UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

Office of the
General Counsel

JAN 14 2008

Mr. Stephen Llewellyn
Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission
1801 L Street, N.W., 10th Floor
Washington, D.C. 20507

Re: *Notice of proposed new information collection: Demographic Information on Applicants for Federal Employment; 72 F.R. 64219 (Nov. 15, 2007)*

Dear Mr. Llewellyn:

The Office of Personnel Management (OPM) writes to oppose the Equal Employment Opportunity Commission's (EEOC's) proposal to establish a form to collect demographic information on applicants for Federal employment. OPM believes that the collection of this information is not in the best interests of the Federal Government and, in light of applicable case law, might actually serve to harm the interests of the Federal Government, its employees, and the public.

Introduction

There is little support for the notion that there is a widespread discrimination problem in Federal hiring and employment. Using even the relatively crude measure required by 5 U.S.C. § 7201(a)(1) – comparing rates of participation by various racial, national origin, or ethnic groups in the Federal workforce to participation rates by those groups in the civilian labor force (CLF) – there is no indication of a pervasive problem.

For example the annual Federal Equal Opportunity Recruitment Program report to Congress for fiscal year 2006 indicates that the representation of minorities in the Federal workplace was 32.2 percent compared to 27.7 percent in the Civilian Labor Force. Although the report acknowledges that Hispanics remain underrepresented in the Federal workforce, as compared to the CLF, the comparison to the CLF is a poor substitute for rigorous analysis. Indeed, a recent study by the U.S. Government Accountability Office, *The Federal Workforce/ Additional Insights Could Enhance Agency Efforts Related to Hispanic Representation* (August 2006), observed that when GAO "compared citizens with similar levels of education, Hispanics were 16 percent or 1.16 times more likely than non-Hispanics to be employed in the federal workforce than in the nonfederal workforce." *Id.* at 3. The GAO acknowledged that citizenship is "required for most federal employment," and that "a greater proportion of federal occupations require higher levels of education than in the CLF."

GAO has demonstrated that blunt comparisons of loosely collected data provide useless, if not incorrect conclusions. For instance, if the same data showed minority over-representation; nobody would seriously suggest that the Government undertake a program to raise the proportion of whites in the Federal Government and thereby bring it more into line with whites' proportion in the CLF.

We raise this point not to be provocative, but to highlight the danger, in the current historical and legal context, in which the effects of past discrimination have waned and the judiciary's views on affirmative action have shifted, of placing too much emphasis on getting numbers to some level that is perceived to be "right." This is the main source of our concern about the current Notice. OPM believes that any new emphasis upon the collection and use of applicant data will only exacerbate this problem. As the discussion below establishes, these efforts could expose the agencies to extended litigation and perhaps liability under the Constitution, thus diverting agency resources from real problems and exposing the taxpayers to a needless drain on the public fisc.

Well-intentioned undertakings that could lead Federal agencies to attempt to increase the number of employees from various groups to levels "proportional" to their percentage of the United States population, the CLF, or the applicant pool (without regard to who, within the applicant pool, was actually qualified for the job or reachable under competitive hiring rules), are particularly inappropriate in the Federal sector because the Federal Government, unlike private sector employers, must abide by merit principles and competitive examining requirements established by statute. For that reason, a Federal employer, unlike an actor in the private sector, is statutorily precluded from considering minority status, or the fact that the applicant is a woman, for example, even as a "plus" factor. See Prohibited Personnel Practices, 5 U.S.C. § 2302(b)(1). Moreover, Rule 4.2 of the Civil Service Rules provides that "[n]o person employed in the executive branch . . . who has authority to take or recommend any personnel action with respect to any person who is an . . . eligible or applicant for a position in the competitive service shall make any inquiry concerning the race . . . of any such . . . eligible or applicant," and that "[a]ll disclosures concerning such matters shall be ignored . . . ." 5 C.F.R. § 4.2. In light of that rule, it is difficult to see how agents of a selecting or recommending official could be permitted to make such inquiries.

In the pages that follow, we discuss in greater detail the reasons why EEOC's proposal, in OPM's view, poses a serious danger for the Government. Essentially, we believe that placing a tool of this nature in the hands of well-meaning agencies may lead to the perpetuation of what would essentially be affirmative action programs without the legally required predicates. For this reason, we request that EEOC rescind the proposal of this data collection form.

