Democracy and a Nonpartisan Civil Service

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Abstract

While campaigning for a second term, President Trump threatened to bring the administrative state "to heel" by making "every executive branch employee fireable at will." Since January 20, 2025, the White House has acted on that promise by issuing several Executive Orders defying and undermining the 150-year-old federal civil service law, along with whistleblower, collective bargaining, privacy, and other rights ensuring federal employment is nonpartisan. Roughly 100,000 civil servants have resigned or been fired. This article reveals the absence of legal or policy justification for the ongoing elimination of the nonpartisan civil service. Historical and empirical analyses show that civil service protections enhance the efficiency and quality of government service and are bulwarks of democratic governance. The Executive Orders and their implementation are inconsistent with several federal statutes, as well as both Article II and the First Amendment to the Constitution.

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The Trump Administration has, since January 20, 2025, fired career civil servants by the tens of thousands, a purge never before attempted in American history.[2] While campaigning, Trump promised to bring the government "to heel" by making "every executive branch employee fireable at will."[3] Vice President Vance advocated firing "every mid-level civil servant" to "replace them with our people."[4] Since taking office, they have said eliminating merit-based personnel rules is justified by cost-saving and efficiency, and to make federal employees "accountable to the President, who is the only member of the executive branch, other than the

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[2] CNN estimates the number fired to be more than105,000 as of March 19. Annette Choi, et al, Tracking Trump's overhaul of the federal workforce, CNN.com (March 19, 2025), https://www.cnn.com/politics/tracking-federal-workforce-firings-dg/index.html .

[3] *Former President Trump in Florence, South Carolina*, C-SPAN (Mar.12, 2022), https://www.c-span.org/video/?518447-1/president-trump-florence-south-carolina [https://perma.cc/F2N7-FWV7] ("We will pass critical reforms making *every* executive branch employee fireable—fireable—by the President of the United States. The deep state must and will be brought to heel.")

[4] Andrew Prokop, *J.D. Vance's radical plan to build a government of Trump loyalists,* Vox.com (July 17, 2024), https://www.vox.com/politics/361455/jd-vance-trump-vice-president-rnc-speech.

Vice President, elected and directly accountable to the American people."[5] The mass firings reveal it is possible to effectively eliminate legislation and regulation without action by Congress to repeal legislation or enact new law, nor even to go through the rulemaking processes prescribed by the Administrative Procedure Act. And, because of Trump's control over the GOP majority in both houses of Congress, there has been no action from Congress, even as the firings have shut down agencies and cabinet departments and eliminated programs that past Congresses created.

The announced goal of the mass firings, however, is worse than just to eliminate programs. Russell Vought, head of the Office of Personnel Management (OPM, the federal government's HR department), said the goal is for government employees to be "traumatically affected" and "viewed as villains." He may be the only head of HR in history, or at least in the history of nontotalitarian state, with the announced goal of tormenting the workforce. A government policy of intentionally inflicting trauma on government employees is horrific. It is also unlawful.

Government employee job protections are an essential part of the legal architecture that makes federal legislation meaningful. Food, transportation, or workplace safety laws and financial regulation mean little if there are no food or OSHA inspectors, air traffic controllers, or bank examiners or SEC employees. For legislation or regulation to have an effect, it must be implemented, which requires government employees. The nonpartisan civil service, along with removal protections for government watchdogs and independent agency heads who ensure the civil service remains nonpartisan, are necessary to ensure existing law remains until it is repealed, even when the White House switches parties. This is not just a matter of effective regulation, it is a matter of democratic government and the rule of law.[6] Bureaucracy is essential to the accountability of government, not a barrier; it is a bulwark of democracy not an enemy.

The current approach to governance is unprecedented in American history. Ever since John Adams replaced George Washington, incoming administrations have generally not replaced most government workers, even when the presidency switched parties.[7] Since the Pendleton Act of 1883, statutes have embodied the principle that federal service below the Cabinet and high-level officials does not terminate with each election. The principle reflects the belief that Americans of

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[5] *See infra* Part I. The quote is from section 1 of the 2025 Schedule C/P EO, discussed *infra* at __.

[6] As Professors Jody Freeman and Sharon Jacobs observed, firing civil servants is a form of deregulation. Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585 (2021). My argument is that the current administration has made firing civil servants the principal aspect of its deregulatory agenda. As Professors Freeman and Jacob have recently noted, it is even more destructive than they foresaw. Jody Freeman & Sharon Jacobs, President Trump's Campaign of 'Structural Deregulation,' lawfare.org (Feb. 12, 2025), https://www.lawfaremedia.org/article/president-trump-s-campaign-of--structural-deregulation.

[7] DAVID H. ROSENBLOOM, FEDERAL SERVICE AND THE CONSTITUTION: THE DEVELOPMENT OF THE PUBLIC EMPLOYMENT RELATIONSHIP 36 (2d ed. 2014) (stating that between 1789 and 1829, "tenure in most of the civil service was during good behavior," although there were some exceptions during the Jefferson administration); *See* ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON (1945).

all political views are best served if the federal workforce–other than the roughly four thousand political appointees–are hired and promoted based on merit rather than affiliation with the party in the White House. Federal employees are obligated by law and by the norms of public service to work with dedication and competence for the current administration to implement all federal legislation and regulations, even where the legislation reflects policy priorities of previous administrations, because those laws remain in effect until they are repealed.

Scholars of public administration and political science, as well as executive branch officials and Congress, debate reforms to the government personnel process and the proper balance of political independence and political control in government employment.[8] Reform is desirable, but wholesale elimination is not. Empirical studies of the effect of the adoption of civil service protections in the United States and elsewhere show civil service protections tend to promote efficiency, productivity, and the quality of government services.[9]

This Article situates the current effort to eliminate civil service is part of a broad effort in the conservative legal movement to expand the power of the President by stripping *all* federal government employees of protection against retaliation based on their beliefs or political affiliation. The constitutional vision of an all-powerful President goes against 150 years of legal efforts to make civil servants independent of the party in power. It not only violates the civil service law, but it also violates the Hatch Act of 1939, which prohibits political discrimination in employment and restricts on-duty partisan political activity by government employees. It violates laws conferring collective bargaining rights and statutory protections for whistleblowers and protections against discrimination on the basis of race, religion, gender, and other protected statuses.[10] While the Supreme Court has embraced some constitutional limits on Congress' ability to protect high-level appointees and administrative law judges from removal without cause, nothing in its Article II decisions authorize such a huge expansion of White House authority over independent agencies and the civil service. Moreover, the effort to make loyalty to the president or his party or his agenda a criterion for hiring, continued employment, or advancement is contrary to well-settled First Amendment law. As recently as 25 years ago, the Supreme Court held that the First Amendment prohibits governments from hiring, promoting, or

[8] A collection of essays exploring the achievements, failures, and possible future reforms of the 1978 reform to civil service is JAMES P. PFIFFNER & DOUGLAS A. BROOK, THE FUTURE OF MERIT: TWENTY YEARS AFTER THE CIVIL SERVICE REFORM ACT (2000).
[9] *See infra* Part III.
[10] Pub. L. 47-27, 22 Stat. 403 (1883). It was replaced, as explained below, by the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (1978), codified as amended at in scattered sections of 5 U.S.C. The Hatch Act, Pub. L. 76-252, 53 Stat. 1147 (1939), codified at 5 U.S.C. §§ 7321-7326, also prevents political discrimination against federal employees and prohibits certain partisan political activity by federal employees. The Federal Service Labor-Management Relations Act was enacted as Title VII of the Civil Service Reform Act of 1978 and is codified at 5 U.S.C. § 7101 et seq.

firing public employees, except the very highest level of political appointees, on the basis of their political affiliation.[11]

My argument proceeds in four parts. First, I describe the Trump Administration's multipronged effort to radically reshape the federal civil service. Second, I illuminate the historical background to Congress' enactment of laws creating rights to be hired and promoted based on merit. I examine the history of the civil service laws and the long practice of a nonpartisan, merit-based civil service, the experiences when we departed from it, and the long trend of increasing protections for government employees against arbitrary or discriminatory firings and mass layoffs. Third, I canvass evidence and theory on the benefits and costs of job protections for government employees. Finally, I explore and refute the administration's arguments about the constitutional and policy groundings for the notion that government service should be "at will," focusing particularly on the inconsistency with the Civil Service Reform Act of 1978, the flawed interpretation of Article II, and the several Supreme Court cases on the First Amendment to the Constitution that stand against this effort.

I. The Trump Administration v. The Civil Service

The current administration is launched on a wholesale abandonment of the principles of merit and nonpartisanship in U.S. federal employment. The restructuring of the executive branch and independent agencies can be seen as a multi-pronged overhaul (about five as of this writing). Many of the prongs overlapped, so the account that follows is only loosely chronological.

A. Prong One: Consolidation of Power Over the Civil Service in the White House and Redesignation of Positions as Excepted from Civil Service Protections

At first, an Inauguration Day Executive Order proposed to create a new category of policy-involved employees ("Schedule P/C") so as to allow the President to remove an indeterminate number of positions from civil service protections by redesignating them as policymaking jobs comparable to those held by political appointees and therefore removable without constraint.[12] The Schedule P/C Executive Order directs agency heads to review existing positions to determine which positions should be excepted from merit appointment and for cause firing by identifying "positions of a confidential, policy-determining, policy-making, or policy-advocating character that are not normally subject to change as a result of a Presidential transition."[13]

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[11] *See infra* Part IV.

[12] Restoring Accountability to Policy-Influencing Positions within the Federal Workforce, Executive Order 14171, 85 Fed. Reg. __ (Jan. 20, 2025) (hereafter "2025 Schedule C/P EO.")

[13] Restoring Accountability to Policy-Influencing Positions within the Federal Workforce, Exec. Order No. __, 85 Fed. Reg. __ (Jan. 20, 2025).

By mid-March, the administration decided to consolidate ultimate power over any and every firing or promotion decision in the Director of the Office of Personnel Management, Russell Vought, the man who said his goal is for civil servants to experience trauma and to be regarded as villains.[14] While, as discussed below, this is inconsistent with the statutorily enumerated OPM responsibilities and the assignment of responsibility for personnel decisions, it aims to consolidate power in the White House.[15]

The Schedule P/C EO specifies that such people fall into seven categories of job responsibilities: (1) "substantive participation in the advocacy for or development or formulation of policy: (2) supervision of attorneys; (3) "substantial discretion to determine the manner in which the agency exercises functions committed to the agency by law"; (4) "viewing, circulating, or otherwise working with proposed regulations, guidance, executive orders, or other non-public policy proposals or deliberations" when the person works with a a presidential appointee or a high-level agency official; (5) bargains collectively on behalf of the agency; (6) supervises any employees in Schedule P/C excepted positions; or (6) anyone that the director of OPM deems to be appropriate for exception.[16]

It is worth noting the specific positions that the Schedule P/C EO seeks to make subject to presidential fiat. Most of the attention has focused on policymaking, perhaps because those jobs seem most closely related to presidential control over policy, which has intuitive appeal. But making anyone who even views or circulates proposed regulations or guidance an at will employee seems aimed not only at policymakers, but at low-level employees who might be inclined to blow the whistle on (or, as the administration would put it, leak) administrative actions they fear are unlawful or an abuse of power. It thus seemed to be aimed squarely at the threat of whistleblowing, a practice explicitly protected by the whistleblower protections written into the civil service laws.

The Schedule P/C EO directs each agency head to "expeditiously petition the Federal Labor Relations Authority to determine whether any Schedule Policy/Career position must be excluded from a collective bargaining unit."[17] Because the EO defines positions subject to reclassification so broadly (to include not just those empowered to make policy but those who may "view" or be involved with the "circulation" of policies or regulations, it may sweep broadly in limiting union rights.

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[14] Strengthening the Suitability and Fitness of the Federal Workforce, Presidential Memorandum, March 20, 2025, https://www.whitehouse.gov/presidential-actions/2025/03/strengthening-the-suitability-and-fitness-of-the-federal-workforce/?utm_source=substack&utm_medium=email.
[15] 5 U.S.C. § 1103 (enumerating responsibilities and powers of Director of OPM).
[16] Restoring Accountability to Policy-Influencing Positions within the Federal Workforce, Exec. Order No. __, 85 Fed. Reg. __ (Jan. 20, 2025).
[17] *Id.*

The EO's chief proponent said it would affect 2 to 4 percent of the federal civilian workforce of more than 2.27 million,[18] or 45,000 to 90,000 workers.[19] But, when the Office of Management and Budget proposed to reclassify its workforce in late 2020, it proposed to strip civil service protections from 88% of its staff.[20] Moreover, the 2025 EO directs the Director of OPM to consult with the Executive Office of the President and then to issue guidance about additional categories of positions to include in the excepted Policy/Career Schedule, thus paving the way for the civil service to be narrowed further.

Finally, the 2025 EO contains a provision absent from the 2020 version. It states that "Employees in or applicants for Schedule Policy/Career positions are not required to personally or politically support the current President or the policies of the current administration. They are required to faithfully implement administration policies to the best of their ability, consistent with their constitutional oath and the vesting of executive authority solely in the President. Failure to do so is grounds for dismissal."[21] This provision is obviously directed at avoiding a First Amendment or Hatch Act challenge. But the question is how it will be interpreted and enforced.

As a cautionary example, the news reports of the Trump Transition in January 2025 indicate that officials at the National Security Council interrogated all civil servants above a certain level about whether they voted for or contributed to Trump and examined their social media to determine whether they support him, aiming to have the entire agency be "100% aligned with the President's agenda."[22] They dismissed a large number on January 24. The point is probably not that the new administration will actually fire all or most civil servants, although the February 11 call to prepare for massive reductions in force raise questions. Rather, the point of the loyalty review is to make government employees fear they will be fired if they fail to demonstrate sufficient loyalty to Trump or to the administration's policy initiatives or actions, no matter how unlawful those actions may be.[23] The NSC may be a particularly sensitive agency for Trump, as

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[18] Cong. Res. Serv., Current Civilian Federal Employment, by State and Congressional District (Dec. 20, 2024), CRS Report R-47716, https://crsreports.congress.gov/product/pdf/R/R47716#:~:text=The%20federal%20government%20employs%20more,every%20state%20and%20U.S.%20territory.

[19] Sherk, *supra*. The Federal Office of Personnel Management estimated the Executive Branch non-uniformed workforce at 2,278,730 people as of March 2024. https://www.fedscope.opm.gov/ *See* Drew DeSilver, *What the Data Say About Federal Workers*, PEW RESEARCH CENTER (Jan 7, 2025), https://www.pewresearch.org/short-reads/2025/01/07/what-the-data-says-about-federal-workers/ .

[20] GAO, Civil Service: Agency Responses and Perspectives on Former Executive Order to Create a New Schedule F Category for Federal Positions, GAO-22-105504 (Sept. 2022), https://www.gao.gov/assets/gao-22-105504.pdf.

[21] *Id.* at section 6(b).

[22] Aamer Mahdani & Zeke Miller, *Incoming Trump Team Questioning Civil Servants at National Security Council About Their Loyalty*, L.A. TIMES (Jan. 13, 2025).

[23] Hadas Gold & Rene Marsh, *Elon Musk publicized the names of government employees he wants to cut. It's terrifying federal workers*, CNN (Nov. 27, 2024).

it was two civil servants at the NSC who blew the whistle on Trump's 2019 efforts to pressure Ukraine to provide information to undermine Biden, which led to Trump's first impeachment.[24]

A second cautionary example is the firing of civil service Justice Department lawyers because of their work with the special counsel, Jack Smith, whom the Attorney General appointed to investigate the efforts to overturn the 2020 election and the January 6 violent assault on the Capitol. In an ominous "Notice of Removal from Federal Service," the new Acting Attorney General asserted an unqualified Article II power to fire, without notice and with immediate effect, civil servants who worked on an investigation that was authorized by the Attorney General and by the federal courts that issued search warrants, simply because the new DOJ leadership does not "trust" them to "assist in implementing the President's agenda faithfully."[25] This suggests that, whatever the EO says about personal or political support of the current administration, it will be implemented to root out perceived political enemies.

B. Prong Two: The Department of Government Efficiency, the Fork in the Road, and the Weekly 5 Bullet-Point Reports

It quickly became clear that the White House did not intend to prioritize carve-outs from the civil service protections, as the Schedule P/C would have suggested, but instead intended to fire tens of thousands of civil servants regardless of current civil service and other statutory protections.

