May 23, 2025
Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415-1000

Re: "Improving Performance, Accountability and Responsiveness in the Civil Service," Proposed Rule, 90 Fed. Reg. 17182, Docket ID: OPM-2025-0004

To the Office of Personnel Management,

Thank you for providing this opportunity to comment on the proposed rule limiting civil service protections. As Professors who have written extensively about administrative and constitutional law, we are strongly opposed to OPM's Proposed Rule. The Proposed Rule would undermine the civil service system created by Congress and facilitate presidential dismantling of administrative government.

We believe that the proposed action will not only create an unacceptable risk of unfair treatment of individual employees but will also substantially weaken the executive branch by deterring qualified workers from joining or remaining in government employment. We are also concerned about the likely chilling effect on candid discussions within the government. As OPM acknowledges, a phalanx of "yes men" will ill-serve any President, yet that is what the proposed regulation would incentivize.

Although we do not go into the topic here, we do support OPM's position that the positions covered by the P/C Schedule will remain subject to merit-based, competitive hiring rather than being patronage positions. But this policy is undermined by the ability of superiors to instantly fire the same individuals without cause.

Problems with the Proposed Rule's Understanding of the President's Article II Powers

The Proposed Rule argues that law cannot constrain the President in his exercise of authority over the executive branch of government, including when it comes to the removal of civil servants. This interpretation of the President's constitutional authority is both mistaken and dangerous. It is mistaken because it relies on an overly broad understanding of "the executive power"[1] and misunderstands the President's constitutional duty to "take Care that the Laws be faithfully executed."[2] It is dangerous because, taken for all that it is worth, it would virtually eliminate Congress's ability to craft administrative procedure or to

[1] U.S. Const. Art. II, Sec. 1, Cl. 1.
[2] U.S. Const. Art. II, Sec. 3.

limit agency discretion. All of administration would be subject to the President's control, to destroy or repurpose as he sees fit. This vision of unrestricted authority flies in the face of the careful scheme of separation of powers set up by the Constitution's drafters.

The Proposed Rule states that "[]the Constitution gives the President authority to set federal workforce policy, vesting executive power exclusively in the President."[3] As OPM has previous recognized, however, while the President does have the power to create excepted service schedules when "necessary" and when "conditions of good administration warrant" and to direct OPM to issue regulations, Congress too has an important role to play in shaping the civil service.[4] It is Congress, after all, that has the power to make all laws necessary and proper to the operations of each of the branches.[5] Even as to inferior officers appointed by the head of a department, the Court has upheld requirements of good cause before termination.[6] The constitutional argument for at-will removal of employees rather than inferior officers is all the more tenuous. Most of the workers covered by the order are officers only to the degree that judicial law clerks are officers: they offer advice or information on important issues that their superiors take seriously.

There has been no serious argument at any time since their enactment that the Pendleton Act, the Lloyd-La Follette Act, or the Civil Service Reform Act (CSRA) were mere congressional "suggestions" whose provisions the president could override at any time and for any reason. The novelty of OPM's assumption of unlimited presidential power over all government employees is an indicator of its weakness.[7]

The expansive claim of presidential power proffered by OPM in the Proposed Rule should also lead us to understand the rule differently. *None* of the safeguards and guarantees that OPM cites in the Proposed Rule can be taken at face value if the president has unfettered authority to disregard them. For example, while the Proposed Rule differs from its predecessor, Schedule F, in maintaining existing merit-based hiring practices for positions designated as Policy/Career, its logic suggests that their application is subject to presidential modification at any time.

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[3] Office of Personnel Management, Improving Performance, Accountability and Responsiveness in the Civil Service, 90 Fed. Reg. 17182, 17188 ("Proposed Rule").
[4] Office of Personnel Management, Upholding Civil Service Protections and Merit System Principles, 89 Fed. Reg. 24982, 25007 (Apr. 9, 2024) ("April 2024 Rule").
[5] U.S. Const., Article I, Section 8, Clause 18.
[6] See Morrison v. Olson, 487 U. S. 654, 685-693 (1988).
[7] See Free Enterprise Fund v. Public Co. Accounting Oversight Board, 561 U.S. 477, 505 (2010) (explaining that the most telling indication of a severe constitutional problem is the lack of any historical precedent). We are unaware of any precedent for the President acting in violation of an Act of Congress in relation to employees who do not qualify as "officers of the United States."