The Legal Framework

The legal landscape with respect to the concept of affirmative action has changed dramatically in the last 30 years. A major watershed was the Supreme Court's decision

in *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 224 (1995), because it established the analytical framework that applies when the Federal Government uses race-conscious factors to conduct its business. In *Adarand*, the Court considered whether the "Federal Government's practice of giving general contractors on Government projects a financial incentive to hire subcontractors controlled by 'socially and economically disadvantaged individuals,' and in particular, the Government's use of race-based presumptions in identifying such individuals, violate[d] the equal protection component of the Fifth Amendment's Due Process Clause." 515 U.S. at 204. A central question in *Adarand* was what level of judicial scrutiny to apply to race-conscious rules.

Adarand and its Progeny

In commencing the Court's analysis, Justice O'Connor summarized the history of cases considering race-based classifications. She noted that the Court had considered, as early as 1978, in *Regents of University of California v. Bakke*, 438 U.S. 275 (1978), "whether race-based governmental action designed to benefit [groups that have suffered discrimination in our society] should . . . be the subject to 'the most rigid scrutiny.'". *Adarand*, 515 U.S. at 218. The Court acknowledged that "*Bakke* did not produce an opinion for the Court" but indicated that Justice Powell, who was the deciding vote, rejected the regents' argument that strict scrutiny should apply only when the classification worked to disadvantage minorities:

> In a passage joined by Justice White, Justice Powell wrote that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." 438 U.S., at 289-290, 98 S.Ct., at 2748. He concluded that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.,* at 291, 98 S.Ct., at 2748.

Adarand, 515 U.S. at 218.

Justice O'Connor then reviewed a series of cases subsequent to *Bakke* in which the Court had addressed similar issues regarding the appropriate level of review, including *Fullilove v. Klutznick*, 448 U.S. 448 (1980), *Wyant v. Jackson Board of Education*, 476 U.S. 267 (1986), *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). Justice O'Connor noted that:

> Despite lingering uncertainty in the details, however, the Court's cases through *Croson* had established three general propositions with respect to governmental racial classifications. First, skepticism: " 'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination,' " *Wygant,* 476 U.S., at 273, 106 S.Ct., at 1847 (plurality opinion of Powell, J.); *Fullilove,* 448 U.S., at 491, 100 S.Ct., at 2781 (opinion of Burger,

> C.J.); see also *id.*, at 523, 100 S.Ct., at 2798 (Stewart, J., dissenting) ("[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect"); *McLaughlin* [*v. Florida*], 379 U.S. [184], at 192, 85 S.Ct. [283], at 288 [(1964)] ("[R]acial classifications [are] 'constitutionally suspect' "); *Hirabayashi* [*v. United States*], 320 U.S. [81], at 100, 63 S.Ct. [1375], at 1385 [(1943)]("Distinctions ***224** between citizens solely because of their ancestry are by their very nature odious to a free people"). Second, consistency: "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," *Croson,* 488 U.S., at 494, 109 S.Ct., at 722 (plurality opinion); *id.*, at 520, 109 S.Ct., at 735 (SCALIA, J., concurring in judgment); see also *Bakke,* 438 U.S., at 289-290, 98 S.Ct., at 2747-2748 (opinion of Powell, J.), *i.e.,* all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized. And third, congruence: "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," *Buckley v. Valeo,* 424 U.S. [1], at 93, 96 S.Ct. [612], at 670 [(1976)]; see also *Weinberger v. Wiesenfeld,* 420 U.S. [636], at 638, n. 2, 95 S.Ct. [1225], at 1228, n. 2 [(1975)]; *Bolling v. Sharpe,* 347 U.S. [497], at 500, 74 S.Ct. [693], at 694 [(1954)]. Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.

