Code: 6325-39

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 210, 212, 213, 302, 432, 451, 537, 575, and 752

[Docket ID: OPM-2025-0004]

RIN: 3206-AO80

Improving Performance, Accountability and Responsiveness in the Civil Service

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing a rule to increase career employee accountability. Agency supervisors report great difficulty removing employees for poor performance or misconduct. The final rule authorizes agencies to move policy-influencing positions into Schedule Policy/Career. These positions will remain career jobs filled on a nonpartisan basis. Yet they will be at-will positions excepted from adverse action procedures or appeals. This will allow agencies to quickly remove employees from critical positions who engage in misconduct, perform poorly, or obstruct the democratic process by intentionally subverting Presidential directives. The rule requires agencies to establish internal policies protecting employees from prohibited personnel practices.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Executive Summary

OPM is issuing final regulations to strengthen employee accountability and the democratic responsiveness of American Government, while addressing longstanding performance management challenges in the Federal workforce. The final rule amends OPM's

regulations in 5 CFR chapter I, subchapter B, as follows:

1. Amending 5 CFR part 213 (Excepted Service) to include Schedule Policy/Career as an excepted service schedule for career positions of a confidential, policy-determining, policy-making, or policy-advocating character (policy-influencing[1] positions), while clarifying that Schedule C appointments are exclusively for noncareer (i.e., political) appointments with confidential or policy responsibilities. The amended regulations further clarify that employees filling excepted service positions are in the excepted service, regardless of whether they retain competitive status, and specifies increasing accountability to the President as grounds for excepting positions from the competitive service.

2. Amending 5 CFR part 212 (Competitive Service and Competitive Status) to provide that employees with competitive status whose positions are subsequently listed in the excepted service or who are moved into an excepted service position retain competitive status but do not remain in the competitive service while in the excepted position.

3. Amending 5 CFR part 752 (Adverse Actions) to remove the amendments made by the April 2024 final rule and provide that individuals whose positions are reclassified into or who are otherwise transferred into Schedule Policy/Career are not covered by chapter 75 procedural requirements or adverse action appeals. Additionally, OPM amends 5 CFR part 752 to remove language pertaining to 10 U.S.C. 1599e, which provided for a 2-year probationary period in the Department of Defense. This language has become obsolete as section 1599e was repealed, effective December 31, 2022, by Pub. L. 117–81, Sec. 1106(a)(1). The rule further amends 5 CFR part 432 (Performance Based Reduction in Grade and Removal Actions) to remove the amendments made by the April 2024 final

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[1] Throughout this rulemaking OPM uses the term "policy-influencing" as a shorthand descriptor of the broader statutory language "confidential, policy-determining, policy-making, or policy-advocating." *See* 5 U.S.C. 7511(b)(2).

rule and to exclude all policy-influencing positions in the excepted service from chapter 43 procedural requirements for performance-based removals.

4. Amending 5 CFR part 210 (Basic Concepts and Definitions (General)) to remove the amendments made by the April 2024 final rule stating that policy-influencing positions are exclusively associated with noncareer political appointments. The final rule also amends 5 CFR 213.3301, 302.101, and 451.302 to conform to the rescission of these definitions.

5. Amending 5 CFR part 302 to remove the amendments made by the April 2024 final rule imposing procedural requirements on movements of positions or employees into policy-influencing excepted service positions (including subsequent Merit Systems Protection Board (MSPB) appeals). The final rule also provides that moving or transferring positions into Schedule Policy/Career will not change how appointments to those positions are made. Positions moved from the competitive service will be filled using competitive hiring procedures and employees so appointed may acquire competitive status. Positions moved from the excepted service will continue to be filled using the procedures that applied to their prior excepted service schedule.

6. Amending 5 CFR part 537 to allow employees reassigned to positions in Schedule Policy/Career to continue to receive student loan repayment benefits under the terms of the applicable service agreement unless eligibility is lost as described in 5 CFR 537.108.

7. Amending 5 CFR part 575 at subparts A, B, and C to allow agencies to continue paying any outstanding recruitment, relocation, or retention incentive under the terms of existing agreements for positions moved into Schedule Policy/Career provided the employees are otherwise fulfilling the terms of their service agreements. This final rule also permits agencies to continue paying a retention incentive to an employee who is not under a service agreement at the time when their position is moved into Schedule Policy/Career.

As further detailed below, this rulemaking will promote Federal employee accountability

and strengthen American democracy while addressing performance management challenges and issues with misconduct within the Federal workforce. It will give agencies the practical ability to separate employees who insert partisanship into their official duties, engage in corruption, or otherwise fail to uphold merit principles. OPM may set forth policies, procedures, standards, and supplementary guidance for the implementation of this final rule.

