 13 (Apr. 16, 2007). Although federal officials may make recommendations and evaluations respecting promotions and assignments, and such functions do not necessarily render such employees officers of the United States subject to the Appointments Clause, the significant authority the bill grants SES Panel members appears to include the kind of executive power that characterizes offices governed by the Clause. Yet under section 3(a) of the bill, members of the Panels may be appointed by the "designee[s]" of department or agency heads as well as the department or agency heads themselves. Because we believe that appointment by such designees would not comply with the requirements of the Appointments Clause, section 3(a) is objectionable on that basis.

Philips v. General Services Administration

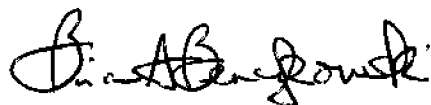
Additional questions have been raised regarding the applicability of *Philips v. General Services Administration*, 917 F.2d 1297 (Fed. Cir. 1990), and whether it provides precedent / support for the SES Panel provisions of H.R. 3774. It does not.

The *Philips* case does not address SES panel composition at all, nor provide constitutional approval for the composition contemplated in the legislation. Rather, the *Philips* opinion deals with very narrow scope-of-review issues raised by a federal employee's claim that a Merit Systems Protection Board ("MSPB") order denying her request that the employing agency retract an article about her case in an agency newsletter was arbitrary, capricious, or otherwise not in accordance with law, or unsupported by substantial evidence. *Id.* In short, *Philips* does not relate to the type of federally mandated panel composition that the Department of Justice has identified as constitutionally objectionable in H.R. 3774.

In addition, the Department's objections to section 3 of H.R. 3774 are based on the equal protection requirements of the Constitution and settled United States Supreme Court precedent recognizing and applying these requirements to race- and gender-based quotas and preferences such as those in the bill. Neither the *Philips* opinion itself, nor the merit systems principles recognized in the statutory section (5 U.S.C. § 2301) involved in that case addresses, controls or informs the constitutional equal protection concerns that the Department of Justice raised with respect to section 3 of the bill.

Thank you for the consideration of our views. If we can be of further assistance in this matter, please do not hesitate to contact this office. The Office of Management and Budget has advised us that there is no objection to the submission of this letter from the perspective of the Administration's program.

Sincerely,



Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Tom Davis
Ranking Minority Member