This second prong of the attack on the civil service began with the early actions of the Department of Government Efficiency (DOGE), headed by Elon Musk. DOGE was created by another EO which renamed the United States Digital Service, an entity created in 2014 to improve agency digital and technology services.[26] The DOGE EO moved the entity from the Office of Management and Budget to the White House, thus exempting it from open records laws, and directed all agency heads to establish "a DOGE Team" in their agency consisting of "one DOGE Team Lead, one engineer, one human resources specialist, and one attorney."[27] DOGE would be headed by an Administrator who would report to the White House Chief of Staff. Elon Musk (the world's richest man and the principal donor to the Trump campaign) has

[24] Mahdani & Miller, *supra* note 128.
[25] Glenn Thrush, et al., *Justice Dept. Fires Prosecutors Who Worked on Trump Investigations*, N.Y. TIMES (Jan. 28, 2025). A copy of the dismissal letter is on CNN.com: https://www.cnn.com/2025/01/27/politics/trump-special-project-january-6-prosecutors/index.html (visited Jan. 28, 2025).
[26] Establishing and Implementing the President's 'Department of Government Efficiency, Executive Order 14,158, 90 Fed. Reg. 8441.
[27] Establishing and Implementing the President's 'Department of Government Efficiency, Executive Order 14,158, 90 Fed. Reg. 8441.

become the de facto head of DOGE, working as an unpaid "Special Government Employee," a job limited to 130 days.[28]

Although the announced purpose of DOGE was to "promote inter-operability between agency networks and systems, ensure data integrity, and facilitate responsible data collection and synchronization," it quickly assumed control of restructuring the entire federal workforce and cancelling government contracts.[29] Numerous public interest organizations, public employee unions, states, and others sued, arguing that DOGE's structure, staff, leadership, and efforts to access government payment systems and sensitive personal information about millions of people violate several federal statutes, including the Federal Advisory Committee Act, which prohibits delegation of government decisionmaking to private citizens without public access, the Freedom of Information Act, the Article II requirements for appointment of government officials, the Privacy Act, and many others.[30]

DOGE's first step in purging the civil service was announced in a memo similar to one Elon Musk issued when he acquired Twitter, the administration notified all federal workers that they faced a "fork in the road": they could quit immediately and take three months' severance (what the program called deferred resignation) or face "enhanced standards of suitability" and the possibility of being fired under plans to downsize or eliminate agencies.[31] Litigation and doubts

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[28] Elon Musk is serving as 'special government employee, White House says, CNN.com (Feb. 3, 2025), https://www.cnn.com/2025/02/03/politics/musk-government-employee/index.html; U.S. Dept. of Justice, Justice Management Division, Summary of Government Ethics Rules for Special Government Employees (Feb. 6, 2006), https://www.justice.gov/jmd/ethics/summary-government-ethics-rules-special-government-employees . The government has disputed in court whether Musk is the head of DOGE, although President Trump has repeatedly said, including in a March 4 speech to a joint session of Congress. Does 1-26 v. Musk, No. 25-0462-TDC at 4 (D. Md. Mar. 18, 2025) (quoting the President as saying that "I have created the brand new Department of Government Efficiency. DOGE. Perhaps you've heard of it. Which is headed by Elon Musk, who is in the gallery tonight.").

[29] David A. Fahrenthold, et al., DOGE Quietly Deletes the 5 Biggest Spending Cuts It Celebrated Last Week, NY Times (Feb. 25, 2025), https://www.nytimes.com/2025/02/25/upshot/doge-spending-cuts-changed.html?algo=combo_clicks_decay_6_lda_unique_80_diversified&fellback=false&imp_id=2969840483347322&pool=channel-replacement-ls&req_id=66720606941113335&surface=for-you-email-channelless&variant=0_channel_translated_pool_popularity_pers&block=3&rank=2&nlid=13501916 .

[30] Several of the cases were consolidated under Public Citizen v. Trump, No. 1:25-cv-00164 (D.D.C. filed Jan. 20, 2025). Others include New Mexico v. Musk, No. 1:25-cv-00429 (D.D.C. filed Feb. 13, 2025). A judge held that, under the Supreme Court's decisions interpreting the Appointments Clause of Article II, Musk exercises so much power that his appointment requires Senate confirmation. Does 1-26 v. Musk, No. 25-0462-TDC (D. Md. Mar. 18, 2025). The White House has apparently ignored this judgment.

[31] The memo excepted those in immigration enforcement, national security, or the postal service. https://www.opm.gov/fork; Lauren Berg, Trump Admin. Offers Gov't Workers 8 Mos. Severance to Quit, Law360.com (Jan. 29, 2025), https://www.law360.com/employment/articles/2290232?nl_pk=55fe735e-c904-46fb-bf39-2466f76f6f11&utm_source=newsletter&utm_medium=email&utm_campaign=employment&utm_content=2025-01-29&read_main=1&nlsidx=0&nlaidx=0.

about whether the deferred resignation agreement gave any enforceable rights to employees may have contributed to the relatively small number of employees who resigned.[32]

Another Executive Order quickly followed, announced in an unusual Oval Office press conference conducted mainly by Elon Musk. It directs the federal Office of Management and Budget to require agencies make all future hires "in consultation with" DOGE, to hire no more than one employee for every four employees who depart, and "to initiate large-scale reductions in force" for all employees "who are not typically designated as essential" during government shutdowns.[33]

Another, which Elon Musk announced on a Saturday on X (but not through official email), ordered civil servants to summarize their accomplishments for the prior workweek, and warned that failure to do so would be deemed a resignation. Shortly after his post, the Office of Personnel Management sent all government employees an email with "What did you do last week?" in the subject matter line. Some agency heads—including the FBI, DOJ, State Department, and Defense Department, instructed workers not to respond, both because of the risk of revealing confidential information or because the agency insisted on its right to manage the workforce.[34] But over a million federal employees across government have sent their weekly emails to some email account, with a copy to their supervisor, reporting their activities for the previous week in five bullet points. Some speculate that the emails are being analyzed by AI to determine whether the individual, the agency, or the subset of it should be targeted for elimination, although the ultimate purpose remains unclear. Some employees have crafted their bullet points to render them useless or to tweak DOGE and OPM, describing their work in very general terms (including "enforcing the statute this agency is charged with enforcing," or "drafting the previous week's bullet point email").[35]

C. Prong Three: Firing Probationary Employees

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[32] OPM reported that 75,000 workers accepted the deferred resignation offer, which is less than 3 percent of eligible employees. News reports suggest most of those were either at retirement age or workers with disabilities who may have concluded they would be fired because they were unable to work in person and feared being fired under the EO eliminating remote work. [Cite.] In an ordinary year, roughly 6 percent of the federal civilian workforce resigns, thus the Fork in the Road initiative apparently failed to produce more than the usual amount of attrition. Cross Conrad, The Fork in the Road, The Regulatory Review (Feb. 25, 2025), https://www.theregreview.org/2025/02/25/conrad-the-fork-in-the-road/.

[33] Implementing the President's 'Department of Government Efficiency' Workforce Optimization Initiative," Feb. 11, 2025, https://www.whitehouse.gov/presidential-actions/2025/02/implementing-the-presidents-department-of-government-efficiency-workforce-optimization-initiative/ (hereafter "Workforce Optimization EO").

[34] Kate Conger, Must Says Government Workers Must Detail Their Workweek or Lose Their Jobs, NY Times (Feb. 24, 2025); Jeff Stein, et al., Musk fights back as some Trump aides resist intensifying DOGE push, Washington Post, (Feb. 25, 2025).

[35] Conversation between the author and an employee of an independent agency, March 19, 2025.

Thereafter, DOGE barraged employees and agencies with mandates. One directed agencies to lay off all probationary employees (those with less than one or two years in their position).[36] Although the majority of probationary employees were hired during the Biden Administration, which raised the suspicion that the mass purge was aimed at those sympathetic to Democratic administrations, many had long government service and were deemed probationary only because transferred from other federal positions. As thousands of employees across government were summarily fired, some had to be quickly rehired when their expertise proved crucial to urgent matters such as safety of the nuclear arsenal, the NASA project to reach Mars (a personal priority of Musk's), the effort to contain the rapidly spready avian flu outbreak, the interest rate calculations essential to the mortgage market, the Indian Health Service and—the largest group to date--55,000 Pentagon officials whose work might be necessary to achieve the new defense secretary's goal of maintaining "lethality and readiness."[37]

The uncertainty and breadth of these orders sowed anxiety and confusion among federal workers.[38] Some employees were locked out of their computers and ordered to leave the building less than an hour after learning of the impending layoffs in a group call.[39] Some received termination notices asserting—without evidence or explanation and contrary to recent and long history of good evaluations—that their job performance was unacceptable or their skills were unnecessary. Some were told they should go into the private sector where they could contribute something of value to the world. Many feel DOGE's messages and brash young staff (one is a recent high school graduate) showed shocking contempt for their commitment to public service, their professionalism, and their expertise. Even those whose job performance was not faulted feel the arbitrariness, the high-handed demands they justify their work to Musk or to the DOGE staffers who interrogated them, and the vulnerability they feel when DOGE staffers have access to their personnel file. DOGE also launched a broad and highly controversial effort to access all private and personally identifying data on every government employee and the U.S. Treasury Department's highly secure payment systems.[40]

D. Prong Four: Firing the Heads of Agencies That Enforce Government Ethics and Federal Employee Job Rights

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[36] *See* Am. Fed. Gov't Emp'ees v. U.S. O.P.M., __ F. Supp. 3d __, 2025 WL 900057 (N.D. Cal. Mar. 24, 2025) (holding that court has subject matter jurisdiction over union claims challenging mass layoffs of probationary employees in litigation in which court preliminarily enjoined layoffs, overturning court's own prior ruling that such claims could be brought only in MSPB or FLRA).

[37] Elaine Kamarck, The Fallout from DOGE's Approach to Government Reform, Brookings Institute (Feb. 26, 2025).

[38] Accounts by current and former federal employees may be read on numerous platforms, including https://www.wethebuilders.org/posts.

[39] Madeleine Ngo, et al., Trump Officials Escalate Layoffs, Targeting Most of 200,000 Workers on Probation, NY Times (Feb. 13, 2025), https://www.nytimes.com/2025/02/13/us/politics/trump-federal-personnel-layoffs.html?smid=url-share

[40]

The Administration has also fired the heads of the agencies charged with enforcing civil service, labor, whistleblower, and government ethics laws. Each had been appointed by the president and confirmed by the Senate. Each was in the midst of a statutorily prescribed multiple-year term. And each was subject to a statute providing they "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office" or a similar standard.[41] Among those fired:

- more than a dozen Inspectors General across cabinet departments and agencies who are supposed to be watchdogs to prevent misconduct and abuse of power[42]
- the Democratic member of the Merit Systems Protection Board, the independent agency that adjudicates claims of federal employees alleging that adverse employment actions violate federal civil service protections
- the head of the Office of Special Counsel, the independent agency in charge of investigating alleged violations of whistleblower and other laws to ensure the civil service remains nonpartisan)[43]
- the chair of the Federal Labor Relations Authority, which enforces collective bargaining rights of federal employees[44]
- the Democratic member of the Office of Government Ethics, which enforces the Ethics in Government Act to prevent conflicts of interest and corruption.[45]

In none of the emails firing the official did the President articulate a reason. All of the removed officials sued. District courts ordered most returned to office unless or until the president established statutory grounds for removal or their term expired. The D.C. Circuit, in a split decision, stayed the decision reinstating the head of the Office of Special Counsel in an order suggesting that the court would not rule for him on the merits, thus leading him to abandon the litigation.[46] But a different panel of the D.C. Circuit, also in a split decision, refused to stay the decision reinstating the head of the MSPB.[47] That case, probably consolidated with a case

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[41] 5 U.S.C. § 1202(d) (MSPB); The head of the Office of Special Counsel, for example, may be removed only for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1211(b).

[42] Nat'l Treas. Emp'ees Union v. Trump, No. 1:25-cv-00170 (D.D.C. filed 1/20/2025); H.R. 492, 119th Cong., 1st sess. (introduced Jan. 16, 2025) https://www.congress.gov/bill/119th-congress/house-bill/492/text?s=1&r=5 ; Aamer Madhani & Zeke Miller, Incoming Trump Team Questioning Civil Servants at National Security Council About Their Loyalty, LA Times (Jan. 14, 2025); Michael Crowley & David Sanger, White House to Old Staff: Go Home. Don't Call Us. We'll Call You., NY Times (Jan. 22, 2025); Yamiche Alcindor, et al., Trump Fires 18 Inspectors General Overnight in Legally Murky Move, NBC News (Jan. 25, 2025), https://www.nbcnews.com/politics/white-house/trump-fires-multiple-inspectors-general-legally-murky-overnight-move-rcna189261 .

[43] 5 U.S.C. § 1211(b).

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[45] Ethics in Government Act, Pub. L. 95-521, 92 Stat. 1824, codified in scattered sections of 5 U.S.C.

[46] Harris v. Bessent, No. 25-412 (RC) (D.D.C. Mar. 4, 2025) (granting summary judgment and permanent injunction reinstating Cathy Harris to MSPB);

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ordering the reinstatement of a Democratic appointee to the National Labor Relations Board, may be the case that presents the legality of these firings to the Supreme Court.

There is irony in insisting that reforming the civil service is about accountability to the public when the leading role in administering the wholesale cuts to the civil service is being played by one who is neither an officer of the United States, nor even the administrator of DOGE. After a government lawyer confessed ignorance of the identity of the person who is duly authorized to run DOGE, the White House suddenly announced a name, although the person named was in Mexico at the time and unaware of the announcement or perhaps even her role.[48] The DOGE staff are a cadre of young men who worked for Musk's companies until assuming an uncertain status.[49] Among actual government officials, a principal architect of these executive actions, now implementing them as special assistant for domestic policy,[50] has described accountability in partisan terms, stating it is to address the predominance of "liberals" among the civil service.[51]

E. Prong Five: Agency Takeovers and Enforcing Loyalty to the President's Appointees

Bureaucratic entrepreneurs among Trump loyalists have achieved success in particular agencies simply by taking over agencies. For example, Russell Vought, who was confirmed as the Director of the Office of Management and Budget, managed to shut down the Consumer Finance Protection Bureau by declaring himself the acting head of the CFPB. After taking over the agency late on a Friday, he sent an email to all staff on Monday morning, telling them to "stand down" and forbidding them to come to the office or to do "any work tasks." He told the Federal Reserve that the CFPB requested zero dollars for its budget and closed the agency's headquarters. When a DOGE team showed up to take over the agency's computers, Elon Musk announced on Twitter / X that the agency was dead (posting "CFPB RIP"). Although civil servants have tried to save the agency by continuing to work, and litigation has slowed the effort to dismantle, the future remains unclear.

[48] Nicholas Nehamas, et al., A Mystery Solved: Amy Gleason, a Former Health Care Executive, Is Running DOGE, NY Times (Feb. 25, 2025).
[49] Shannon Bond, et al, "Who is part of Elon Musk's DOGE, and what are they doing? NPR.org (Feb. 7, 2025), https://www.npr.org/2025/02/07/nx-s1-5288988/doge-elon-musk-staff-trump
[50] Jeff Stein, et al., *Trump Aides Prep Executive Orders Aimed at the Federal Workforce*, WASH. POST (Jan. 19, 2025), https://www.washingtonpost.com/business/2025/01/19/trump-federal-workforce-executive-orders/.
[51] James Sherk, *Biden Administration Proposal Insulates the Bureaucracy from Accountability*, Issue Brief, CENTER FOR AMERICAN FREEDOM 3 (Sept. 20, 2023) (stating that "[c]areer federal employees are disproportionately liberal" which gives them "more incentive to oppose conservative policy initiatives"); James Sherk, *Tales from the Swamp: How Federal Bureaucrats Resisted President Trump*, Issue Brief, CENTER FOR AMERICAN FREEDOM 1 (Jan. 8, 2025).

Similarly, administration officials are in the process of shutting down all or most of other agencies (US AID) and have announced the intent to close the entire Department of Education, laying off most of the staff. Litigation has been filed but has not stopped the effort.[52]

Meanwhile, OPM has proposed new regulations to "allow agencies to quickly remove employees from critical positions" if they "obstruct the democratic process by intentionally subverting Presidential directives."[53] Although the government's plans for defining what is meant by "subverting Presidential directives" remain unclear, already the administration has summarily fired several career lawyers at the Department of Justice. They were informed in a letter from the acting attorney general that they were being fired because their work on the special counsel's team that investigated the effort to overturn the 2020 election "the leadership of the Department" could not "trust you to assist in implementing the President's agenda faithfully."[54] Others who have been fired or threatened with firing include FBI agents who investigated the January 6 insurrection,[55] and almost the entire staff of agencies that the president summarily eliminated, including the US Agency for International Development (USAID), the Consumer Financial Protection Bureau (CFPB), and over half of the Department of Education.[56]

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The foregoing is not a complete account of the administration's attack on federal employees, and it will surely be out of date by the time this article is in print. But the goals of this multi-pronged attack seem clear. The administration seeks not only to eliminate programs that the White House does not like without needing to muster a majority in Congress, but also to make it impossible for government to use expertise to enforce law now and to rebuild in the future.[57]

II. The Purpose of a Nonpartisan Civil Service – Lessons from History

The power asserted by the current administration is unprecedented. It is true that for half of the nineteenth century the president's party asserted the power to hire and fire based on party service and for a decade in the mid-twentieth century, thousands of civil servants were purged because

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[52] *See, e.g.*, Am. Foreign Serv. Ass'n v. Trump, __ F. Supp. 3d __, 2025 WL 573672 (D.D.C. Feb. 21, 2025) (dissolving TRO against layoff of US AID staff); *but see* Does 1-26 v. Musk, __ F. Supp. 3d __, 2025 WL 840574 (D.Md. Mar. 18, 2025) (preliminarily enjoining closure of US AID and laying off of its staff).

[53] The proposed regulations have not been made public, but their release by OPM was reported by Politico on February 11, 2025. https://www.politico.com/news/2025/02/11/trump-administration-federal-worker-protections-00203598

[54] Glenn Thrush, et al., Justice Dept. Fires Prosecutors Who Worked on Trump Investigations, NY Times (Jan. 28, 2025). A copy of the dismissal letter is on CNN.com: https://www.cnn.com/2025/01/27/politics/trump-special-project-january-6-prosecutors/index.html (visited Jan. 28, 2025).

[55] Charlie Savage, *Trump Says He'll Fire F.B.I. Agents Amid Fight Over Those Who Investigated Jan. 6*, NY Times (Feb. 7, 2025).