II. Digest of Public Comments

In response to the proposed rule, OPM received 40,500 comments during the 45-day public comment period from a variety of individuals (including current and former civil servants, scientists, Nobel laureates, and members of Congress) and organizations such as those representing science and technology, national and local unions, and Federal agencies. Of the 40,500 comments received, 35,551 were posted, 2 were withdrawn, and 7 were not posted because they contained threats to the President and members of the Administration or contained sensitive personally identifiable information from commenters. The remaining 4,940 comments are attributed to individual commenters who indicated on their comment submission that their comment represented a specific number of submissions. For example, one commenter stated that he and 7 other people were part of a group of former Environmental Protection Agency employees submitting a comment on behalf of all 8 people. In another example, a commenter indicated that they are part of 2 organizations, the Union League Club of Chicago and the League of Women Voters of Chicago, and their comment represents 3,200 submissions. At the conclusion of the public comment period, OPM reviewed and analyzed the comments. In general, the comments ranged from ardent support of the proposed regulation to categorical rejection of it. Approximately 5 percent of the overall comments were supportive, 1 percent neutral or mixed, and 94 percent opposed the proposed regulation.

In the proposed rule, OPM invited comments on whether it is appropriate to retain certain amendments to parts 302 and 752, as well as input on the costs and benefits of this rule. OPM received a wide variety of comments in response to the proposed rule and incorporated them into

the relevant sections that follow. OPM found the comments helpful when explaining the purpose, scope, and impact on the Federal workforce in drafting this final rule.

In the next section, we address the background for these regulatory amendments and related comments. In subsequent sections, we address the specific amendments, provide a regulatory analysis, and provide the amended regulatory text. Note that OPM received several comments that are not addressed below because they were beyond the scope of the proposed regulatory changes or else were vague or incomplete.

III. Background and Related Comments

A. History of the Civil Service and Removal Restrictions

Critical to the success of any presidency is the ability to implement an agenda endorsed by the American people free from antidemocratic, unaccountable bureaucratic resistance. "The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws."[2] In order to execute his Article II duty to ensure that the laws are faithfully executed, the vast expansion in the scope and complexity of Federal law has required the President to delegate such authority to thousands of career civil servants involved in policy formulation. Because in practice such delegation involves hundreds of thousands of distinct statutory provisions, it is extraordinarily difficult for the President—or agency heads appointed by the President and confirmed by the Senate—to ensure that all such delegations are being executed consistent with the priorities of the President. It is therefore critical to create an incentive architecture that will encourage and reward accurate translation of such priorities.[3]

As explained in greater detail in the proposed rule, however, the Federal service has matured to a point where the status quo removal restrictions for policy-influencing positions have become harmful overcorrections to fears of a return to the spoils system of the past. Instead

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[2] *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd*., 561 U.S. 477, 499 (2010).
[3] *See id*. at 498 ("the Framers sought to ensure that 'those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.'") (quoting 1 Annals of Cong., at 499 (J. Madison)).

of protecting merit, these removal restrictions too often undermine democratic accountability, entrench bureaucratic policy-resistance, and frustrate the President's constitutional ability to faithfully execute the law. As James Madison observed during the First Congress, "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws."[4]

From the beginning of the earliest days of the American republic, the appointment and removal of Federal officers flowed from the authority vested in the President under Article II of the Constitution. However, over the course of the Nineteenth Century, presidents began to lose control of the appointment and removal process due to the rise of the patronage system. By the 1880s, appointments to positions in the executive branch were predominantly made based on political connections, typically as a reward for loyal supporters of the party in power. Members of Congress and local party machines would use their influence with the President to get their preferred candidates Federal appointments. The patronage system began showing strain as the Federal Government expanded rapidly after the Civil War. The Federal civilian workforce nearly doubled in size between 1871 and 1881, from 51,000 to 100,000 employees.[5]

Congress responded when it passed the Pendleton Civil Service Act of 1883 (Pendleton Act) to begin the shift to a merit system by requiring competitive examinations for covered positions and insulating those jobs from purely political patronage. The Pendleton Act also established the Civil Service Commission (CSC) to help implement and enforce its requirements. While the Pendleton Act professionalized hiring, early statutes and practice still left wide managerial latitude over removals. The Pendleton Act also prohibited executive branch officials from dismissing classified employees because they declined to render political services, but otherwise such officials served at the pleasure of the President. Classified employees' status

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[4] *Id*. at 492 (quoting 1 Annals of Cong. 463 (1789)).
[5] Ronald N. Johnson & Gary D. Libecap, The Federal Civil Service and the Problem of Bureaucracy: The Economics and Politics of Institutional Change, 17 (University of Chicago Press, 1994), https://www.nber.org/system/files/chapters/c8633/c8633.pdf (Johnson & Libecap).

