



ALDEN
LAW GROUP, PLLC

KRISTIN D. ALDEN (DC, MD, VA)

MICHELLE BERCOVICI (DC, MD)

JAMES M. EISENMANN (DC, MD)

ROSS FISHBEIN (DC, MD)

SAMANTHA NICODEMUS (DC, NY)

TYRA ROBINSON (DC, MD)

CHRISTINE KUMAR (DC, NJ)

PHILIP A. MUELLER OF COUNSEL (DC, MD)

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Director Kiran Ahuja
U.S. Office of Personnel Management
1900 E St NW
Washington, DC 20415

Re: Comment on Proposed Rule concerning Upholding Civil Service Protections and Merit System Principles | Docket ID: OPM-2023-0013

Dear Director Ahuja,

Thank you for the opportunity to comment on OPM's proposed rule concerning Upholding Civil Service Protections and Merit System Principles. I am a former Executive Director and General Counsel of the Merit Systems Protection Board and currently an Adjunct Professor at the American University School of Public Affairs and a Partner in the Washington, D.C. employment and labor law firm Alden Law Group, PLLC. I write to provide support for OPM's proposal, as well as make one suggested clarification to ensure that the proposal more fully achieve its goals of protecting the civil service and the merit system.¹

The American people depend upon a strong, independent, highly capable, and independent civil service to provide fair, legitimate, and high-quality government services. Our civil service laws and regulations have been designed to ensure that the federal government serves and protects the public interest, consistent with nearly a century and a half of guidance from Congress as well as a substantial weight of empirical evidence. In the face of recent attempts to weaken civil service protections to facilitate civil service politicization and threats of further attacks in the future, I applaud OPM's attention to strengthening civil service protections to ensure that the public interest is protected far into the future.

As described further below, civil service protections provide tremendous benefits to the government and the American people, and Congress has demonstrated longstanding commitment to such protections. OPM should soundly reject and explain the problems with proposals to substantially reduce civil service protections, such as the prior effort in 2020 to create a new Schedule F category within the excepted service. I hope OPM will finalize its proposed rule, and

¹ I want to thank Aman George, Senior Counsel at the Democracy Forward Foundation for his assistance in preparing this comment.

in doing so, further clarify the application of civil service protections to career employees in the Senior Executive Service.

These changes will help to ensure that the American people and government leaders can count on the services of an experienced, professional, and mission-oriented civil service. These changes would continue to ensure that government leaders are bound to hire, promote, and, when necessary, discipline employees, based on merit and performance, as Congress has long intended, and as is consistent with civil service best practices.

I. Background: aborted efforts in 2020 to weaken protections for senior members of the civil service

The majority of federal employees are employed in the competitive service, subject to competitive examination for hiring and civil service protections.² Five categories of employees are excepted from this structure, and categorized as members of excepted Schedules A, B, C, D, or E:

- **Schedule A:** Positions that are not confidential or policy-determining, but for which it is not practicable to hire via examination (such as temporary hiring needs for critical positions, or hiring individuals with certain disabilities);
- **Schedule B:** Positions that are *not* confidential or policy-determining, but for whom it is not practicable to hold a competitive examination, but are otherwise subject to OPM qualification standards;
- **Schedule C:** Positions of a “confidential or policy-determining character.” In practice, this schedule is made up of political appointees who serve at the pleasure of the head of the agency or department;
- **Schedule D:** Positions that are *not* confidential or policy-determining, for which adequate recruitment of sufficient numbers of candidates meeting educational qualifications is impracticable (such as student interns, recent graduates, and Presidential Management Fellows); and
- **Schedule E:** Administrative law judges.³

² Cong. Rsch. Serv., R45635, *Categories of Federal Civil Service Employment: A Snapshot 1* (2019), <https://sgp.fas.org/crs/misc/R45635.pdf>.

³ See 5 C.F.R. § 6.2; U.S. Gov’t Accountability Off., GAO-22-105504, *Agency Responses and Perspectives on Former Executive Order to Create a New Schedule F Category of Federal Positions 5* (Sep. 2022), <https://www.gao.gov/assets/gao-22-105504.pdf> (“GAO Schedule F Report”); U.S. Off. Pers. Mgmt., *Excepted Service Hiring Authorities: Their Use and Effectiveness in the Executive Branch*, at 10, 20, 38 (July 2018), <https://www.opm.gov/policy-data-oversight/hiring-information/excepted-service/excepted-service-study-report.pdf>.

On October 21, 2020, President Trump issued Executive Order 13957, titled “Creating Schedule F in the Excepted Service.”⁴ E.O. 13957 criticized federal performance management, and emphasized the need to “separat[e] employees who cannot or will not meet required performance standards.”⁵

E.O. 13957 described the existence of a range of federal employees employed “in positions of a confidential, policy-determining, policy-making, or policy-advocating character,” aside from attorneys hired under Schedule A and members of the Senior Executive Service, who are generally appointed “through the competitive service.”⁶

E.O. 13957 emphasized the importance of Presidential oversight of these employees to ensure “[f]aithful execution of the law,” the importance of “appropriate temperament, acumen, impartiality, and sound judgment” for these positions, and the need for individuals in these positions to keep “non-public information . . . confidential.”⁷

For these positions, E.O. 13957 stated that “agencies should have a greater degree of appointment flexibility . . . than is afforded by the existing competitive service process.”⁸ To grant agencies that flexibility, the Order asserted that, under 5 U.S.C. § 3302(1), “conditions of good administration make necessary an exception to the competitive hiring rules and examinations for career positions in the Federal service of a confidential, policy-determining, policy-making, or policy-advocating character.”⁹ It also asserted that “[c]onditions of good administration similarly make necessary excepting such positions from the adverse action procedures” set forth in 5 U.S.C. Ch. 75 (which are subject to civil service protections against prohibited personnel actions).¹⁰

Going forward, E.O. 13957 declared that the appointment of career employees to “positions of a confidential, policy-determining, policy-making, or policy-advocating character” would be made under a new Schedule F of the excepted service.¹¹ In creating the new Schedule F, E.O. 13957 also explicitly limited Schedule C to include only political appointees.¹²

E.O. 13957 directed each agency to conduct a review of the positions within the agency to determine which positions should be subject to the new Schedule F because they are

⁴ Exec. Order No. 13,957, 85 Fed. Reg. 67,631 (Oct. 21, 2020), <https://www.federalregister.gov/documents/2020/10/26/2020-23780/creating-schedule-f-in-the-excepted-service> (“E.O. 13957”).

⁵ *Id.* at 76,631.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 67,632.