Problems with the Proposed Rule's Interpretation of the Relevant Statutes

As a threshold matter, OPM tries to avoid the weaknesses in its statutory claims by locating all responsibility for the new rule in the president and arguing that it is merely a pass-through implementing the president's decisions. The President, OPM argues, may unilaterally override OPM's 2024 regulations and amend parts 210 and 302 of the civil service regulations.[8] All that OPM is doing in this Proposed Rule, by its own account, is cleaning up the Code of Federal Regulations to reflect the President's actions. But OPM must ensure that its actions comply with the requirements of federal law regardless of whether it undertakes those actions to align with presidential policy or for some other reason.

Second, we disagree with OPM's interpretation of the civil service laws as allowing either the President or OPM itself to exempt such broad swaths of the federal civil service from statutory termination protections. OPM argues that reclassification of employees to eliminate their adverse action rights is "clearly authorized" by the provisions of the U.S. Code in Chapter 75, Part II, which states that the chapter shall not apply to an employee "whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character" by the President or by OPM.[9] The law also provides that the alternative adverse action rights in Chapter 43, Title V will not apply to employees "occupying a position not in the competitive service excluded from coverage of this subchapter by regulations of the Office of Personnel Management."[10]

OPM argues that these provisions create virtually unlimited discretion to strip federal civil service employees of adverse action rights, suggesting that "Congress could hardly have spoken more clearly on these matters."[11] But it is far from clear that the Congress authorized either exemptions from the competitive service on this scale or the reclassification of existing members of that service in a way that strips them of their procedural rights.

OPM itself interpreted Chapter 75 as recently as its April 2024 Final Rule as containing "terms of art" that refer only to noncareer political appointments.[12] By contrast, OPM now substitutes an acontextual reading of the phrases as including any federal employee, career or otherwise, "involved in determining, making, or advocating for government policy."[13] We believe that OPM got it right the first time. In addition to the

[8] Proposed Rule at 17187.
[9] 5 U.S.C. § 7511(b)(2).
[10] 5 U.S.C. § 4301(2)(G).
[11] Proposed Rule at 17215.
[12] April 2024 Rule at 24983.
[13] Proposed Rule at 17194.

persuasive reasons articulated in OPM's April 2024 rule,[14] we find that OPM's new interpretation is also highly suspect under the "major questions doctrine" articulated by the Supreme Court in *West Virginia v. EPA*, which suggests that courts should be skeptical of agency claims of novel and expansive statutory authority anchored in modest statutory provisions.[15] It is worth noting that, as in several other cases involving the major questions doctrine, here OPM claims it was acting under the direct supervision and at the behest of the President. The doctrine is still applicable in this context.

The major questions doctrine bolsters the already strong case for interpreting the Civil Service Reform Act more narrowly.[16] The Court has observed that it will hesitate before concluding that Congress meant to confer authority on agencies to promulgate regulations of great "economic or political significance,"[17] especially where an agency is claiming to locate unprecedented powers in ambiguous statutory text.[18] OPM itself designates the Proposed Rule a "significant regulatory action"[19] and does not attempt to deny the economic or political implications of the rule, even in its discussion of the major questions doctrine itself.[20]

The Proposed Rule predicts that the new policy/career exception will apply to approximately 50,000 employees, including about 45,000 existing employees who will be reclassified.[21] But these estimates are highly uncertain, and the Proposed Rule acknowledges that "[t]he President may move a greater or smaller number of positions."[22] The Project on Government Oversight predicted that the previous iteration of Schedule Policy/Career, Schedule F, would have impacted up to 100,000 or more federal employees, and observes that this Proposed Rule gives the administration significantly greater discretion to reclassify workers.[23] Even if OPM's conservative estimate is accurate,

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[14] *See* 2024 Final Rule at 25019-25026 (pointing to the consistent history of the term's application and the danger of a broader interpretation "turning the exception into one that 'eats the rule.'").