under the Pendleton Act was similar to most private sector workers today. Businesses today cannot fire workers for certain discriminatory reasons, such as race or religion, but employees otherwise serve at the pleasure of their employer. Civil service employees also had no right to appeal or otherwise contest removals. Instead, the Pendleton Act was enforced through penalties on officials who violated its requirements. The reformers who created the Pendleton Act made a conscious decision to keep the civil service at-will. They saw little risk of patronage-based dismissals as long as civil service hiring forbade rewarding campaign supporters with new appointments.[6]

In 1912, Congress passed the Lloyd-La Follette Act of 1912.[7] Among its provisions, the Lloyd-La Follette Act provided that employees in the classified service (now known as the competitive service) could only be removed "for such cause as will promote the efficiency of [the] service", and must be given written notice of the reasons for their proposed dismissal and an opportunity to respond.[8] Among its provisions, the Lloyd-La Follette Act further mandated that "no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal."[9] The next year the CSC explained its policy governing civil service dismissals, delimiting the ability of agencies to remove employees as freely as possible with only the limits necessary to ensure the proper exercise of this authority.[10] The Lloyd-La Follette Act's policy, according to the CSC, was intended to "prevent removals upon secret charges and to stop political pressure for removals."[11] The Lloyd-La Follette Act and its predecessor executive orders did not give classified civil service employees tenure or the ability to appeal removals. They instead imposed procedural requirements to ensure dismissals were not pretextual and to prevent political or religiously motivated removals. Agencies

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[6] *See* P. P. Van Riper, History of the United States Civil Service, 101-03 (Row, Peterson & Co. 1958) (Van Riper).
[7] 37 Stat. 555 (1912).
[8] *Id.*
[9] *Id*.
[10] U.S. Civil Service Commission, Twenty-Ninth Annual Report, 21-22 (1913).
[11] *Id*. at 22.

remained the sole judge of employee conduct and performance.

For the first six decades of the merit service, employees could not appeal removals. That only began to change during the Second World War. The Veterans Preference Act (VPA) of 1944 gave veterans significant hiring preferences for Federal jobs.[12] It also provided that veterans—including those in the excepted service—could be dismissed only to promote the efficiency of the service, and it allowed veterans to appeal adverse actions to the CSC.[13] In 1948, Congress amended the law to make the outcomes of CSC appeals binding on agencies.[14] These amendments gave preference-eligible veterans the ability to appeal removals outside their agency.

Until the 1950s, courts would entertain procedural challenges to civil service removals, overturning them where agencies did not follow Lloyd-La Follette procedures. But courts generally avoided examining the substance of removal actions.[15] A significant precedent was established in 1954 when the D.C. Circuit Court of Appeals decided *Roth v. Brownell*.[16] As noted in the decision, the Lloyd-La Follette Act provided that "[n]o person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing."[17] The D.C. Circuit construed this language to require agencies to follow Lloyd-La Follette procedures to take employees out of the competitive service — whether through a discharge or through moving the position into the excepted service.[18] The D.C. Circuit subsequently clarified that agencies could dismiss employees from confidential or policy-making positions based purely on loss of confidence. In *Leonard v. Douglas*, the D.C. Circuit concluded that removing an

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[12] Pub. L. 78-359, 58 Stat. 387 (1944).
[13] *Id.* at 390.
[14] Pub. L. 80-741, 62 Stat. 575 (1948).
[15] *See* Gerald E. Frug, "Does the Constitution Prevent the Discharge of Civil Service Employees," 124 U. Pa. L. Rev. 942, 970, n.134, (1976) (*Frug*).
https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4997&context=penn_law_review.
[16] 215 F.2d 500 (D.C. Cir. 1954) (*Roth*), *cert. denied,* 348 U.S. 863 (1954).
[17] *Id.* at 501 (quoting 37 Stat. 555 (1912), as amended, 62 Stat. 354 (1948)).
[18] *Id.* at 502.

employee from a policy-making position because his superiors did not find him suitable to advance their policies promoted "the efficiency of the service" and was therefore lawful.[19] Consequently, while the Lloyd-La Follette Act and VPA imposed procedural requirements on removals, agencies generally retained broad authority to dismiss employees for non-discriminatory reasons. Those reasons included removing employees from policy-influencing positions based purely on the belief they would not effectively advance the President's policies.

