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EXECUTIVE ORDER 13583: ESTABLISHING A COORDINATED GOVERNMENT-WIDE INITIATIVE TO PROMOTE DIVERSITY & INCLUSION IN THE FEDERAL WORKFORCE

By Christopher Byrnes*

Note from the Editor:

This article is about Executive Order (EO) 13583—Establishing a Coordinated Government-Wide Initiative to Promote Diversity and Inclusion in the Federal Workforce. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to further discussion about the issues involved. To this end, we offer links below to different perspectives on the issue, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

Related Links:

- Executive Order 13583: <http://www.whitehouse.gov/the-press-office/2011/08/18/executive-order-establishing-coordinated-government-wide-initiative-prom>
 - U.S. Office of Personnel Management, Office of Diversity and Inclusion, Government-Wide Diversity and Inclusion Strategic Plan 2011: <http://www.opm.gov/diversityandinclusion/reports/GovernmentwideDIStrategicPlan.pdf>
 - Slow Progress Toward a Representative Federal Workforce, Center for American Progress, March 26, 2012: <http://www.americanprogress.org/issues/race/news/2012/03/26/11248/slow-progress-toward-a-representative-federal-workforce/>
 - Jitinder Kohli, Ask the Experts: Diversity in the Senior Ranks of the Federal Government, Center for American Progress, Oct. 20, 2011: <http://www.americanprogress.org/issues/open-government/news/2011/10/20/10411/diversity-in-the-senior-ranks-of-the-federal-government/>
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On August 18, 2011, President Obama issued Executive Order (EO) 13583—Establishing a Coordinated Government-Wide Initiative to Promote Diversity and Inclusion in the Federal Workforce. The EO, which stated a commitment to “equal opportunity, diversity, and inclusion,” directed all federal agencies to “develop and implement a more comprehensive, integrated, and strategic focus on diversity and inclusion as a key component of their human resource strategies,” consistent with applicable law. It was issued so that the federal government would “realize more fully the goal of using the talents of all segments of society,” and “create a culture that encourages collaboration, flexibility, and fairness to enable individuals to participate to their full potential.”¹

Pursuant to Section 2 of the EO, the Office of Personnel Management (OPM), working in conjunction with the Office of Management and Budget (OMB), the President’s Management Council, and the Equal Employment Opportunity Commission (EEOC), developed and issued a government-wide strategic plan soon thereafter to guide agencies in implementing the EO. The plan set out three goals to “provide a path for successful agency diversity and inclusion efforts: workforce diversity, workplace inclusion, and sustainability.”² More to the point of

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this article, the plan embraces a broad definition of diversity—to be sure, one that includes the usual characteristics of race, ethnicity, national origin, gender, and age, among others, but also one that includes “differences among people concerning where they are from and where they have lived and their differences of thought and life experiences.”³

So with such a broad definition of diversity and a stated commitment to equal opportunity and compliance with applicable law, why should applicants for federal employment, not to mention the general public, be concerned about the EO and these strategic plans? Because, in theory, the EO rests on faulty premises and, in practice, it could encourage more discrimination in federal employment.

Although not specifically mentioned in the EO, its issuance appears to be animated at least in part by statistics that purport to show disparities between men and women, and among racial and ethnic groups, in terms of their representation in the federal workforce, particularly in the ranks of the Senior Executive Service. A 2009 EEOC report showed that white males held more than 61 percent of senior federal service positions, compared with 29 percent for women, 7 percent for African Americans and 3.6 percent for Hispanics.⁴ However, recent reports from both the OPM and EEOC show that the percentage of women and minorities in senior level jobs increased in FY 2010, continuing a general upward trend since 2000.⁵

The premise that the federal workforce (or specific job categories within the federal workforce) must mirror the demographics of the population or even the relevant labor force suffers from serious flaws. Proportional representation as an end goal tends to encourage racial, ethnic and gender bean-counting

where federal hiring managers should more appropriately be placing an emphasis on hiring, training, and promoting the best qualified candidates—those most capable of meeting the demands of particular job requirements.