[15] West Virginia v. EPA, 567 U.S. 697, 723-24 (2022).

[16] It is not significant that this rule arises in the personnel context rather than the regulatory context. As the Supreme Court has observed, "experience shows that major questions cases 'have arisen from all corners of the administrative state.'" Biden v. Nebraska, 600 U.S. 477, 505 (2023).

[17] Biden v. Nebraska, 600 U.S. 477 at 501.

[18] West Virginia v. EPA, 597 U.S. 697, 723 (2022).

[19] Proposed Rule at 17221.

[20] Id. at 17215.

[21] Id. at 17220.

[22] Id. at 17220; *see also* id. at 17188 (observing that "the President—not OPM—will now move positions into Schedule Policy/Career" by executive order).

[23] Joe Spielberger, The Dangers of Trump's Schedule Policy/Career Executive Order, Project on Government Oversight (Jan. 31, 2025), https://www.pogo.org/analysis/the-dangers-of-trumps-schedule-policy-career-executive-order. Other estimates of Schedule F's impact were even higher. *See* Drew Friedman, Trump administration estimates 50,000 federal employees will lose civil service protections, Federal News Network

however, this action will impact fully 2% of the total federal workforce,[24] potentially putting at risk at least $4.5 billion in employee salaries.[25]

The Proposed Rule itself gives little indication of which positions could be affected. However, it points to both Executive Order 13957 and to OPM's guidance memo on the Order's implementation.[26] Those documents suggest that covered positions may include those where an employee has "[a]uthority to bind an agency to a position, policy, or course of action without higher level review or with only limited higher-level review," where the position entails "[s]ubstantive participation and discretionary authority in agency grantmaking, such as substantive exercise of discretion in the drafting of funding opportunity announcements, evaluation of grant applicants, or recommending or selecting grant recipients," or where the employee is engaged in "[a]dvocacy for administrative policy, either in public or before other governmental entities, such as Congress or state governments."[27] These categories are broad, creating substantial risk that employees whose jobs have only tangential connections to policymaking work will be swept up in the effort.

Moreover, the Proposed Rule is unprecedented in that it claims significantly greater powers than ever before to transfer civil servants from competitive to exempt positions. We note that OPM does not deny the Proposed Rule's novelty. We also disagree with OPM's claim that the proposed rule's predecessor, Schedule F, was "far from novel" in that "[i]t sought to restore the removal procedures that prevailed for the vast majority of American history."[28] The test for novelty under the major questions doctrine should not be whether the law was once upon a time as an agency attempts to make it today. It should be whether, *under the statutory provisions at issue*, the agency has ever sought to exercise authority of this scope. The answer to that question, in this context, is a clear "no." The existing OPM schedules cover far fewer federal positions and/or do not strip employees' adverse action rights. For example, OPM itself identifies only 1,624 Schedule C

(Apr. 18, 2025) (estimating, based on documents from President Trump's first term, that closer to 200,000 career federal positions could have been affected by Schedule F).

[24] *See* Drew Desilver, Pew Research Center, What the data says about federal workers (Jan. 7, 2025) (estimating the non-USPS federal civilian workforce at 2.4 million).

[25] This calculation is based on the average annual pay across the federal workforce of $106,382 per year. *Id*.

[26] OPM, Memorandum from Charles Ezell, Acting Director, U.S. Office of Personnel Management to Heads and Acting Heads of Departments and Agencies, Guidance on Implementing President Trump's Executive Order titled, *"Restoring Accountability to Policy-Influencing Positions Within the Federal Workforce."* (Jan. 27, 2025).

[27] Id.

[28] Proposed Rule at 17215.

employees,[29] compared with the 50,000 that OPM itself predicts will be designated as Schedule Policy/Career.