In the years leading up to the establishment of the current civil service system, the Supreme Court ruled in *Arnett v. Kennedy* that a Federal employee has a constitutional due process interest in continued Federal employment. *Arnett* made constitutional due process challenges generally applicable to civil service removals, not just when employees were fired for exercising constitutional rights.[20]

Congress legislated against this backdrop when it passed the Civil Service Reform Act of 1978 (CSRA).[21] The CSRA replaced the Lloyd-La Follette Act, VPA, executive orders, and private rights of action in Federal court with a new unified framework governing adverse actions and subsequent appeals.[22] The CSRA maintained prohibitions on patronage and restricted agencies' ability to take adverse actions in some respects. For example, the CSRA gave non-preference eligible employees in the competitive service the same right to appeal long-term suspensions and demotions that preference eligible employees possessed.[23] The CSRA also expanded preference-eligible employees' ability to appeal suspensions by authorizing appeals of suspensions of more than 14 days, rather than those exceeding 30 days.[24]

In other ways, the CSRA made taking adverse actions easier. It prevented Federal employees from directly challenging removals in Federal district court. The CSRA instead

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[19] 321 F.2d 749, 751-53 (D.C. Cir. 1963).
[20] 416 U.S. 134, 163 (1974).
[21] Pub. L. 95-454, 92 Stat. 1111 (1978).
[22] *Id.*
[23] *Compare* 5 U.S.C. 7511 (1978) *with* 80 Stat. 528, Pub. L. 89-554 (1966).
[24] *Compare* 5 U.S.C. 7512 *with* 80 Stat. 528, Pub. L. 89-544 (1966).

channeled adverse action appeals to the MSPB[25] and subsequent legislation vested judicial review in the Federal Circuit Court of Appeals.[26] The CSRA also repealed Lloyd-La Follette provisions governing removal from the competitive service, replacing it with a new unified framework of adverse action appeals for both competitive service employees and excepted service preference-eligibles. Notably, the CSRA thus removed from Federal law the language the D.C. Circuit interpreted in *Roth*. The CSRA also categorically excluded excepted service employees in policy-influencing positions from adverse action procedures.[27]

In an important decision after the enactment of the CSRA, the Supreme Court held in *United States v. Fausto* that employees statutorily excluded from chapter 75 could not contest removals in Federal district court.[28] The Court explained that the CSRA created a comprehensive review system for adverse actions; exclusion from CSRA coverage meant employees could not appeal adverse actions elsewhere.[29] Shortly thereafter, Congress passed the Civil Service Due Process Amendments Act of 1990 (DPAA).[30] This law, which remains in effect, amended the CSRA by extending chapter 75 to generally cover excepted service employees—preference eligible or not—after an initial trial period.[31] At the same time, Congress retained the exclusion from chapter 75 procedures for excepted service employees in policy-influencing positions.[32]

A large number of commenters argued that classifying career positions as policy-influencing and exempt from adverse action procedures violates the Pendleton Act, the Lloyd-La Follette Act and/or the CSRA. These arguments misunderstand the law.

The Pendleton Act did not provide tenure protection for Federal employees. The

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[25] *See* 5 U.S.C. 7701; Pub. L. 95-454, 92 Stat. 1111 (1978).
[26] *See* 5 U.S.C. 7703(b)(1)(A); Pub. L. 97-164, 96 Stat. 25 (1982).
[27] 5 U.S.C. 7511(b)(2).
[28] 484 U.S. 439, 454-55 (1988) (*Fausto*). Commenter 34947 asserts the proposed rule misreads *Fausto* as applying to constitutional claims when it only addresses statutory claims. However, the proposed rule did no such thing. *See* 90 FR 17186 & 17217 (citing to *Fausto* for the proposition that Federal employees cannot contest removals in district court because the CSRA is the exclusive remedial statutory framework for adverse action appeals and judicial review).
[29] *Fausto*, 484 U.S. at 455.
[30] Pub. L. 101-376, 104 Stat. 461 (1990).
[31] *Id.*
[32] 5 U.S.C. 7511(b)(2).

proponents of the Act were primarily concerned with establishing merit as the basis for civil service appointments. The most significant aspect of the Pendleton Act was to provide for examinations (i.e., tests) for Federal employment. The idea was that people who did very well on these tests would likely make the most competent employees.

Tenure protection for Federal employees, especially for non-veterans, is a relatively recent phenomenon that had no place under the Pendleton Act. As discussed above, the Lloyd-La Follette Act did not require external review of adverse actions, and it expressly provided that trial-like proceedings were not required to effectuate dismissals.