Also, a disparity is not necessarily evidence of discrimination, let alone proof of discrimination. In the federal workforce, there is much more evidence that racial, ethnic, and gender discrimination is not a systematic problem and that individual instances are appropriately remedied. Thus, an inference of discrimination is especially unwarranted from mere disparities in sectors of the federal workforce that are much more likely explained by other factors.

Is there a relationship between the racial or gender composition of a workforce and its performance that would justify attaining or maintaining a certain race or gender balance? Many in corporate America, the military, and education take it for granted that there is, but studies show this relationship is tenuous. In 2003, Professor Thomas A. Kochan of Massachusetts Institute of Technology's Sloan School of Management and other members of a research consortium conducted a study of the relationships between racial and gender diversity and the business performance of four large firms. Their study found no correlation between diversity and improved company performance.⁶ In a later discussion of the study in *Workforce* magazine, Professor Kochan again asserted that "there is virtually no evidence to support the simple assertion that diversity is inevitably good or bad for business," and that "[t]here are no strong positive or negative effects of gender or racial diversity on business performance."⁷ Psychologist Helen Hemphill found that diversity training "created even more divisiveness and disruption than existed before."⁸ Also, an article twenty years ago in *Forbes* calculated the cost of preferences to the economy at well over \$225 billion in 1991, or 4 percent of the gross national product.⁹

As mentioned above, OPM defines diversity broadly to include backgrounds, thought, and experience. Tellingly, its November 2011 guidance to agencies on diversity concedes that the federal government does not collect data on this kind of diversity, but promises that OPM, OMB, EEOC, and DOJ will work together to refine existing measurements (race, gender, etc.) and provide additional guidance for agencies in subsequent issuances.¹⁰ Until the federal government develops ways to measure applicants' and employees' backgrounds, thoughts, and experiences, OPM's guidance directs agencies to make due by relying on old standbys to assess how they are meeting their diversity goals—race, national origin, and gender. For example, agencies must:

- Analyze their current and future workforce to conduct a "barrier analysis," the process described in EEOC Management Directive 715, which involves comparing the participation rates of different races, genders, and national origin groups in the agency's workforce with corresponding participation rates in the relevant civilian labor force.¹¹
- Collect and analyze applicant flow data and determine if applicant pools are reflective of the civilian labor force.¹²

- Measure the percentage of qualified applicants from various hiring authorities . . . by demographic group. This mandate extends to an agency's internship program and Presidential Management Fellows.¹³

- Review their leadership development programs, determine whether they draw from all segments of the workforce, and develop strategies to eliminate barrier(s) where they exist.¹⁴

- Measure the total percentage of higher-level employees by demographic group and compare with the percent of each group that participated in leadership development programs in the past 12 months.¹⁵

- Analyze applicant pool data for all leadership development programs by demographic groups.¹⁶

- Measure the percentage of agency employees engaged in mentoring relationships by all demographic categories.¹⁷

- Measure the number of higher-level employees engaged in mentoring relationships by demographic categories.¹⁸

- Measure the percentage of all demographic groups incorporated into agency succession planning system.¹⁹

- Ensure that managers, supervisors, and employees have performance measures in place to execute the diversity and inclusion goals. Agencies are encouraged to include a diversity and inclusion element in performance plans in SES and supervisors/managers to which these agency personnel would be held accountable.²⁰

- Employ a diversity and inclusion dashboard with metrics as a tool for agency workforce planning and reporting. While OPM makes a nod to broader diversity by encouraging agencies to establish a non-numerical, qualitative diversity goal in their Strategic Plan, it also encourages agencies to establish "diversity and inclusion" metrics that include statistics on employee hiring, retention, promotions, EEO compliance and grievances.²¹

