



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

To: Members of the Committee on Administration and Management

From: Bobby Ochoa, Attorney Advisor

Date: November 1, 2019

Re: Committee on Administration and Management:
Listing Agency Officials Follow Up

During the second Committee meeting, members had several questions that staff noted for follow-up regarding both OPM's data and the Senior Executive Service. Here is a brief document compiling OPM's responses and identifying some additional useful information for you ahead of Monday's meeting. Selected relevant excerpts are appended.

OPM's EHRI Data Warehouse:

Response from OPM to ACUS inquiry about whether the OPM database is based on the position or the person, and how this relates to the ability to identify vacancies and acting officials: OPM's "EHRI data is at the person level not to the position or job. When a person separates from an agency no further information is sent by the agency about the person (or position). There is some variability when a person is in an acting position. Generally, there is an indication of a detail to the position the person will be acting in with an associated timeframe, but that is not always the case."

Senior Executive Service:

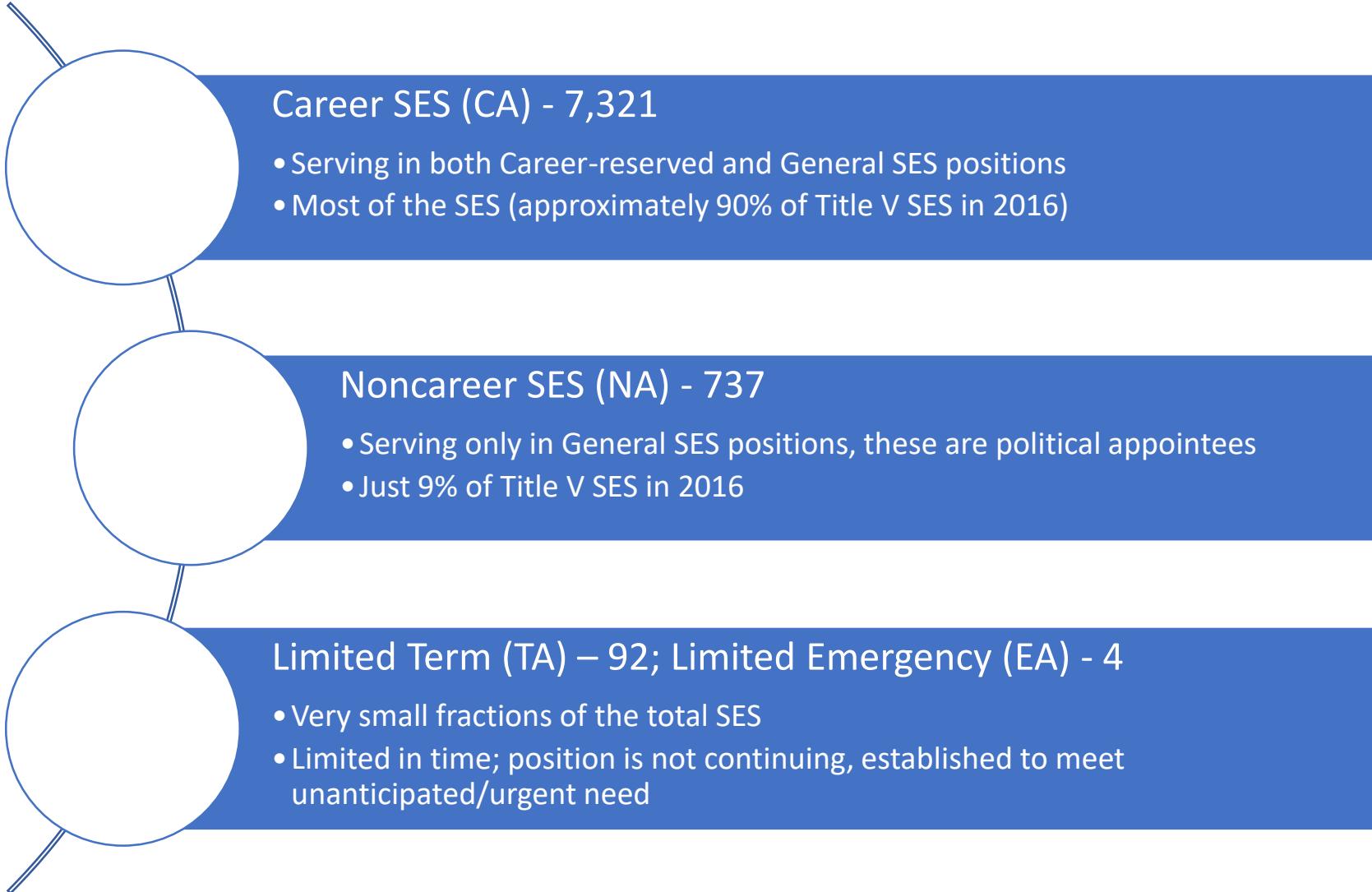
In light of the Committee's discussion and questions during the October 18 Committee Meeting, I have assembled and attached a few slides about the SES. We would also point the Committee to several materials that may be helpful for the upcoming meeting on November 4:

1. 5 U.S.C. §§ 3131–36. Relevant excerpts are appended. Pursuant to 5 U.S.C. § 3132(b)(4), agencies must publish a list of their career-reserved SES positions by March 1 each year. OPM publishes a consolidated notice in the Federal Register listing each career-reserved SES position in each agency, identifying the agency, the organization, and the title of each position. *See, e.g.*, SES Positions That Were Career Reserved During CY 2017, 83 Fed. Reg. 29,312 (June 22, 2018).
2. 5 C.F.R. pt. 317 (2019) ("Employment in the Senior Executive Service").
3. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 541–42 (2010) (Breyer, J., dissenting). Appendix B also includes a table of select SES positions. Relevant excerpts are appended.

4. SEN. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, 114TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS 217–18 (THE PLUM BOOK) (Comm. Print 2016), *available at* <https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2016/pdf/GPO-PLUMBOOK-2016.pdf>. Appendix No. 2 includes a brief synopsis of the SES, which is appended.
5. JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 62–70 (2ND ED. 2018), *available at* <https://www.acus.gov/publication/sourcebook-united-states-executive-agencies-second-edition>.
6. Bobby Ochoa, Listing Agency Officials 4–8 (Oct. 10, 2019) (draft report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/draft-report-listing-agency-officials>.
7. OFF. OF PERSONNEL MGMT., 2017 SENIOR EXECUTIVE SERVICE REPORT (2018), *available at* <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/ses-summary-2017.pdf>.
8. OFF. OF PERSONNEL MGMT., GUIDE TO THE SENIOR EXECUTIVE SERVICE (2017), *available at* <https://www.opm.gov/policy-data-oversight/senior-executive-service/reference-materials/guidesesservices.pdf>.

Senior Executive Service (SES)

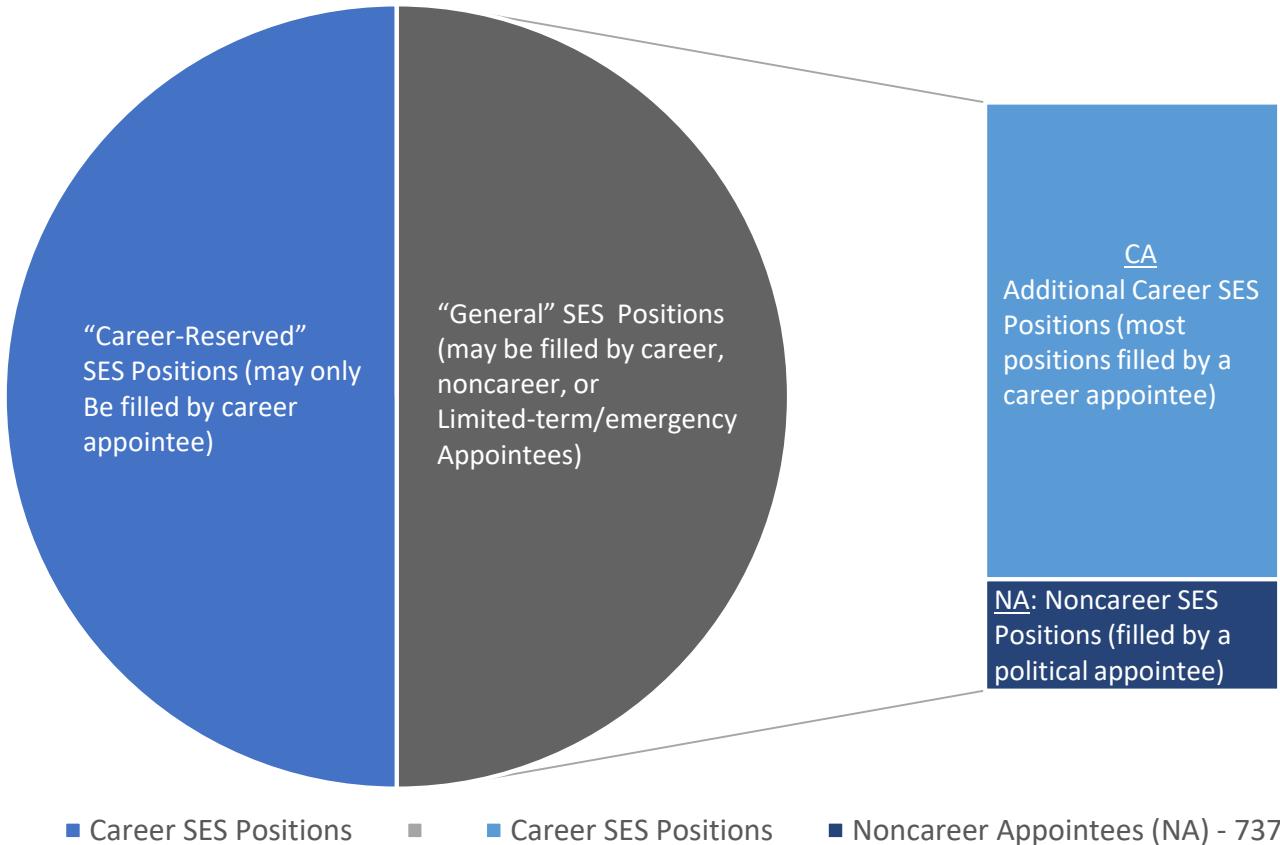
TOTAL: 8,156 SES Appointments in Fiscal Year 2016 (OPM SES Report)