Justice O'Connor discussed the "surprising turn" that the Court had taken in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 548, which appeared to head the Court in a different direction by holding that "benign" racial classifications by the Federal Government "need only satisfy intermediate scrutiny." Justice O'Connor criticized the reasoning of *Metro Broadcasting* as follows:

> By adopting intermediate scrutiny as the standard of review for congressionally mandated "benign" racial classifications, *Metro Broadcasting* departed from prior cases in two significant respects. First, it turned its back on *Croson*'s explanation of why strict scrutiny of all governmental racial classifications is essential:
>
> > "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body

> is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson, supra,* at 493, 109 S.Ct., at 721 (plurality opinion of O'CONNOR, J.).
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> We adhere to that view today, despite the surface appeal of holding "benign" racial classifications to a lower standard, because "it may not always be clear that a so-called preference is in fact benign," *Bakke, supra,* at 298, 98 S.Ct., at 2752 (opinion of Powell, J.). "[M]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system." Days, Fullilove, 96 Yale L.J. 453, 485 (1987).
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> Second, *Metro Broadcasting* squarely rejected one of the three propositions established by the Court's earlier equal protection cases, namely, congruence between the standards applicable to federal and state racial classifications, and in so doing also undermined the other two--skepticism of all racial classifications and consistency of treatment irrespective of the race of the burdened or benefited group. See *supra,* at 2110-2111. Under *Metro Broadcasting,* certain racial classifications ("benign" ones enacted by the Federal Government) should be treated less skeptically than others; and the race of the benefited group is critical to the determination of which standard of review to apply. *Metro Broadcasting* was thus a significant departure from much of what had come before it.

The Court ultimately rejected this "surprising turn" in its *Adarand* holding and returned to the principles established in the case law through *Croson*. Justice O'Connor, speaking for the Court, noted that

> we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled.

Adarand continues to be good law. As the late Chief Justice Rehnquist observed in *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) which, with *Grutter v. Bollinger*, 539 U.S. 982 (2003), was one of two cases concerning affirmative action in the admission of students to the University of Michigan:

> "It is by now well established that 'all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.' *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 224, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). This '"standard of review ... is not dependent on the race of those burdened or benefited by a particular classification."' *Ibid.* (quoting *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 494, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion)). Thus, 'any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny.' *Adarand,* 515 U.S., at 224, 115 S.Ct. 2097."

Accord Johnson v. California, 543 U.S. 499, 505 (2005); *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738, 2751-2752 (2007).

In *Gratz*, the Court held that "because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondent's asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment."[1] Although the Supreme Court was more favorably disposed to Michigan Law School's plan for considering race in assessing the whole candidate, in *Grutter*, it arrived at that decision based upon factors unique to the university setting. 539 U.S. at 328. Justice O'Connor, like Justice Powell in *Bakke*, found that the State's use of race in *Grutter* was justified by a compelling state interest only because of the perceived educational benefits that might flow from a diverse student body. In reaching that conclusion, she relied expressly upon the First Amendment and the Court's traditional deference, pursuant to that Amendment, to the administrative determinations of post-secondary academic institutions. This deference led the Court to accept, uncritically, the Law School's conclusion that obtaining this diversity was "essential" to its mission. *Id.* at 328-329. *See also Parents*, 127 S.Ct. at 2754. This deference served as a sort of stand-in for the sort of "'searching judicial inquiry into the justification for . . . race-based measures,'" that strict scrutiny would otherwise have required. *Grutter*, 539 U.S. at 326, 328-329. Justice O'Connor focused in particular upon the role of educational institutions in serving as incubators of leaders. Id. at 330-331/

The Federal Government is not the academy and will not be the beneficiary of the sort of deference afforded the University of Michigan in any lawsuits arising from agencies' use of applicant data. Nor can the Federal Government properly be characterized as a "feeder" for other institutions. Many who work in the Government make their careers here, many come to the Government from the private sector or non-governmental organizations, and many go back and forth repeatedly among all three categories of employers. Accordingly, the slight space left open in *Grutter* for the

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[1] As noted above, the Court held, in *Adarand*, that the same analysis should be applied to the Federal Government, via the Fifth Amendment. 515 U.S. at 227.

consideration of race in making selection decisions will be of no avail to Federal employers.