¹¹ *Id.*

¹² *Id.*

confidential, policy-determining, policy-making, or policy-advocating, but not political appointments; publish those determinations in the Federal Register; and update that review annually.¹³ It also directed agencies to “establish rules to prohibit the same personnel practices prohibited by section 2302(b) of title 5 [for] any employee or applicant for employment in Schedule F of the excepted service.”¹⁴

While E.O. 13957 was rescinded by President Biden on January 22, 2021,¹⁵ prior to any federal employees actually being rescheduled or hired into the new Schedule F,¹⁶ some agencies had started to recategorize positions under the new regime. OMB and the International Boundary and Water Commission were furthest through the process, having submitted a petition to OPM for placement of certain positions in Schedule F.¹⁷ OMB proposed to reschedule 415 employees, roughly 68 percent of its total workforce, into Schedule F.¹⁸ The bulk of these employees (87 percent) were relatively senior positions in grades GS-13 to GS-15.¹⁹

Five additional agencies (EEOC, EPA, FERC, FTC, and OPM) had conducted an initial review of positions potentially eligible for placement into Schedule F; FERC had determined that more than half its positions were eligible for Schedule F, while the other four agencies had determined that 10 percent or less of their workforce met the Schedule F criteria.²⁰

II. A competitively selected civil service with strong protections against arbitrary adverse actions provides significant benefits

As Congress has long determined and research has repeatedly confirmed, civil service protections provide significant benefits to the American public. These benefits support OPM’s proposed rule. They also establish that the Schedule F proposal would have been costly to effective federal government functioning by weakening the qualifications of incoming civil servants, reducing the independence of the civil service, diminishing public trust in government, threatening employee engagement and performance, and eroding institutional memory.

¹³ *Id.* at 67,633.

¹⁴ *Id.* at 67,624.

¹⁵ Exec. Order No. 14,003, 86 Fed. Reg. 7,231 (Jan. 22, 2021).

¹⁶ U.S. Gov’t Accountability Off., GAO-22-105504, *Civil Service: Agency Responses and Perspectives on Former Executive Order to Create a New Schedule F Category of Federal Positions* 10 (2022) (“GAO Schedule F Report”).

¹⁷ *Id.* at 11-12.

¹⁸ *Id.* at 13-14.

¹⁹ *Id.* at 14-15.

²⁰ *Id.* at 17.

A. The benefits of civil service protections have been widely recognized by Congress for 150 years

The notion of a competitively selected civil service is far from a modern creation; the justification for competitive selection stretches more than a century and a half. Throughout that period, Congress has grappled with the same concerns—whether and how to insulate civil servants from political forces, how to ensure the civil service is staffed by experienced professionals, how to promote trust that the government acts in the public interest—that are at stake in contemporary debates about civil service protections.

In 1866, a Joint Select Committee of the two Houses of Congress presented a report led by Representative Thomas Jenckes of Rhode Island calling attention to the need for a competitively selected civil service.²¹ That report criticized the spoils system of the time for turning executive branch officials into “private clerks” for their “temporary superior[s],” weakening their “responsib[ility] to the state.”²² Instead, the Joint Select Committee envisioned civil service reform that would free civil servants from “the caprices of [department] heads ‘dressed in a little brief authority,’” and instead create a system whereby, if a civil servant “performed his duties well, the state would recognize his services.”²³ An extensive review of contemporary governments in the mid-nineteenth century revealed that the spoils system was already outdated, and that competitive and protected civil services ensured higher functioning governments.²⁴ Even in 1866, the Joint Select Committee found that “there is hardly a civilized country without a system of examination and promotion in the dispensation of its public offices.”²⁵

Early advocates for a professionalized civil service had to rebut concerns of a “permanent bureaucracy,” to which the Joint Select Committee noted that “[a] permanent bureaucracy is only dangerous when it is *incompetent and practically irresponsible* [to the public interest],” and that a lack of competitive examination would just create a permanently low-caliber and unqualified bureaucracy.²⁶

The further output of that Joint Select Committee’s work was a draft civil service reform bill.²⁷ That draft bill would later be the basis for 1883’s Pendleton Act, which created a Civil Service Commission to oversee a competitive examination system for public servants and

²¹ J. Select Comm., *Civil Service of the United States*, J. Rep. No. 8, 39th Cong. (1866), reprinted in Thomas Allen Jenckes, *Civil Service of the United States*, Ticknor & Fields (1867), https://www.google.com/books/edition/_/UQ0vAAAAYAAJ?hl=en&gbpv=1&pg=PA1.

²² *Id.* at 5.

²³ *Id.* at 6.

²⁴ *Id.* at 9-14.

²⁵ *Id.* at 14.

²⁶ *Id.* at 15 (emphasis in original).

²⁷ *See id.* at 18-22.

prohibited disciplining career employees for refusing to perform political services.²⁸ When the Pendleton Act was being debated, its champions lauded the need for “the offices of the Government [to be] trusts for the people,” with officials selected for their “fidelity, capacity [and] honesty.”²⁹ By contrast, under the system that existed prior to the Act’s passage, “the President and his Cabinet and those who are charged with the responsibility [of selecting government officials had] remitted the question of fitness to their own partisan friends,” with “members of Congress” and members of the President’s party “under strain and pressure to secure a nomination or a renomination or election . . . to reward those whose friends and families and connections and aids and deputies will serve their purpose.”³⁰ The Act was intended to eliminate the influence of “personal fidelity and partisan activity” as the key qualifications for federal officials, and replace them with “fitness, capacity, honesty [and] fidelity.”³¹

Crucially, Sen. Pendleton advocated for the reform in the face of complaints from his own party that “abandonment of the spoils system will exclude Democrats from office when the day of our victory shall come,” encouraging his party to instead have faith that Democrats could “stand the test of merit for official position and promotion with any equal number of men in any party of the country.”³²

The Act was intended to improve the existing civil service, in which civil servants “d[id] not depend upon . . . their character and [] the good work they may do . . . to maintain them in place,” but rather relied upon “the recommendations of political friends.”³³ Similarly, Sen. Hoar praised the Act for targeting the spoils system and seeking to decouple the federal civil service from shifting political winds. As he explained, the Act would

cut[] up by the roots the existing system of political appointments to office and the use of office-holders of this country, so far as they have been used, as a disciplined army to be led into service or as a body of subordinates to be taxed for service by either political party in the country . . . the office-holders of the country will be removed as a body from its political forces each individual left to belong to such political organism as he chooses, as he is now left to belong to such church or such temperance society as he chooses.³⁴

The opponents of the Pendleton Act argued that civil service protections were “one step in the direction of the establishment of an aristocracy in this country, the establishment of another privileged class.”³⁵ One Senator argued that America’s was “a republican government; it is democratic in form, and you have to change the nature of the Government and change human

²⁸ Pendleton Act, ch. 27, 22 Stat. 403 (1883).

²⁹ 14 Cong. Rec. 206 (1882).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 208.

³³ *Id.* at 241 (statement of Sen. Hawley).

³⁴ *Id.* at 275.

³⁵ *Id.* at 277.

nature also before you will be able to adopt in practice here any utopian theories about civil service.”³⁶ These arguments that the civil service should be responsive to, rather than insulated from, the churn of partisan politics are echoed by contemporary critics of civil service protections.³⁷ But these arguments against a professional civil service were soundly *rejected* with the passage of the Pendleton Act, and have been proven to be incorrect over more than a century of experience.