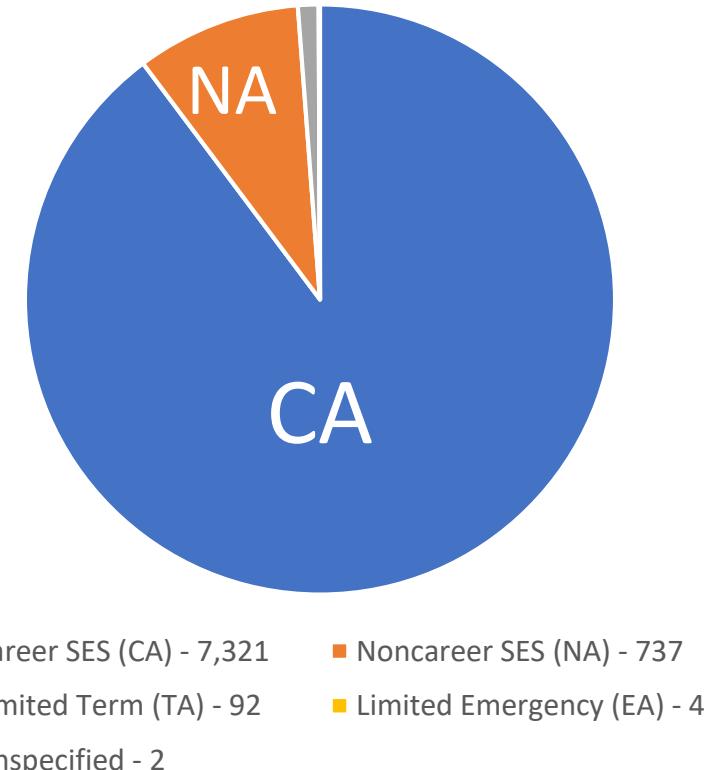
Senior Executive Service (SES)

* Fiscal Year 2016 (OPM SES Report)

Types of SES Positions



SES Appointment Categories



The Plum Book Categories (2016 Ed.)

PAS	PA	SES (GEN, NA)
 1,242 Positions	 472 Positions	 3,684 Career Positions, 761 Noncareer Positions
 Senate-confirmed presidential appointees	 Mostly in EOP and other committees, boards, and commissions	 Top-level policy, supervisory, and managerial positions
Term/Emergency (TA/EA)	Schedule C (SC)	Other (XS)
 76 Positions	 1,538 Positions	 585 Positions
 Nonrenewable, time-limited, 5% limit	 Nonpermanent political appointees excepted from the competitive service	 Positions subject to “statutory excepted appointment”

5 USCS § 3131

Current through Public Law 116-65, approved October 9, 2019.

United States Code Service > TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES (§§ 101 — 11001) > Part III. Employees (Subpts. A — J) > Subpart B. Employment and Retention (Chs. 31 — 37) > CHAPTER 31. AUTHORITY FOR EMPLOYMENT (Subchs. I — V) > Subchapter II. The Senior Executive Service (§§ 3131 — 3136)

§ 3131. The Senior Executive Service

It is the purpose of this subchapter [[5 USCS §§ 3131](#) et seq.] to establish a Senior Executive Service to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality. The Senior Executive Service shall be administered so as to—