It was not until 1944 that the VPA provided any type of third-party review of adverse actions, and only for veterans. Although the Congressional record on this provision is sparse, it appears to have been motivated by concerns that agencies would formally honor veteran preference in hiring only to pretextually dismiss veterans after the fact.[33]It was not until the 1970s that full third-party review by the CSC was afforded to non-veteran employees facing adverse actions. Until then employees without veteran preference had no right to appeal their removal outside their agency. A number of commenters have mischaracterized the Pendleton Act as standing for something it never addressed—due process. The Pendleton Act, as innovative as it was, was concerned *only* with merit-based hiring, i.e., examining potential candidates for Federal employment on the basis of objective examinations instead of patronage appointments. Attempts to characterize the Pendleton Act as encompassing notions of procedural rights introduced only in the late 20th century thus are historically inaccurate. Instead, the current system with multiple avenues of appeal for employees seeking to challenge adverse actions involving substandard or lackluster performance as well as overt misconduct only arose in the 1970s.

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[33] *See* Frug, 124 U. Pa. L. Rev. at 959-60; *see also* S. Rep. No. 78-907, at 2 (1944). "The committee recognizes the necessity of assuring that those who have left civil employment to serve in the armed forces during this war shall not, upon their return, be penalized by displacement or loss of opportunity due to the presence of wartime emergency employees."

Furthermore, nothing in this final rule interferes with merit as a basis for appointment into the competitive service nor as a basis for appointment into Schedule Policy/Career. Appointments to Schedule Policy/Career positions that were previously in the competitive service will continue to be made using merit-based competitive hiring procedures. In addition, the CSRA, which subsequently replaced some provisions of the Pendleton Act, includes specific language exempting from the procedural protections associated with the competitive civil service those positions that are of a policy-influencing character.[34] This rule will principally affect removal procedures for employees in policy-influencing positions whose performance or conduct is judged to be deficient. The vast majority of those appointed under Schedule Policy/Career will thus experience no change in their employment characteristics or conditions and retain protections against prohibited personnel practices including retaliation against whistleblowing (PPPs).

Many commenters also asserted that Schedule Policy/Career dismissal procedures violate the Lloyd-La Follette Act, requiring certain procedural notice before removal of an employee can be effected. Although the Lloyd-La Follette Act was superseded by the CSRA, the CSRA contains procedural requirements applying to adverse actions and generally provides for appeals of adverse actions, including dismissals, to the MSPB. In a similar fashion, the DPAA extended the rights of non-preference eligibles to receive pre-termination notice and also to appeal adverse decisions to the MSPB. As highlighted in the preamble to the proposed rule, both the CSRA and the DPAA authorize OPM and the President to exempt employees in policy-influencing positions from access to chapter 75 adverse action procedures and appeals. Thus, this rule maintains harmony with both the CSRA and the DPAA, as it utilizes a longstanding express statutory exemption.

B. Executive Orders 13957, 14003, 14171, and the Prior OPM Rulemaking

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[34] 5 U.S.C. 7511(b)(2).

President Donald Trump issued Executive Order (E.O.) 13957 creating "Schedule F" in October 2020. As previously discussed, chapter 75 adverse action procedures do not cover employees in excepted service positions that the President, OPM, or an agency head, as applicable, have determined are policy-influencing.[35] Prior administrations had applied this exemption only to political appointments, principally positions in Schedule C of the excepted service.[36] E.O. 13957 created a new Schedule F (following the pre-existing schedules A through E) for career employees in policy-influencing positions.[37]

Schedule F applied to policy-influencing positions "not normally subject to change as a result of a Presidential transition."[38] E.O. 13957 established a process for agencies to review their workforce, identify such policy-influencing career positions, and ask OPM to move them into Schedule F.[39] The order provided guideposts for that analysis, identifying positions such as regulation writers or officials in agency policy offices as likely belonging in Schedule F.[40] Under 5 U.S.C. 7511(b)(2), any career positions moved into Schedule F would be excluded from chapter 75 adverse action procedures and, consequently, MSPB appeal rights.

At the same time, Schedule F positions remained career jobs filled based on merit, not political connections. Any position filled with the involvement of the White House Office of Presidential Personnel could not be placed into Schedule F.[41] E.O. 13957 also prohibited hiring or firing Schedule F employees based on their political affiliation or for other discriminatory reasons or retaliation against whistleblowers. It further required agencies to establish internal procedures to ensure compliance with this non-discrimination directive.[42] E.O. 13957 put policy-influencing career Federal employees in the same position as most private sector workers,

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[35] 5 U.S.C. 7511(b)(2).
[36] 5 CFR 6.2 (2024).
[37] E.O. 13957, 85 FR 67631, 67633 (Oct. 26, 2020).
[38] *Id.*
[39] *Id.*
[40] *Id.* at 67633-67634.
[41] *Id.* at 67632.
[42] *Id*. at 67634.

generally serving at-will but protected from discriminatory removals.