In fact, Congress over time has reaffirmed and expanded protections for civil servants. It began this process over a century ago by broadening protections against politically motivated removals of federal employees from office. The Lloyd-LaFollette Act in 1912 guaranteed that civil servants could be removed only for cause.³⁸ It sought to ensure that whistleblowing civil servants were able to report to Congress and the public about shortcomings of their agencies’ performance, in the face of “gag” rules then-implemented by the executive branch that prevented civil servants from reporting to Congress without consent of department heads.³⁹ As one of the bill’s namesakes, Rep. James Tilghman Lloyd noted, the bill also sought to “do away with the discontent and suspicion which now exists among the employees [of the civil service] and [] restore that confidence which is necessary to get the best results from the employees,” by ensuring that civil servants being dismissed from service would have the benefit of a written record of charges against them, with reports made to Congress, and the ability to have Congress subject their dismissal to “special inquiry” if department heads “trump up charges” to dismiss civil servants.⁴⁰

The Civil Service Reform Act of 1978 reflects many of the same concerns and priorities that animated these earlier acts. As the Senate Conference Report stated: “Both the public and those in government have a right to the most effective possible civil service; that is, one in which

³⁶ *Id.* (statement of Sen. Brown).

³⁷ See, e.g., Alayna Treene, *Scoop: 2024 GOP Hopefuls Back Trump’s Plan To Purge Civil Servants*, Axios (Aug. 3, 2022), <https://www.axios.com/2022/08/03/2024-gop-hopefuls-trump-plan-purge-civil-servants> (potential presidential candidates criticizing an “entrenched bureaucracy” and “unaccountable power-mad bureaucrats”); Donald Devine et al., *Central Personnel Agencies: Managing the Bureaucracy*, Heritage Found. Project 2025, at 69, 80 (2023), https://thf_media.s3.amazonaws.com/project2025/2025_MandateForLeadership_CHAPTER-03.pdf (criticizing “career-first policy and value viewpoints” among career staff that “underplays the political role in leadership”); Philip K. Howard, *Civil Service Reform: Reassert the President’s Constitutional Authority*, Am. Int. (Jan. 28, 2017), <https://www.the-american-interest.com/2017/01/28/civil-service-reform-reassert-the-presidents-constitutional-authority/> (“[T]he civil service has become a property right of the employees themselves . . . Public employees answer to no one.”).

³⁸ 37 Stat. 539 at 555 (Aug. 24, 1912).

³⁹ See 48 Cong. Rec. 5625-26 (1912) (statement of Rep. Fowler criticizing a Post Office rule that forbade employees from attempting to influence Congress or its committees except through heads of the departments on penalty of dismissal from government service); *id.* at 5637-38 (Rep. Wilson noted that “[t]he spirit of the department head that he has been constituted the sole protector of the employees who come under his jurisdiction must be rebuked. It is for Congress to say what treatment this Government shall accord its employees.”).

⁴⁰ *Id.* at 4653-54.

employees are hired and removed on the basis of merit and one which is accountable to the public through its elected leaders.”⁴¹ To be sure, Congress at that time intended to provide agency management more flexibility in personnel management to ensure operational excellence, but to do so only in a way that preserved the public’s “right to a Government which is impartially administered.”⁴² As the Committee noted, “[a]n employee has no right to be incompetent; a manager has no right to hire political bed fellows.”⁴³ The goals of the 1978 Reform Act included “discourag[ing] subversions of merit principles” through the creation of the Merit Systems Protection Board and Office of Special Counsel,⁴⁴ and bolstering protections for “employees who disclose government illegality, waste, and corruption.”⁴⁵

In sum, since the late nineteenth century, Congress has repeatedly directed that the civil service be professionalized and insulated from partisan politics, so that:

- Federal civil servants were appropriately qualified for their positions;
- Civil servants had the opportunity to be promoted for strong performance; and
- Civil servants would feel primarily responsible to the public interest and the missions of their agencies, rather than ever-shifting partisan pressures from political leaders.

Further, Congress has been clear about these goals even in the face of concerns about the ostensible creation of a permanent bureaucracy or bureaucratic class. Congress decided to target the threats of increased incompetence and patronage in a spoils system, and decided that the benefits of a professionalized civil service outweighed concerns about bureaucratic inertia. To address concerns about bureaucratic inertia, Congress has created tools for low-performing federal employees to be removed from their positions, using mechanisms and protections consistent with its goals in creating a professional civil service. Proposals like Schedule F that would have the executive branch unilaterally rebalance these equities to make the civil service more transient and responsive to the cycle of presidential politics defy the weight of longstanding Congressional guidance that professionalism in the civil service is to be valued over political responsiveness.

B. Extensive academic literature reinforces the benefits of civil service protections

Extensive academic literature has studied the benefits of civil service protections. Researchers have consistently found that such protections provide a variety of benefits that reinforce Congress’s decision to build and maintain an independent, well-credentialed civil service.

⁴¹ S. Rep. No. 95-989, at 744 (1978) (Conf. Rep.) (report of the Senate Committee on Governmental Affairs to accompany S. 2640).

⁴² *Id.* at 746.

⁴³ *Id.*

⁴⁴ *Id.* at 747.

⁴⁵ *Id.* at 748.

1. *The Pendleton Act achieved Congress’s goal of improving the qualifications of federal employees*

The Pendleton Act itself “led to improvements in targeted employees’ professional background: new hires in positions requiring exams were 11 percentage points less likely to report working in an unskilled occupation prior to joining the Customs Service, and 9 percentage points more likely to report working in a professional one.”⁴⁶ The Pendleton Act also “led to a sizable reduction in employee turnover: the two-year turnover rate was 27% lower among employees in reformed districts . . . [B]y limiting politicians’ discretion to hire, exams also reduced an important incentive to remove employees in the first place –thus lowering turnover and potentially facilitating the accumulation of bureaucratic expertise.”⁴⁷

2. *Some friction between political appointees and civil service staff who may disagree with them can protect the public interest*

Many studies have found that friction between political agency heads and career staff have served to protect the public interest in a variety of ways. For example, agencies who host highly-ideological politically-appointed agency heads often face career civil servants who “comprise a moderating counterweight against more ideologically extreme appointees” and thus “serve as a bulwark against wild changes in regulatory policy . . . pull[ing] agency policies toward the median voter.”⁴⁸ These agencies also tend to move more cautiously through rulemakings, utilizing less hurried rulemakings with particularly thorough records, with these rulemakings just as likely to produce final rules as in agencies with less internal conflict.⁴⁹

Another study similarly noted the “fragmented” nature of power within the administrative state, in which political leadership, career civil servants, and external interests and civil society constitute an “ecosystem” that naturally “accommodates the interplay of presidential, technocratic, legalistic, and broader public interests and agendas” in a way that is legitimate and “constitutionally sound . . . unto itself” without the need for “intensive administrative control” by the President or Congress.⁵⁰

A professional and independent civil service that is insulated from the whims of political appointees also has been shown to meaningfully reduce opportunities for corruption. One study of 520 experts across 52 countries found that, “even when controlling for a very broad range of political and institutional factors, bureaucratic professionalism is a statistically significant

⁴⁶ Diana Moreira & Santiago Pérez, *Civil Service Exams and Organizational Performance: Evidence from the Pendleton Act* 3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 28665, 2022), https://www.nber.org/system/files/working_papers/w28665/w28665.pdf.

⁴⁷ *Id.*

⁴⁸ Brian D. Feinstein and Abby K. Wood, *Divided Agencies*, 96 S. Cal. L. Rev. 731, 737 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3925861.

⁴⁹ *Id.* at 736.