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[57] Id.; Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585 (2021).

of their alleged Communist sympathies. It is also true that even in times where merit rather than politics were emphasized, "meritorious" applicants did not include Black, Brown, or female workers, regardless of their ability. But it is also no oversimplification of history to say that Congress enacted current civil service and other public employee labor laws precisely because of the pernicious effects of political and other discrimination in hiring. Whatever the need for reform of civil service law (as discussed below in Part III), the notion that government employment below the top levels should be nonpartisan is as old as the Republic.[58]

Histories of federal sector employment note that before the presidency of Andrew Jackson (1829-1837), incoming administrations did not fire government employees, even when the new administration was bitterly opposed to its predecessor.[59] Jefferson, the first non-Federalist president, left many presidential appointees in office (though he removed several), as did John Quincy Adams when he succeeded Monroe, the last of president of the Virginia planter class.[60] Congress and Presidents sparred over whether the President could remove an officer who had been confirmed by the Senate without Senate approval; indeed, Andrew Johnson was impeached for trying to remove Edwin Stanton.[61] Scholars debate whether Congress decided in 1789 that Article II's silence about whether the power of presidential appointment connotes a presidential

[58] The literature on the history and possible reforms to government employment generally and civil service in particular is voluminous. *See, e.g.*, DONALD F. KETTLE, ET AL., CIVIL SERVICE REFORM: BUILDING A GOVERNMENT THAT WORKS (Brookings 1996) (advocating greater flexibility and modernizing HR management to enable better training of civil servants and deployment of personnel). Even advocates of reducing the procedural protections against discharge of civil servants emphasized the importance of balancing the interest in ensuring competence against the values of stability and the rights of employees. *See* Gerald E. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?* 124 UNIV. OF PENN. L. REV. 942, 1010 (1976). To be sure, some states–primarily in the southeast–have sought to turn substantial parts of the state bureaucracy to at-will employment, and the studies of the efficacy of these so-called "radical reforms" of civil service have not clearly shown it improved the efficiency or quality of government. *See, e.g.*, Robert J. McGrath, *The Rise and Fall of Radical Civil Service Reform*, 73 PUBLIC ADMIN. REV. 638 (2013) (surveying the literature on the origins and diffusion of efforts to abolish job protection for state government employees in states including Georgia, Florida, South Carolina, Arkansas, North Dakota, Mississippi, and other states and subdivisions).

[59] ROSENBLOOM, *supra* note 12, at ch. 2.

[60] MARTIN SHEFTER, POLITICAL PARTIES AND THE STATE: THE AMERICAN HISTORICAL EXPERIENCE 65 (1994) (noting that in his first two years in office Jefferson replaced 186 of 316 presidential appointees from the prior administration, resisting pressure to replace more because he sought to conciliate the opposition).

[61] Congress enacted Tenure in Office Acts in 1820, 1867, and 1887 articulating various conflicting positions about the power of the President to remove Senate-confirmed officials, and Andrew Johnson was impeached in 1868 for attempting to fire Secretary of War, Edwin Stanton, in violation of the 1867 statute. (Stanton supported Reconstruction legislation providing for the redistribution of land to Black formerly enslaved people when Johnson did not.) Eventually, the Senate repealed legislation restricting the President's right to remove Senate confirmed officers, and the Supreme Court upheld the power of presidential removal of Senate-confirmed officers. *Parsons v. United States*, 167 U.S. 324, 343 (1897). The power of the President to remove officers nominated by the President and confirmed by the Senate presents a different issue from the power to fire civil servants.

right of removal without concurrence of the Senate.[62] The norm that Senate-confirmed appointees tender their resignation on Inauguration Day largely settled the debate.

Andrew Jackson, the first President elected (in 1828) against an incumbent since Jefferson replaced Adams in 1801, believed that replacing government workers was necessary to achieve his goals of reforming and democratizing government. He sought to reduce the influence of elites who had dominated public service and to make his government more representative of the white male population and more aligned with his party.[63] Making government jobs available to ordinary men who had supported his campaign would restore faith in government, he hoped, and prevent government from being "an engine for the support of the few at the expense of the many."[64] Frequent replacement of government employees was feasible, moreover, because for Jackson, the proper (and limited) functions of government did not require skills beyond those possessed by ordinary people: delivering mail, collective tariff revenue, distributing land to whites and forcing native people further west.

Although Jackson dismissed an estimated ten and twenty percent of all federal office holders during his eight years in office (a similar percentage as Jefferson[65]), nevertheless from the time of Jackson until the enactment of the Pendleton Act in 1883, there was greater emphasis in recruitment and retention in government service on partisan affiliation and both past and expected future work on behalf of the party.[66] The Jackson administration dismissed some elderly and incompetent workers, but they also got rid of those whom they suspected of being insufficiently devoted to his agenda.[67] This democratized government service to some extent, as middle-class professionals squeezed out the old elite, but government service remained closed to the working class, people of color, and women.

The patronage system in federal, state, and local employment supported the development of mass political parties by making party work and financial contributions a condition of employment. Scholars estimate that federal employees were compelled to contribute between 1 and 6 percent of their annual salary to the party in power. One employee in the New York customhouse explained he overcame his reluctance to pay fifteen dollars to the party in the 1830s when "the

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[62] *Compare* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006) (arguing that Congress decided the Article II power of appointment carries with it the power to remove) *with* Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PENN. L. REV. 753 (2023) (arguing that Congress did not decide the President has the power to remove).
[63] ROSENBLOOM, *supra* note 12, at 43.
[64] ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON 46 (1953) (quoting Jackson's inaugural address to Congress, II MESSAGES AND PAPERS OF THE PRESIDENT 448 (Richardson, ed. __)
[65] Id. at 47.
[66] ROSENBLOOM, *supra* n. __ at 49 ("Political parties allocated government employment as remuneration for their workers. The parties also coerced partisan work through the threat of removal, and they taxed civil servants' salaries through political assessment.").
[67] ROSENBLOOM, *supra* note 12, at 43-44.

deputy surveyor observed that I ought to consider whether my $1,500 per annum was not worth paying fifteen dollars for."[68]

Whatever the benefit to the parties, political leaders who agreed on little else excoriated the patronage system for producing incompetence and retaliation against political opponents. Joseph Story, in his 1833 *Commentaries on the Constitution*, concluded that patronage was inconsistent with the Constitution and feared that government officials put in office through party patronage would become an "instrument of their resentments, or their mercenary bargains" and that those appointed would be "fawning sycophants of their popular leader," that the "worthier and abler men" would be excluded from government service, and that "elections will be corrupted at their very source."[69] John Calhoun complained patronage would "convert the entire body of those in office into corrupt and supple instruments of power."[70] Daniel Webster allegedly said that patronage "tends to turn the whole body of public officers into partisans, dependents, favorites, sycophants, and man-worshippers."[71] Criticism persisted long after the political fights between Jackson and the Whigs ended, and especially after the harms of frequent turnover and incompetence were revealed during the Civil War and Reconstruction.[72] Theodore Roosevelt, who served on the Civil Service Commission before becoming President in 1901, said the spoils system was "more fruitful of degradation in our political life than any other that could possibly have been invented. The spoilsmonger, the man who peddled patronage, inevitably bred the vote-buyer, the vote-seller, and the man guilty of misfeasance in office."[73]

As evidence of incompetence and corruption in the appointment of federal employees mounted after the Civil War, the political will to enact legislation emulating Britain's 1854 examination-based civil service reform grew. The reformers' lofty goal was "to transform the federal service from an arm of the political party in power into a body of politically neutral, technically qualified civil servants shielded from partisan political pressures and dedicated to promotion of the public interest as embodied in law."[74] Reformers got political traction when a disappointed office seeker, resentful that his political work was not rewarded by a federal job, assassinated President James Garfield a few months after his inauguration in 1881.

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[68] ROSENBLOOM, *supra* n.12 at 51 (quoting H.R. Rep. No. 313, 25th Cong., 3d Sess. p. 250 (Feb. 27, 1839)).
[69] Joseph Story, *Commentaries on the Constitution*, vol. 3, § 1533 (1833), available at: https://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s58.html.
[70] ROSENBLOOM, supra note 12, at 49.
[71] The quotation is attributed to Webster by Justice McReynolds in dissent in *Myers v. United States*, 272 U.S. 42, 179 (1926), a case discussed infra.
[72] PAUL P. VAN RIPER, HISTORY OF THE UNITED STATES CIVIL SERVICE, 43-44 (1958) (noting the huge increase in spoils appointments in 1856 and 1860).
[73] Quoted in U.S. OFFICE OF PERSONNEL MGT., BIOGRAPHY OF AN IDEAL: A HISTORY OF THE FEDERAL CIVIL SERVICE 182-83 (2003), available at https://dml.armywarcollege.edu/wp-content/uploads/2023/01/OPM-Biography-of-an-Ideal-History-of-Civil-Service-2003.pdf.
[74] *Id.* at 58.

The Pendleton Act of 1883 created a merit-based process for hiring civil servants, forbade removals on political or religious grounds, and created a new federal agency, the Civil Service Commission, to administer the new system.[75] Although the statute did not originally restrict dismissals except on political or religious grounds and had no procedural safeguards for those facing dismissal, in 1897 President McKinley issued an executive order, which Congress incorporated into the law in 1912, requiring just cause for dismissal of any employee covered by the civil service law. It also required that the employee be given written notice of the charges and an opportunity to respond.[76]

The narrow goals of the Pendleton Act were to prevent paying and extorting bribes to secure favorable government action and to prevent incumbent politicians from funding and staffing their re-election campaigns through mandatory contributions or labor from government employees. The broader goal was to improve the quality of government policymaking and implementation by professionalizing government service. When tenure in government service was short, there was no opportunity for advancement, and people were chosen for their loyalty to the elected official rather than for knowledge or skill relevant to their job. But after 1883, the number of college graduates in government service grew significantly, which was noteworthy at a time when less than 15 percent of the population graduated from college. It was not, however, because the merit selection process discriminated in their favor or required technical training or knowledge irrelevant to the job, but because a greater percentage of college graduates took the civil service exam believing that government service was a good career.[77]

The civil service law was the product of the Progressive philosophy that administration should be separated from politics. In the Progressives' view, granting administration integrity and autonomy from party control was necessary not only to combat corruption, but also to promote policymaking and program implementation based on facts and science, and, crucially, to enable government to honor the collective commitments reflected in legislative judgments.[78] The adoption of nonpartisan civil service occurred as Congress created the first independent federal regulatory commission, the Interstate Commerce Commission, in 1887. The task of regulating railroads and the increasingly large and complex economic institutions required expertise and independence from politicians who were lobbied intensely by affected businesses. Business benefited from the merit system because the service of government agencies that mattered to them–such as the postal service and the customs houses control imports and exports–made fewer errors and handled their tasks more efficiently.[79]

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[75] Pub. L. 47-27, 22 Stat. 403 (1883). It was replaced, as explained below, by the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (1978), codified as amended in scattered sections of 5 U.S.C.
[76] ROSENBLOOM, supra note 12, at 67.
[77] *Id.* at 313.
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[79] *Id.* at 316.

The number and percentage of federal workers covered by civil service protection grew over the years, such that by 1900 slightly less than half of the federal workforce were in competitive service positions.[80] Today, the vast majority of civilian employees have some job rights, although the discretion available to managers in hiring and the degree of protection against dismissal is weaker for certain senior executives, several categories of excepted positions, and for probationary employees in their first year or two in a position.

To be sure, presidential administrations have long used expansions and reductions in the positions covered by the merit-based civil service for political reasons. President McKinley, a Republican who defeated the Democratic candidate in 1896 and thus ended a relatively long period of Democratic control of the White House, promptly withdrew 10,000 offices from the merit-based service so that he could replace Democrats with those sympathetic to his policy views. And some Presidents, including Grover Cleveland in 1888, having appointed people sympathetic to their policies to excepted positions, classified them as they were leaving office to entrench their policies against anticipated change by a successor of the opposite party.[81]

It is also clear that both before the widespread adoption of the spoils system and after the enactment of the Pendleton Act, racism and sexism operated in hiring, promotion, compensation, and dismissal. In 1810, Congress enacted a law prohibiting employment of nonwhite persons as mail carriers, apparently prompted by the U.S. Postmaster General warning that Black mail carriers might foment or coordinate a rebellion of enslaved persons.[82] Although that law was repealed in 1865, in 1913 President Wilson segregated the civil service on the basis of race, allegedly to reduce "friction" between races or "discontent" of white civil servants who worked with Black civil servants.[83] Moreover, although an 1870 statute authorized the appointment of women to federal jobs "upon the same requisites and conditions, and with the same compensations, as are prescribed by men," it was interpreted to allow department heads discretion about whether to hire women at all, and the discretion was used to exclude or segregate on the basis of sex.[84] The Hatch Act of 1939 (discussed below) had a limited prohibition on discrimination on the basis of race or religion. The Ramspeck Act of 1940, ineffectually prohibited race and religious discrimination in compensation, promotions, and other personnel decisions.[85] Finally, in 1972, Congress extended the antidiscrimination provisions of Title VII of the Civil Rights Act of 1964 to the federal government.[86]

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[80] Ari Hoogenboom, *The Pendleton Act and the Civil Service*, 64 AM. HIST. REV. 301, 303 (1959).
[81] *Id*. at 304.
[82] ROSENBLOOM, *supra* n. 12 at 95, citing 2 Stat. 594 (Apr. 30, 1810).
[83] Abhay Aneja & Guo Xu, *The Costs of Employment Segregation: Evidence from the Federal Government Under Woodrow Wilson*, 137 QUARTERLY J. ECON. 911 (2022).
[84] *Id.* at 99.
[85] ROSENBLOOM, supra note 12, at 96.
[86] Pub. L. 92-261, codified at 42 U.S.C. §§ 2000e et seq.; 5 U.S.C. § 5108.

The prohibition on political discrimination was strengthened by the Hatch Act of 1939, which was motivated by Republican fears that Democrats were consolidating power by appointing college-educated liberals to the many New Deal agencies.[87] To ensure that government service below the level of political appointees and their deputies remains nonpartisan, and to prevent coercion of political activity, the Hatch Act restricts the ability of government employees to engage in partisan political activity on paid time as well as during their off hours.[88]

In twice upholding the constitutionality of the Hatch Act against the claim that it infringed public employees' First Amendment rights, the Supreme Court emphasized the importance of a politically neutral civil service in a government where party control of the executive and the legislature is expected to switch every several years. In *United Public Workers v. Mitchell*, the Court reasoned that the restriction on political activity was justified to prevent government officials from using employees in political activities and from pressuring them to participate in campaigns.[89] The Court said: "Congress may reasonably desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system. It may have considered that parties would be more truly devoted to the public welfare if public servants were not over active politically."[90] And the Court also recognized that Congress could legitimately conclude that reducing political activity by civil servants would prevent distortions in the political process and improve the efficient operation of government.[91] The Court reaffirmed this holding in *United States Civil Service Commission v. National Association of Letter Carriers*.[92] The Court found that the prohibition on political activities by government employees was justified to ensure that "meritorious performance rather than political service" be the basis for hiring and promotions.[93]

In addition to the Hatch Act, there were other results of backlash against the growth of the New Deal agencies and the GOP fear that the Roosevelt Administration and the Democratic majority in Congress were using the growing staff of agencies to stack the government with Democrats. The most significant, from the standpoint of today's massive purges of the federal workforce, were the Cold War so-called loyalty-security programs. The first, adopted in early 1947 by Executive Order 9835, required "a loyalty investigation of every person entering the civilian employment of any department or agency in the executive branch of the Federal government,"

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[87] ROSENBLOOM, supra note 12, at 80. 54 Stat. 1214 (Nov. 26, 1940).
[88] Pub. L. 76-252, 53 Stat. 1147 (1939), codified as amended at 5. U.S.C. §§ 1501-08, 7321-26. It excepts several agencies, as well as military personnel. The excepted agencies include, among others, the FEC, the Office of the Director of National Intelligence, the CIA, the Defense Intelligence Agency, the NSA, the NSC, the FBI, the Secret Service, the MSPB, administrative law judges, and career Senior Executive Service employees. On GOP concerns about Democratic power during the New Deal, see ROSENBLOOM, *supra* n. __ at 82.
[89] 330 U.S. 75 (1947).
[90] *Id.* at 100.
[91] *Id.* at 99.
[92] 413 U.S. 548 (1973).
[93] *Id.* at 557.

and created a Loyalty Review Board within the Civil Service Commission to review cases and oversee the process. The screening drew on the massive FBI files compiled at the direction of J. Edgar Hoover, who had been hunting and seeking to deport leftists since 1919. It would also treat membership or affiliation with any leftist organization as a red flag, and among the organizations that the Attorney General deemed "subversive" were those working for civil rights, civil liberties, immigrant rights, and peace or nuclear disarmament. At a cost of $25 million a year between 1947 and 1952, it led to 560 federal employees being fired and 6,828 people resigning or withdrawing their application, but no evidence that any employee was a spy for the Soviet Union or any other country.[94]

The original standard for dismissal or refusal to hire under the loyalty-security programs was that "reasonable grounds exist for belief that the person involved is disloyal to the government of the United States," but in 1951 the burden of proof was shifted to the individual and the standard because "a reasonable doubt as to the loyalty of the person involved." Among the obvious grounds for finding disloyalty (such as engaging in treason or sabotage) was a pernicious political test. For the first time, "membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons designated by the Attorney General as totalitarian, fascist, communist, or subversive" disqualified an employee from federal employment.[95] The system was modified and codified by statute in 1950, and was extended by executive order in 1953 to all government departments and agencies.[96] And then, in 1955, Congress prohibited membership in organizations advocating overthrow of the Constitution and required federal employees to sign affidavits of noncommunist affiliation, although the Supreme Court declared the statute unconstitutional in part.[97]

The abuses of the loyalty-security investigations are notorious, ranging from inquiries about whether people had "communist literature" or "communist art" in their homes to intrusive questions about government workers' views on interracial marriage and "female chastity."[98] In addition to the 560 federal employees fired for "loyalty" reasons in 1950-53, about 1,500 more were fired between 1953 and 1956, and as many as ten thousand more resigned after receiving interrogatories or charges.[99]

Then, as now, the goal was to strike fear in those on the left. It worked. Because of the fear of being labeled a communist, many people did not speak publicly about it. My mother was one of

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[94] Clay Risen, Red Scare: Blacklists, McCarthyism, and the Making of Modern America 41 (2025).
[95] Exec. Order No. 9835, 12 Fed. Reg. 1935 (Mar. 21, 1947); Exec. Order No. 10241, 16 Fed. Reg. 3690 (Apr. 28, 1951). *See* Seth Richardson, *The Federal Employee Loyalty Program*, 51 COLUM. L. REV. 546 (1951) (describing the program, which Richard directed).
[96] Pub. L. 81-733; Exec. Order No. 10450, 18 Fed. Reg. 2489 (Apr. 29, 1953).
[97] Pub. L. 84-330, 69 Stat. 624 (1955); Stewart v. Washington,
[98] ROSENBLOOM, supra.
[99] *Id.*

those who resigned after being falsely accused of disloyalty and described the experience in daily letters to a friend who eventually became my father. To understand how the experiences of today's civil servants echo those of the Red Scare, I decided to finally open the dusty suitcase containing her letters and read them. I've had that suitcase of letters since she died 50 years ago, but never managed to read more than a few because her pain was too raw, and the end of her story was too sad.