Finally, if an agency fails to submit to OPM reports required by all federal laws, regulations, executive orders, management directives, and policies related to diversity and inclusion, OPM will issue a "Diversity and Inclusion Improvement" notice and notify the President's Management Council of the deficiency.²²

Several agencies have already taken this guidance to heart and issued their diversity and inclusion strategic plans.²³ These plans are predictably heavy on race and gender-conscious diversity and light on diversity of thought, backgrounds, and experiences:

- According to its plan, the Department of Veterans Affairs (VA) will implement a "Diversity Index," which measures its aggregate workforce composition by race, ethnicity, and gender as compared with the civilian labor force/relevant civilian labor force, to monitor the status of its diversity.²⁴ While the VA is careful to deny that the Index is a "target metric," it nevertheless will use it to track program impact and overall progress. It is difficult to imagine that management and staff will not treat it as a target metric, however, since the VA will also implement and monitor

mandatory EEOC and diversity and inclusion standards in all leadership performance plans and will establish baseline metrics and a reporting system to enable its offices to identify and eliminate barriers in its recruiting and hiring of Hispanics, white females, African-Americans, and other groups denoted by their race and gender.²⁵

- The Department of Agriculture’s Agricultural Marketing Service’s plan calls for increasing the diversity of its workforce in “underrepresented groups” and for publicizing to senior leadership and employees’ diversity data by “race, national origin, [and] gender”²⁶

Agencies should certainly seek to identify and remove any actual barrier to equal opportunity in the federal workforce, but they must do so within the dictates of the law, which requires the use of nondiscriminatory means. As currently written, the EO fails to set forth applicable law with respect to nondiscrimination in hiring, promotion, training or retention efforts. But it does emphasize that agencies will be monitored and assessed on the basis of their progress in achieving the “diversity” and “inclusion” called for in the EO. The pressure for results without appropriate legal guidance will drive agency heads and federal hiring managers to focus on numbers and quotas to achieve what they perceive to be the right racial, ethnic, gender or other mix, whether overtly or covertly. Because the EO encourages agencies to pursue its directives internally through “human resource strategies,” there is also unlikely to be any transparency in the process.

Moreover, the federal government’s use of racial classifications and setting stated or unstated goals of particular racial and ethnic percentages inevitably encourages discrimination as a means to meet them, thereby triggering strict constitutional scrutiny.²⁷ When the federal government uses any classifications based on race, these classifications raise constitutional concerns under the equal protection component of the Due Process Clause of the Fifth Amendment.²⁸ Government racial classifications are “presumptively invalid”²⁹ and are reviewed by courts under a standard of strict scrutiny.³⁰ Under strict scrutiny, the government must demonstrate that the racial classification is “narrowly tailored” to further a “compelling public interest.”³¹ The Supreme Court has so far recognized a discrete number of interests sufficiently compelling to justify race-conscious government decisions, but diversity in the federal or even the private workforce has not been among them.³²

Even if a “compelling interest” were established, the government’s programs must be race-blind to satisfy the “narrow tailoring” prong of strict scrutiny. To the extent that the government is concerned that minority groups face discrimination in federal hiring, training, promotion, and retention, it must take care to use effective responses that do not require racial classifications or preferences. The desire to achieve a particular politically correct mix is not itself a compelling or important interest; that would be “discrimination for its own sake. . . . [which] the Constitution forbids.”³³

Any federal hiring preferences based on gender would also be presumptively invalid under an equal protection analysis, requiring an “exceedingly persuasive justification.”³⁴ A federal

agency would have to show that the challenged classification or employment action furthers an important government interest by means that are substantially related to that interest.³⁵ Generally, the Supreme Court has recognized that remedial purposes can justify gender-based classifications in the equal protection context, but not diversity purposes.³⁶

Aggrieved job applicants have not been always been successful pursuing constitutional claims in court under the Due Process Clause of the Fifth Amendment. They may still seek relief, however, through a claim brought under Title VII of the Civil Rights Act of 1964, which, the Supreme Court has held, provides the “exclusive judicial remedy” for federal employment discrimination claims.³⁷