OPM may well believe that the adverse action rights guaranteed to civil servants are too onerous, but exceptions from those procedures on this scale should be made by Congress, not OPM. As the Supreme Court explained in *Biden v. Nebraska*, "the question here is not whether something should be done; it is who has the authority to do it."[30]

Problems with the Proposed Rule's Reasoning

The proposed rule suggests that, because OPM is merely implementing Presidential actions, it need not comply with administrative requirements, including the obligation to provide non-arbitrary reasons for the actions the Proposed Rule would take.[31] However, that is not the case. While the President is not subject to the requirements of the Administrative Procedure Act (APA),[32] OPM is.[33] Some of the actions OPM proposes are to implement presidential policy. But they are still OPM's actions, and are thus subject to the APA's requirements, including the obligation to ensure that agency actions are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[34] The reasoning of the Proposed Rule, however, falls short in several respects.

Need for the Rule

Under the APA, an agency must "articulate a satisfactory explanation for its action."[35] Here, OPM has failed to offer a satisfactory explanation for why this rule is needed. OPM points to two difficulties motivating the rule. First, it suggests that there is a "widespread" practice of civil servants disobeying presidential directives, even while admitting that the practice is "one that many federal employees do not engage in."[36] Its evidence for this proposition consists of allegations in two comments on the April 2024 OPM rule, academic literature identifying the basic challenge for principals of controlling

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[29] OPM, Plum Data, https://www.opm.gov/about-us/open-government/plum-reporting/plum-data/.
[30] Biden v. Nebraska, 600 U.S. 477, 501 (2023).
[31] *See, e.g.* Proposed Rule at 17194 ("even if OPM had not independently concluded career employee partisanship is a pressing concern—and it has—OPM would defer to the presidential determination that it was"); *id.* at 17198 ("Even if OPM did not find the factors discussed above independently persuasive—and it does—OPM would nonetheless propose removing the April 2024 final rule's restrictive definition of the policy-influencing terms to comport with Executive Order 14171 . . . .").
[32] *See* Franklin v. Massachusetts, 505 U.S. 788 (1992) (holding that the President's actions are not reviewable under the APA).
[33] 5 U.S.C. § 551 (defining agencies subject to the statute as including "each authority of the Government of the United States").
[34] 5 U.S.C. §706(2)(A).
[35] Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("*State Farm*").
[36] Proposed Rule at 17194.

the behavior of agents (in contexts including but not limited to administration), news reports of a handful of government employees pushing back against White House policies during the first Trump administration, and a single poll purporting to survey "500 federal government managers" about the hypothetical actions they would take if presented with a directive from President Trump with which they disagreed.[37] This "evidence" does not paint a picture of widespread bureaucratic nullification (or, indeed, identify a single documented instance of a civil servant refusing to comply with specific directives from a superior).[38]

Second, OPM points to the alleged challenge of terminating federal employees who have under-performed or engaged in misconduct. But all that OPM has offered in support of its claim are surveys suggesting (but not demonstrating) that some federal supervisors do not feel confident about their ability to navigate the termination procedures in chapter 43 or chapter 75 successfully and that many federal managers and employees believe that their agency does not fire poor performers.[39] This seems to reflect a fundamental disagreement between OPM and the Congresses that established the modern civil service system: OPM may believe that job security only protects bad performers,[40] but Congress obviously felt otherwise when it established such protections in the first place.

OPM also fails to show a "rational connection between the facts found and the choice made."[41] Even if OPM's anecdotes of bureaucratic resistance to presidential policies were accurate, and even if contesting policies that civil servants feel contravene existing law were necessarily grounds for termination, and even if it were not possible to remove those employees using the procedures in chapters 43 and 75, OPM's Proposed Rule would still be an overreaction. If OPM genuinely believes that the existing procedures of chapters 43 and 75 unduly constrain the termination of employees who are underperforming or who have engaged in misconduct, it could petition Congress to reduce the stringency of procedural safeguards. OPM could also provide more training to agency

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[37] Proposed Rule at 17191-3.

[38] OPM also defers to the president, arguing that "even if OPM had not independently concluded career employee partisanship is a pressing concern—and it has—OPM would defer to the presidential determination that it was." Proposed Rule at 17194. As we argue above, however, agencies may not abdicate their responsibility to justify their own actions in this way.