⁵⁰ See Jon. D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. Rev. 227, 229-232 (2016), <https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-91-2-Michaels.pdf>.

deterrent of corruption.”⁵¹ Bureaucratic professionalism is created through a “separation of interests,” in which bureaucrats and political leaders in a government are *both* empowered, but responsive to separate constituencies (political leaders accountable to voters, bureaucrats accountable to peers and the broader public interest), with “weak[er] ties between politicians and bureaucrats diminish[ing] the possibility of collusion and increas[ing] the chances for both [] to reveal corrupt actions taken by the other.”⁵² The “decisive way to create separation of interests between bureaucrats and politicians” is the “meritocratic recruitment of bureaucrats, which politicians do not influence.”⁵³

In this model,

[c]ontrary to a political appointee, a professional bureaucrat will not have much to gain from playing along if she observes corrupt behavior of politicians. She has for example no interest in rewarding the supporters of any particular politician, because her carrier is not dependent on the re-election of any political sponsor, but on the judgment of her professional peers. She has, however, much to lose if she doesn’t expose corrupt behavior. If it is revealed that she has known about corruption without exposing it her career is damaged, and her professional peers – who ha[ve] not gained from the corruption – ha[ve] no interest in protecting her.⁵⁴

It also bears mentioning that the United States’ peer countries all seek to insulate civil servants from political control to some degree, consistent with best practices. In fact, a 2007 OECD survey of senior civil servants across multiple countries found that in many ways, the United States’ executive branch is more politicized than our peers: the U.S. had the highest or among the highest rates of political appointments in the civil service, and the highest or among the highest levels of political involvement in appointment, dismissal, and promotion of civil servants.⁵⁵ Policies like Schedule F (or future attempts to weaken civil service protections) would push our civil service further away from recognized best practices.

⁵¹ Carl Dahlström et al., *The Merit of Meritocratization: Politics, Bureaucracy, and the Institutional Deterrents of Corruption*, 65 Pol. Rsch. Q. 656, 656 (2012), *working paper draft available at* https://www.researchgate.net/profile/Victor-Lapuente/publication/258180479_The_Merit_of_Meritocratization/links/5411434b0cf2df04e75d7417/The-Merit-of-Meritocratization.pdf.

⁵² *Id.* at 13-14.

⁵³ *Id.* at 13.

⁵⁴ *Id.* at 15.

⁵⁵ Anne Ketelaar et al., *Performance-Based Arrangements for Senior Civil Servants OECD and Other Country Experiences* 14-15 (OECD Working Papers on Public Governance No. 2007/5, 2007), <https://www.oecd.org/gov/38990099.pdf>. It is worth noting, however, that the U.S. system pairs these high rates of political involvement in civil service decisions with unusually strong restrictions on political activities by public servants and administrative activities by politicians. *Id.* at 15.

3. *A professional and insulated civil service bolsters legitimacy and public trust in government*

Trust in government is crucial for societal cooperation and can have a wide range of effects on society. Variations in trust in government have been found to measurably affect infection rates during the COVID-19 epidemic,⁵⁶ as well as various measures of economic stability and performance;⁵⁷ distrust can lead to a cycle of disengagement by citizens who may stand to benefit the most from a reliable and engaged government,⁵⁸ or help to erode commitment to democratic government and peaceful transitions of power altogether.⁵⁹

Maintaining public trust is a complex and ongoing challenge for the federal government.⁶⁰ While, as of May 2022, trust in career employees at government agencies had declined from previous years, a majority of Americans still reported having a great deal or fair amount of confidence in career employees to act in the best interest of the public; substantially more Americans believe this about career employees than about political appointees.⁶¹

A recent study of over seven thousand people asked them to participate in an experiment “in which each participant views one of 24 vignettes concerning policymaking at an administrative agency.” Each vignette emphasized different aspects of policymaking that are potentially relevant to public legitimacy.⁶² The study sought to understand whether members of the public were more inclined to view agency actions as legitimate if the agency’s claim to legitimacy rested on (1) technocratic expertise, (2) public participation in agency decision-making, or (3) greater accountability to elected officials, primarily the President.⁶³

⁵⁶ Thomas J. Bollyky et al., *Pandemic Preparedness and COVID-19: An Exploratory Analysis of Infection and Fatality Rates, and Contextual Factors Associated with Preparedness in 177 Countries, from Jan 1, 2020 to Sept 30, 2021*, 399 *Lancet* 1489, 1489 (2022), <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2822%2900172-6>.

⁵⁷ John Perry, *Trust in Public Institutions; Trends and Implications for Economic Security*, United Nations Dep’t Econ. & Social Affs. (July 20, 2021), <https://www.un.org/development/desa/dspd/2021/07/trust-public-institutions/>.

⁵⁸ *Id.*

⁵⁹ See Kira Lerner, *12m Americans Believe Violence is Justified to Restore Trump to Power*, *The Guardian* (June 9, 2023, 6:00 AM), <https://www.theguardian.com/us-news/2023/jun/09/january-6-trump-political-violence-survey>.

⁶⁰ See Paul Hitlin & Nadzeya Shutava, *Trust in Government: A Close Look at Public Perceptions of the Federal Government and Its Employees*, P’ship for Pub. Serv. (Mar. 23, 2022), <https://ourpublicservice.org/publications/trust-in-government/>.

⁶¹ Pew Rsch. Ctr., *Americans’ Views of Government: Decades of Distrust, Enduring Support for Its Role* (June 6, 2022), <https://www.pewresearch.org/politics/2022/06/06/americans-views-of-government-decades-of-distrust-enduring-support-for-its-role/>.

⁶² Brian D. Feinstein, *Legitimizing Agencies*, *U. Chi. L. Rev.* (forthcoming) (Wharton Sch. Rsch. Paper at 5, Mar. 2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4389050.

⁶³ *Id.* at 8.

The study found that emphasizing the technocratic expertise of agency officials, including that they could not be hired for their political views or fired for disagreements with political leaders, resulted in a “statistically significant . . . [increase] in legitimacy scores.”⁶⁴ The study found smaller increases in perceived legitimacy from emphasizing public participation,⁶⁵ but found no increase in perceived legitimacy from emphasizing the responsiveness of the agency action to the President’s priorities and White House staff.⁶⁶

In sum, “participants were most likely to view decisions as more legitimate after they learned about the role of politically insulated, expert civil servants in formulating that decision,” an effect that held true for both supporters and opponents of the Presidents in the vignettes.⁶⁷ The report goes on to conclude:

These results should persuade institutional designers endeavoring to create durable, popular administrative structures to empower politically insulated, expert civil servants. For instance, Congress can place limits on the President’s ability to reclassify executive-branch personnel from the competitive service, which holds civil-service protections, to politically appointed positions. Further, agency heads can expand on the practice of subdelegating binding decisionmaking authority on consequential matters to civil servants.

In addition to these legal changes, advocates of a robust administrative state should not countenance unwarranted disparagement of civil servants. By offering concrete examples how those announcing “I’m from the government and I’m here to help” provide needed assistance, they can turn President Ronald Reagan’s famous quip on its head.⁶⁸

The report also cautions that “the conclusion that expertise and political insulation boost legitimacy has a converse: those desiring to erode public support for agencies ought to weaken the civil service.”⁶⁹ The study’s results would suggest that,

by chipping away at civil servants’ insulation from political principals, these and other measures can reduce agencies’ perceived legitimacy. Indeed, it is possible that a negative feedback loop could develop concerning agencies’ legitimacy and civil-service protections. In this telling, lawmakers first express concerns that power exercised by democratically unaccountable civil servants is illegitimate. As a solution, they roll back laws designed to protect civil servants’ political independence. That turn away from the expertise paradigm erodes agencies’ perceived legitimacy. The public’s lower view of agencies’ legitimacy makes

⁶⁴ *Id.* at 33-35.