Agencies’ efforts to meet their diversity and inclusion goals raise concerns under the antidiscrimination provisions of Title VII,³⁸ which prohibits the federal government from discriminating on the basis of either race or sex in hiring. The Supreme Court has allowed the limited use of racial and sexual preferences in private hiring under Title VII, but only to redress past employment practices that resulted in “manifest imbalances” of the groups being discriminated against in “traditionally segregated job categories.”³⁹ The Court allowed these preferences in part based on Congress’s intent in enacting Title VII to defer to private employers’ traditional management prerogatives.⁴⁰ No such deference is applicable in the case of federal sector employers. One could argue that the federal government bears a moral responsibility to serve as a model of color-blindness to other employers.

Whatever deference is owed to federal hiring decisions, it would be difficult to show historical, entrenched discrimination in many federal agencies since they have been subject to the amended scope of Executive Order 11,246 since 1967.⁴¹ Federal appeals courts have so far rejected preferences based on the diversity rationale in the Title VII context.⁴² Diversity in an agency’s workforce would seem to require ongoing maintenance by the agency, and the Supreme Court has noted that preferences can only be used to attain, not maintain, racial balance.⁴³

What can a job applicant do if they feel they have been rejected for a job in federal service on account of the Executive Order and any related policies and managerial incentives? Like all litigants, these job applicants (or employees who applied unsuccessfully for internal promotion) have to satisfy the requirements of standing, ripeness, and mootness for a federal court to have jurisdiction over the case. The applicant can satisfy these by alleging that the federal agency is “sufficiently committed” to an existing written agency policy favoring another gender or race in hiring that the [applicant] will “likely face a career impediment” when the applicant applies for an opening in the “relatively near future.”⁴⁴ Unwritten agency hiring policies are too speculative to be challenged, and an applicant’s plans to apply in the distant future are too speculative to form the basis of a cognizable injury for these purposes.

Once the applicant proceeds with a Title VII claim, though, the applicant would have to identify a past adverse employment action (non-selection for a position) to make a *prima facie* case of employment discrimination.⁴⁵ This gives

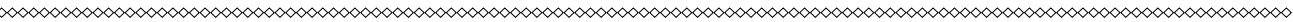
the agency an opportunity to provide evidence of a legitimate non-discriminatory reason for not hiring the applicant.⁴⁶ Unfortunately, this shifts the focus away from the policy and on to the merits of the applicant. A qualified or exceptionally qualified applicant should fare better with these hurdles to challenging both the offending discriminatory policy and the resulting non-selection.

We live in an increasingly multiethnic and multiracial nation. The notion that the federal government should be classifying people by skin color, their ancestors' country of origin, or their gender, and administering job opportunities on this basis, should trouble us all. As Chief Justice Roberts wrote in 2007, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."⁴⁷ Employment opportunities in the private sector are fewer and farther between in the current economy, and many Americans may find themselves turning to opportunities in federal service where the dirigiste hand of racial and gender preferences may play a part in hiring and promotion decisions. Do the unemployed need the kind of barrier to employment posed by this Executive Order?