[39] Proposed Rule at 17189.

[40] Indeed, OPM intimates that it considers the laws are unconstitutional as applied to any employee involved in the policy process:

> Insulating policy-influencing employees from accountability to the elected President accordingly insulates them from accountability to the American people. This enables career officials to exercise Federal power without a democratic mandate. This runs contrary to the founding principles of American government.

90 Fed. Reg. 17209.

[41] *State Farm* at 43.

supervisors on navigating those proceedings. Ultimately, OPM fails to explain why its chosen approach—allowing for the wholesale elimination of process for a significant fraction of the competitive service—is the best way to ensure an accountable civil service.

Even if it decided to remove existing job protections, OPM could consider the alternative of providing more tailored safeguards against arbitrary or politically motivated removal. OPM convincingly rebutted its current view that it lacks power to do so as recently as last year.[42] Moreover, power to require such safeguards seems to be within the scope of the directive to OPM given by section 4(i)(b)(i) of EO 13957. The directive instructs the head of OPM to "(i) adopt such regulations as the Director determines may be necessary to implement this order." Under OPM's view of Presidential power, this would certainly give OPM authority to issue regulations even if the statute does not. Even on less aggressive interpretations of Article II, such interstitial regulation by the President and his delegates seems defensible. Section 6 of EO 13957 requires agency heads to adopt regulations regarding the employment practices prohibited by section 1302(b) of Title V, and OPM direction regarding those agency regulations fits comfortably within the scope of its own authority under section 4.

Such alternative protections could satisfy both the concern that present termination procedures are too onerous and the need to retain sufficient job security to achieve and retain the best people. OPM's expertise would undoubtedly allow it to craft better alternatives than we can, but we present some options for the sake of illustration. One possibility is that OPM could require that agency regulations allow terminated employees to appeal to the head of their agency, presenting written evidence to challenge the termination. Or, OPM could mandate some kind of streamlined internal appeals process. Finally, employees might be allowed to appeal to the Merit Systems Protection Board, but with review limited to whether the supervisor had a prohibited reason for acting. Failure to consider these or other possible alternatives to full civil service protection would be arbitrary and capricious.

Failure to Consider Reliance Interests

Furthermore, the Proposed Rule does not adequately consider the significant reliance interests of current career employees in the procedural protections created by chapters 43 and 75.[43] The Supreme Court has emphasized that "longstanding policies may have 'engendered serious reliance interests that must be taken into account'" when an

[42] *See* April 2024 Rule.

[43] *See* Dept. of Homeland Security v. Regents of the University of California, 591 U.S. 1 (2020) (finding that the Department of Homeland Security's decision to terminate an immigration program because of a failure to address whether there was "legitimate reliance" on the program).

agency changes course.[44] We believe that the Proposed Rule does not take those interests sufficiently seriously. Civil servants who were hired into positions covered by these chapters have a reasonable expectation of continued employment subject to their protections. OPM itself recognized these expectations as recently as April 2024 when it adopted a rule clarifying that individuals in the competitive service who are reclassified involuntarily to the excepted service, or who are moved involuntarily from one excepted service schedule to another, must receive prior notification and the right to appeal.[45]

These reliance interests are important in their own right. Federal employees are human beings who may suffer serious financial and emotional harm from termination. The Proposed Rule displays a discouraging lack of concern these employees. It makes the unsupported assumption, for example, that employees whose adverse action rights are being stripped "will spend an average of four hours total familiarizing themselves with these changes and determining the best course of action to respond to these changes," including "seeking alternative employment."[46] It is difficult to imagine that a federal employee whose job security has just been put at risk will spend only four hours thinking through the implications of this move.

These reliance interests are also important because an OPM decision to make drastic changes in personnel policy without considering reliance interests today will necessarily raise the specter of further drastic changes tomorrow, either by this Administration or a successor. By undermining the ability of employees to rely on current job protections, such drastic changes impair the civil service system as a whole, even as to employees who are not directly affected by the proposed rule.