She graduated from Berkeley at the end of World War II with a degree in international relations and a desire to help build the post-war order. She went to Washington, D.C., thrilled to work for an agency that valued her expertise in Soviet politics and facility with languages. A week before she was to depart for a two-year post in Berlin, her assignment was suddenly cancelled. Someone accused her of being a communist because she had been seen with Russian emigres. She explained that her Russian acquaintances were anti-communists who had fled the country after the 1917 revolution, and she socialized with them to perfect colloquial Russian. The person who accused her of being a Communist knew too little Russian history to know that the emigres fled because they were *not* Communists, and in the hysteria of the early 1950s, being a progressive Democrat who spoke Russian could render anyone suspect. In those days of hysteria, nobody would listen to reason. She was given no chance to explain and no semblance of due process.

Her letters from before her firing described her excitement about her work. And then there was one full of shock and disbelief. Maybe the decision would be reversed. Maybe it was a mistake. After a week, her tone turned to rage. She was a loyal American, a devoted public servant, and a farm girl who had worked summers during college packing vegetables to support the war effort. Firing felt personal--the government rejected her and everything she had studied and worked to achieve. She lost self-confidence. She succumbed to self-pity, and then quickly apologized for it. Her letters expressed anxiety, depression, and fear about money.

Her letters describe the struggle to find another job. Some of her skills could not be used in the private sector. Even the transferable knowledge was useless in an era when most companies would hire women only as secretaries. Plus, as her letters prove, she was a mediocre typist. Her savings dwindled. She gave up her apartment and moved in with friends. Finally, she abandoned her career, accepted my father's offer of marriage, and became an unhappy housewife in a small college town. Eventually she found a job teaching in a community college. But she never found another job that used her knowledge and training, and never overcame the feelings of loss, grief, and rejection. Her faith in her country was shaken. It was a devastating blow from which she never recovered before her death at age 50.)

Ultimately the Supreme Court concluded that making current or past membership in a political party or organization grounds for dismissal from employment violated the First Amendment rights of current and prospective government employees. In *Wieman v. Updegraff*, the Court held

that states cannot command oaths of noncommunist affiliation under penalty of firing.[100] In *Cafeteria Workers v. McElroy* and *Keyshian v. Board of Regents,* the Court held that the government cannot deny employment solely because of past affiliation with the Communist Party or "subversive" organizations.[101]

Alarm about the corruption revealed by the Watergate scandal prompted calls for reforms to strengthen the civil service laws. A galvanizing event was when a witness at the Watergate hearings testified about the Nixon Administration's plans to replace civil service with a hiring plan that would allow the President to purge all Democrats from government employment. At the same time, however, Congress and President Carter wanted reforms to increase the efficiency of government.[102] With these twin aims, Congress enacted the Civil Service Reform Act of 1978, which substantially overhauled the system created by the Pendleton Act and remains in force today.[103]

The CSRA clarified that recruitment, promotion, discipline, and removal, along with pay, should be based on merit and on "fair and equitable treatment" "without regard to" political affiliation, race, color, religion, national origin, sex, marital status, age, or disability, "and with proper regard for their privacy and constitutional rights."[104] It broadly prohibits any "personnel action" (including a hire, assignment, transfer, pay, promotion, or dismissal) on the basis of race, color, religion, sex, national origin, age, disability, marital status, or "political affiliation."[105] It prohibits efforts to coerce or to retaliate against an employee because of political activity or lack of it.[106] It also protects whistleblowers by prohibiting personnel actions taken because the employee disclosed information the employee "reasonably believes evidences any violation of any law, rule, or regulation" or "gross mismanagement" or "abuse of authority."[107]

The CSRA balanced the job protections with a variety of measures to make the civil service more responsive to political appointees and to increase efficiency and flexibility. It created the Senior Executive Service, a category of senior managerial positions covered by a different set of rules regarding promotion and removal that make them career employees but more subject to control by political appointees than lower level civil servants.[108] The purpose of the SES was to create a corps of competent, experienced generalists just below the level of political appointee to

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[100] 344 U.S. 183 (1952).
[101] *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961); *Keyshian v. Board of Regents*, 385 U.S. 589 (1967).
[102] ROSENBLOOM, *supra* n.12 ch. 8.
[103] United States v. Fausto, 484 U.S. 439, 445 (1988) (recognizing that the CSRA creates a comprehensive system governing the civil service).
[104] 5 U.S.C. § 2301.
[105] 5 U.S.C. § 2301(b).
[106] *Id.*
[107] 5 U.S.C. § 2301(b)(1), (3), (8).
[108] 5 U.S.C. § 2101a (creating the SES), §§ 7541-7543 (rules for appointment, promotion, and removal of SES).

manage lower level civil servants. Thus, under the CSRA, there are three categories of government employees (other than those in the uniformed or armed services[109]): the competitive service (comprising the majority of employees who are covered by civil service rules for hiring, promotion, and removal[110]), the excepted service (comprising about a third of employees who are not[111]), and the SES. To increase the efficiency and consistency in managing the government workforce and the hiring, promotion, and firing process, the CSRA replaced the Civil Service Commission with the Office of Personnel Management (to manage the bureaucracy) and the Merit Systems Protection Board (to handle appeals of adverse employment actions.[112])

Enforcement of civil servants' rights under the CSRA when an employee believes the agency or OPM has erred is handled in part by the Office of Special Counsel, who is appointed by the President, confirmed by the Senate, serves a 5-year term, and is removable only for "inefficiency, neglect of duty, or malfeasance in office."[113] The OSC, as the office was defined in the federal Whistleblower Protection Act of 1989 and strengthened by the Whistleblower Protection Enhancement Act of 2012,[114] is empowered to receive and investigate allegations that agencies have violated the merit or whistleblower rights, to determine whether reasonable cause to believe a prohibited personnel action has occurred, to petition the MSPB for corrective action, but not to challenge the MSPB's failure to act in court, although OSC is authorized to appear as amicus curiae in a federal court in an action brought by an aggrieved employee.[115]

Like any other major reform law, the CSRA failed to achieve its most ambitious goals of efficiency, flexibility, and invariably high levels of competence. Many subsequent small-scale reform laws have addressed particular problems. But, with various amendments, the CSRA remains in force.[116]

According to the federal Office of Personnel Management, of the roughly 2.2 million civilian executive branch employees, two-thirds are in the "competitive service," meaning they are hired based on an open search and objective criteria and cannot be fired without cause after a one-year probationary period. Just under one-half of one percent (about 8,700 people) are in the Senior Executive Service. Employees in the SES can be removed for unsatisfactory job performance or malfeasance or neglect of duty. The remaining third are "excepted service," such as lawyers or engineers or scientists, who are not subject to the usual civil service hiring rules because they have special skills that cannot feasibly be measured on an examination or other objective

[109] 5 U.S.C. § 2101.
[110] 5 U.S.C. § 2102.
[111] 5 U.S.C. § 2103.
[112] 5 U.S.C. § 1101.
[113] 5 U.S.C. § 1211(b).
[114] Pub. L. 101-12, 103 Stat. 16 (1989); Pub. L. 112-119, 126 Stat. 1465 (2012).
[115] 5 U.S.C. §1211
[116] JAMES PFIFFNER & DOUGLAS A. BROOK, EDS., THE FUTURE OF MERIT: TWENTY YEARS AFTER THE CIVIL SERVICE REFORM ACT (2000).

measures used to hire the competitive service. After a two-year probationary period, those in excepted service positions generally have the same rights against removal without cause that employees in the competitive service have.[117] About 4,000 federal employees are political appointees who are either confirmed by the Senate (about 1,200), or appointed without the requirement of Senate confirmation (about 450), or are noncareer SES or are otherwise excepted from civil service protections.[118]

Applicants for employment in the competitive service must go through a competitive hiring process.[119] Those who are excepted under the statutory provision for policy-making appointments are noncareer, political appointees who have a "close working relationship with the President, head of an agency, or other key appointed officials who are responsible for furthering the goals and policies of the President," and have "no expectation of continued employment beyond the [relevant] presidential administration."[120] The terms "confidential, policymaking" position, the Merit Systems Protection Board has said, is "a shorthand way of describing positions to be filled by 'political appointees.'"[121]

The CSRA created a process for designating positions as either in the competitive service or in the excepted service. It does so by authorizing the President to except some positions from the competitive service if "conditions of good administration warrant."[122] The President, in turn, delegated to OPM the task of defining such positions.[123] OPM has issued regulations that include five "schedules" to define and categorize the one-third of federal employees who are in the excepted service.[124] Schedule A are non-confidential and non-policy-determining employees for whom it is not practical to examine applicants, "such as attorneys, chaplains, and short-term positions for which there is a critical hiring need." Schedule B are like schedule A but require the applicant to satisfy basic qualification standards, and are those who engage in scientific, professional, and technical activities. Schedule C are confidential and policy-determining positions and include most political appointees below the cabinet and sub-cabinet levels. Schedule D are non-confidential and non-policy-determining positions for which the usual competitive hiring process makes it difficult to recruit students or recent graduates. Schedule E are administrative law judges.[125]

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[117] Drew DeSilver, *What the Data Say About Federal Workers*, PEW RESEARCH CENTER (Jan 7, 2025), https://www.pewresearch.org/short-reads/2025/01/07/what-the-data-says-about-federal-workers/ (reporting data from the Office of Personnel Management).
[118] 89 Fed. Reg. at 24993 n. 138.
[119] 5 C.F.R. Part 337; OPM, Competitive Hiring, https://www.opm.gov/policy-data-oversight/hiring-information/competitive-hiring.
[120] 5 C.F.R. § 210.102(b)(3), (b)(4).
[121] O'Brien v. Office of Indep. Counsel, 74 M.S.P.R. 192, 206 (1997); see also Special Counsel v. Peace Corps, 31 M.S.P.R. 225, 231 (1986).
[122] 5 U.S.C. § 3302.
[123] Exec. Order No. 10577 § 6.1(a) (1954); 5 C.F.R. § 6.1(a).
[124] 5 C.F.R. § 6.2.
[125] *Id.*

Both the 2020 and one of the 2025 Executive Orders propose to create a new Schedule of excepted positions. In 2020 it was called Schedule F and in 2025 it is called Schedule Policy/Career. In both EOs, the category is for "positions of a confidential, policy-determining, policy-making, or policy-advocating character that are not normally subject to change as a result of a presidential transition."[126] Positions occupied by employees with civil service rights could be involuntarily transferred into Schedule F, which would strip the employee of their rights to appeal an adverse employment action. Agencies were directed to review their workforce to identify all positions fitting this description and to petition OPM to transfer them to the Schedule F excepted service, and also to make all new hires for positions that fit the description without reliance on the civil service procedures.[127] The result would be that employees would lose civil service protections. The definition and intended size of the group who would be assigned to the new exempt Schedule F were unclear; the program's architect said it would be about 50,000 people, but other estimates ranged into the hundreds of thousands. The Government Accountability Office reported that the Office of Management and Budget petitioned to place a full 68 percent of OMB workers in Schedule F.[128]

Moreover, a January 20, 2025 Presidential Memorandum directed agencies to "reassign agency SES members to ensure their knowledge, skills, abilities, and mission assignment are optimally aligned" with the administration's "policy priorities." Acting on that, in February 2025, the Acting Director of OPM ordered agencies to redesignate career SES positions to reduce the number of career positions and to increase the ability of agency leaders to replace them with "non-career officials to carry out presidential priorities."[129]

One final feature of the CSRA deserves mention because it also limits the discretionary authority of the President over federal employees. Title VII of the CSRA, sometimes known as the Federal Labor Relations Act or the Federal Service Labor Relations Statute, codified a practice first authorized by Executive Order in 1962 creating the right of many federal employees to unionize and bargain collectively.[130] The FLRA is patterned on the National Labor Relations Act of 1935, as amended in 1947 and 1959, which protects rights to unionize and bargain collectively in

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[126] 85 Fed. Reg. 67631, 67632; Restoring Accountability, supra note 4, at section 4.
[127] *Id.*
[128] Gov't Accountability Off., Civil Service-Agency Responses and Perspectives of Former Executive Order to Create a New Schedule F Category for Federal Positions, (Sept. 2022), https://www.gao.gov/assets/gao-22-105504.pdf.
[129] Ezell Memorandum to Heads and Acting Heads of Departments and Agencies (Feb. 24, 2025), chcoc.gov/reclass memo gov-wide all 2-24-2025.
[130] Karahalios v. Nat'l Fed. Fed. Emp'ees, Local 1263, 489 U.S. 527, 531 (1988); Exec. Order No. 10988 (Jan. 17, 1962). *See* 50th Anniversary of Executive Order 10988, FLRA.gov, https://www.flra.gov/50th_Anniversary_EO10988 (visited Jan. 19, 2025).

private sector employment.[131] Like the NLRA, the FLRA grants employees the right to unionize and obligates federal agency employers to recognize the union chosen by the employees and to bargain in good faith with it. Like the NLRA, the FLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter," "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment," and to retaliate against employees for participating in the enforcement of the statute.[132] It also prohibits unions from coercing and discriminating against workers and grants workers rights to fair treatment by their union.[133]

The CSRA also protected federal employees who blew the whistle on wrongful government conduct. Those protections were strengthened with the enactment of the Whistleblower Protection Act of 1989.[134] Federal employees are protected in the right to disclose information that the employee "reasonably believes evidences a violation of any law, rule or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety" unless the "disclosure is specifically prohibited by law" and is not "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs."[135] One of the comments cited by OPM in its 2024 regulations protecting the job rights of employees whose positions might have been reclassified as excepted from civil service by Schedule F stated that the whistleblower protections might have been jeopardized by reclassification of the positions of employees suspected of being disloyal.[136]

The experience of Alexander Vindman bears out the concern that attempts to revive Schedule F may be prompted by the desire to child whistleblowing. Vindman was an NSC staff member who was assigned to listen in on calls between the President and certain foreign leaders. While doing that, he heard Donald Trump threaten to withhold funds to Ukraine unless President Zelinsky produced damning information on Hunter Biden. Concerned that this was illegal, Vindman reported what he heard. His disclosure led to the first Trump impeachment.

Additional provisions of the CSRA became salient as the administration instituted mass layoffs in February 2025. One was the distinction between probationary and other civil service employees, as OPM directed agencies to identify and then terminate all probationary employees whom the agency head did not consider essential. A second was the law regulating reductions in

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[131] Karahalios, 489 U.S. at 534 (stating that the FLRA is "modeled" on the NLRA but "is not a carbon copy" of it).
[132] 5 U.S.C. §7116(a)(1), (2), (4). *See generally* Steven E. Sherwood, *Collective Bargaining in the Federal Sector*, 25 A.F. L. REV. 302 (1985).
[133] 5 U.S.C. §7116(b), (c).
[134] Pub. L. 101-12, 103 Stat. 16 (Apr. 10, 1989), codified in scattered sections of 5 U.S.C.
[135] 5 U.S.C. § 1213(a).
[136] 89 Fed. Reg. at 24997.

force of federal employees. Both are part of the CSRA and its implementing regulations. The legal arguments about them are discussed below in Part IV.

The history shows that over the last 150 years, Congress has steadily expanded the job protections for federal employees. Its goals included ensuring that hiring, assignment, and promotion are based on merit rather than political service, race, gender, or other irrelevant considerations. Both the legislation and the regulations OPM adopted pursuant to the regulation have tried to balance efficiency and flexibility with fairness, to enable government to recruit and retain employees with the knowledge and skill needed. The legislation and regulations also insist that adverse job actions be based on failure to perform the job rather than retaliation for whistleblowing, or belonging to the "wrong" political party, whether that party is the Democrats, the Republicans, the Socialists, or the Communists.

III. The Arguments About Job Protections for Public Employees

Having examined the history of job protections and merit selection for government employees, I now turn to contemporary thinking about the justifications for job protections for government employees. The literature on the theory of institutional design for public administration appears to have grown in proportion to the expansion of presidential claims of power. The empirical literature on whether strong, weak, or no job protection for civil servants produces better governance, as measured by various metrics, is also large. Both literatures raise serious doubts about the desirability of the version of executive control now being implemented.

The theoretical literature on the virtues and vices of White House control over the civil service is too large to survey here, but is surveyed in a 2021 book by political scientists Stephen Skowronek, John Dearborn, and Desmond King. Analyzing the theory underlying the first Trump Administration attack on the independence of the executive branch bureaucracy and the critiques of it, they argue that the contenders on each side pitted two unduly simplistic ideas against one another.[137] On the one hand, Trump and adherents of the so-called unitary executive doctrine present a simplified notion that unbridled executive power is efficient, just, and democratic because the President was elected by the people, which justifies direct, exclusive, and hierarchical control by the White House over the entire administrative apparatus of government. This is a vision that pits the chief executive against the rest of the executive branch.