Endnotes

- 1 See Exec. Order No. 13,583, 76 Fed. Reg. 52847 (Aug. 18, 2011).
- 2 See U.S. Office of Personnel Management, Office of Diversity and Inclusion, Government-Wide Diversity and Inclusion Strategic Plan 2011, available at <http://www.opm.gov/diversityandinclusion/reports/GovernmentwideDIStrategicPlan.pdf> (last visited Oct. 1, 2012).
- 3 See *id.* at 5.
- 4 See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, OFFICE OF FEDERAL OPERATIONS, ANNUAL REPORT ON THE FEDERAL WORK FORCE FISCAL YEAR 2009 I-12, available at <http://www.eeoc.gov/federal/reports/fsp2009/upload/FY-2009-Annual-Report.pdf> (last visited Oct. 3, 2012).
- 5 See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, OFFICE OF FEDERAL OPERATIONS, ANNUAL REPORT ON THE FEDERAL WORK FORCE FISCAL YEAR 2010 iii, available at http://www.eeoc.gov/federal/reports/fsp2010_2/upload/fsp2010_2.pdf (last visited Jan. 10, 2013).
- 6 See generally Thomas A. Kochan et al., *The Effects of Diversity on Business Performance: Report of the Diversity Research Network*, 42 J. HUM. RESOURCE MGMT. (No. 1) 3-21 (Spring 2003). A copy of the study is available at http://chrs.rutgers.edu/pub_documents/38.pdf (last visited Oct. 3, 2012).
- 7 See Fay Hansen, *Diversity's Business Case Doesn't Add Up*, WORKFORCE (Apr. 2, 2003), available at <http://www.workforce.com/article/20030402/NEWS02/304029993/diversitys-business-case-doesnt-add-up> (last visited Oct. 1, 2012). Ms. Hansen noted in her article that "empirical studies indicate that racial and ethnic diversity may, in fact, have a negative impact on business performance unless specific forms of analysis, training, and monitoring are in place. If left unattended or mismanaged, diversity is likely to produce miscommunication, unresolved conflict, higher turnover, and lower performance."
- 8 See HELEN HEMPHILL & RAY HAINES, DISCRIMINATION, HARASSMENT, AND THE FAILURE OF DIVERSITY TRAINING: WHAT TO DO NOW (1997).
- 9 See Peter Brimelow & Leslie Spencer, *When Quotas Replace Merit, Everybody Suffers*, FORBES (Feb. 15, 1993).
- 10 See U.S. OFFICE OF PERSONNEL MANAGEMENT, GUIDANCE FOR AGENCY-SPECIFIC DIVERSITY AND INCLUSION STRATEGIC PLANS 4 fn. 1 (Nov. 2011) [hereinafter OPM GUIDANCE], available at <http://www.opm.gov/diversityandinclusion/reports/DIAgencySpecificStrategicPlanGuidance.pdf> (last visited Oct. 3, 2012).
- 11 See OPM GUIDANCE, *supra* note 10, at 9.
- 12 See *id.* at 10-11.
- 13 See *id.* at 11.

