



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

OCT 31 2018

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security and  
Governmental Affairs  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 1132, the "Political Appointee Burrowing Prevention Act," as reported from the Committee on Homeland Security and Governmental Affairs. As we explain below, the bill presents the following constitutional concern.

Associate Director Approval of the Appointment of a Political Appointee to a Career Position

The bill would require "the head of an agency" to obtain the approval of an Associate Director of the Office of Personnel Management ("OPM") before appointing a current or former political appointee to a career position, including career officer positions. H.R. 1132, sec. 2(a), § 3115(a)(1). An "agency" is defined as an "Executive agency" under 5 U.S.C. § 1005, which in turn is defined as "an Executive department, a Government corporation, and an independent establishment," and thus will include many department heads with the authority to appoint inferior officers. *See* U.S. Const. art. II, § 2, cl. 2. The Associate Directors of OPM are appointed by the Director of OPM, 5 U.S.C. § 1102(d), and thus are not department heads who may appoint inferior officers under the Appointments Clause.

There is precedent for requiring the concurrence of another department head, such as the Director of OPM, before appointing an inferior officer. *See, e.g.*, 50 U.S.C. § 3041(b) ("In the event of a vacancy in a position referred to in paragraph (2) [including a number of offices in the intelligence community], the head of the department or agency having jurisdiction over the position shall obtain the concurrence of the Director of National Intelligence before appointing an individual to fill the vacancy or recommending to the President an individual to be nominated to fill the vacancy."); *see also* 10 U.S.C. § 201(b) (similar for Department of Defense); 5 C.F.R. § 617.601(b) ("Each use of a noncareer appointment authority must be approved individually by the Office of Personnel Management[.]"). In such cases, the statute or regulation merely requires the concurrence of multiple individuals who would be entitled to appoint inferior officers in their own right. But requiring a non-department head to concur in the appointment of an inferior

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officer by a department head (as opposed to making a non-binding recommendation of an appointee to a department head, *see United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 392 (1867)) would cause that non-department head to share in the appointment authority and would violate the Appointments Clause. H.R. 1132 would thus be unconstitutional as applied to an appointment to any career officer position.

We recommend that the bill be revised to conform to the version of H.R. 1132 reported by the House Committee on Oversight and Government Reform on December 5, 2017, which would have required the agency head to obtain the approval of the Director of OPM, who is a department head, before appointing a current or former political appointee to a career position.

Thank you for the opportunity to present our views. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,



Prim F. Escalona  
Principal Deputy Assistant Attorney General

cc: The Honorable Claire McCaskill  
Ranking Member