On the other hand, Skowronek et al said, defenders of the administrative state emphasize that bureaucracy serves values of technical competence and procedural rationality. Protection against removal for arbitrary or political reason allows civil servants to exercise fidelity to legislation

[137] STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE ch. 1 (2021) (describing the conflict between these two phantom ideas about good governance).

enacted by Congress rather than accede to whims of an ill-informed, self-interested President and his cadre of self-regarding enablers.[138] This view reads the civil service law as desirable because governance of the complex modern state requires expansion of the executive branch, but insists overweening executive power is a threat to good government. When Congress created administrative agencies to enforce complex laws, it transformed the President into "a policy entrepreneur and national agenda setter," but it also "took care to instill administration with an organizational integrity of its own and to set the everyday operations of the executive branch at some distance from the chief executive officer."[139]

Others have called for more refined and realistic theories about which types of government decisionmaking should be independent of political control (monetary policy and the Federal Reserve? Statistical analysis that underlies policy decisions? Scientific analysis that underlies drug approvals? Food and bridge inspections?) and which should be subject to political control, and what form that control should take.[140] The point is that few scholars seriously dispute that there should be some balance between political control of policymaking and independent judgment immune from political pressure. The challenge is in striking the balance, and most agree that, at least to some extent, the right balance is an empirical question.

To begin with, one needs to identify a measure of the quality of governance to determine whether job protections for government employees produces better or worse governance. A recent article by Nicholas Bednar proposes a useful one. His is a combined measure of "bureaucratic capacity," which he defines generally as the human capital that enables policymaking, and specifically as employees' "substantive and procedural expertise"; government's "ability to recruit and retain skilled employees"; and an agency's "ability to organize itself for efficient team production."[141] Working with this combined definition, Bednar analyzed a huge volume of federal employee data and found that independence of either the decisionmaker or the policy decision from presidential control increases the bureaucratic capacity.[142]

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[138] STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE ch. 1 (2021) (describing the conflict between these two phantom ideas about good governance).
[139] *Id.* at 202.
[140] These examples and the discussion of the literature and the issues are explored in Noah A. Rosenblum, *Toward a Realist Defense of the Civil Service,* 13 REG. REV. 7 (2024), AND Noah A. Rosenblum & Roderick M. Hills, Jr., *Presidential Administration After Arthrex*, __ DUKE L.J. __ (forthcoming 2025), available at SSRN: https://ssrn.com/abstract=5122594 (Feb. 5, 2024).
[141] Nicholas Ryan Bednar, *Bureaucratic Autonomy and the Policymaking Capacity of United States Agencies, 1998-2021*, 12 POL. SCI. RSCH. & METHODS 652 (2024).
[142] Id. at Table 2 and Figure 2 (finding that "a one standard deviation in either decision-maker or political review independence increases bureaucratic capacity by more than a quarter of a standard deviation").

In terms of connecting independence to various measures of the quality of governance, the most comprehensive published survey of the empirical literature on the effects of civil service protections identified 96 empirical articles published from 1991 to 2022 that related to meritocracy and government performance broadly defined.[143] The articles overwhelmingly found that meritocratic appointment is positively related to several measures of good government, including performance, whistleblowing, economic growth, quality of service delivery, regulatory quality, work motivation, and public service motivation, and negatively related to corruption.[144] Meritocratic promotion and merit-based rewards have been studied less frequently, but also were found to be positively related to the measures of good government noted above, as well as efficiency of government accounting, program and agency performance, individual competence, and public confidence.[145] Job security was the second most frequently studied practice, and it was found to be positively related to the measures of good government but, contrary to expectations, it was found in one study to be negatively associated with public service motivation and in another study to be negatively associated with corruption.[146] Conversely, politicization was found to be negatively related to government performance, employee work attitudes, and impartial administration, and positively correlated to corruption.[147]

Digging into some of the most highly relevant empirical studies illustrates the basis for the meta-analysis discussed above, and also addresses why civil service protections do not thwart incoming administrations' ability to shape policy to the extent that the current administration asserts. For example, empirical study of turnover in the federal bureaucracy below the level of political appointees after an election shows, in the period between 1973 and 2014, a fair amount of turnover, especially at the higher levels of the civil service ladder and at agencies that are ideologically distant from the new administration.[148] Thus, there already exists some degree of voluntary staff change that aligns the bureaucracy with the elected leaders' views. This should come as no surprise. It is to be expected that those committed to strong environmental regulation or workers' rights may want to leave the EPA or the DOL or NLRB when there is a new administration that does not share their values. And when the new administration's policies are a more extreme departure from the past, we might expect more departures.

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[143] Eloy Oliveira et al., What does the evidence tell us about merit principles and government performance? 102 PUBLIC ADMIN. 668 (2024). The authors conducted the literature review using the PRISMA guidelines which require complete reporting of systematic reviews and meta-analyses and prespecification of selection and quality criteria for inclusion of studies to minimize author bias in selecting articles for inclusion. Id. at 672 (including citations to the literature on PRISMA guidelines for literature reviews).
[144] Id. at 678.
[145] Id.
[146] Id. 682-83.
[147] Id. at 683.
[148] Alexander Belmont, John M. de Figueiredo & David E. Lewis, *Elections, Ideology, and Turnover in the U.S. Federal Government*, NBER Working Paper 22932 (2019).

On the other hand, this study shows that not all civil servants opposed to the new administration will leave. The chief advocate of shrinking the civil service cites examples from the first Trump term where civil servants refused to work on certain matters or, according to political appointees, produced work slowly or not well. What cannot be discerned from these anecdotes, however, is whether the resistance was because civil servants believed what they were told to do was unconstitutional or contrary to the statute. To take a current example, if a civil servant in the State Department declined to implement a direction to deny passports to applicants who could not demonstrate at least one parent was a U.S. citizen at the time of their birth, is that misfeasance or is that acting on the civil servant's oath to uphold the Constitution?[149] In sum, it is difficult to know when resistance or poor work by civil servants is in service of or defiance of the law.

Empirical studies of the effects of two dozen states' adoption of "radical civil service reform" that, to varying degrees, made state government jobs at-will offer weak support for the idea that at-will employment leads to responsiveness and efficiency.[150] In Georgia, less than half of state HR managers surveyed ten years after adoption of at-will employment (by which time three-quarters of state employees were employed at-will) said that at-will employment had made employees "responsive to the goals and priorities of of agency administrators" and just over a third said it provided "the needed motivation for employee performance."[151] OPM cited one study of the effect of Georgia's transition to at-will employment which found that over 75% of Georgia state employees disagreed with the proposition that at-will employment made Georgia's government workforce "more productive and responsive to the public."[152]

Few of the studies of these state experiments clearly disentangled whether the states that repealed civil service protections (which are often characterized by nonlawyers as making government employment at-will) also abolished other job protections, including collective bargaining agreements with just cause protections. And of course no state could deprive its workforce from federal laws prohibiting discrimination on the basis of race, religion, sex, national origin, age, disability, or veteran status. Nor could they insulate personnel decisions from scrutiny for political discrimination under the First Amendment. Thus, studies of state experiences with repealing civil service laws are not a reliable predictor of what will happen if the 2025 Executive Order is upheld and enforced.

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[149] *United States v. Wong Kim Ark*, 169 U.S. 649, 704 (1898) (holding that a person born in the U.S. is a citizen, even though his parents were Chinese citizens and were ineligible, under U.S. law at that time, to become U.S. citizens); *State of Washington v. Trump*, No. C25-0127-JCC (W.D. Wa. 1/23/25) (granting a temporary restraining order against Executive Order directing government officials to deny citizenship to U.S. born children of noncitizens).

[150] *See, e.g.*, STEPHEN E. CONDREY & ROBERT MARANTO, EDS., RADICAL REFORM OF THE CIVIL SERVICE ch. 13 (2000).

[151] Stephen E. Condrey & R. Paul Battaglio, Jr., *A Return to Spoils? Revisiting Radical Civil Service Reform in the United States*, 67 PUB. ADMIN. REV. 425, 428 (2007).

[152] 89 Fed. Reg. at 24998.

Nevertheless, two authors of who hold divergent views about the desirability of eliminating civil service published a book surveying studies on radical civil service reform. They conclude, "increased managerial flexibility coupled with less accountability to civil service authorities may spawn bureaucratic fiefdoms controlled by skilled bureaucratic entrepreneurs. … At a minimum, particularly in large organizations, the result of arbitrary personnel rulings with little opportunity for impartial recourse may lead to an exodus of government's more skilled and mobile employees and discourage persons at the start of their careers from seeking government employment."[153]

Scholars have reviewed the considerable empirical literature on civil service reform and developed models to explain whether or under what conditions reducing job protections increases the quality and responsiveness of government employee work. One model shows that "bureaucratic performance is greater in any equilibrium in which motivated bureaucrats choose government than in which all equilibria in which they do not."[154] The idea, translated into nontechnical language, is that some degree of job security improves governance by recruiting and retaining motivated and skilled employees to government, but that too much job security reduces government performance by disincentivizing good work and by making it unduly difficult to dismiss bad employees. Of course, the difficulty is defining and achieving that equilibrium.

Another paper studied and modeled the incentives of populist leaders on whether to replace bureaucrats with loyalists. They find that bureaucrats faced with populist leaders determined to undermine existing policy have incentives to feign loyalty to the leader in the hopes of keeping their job and waiting for a future administration, and that strong civil service protections lessen the need for feigning loyalty. But they also find that when a populist hires a loyalist, strong civil service protections enable the loyalist to stay in office in a future administration. Ultimately, they conclude that "even short-term populism can lower the expertise of the bureaucracy and create poor policy implementation."[155]

Some scholars have studied the effect of civil service laws by comparing measures of performance before and after a civil service law was implemented or by comparing the performance of government agencies where staff are subject to replacement to agencies where staff are protected from political replacement.[156] One ambitious large study measured the effect

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[153] *Id.* at 222.
[154] Daniel Gibbs, *Civil Service Reform, Self-Selection, and Bureaucratic Performance*, 32 ECON. & POLITICS 279 (2020).
[155] Greg Sasso & Massimo Morelli, *Bureaucrats Under Populism*, 202 J. PUB. ECON. 104497, 9 (2021).
[156] Abhay Aneja & Guo Xu, *Strengthening State Capacity: Civil Service Reform and Public Sector Performance During the Gilded Age*, 114 AM. ECON. REV. 2352 (2024) (surveying the literature on the effects of civil service law and finding, based on analysis of numerous data, that the adoption of civil service

of the adoption and expansion of the Pendleton Act in 1883 and 1893 on the efficiency and productivity of the U.S. postal service. The study found, while controlling for many possibly confounding variables, that civil service protections improved the efficiency, the accuracy, and the productivity of the postal service.[157] Another study approached the similar problem from a different methodological point of view focusing on the effect of politically-mandated turnover of school staff on student test scores in Brazil. Students at schools where staff were subject to replacement after a mayoral election had lower test scores after the election than did students at schools where school staff were insulated from replacement following an election.[158]

A challenge in assessing the likely effects of attacks on civil service protections is in determining whether it will ultimately increase or decrease reliance on, and accurate and fair assessments of, merit in hiring, pay, and promotion. A recent empirical study, based on a field experiment, of frontline health workers in Sierra Leone showed that a more meritocratic promotion system increased their productivity, by increasing motivation and effort, especially for workers who were evaluated sufficiently favorably to have a realistic shot at promotion, and where workers perceived the assessment of merit as being accurate.[159] The authors also speculate that a meritocratic promotion system may enhance the quality of the applicant pool, which would have long-term positive effects on the quality of government service.

In sum, the empirical evidence on abolishing job protections for government employees does not sustain the robust claims that eliminating civil service will improve government. The consensus of the literature is that some reforms are desirable, some have been tried and have produced good results, and completely abolishing legal rights to job tenure during good behavior is extremely risky because it often produces more harm than good. But the tone and content of the EOs suggest that the real justification is not to improve the quality of government, but rather to allow the President unfettered power to remake it, even when Congress fails to act. More recently issued executive orders reinforce the point.

IV. Assessing the Case Against the Nonpartisan Civil Service and the Political Independence of the Agencies that Administer It

The effort to make some, and perhaps eventually all, federal employees fireable by the President, is part of a larger right-wing effort to increase the power of the White House relative to Congress

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protections in 1883 and 1893 improved the efficiency and productivity of the postal service); Mitra Akhtari, Diana Moreira & Laura Trucco, *Political Turnover, Bureaucratic Turnover, and the Quality of Public Services*, 112 AM. ECON. REV. 442 (2022) (finding that political turnover lowers test scores when public school staff are not insulated from replacement).

[157] Aneja & Xu, *supra*.

[158] Akhtari, Moreira & Trucco, *supra* note __.

[159] Erika Deserranno, Philipp Kastrau, & Gianmarco Leon-Ciliotta, Promotions and Productivity: The Role of Meritocracy and Pay Progression in the Public Sector, 7 American Economics Review: Insights 71 (2025).

and the rest of the executive branch that has been going on since the late 1960s, a time when Republicans had not controlled both houses of Congress since 1932 and assumed their only chance of federal government control was to enhance the power of the President. Both the Nixon and the Reagan White Houses adopted strategies to identify and sideline civil servants whom they perceived as disloyal, and the Reagan Administration tapped the conservative Heritage Foundation in an effort to elevate loyalists and impose their policy on the bureaucracy through centralized control.[160]

Even after Republicans—through a mix of popularity and gerrymandering—won majorities of Congress after 1994, it is not surprising that wholesale attacks on the civil service have been a project of Republican presidents. Empirical study of civil servants' voter registration has suggested that a plurality of civil servants (about 50%) are registered Democrats, a third to a quarter are registered Republicans (ranging from 32% in 1997 to 26% in 2019).[161] The political affiliation of civil servants is not uniform across agencies, with more Democrats in the Department of Education, Environmental Protection Agency, and Department of State, but near parity of Democrats and Republicans in the Departments of Transportation and Agriculture.[162] Little wonder then that Democrats have promoted reform (including the Civil Service Reform Act of 1978, one of President Carter's signal achievements) while Republicans have sought elimination.

While the current effort may be an effort to shrink government, an old-school GOP demand, it may also be an effort to shift the party affiliation of civil servants. Although the administration has at times asserted that exempting federal employees from the civil service or firing them is necessary to address "poor performance by career employees,"[163] or because civil service rules "empower ideological activists in the bureaucracy to pursue their own agendas regardless of who the American people elect to run the government,"[164] and/or because of the difficulty of firing employees after the one-year or two-year probationary period,[165] poor performance or failure to

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[160] Donald P. Moynihan, *Public Management for Populists: Trump's Schedule F Executive Order and the Future of the Civil Service*, 82 PUB. ADMIN. REV. 174 (2022).
[161] Spenkuch, Teso & Xu, Ideology and Performance in Public Organizations, NBER Working Paper 28673 (2021), https://www.nber.org/system/files/working_papers/w28673/w28673.pdf .
[162] Id. at 16.
[163] *Id.*; James Sherk, *Biden Administration Proposal Insulates the Bureaucracy from Accountability*, Issue Brief, Center for American Freedom (Sept. 20, 2023), https://americafirstpolicy.com/issues/issue-brief-biden-administration-proposal-insulates-the-bureaucracy-from-accountability.
[164] *Id.* at 2.
[165] James Sherk, *Biden Administration Proposal Insulates the Bureaucracy from Accountability*, Issue Brief, Center for American Freedom (Sept. 20, 2023), https://americafirstpolicy.com/issues/issue-brief-biden-administration-proposal-insulates-the-bureaucracy-from-accountability. Sherk was a researcher at the Heritage Foundation before going to work in the Trump Administration in 2017 as Special Assistant to the President for Domestic Policy. He spent the Biden Administration at the American First Policy Institute (AFPI), one of a number of research institutes established to advance right-wing policy initiatives. He published an extended defense of the Schedule F as an AFPI Issue Brief.

follow instructions from a supervisor or to enforce law or policy have always been a basis for firing. Streamlining the process for firing poor performers, however, has never been on the Trump agenda. Rather, as noted above, the real justification for the new exception, its architect candidly admitted, is that because civil servants "are disproportionately liberal," their alleged resistance to presidential policy disproportionately afflicts conservative administrations.[166] After all, both Trump and Vance have advocating replacement of those fired with loyalists. If this is the first step to staffing the entire government with Trump loyalists, it will go beyond what Professor Kate Shaw has labeled "partisanship creep" to be a top-to-bottom partisan takeover.[167]

In what follows, I examine legal arguments that have been presented both by the administration and by its critics in and out of court regarding the firing or restructuring of the civil service. Because of the large number and variety of the efforts to restructure the federal government and to fire federal civilian employees since January 20, 2025, I focus on those that might have the most enduring significance for the principle of a nonpartisan civil service. In particular, I focus on the power of the White House or OPM to reduce the scope of the civil service under the CSRA and the constitution. Although these have been less prominent since DOGE has shifted the focus to mass layoffs of probationary employees and shuttering agencies, it may be that in the long term the power to eliminate civil service protections entirely will have greater structural significance.

A. The APA Arguments About Schedule P/C

Although Schedule P/C has been eclipsed in the news since it was proposed, the administration is continuing its efforts to adopt it. For it to go into effect requires rescinding the regulations OPM issued during the Biden Administration under the Administrative Procedure Act process that OPM used to adopt them.[168] This is undoubtedly why the Biden-era OPM decided to issue regulations under the cumbersome notice and comment process even after President Biden rescinded the Trump Schedule F executive order.[169] The Trump Administration has launched a rulemaking proceeding to rescind them. Once it is complete, it will be necessary to convince a court that Schedule Policy/Career is consistent with the CSRA and/or mandated or permitted by the Constitution. This section addresses the 2024 OPM regulations intended to prevent its revival by Executive Order, then consider whether the 2024 regulations or Schedule P/C are more consistent with the CSRA.

When Congress created the Office of Personnel Management (OPM) in the CSRA in 1978, it authorized the agency to use notice and comment rulemaking as authorized by the

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[166] *Id.* at 4.
[167] Katherine Shaw, *Partisanship Creep*, 118 NORTHWESTERN U. L. REV. 1563 (2024).
[168] *See infra*
[169] *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 101 (2015).