⁶⁵ *Id.* at 40-42.

⁶⁶ *Id.* at 42-48.

⁶⁷ *Id.* at 49-50.

⁶⁸ *Id.* at 50.

⁶⁹ *Id.*

additional rollbacks of civil-service protections more politically palatable. The cycle repeats.⁷⁰

By contrast, despite the fact that “so many scholars and judges . . . consider presidential control to be a wellspring of legitimacy for the administrative state,” the results suggest that “few members of the broader public appear to agree.”⁷¹

These results echo other studies that have linked public trust and legitimacy to civil service independence and good government. A recent study of public trust and civil service across OECD countries found that “more attention should be placed on maintaining a competent, impartial bureaucracy, or ensuring the fair implementation of the law, or addressing corrupt practices,” as “[f]ailure to do so may seriously constrain efforts to promote trusting attitudes.”⁷²

Similarly, other authors have found “a link between [government] impartiality and [perceived] service quality” by citizens, suggesting that “[p]olicymakers should consider impartiality to be one of the key principles of the administrative process . . . [o]therwise, lack of impartiality leads to negative outcomes such as corruption and lower trust.”⁷³

4. *Strong and predictable civil service protections improve employee engagement and performance*

The relentless drumbeat from some quarters criticizing government bureaucrats often fails to grapple with the reality that “bureaucrats have faces, technocrats have souls, and the values and capabilities that these flesh-and-blood human beings bring to their jobs may matter more for the quality of our government than is often appreciated.”⁷⁴

A lengthy survey of state-level civil service changes that reduced civil service protections in the 2000s found that in many cases, reforms were politically driven efforts to

establish and defend political actors’ capacities . . . to carry out the agendas of elected executives, legislators, and other policy makers. Governors, like Zell Miller of Georgia and Jeb Bush of Florida, aggressively pushed reforms designed to remove merit system barriers to direct and tighten policy control over state agencies and their employees. These types of initiatives are often “sold” in terms

⁷⁰ *Id.* at 51-52.

⁷¹ *Id.* at 56.

⁷² Andrew L. Morelock, *In Bureaucrats We Trust? Good Governance and Trust in Civil Servants*, 45 Pub. Admin. Q. 315, 2023 WLNR 32959285, at 9 (Oct. 1, 2021). Moreover, study concluded that “indicators of good governance may be a more influential factor on trust in government than the actual outcomes produced by countries” such as national economic conditions or degrees of inequality. *Id.*

⁷³ Kohei Suzuki & Mehmet Akif Demircioglu, *Is Impartiality Enough? Government Impartiality and Citizens’ Perceptions of Public Service Quality*, 34 *Governance* 727, 756-57 (2021), <https://onlinelibrary.wiley.com/doi/full/10.1111/gove.12527>. Notably, these authors also found that impartial government processes were associated with *lower* perceptions of service quality specifically among vulnerable citizens. *Id.* at 756.

⁷⁴ Matthew C. Stephenson, *The Qualities of Public Servants Determine the Quality of Public Service*, 2019 Mich. St. L. Rev. 1177, 1180 (2019).

of a need to enhance executive leadership and accountability for results and, inevitably, to allow the removal of the legions of “unresponsive, incompetent, insulated, bureaucrats” who the public is easily convinced lurk in the shadows of state agencies.⁷⁵

These popular myths about civil servants do not generally square with reality, as documented exhaustively in a 2005 report for the European Institute of Public Administration.⁷⁶

The efforts to weaken state-level civil service protections had a “tendency to punish state employees” with “demoralizing ‘bureaucrat bashing’ rhetoric of the ideologically and politically driven reformers.”⁷⁷ But there has been “[g]rowing awareness among policy makers, public employees and their organizations, and human resource professionals that” state-level reforms to weaken civil service protections “have not delivered the benefits they promised and may well dampen enthusiasm for [similar] initiatives by the states that contemplate sudden, wholesale, changes in existing arrangements.”⁷⁸

In their study of civil service employee responses to Georgia’s reforms, these authors found measurable decline in the number of employees saying they liked their jobs and an increase in those intending to leave employment within the coming year.⁷⁹ Employees did not believe the reforms would result in high-performing employees being rewarded, did not trust that performance would take precedence over office politics, and did not believe as much as before the changes that performance appraisals were conducted fairly and believing they understood their job expectations.⁸⁰ Over 75 percent of state employees disagreed that the reforms “had resulted in a state workforce that is now more productive and responsive to the public.”⁸¹

Of particular relevance to Schedule F, one prominent study found that the density of politically appointed leadership within agencies had a measurable *negative* correlation with federal program performance.⁸² As this study found, “programs administered by appointees get systematically lower PART grades [an OMB measure of program performance] than careerist-administered programs even when we control for differences among programs, substantial

⁷⁵ Lloyd G. Nigro & J. Edward Kellough, *The States and Civil Service Reform: Lessons Learned and Future Prospects*, in *Civil Service Reform in the States: Personnel Policy and Politics at the Subnational Level* 315, 316-17 (J. Edward Kellough & Lloyd G. Nigro eds., 2006).

⁷⁶ Christoph Demmke, *Are Civil Servants Different Because They Are Civil Servants?*, Eur. Inst. Pub. Admin. (2005), <https://www.dgaep.gov.pt/media/0601010000/lux/civilservantsdifferent.pdf>.

⁷⁷ Nigro & Kellough, *supra* note 75, at 319.

⁷⁸ *Id.*

⁷⁹ Lloyd G. Nigro & J. Edward Kellough, *Civil Service Reform in Georgia: A View from the Trenches*, in *Civil Service Reform in the States*, *supra* note 75, at 124.

⁸⁰ *Id.* at 126-130.

⁸¹ *Id.* at 138.

⁸² David E. Lewis, *Politicization and Performance: The Larger Pattern*, in *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance* 172, 177-180 (2008).

variation in management environment, and the policy content of programs themselves.”⁸³ On average, a career-run program would rank fifteen percentiles higher than a comparable program run by political appointees, and higher degrees of political leadership (in terms of percent of staff made up of political appointees) correlate with lower program scores.⁸⁴

Similarly, federal employee surveys have shown that “federal employees evaluate the leadership, management, and work climate of their agency more highly if their agencies are run by career managers,” and “[e]mployees in agencies with high percentages of appointees are less likely to agree . . . that they have a high level of respect for their organization’s senior leaders or that their senior leaders engender high levels of commitment or motivation in the workforce.”⁸⁵ Employees in highly politicized agencies evince “less general satisfaction in the workplace and federal workers in more politicized agencies are less likely to believe their agency compares favorably with other organizations and to recommend their job as a good place to work.”⁸⁶

Federal scientists surveyed in 2018 across many agencies identified political appointees in their agencies as the single largest barrier to science-based decision making.⁸⁷ As that survey found, “leadership can strongly influence federal scientists’ morale, job satisfaction, and overall effectiveness, and reports of low morale were generally associated with respondents’ perceptions of poor leadership.”⁸⁸ These findings reinforce “a large and growing body of research on positive organizational psychology” that “demonstrates that not only is a cut-throat environment harmful to productivity over time, but that a positive environment will lead to dramatic benefits for employers, employees, and the bottom line.”⁸⁹

Similarly, research has shown that high numbers of political appointees within agencies reduce the effectiveness of agency inspector generals, “therefore allowing waste, fraud, and abuse to continue in the federal government.”⁹⁰

Accordingly, reducing civil service protections, along the lines of the Schedule F plan, is costly, including by likely reducing trust and engagement from civil servants. Employees who have an “active, positive, and fulfilling work-related state of mind . . . characterized by vigour, dedication and absorption” in their work are characterized as more highly “engaged” than

⁸³ *Id.* at 182.