The Order explained that these changes were necessary to enable agencies to more effectively address poor performance. It cited findings from the MSPB's Merit Principles Survey that less than a quarter of Federal employees believe their agency addresses poor performers effectively. E.O. 13957 explained that poor performance in policy-influencing positions is especially problematic, as it can affect the performance of the entire agency.[43] E.O. 13957 also explained that competitive hiring procedures do not provide enough flexibility to select applicants with the necessary intangible qualities for these important positions, such as sound judgment, acumen, or impartiality.[44]

Schedule F also came in the context of widespread reports of career staff resistance to Trump Administration policies.[45] While Schedule F employees would not be dismissed based on their personal beliefs, agencies could swiftly dismiss any who did not perform their duties in a nonpartisan manner. However, no agencies moved positions into Schedule F before President Trump left office.[46]

Shortly after taking office, President Biden issued E.O. 14003 revoking E.O. 13957 and abolishing Schedule F.[47] E.O. 14003 described Schedule F as "undermin[ing] the foundations of the civil service and its merit system principles, which were essential to the [Pendleton Act's] repudiation of the spoils system," and asserted that the repeal of E.O. 13957, among other executive orders, was necessary to "rebuild the career Federal workforce."[48]

E.O. 14003's reasoning ignored the fact that Schedule F gave employees stronger removal protections than the Pendleton Act did. The Pendleton Act merely prohibited hiring or

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[43] *Id.* at 67631-32.
[44] *Id*.
[45] *See, e.g.,* Juliet Eilperin et al., *Resistance from Within: Federal Workers Push Back Against Trump,* Wash. Post, Jan. 31, 2017, https://www.washingtonpost.com/politics/resistance-from-within-federal-workers-push-back-against-trump/2017/01/31/c65b110e-e7cb-11e6-b82f-687d6e6a3e7c_story.html.
[46] U.S. Gov't Accountability Off., GAO-22-105504, *Civil Service: Agency Responses and Perspectives on Former Executive Order to Create a New Schedule F Category for Federal Positions*, at 10 (Sept. 2022) (2022 GAO Report), https://www.gao.gov/assets/gao-22-105504.pdf.
[47] E.O. 14003, 86 FR 7231, 7231 (Jan. 22, 2021).
[48] *Id.* at 7231-32.

dismissing classified employees based on their politics or failure to make political contributions. Section 6 of E.O. 13957 forbids taking any personnel actions prohibited by 5 U.S.C. 2302(b),[49] which includes actions based on protected characteristics (such as race, sex, or religion), political affiliation, or retaliation against whistleblowers.[50] Section 6 further directs agencies to incorporate these prohibitions into their internal policies.[51] E.O. 14003 also ignored the fact that the Federal Employee Viewpoint Survey (FEVS) showed career Federal employee job satisfaction rising throughout the first Trump Administration, reaching a record high of 72 percent in 2020.[52]

Commenter 11329 noted that the FEVS showed that employee job satisfaction was higher with their direct supervisor than senior leadership.[53] However, this does not rebut the fact that the FEVS demonstrated that overall job satisfaction reached 72 percent in 2020, the highest level FEVS ever recorded. Based on their survey responses, Federal employees did not feel their workforces needed rebuilding.[54]

During the Biden Administration, OPM proposed, and in April 2024 finalized, new regulations related to E.O. 14003.[55] The April 2024 final regulations had three principal components. First, OPM used Presidential authority delegated under 5 U.S.C. 3301 and 3302 and E.O. 10577 to regulatorily define the phrases "confidential, policy-determining, policy-making or policy-advocating" and "confidential or policy-determining" to refer exclusively to political appointments, with no application to career employees.

Second, OPM used those same delegated Presidential authorities to add a new subpart F

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[49] E.O. 13957, 85 FR at 67634.
[50] *See* 5 U.S.C. 2302(b).
[51] *Supra* n. 49.
[52] U.S. Off. of Pers. Mgmt*., FEVS: Empowering Employees. Inspiring Change* 11 (2020), https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2020/2020-governmentwide-management-report.pdf.
[53] *See id.* at 10-11.
[54] In addition, the notion that the career civil service needed to be "rebuilt" because of E.O. 13957 was clear hyperbole, as no positions were ever moved into Schedule F. *See* 2022 GAO Report at 10.
[55] Upholding Civil Service Protections and Merit System Principles, 89 FR 24982 (April 9, 2024) (Upholding Civil Service Protections).

to 5 CFR part 302. Subpart F prescribed mandatory procedures for transferring positions into the excepted service, or into a new excepted service schedule. Subpart F also required agencies to notify employees that involuntary movements or transfers into a policy-influencing position would not affect their competitive status or civil service appeals and would allow employees to appeal to the MSPB to the extent that an agency committed procedural error or indicated that the transfer would terminate adverse action appeals.