More recently, in *Parents*, the Court considered two school districts' systems for assigning students to schools. The Court noted that it had recognized only two interests that "qualify as compelling," under the strict scrutiny formula, remedying past discrimination and diversity in higher education. 127 S.Ct. at 2752 (citing *Grutter*). The Court noted that the law school admissions system in *Grutter* "focused on each applicant as an individual" and that the use of racial classification was "part of a broader assessment of diversity and not simply an effort to achieve racial balance, which the [*Grutter*] Court explained would be 'patently unconstitutional.'" *Parents*, 127 S.Ct. at 2753, citing *Grutter*, 539 U.S. at 330.

Under current Supreme Court jurisprudence, therefore, the desire for racial balance not only is insufficient to serve as a compelling governmental interest; it is regarded as "illegitimate." *Parents* 127 S.Ct. at 2725. In, *Parents* the Court asserted that:

> Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." . . . Allowing racial balancing as a compelling end in itself would "effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human beings' race' will never be achieved."

Parents, 127 S.Ct. at 2757-2758. The Court also noted that "[r]acial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" Id. at 2758.

These Supreme Court precedents illustrate the reasons why OPM is concerned about encouraging agencies to engage in collecting applicant data. The Court has instructed the lower courts to look critically at any use of data concerning race, sex, or similar categories, even if such use is well-motivated and intended to ensure inclusiveness. The Court repeatedly observes that equal protection is an individual right, not a right belonging to groups, and that even uses that are intended to be benign will be scrutinized with great skepticism. There is thus little that agencies can actually do with such data that will not run afoul of these precedents. *Parents, Adarand*, and the cases in between foreclose the use of such data either to attempt to undo historical wrongs or to attempt to rectify some perceived disproportionality. Moreover, in the Federal context, where the First Amendment deference afforded to the university selection process in *Grutter* is inapplicable, and where agency employers must follow competitive hiring

rules, the Government's desire for a diverse workforce, even in the broader sense discussed in *Grutter*, would likely be found not to provide a compelling governmental interest for using race-conscious factors.

MD/DC/DE Broadcasters

The notion that it is dangerous for the Federal Government to attempt to address the vestiges of historical discrimination or achieve proportional representation is further underscored by the decisions of the United States Court of Appeals, District of Columbia Circuit in *MD/DC/DE Broadcasters Association v. FCC,* 236 F.3d 13, petitions for rehearing denied, 253 F.3d 732 (D.C. Cir. 2001) ("*Broadcasters*"). *Broadcasters* involved an FCC regulation. The original version of the regulation required all broadcast licensees to carry out a program of

> specific practices designed to ensure equal opportunity and nondiscrimination in every aspect of station employment policy and practice. . . . The regulations required stations to seek out sources likely to refer female and minority applicants for employment, to track the source of each referral, and to record the race and sex of each applicant and of each person hired. If these data indicated that a station employed a lower percentage of women and minorities than were employed in the local workforce, then the Commission would take that into account in determining whether to renew the station's license.

236 F.3d at 13. The D.C. Circuit struck down that version of the regulation as an "unconstitutional race-based classification" in an earlier decision, *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998) ("*Lutheran Church*"). In *Lutheran Church*, the court first observed that the regulation should be subject to strict scrutiny "because it was 'built on the notion that stations should aspire to a workforce that attains, or at least approaches proportional [racial] representation' and 'oblige[d] stations to grant some degree of preference to minorities in hiring.'" 236 F.3d at 16. The court remanded the matter to the Commission "to determine whether it had a compelling government interest . . . to support its regulation of employment practices in the broadcast industry." 236 F.3d at 16.

The FCC then suspended the existing rule and sought comments on a new proposed rule. Based upon observations received during the comment period, "the Commission concluded that word-of-mouth recruiting was the single greatest barrier to equal employment in the broadcast industry . . ." and issued a new rule providing "that a licensee must make a good faith effort to disseminate widely any information about job openings." *Id.* at 17. In order to fulfill this requirement, the Commission offered two options.

> Under Option A the licensee (if it has more than ten employees) must undertake four approved recruitment initiatives in each

> two-year period; qualifying initiatives are specified by the Commission in some detail, as can be seen from the list reproduced in the margin. [Footnote omitted.] A licensee that selects Option A need not report the race and sex of job applicants. Under Option B the licensee may design its own outreach program but must report the race and sex of each job applicant and the source by which the applicant was referred to the station. *See* 47 C.F.R. § 73.2080(d).