⁸⁴ *Id.* at 182-84.

⁸⁵ *Id.* at 191.

⁸⁶ *Id.*

⁸⁷ Ctr. for Sci. & Democracy, *Science under President Trump*, Union of Concerned Scientists 2 (2018), <https://www.ucsusa.org/sites/default/files/attach/2018/08/science-under-trump-report.pdf>.

⁸⁸ *Id.* at 6.

⁸⁹ Emma Seppälä & Kim Cameron, *Proof That Positive Work Cultures Are More Productive*, Harv. Bus. Rev. (Dec. 1, 2015), <https://hbr.org/2015/12/proof-that-positive-work-cultures-are-more-productive>.

⁹⁰ Grace Wallack, *Political Appointees Harm the Integrity and Efficiency of Government*, Brookings Inst. (Apr. 13, 2016) <https://www.brookings.edu/articles/political-appointees-harm-the-integrity-and-efficiency-of-government/>.

employees who do not share this mindset or state.⁹¹ Empirical literature studying employee engagement “shows a clear, significant correlation with performance and customer satisfaction” across a wide range of studies in the public and private sectors.⁹² Beyond the well-studied effects on organizational performance, public sector engagement has been linked to “customer satisfaction, thereby increasing citizen trust and confidence in government services.”⁹³

5. *Institutional memory and knowledge are crucial to healthy organizations*

Turnover among senior civil servants imposes substantial costs on agencies and the public, and extensive academic literature has examined the benefits of institutional memory on organizational performance.

Institutional memories may be “stored” in a variety of locations: (1) the experience and knowledge of existing staff, (2) paper and electronic databases, (3) management systems and processes, and (4) norms and values of organizational cultures.⁹⁴ This accumulated knowledge can be ignored, or, worse, specifically targeted for disregard or destruction by management practices that transform a positive forward-looking “focus on future possibilities” into an “unjustifiable enmity or contempt for the past,” resulting in “little respect for traditional bureaucratic attention to precedent, scrupulous record-keeping, caution or balance,” and a disinclination to seek lessons from “the professionals who are actually delivering many of the public services because they are seen as being trapped in the traditional culture.”⁹⁵

“Public institutions must take lessons from past experiences if they hope to improve performance over time,” but “positional churn, institutional churn, and poorly managed digital file management systems” can all challenge institutional memory.⁹⁶

[P]ublic institutions remember the past through their stories as much as through their files . . . The files contain facts and figures, but the stories contain the judgments and inferences of those who experienced the past. These stories are retained within the memories of individuals, where details fade or alter over time. They are also transmitted between individuals, passed down through long-lasting projects, and spread across the public service where they lose nuance.⁹⁷

⁹¹ OECD, *Engaging Public Employees for a High-Performing Civil Service*, OECD Pub. Governance Revs. 59 (2016), https://read.oecd-ilibrary.org/governance/engaging-public-employees-for-a-high-performing-civil-service_9789264267190-en#page1.

⁹² *Id.* at 60-61.

⁹³ *Id.* at 62-63.

⁹⁴ Christopher Pollitt, *Bureaucracies Remember, Post-Bureaucratic Organizations Forget?*, 87 Pub. Admin. 198, 202-03 (2009), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1467-9299.2008.01738.x>.

⁹⁵ *Id.* at 207-08.

⁹⁶ Rodney Scott et al., *Public Sector Institutional Memory Through Storytelling* 14 (2019) <https://tinyurl.com/2hsryh3s>.

⁹⁷ *Id.* at 14-15.

One study of institutional memory in crisis management organizations found that “organizations that develop institutional memory are less likely to repeat strategic errors,” errors which “can lead to losses of life, unchecked violence, and wasted funds.”⁹⁸ Institutional memory can also “increase[] prospects for success” by ensuring that organizations are “[u]nderstanding past failures,” as well as by giving them the ability to undertake reforms after acknowledging errors.⁹⁹

One study of U.S. federal agencies found that previous experience within an agency’s bureau, and prior length of tenure, had significant positive impacts on program performance.¹⁰⁰ This correlation between managerial experience and program performance is perhaps because experienced managers’

knowledge of programs, processes, structures, and personnel facilitates monitoring, reduces the start-up costs associated with a new management position, and helps them know better how to measure and manage performance. Previous bureau experience may also bring specialized policy knowledge that helps facilitate management oversight.¹⁰¹

The failures of the Federal Emergency Management Agency (FEMA) in the wake of Hurricane Katrina, for example, can in part be linked to failures of inexperienced political leadership. At the time of Katrina, FEMA “had recently been downgraded within the machinery of government; had received a number of senior political appointees with few relevant skills; and had lost some of their most experienced senior staff.”¹⁰² In the wake of Katrina, “many resources stood idle for days while the respective organizations got themselves sorted out,” while “state officials were confused by the unfamiliarity of recently introduced federal procedures and structures,” (FEMA had recently been absorbed into the new Department of Homeland Security), and “existing emergency plans (including, most significantly, the one for New Orleans) were not put into action.”¹⁰³

While it is certainly important to promote high-performing employees and remove low performers who are hampering an agency’s mission, proposals that would facilitate rapid mass firings of experienced employees to suit a presidential administration’s political agenda would

⁹⁸ Heidi Hardt, *NATO’s Lessons in Crisis: Institutional Memory in International Organizations* 7 (2018).

⁹⁹ *Id.* at 8.

¹⁰⁰ David E. Lewis, *supra* note 82, at 186.

¹⁰¹ *Id.*

¹⁰² See Christopher Pollitt, *Time, Policy, Management: Governing with the Past* 3 (2008); see also David E. Lewis, *supra* note 82, at 1 (“critics have argued that FEMA’s appointee-heavy management structure created numerous administrative problems that contributed directly to the lax Katrina response. Among the problems identified was limited emergency-management experience among appointees. This was epitomized by the well-publicized fact that director Michael Brown’s most significant prior work experience was with the International Arabian Horse Association.”).

¹⁰³ Christopher Pollitt, *Time, Policy, Management: Governing with the Past* 3 (2008).

likely impact the ability of agencies to preserve institutional knowledge and use it to improve agency operations over time.¹⁰⁴

III. OPM should specifically articulate the deficiencies of the Schedule F proposal, which would have been exceedingly costly and debilitating to the civil service and government operations

As described above, civil service protections provide important benefits, including benefits that have long been core priorities of Congress in the design of the professional civil service system:

- Identifying highly qualified candidates with relevant experience for civil service employment;
- Building a culture of responsibility to the U.S. government and its laws, rather than to a rotating cast of highly ideological political leadership, including allowing space for internal dissent;
- Ensuring rigorous, well-supported changes in regulations at the expense of rapid and significant fluctuation in regulatory policy; and
- Preserving institutional knowledge about highly technical government policies that can take years to formulate and decades to implement.