Failure to Adequately Consider Impact on Federal Civil Service

The President is charged with taking actions that are "necessary to ensure that personnel management is based on and embodies the merit system principles."[47] The President is also authorized to issue rules that "shall provide, as nearly as conditions of good administration warrant, for … necessary exceptions of positions from the competitive service"[48] Thus, in implementing this provision, OPM is charged with hewing as closely as possible to merit system principles and conditions of good administration, making only "necessary" exemptions. These provisions establish a narrow tailoring requirement, and obligate OPM to consider the impact of any rules on "good administration." Yet OPM has

[44] Dept. of Homeland Security v. Regents of the University of California, 591 U.S. 1, 30 (2020).
[45] *See* Office of Personnel Management, Upholding Civil Service Protections and Merit System Principles, 89 Fed. Reg. 24982 (Apr. 9, 2024).
[46] Proposed Rule at 17220.
[47] 5 U.S.C. 2301(c).
[48] 5 U.S.C. 3302(1).

failed to take into account evidence that the proposed rule will damage the government's ability to attract and retain highly qualified employees.

OPM's arguments that its Proposed Rule will not undermine the effectiveness or efficiency of the federal civil service are unpersuasive. OPM posits that the rule "will not create substantive recruitment and retention concerns or service disruptions."[49] OPM also asserts that, even with elimination of adverse action rights, the federal government still offers a more generous benefits package than most comparable private-sector employers and thus will continue to attract strong candidates. [50] However, the source of their own data belies their conclusions, at least when it comes to employees with advanced degrees.[51] For these employees, the compensation differential is dramatic. In the report that OPM cites, the Congressional Budget Office concluded that "[f]ederal workers with a professional degree or doctorate—about 10 percent of the federal workforce—earned about 29 percent less, on average, than their private-sector counterparts."[52] CBO also noted that "[w]orkers value job security, and federal employment offers more of it than many jobs in the private sector."[53]

The Proposed Rule fails to consider realistically the impacts of the new schedule on the government's ability to recruit and retain highly qualified professionals. If nothing else, the rule should be revised to exclude those individuals from reclassification. Otherwise, the government runs the risk of losing critical access to sophisticated expertise on matters ranging from financial markets, cutting-edge technologies, public health, environmental protection, and economic policy. A rule that ignores clearly relevant data or fails to consider the opportunity of more narrowly tailoring the rule would run a serious risk of being overturned as arbitrary and capricious.

OPM offers two responses to the risk of undermining the quality of the federal workforce, neither of them convincing. One is to rely on the President's executive orders to prove the desirability of its proposed regulation. But "the President made me do it" does not suffice as a reasoned explanation for an agency action. Moreover, neither EO 14171 nor EO 13957 addresses any potential adverse effects of eliminating protection from adverse actions, including effects on recruiting and retention, potential errors in removing

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[49] Proposed Rule at 17216.
[50] Id.
[51] The Congressional Budget Office analysis that OPM cites actually shows that federal sector wages *plus* benefits averaged 22% *lower* for employees with a Master's or Professional degree or doctorate, and that private sector wages alone are higher for employees with a Bachelor's, Master's or Professional degree or doctorate. Congressional Budget office: Comparing the Compensation of Federal and Private-Sector Employees in 2022 at 2 (April 2024), https://www.cbo.gov/system/files/2024-04/59970-Compensation.pdf.
[52] Id. at 3.
[53] Id.

employees, or chilling effects on the ability of employees to give candid advice. Thus, even if it were proper for the agency to defer blindly to presidential fact findings, there are simply no such findings to defer to in this instance.

