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TESTIMONY  
of

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On

TRANSFORMING THE DEFENSE DEPARTMENT:  
EXPLORING THE MERITS OF THE PROPOSED  
NATIONAL SECURITY PERSONNEL SYSTEM

Before the

HOUSE GOVERNMENT REFORM COMMITTEE,  
SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY ORGANIZATION

April 29, 2003

Madame Chair, the Senior Executives Association (SEA) appreciates the invitation to provide its views on the very recently proposed legislation from the Department of Defense that would dramatically overhaul its personnel system. We comment today on those parts of the legislation that will affect the Senior Executive Service. We further note that at least one part of the proposed bill affects the Senior Executives Association and its ability to act on behalf of its DoD members, and we also comment on that provision.

Our first observation is the speed accompanying the consideration of the DoD proposal. It was only sent to Congress the week before last and is headed in short order to closed markup hearings in both the House and Senate Armed Services Committees. It is not clear what is prompting such speedy consideration on a fast track which wasn't even accorded the legislation creating the Department of Homeland Security. At a minimum, the radical and untested nature of many of the proposals requires much more deliberation and consideration, especially considering the government-wide fallout that will undoubtedly occur as a result of the DoD proposal, if it is enacted.

SEA is proud of its representation of its members and at the same time its promotion of good government policies. We have for the past 23 years advocated a flexible and responsive Senior Executive Service, and we stand ready to work with Congress to implement necessary changes to the federal human resources system to the extent greater flexibility and responsiveness is needed.

One of the most significant good government initiatives that has consistently driven SEA policy is ensuring laws that allow for a vibrant career Senior Executive Service that can interact with political appointees without fear of reprisal or unfair branding when a political administration changes. Many of the parts of chapters 31, 33, and 35 of Title 5 are designed in large part to create an environment of a flexible Senior Executive Service with just enough protection so that career senior executives will not be unfairly subjected to politically motivated treatment.

Examples of the flexibility that agencies currently have include the right to reassign an executive to any SES position at any time, the right to remove for less than fully successful performance without a hearing or other recourse, the absence of grievance rights for performance appraisal ratings, and the authority to lower an executive's pay one level per year. SEA stands ready to participate and promote further flexibilities, as needed, but remains concerned that the DoD proposal has gone too far and allows so much flexibility that the risk is that DoD's career Senior Executive Service contingent could be replaced by political appointees and a politically driven executive corps that would be beyond the oversight or control of Congress or OPM.

The first section of the bill proposes a new section 9902 to be added to Title 5 which would require the Secretary to work with the Director of OPM in developing a new personnel system - unless the Secretary determines that national security requires him to act alone, in which case he can proceed without the OPM Director. We consider this provision to be particularly dangerous, especially since it applies to the basic design and adjustment of DoD's human resources system. We believe OPM's role is critical to assure full adherence to merit system principles. This is especially true considering OPM's government-wide role and the large

numbers of federal employees at DoD, including more Senior Executives than at any other agency.

The first portion of the proposed bill goes on to propose the flexibility to totally transform the DoD personnel system. The bill appears to have used the Homeland Security Act of 2002 as a model for creating a flexible personnel system in DoD similar to the authority given to Homeland Security last year. But DoD's bill goes much further allowing much greater flexibility and authority to the Secretary. In fact, it allows the Secretary to totally eviscerate the current system and to substitute in its place whatever he wishes without any review or restriction imposed by OPM or by Congress. Our comments are restricted to this first portion of the bill.

During the summer and fall of 2002, much debate occurred about the new Department of Homeland Security and the degree of flexibility needed to accomplish its mission. The premise of this need for personnel flexibility was the anticipated difficulty in merging 22 different federal organizations with 22 different cultures into one new department so that effective homeland security would be the result. No similar need or argument is advanced by DoD in making its request for even greater authority than has been granted to the Secretary of Homeland Security. In fact, DoD appears to have functioned quite well in the recent Iraqi War, and no examples or detailed rationales have been provided to justify the request for this additional personnel authority.

In particular, the Senior Executive Service has worked efficiently and effectively for 25 years now in DoD and is a model of an efficient, effective leadership corps that is performance and merit based. At a minimum, any reforms to the DoD personnel system should not destroy or minimize the existing structural components of the career Senior Executive Service that are designed to assure the efficient operation of a career civil service subject to the direction of its political leadership. These components to the SES structure were developed by Congress and were designed to provide a flexible career executive service that is free from political influence, but at the same time one that is subject to direction from the political appointees that career executives work with so closely.