- (1)provide for a compensation system, including salaries, benefits, and incentives, and for other conditions of employment, designed to attract and retain highly competent senior executives;
- (2)ensure that compensation, retention, and tenure are contingent on executive success which is measured on the basis of individual and organizational performance (including such factors as improvements in efficiency, productivity, quality of work or service, cost efficiency, and timeliness of performance and success in meeting equal employment opportunity goals);
- (3)assure that senior executives are accountable and responsible for the effectiveness and productivity of employees under them;
- (4)recognize exceptional accomplishment;
- (5)enable the head of an agency to reassign senior executives to best accomplish the agency's mission;
- (6)provide for severance pay, early retirement, and placement assistance for senior executives who are removed from the Senior Executive Service for nondisciplinary reasons;
- (7)protect senior executives from arbitrary or capricious actions;
- (8)provide for program continuity and policy advocacy in the management of public programs;
- (9)maintain a merit personnel system free of prohibited personnel practices;
- (10)ensure accountability for honest, economical, and efficient Government;
- (11)ensure compliance with all applicable civil service laws, rules, and regulations, including those related to equal employment opportunity, political activity, and conflicts of interest;
- (12)provide for the initial and continuing systematic development of highly competent senior executives;
- (13)provide for an executive system which is guided by the public interest and free from improper political interference; and
- (14)appoint career executives to fill Senior Executive Service positions to the extent practicable, consistent with the effective and efficient implementation of agency policies and responsibilities.

History

5 USCS § 3132

Current through Public Law 116-65, approved October 9, 2019.

United States Code Service > TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES (§§ 101 — 11001) > Part III. Employees (Subpts. A — J) > Subpart B. Employment and Retention (Chs. 31 — 37) > CHAPTER 31. AUTHORITY FOR EMPLOYMENT (Subchs. I — V) > Subchapter II. The Senior Executive Service (§§ 3131 — 3136)

§ 3132. Definitions and exclusions

(a)For the purpose of this subchapter [[5 USCS §§ 3131](#) et seq.]—

(1)“agency” means an Executive agency, except a Government corporation and the General Accounting Office [Government Accountability Office], but does not include—

(A)any agency or unit thereof excluded from coverage by the President under subsection (c) of this section; or

(B)the Federal Bureau of Investigation, the Drug Enforcement Administration, the Central Intelligence Agency, the Office of the Director of National Intelligence, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, Department of Defense intelligence activities the civilian employees of which are subject to section 1590 of title 10, and as determined by the President, an Executive agency, or unit thereof, whose principal function is the conduct of foreign intelligence or counterintelligence activities;

(C)the Federal Election Commission or the Election Assistance Commission;

(D)the Office of the Comptroller of the Currency, the Office of Thrift Supervision,[,] the Resolution Trust Corporation, the Farm Credit Administration, the Federal Housing Finance Agency, the National Credit Union Administration, the Bureau of Consumer Financial Protection, and the Office of Financial Research;

(E)the Securities and Exchange Commission; or

(F)the Commodity Futures Trading Commission;

(2)“Senior Executive Service position” means any position in an agency which is classified above GS-15 pursuant to section 5108 [[5 USCS § 5108](#)] or in level IV or V of the Executive Schedule, or an equivalent position, which is not required to be filled by an appointment by the President by and with the advice and consent of the Senate, and in which an employee—

(A)directs the work of an organizational unit;

(B)is held accountable for the success of one or more specific programs or projects;

(C)monitors progress toward organizational goals and periodically evaluated and makes appropriate adjustments to such goals;

(D)supervises the work of employees other than personal assistants; or

(E)otherwise exercises important policy-making, policy-determining, or other executive functions;

but does not include—

(i)any position in the Foreign Service of the United States;

(ii)an administrative law judge position under section 3105 of this title [[5 USCS § 3105](#)];

(iii)any position established as a qualified position in the excepted service by the Secretary of Homeland Security under section 226 of the Homeland Security Act of 2002 [[6 USCS § 147](#)]; or

(iv)any position established as a qualified position in the excepted service by the Secretary of Defense under section 1599f of title 10 [[10 USCS § 1599f](#)];

(3)"senior executive" means a member of the Senior Executive Service;

(4)"career appointee" means an individual in a Senior Executive Service position whose appointment to the position or previous appointment to another Senior Executive Service position was based on approval by the Office of Personnel Management of the executive qualifications of such individual;