The Schedule F proposal would have implicated a number of these core benefits of civil service protections, in ways that would have imposed costs on the government and harmed the public interest. Without long-standing job protections, senior civil servants would feel pressure to “just keep quiet when faced with a difficult situation for fear of being fired at will,” or to “do just enough—or just not enough—to avoid getting fired, rather than focusing on doing the best job they can.”¹⁰⁵ As one report noted, concerns about the erosion of the civil service are amplified by the fact that over 70 percent of the 2 million career civil servants in the federal government work in agencies with a national security role, and Schedule F could have allowed a President to reclassify (and further politicize) directors of offices leading the United States’ work on multilateral nuclear affairs, terrorism analysis, chemical weapon nonproliferation, domestic

¹⁰⁴ See, e.g., Andrea N. Baron et al., *Effects of Practice Turnover on Primary Care Quality Improvement Implementation*, 35 Am. J. Med. Quality 16, 18-20 (2020) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6819201/> (finding that high rates of turnover in medical practices hampered efforts to improve service delivery, in part because of a loss of institutional memory, with new staff needing to be trained from scratch on procedures and best practices and lacking the capacity during training to keep working on improvement of the practice).

¹⁰⁵ Jim Eisenmann, *Trump’s Plan to Gut the Civil Service*, Lawfare Inst. (Dec. 8, 2020, 10:28 AM), <https://www.lawfaremedia.org/article/trumps-plan-gut-civil-service>.

violent extremism, and the links between terrorism, narcotics, and crime, among other crucial functions.¹⁰⁶

As the Government Accountability Office found, stakeholders believed that Schedule F “could be used to expedite hiring of federal employees committed to advancing the President’s policy agenda, and removing those who were not,” creating a “risk that employees in Schedule F positions could be subject to removal for partisan political reasons.”¹⁰⁷ Some stakeholders raised concerns that Schedule F would “create a second, and potentially larger contingent of political appointees hired for their responsiveness to the President rather than their qualifications.”¹⁰⁸ Some also believed that removing protections against politically-motivated adverse actions for employees under Schedule F “could reduce the willingness of civil service employees to challenge potentially inefficient, unethical, or illegal requests from political staff without fear of removal.”¹⁰⁹

Stakeholders also noted that increased staff turnover between administrations due to Schedule F could lead to “a lack of continuity and a potential degradation in the overall subject matter expertise held within the civil service,” endangering the civil service’s ability to “preserv[e] institutional memory, knowledge, and competence across administrations.”¹¹⁰ Indeed, as noted above, the Trump administration’s proposal would have converted nearly 70 percent of the workforce at the Office of Management and Budget and the majority of the workforce at the Federal Energy Regulatory Commission into easily removable Schedule F employees, which raises significant concerns about rapid possible degradation of institutional memory and experience.¹¹¹

These concerns echo those that have animated Congress’s attempts to professionalize the civil service for more than 150 years as well as the results of myriad studies of the benefits of a professional civil service.

The Schedule F proposal as articulated in E.O. 13957 failed entirely to grapple with the many benefits of a professional civil service. Instead, it relied on vague and conclusory assertions that competitive selection procedures inhibit the hiring of candidates with appropriate “work ethic, judgment, and ability to meet the particular needs of the agency,” and that more “flexibility to expeditiously remove poorly performing employees” was needed without any consideration of the countervailing considerations that favor strong employee protections.¹¹²

¹⁰⁶ Cissy Jackson, *Congress Must Pass the Preventing a Patronage System Act to Protect Federal Civil Servants’ Impartiality*, Ctr. Am. Prog. (Dec. 2, 2022), <https://www.americanprogress.org/article/congress-must-pass-the-preventing-a-patronage-system-act-to-protect-federal-civil-servants-impartiality/>.

¹⁰⁷ GAO Schedule F Report, *supra* note 16, at 21.

¹⁰⁸ *Id.* at 22.

¹⁰⁹ *Id.* at 25.

¹¹⁰ *Id.* at 23.

¹¹¹ *Id.* at 13-17.

¹¹² *See* 85 Fed. Reg. at 67,632.

I encourage OPM to consider these issues more deeply than the prior administration did and explain in its final rule why it is in the public interest for the federal government to maintain a staff of senior civil servants who are competitively selected and insulated from rapid and arbitrary dismissal.

IV. OPM should bolster and expand protections for members of the civil service

In light of the discussion above, I wholeheartedly support OPM's proposals to strengthen and clarify civil service protections and commit the federal government to merit system principles. I also recommend that OPM ensure the application of its proposals to career-reserved positions in the Senior Executive Service, which may be targets of future attempts to weaken civil service protections.

A. OPM's proposals are well-considered and would help strengthen the civil service

OPM's proposal to clarify the rights of employees in the competitive service via amendments to 5 C.F.R. part 752 would help protect career civil servants against arbitrary adverse actions while serving in their positions, and would ensure that those employees' protections remain even when a competitive-service position is moved into the excepted service.

This proposal would ensure that a future administration would not be able to use rescheduling as a tool to bypass the civil service protections of employees currently serving in the competitive service. While a future administration may seek to reschedule positions to advance the good administration of the government, OPM's proposal would ensure that such an effort is undertaken in an orderly manner that does not deprive employees of due process rights or deprive the public of the benefits of a professional civil service.

OPM further proposes to amend 5 C.F.R. part 210 to define the terms "confidential, policy-determining, policy-making, or policy-advocating" and "confidential or policy-determining," to explicitly state that these terms are intended only to cover noncareer political appointments, not members of the career civil service. This proposal would help to ensure that senior civil servants, who have built careers on public service and whose experience and expertise is irreplaceable, retain protections against arbitrary adverse actions. As discussed in Section II.B.3, above, the U.S. federal government already has unusually high volumes of political appointment and high degrees of political control over bureaucracies relative to peer countries, in many ways to the detriment of government effectiveness. OPM's proposal is wise to constrain the discretion of the executive branch to effectively further expand the ranks of political appointees by removing protections for senior civil servants and reinforces Congress's longstanding commitment to civil service protections.

OPM's proposal would also create a new process for moving encumbered positions into the excepted service via amendments to 5 C.F.R. part 302. This proposal would ensure thoughtful engagement by agency executive and human capital leadership in the decision to move positions into excepted service. It would also ensure that an agency clearly addresses the implications of rescheduling positions for the agency's adherence to merit system principles. Last, the creation of a notice and appeals process via OPM's proposed 5 C.F.R. § 302.602-3 would provide a bulwark against the use of rescheduling as an end run around competitive service protections.

While a future administration may still seek to reschedule positions or create new excepted service schedules, OPM's proposals would ensure that these processes are deliberate and thoughtful about the impacts on the core values Congress intended to protect in creating a civil service.

I support OPM's proposals in full.