236 F.3d at 17. The new rule also required each licensee to file an Annual Employment Report.

Both the United Church of Christ and the Broadcasters petitioned for review of the new rule. The cases were consolidated before the D.C. Circuit, which then reviewed the new rule in *Broadcasters*. The Broadcasters challenged the rule upon the ground, among other things, that it "employ[ed] a race-based classification that does not withstand strict scrutiny." 236 F.3d at 18. On review of the new regulation, the court concluded that Option B, which required tracking of the race and sex of applicants, violated equal protection. In reaching this conclusion, the court observed that "[a] regulatory agency may be able to put pressure upon a regulated firm in a number of ways, some more subtle than others." 236 F.3d at 19. It further observed that

> Option B . . . clearly does create pressure to focus recruiting efforts upon women and minorities in order to induce more applications from those groups. Licensees selecting Option B must report the race, sex, and source of referral for each applicant. *See* 47 C.F.R. § 73.2080(d)(1). The Commission made clear, moreover, in adopting the rule, that "[i]f the data collected does [sic] not confirm that notifications are reaching the entire community, we expect a broadcaster to modify its program as warranted so that it is more inclusive." R&O at ¶ 104. In determining whether recruitment efforts have reached the "entire community," the Commission considers the number of women and minorities in the applicant pool. If a licensee reports "few or no" women and minorities in its applicant pool, then the Commission will investigate the broadcaster's recruitment efforts. *Id.* at ¶ 120.

The court also observed that "the Commission's focus upon the race and sex of applicants belies its statement . . . that its only goal is that licensees recruit with a 'broad outreach.' [Citation omitted.] Were that the Commission's only goal, then it would scrutinize the licensee's outreach efforts, not the job applications those efforts generate." Id. at 19.

Most significant, for our purposes, was the court's observation that:

> Measuring outputs to determine whether readily measurable inputs were used is more than self-evidently illogical; it is evidence that the agency with life and death power over the licensee is interested in

> results, not process, and is determined to get them. As a consequence, the threat of being investigated creates an even more powerful incentive for licensees to focus their recruiting efforts upon women and minorities, at least until those groups generate a safe proportion of the licensee's job applications.

Id.

The court then turned to the question of the appropriate level of scrutiny, using *Adarand* as its touchstone. 236 F.3d at 20. The court framed the question as "whether a government mandate for recruitment targeted at minorities constitutes a 'racial classification' that subjects persons of different races to 'unequal treatment,' a question that the court had reserved in Lutheran Church. 236 F.3d at 20. The court rejected the notion that preferential recruiting does not disadvantage anyone observing:

> Under Option B the Commission has compelled broadcasters to redirect their necessarily finite recruiting resources so as to generate a larger percentage of applications from minority candidates. [Footnote omitted.] As a result, some prospective nonminority applicants who would have learned of job opportunities but for the Commission's directive now will be deprived of an opportunity to compete simply because of their race. While the Commission's intentions are to benefit minorities rather than to disadvantage non-minorities, *Adarand* clearly holds that the standard of constitutional review does not turn upon the race of those benefitted [sic] by a particular government action. *See Adarand,* 515 U.S. at 224, 115 S.Ct. 2097.

236 F.3d at 20-21. The court thus concluded that the new rule must be evaluated pursuant to strict scrutiny.

When it applied strict scrutiny, the court concluded that the rule violated equal protection. The court rejected the Government's argument "that it ha[d] a compelling interest both in remedying the effects of past discrimination and in preventing future discrimination in the distribution of public benefits," because "the Government's remedial interest is compelling only with respect to 'identified discrimination,' and it [was] far from clear that future employment in the broadcast industry is a public benefit for which the Government is responsible." 236 F.3d at 21. The court further observed:

> [T]he Broadcasters argue convincingly that the new EEO rule is not narrowly tailored to further that interest. First, Option B places pressure upon each broadcaster to recruit minorities without a predicate finding that the particular broadcaster discriminated in the past or reasonably could be expected to do so in the future. Quite apart from the question of a compelling governmental interest, such