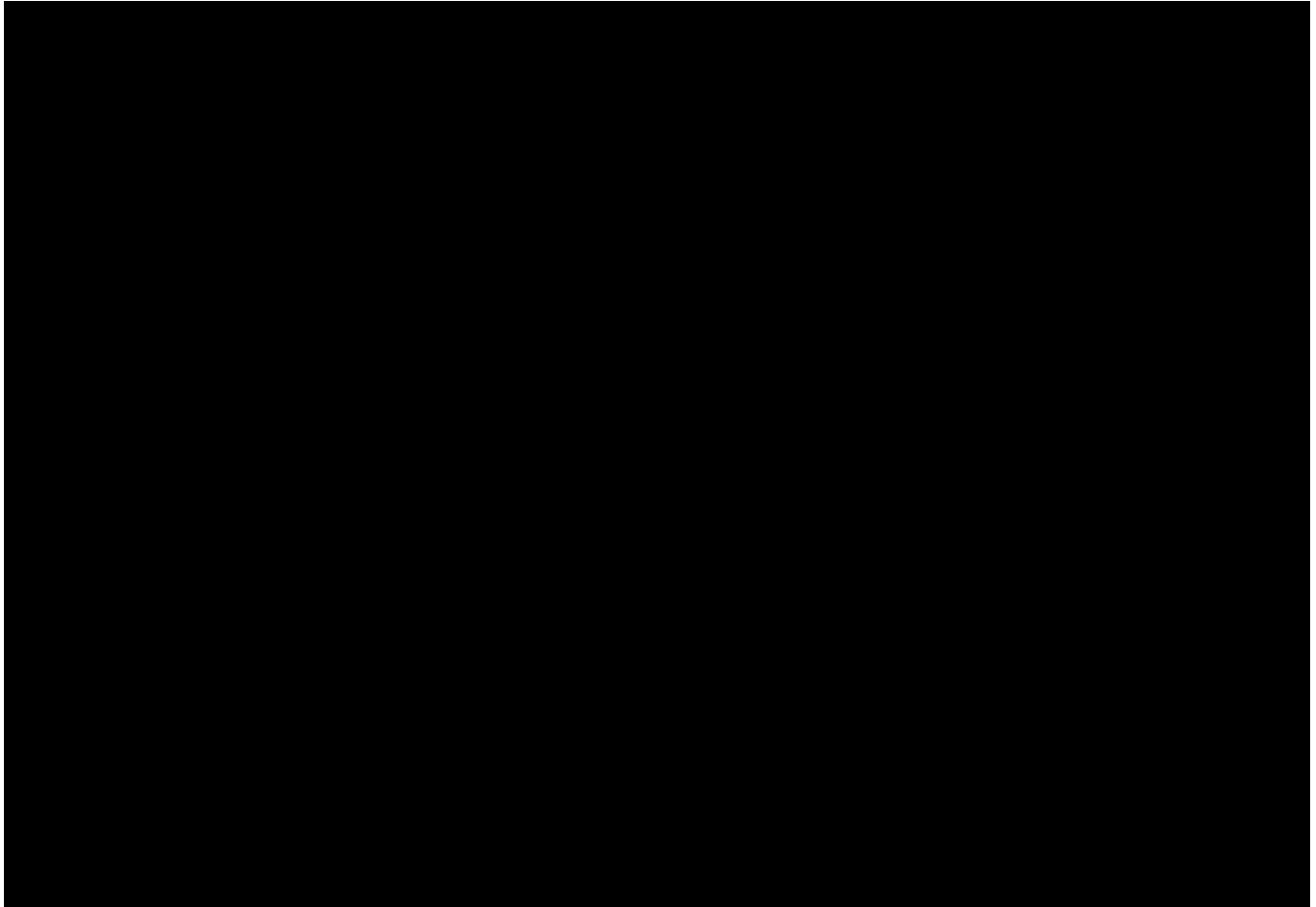
(5)"limited term appointee" means an individual appointed under a nonrenewable appointment for a term of 3 years or less to a Senior Executive Service position the duties of which will expire at the end of such term;

(6)"limited emergency appointee" means an individual appointed under a nonrenewable appointment, not to exceed 18 months, to a Senior Executive Service position established to meet a bona fide, unanticipated, urgent need;

(7)"noncareer appointee" means an individual in a Senior Executive Service position who is not a career appointee, a limited term appointee, or a limited emergency appointee;

(8)"career reserved position" means a position which is required to be filled by a career appointee and which is designated under subsection (b) of this section; and

(9)"general position" means any position, other than a career reserved position, which may be filled by either a career appointee, noncareer appointee, limited emergency appointee, or limited term appointee.



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ACCOUNTING OVERSIGHT BD.