Administrative Procedure Act.[170] OPM followed this procedure in issuing the October 2024 rule clarifying that positions in the competitive service cannot be transferred to the excepted service under a new Schedule F (now called Policy/Career) or similar exception without granting the employees appeal rights.[171]

Agency rules adopted after formal rulemaking are subject to judicial review under the APA but are not to be set aside unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[172] Otherwise, they can be changed only by a new rule rescinding the earlier one that itself has to be adopted by the APA notice and comment rulemaking procedure.[173]

Although the matter is not without doubt, OPM rules relating to personnel matters, which is what the October 2024 regulations are, are probably not subject to the Congressional Review Act (CRA) and cannot be invalidated by Congress (other than, of course, by enacting legislation to change the CSRA).[174] Under the CRA, agencies promulgating major rules must submit to both houses of Congress and the GAO a report containing the text and a summary of the rule and its proposed effective date and give Congress time to use a fast-track procedure to overturn the rule. If both houses agree to a joint resolution of disapproval and it is signed by the President (or Congress overrides the veto), the rule does not take effect.[175] The CRA specifically exempts "any rule relating to agency management personnel" or "any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties."[176]

In issuing the 2024 regulations, OPM concluded that the 2020 EO Schedule F's proposed extension of an exception from the competitive service for employees in "positions of a confidential, policy-determining, policy-making, or policy-advocating character" was both not consistent with good administration and inconsistent with the CSRA. It discussed the 4,000 comments received in the rulemaking process and some of the empirical literature discussed above examining whether the expansion of at-will employment in several states increased the quality of public services. It examined at considerable length the various legal arguments, based both on the CSRA and Article II of the Constitution, about whether OPM or the White House has

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[170] 5 U.S.C. § 1103(b). *See* Nat'l Treas. Emp'ees Union v. Horner, 854 F.2d 490, 496 (D.C. 1988).
[171] 89 Fed. Reg.
[172] 5 U.S.C. § 706(2)(A), *Horner*, 854 F.2d at 498.
[173] *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015); *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (stating the APA makes no distinction "between initial agency action and subsequent agency action undoing or revising that action").
[174] *See* Contract with America Advancement Act of 1996, Pub. L. 104-121, 110 Stat. 868 (Congressional Review Act), 5 U.S.C. §§ 801-808. See Congressional Research Service, Congressional Review Act: Determining Which "Rules" Must Be Submitted to Congress (Oct. 22, 2024), CRS R45248, https://crsreports.congress.gov/product/pdf/R/R45248 (viewed Jan. 26, 2025).
[175] 5 U.S.C. § 801(f).
[176] 5 U.S.C. §804(3).

the authority to expand the excepted service to cover all policy positions and to involuntarily transfer incumbent employees to at will jobs. All of this is the kind of reasoned decisionmaking that the APA requires.[177]

The statutory language referring to the President's ability to exempt such employees was, OPM found, intended by the CSRA to apply only to noncareer political appointees, not to career staff.[178] That is, according to OPM, Congress intended the exception for those people who, under Article II, whether or not subject to Senate confirmation, are officers who are appointed by the President, or the head of a department, or a court.[179] These appointees, OPM explained, are excepted from the civil service protections under Schedule C.[180] The number of such political appointees, OPM observed, has remained steady since the 1950s and a dramatic expansion (from about 4,000 to anywhere between 50,000 and several hundred thousand), was inconsistent with Congress' intent in the CSRA.[181] (Currently, about 1300 Executive Branch officials are subject to Senate confirmation. The others may be appointed by the President or by the head of a department. As of this writing, President Trump has nominated only 198 people out of the 1300 political positions requiring Senate confirmation.[182]) Moreover, OPM also responded to the argument (addressed below) that Congress authorized the President to determine that positions should be excepted from civil service when conditions of good governance warrant. OPM said that the President's authority to except positions when conditions of good government warrant only allows the designation of a *position* as excepted, not to force an employee to involuntarily transfer to the excepted service and lose all job protections.[183] Finally, OPM cited a number of provisions of the CSRA authorizing it to issue regulations.[184]

For OPM to eliminate the rights granted to employees to challenge the reclassification of their positions in Schedule P/C would require OPM to go through formal rulemaking again.[185] That surely looks to the new Trump Administration as an impermissible effort by the outgoing Biden Administration to entrench its policy preferences, which is presumably why Trump tried a more direct route in declaring the OPM rules invalid in the 2025 EO.[186] The National Treasury Employees Union, which represents 150,000 federal employees, including many who would be

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[177] *Horner*, 854 F.2d at 498.
[178] 5 U.S.C. §7511(b)(2), 89 Fed. Reg. 24982, 24986-87 (Apr. 9, 2024).
[179] Art. II, § 2.
[180] 89 Fed. Reg. at 24987.
[181] *Id.*
[182] Political Appointee Tracker, https://ourpublicservice.org/performance-measures/political-appointee-tracker/ (a joint project of the Washington Post and the Partnership for Public Service).
[183] 89 Fed. Reg. at 24991.
[184] *Id.* at 25006, citing 5 U.S.C. §§ 1103, 1302, 3308, 3317, 3318, 3320.
[185] *Perez*, 575 U.S. at 101; *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (stating the APA makes no distinction "between initial agency action and subsequent agency action undoing or revising that action").
[186] The Schedule P/C EO directs the head of OPM to "promptly amend the Civil Service Regulations to rescind all changes made by the final rule of April 9, 2024" and declares the 2024 rule "inoperative and without effect."

impacted sued in 2025[187] (as they did in October 2020 when the last Trump Administration promulgated Schedule F by Executive Order[188]). Most of the NTEU suit is focused on the inconsistency of the EO with the CSRA, arguments discussed below. But it also argues that the EO cannot invalidate the 2024 OPM regulation under the APA.

B. The CSRA Arguments About White House or OPM Control over Personnel and Schedule P/C

The administration is attempting to consolidate power over any and every firing or promotion decision in two ways. One is to give the Director of the Office of Personnel Management authority to determine the "suitability" of any and all government employees.[189] The other is the assertion that all policy-involved employees should be excepted from the civil service.

The CSRA defines the powers and responsibilities of the Director of OPM as overseeing OPM and "executing, administering, and enforcing … the civil service rules … except with respect to functions for which the Merit Systems Protection Board or the Special Counsel is primarily responsible."[190] It does not confer on OPM or its Director the power to make determinations of suitability for continued federal employment. Rather, those determinations are vested in supervisors, subject to review by MSPB. Indeed, it is inconsistent with the entire civil service system to confer such powers on OPM.

OPM's responsibilities are explicitly defined in the CSRA as focused on administration of systems, not substantive determination of whether employees are "suitable" for continued employment. For example, the statute says OPM "shall design a set of systems, including appropriate metrics, for assessing the management of human capital by Federal agencies."[191] The "systems … shall be defined in regulations of the Office of Personnel Management and include standards for" such things as "aligning human capital strategies of agencies with the missions, goals, and organizational objectives of those agencies," "sustaining a culture that cultivates and develops a high performing workforce," and "holding managers and human resource officers accountable" for HR management "in accordance with merit system principles."[192] For the Director of OPM himself to insert himself in substantive decisionmaking, subject to no standards other than his own view of which employees are "suitable" is *ultra vires* and likely arbitrary and capricious.

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[187] *NTEU v. Trump*, No. 1:25-cv-00170, filed 1/20/25 (D.D.C. 2020).
[188] *NTEU v. Trump*, No. 20-3078, filed 10/26/2020 (D.D.C. 2020), *see* Courtney Rozen, Federal Workers Seeking Trump Shield Look to Decades-Old Law, Bloomberg.com (Jan. 15, 2025).
[189] Strengthening the Suitability and Fitness of the Federal Workforce, Presidential Memorandum, March 20, 2025, https://www.whitehouse.gov/presidential-actions/2025/03/strengthening-the-suitability-and-fitness-of-the-federal-workforce/?utm_source=substack&utm_medium=email.
[190] 5 U.S.C. § 1103(a)(5).
[191] 5 U.S.C. § 1103(c)(1).
[192] Id. at (c)(2).

Moreover, even if there were an argument that OPM could establish itself as the reviewer of the suitability of all government employees for continued employment, such as by rulemaking stating that its involvement is a "system" for "holding managers" in agencies "accountable," such a dramatic change in the operation of the civil service system would surely be subject to challenge under so-called major questions doctrine. Since its creation nearly a half-century ago OPM has not had this authority. To claim it now is quite a radical change.

In sum, under the CSRA OPM is in charge of managing systems, not managing individual employees other than its own staff. The White House effort to consolidate power over firing in OPM is contrary to the statute.

As for Schedule P/C, there are two possible statutory arguments authorizing the administration to except a new category of federal employees from civil service protections. One is the provision of the CSRA that states: "The President may prescribe rules governing the competitive service. The rules shall provide, as nearly as conditions for good administration warrant, for … necessary exceptions of positions from the competitive service."[193] The statute thus requires that exceptions be "necessary" and consistent with "good administration."[194] As discussed above, OPM concluded in its 2024 regulation that expanding the excepted service to cover tens of thousands of additional positions was neither "necessary" nor consistent with "good administration."

There has been only one case interpreting the meaning of the terms "necessary" and "good administration" in the context of decisions about expanding or contracting the number of positions in the competitive or excepted service or transferring employees wholesale from one classification to another. In *National Treasury Employees Union v. Horner*, the D.C. Circuit reviewed the decision of OPM to reclassify a large number of jobs as being in the excepted service and found its decision was arbitrary and capricious because OPM had failed to adequately explain the basis of its decision.[195]

Because the statutory language is capacious and the federal courts are no longer required to grant deference to an agency's reasonable interpretation of its own statute,[196] it is difficult to identify the constraints that might operate on the federal courts' likely confrontation with the Trump Administration over Schedule Policy/Career. Given the Supreme Court's penchant for expanding executive power at the expense of Congress or independent agencies, as discussed below, the courts' likely approach to the statutory interpretation question seem standardless.

[193] 5 U.S.C. § 3302(1).
[194] *Nat'l Treas. Emp'ees Union v. Horner*, 657 F. Supp. 1159 (D.D.C. 1987).
[195] 854 F.2d 490, 496 (D.C. 1988).
[196] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

The second CSRA provision that the administration might invoke is the coverage section, section 7511(b), which states: "This subchapter does not apply to an employee--

> **(1)** whose appointment is made by and with the advice and consent of the Senate;
> **(2)** whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by--
> **(A)** the President for a position that the President has excepted from the competitive service;
> **(B)** the Office of Personnel Management for a position that the Office has excepted from the competitive service; or
> **(C)** the President or the head of an agency for a position excepted from the competitive service by statute; [or]
> **(3)** whose appointment is made by the President ….[197]

The Schedule P/C EO relies on the language of section 7511(b)(2). The problem with relying on it, however, is that it does not address the question whether the President has power under subsection (b)(2)(A) to except jobs from the competitive service, especially given that OPM in 2024 adopted regulations specifically rejecting the creation of new exceptions. Hence, the same question arises: does the statute allow the President to dictate by executive order that a broad new exception is necessary for good administration?

As OPM explained in its 2024 rulemaking, to except a swath of new positions from civil service regulations requires the agency to undergo rulemaking. In that process, OPM explored the evidence as to whether it is "necessary" to reclassify positions in the interest of "good government," which is the statutory standard. It would be possible, and likely if OPM were to engage in new rulemaking, that it could reach a different decision about what is "necessary" in the interest of "good government."

The legislative history of section 7511(b)(2) states that it is "an extension of the exception for appointments confirmed by the Senate. These positions are currently placed in Schedule C (positions at GS-15 and below), or filled by non-career executive assignment."[198] Schedule C, it will be recalled, covers confidential and policy-determining positions and include most political appointees below the cabinet and sub-cabinet levels. The question invited by the EO is the limit of the power of the President to expand the number of political appointees and how far the concepts of policy making, policy determining, and confidential work can be stretched, consistent with the commitment of Congress to civil service appointments.

The EO includes in the new category a broad number of positions that are not clearly "confidential, policy-determining, policy-making or policy-advocating." For example, there is a

[197] 5 U.S.C. § 7511(b).
[198] S. Rep. 95-969, 48-49, 1978 U.S. Code Cong. & Admin. News 2723, 2770-71.

difference between "substantive policy-related work" (excepted under Schedule Policy/Career) and "policy-determining" or "policy-advocating" (authorized for exception by the CSRA).[199] For example, an employee authorized to research responses to public comments in the APA notice and comment rulemaking process, who might be as menial as a new college graduate, is doing "substantive policy-related work" but be a long way from determining policy. Similarly someone who is involved in "viewing, circulating, or otherwise working with proposed regulations, guidance, executive orders" and is "working in the agency or agency component executive secretariat" could be an administrative assistant. These positions are many steps below the political appointee.

Even if the President or OPM can reclassify these positions prospectively, there is no basis in the statute to allow large numbers of employees to be involuntarily transferred from a civil service position to an excepted position and then be summarily fired because their position has been reclassified. The CSRA contains no provision authorizing an involuntary transfer of an employee to at-will status after they have acquired the job protections that come with years of service. The NTEU argues that incumbents in any reclassified position have both civil service and due process rights that cannot be summarily abrogated by executive order. The CSRA states that non-probationary employees in both the competitive and the excepted service have due process rights if an agency removes the employee, suspends them for more than 14 days, reduces their grade or pay, or furloughs them for 30 days or less.[200] Due process, as defined both in the statute and by the Constitution, includes the right to notice, to respond, and to appeal to the MSPB.[201]

The Schedule P/C EO seeks to broadly strip collective bargaining rights from federal employees. Nothing in the EO itself or in the defenses of it have explained why collective bargaining poses a threat to the efficiency, competence, or accountability of government workers. Rather, the EO and its defender have focused on whether the workers are "required or authorized to formulate, determine, or influence the policies of the agency."[202] But Congress' decision to allow government workers to unionize reflects the view that one can be authorized to influence agency policy and still have an interest in collective representation on compensation, conditions of employment, and just treatment. To override this legislative determination (one that was enacted by Congress and signed into law by a prior President) is a startling overreach.

The consolidation of discretionary power in OPM and the proposal to reduce the scope of civil service and other labor rights seem aimed at controlling, perhaps without regard to what the law requires, those who might be more inclined to follow the statutes and regulations they believe they are charged to enforce than to follow the unorthodox views of political appointees. The

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[199] *Compare* 2025 EO section 5(c)(1) *and* 5 U.S.C. § 7511(b).
[200] 5 U.S.C. § 7512.
[201] 5 U.S.C. §§ 7511-7513, 7701; *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985); *Kriner v. Dept. of Navy*, 61 M.S.P.R. 526, 531 (1994).
[202] *Id.* at section 4(e).

focus seems not to be on increasing the competence or efficiency of government work, but rather on controlling those who the administration fear might have the ability to protect workers or the public from unlawful actions or abuse of power.

C. The Legal Arguments About Mass Layoffs

It appears as of this writing that the majority of federal employees who have been fired or face the imminent threat of it have been subject to mass layoffs. They are either probationary employees or are in positions in agencies (the CFPB, USAID) or cabinet departments (Department of Education) that the White House seeks to eliminate. As noted above, OPM directed agencies to lay off all probationary employees who are not "mission critical" by February 27. This is alleged to be a sizeable number, as the federal government employed (before the purges began) approximately 220,000 probationary employees. By the middle of March, according to the opinion of Judge Bredar of the District of Maryland in a case challenging the mass layoffs, the government had terminated approximately 25,000 probationary employees.[203]

Both the probationary status issues and the RIF issues have been the basis for injunctions granted by two federal courts and stays issued in two MSPB proceedings.[204]

Regulations implementing the CSRA define a probationary employee, as one in the first year or two of employment. They may be terminated if his "work performance or conduct during this period fails to demonstrate his fitness or his qualifications for continued employment,"[205] or "for reasons based in whole or in part on conditions arising before his employment."[206] The probationary period is described as an extension of the merit hiring process, so the basis for termination is either that the employee lacks the merit required for the job or that there was an error in assessing the agency's needs, before the time of hire (not changed circumstances after

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[203] State of Maryland v. U.S. Dept. of Agriculture, No. JKB-25-0748 (Mar. 13, 2025)

[204] State of Maryland v. U.S. Dept. of Agriculture, No. JKB-25-0748 (Mar. 13, 2025); [cite Alsup case when opinion/order is disseminated]. In a pair of cases, Special Counsel ex rel. John Doe v. Dept. of Agriculture, CB-1208-25-0020-U-1 (MSPB Mar. 5, 2025), and Special Counsel ex rel. John Doe v. Dept of [blanked out], CB-1208-25 [blanked out] (Feb. 25, 2025), two different members of the MSPB stayed the firing of probationary employees. Both decisions, neither of which is precedential, cite 5 U.S.C. §3502 (directing OPM to prescribe regulations for release of employees in a RIF which give "due effect to" tenure of employment, military preference, length of service, and efficiency or performance ratings); 5 C.F.R. part 351 (regulations issued per 5 U.S.C. §3502 requiring agencies to follow procedures for granting priority for retention of employees during RIFs). The MSPB also cited numerous cases pertaining to RIF procedures, including Bielomaz v. Dept. of Navy, 86 M.S.P.R. 276 (2000), which indicates that probationary employees are included in RIF procedures.

[205] 5 C.F.R. §315.804. *See* McGuffin v. Soc. Sec. Admin., 942 F.3d 1099 (Fed. Cir. 2019) (describing the rights and procedures of probationary employees to be terminated for failure to demonstrate fitness).

[206] 5 C.F.R. §315.805.

the hire, such as a closure of the agency). Probationary employees do not have full appeal rights, but they do have a right not to be fired arbitrarily, discriminatorily, or for political reasons.