Last summer, when SEA participated in the debate on the new Department of Homeland Security, we raised many of these same concerns. The result of our effort was an assurance by the House Select Committee on Homeland Security that the basic structure of the SES, as contained in chapters 31,33 and 35 of Title 5, United States Code, would not be disturbed. In other words, these chapters would not be part of the President's flexibility. In fact, our concerns led the then Chairman of the House Select Committee on Homeland Security, Representative Rob Portman, to write a letter to the editor of New Republic magazine in which he stated his support for the SES and specifically stated that the Homeland Security Bill sought to preserve the Senior Executive Service as it currently exists. Ultimately, the SES was fully preserved in the Homeland Security Act that is now law. And no one suggests that more flexibility in connection with the structure or rules of the SES is needed for the new Department of Homeland Security, even given its critical and sensitive mission.

## **DoD BILL PROPOSED PERSONNEL SYSTEM FLEXIBILITY**

The Department of Defense now proposes that the Secretary of Defense have flexibility over all of those statutory provisions that govern the Senior Executive Service except for 5 U.S.C. sections 3131 and 3132(a). These two statutes, for which there is no flexibility, define the basic principles of the SES. The remaining SES statutes, for which flexibility is proposed, provide the important, but minimal, standards which govern the structure and operation of the SES. Some of the provisions affecting the SES for which flexibility is proposed are those requiring and implementing career reserved positions; limiting the number of noncareer SES; limiting temporary SES appointments; requiring the qualifications review procedure now performed by OPM; imposing the 120-day get acquainted rule and the 60-day notice of a geographic reassignment, allowing for fallback rights to GS positions for career employees who have entered the SES; providing for RIF procedures based primarily on performance, and eliminating performance review board protections and Merit Systems Protection Board (MSPB) appeal rights. As explained below, each of these statutory provisions is an important civil service protection that prevents politicization and misuse of the career Senior Executive Service.

### **Career Reserved Positions**

Section 3132(b) of Title 5, United States Code, defines the term “career reserved position” as a position that may only be filled by a career appointee because the public requires confidence that the incumbent of the position is free from political influence. Examples of such positions are law enforcement and auditing. It is difficult to imagine why the DoD needs flexibility on this provision. Except for some positions that are required by law, the agency itself, with OPM’s help, decides whether a position is general or career reserved based on a statutory definition. If public confidence requires that a position be reserved to a career appointee, the Secretary of Defense should not have the “flexibility” to place a political appointee into the position. Career reserved positions protect the public because they assure that the law is enforced without political considerations influencing required or necessary government action. This is an important protection to the operation of government and to the protection of the public, and it must be maintained.

### **Noncareer SES**

Subject to exceptions granted by OPM, current law requires that no more than 10% of the Senior Executive Service, government-wide, be non-career appointees, with no more than 25% in any one agency. The Volcker Commission Report recently issued strongly advocates a reduction in the number of political appointees with a greater reliance on career appointees. Under these circumstances, there appears to be no justification for greater flexibility to permit the Secretary to appoint unlimited political Senior Executives.

### **Limited Appointments**

At present, an agency may appoint temporary Senior Executives to fill emergency or special project needs. These appointees are limited to 5% of the SES positions and are also subject to time limitations. To prevent the SES from being filled with temporary appointees who

have not been subjected to a competitive process or a qualifications review, these current limitations are reasonable. No case has been made that the system that has worked well for 25 years is inadequate or that greater flexibility is needed.

### **Qualifications Review Boards**

One of the most important protections for the career Senior Executive Service and the public it serves is the OPM-administered Qualifications Review Board process. This is a test all career senior executives must pass before they can receive their appointments. It assures that the appointee is truly qualified and that the appointment is free from political influence. The process is quite efficient and does not cause delays in the appointment of career senior executives. OPM completes these QRB functions on average within two weeks of the submission by the agency. No reason exists for excusing DoD from this reasonable process that ultimately protects the American public by assuring that only qualified applicants are admitted to the career SES.

### **120-day get Acquainted Period**

This statute assures that a new political administration will give career Senior Executives at least 120 days to demonstrate their capabilities before effecting a permanent reassignment. Often a truly effective career SES will be unfairly labeled by an incoming political Administration or appointee as favoring the outgoing political party when the executive has merely fulfilled his or her responsibilities in carrying out appropriate policies. This 120-day get acquainted rule is an important protection that in the long run actually helps the government run more effectively. Again, no flexibility is needed.

### **60-day Notice of Geographic Reassignment**

Senior Executives are, by definition, mobile and subject to reassignment at the pleasure of their agency. Nonetheless, an immediate reassignment to a new geographic location would obviously be unreasonable in all but the rarest case and could be used to punish the executive. The 60-day notice period, in fact, does not prevent the immediate detail of the Senior Executive to a new location if urgently needed, but it does allow for payment of per diem for the first 60 days. This is not an unreasonable requirement and no flexibility is needed. Certainly, no case has been made indicating that the current procedure is restrictive or cumbersome.