- B. OPM should clarify that the protections for employees in the competitive service also extend to the Senior Executive Service, particularly career-reserved Senior Executive Service positions

I further suggest that OPM mirror the protections proposed for 5 C.F.R. § 212.401 in OPM regulations governing the Senior Executive Service.

OPM's proposal would ensure that an employee serving in the competitive service at the time their position is first listed under an excepted service schedule remains in the competitive service while they occupy that position. 88 Fed. Reg. at 63,882. I suggest that OPM insert parallel language into the regulations governing the Senior Executive Service at 5 C.F.R. Part 214 to ensure that these protections apply to those positions as well.

I would suggest that 5 C.F.R. § 214.403 be amended as follows (with amendments in italics & underline):

5 C.F.R. § 214.403 Change of Position Type

(a) An agency may not change the designation of an established position from career reserved to general, or from general to career reserved, without the prior approval of the Office of Personnel Management;

(b) An employee serving in a career-reserved Senior Executive Service position at the time his position is first moved to general, or first listed under Schedule A, B, or C, or whose position is otherwise moved from the Senior Executive Service and listed under a schedule created subsequent to [effective date of final rule] remains in the career-reserved Senior Executive Service while he occupies that position.

Similarly, I would suggest that OPM clarify that the changes proposed within 5 CFR Part 302 include Senior Executive Positions as well, by amending OPM's proposal as follows (with amendments in italics and underline):

5 C.F.R. § 302.601 Scope.

This subpart applies to any situation where an agency moves a position from the competitive service *or career-reserved Senior Executive Service* to the excepted service, or between excepted services, whether pursuant to statute, Executive order, or an OPM issuance, to the extent that this subpart is not inconsistent with applicable statutory provisions. This subpart also applies in situations where position previously governed by Title 5 of the U.S. code will be governed by another title of the U.S. code going forward, unless the statute governing the exception provides otherwise.

§ 302.602 Basic requirements.

(a) In the event the President, Congress, OPM, or their designees direct agencies to move positions from the competitive service *or career-reserved Senior Executive Service* for

placement in the excepted service under Schedule A, B, or C, or any Schedule in the excepted service created after [effective date of final rule], or to move positions from a schedule in the excepted service to a different schedule in the excepted service, the following requirements must be met, as relevant:

(1) If the directive explicitly delineates the specific positions that are covered, the agency need only list the positions moved in accordance with that list, and their location within the organization.

(2) If the directive requires the agency to select the positions to be moved pursuant to criteria articulated in the directive, then the agency must provide a list of the positions to be moved in accordance with those criteria, denote their location in the organization, and explain, upon request from OPM, why the agency believes the positions met those criteria.

(3) If the directive confers discretion on the agency to establish objective criteria for identifying the positions to be covered, or which specific slots of a particular type of position the agency intends to move, then the agency must, in addition to supplying a list and the locations in the organization, supply the objective criteria to be used and an explanation of how these criteria are relevant.

(b) An agency is also required to—

(1) Identify the types, numbers, and locations of positions that the agency proposes to move into the excepted service.

(2) Document the basis for its determination that movement of the position or positions is consistent with the standards set forth by the President, Congress, OPM, or their designees as applicable.

(3) Obtain certification from the agency's Chief Human Capital Officer (CHCO) that the documentation is sufficient and movement of the position or positions is both consistent with the standards set forth by the directive, as applicable, and with merit system principles.

(4) Submit the CHCO certification and supporting documentation to OPM (to include the types, numbers, and locations of positions) in advance of using the excepted service authority, which OPM will then review.

(5) For exceptions effectuated by the President or OPM, list positions to the appropriate schedule of the excepted service only after obtaining written approval from the OPM Director to do so. For exceptions effectuated by Congress, inform OPM of the positions excepted either before the effective date of the provision, if the statutory provisions are not immediately effective, or within 30 days thereafter.

(6) For exceptions created by the President or OPM, initiate any hiring actions under the excepted service authority only after OPM publishes any such authorizations in the Federal Register, to include the types, numbers, and locations of the positions moved to the excepted service.

(7) For positions currently designated as career-reserved Senior Executive Service positions, explain the changed factual circumstances that led the agency to conclude that

the position may be excepted from the competitive service without negatively impacting the impartiality, or the public's confidence in the impartiality, of the Government.

(c) In accordance with the requirements provided in paragraphs (a) and (b) of this section—

(1) An agency that seeks to move an encumbered position from the competitive service *or career-reserved Senior Executive Service* to the excepted service, or from one excepted service schedule to another, must provide written notification to the employee of the intent to move the position 30 days prior to the effective date of the position being moved.

(2) The written notification required by paragraph (c)(1) of this section must inform the employee that the employee maintains their civil service status and protections notwithstanding the movement of the position.

§ 302.603 Appeals.

(a) A competitive service *or career-reserved Senior Executive Service* employee whose position is placed into the excepted service or who is otherwise moved to the excepted service, or an excepted service employee whose position is placed into a different schedule of the excepted service or who is otherwise moved to a different schedule of the excepted service, may directly appeal to the Merit Systems Protection Board, as provided in paragraphs (b) and (c) of this section, to have their competitive status and civil service protections reinstated, as applicable.

(b) An employee whose position is moved into the excepted service or into a different schedule of the excepted service may appeal to the extent that such move purportedly strips the employee of the status and civil service protections the employee has already accrued.

(c) An employee whose move to a new position that would require the employee to relinquish their competitive status or civil service protections is facially voluntary may appeal if the employee believes that such move was coerced.

Similarly, I would suggest that OPM clarify that the changes proposed within 5 CFR Part 752 include Senior Executive Positions as well, by proposing the following amendments to 5 CFR Part 752 Subpart F (amendments in italics):

§ 752.601 Coverage

(c) Employees covered. This subpart covers the following appointees:

(1) A career appointee –

(i) Who has completed the probationary period in the Senior Executive Service, *including such an employee who is moved involuntarily into the excepted service and still occupies that position or a similar position;*

(ii) Who is not required to serve a probationary period in the Senior Executive Service, *including such an employee who is moved involuntarily into the excepted service and still occupies that position or a similar position; or*

(iii) Who was covered under 5 U.S.C. 7511 immediately before appointment to the Senior Executive Service, including such an employee who is moved involuntarily into the excepted service and still occupies that position or a similar position.

(2) A limited term or limited emergency appointee

(i) Who received the limited appointment without a break in service in the same agency as the one in which the employee held a career or career-conditional appointment (or an appointment of equivalent tenure as determined by the Office of Personnel Management) in a permanent civil service position outside the Senior Executive Service, including such an employee who is moved involuntarily into the excepted service and still occupies that position or a similar position; and

(ii) Who was covered under 5 U.S.C. 7511 immediately before appointment to the Senior Executive Service.

V. Conclusion

A well-credentialed and independent civil service is crucial to our federal government effectively serving the public interest. I applaud OPM's proposal to strengthen protections against increased politicization of the federal government, and encourage OPM to finalize its proposal quickly, while also ensuring that protections reach career civil servants in SES positions. To the extent that OPM wishes to discuss this comment further, I welcome the opportunity to answer any additional questions, and can be reached at jeisenmann@aldenlg.com. Thank you for the opportunity to comment on this important matter.

Very truly yours,



James M. Eisenmann

jeisenmann@aldenlg.com