> a sweeping requirement is the antithesis of rule narrowly tailored to meet a real problem. . . .
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> The requirement in Option B that licensees report the race of each applicant is another departure from the norm of narrow tailoring and a corollary, no doubt, of the Commission's true interest in results rather than mere outreach. The race of each job applicant is relevant to the prevention of discrimination only if the Commission assumes that minority groups will respond to non-discriminatory recruitment efforts in some predetermined ratio, such as in proportion to their percentage representation in the local workforce. Any such assumption stands in direct opposition to the guarantee of equal protection, however. *See Lutheran Church,* 141 F.3d at 352 (noting that Commission's claim that its goal of proportional representation was equivalent to goal of nondiscrimination "presupposes that non-discriminatory treatment typically will result in proportional representation in a station's workforce. The Commission provides no support for this dubious proposition"); . . . . The racial data required by Option B simply are not probative on the question of a licensee's efforts to achieve "broad outreach," much less narrowly tailored to further the Commission's stated goal of non-discrimination in the broadcast industry. Because Option B of the new EEO rule is not narrowly tailored, it does not withstand strict scrutiny, and we hold that it violates the equal protection component of the Due Process Clause of the Fifth Amendment.

236 F.3d at 22.

The import of this case for the Federal Government should be straightforward. The D.C. Circuit suggests that there is no proper basis for an across-the-board requirement that agencies collect and analyze data on the race, national origin, or sex of applicants for employment. The D.C. Circuit, in *Broadcasters*, has already found that "measuring outputs to determine whether readily measurable inputs were used is more than self-evidently illogical; it is evidence that the agency . . . is interested in results, not process, and is determined to get them." It is precisely the likelihood that Federal agencies will eventually evince the same "determination to get [results]" that makes the collection of such data dangerous. Making this form available will be inherently coercive; it will lead, inevitably, to pressure on the collecting agencies "to focus their recruiting efforts upon women and minorities, at least until those groups generate a safe proportion of the licensee's job applications." 236 F.3d at 19-20. And such practices cannot withstand strict scrutiny because an interest in remediating acknowledged historical or general societal discrimination or achieving a racial balance is not a compelling governmental interest, under the applicable precedents.

Moreover, Broadcasters suggests that even using this data to inform recruiting strategies could itself constitute an equal protection violation. The Court noted that

licensees have scarce resources and that a decision to devote resources to pursue one group could constitute an actionable detriment to the members of other groups. Under the circumstances, it is difficult to see how agencies could use this data without exposing themselves to substantial litigation risk. Because EEOC does not propose to limit use of this form to situations where actual discrimination by a particular agency has been established, it will be inherently susceptible to uses that will prove to be unconstitutional. In light of the D.C. Circuit's demonstrated hostility toward the collection of such data, this policy could doom the Government to decades of reverse discrimination lawsuits. We understand that EEOC is not explicitly requiring agencies to use this form. But neither is EEOC restricting use of the form to situations where actual past discrimination must be remedied. And we note that MD 715 asks agencies to report on applicant data. If this form becomes available, it is not unreasonable to suppose that agencies will at least feel pressured to use this form as part of the MD 715 reporting. Misguided efforts by agencies to use the collected data to "improve" their numbers could expose the agencies to liability and thus hurt both the agencies and the taxpayers (and divert resources from addressing real problems).

The Federal Statutory Context

Apart from the constitutional problem that use of this data poses, agency attempts to use this data to inform recruiting and hiring decisions is likely to run afoul of Federal statutory requirements. As noted above, the Federal Government, unlike private sector employers, must abide by the merit principles and Federal statutory and regulatory requirements concerning competitive hiring. Moreover, a Federal agency, unlike the University of Michigan Law School's admissions committee is, as a matter of law, precluded from any attempt to "consider race or ethnicity . . . as a 'plus' in a particular applicant's file," see Grutter, 539 U.S. at 334, because it would be a prohibited personnel practice for a selecting official to "discriminate *for or against* any employee or applicant for employment – (A) on the basis of race, color, religion, sex, or national origin . . . . " 5 U.S.C. § 2302(b)(1). [Emphasis supplied.] Finally, Rule 4.2 proscribes any recommending or selecting official from inquiring about race and requires that data collected pursuant to such an inquiry be ignored if collected. 5 C.F.R. § 4.2. So there would be, effectively, nothing that a selecting official could do with data that might suggest that appointments from members of particular groups lag behind applications from that group, even under the constitutional analysis adopted in *Grutter*.