Third, OPM used its own statutory authority under 5 U.S.C. 7514 to provide that, notwithstanding 5 U.S.C. 7511(b)(2), any tenured civil service employees whose positions were moved, or who were otherwise moved into policy-influencing excepted service positions, would remain covered by chapter 75 procedures.

Under the April 2024 final rule, a re-issued Schedule F could not cover career positions, MSPB adjudicators could overturn transfers into Schedule F, and incumbent employees could keep MSPB appeal rights even if their positions were transferred into Schedule F.

The rulemaking responded to a National Treasury Employees Union petition for regulations to prevent the reinstatement of Schedule F.[56] The final rule candidly acknowledged disagreement with E.O. 13957 but explained that "OPM does not and cannot prevent a President from creating excepted service schedules or from moving employees."[57]

During the 2024 election cycle President Trump announced plans to reissue E.O. 13957 if re-elected.[58] Donald Trump won the 2024 Presidential election and promptly fulfilled this commitment, issuing E.O. 14171 on January 20, 2025.[59] The new order reinstated E.O. 13957, while amending it in several ways.[60] The order redesignates "Schedule F" as "Schedule

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[56] *See* Nat'l Treasury Employees Union, Petition for Regulations to Ensure Compliance with Civil Service Protections and Merit System Principles for Excepted Service Positions (Dec. 12, 2022), https://www.nteu.org/~/media/Files/nteu/docs/public/opm/nteu-petition.pdf?la=en.
[57] *See* Upholding Civil Service Protections, 89 FR at 25009.
[58] *See, e.g.,* Donald J. Trump, *President Trump's Plan to Dismantle the Deep State and Return Power to the American People* (Mar. 21, 2023), https://www.donaldjtrump.com/agenda47/agenda47-president-trumps-plan-to-dismantle-the-deep-state-and-return-power-to-the-american-people.
[59] *See* E.O. 14171, 90 FR 8625 (Jan. 31, 2025).
[60] *See id.* at 8625-26.

Policy/Career."[61] This change in nomenclature emphasizes that covered positions remain career positions and are not being converted into political appointments—a common misperception of the original order. The E.O. emphasizes that patronage remains prohibited by defining Schedule Policy/Career to only cover "career positions."[62] The E.O. also expressly describes what is and is not required of Schedule Policy/Career employees: "Schedule Policy/Career [employees] are not required to personally or politically support the current President or the policies of the current administration. However, Schedule Policy/Career 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."[63]

E.O. 14171 also requires OPM to apply Civil Service Rule 6.3(a) to Schedule Policy/Career positions.[64] This rule authorizes OPM to prescribe by regulation conditions under which excepted positions may be filled in the same manner as competitive service positions are filled and conditions under which persons so appointed may acquire competitive status in accordance with the Civil Service Rules and Regulations.[65] E.O. 14171 thus requires OPM to establish merit-based hiring procedures for Schedule Policy/Career positions.

E.O. 14171 also overrode significant parts of the April 2024 final rule. That rule used delegated Presidential authority under 5 U.S.C. 3301 and 3302 to amend parts 210 and 302 of the Civil Service Regulations. President Trump used his executive authority to directly render those amendments inoperative. E.O. 14171 now requires that OPM rescind the amendments made by the April 2024 final rule.[66] E.O. 14171 further provides that "[u]ntil such rescissions are effectuated (including the resolution of any judicial review) 5 CFR part 302, subpart F, 5 CFR 210.102(b)(3), and 5 CFR 210.102(b)(4) shall be held inoperative and without effect."[67]

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[61] *Id.* at 8625.
[62] *See id.* at 8625-26.
[63] *Id*. at 8626.
[64] *See id*. at 8625.
[65] 5 CFR 6.3(a).
[66] *See* E.O. 14171, 90 FR at 8626.
[67] *Id*.

Consequently, both the April 2024 final rule's definition of "confidential, policy-determining, policy-making, or policy-advocating" as a term of art that refers exclusively to political appointees[68] and its procedural requirements for moving employees into such policy-influencing positions[69] are no longer in effect.

In a structural difference with the original E.O. 13957, the President—not OPM—will now move positions into Schedule Policy/Career. Pursuant to E.O. 14171, agencies will assess their workforces and petition OPM to recommend that the President move specific positions into Schedule Policy/Career.[70] OPM will review these petitions and make the recommendations it deems appropriate.[71] However, the President will make the final decision about which positions go into Schedule Policy/Career.[72] That decision will be effectuated by a new executive order issued under Presidential—not OPM—authority.