- 14 See *id.* at 17.
- 15 See *id.* at 17.
- 16 See *id.* at 17.
- 17 See *id.* at 17.
- 18 See *id.* at 17.
- 19 See *id.* at 17.
- 20 See *id.* at 24-25.
- 21 See *id.* at 25.
- 22 See *id.* at 25.
- 23 See, e.g., NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, DIVERSITY AND INCLUSION STRATEGIC PLAN (Mar. 16, 2012) ("NARA Diversity Plan"), available at <http://www.archives.gov/about/plans-reports/strategic-plan/diversity-inclusion/diversity-inclusion-plan.pdf> (last visited Oct. 13, 2012); U.S. DEP'T. OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE, DIVERSITY AND INCLUSION STRATEGIC PLAN FY 2012-2013 [hereinafter AMS DIVERSITY PLAN], available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5099215> (last visited Jan. 10, 2013); U.S. DEP'T. OF DEFENSE, DIVERSITY AND INCLUSION STRATEGIC PLAN FY 2012-2017 (2012) [hereinafter DOD DIVERSITY PLAN], available at http://diversity.defense.gov/docs/DoD_Diversity_Strategic_Plan_%20final_as%20of%2019%20Apr%2012%5B1%5D.pdf (last visited Oct. 13, 2012); U.S. DEP'T. OF ENERGY, DIVERSITY AND INCLUSION STRATEGIC PLAN 2012-2015 (Mar. 23, 2012) [hereinafter DOE DIVERSITY PLAN], available at <http://energy.gov/sites/prod/files/New%20DOE%202012-2015%20Diversityand%20inclusion%20Strategic%20Plan.pdf> (last visited Oct. 13, 2012); U.S. DEP'T. OF VETERANS AFFAIRS, DIVERSITY AND INCLUSION STRATEGIC PLAN FY 2012-2016 (Mar. 2012) [hereinafter VA DIVERSITY PLAN], available at <http://www.diversity.va.gov/products/files/StrategicPlan.pdf> (last visited Oct. 13, 2012).
- 24 See VA DIVERSITY PLAN, *supra* note 23, at 15.
- 25 See *id.* at 15, 22.
- 26 See AMS DIVERSITY PLAN, *supra* note 23, at 3-4.
- 27 See, e.g., Lutheran Church-Missouri Synod v. FCC, 154 F.3d 487 (D.C. Cir. 1998) (holding that strict scrutiny standard of review of the FCC affirmative action regulations at issue was appropriate even though the regulations did not explicitly direct or require radio stations to use hiring preferences, but put indisputable pressure on them to do so); see also *Adarand*, 515 U.S. 200, 227 (1995) ("all racial classifications ... must be analyzed by a reviewing court under strict scrutiny").
- 28 The Fifth Amendment to the Constitution of the United States does not provide an explicit guarantee of equal protection of the laws as does the Fourteenth Amendment. However, the Supreme Court has held that such a guarantee inheres in the Fifth Amendment's guarantee that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 212-217 (1995).
- 29 See *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979).
- 30 See *Adarand*, 515 U.S. at 224.
- 31 *Id.* at 227.
- 32 The Supreme Court has so far recognized only a discrete number of these compelling interests: national security (see *Korematsu v. United States*, 323 U.S. 214, 217-20 (1944)), the educational benefits that flow from a diverse student body in higher education (see *Grutter v. Bollinger*, 539 U.S. 306, 328-330 (2003)), and remedying specific past discrimination (see *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-92 (1989)).
- 33 See *University of California Regents v. Bakke*, 438 U.S. 265, 307 (Powell, J.).
- 34 See *United States v. Virginia*, 518 U.S. 515, 533-534 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).
- 35 See *Hogan*, 458 U.S. at 724-725; *Craig v. Boren*, 429 U.S. 190, 197 (1976).
- 36 See, e.g., *Califano v. Webster*, 430 U.S. 313, 317 (1977) (per curiam) ("Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been



recognized as such an important governmental objective.”).

37 *See, e.g.*, *Worth v. Jackson*, 377 F.Supp.2d 177, 181-183 (D.D.C. 2005) (citing *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 835 (1975)).

38 *See* 42 U.S.C. § 2000e-16 (a).

39 *See, e.g.*, *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616-639 (1987) (gender preferences); *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 208-209 (1979) (racial preferences).

40 *See Johnson*, 480 U.S. 616, 645; *Weber*, 443 U.S. 193, 206–207.

41 *See* Exec. Order No. 11,246, 30 Fed. Reg. 12, 319 (Sept. 24, 1965) (“It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin.”). President Johnson issued Executive Order 11,375 in 1967 to amend Executive Order 11,246 to include sex as a protected category. *See* Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 13, 1967); *see also* 41 C.F.R. §§ 60-2.1-60-2.35 and 60-4.1 to 60-4.9 (2008).

42 *See, e.g.*, *Messer v. Meno*, 130 F.3d 130, 135-137 (5th Cir. 1997); *Taxman v. Bd. of Educ. of the Twp. of Piscataway*, 91 F.3d 1547, 1557–1563 (3d Cir. 1996) (en banc).

43 *See Johnson*, 480 U.S. at 639.

44 *See Worth v. Jackson*, 451 F.3d 854, 859-860 (D.C. Cir. 2006).

45 *See Worth*, 377 F.Supp.2d 177 at 184.

46 *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

47 *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007).