Moreover, encouraging agencies to collect applicant data will leave them open to subsequent charges that they discriminated against applicants who self-identified. Agencies that do not collect such data and administer blind assessment processes are currently able to say that they had no knowledge of the applicant's race, sex, or national identity. Although the Notice recites that "[t]he voluntary responses are treated in a highly confidential manner and play no part in the selection of who is hire," these outcomes are actually beyond EEOC's control and depend upon the propriety and good will of the people at the agencies who collect and maintain custody of the data. If this form is approved and used, applicants who are not selected will now be in a position to argue (whether with good cause or not) that the agency's collection of this data played a

role in their non-selection. Agencies will be forced to fend off such claims even if they are unfounded.

Utility

Apart from the negative impact that routine use of this form will likely have on the Government, OPM questions its practical utility and the quality, utility, and clarity of the information to be collected. First, EEOC acknowledges that "[r]esponse by applicants is optional." Although, as noted above, the Notice recites that the responses will be handled appropriately, applicants may well be concerned about misuse nonetheless. OPM has no reason to believe agencies will abuse the data, but neither EEOC nor OPM can vouch for the future conduct of every selecting official or data handler who may have access to it. Applicants (minority and non-minority alike) who know something about history might well decline to identify themselves out of concern that self-identification could hurt their prospects. Alternatively, some applicants might decline to identify themselves out of pique with the request itself. These facts introduce a great deal of uncertainty as to whether aggregate data will be at all representative of reality. Because there is no way to ensure that the data is collected with any rigor, its utility seems highly questionable.

In addition, the Notice provides no information on who should be considered an applicant and when the form should be administered. There was a time, before e-mail and the Internet, and when assessment was predominantly undertaken pursuant to paper-and-pencil examinations in a proctored environment, when determining who constituted an applicant was a relatively simple proposition. Applicants had to go to some effort to make themselves known. They had to forward a written application that took time to prepare and postage to send; they often had to submit to examinations that took time and effort. Now, with the advent of Web sites such as USAJOBs, and the use of rating schedules rather than traditional paper-and-pen examinations, interested parties can apply by forwarding their resumes to dozens of agencies at a time. They can and do forward resumes for jobs for which they are clearly not qualified, simply because it is easy and essentially cost-free. In this environment, it is not altogether clear who should be considered to be an applicant and at what point a person who is interested in a job should be considered to have applied.[2]

Finally, without rigorous standards to help agencies determine who is a bona fide applicant, the process of collecting this data could be hijacked by interest groups eager to make a point. For example, an interest group could skew numbers wildly and make a particular selection profile look "unbalanced" simply by encouraging members to submit applications en masse, without regard to whether those individuals meet even the basic qualifications for the position.

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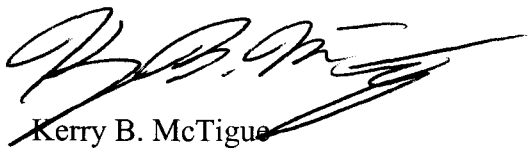
[2] Indeed, OPM and EEOC have been discussing this problem for years, and OPM's opposition to the collection of applicant data has never wavered.

Conclusion

For all of these reasons, OPM opposes the adoption of this form. There is no law that requires the collection of this data and there is a Civil Service Rule that appears to preclude it. Although EEOC purports to require agencies to consider such data (and thus, presumably, to collect it), this policy has been introduced only through management directive, not through a regulation promulgated pursuant to a formal notice and comment procedure. Collecting this data is likely to lead agencies into a course of action that will be found unconstitutional, and/or violative of applicable statutes, and thus damaging to the interests of both the Government and the public. Moreover, the collections for which the form is designed cannot be conducted with any rigor, and thus will not lead to useful results. We urge you to withdraw your proposal.

Very truly yours,



Kerry B. McTigue
General Counsel