The Proposed Rule's second response is that the President instructed that terminations be governed only by the merits, not considerations such as political affiliation. But one of the major justifications for termination given by the President, failure to cooperate with the President's agenda, is an invitation for supervisors to consider an employee's political views. This justification for termination involves not just objective behavior but a surmise about the employee's motivations and desire to actively support the President's agenda. It is also far too easy to disguise politically-motivated terminations. Consider, in this light, the recent termination of the acting head of the National Intelligence Council and his deputy. The terminations occurred after the Council released a report contradicting the President's assessment of the Venezuelan government's ties to the Tren de Aragua gang.[54] The officials were asked by Director of National Intelligence Tulsi Gabbard's chief of staff to "rethink" the report.[55] The Council then issued a new assessment that reached broadly the same conclusions.[56] The officials were subsequently fired based on allegations that they were opposed to the president's policies.[57] While these officials were not part of the competitive service, the proposed rule would make it just as easy, if not easier, to terminate Schedule Policy/Career employees for pretextual reasons. Whether or not particular terminations are warranted for apolitical reasons, the result would be to stifle the kind of internal debate and expert opinion-giving that makes our government stronger.

Ultimately, the whole point of the Civil Service system is that the unchecked judgment of a supervisor is not an adequate basis to ensure nonpartisan, merits-based decision making. Without some recourse, employees have no reason to be confident that supervisors will make decisions based on the merits, let alone that they will do so correctly. To paraphrase James Madison in Federalist 51, if supervisors were angels, civil service laws would not be necessary.[58]

Knowing that their job security rests on unchecked discretion, employees will have little reason to expect that security. Nor will they have any reason to believe that they will

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[54] Charlie Savage, Julian E. Barnes and Maggie Haberman, Official Pushed to Rewrite Intelligence So It Could Not Be 'Used Against' Trump, N.Y. Times (May 20, 2025).
[55] Id.
[56] Id.
[57] *See* Brooke Singman, Gabbard fires 'deep state' heads of National Intelligence Council to root out 'politicization of intel,' Fox News (May 13, 2025).
[58] The Federalist No. 51 (James Madison).

have a chance to receive federal benefits without an assurance of long term employment. Given that the government expects the most highly qualified employees to take a nearly one-third pay cut from private sector wages, assurances of fair treatment with nothing to back them up can carry little weight.

For the same reason, OPM is simply whistling in the dark when it contends that the President's assurance of fair treatment will avoid any chilling effect on the advice, data, or other information offered by experts and experienced officials. In the absence of any redress for retaliation for being the bearer of bad news, the only smart course is to maintain a diplomatic silence rather than raise counterarguments or generate data that is inconsistent with a superior's desired policy outcome. Only unflagging, fervent agreement with superiors can allow a worker to provide affirmative proof that they are not part of the "deep state."

Context and Pretext

While the Proposed Rule repeatedly professes that no employees designated as Policy/Career will be removed because of their political affiliation or their lack of personal support for President Trump or his policies,[59] there are good reasons to be skeptical. First, the Proposed Rule notes that these limitations stem from the Executive Order 14171, suggesting that the President is not bound by them and could change his mind at any time. Second, President Trump has made clear his goal to "obliterate the deep state"[60] and reduce the size of the Federal bureaucracy.[61]

President Trump has already seriously undermined the job security of government employees by dramatically shrinking or even eliminating federal agencies,[62] by terminating probationary employees,[63] by removing the heads of agencies notwithstanding statutory

[59] *See, e.g.* Proposed Rule at 17187 (citing EO 14171).
[60] *See* Colleen Long and Dan Merica, What Trump has said he will do on Day 1, PBS News (Nov. 12, 2024).
[61] *See* Fact Sheet: President Donald J. Trump Reduces the Federal Bureaucracy, https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-reduces-the-federal-bureaucracy/.
[62] *See, e.g.* Julia Shapero and Ella Lee, Judge blocks Trump administration from dismantling CFPB, The Hill (Mar. 28, 2025); Fatma Tanis and Benjamin Swasey, A federal judge says the USAID shutdown likely violated the Constitution, npr.org (Mar. 18, 2025).
[63] While it is difficult to determine precisely how many probationary employees were terminated across the federal government in 2025, the government's own filings show that more than 24,000 such employees were fired and subsequently rehired in response to a federal court order in March. Melissa Quinn, Court records show how many federal workers were fired and rehired at 18 agencies, CBS News (Mar. 18, 2025).

removal protections,[64] and by offering civil servants incentives to resign their positions.[65] Some political appointees have already been using the fact of the Proposed Rule to pressure employees to accept government buyouts or early retirement.[66] It is hard to imagine that the President will not use OPM's rule to continue his efforts to reduce the size of the federal workforce, regardless of the merits of individual cases.