The mass layoffs violate this rule. Although some employees report having received conclusory termination notices stating their "ability, knowledge, and skills do not match the Agency's current needs," or was "in the government's interest" or "in accordance with the priorities of the Administration," the mass firings, the absence of particularized evidence, the fact that the notice in some cases was sent weeks after the employee was locked out of the computer system, and the existence of recent positive reviews from supervisors, and the absence of involvement by or even knowledge of the employees' actual supervisors regarding the firing, make clear that the firings were not based on "work performance or conduct" during the probationary period, as the regulation requires, and the notices did not explain "the agency's conclusions as to the inadequacies of [the employees'] performance or conduct."[207]

The second is the law regulating reductions in force (RIF) of federal employees. All federal employees are protected by the RIF procedure, which requires ranking employees by seniority, veteran's preference, length of service, and performance, laying off in order of ranking, and probationary employees are entitled to be retained in preference to certain temporary and term employees.[208] All who are RIF'd are entitled to advance notice, as are states in order to allow them to plan for mass unemployment.

One of the government's principal defenses has been that federal employees may challenge their termination only before the MSPB (in the case of a violation of the CSRA, the Hatch Act, or the Whistleblower Protection Act or any of the antidiscrimination laws protecting federal employees) or the FLRA (in the case of a firing alleged to be an unfair labor practice relating to the rights to unionize and bargain collectively).[209] It is noteworthy that Trump also fired the heads of the MSPB and the FLRA, rendering them temporarily defunct for lack of a quorum, and has not nominated replacements.[210] But employees have also filed charges in those agencies.

Courts rejected both the administration's contentions that the exclusive forums are the MSPB and the FLRA and that the CSRA allows agencies to fire probationary employees without cause and without any process other than sending a letter notifying the employee of the firing on the date of firing and to fire all employees without cause or individualized hearing in a reduction in force (RIF). The courts and the MSPB reasoned that the mass firings were plausibly alleged to be

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[207] Accounts of termination notices like this are given by affected civil servants on the We the Builders site (see, e.g., https://www.wethebuilders.org/posts/merit-is-a-myth) and in the cases brought by or on behalf of fired probationary employees, State of Maryland v. U.S. Dept. of Agriculture, No. JKB-25-0748 at 35-36 (Mar. 13, 2025) See 5 C.F.R. 315.804.

[208] 5 C.F.R. §351.501

[209] *See, id.* (rejecting the argument).

[210] *See infra* (discussing the legality of removal of heads of independent agencies).

a reorganization rather than based on individuals' performance and that a reorganization triggers RIF procedures requiring the agency to take into account efficiency or performance ratings for all employees, probationary or not.[211] The courts held that the agency terminations violated the RIF provisions of the CSRA and, therefore, the APA because they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[212]

The mass layoffs may also violate collective bargaining agreements between the agencies and the unions representing the laid off workers. The new leadership of OPM, however, has taken a narrow view of the collective bargaining rights of affected workers, both as to whether the union has a right to bargain about the scope (as opposed to the effects) of layoffs and as to whether the agency has a duty to provide information to enable the union to bargain about whatever subjects are within the scope of bargaining.[213] In a March 12 memo to all agencies and departments, OPM advised agency heads to look for CBA language waiving the right to bargain about a RIF, and suggested that a management rights clause (a standard term in many CBAs) governing agency "organization" or "number of employees" may eliminate the need to bargain.[214] Moreover, the memo counseled that CBA restrictions on such management rights are inconsistent with OPM regulations regarding hiring and layoff, and advised agencies to take a narrow view of the right of unions to demand information regarding layoffs.[215]

D. The Constitution

The attack on the civil service acquired a constitutional theory to justify it during the Reagan Administration. Attorney General Edwin Meese, working with a group of young lawyers, including future Supreme Court justices John Roberts and Samuel Alito, developed the idea that Article II of the Constitution confers unilateral power on the President to control the entire

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[211] State of Maryland v. U.S. Dept. of Agriculture, No. JKB-25-0748 (Mar. 13, 2025); [cite Alsup case when opinion/order is disseminated]. In a pair of cases, Special Counsel ex rel. John Doe v. Dept. of Agriculture, CB-1208-25-0020-U-1 (MSPB Mar. 5, 2025), and Special Counsel ex rel. John Doe v. Dept of [blanked out], CB-1208-25 [blanked out] (Feb. 25, 2025), two different members of the MSPB stayed the firing of probationary employees. Both decisions, neither of which is precedential, cite 5 U.S.C. §3502 (directing OPM to prescribe regulations for release of employees in a RIF which give "due effect to" tenure of employment, military preference, length of service, and efficiency or performance ratings); 5 C.F.R. part 351 (regulations issued per 5 U.S.C. §3502 requiring agencies to follow procedures for granting priority for retention of employees during RIFs). The MSPB also cited numerous cases pertaining to RIF procedures, including Bielomaz v. Dept. of Navy, 86 M.S.P.R. 276 (2000), which indicates that probationary employees are included in RIF procedures.

[212] 5 U.S.C. §706(2)(A); 5 U.S.C. § 3502.

[213] Charles Ezell to Heads and Acting Heads of Departments and Agencies (Mar. 12, 2025), available at https://federalnewsnetwork.com/wp-content/uploads/2025/03/Guidance-on-collective-bargaining-on-ARRPs-FINAL.pdf (viewed March 26, 2025).

[214] Id.

[215] Id.

executive branch. This became known as the theory of the unitary executive.[216] As Attorney General Meese explained in a 1985 speech, the theory justified challenges to the independence of agencies created in the Progressive and New Deal eras. Proponents of the unitary executive idea justified it in terms of transparency and accountability. As Professor Skowronek said, the conservatives who advocated the unitary executive tied the fact that the President the one officer voted on by the entire nation "to the notion that the selection of the President had become, in effect, the only credible expression of the public's will." Having "fused" the "public voice" to the will of the President, "extra-constitutional controls could be rejected as inconsistent with democratic accountability, and the vast repository of discretionary authority over policy accumulated in the executive branch could be made the exclusive province of the incumbent."[217] The history and constitutional debates around the unitary executive have been carefully studied by others. Less well known is that it also has been mobilized by conservative activists as the basis for attacking the political independence of the *entire* federal civilian workforce and the civil service and collective bargaining rights that flow from it.

To understand the breadth of the assault on the merit-based government employment system, it is important to understand that the Supreme Court has lately ruled that the constitution imagines there are three broad categories of federal government employees (other than those who are elected officials): "principal officers," "inferior officers," and "employees."[218] Principal officers are those who are nominated by the President and confirmed by the Senate. Inferior officers are those who are appointed by the President, by a court, or by heads of departments.

These two categories are defined in the Appointments Clause of Article II, § 2. It provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[219] A great deal of writing–more than could be cited here–explores the question of what is meant by this language. Who is an "inferior Officer"? Which government workers are not officers at all? And, importantly, although the Appointments Clause spells out the power to appoint, it says nothing about the power to remove.

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[216] Deborah Pearlstein, *The Democracy Effects of Legal Polarization: Movement Lawyering at the Dawn of the Unitary Executive*, 2 J. AM. CONST. HIST. 357, 365-66 (2024); Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Development Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070 (2009).
[217] Skowronek, *The Conservative Insurgency*, *supra* at 2098.
[218] *Lucia v. Securities Exch. Comm'n*, 585 U.S. 237, 244-45 (2018).
[219] U.S. CONST. art. 2, § 2.

A branch of the conservative legal movement seized on the Appointments Clause as a tool to reduce the number of federal employees who can be appointed by any method other than by the President, a court, or a department head. And they embraced the notion that the power of appointment includes the power to remove, except they insist that although the Senate is involved in appointing, nobody but the President or his designee has the power to decide on removal. Both the 2020 and the 2025 Policy/Career Executive Orders claim to expand the President's unfettered power from officers to *all* government employees.[220]The Trump Administration's effort to reduce the scope of the civil service and to remove without cause officials who enforce the CSRA, the Whistleblower Protection Act, and other federal employee job rights, is both unwarranted by Article II and inconsistent with the First Amendment. The administration's argument that civil service protections are inconsistent with Article II is radical and wrong. Not since 1883 has the President or his party had the power to fire civil servants protected by congressional statute. Nor does Article II license the President to fire government employees in violation of any other statutory protection, such as those prohibiting discrimination on the basis of race, religion, gender, veteran status, or whistleblowing. Moreover, even if Article II gave the President power to remove employees below the level of "principal" and "inferior officers," that power–like all other Article II powers–cannot be exercised to discriminate against people based on their beliefs or political affiliations in violation of the First Amendment. In sum, as explained below, Article II does not allow the President to flout job protections enacted by Congress, and the First Amendment does not allow the President to hire, promote, or fire based on political beliefs.

1. Article II

Advocates of Schedule P/C argue the President has the constitutional authority to except large swaths of the federal workforce from civil service protections, notwithstanding any statutory protections, under their unitary executive conception of the Appointments Clause. As one commenter baldly put it to OPM, job protections for federal employees "usurp presidential authority" because "all employees of the Executive Branch serve at the sole discretion of the President and any laws, rules, regulations, or guidelines that restrict this discretionary power subvert the authority of the U.S. Constitution and as such are unconstitutional."[221] Although this argument has not yet been addressed in the cases involving the mass layoffs of probationary employees, it is expected to be presented.

This is a radical argument. If followed, it would find that all statutory protections for federal workers are unconstitutional. No court has yet taken this view.

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[220] Exec. Order No. 13957, Oct. 21, 2020, 85 Fed. Reg.. 63561 (10/26/2020); Restoring Accountability to Policy-Influencing Positions within the Federal Workforce, Exec. Order No. __, 85 Fed. Reg. __ (Jan. 20, 2025).
[221] 89 Fed. Reg. at 25007.

In fact, the early constitutional litigation was not strongly in favor of this position. The first case, from 1839, arose when a new federal district judge replaced the clerk of the court, the judge candidly said, for no reason other than the replacement was a friend.[222] The Supreme Court declined to rule that the replacement by a judge violated the Appointments Clause, which empowers "courts" (as opposed to individual judges) to make appointments.[223] But because judges' decisions in hiring clerks are so closely tied to the judicial function, the case sheds little light on how the Court regarded the Appointments Clause as applied to the executive branch.

The next case, from 1879, interpreted the Appointments Clause provision empowering department heads to appoint inferior officers. A physician appointed to determine eligibility of applicants and recipients of government pensions for those injured in the Civil War was indicted for extorting payments from the pensioners in addition to the sums he received from the government for his services. Finding that he was not appointed by a department head, the Court concluded he was not an officer and therefore was not subject to prosecution under a statute criminalizing extortion by an "officer of the United States."[224] This decision suggests that employees of the United States, as distinguished from officers and inferior officers, occupy a distinctly different constitutional position.

A few years later, the Court considered whether, for those who are not officers appointed by the President, Congress may grant protections against removal. In *United States v. Perkins*, the Supreme Court determined that Congress had validly provided by statute that naval officers could be removed during peacetime only pursuant to a decision of a court martial.[225] In *Perkins*, a cadet engineer was summarily discharged from the Navy in 1883 on the grounds that his service was not needed. The government asserted that because the Secretary of the Navy had the power to appoint him, he also had the power to dismiss him at will. The Court disagreed, explaining, "We have no doubt that when congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest."[226] The statute authorizing appointment of naval officers specified that "no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."[227] This decision was followed in *Morrison v. Olson*,[228] which, in a 7-1 decision, upheld the power of Congress to insulate independent counsel from executive removal. More important,

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[222] *Ex Parte Hennen*, 38 U.S. 225, 226 (1838).
[223] *Id. See* James E. Pfander, *The Chief Justice, The Appointment of Inferior Officers, and the "Court of Law" Requirement*, 107 NORTHWESTERN L. REV. 1125, 1152 (2013).
[224] *U.S. v. Germaine*, 99 U.S. 508, 509 (1878).
[225] 116 U.S. 483 (1886).
[226] *Id.* at 485.
[227] *Id.* at 484.
[228] 487 U.S. 654 (1988).

for the civil service, *Perkins* was, Robert Post, the historian of the Taft Court, observed, "the constitutional rock on which the federal civil service was erected."[229]

Until recently, there was only one Supreme Court decision suggesting that the Appointments Clause limits the power of Congress to protect executive branch officials from at-will removal, and even that case, *Myers v. United States*, accepts the constitutionality of Congress's creation of civil service protection. In *Myers,* the Court, in an opinion by Chief Justice Taft, held that the Appointments Clause conferred on the President the right to remove a first class postmaster.[230] However, Taft's opinion for the Court noted the "evil of the spoils system" that Congress had outlawed in 1883, and noted further that positions covered by the merit system "may still be enlarged by further legislation," and made clear that the holding of the case "works no practical interference with the merit system."[231] The postmaster whose job was at issue in the case was appointed by the President and confirmed by the Senate, a job category that Congress had specifically excepted from the civil service protection.[232] "If such appointments were vested in the heads of departments to which they belong, they could be entirely removed from politics," and there would be no constitutional issue with granting protection against removal.[233]

The dissents of both Justice McReynolds and Justice Brandeis faulted Taft's legal and political history from 1789 to the 1920s as well as his account of the separation of powers. Both McReynolds (no fan of what came to be known as the administrative state) and Brandeis pointed out that the Court's approach to executive power cast doubt on scores of statutes creating commissions, agencies, and tribunals to regulate the economy–from the Interstate Commerce Act of 1887 to the Railway Labor Act of 1926. Professor Post quoted Edward Corwin, the great constitutional law scholar of the era, criticizing the reasoning of *Myers* for creating a constitutional paradox: "while the Constitution permitted Congress to vest duties in executive officers in the performance of which they were to exercise their own independent judgment, it at the same time permitted the President to guillotine such officers for exercising the very discretion which Congress had the right to require."[234] And Professors Katz and Rosenblum have argued that Taft's opinion "did not explicate a preexisting tradition of presidential power; it invented one."[235]

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[229] Robert Post, [holmes devise volume]
[230] 272 U.S. 52, 176 (1926).
[231] *Id.* at 173.
[232] *Id.* at 174.
[233] *Id.* Moreover, as Professors Andrea Katz and Noah Rosenblum and Robert Post have observed, correspondence between Chief Justice Taft and other members of the Court during the deliberations over *Myers* reveal that all agreed that Article II did not prevent Congress from establishing civil service protections for federal employees. Andrea Scoseria Katz & Noah Rosenblum, *Becoming the Administrator-in-Chief:* Myers *and the Progressive Presidency*, 123 COLUM. L. REV. 2153 (2023); [cite Post]
[234] *Id.* at __ (quoting Edward S. Corwin, The President as Administrator in Chief, 1 J. Politics 17, 50 (1939)).
[235] Andrea Scoseria Katz & Noah A. Rosenblum, *Becoming the Administrator in Chief:* Myers *and the Progressive Presidency*, 123 COLUM. L. REV. 2153, 2153 (2023).

Less than a decade later, however, the Court recognized, as Congress created independent agencies with the intent to remove policymaking from what it considered the pernicious effect of lobbying, that Congress could provide job security for the agency heads. In *Humphrey's Executor v. United States*, the Court upheld a statute insulating the commissioners of the Federal Trade Commission from removal except for "inefficiency, neglect of duty, or malfeasance in office."[236] The Court reasoned that the FTC was designed to be "non-partisan"; by statute no more than three of its five members were to be of the same political party. It was also to "act with entire impartiality," and to exercise "the trained judgment of a body of experts."[237]

The Court has continued to adhere to this approach. In *Weiner v. United States* the Court went further and held that even without a statutory limit on removal, the President could not remove executive officials where independence from the President is desirable.[238] Regardless of the absence of statutory protection against removal, the Court concluded that the functional need for independence (in that case of the War Claims Commission) limited the President's removal power because Congress intended the commission to award claims on merit rather than political influence.[239]

The Court has also upheld removal restrictions when necessary to assure an agency's independence. In *Morrison v. Olson*, the Court upheld the constitutionality of limits on the President's ability to remove the independent counsel, where the statute creating the independent counsel permitted her to be removed by the attorney general only for cause.[240] The Court contrasted *Bowsher v. Synar*, where the Court had declared unconstitutional Congress's exercise of the removal power over an individual performing executive tasks, with the independence needed for an independent counsel.[241]

The Roberts Court, however, has begun a revolution, reading Article II to impose limits on both the *appointment* and the *removal* of government officials. It further reads those limits as enforcing a principle of presidential *control* of policymaking. What remains uncertain, as scholars have observed, is whether the Court will extend Article II to allow complete presidential discretionary control over all aspects of *administration* as opposed to just *policymaking*.[242] As for appointments, the Court in *SEC v. Lucia*, determined that ALJs of the SEC exercise "significant discretion" in carrying out "important functions" and "hold a continuing office established by law," and are therefore officers of the United States who must be appointed in the manner

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[236] 295 U.S. 602, 620 (1935) (quoting 15 USC § 41).
[237] *Id.* at 624.
[238] 357 U.S. 349 (1958).
[239] *Id.* at 353.
[240] 487 U.S. 654 (1988).
[241] *Id.* at 685-86.
[242] *See* Rosenblum & Hills, *supra* n. __ .

described by the Appointments Clause.[243] And, in 2021, in *United States v. Arthrex, Inc.*, the Court declared job protections for Administrative Patent Judges, who were appointed and removable by the Secretary of Commerce, unconstitutional.[244] The Chief Justice's opinion emphasized that Administrative Patent Judges rendered final decisions on patent validity and the Director of the Patent and Trademark Office who appoints them, assigns them to cases, determines whether cases proceed to their review, and sets their pay, lacked one power that in the Court's view is essential: the power to actually decide each case.[245]

The Schedule P/C EO justification for carving out policy-involved jobs from civil service protection is that civil servants exercise discretion. One could imagine that argument being expanded in a constitutional challenge to the CSRA into a requirement of Article II. The argument might be for SES, or even for lower-level civil servant food or OSHA inspectors, environmental scientists, park rangers, transportation analysts, bank examiners, IRS accountants, or statisticians employed by the BLS or other government statistics agencies, all perform "important functions" and exercise discretion. And their jobs are established by law. That their decisions are reviewable by others may not satisfy the *Lucia/Arthrex* standard if, as a practical matter, their supervisors lack the power to change their analysis. There is a significant difference between making policy about the extent of risk to tolerate regarding workplace safety or foodborne illness or about the target level of unemployment for the nation's economic health, and the administration of a system of inspections of workplaces or meatpacking plants or the data engineering and analysis of employment data.