BREYER, J., dissenting



Reading the criteria above as stringently as possible, I still see no way to avoid sweeping hundreds, perhaps thousands of high-level Government officials within the scope of the

BREYER, J., dissenting

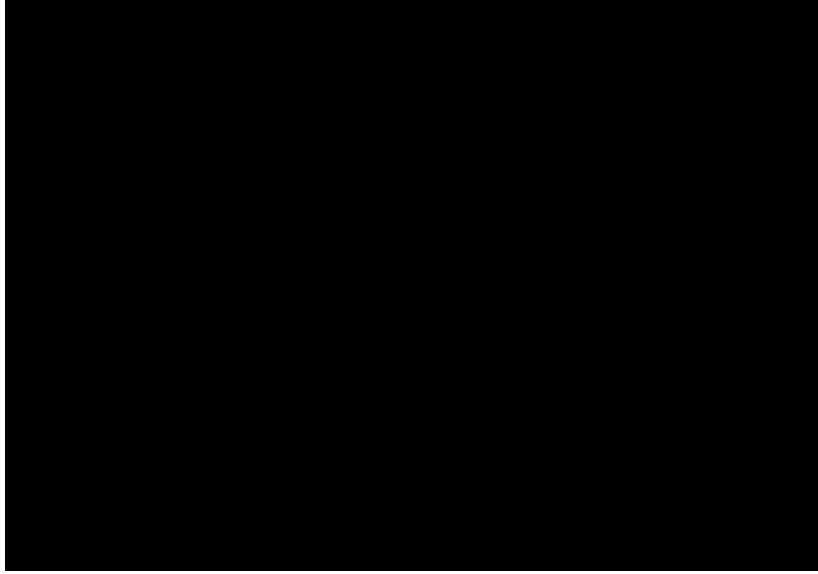
Court’s holding, putting their job security and their administrative actions and decisions constitutionally at risk. To make even a conservative estimate, one would have to begin by listing federal departments, offices, bureaus, and other agencies whose heads are by statute removable only “for cause.” I have found 48 such agencies, which I have listed in Appendix A, *infra*. Then it would be necessary to identify the senior officials in those agencies (just below the top) who themselves are removable only “for cause.” I have identified 573 such high-ranking officials, whom I have listed in Appendix B, *infra*. They include most of the leadership of the Nuclear Regulatory Commission (including that agency’s executive director as well as the directors of its Office of Nuclear Reactor Regulation and Office of Enforcement), virtually all of the leadership of the Social Security Administration, the executive directors of the Federal Energy Regulatory Commission and the Federal Trade Commission, as well as the general counsels of the Chemical Safety Board, the Federal Mine Safety and Health Review Commission, and the National Mediation Board.

This list is a conservative estimate because it consists only of career appointees in the Senior Executive Service (SES), see 5 U. S. C. §§2101a, 3132(a)(2), a group of high-ranking officials distinct from the “competitive service,” see §2102(a)(1)(C), who “serve in the key positions just below the top Presidential appointees,” Office of Personnel Management, About the SES, online at http://www.opm.gov/ses/about_ses/index.asp; and who are, without exception, subject to “removal” only for cause, §§7542–7543; see also §2302(a)(2) (substantially limiting conditions under which “a career appointee position in the Senior Executive Service” may be “transfer[red], or reassign[ed]”). SES officials include, for example, the Director of the Bureau of Prisons, the Director of the National Drug Intelligence Center, and the Director of the Office of International Monetary Policy in the Treasury Department. See Senate Committee on Homeland Security

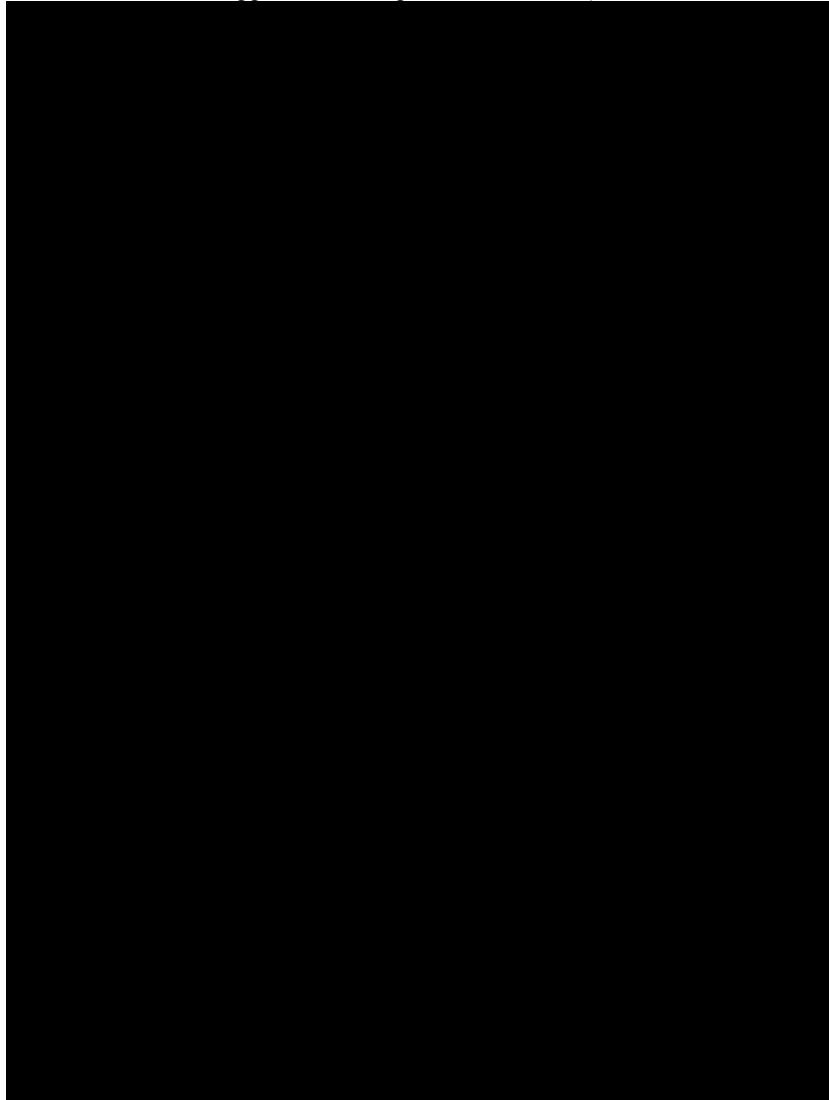
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BREYER, J., dissenting