Even if these concerns are misplaced, they are widespread. It is reasonable for career staff to fear mistreatment when the head of the Office of Management and Budget (OMB) is on record saying: "We want the bureaucrats to be traumatically affected…When they wake up in the morning, we want them to not want to go to work, because they are increasingly viewed as the villains. We want their funding to be shut down … We want to put them in trauma."[67] The White House Deputy Chief of Staff for Policy has said that elements within the bureaucracy are the biggest threat to democracy that America is facing.[68] Civil servants and prospective employees will also remember similar statements from President Trump's first term, such as the Secretary of the Interior opining that a third of the department's staff were disloyal.[69]

While we may believe that political appointees will try in good faith to observe the President's directive to avoid terminations for reasons unrelated to employee performance, federal employees may feel otherwise. Federal employees are unlikely to feel assurance that they will be discharged only for objectively poor performance or deliberate sabotage of the President's agenda, particularly as other forms of redress such as collective bargaining

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[64] *See* Melissa Bredbenner, President Trump's Power to Remove FTC Commissioners, The Regulatory Review (Mar. 27, 2025) (describing the firings of FTC commissioners, the chair of the NLRB, two EEOC commissioners, and a member of the MSPB, all of whom were subject to statutory removal protections).
[65] *See* Nick Bednar, Breaking Down OPM's 'Fork in the Road' Email to Federal Workers, Lawfare (Jan. 30, 2025).
[66] *See, e.g.* Eric Katz and Erich Wagner, Some agencies are notifying employees of their 'Schedule F' status, Government Executive (Apr. 3, 2025), https://www.govexec.com/management/2025/04/some-agencies-are-notifying-employees-their-schedule-f-status/404271/ (reporting on an email from NOAA's acting assistant administrator reminding staff that the early retirement and buyout window closed April 17 and suggesting that information about reclassification under Schedule Policy/Career 'may help you make a more informed decision about whether to pursue' those options).
[67] Alice Herman, *Russell Vought: Trump appointee who wants federal workers to be 'in trauma,'* The Guardian (Feb. 10, 2025), https://www.theguardian.com/us-news/2025/feb/10/who-is-russell-vought-trump-office-of-management-and-budget (quoting video recording).
[68] Frank Berte, Stephen Miller warns of 'unelected bureaucracy' as threat to democracy, The Exponent (Feb. 21, 2025) (text plus video of Miller's remarks), https://www.purdueexponent.org/news/national/watch-stephen-miller-warns-of-unelected-bureaucracy-as-threat-to-democracy/article_2c16bdef-e43e-59c0-ac92-30a32baaddb5.html.
[69] Darryl Fears and Juliet Eilperin, *Zinke says a third of Interior's staff is disloyal to Trump and promises 'huge' changes*, Wash. Post (Sept. 26, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/09/26/zinke-says-a-third-of-interiors-staff-is-disloyal-to-trump-and-promises-huge-changes/.

agreements and independent inspector generals are being weakened or eliminated. Nor will their fears be quieted by OPM's representations that capable employees will be safe in criticizing policies favored by their superiors or that superiors will never consider other indicia of loyalty to a President's agenda like party affiliation or campaign contributions. These anxieties will amplify the effect that we have already identified of undermining the ability of the government to hire and retain the best qualified employees.

* * *

No institution is perfect, and the federal bureaucracy is no exception. Past presidents of both parties have dedicated time and effort to studying its problems and to adopting reforms. This Proposed Rule is of a different character. It relies on a limited set of anecdotes and poll responses to suggest a more significant problem than in fact exists and uses that claim to justify novel and far-reaching changes that would undermine the promise of a non-partisan civil service that undergirds American administration. We urge that OPM instead consider less draconian adjustments to the civil service regulations that are in greater harmony with the CSRA and that will maintain the existing strengths of our expert, nonpartisan civil service and the attractiveness of federal government work.

Sincerely,

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