As for for-cause removal, the Roberts Court has read *Humphrey's Executor, Weiner,* and *Morrison* as representing the "outermost constitutional limits of permissible congressional restrictions on the President's removal power."[246] It has ruled that two categories of government officials can be protected against removal but for cause: multimember expert agency heads who do not wield substantial executive power, and inferior officers with no policymaking or administrative authority.[247] In the firings of both civil servants and the heads of agencies Congress intended to protect them, litigation has focused both on the multi- versus single-member issue and on the question whether they exercise substantial executive power.

The Roberts Court opinions on which the administration's arguments rest began in 2010 with *Free Enterprise Fund v. Public Company Accounting Oversight Board*, in which the Court held

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[243] *Securities and Exch. Comm'n v. Lucia*, 585 U.S. 237 (2018). On the implications of this definition of the ALJ jobs covered by the Appointments Clause, and its likely impact on the 1655 ALJs who handle Social Security cases, see Article II–Appointments Clause–Officers of the United States–*Lucia v. SEC*, 132 Harv. L. Rev. 287 (2018).
[244] 594 U.S. 1, 23 (2021).
[245] *Id.* at 14.
[246] *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 594 U.S. 1, 6 (2021).
[247] *Id.* at 6.

that Article II prevents Congress from granting for cause removal protection to an officer when the officer empowered to remove them also enjoys removal protection.[248] Chief Justice Roberts, writing for the majority in a 5-4 split Court, found this two-layer protection rule to exist in the power conferred on the President in Article II. The opinion is peppered with phrases suggesting that the Court was concerned with protecting democracy from the deep state. The Court noted President Harry Truman's frustration with federal employees and said: "In its pursuit of a "workable government," Congress cannot reduce the Chief Magistrate to a cajoler-in-chief."[249] And the Court said: "One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders."[250]

To allay concerns that this new constitutional doctrine would render civil service law unconstitutional, Chief Justice Roberts said: "We do not decide the status of other Government employees, nor do we decide whether lesser functionaries subordinate to officers of the United States must be subject to the same sort of control as those who exercise significant authority pursuant to the laws. … Nothing in our opinion, therefore, should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies."[251] But its decisions on ALJs do not instill confidence.

Moreover, the Court has steadily expanded the scope of its rulings on Article II removal powers. In 2020, in *Seila Law LLC v. Consumer Financial Protection Bureau*, the Court (in an opinion by Chief Justice Roberts) held that Article II authorized the President to remove the head of a single-member commission or agency who exercised significant executive authority.[252] The Court emphasized the importance and breadth of the executive power exercised by the Director of the Consumer Finance Protection Bureau. It questioned the wisdom of having a single Director who did not need to secure agreement from colleagues to make policy, and asserted the desirability of having Presidential control over such a person.[253]

And, in *Collins v. Yellen*, the Court declared unconstitutional removal protection for the single Director of the Federal Housing Finance Agency, an independent agency created by Congress after the 2008 mortgage meltdown to supervise the Fannie Mae and Freddie Mac, the two federally-created private entities that purchase and securitize home mortgages.[254] In a majority opinion by Justice Alito, a splintered Court ruled that the FHFA Director exercises sufficient

[248] 561 U.S. 477 (2010).
[249] *Id.* at 502.
[250] *Id.* at 499.
[251] *Id.* at 506 (internal quotation marks omitted).
[252] 591 U.S. __ (2020).
[253] Id at __.
[254] 594 U.S. 220, 228 (2021).

executive power that he must be removable at will.[255] The opinion noted that FHFA is empowered to issue rules and regulations, to issue subpoenas, and to put Fannie Mae and Freddie Mac into conservatorship and to appoint itself as conservator.[256] But the opinion also said that the constitutionality of removal protections does not depend on an inquiry into "the importance of the regulatory and enforcement authority" of various agencies.[257] This matters because, as noted below, the litigation over the Trump Administration's firing of officials that head various government agencies has focused, in part, on whether they exert significant *executive* authority. Dissenting justices in *Collins* insisted that the majority "careen[ed] right past" the limits in *Seila*, as Justice Kagan put it, and disregarded the distinction that the *Seila Law* opinion drew between the CFPB and the FHFA.

The Court has thus appeared to invent a framework by which Congress must structure government. The President nominates and the Senate confirms "principal" officers. The President, or a department head, or a court appoints "inferior" officers. These, the Court suggests, are the *only* two kinds of government officials who may "exercise significant authority pursuant to the laws of the United States."[258] And they must be removable by the President at will, unless they are a member of a multimember board or commission. Beyond that, the "lesser functionaries such as employees and contractors" may not exercise "significant and unreviewable authority."[259]

The implications of this novel interpretation of the Constitution are significant. One possibility is that the Court has committed itself to supervision of how the Congress and the executive branch assign responsibilities. No employee can exercise "significant and unreviewable authority" unless they are either a Senate-confirmed political appointee or the next level down of appointee who is appointed by the President, or a department head, or a court. On this analysis, the civil service system will remain intact, but litigants who are dissatisfied with executive or independent agency action can sue to invalidate it if the decisionmaker was too low in the governmental hierarchy to satisfy the Court's sense of a desirable organizational hierarchy. This is what happened in *Arthrex.* The Court decided that a certain category of federal employee (an ALJ) had too much responsibility and too little supervision, so they declared the employee's act unconstitutional.[260]

Alternatively, and perhaps just as pernicious, the Court may conclude that Congress or agencies may assign job responsibilities as they deem appropriate, so long as those who make decisions

[255] Id. at 253.
[256] Id. at 254.
[257] Id. at 253.
[258] *Id.* at 13 (cleaned up).
[259] *Id.*
[260] Id.

can be fired at will, thus rendering job protections for a potentially vast swath of the executive branch unconstitutional.

Either way, it appears that the Court has decided that Article II makes it a kind of super-personnel department for the executive branch and the independent agencies. It can invalidate executive actions if it thinks the decisionmaker was too low in the government's organization chart, or it can invalidate a statute that confers job security on the decisionmaker. Employment lawyers who have long complained about courts dismissing employment discrimination suits by saying that "federal courts hearing employment discrimination claims do not sit as a super-personnel department that reexamine an entity's business decisions"[261] suddenly find that the Supreme Court is quite willing to be a super personnel department reexamining the decisions of the other branches of government. And when the Court dismissed a First Amendment whistleblower claim of a lawyer concerned about unconstitutional police conduct and perjury in a search warrant, the Court emphasized that "government offices could not function if every employment decision became a constitutional matter."[262]

At the very least, it is clear that the Court is sympathetic to the unitary executive philosophy. The Court has recently described the President as "the only person who alone composes a branch of government."[263] The question is how far the Court is willing to take the unitary executive theory and whether it is willing to extend it so far as to declare all limits on presidential removal – from the CSRA, collective bargaining agreements, or even employment discrimination laws – unconstitutional.

Applying this framework, officials fired from MSPB, OSC, and other agencies have challenged their firings.

As regards the MSPB, which by statute has three members, only two of which may be from the same political party, a district court permanently enjoined the removal of Member Cathy Harris without cause.[264] Judge Contreras observed both that the MSPB has multiple members and that it does not wield substantial executive power. As to the first, the judge noted that *Seila Law* said Congress could grant for-cause removal protection to the heads of CFPB "by converting the CFPB into a multimember agency."[265] Judge Contreras also noted that MSPB, like the Federal Trade Commission whose members' for-cause removal protection the Court upheld in *Humphrey's Executor*, is a "nonpartisan body of experts" who serve overlapping, staggered

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[261] *See* Greenslade v. Chicago Sun-Times, Inc., 112 F.3d 853 (7th. Cir. 1997); Kneibert v. Thomson Newspapers, Michigan, Inc., 129 F.3d 444 (8th Cir. 1997).
[262] Garcetti v. Ceballos, 547 U.S. 410, 419 (2006) (quoting Connick v. Myers, 461 U.S. 138, 143 (1983)).
[263] Trump v. United States, 603 U.S. 593, 610 (2024) (quoting Trump v. Mazars USA, LLP, 591 U.S. 848, 868 (2020)).
[264] Harris v. Bessent, 2025 BL 70359 (D.D.C. 2025).
[265] *Harris*, 2025 BL 70359 at page 7, quoting *Seila Law*, 591 U.S. at 237.

seven-year terms, which both enables the President to shape the leadership and the Members to "accumulate expertise."[266] Moreover, the *Harris* judge reasoned, the MSPB, like the FTC, is quasi-judicial, with its decisions reviewable in federal court, and its rulemaking power is limited to its own internal procedures, which means it is not executive. It does not regulate private parties (unlike the CFPB and FHFA), it does not investigate or initiate investigations, but rather must "passively wait" for cases to be brought, it preserves the power of the Executive Branch by keeping claims of employees for mediation and initial adjudication within an executive branch agency rather than in federal court, and its decisions are not final, as they are subject to federal court review at the behest of the employee or OPM.[267] Moreover, the MSPB, like the independent counsel role upheld in *Morrison v. Olson*, needs independence to serve its function.

Another district court enjoined removal of the single member head of OSC on the basis of the lack of executive power and the importance of independence. Although a split panel of the D.C. Circuit stayed the decision and the OSC abandoned the challenge to his removal, the district court's reasoning is worth noting. The district judge observed "the defining and essential feature of the Office of Special Counsel as it was conceived by Congress and signed into law by the President: its independence. … [H]is independence is inextricably intertwined with the performance of his duties," which are "to look into and expose unethical or unlawful practices directed at federal servants, and to help ensure that whistleblowers who disclose fraud, waste and abuse on the part of government agencies can do so without suffering reprisals. It would be ironic, to say the least, and inimical to the ends furthered by the statute if the Special Counsel himself could be chilled in his work by fear of arbitrary or partisan removal."[268] The need for independence of those charged with such investigation formed the basis of the Court's opinion in *Morrison v. Olson*, the continuing vitality of which the Court recognized in *Seila Law.* Justice Rehnquist's opinion for 8 justices in *Morrison* noted the that "Congress, of course, was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers."

[Say something about the fate of the Harris ruling in the D.C. Circuit]

2. The First Amendment

The ongoing firings of government employees appears to be at least in part because of their political views. In the case of firing probationary employees, it may be because they are imagined to be sympathetic to the aims of the Biden Administration because they began their position during that Administration. Or it may be because they are imagined to be sympathetic to

[266] Id. at 7 (quoting *Humphrey's Executor*, 295 U.S. at 624.
[267] Id. at 8.
[268] Dellinger v. Bessent, No. 25-0385 (ABJ), at 4 (D.D.C. 2025).

the goals of their agency (as in the case of CSPB and US AID). Or because of their work on matters that the president deplores (as in the case of the lawyers and FBI agents who worked on the January 6 cases or for the Independent Counsel). Firing them implicates the First Amendment rights of public employees. Even if the President is accorded expansive power under Article II, still his power is limited by the First Amendment.

It will be necessary to prove that the firing and replacement of probationary or other employees is because of their off duty political speech, rather than because of the president's distaste for the work they did as part of their job (such as prosecuting him or those who committed crimes on January 6). Speech as part of one's job is government speech that is not subject to the First Amendment.[269]

In *Elrod v. Burns*, the Supreme Court held that state and local government agencies could not make hiring or replacement of government employees conditional on membership in or support of the political party in power.[270] All of the arguments made in favor of Schedule Policy/Career were considered and rejected by the plurality in *Elrod*. In that case, the Cook County Sheriff's Department defended the practice of replacing employees who affiliated with the opposing political party by asserting that replacement was necessary to provide "the incentive to work effectively" and to prevent staff from "subvert[ing] the incumbent administration's efforts to govern effectively."[271] The Court was "doubtful that the mere difference of political persuasion motivates poor performance; nor do we think it legitimately may be used as a basis for imputing such behavior."[272] The Court also rejected the notion that patronage in hiring and firing ensures accountability to the public. The Court's view was that allowing the firing lower-level employees for cause and the political appointment of high-level officials were sufficient to ensure the accountability of elected officials to the electorate.[273]

Of course, all of these judgments of the majority of the 1976 Supreme Court about the need for First Amendment protection from patronage in hiring may be quite different, and even diametrically opposed, to the current Court majority. But, as the Court then said, and as remains true today, hiring and firing government employees based on their political party affiliation is a sharp content-based discrimination restriction on the rights of political speech and association that are core to the First Amendment. It is not plausible to argue that political discrimination is narrowly tailored to serve a compelling governmental interest, thus justifying the violation of First Amendment rights. The federal government appears to have operated adequately at least since the Hatch Act prohibited political discrimination in 1939, and to a lesser extent since the Pendleton Act was adopted in 1883.

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[269] *See Garcetti*, 547 U.S. at 421.
[270] 427 U.S. 347 (1976).
[271] *Id.* at 364.
[272] *Id.* at 365.
[273] *Id.* at 367.

The Court majority extended the principle from *Elrod v. Burns* to confidential employees (lawyers) in *Branti v. Frankel*, observing, "whatever policymaking occurs in the public defender's office must relate to the needs of individual clients and not to any partisan political interests. Similarly, although an assistant is bound to obtain access to confidential information arising out of various attorney-client relationships, that information has no bearing whatsoever on partisan political concerns."[274]

Finally, the Court applied the First Amendment freedom of political belief and association to promotion and transfer decisions in *Rutan v. Republican Party*.[275] The parties described in that case and elaborate system operated by the Illinois Governor's office for assessing all agency recommendations for hiring, transfers, and promotions that "looked at whether the applicant voted in Republican primaries in past election years, whether the applicant has provided financial or other support to the Republican Party and its candidates, whether the applicant has promised to join and work for the Republican Party in the future, and whether the applicant has the support of Republican Party officials at state or local levels."[276] The Court held, 5-4, that this personnel system violated the First Amendment rights of government employees. In *Rutan*, the Court said "the First Amendment not only limits firings because of political party affiliation, but also restricts decisions about promotions, transfers, and recalls after layoffs based on political affiliation or support."[277]

What the Court declared unconstitutional as violating the First Amendment in these cases is quite similar to what has been reported about the National Security Council in January, where the Trump Administration targeted subject matter experts from the Departments of State and Defense, the FBI, and the CIA who had been detailed to the NSC. Today, as in *Rutan*, staff working at the behest of Mike Waltz, Trump's National Security Advisor, eviewed the off-duty political activities, affiliations, and contributions, as well as their beliefs as expressed on social media, of all subject matter experts working at the NSC.[278] Today, as in *Rutan*, the names of those who are deemed insufficiently aligned with the President and his party, were submitted to someone who ordered that the suspected non-MAGA government employees be transferred from the NSC back to whichever government department or agency where they worked before. Waltz said he wanted everyone working at the NSC to be "100% aligned with the president's agenda,"

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[274] 445 U.S. 507, 519 (1980).
[275] 497 U.S. 62 (1990).
[276] *Id.* at 66.
[277] *Id.* at __.
[278] Aamer Mahdani & Zeke Miller, *Incoming Trump Team Questioning Civil Servants at National Security Council About Their Loyalty*, L.A. TIMES (Jan. 13, 2025), https://www.latimes.com/world-nation/story/2025-01-13/incoming-trump-team-questioning-civil-servants-at-national-security-council-about-their-loyalty.

and that anyone who is not would be reassigned to the agency where they worked before transferring to the NSC.[279]

Under current First Amendment law, this is impermissible, regardless of how the CSRA is interpreted and regardless of how the Court defines the scope of executive power.

Anticipating this objection, the 2025 EOs was the addition of language stating that employees or applicants for Schedule Policy/Career positions "are not required to personally or politically support the current President or the policies of the current administration."[280] But the 2025 EO goes on to say that employees "are required to faithfully implement administration policies to the best of their ability, consistent with their constitutional oath and the vesting of executive authority solely in the President. Failure to do so is grounds for dismissal."[281] The question is how much of the second and third sentences undermine the first.

First, the NSC's dismissal of numerous employees after a political vetting suggests the administration has no intention of complying with this language. Second, even if the NSC is an anomaly and other agencies will refrain from making personnel decisions based on politics, if the administration takes the position that government employees must do whatever the political appointee who supervises them says, regardless of the legality of the action, because of the "vesting of executive authority solely in the President," then there is little protection at all.

Conclusion

To ensure that the President has the ability to implement policy, it is widely accepted that an incoming administration is empowered not only to replace the Cabinet and other high-level officers, but over 4,000 government workers, over 2500 of whom are not high enough in the hierarchy to require Senate confirmation. In addition, a variety of policymaking government employees are excepted from full civil service protections under Schedules A through E of the regulations implementing the current federal civil service law. For every President in recent memory, this has been sufficient to ensure that the bureaucracy was responsive to a new administration's policy agenda.

The Trump Administration's effort to eliminate civil service protections and to fire an untold number of federal employees goes further in scope or numbers than any prior President, including even the last months of the first Trump presidency. It appears to be aimed not only at eliminating the civil service principles of nonpartisanship and merit selection, but also the rights of federal employees to unionize and bargain collectively and to blow the whistle on unlawful

[279] *Id.*
[280] 2025 EO at section 6(b).
[281] *Id.*

government conduct. The claim of a need to have this power to increase the effectiveness of the federal bureaucracy is unproven. It would clearly violate federal statutes. It is an extraordinary and thus far unsupported interpretation of the executive power under Article II. It also would violate the First Amendment. Making all federal employees subject to firing for their political views is bad for democracy and bad for public administration.