and Governmental Affairs, United States Government Policy and Supporting Positions 99, 103, 129 (2008) (hereinafter Plum Book). And by virtually any definition, essentially all SES officials qualify as “inferior officers,” for their duties, as defined by statute, require them to “direc[t] the work of an organizational unit,” carry out high-level managerial functions, or “*otherwise exercis[e] important policy-making, policy-determining, or other executive functions.*” §3132(a)(2) (emphasis added). Cf. *ante*, at 484 (describing an “inferior officer” as someone who “determines the policy and enforces the laws of the United States”); *ante*, at 506–507 (acknowledging that career SES appointees in independent agencies may be rendered unconstitutional in future cases). Is the SES exempt from today’s rule or is it not? The Court, after listing reasons why the SES may be different, simply says that it will not “address” the matter. *Ante*, at 507. Perhaps it does not do so because it cannot do so without revealing the difficulty of distinguishing the SES from the Accounting Board and thereby also revealing the inherent instability of the legal rule it creates.



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B

The table that follows lists the 573 career appointees in the SES who constitute the upper level management of the independent agencies listed in Appendix A, *supra*. Each

Appendix B to opinion of BREYER, J.

of these officials is, under any definition—including the Court’s—an inferior officer, and is, by statute, subject to two layers of for-cause removal. See *supra*, at 539–543.

The data are organized into three columns: The first column lists the “office” to which the corresponding official is assigned within the respective agency and, where available, the provision of law establishing that office. Cf. *supra*, at 539 (citing *Mouat*, 124 U. S., at 307–308; *Germaine*, 99 U. S., at 510). The second and third columns respectively list the career appointees in each agency who occupy “general” and “reserved” SES positions. A “general” position is one that could be filled by either a career appointee or by a noncareer appointee were the current (career) occupant to be replaced. See 5 U. S. C. § 3132(b)(1). Because 90% of all SES positions must be filled by career appointees, § 3134(b), “most General positions are filled by career appointees,” Plum Book 200. A “reserved” position, by contrast, must always be filled by a career appointee. § 3132(b)(1). The data for the “general position” column come from the 2008 Plum Book, a quadrennial manual prepared by the congressional committees responsible for Government oversight. See *supra*, at 541–542. Positions listed as vacant in that source are not included. The data for the “reserved position” column come from a list periodically published by the Office of Personnel Management and last published in 2006. See 72 Fed. Reg. 16154–16251 (2007); § 3132(b)(4). Given the Federal Government’s size and the temporal lag between the underlying sources, the list that follows is intended to be illustrative, not exact.

Nuclear Regulatory Commission (192)		
<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the Executive Director for Operations 10 CFR § 1.32 (2009)	Executive Director	Director of Nuclear Security Projects
	Deputy Executive Director for Reactor and Preparedness Programs	

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<i>Office</i>	<i>General Position</i>	<i>Reserved Position</i>
Office of the Executive Director for Operations— <i>Continued</i>	Deputy Executive Director for Materials, Waste, Research, State, Tribal, and Compliance Programs	
	Deputy Executive Director for Corporate Management	
	Assistant for Operations	
	Director for Strategic Organizational Planning and Optimization	
Office of the Secretary 10 CFR § 1.25	Secretary	
Office of the Chief Financial Officer 10 CFR § 1.31	Chief Financial Officer	Director, Division of Planning, Budget and Analysis
		Director, Division of Financial Services
		Deputy Chief Financial Officer
		Director, Division of Financial Management
Office of the Inspector General 10 CFR § 1.12		Deputy Inspector General
		Assistant Inspector General for Audits
		Assistant Inspector General for Investigations
Office of the General Counsel 10 CFR § 1.23	General Counsel	Director, Commission Adjudicatory Technical Support

APPENDIX NO. 2

SENIOR EXECUTIVE SERVICE

The Senior Executive Service (SES) is a personnel system covering top level policy, supervisory, and managerial positions in most Federal agencies. Positions in Government corporations, the FBI and Drug Enforcement Administration, certain intelligence agencies, certain financial regulatory agencies, and the Foreign Service are exempt from the SES.