### **Fallback Rights**

Current law gives career employees who enter the SES from lower level career positions the right to return to the grade level from which they were appointed if they are removed from the SES for less than fully successful performance, removed because a reduction in force, or if they do not pass their probationary period. If flexibility is granted to the Secretary of Defense to at any time change this or eliminate these fallback rights, serious consequences could result. Many career employees may choose not to seek SES positions on the mere possibility that DoD could issue an internal regulation taking away these fallback rights and then ending an employee's career solely by virtue of his or her acceptance of an SES position.

## **RIF Procedures Based Primarily on Performance**

Over the years, much criticism has centered around the governments's seniority based reduction in force rules. However, this has never been the case with the Senior Executive Service where the RIF statute has always given agencies total flexibility to design their SES RIF procedures with the only requirement that it decide which executive to release as a result of a RIF primarily on the basis of performance. This existing law has it right and again no further flexibility is required.

## **The Role of the Merit Systems Protection Board and Agency Performance Review Boards**

When the Homeland Security legislation was debated, SEA opposed elimination of MSPB appeal rights for federal employees and flexibility to eliminate Performance Review Boards for Senior Executives. The Homeland Security Act that was finally enacted does provide for flexibility in both these areas but the personnel system that will implement these changes has not yet been designed or tested. We do not know whether the reforms will even take place, much less whether they will work. It is premature and unnecessary to enact similar flexibilities at DoD when the MSPB appeal system and SES PRB system appears to be working everywhere in government without significant complaint. The need for flexibilities that motivated reforms in Homeland Security do not necessarily apply at DoD. We urge that this flexibility be dropped from the bill pending further justification.

## **ADDITIONAL PERSONNEL AUTHORITY IN DoD BILL**

One provision proposed by DoD which SEA supports for government-wide applicability is the provision that annuitants can be re-employed by agencies without loss of their annuities. Currently, only OPM can authorize this. SEA believes that agency heads should be able to decide whether an annuitant is so valuable that he or she should be re-employed and the agency head should have the authority to pay full salary without loss of annuity if this is necessary to attract valued retirees back to needed service.

The bill also proposes a new section 9904 to Title 5 that would allow the Secretary the authority to appoint "highly qualified experts." These appointments would be for up to six years. The proposed statute contains no limit on the number of these appointments nor does it provide standards for what types of positions are to be filled by these highly qualified experts. The bill proposes to pay these experts up to the maximum now allowed by statute for base pay for Senior Executives plus full locality pay (not allowed for Senior Executives) plus an additional amount of up to 50% of salary. SEA's concern about this is: (1) no case has been made for the need for such sweeping authority; (2) the entire career SES could be supplanted by appointments of these highly qualified experts; and (3) it would lead to further fragmentation of the SES corps at a time when the future structure of a government-wide SES corps is about to be debated as a result of proposals in the Volcker Commission Report and ideas that have floated out of OPM for the last several years.

We have addressed our concerns about fragmentation before and some of it deserves repeating. The failure to address pay compression - coupled with the desire for flexibility and an "each agency for itself" mentality - is leading to more and more splintering of what was once a government-wide Senior Executive Service. We now have the Senior Biomedical Research Service, the FAA Executive system, the IRS critical pay positions, the Defense Intelligence SES, and on and on.

This proliferation of systems inhibits effective oversight of the executive corps, as well as effective management of what should be a government-wide corps, the critical human resource provided by the top career executive leadership. Also inhibited will be opportunities for mobility, for executives to move between agencies, either for professional revitalization or for the good of the government, as they will be restrained by the very different systems - whether qualifications or pay - operated by each agency.

SEA supports careful study and review of the Senior Executive Service structure and urges that it have government-wide applicability. Without this further study, we recommend against provisions like that proposed in the DoD bill for sweeping reforms of the Senior Executive Service and creation of a whole new category of highly compensated employees.

One final note is the provision on collaboration with employee organizations in the DoD Bill. Because SEA is a professional association and is not the exclusive representative of its members, the DoD bill proposes to offer collaboration to organizations such as SEA on the design of the new personnel system solely at the discretion of the Secretary. This is markedly different from the Homeland Security Act of 2002 where SEA's participation in the design of a new personnel system is assured. SEA urges similar language in the DoD bill requiring consultation with groups similar to SEA if Congress decides that DoD should have the authority to design a new personnel system.

## **CONCLUSION**

The Defense Transformation for the 21<sup>st</sup> Century bill proposes sweeping changes, not just in the SES, but in the rest of DoD's civil service work force. Some of these changes may well be needed or even a good idea. For example, it seems to make sense that DoD have just one personnel system for its GS workforce, and it should be able to implement some of its best practices. Also, SEA supports DoD's efforts to achieve relief from some of the more draconian provisions of Title V that inhibit its ability to hire and compensate the executive workforce it needs. Nonetheless, we believe the basic principles we have outlined above are the minimal provisions that must be retained in statute to retain the integrity of the career Senior Executive Service.