The SES includes most Civil Service positions above grade 15 of the General Schedule. An agency may establish an SES position only within an allocation approved by the U.S. Office of Personnel Management (OPM). Currently, there are 9936 SES positions allocated by OPM to agencies.

Types of SES Positions

There are two types of SES positions: Career Reserved and General. About half of the SES positions are designated in each category. Once a position is designated by an agency, the designation may not be changed without prior OPM approval.

SES positions are designated Career Reserved when the need to ensure impartiality, or the public's confidence in the impartiality of the Government, requires that they be filled only by career employees (e.g., law enforcement and audit positions).

The remaining SES positions are designated General. A General position may be filled by a career appointee, a noncareer appointee, or, if the position meets the criteria described below, by a limited term or limited emergency appointee. Because of the limitations on the number of limited appointees, most General positions are filled by career appointees.

A given General position may be filled at one time by a career appointee and at another time by a noncareer or limited appointee, or vice versa. Because of the limitations on the number of noncareer and limited appointees, as discussed below, most General positions are filled by career appointees. This publication lists only General positions since Career Reserved positions must be filled by a career appointee.

Appointments to SES Positions

The legislation establishing the SES provides three methods of appointment. Veterans preference is not applicable in the SES.

(1) **Career appointment:** Career appointments are made through a Governmentwide or an "all sources" merit staffing (competitive) process, including recruitment through a published announcement, rating and ranking of eligible candidates, approval by the agency of the professional qualifications of the selected candidate, and a further review and approval of the executive/managerial qualifications of the proposed selectee by an OPM-administered SES Qualifications Review Board.

Traditionally, a career appointee serves a 1-year probationary period. Upon completion, the appointee acquires tenure rights and may be removed from the SES only for cause or for poor performance. (A performance appraisal for a career appointee may not be made, however, within 120 days after the beginning of a new Presidential Administration, i.e., one where the President changes.)

When a career appointee is reassigned within an agency, he or she must be given at least a 15-day advance written notice. If the reassignment is to another commuting area, the notice period is 60 days; the agency first must consult with the individual as to the reasons and the individual's preferences.

A career appointee may not be involuntarily reassigned within 120 days after the appointment of a new agency head, or during the same period after the appointment of a noncareer supervisor who has the authority to make an initial appraisal of the career appointee's performance. A career appointee may not be involuntarily transferred to another agency.

Like all career Federal employees, a career SES appointee is entitled to protection against retaliatory or politically motivated personnel actions and may lodge a complaint with the Office of the Special Counsel if a prohibited personnel practice has occurred.

(2) **Noncareer appointment:** By law, no more than 10 percent of total SES positions Governmentwide may be filled by noncareer appointees. The proportion of noncareer appointees may, however, vary from agency to agency, generally up to a limit of 25 percent of the agency's number of SES positions. OPM approves each use of a noncareer authority by an agency, and the authority reverts to OPM when the noncareer appointee leaves the position.

Noncareer appointees may be appointed to any SES General position. There is no requirement for competitive staffing, but the agency head must certify that the appointee meets the qualifications requirements for the position.

Any noncareer appointee may be removed by the appointing authority (e.g., for loss of confidence or change in policy). There is no appeal right.

(3) Limited appointment: Limited appointments are used in situations where the position is not continuing (e.g., to head a special project), or where the position is established to meet a bona fide, unanticipated, urgent need. Limited term appointments may not exceed 3 years; limited emergency appointments, 18 months.

By law, limited appointments Governmentwide may not exceed 5 percent of total SES positions. The appointments may be made only to General positions. Generally, OPM allocates limited appointment authorities on a case-by-case basis. However, each agency has a small pool of limited authorities equal to 3 percent of their total SES position allocation from OPM. Such pool authorities may be used only for appointment of career or career-type Federal civil service employees. Selection procedures and qualification requirements are determined by the agency, and the incumbent serves at the pleasure of the appointing authority.

By law, the appointment to or removal from any SES position in an independent regulatory commission shall not be subject, directly or indirectly, to review or approval by an officer or entity within the Executive Office of the President.