E.O. 14171 provided additional guideposts for agencies when assessing which positions may belong in Schedule Policy/Career. These guideposts include considering both immediate and higher-level supervisors of employees in Schedule Policy/Career for inclusion in Schedule Policy/Career.[73] If a subordinate employee is in a policy-influencing role, superior officials with authority to tell that employee what to do are also likely policy-influencing. E.O. 14171 further requires agencies to consider positions with duties that the OPM Director indicates may be appropriate for inclusion in Schedule Policy/Career.[74] OPM later issued guidance about types of positions agencies should consider in their Schedule Policy/Career reviews.[75]

President Trump also explained why he issued this order. E.O. 14171 cited MSPB

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[68] *See* Upholding Civil Service Protections, 89 FR at 25045.
[69] *See id.* at 25046-47.
[70] *See* E.O. 13957, 85 FR at 67633-34; E.O. 14171, 90 FR at 8625-26.
[71] *See id.*
[72] *See id.*
[73] *See id.*
[74] *See id.*
[75] U.S. Off. of Pers. Mgmt., *Guidance on Implementing President Trump's Executive Order titled, "Restoring Accountability To Policy-Influencing Positions Within the Federal Workforce*, (Jan. 27, 2025), https://www.opm.gov/chcoc/latest-memos/guidance-on-implementing-president-trump-s-executive-order-titled-restoring-accountability-to-policy-influencing-positions-within-the-federal-workforce.pdf (January 2025 Memorandum).

research showing only 41 percent of supervisors are confident they could remove a subordinate for serious misconduct, and just 26 percent are confident they could remove one for poor performance.[76] The order explained that: "[a]ccountability is essential for all federal employees, but it is especially important for those who are in policy-influencing positions. These personnel are entrusted to shape and implement actions that have a significant impact on all Americans."[77] As discussed below, however, there have been recent, numerous, and well-documented cases of career Federal employees resisting and undermining the policies and directives of their executive leadership.

C. Reasons for New Rulemaking

1. Change in Administration Policy and Operative Legal Standards

Through this rulemaking, OPM is now finalizing regulations to rescind the changes made by the April 2024 final rule, implement E.O. 14171, and establish Schedule Policy/Career for policy-influencing career positions. Schedule Policy/Career positions will generally be filled using merit-based competitive hiring procedures, with exceptions only for those positions currently filled using excepted hiring procedures. Individuals appointed or reassigned to Schedule Policy/Career positions will be excepted from chapter 43 and 75 procedures for performance-based and adverse actions. They will be exempt from statutory PPP coverage under 5 U.S.C. 2302(b) as policy-influencing positions are not covered positions under 5 U.S.C. 2032(a). However, E.O. 13957 is explicit that agencies must establish and enforce internal policies barring PPPs including whistleblower reprisal. Consequently, Schedule Policy/Career employees will remain career employees, while subject to elevated levels of accountability for their performance and conduct. For the reasons explained in greater detail in the proposed rule, OPM is proceeding with these changes to ensure accountability of the Federal career workforce

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[76] *See* E.O. 14171, 90 FR at 8625; *see also* Merit Sys. Prot. Bd., *Remedying Unacceptable Employee Performance in the Federal Civil Service* at 15 (June 18, 2019) (Remedying Unacceptable Employee Performance), https://www.mspb.gov/studies/researchbriefs/Remedying_Unacceptable_Employee_Performance_in_the_Federal_Civil_Service_1627610.pdf.

[77] E.O. 14171, 90 FR at 8625.

charged by the President to deliver on the bold policy agenda endorsed by the American voters, as well as to bring the civil service regulations into conformity with operative legal requirements.

2. Needed to Address Factors Inadequately Considered in Prior Rulemaking

OPM also now realizes that it gave inadequate consideration to several factors when issuing the April 2024 final rule. Upon further consideration, OPM has concluded that these factors call for issuing this final rule.

i. Adverse Action Procedures Make Addressing Poor Performance, Misconduct, and Corruption Challenging.

Chapter 75 requires that most agencies follow specific procedures to take adverse actions against employees for misconduct or poor performance. Chapter 43 sets out procedures for actions based on unacceptable performance (i.e., performance-based actions). However, decades of experience have demonstrated that the procedures described in chapters 43 and 75 are inadequate to allow agencies to hold employees accountable for poor performance, misconduct, or corruption.

The substantial evidence documented in the proposed rule and this final rule demonstrate the extent to which existing authorities leave agencies unable to effectively address poor performance, misconduct, and corruption. Moreover, the April 2024 final rule imposed additional procedural hurdles that would delay or prevent agencies from effectively addressing these issues.

The proposed rule cited a wide range of data demonstrating the need for these reforms. Nevertheless, several commenters have argued against OPM's reliance upon this data. Commenters such as 1443, 2869, 14463, 16846, 26624, 27012, 28185, 28202, 28619, 32647, 34522, 35520, and others, claim that the proposed rule's citation to research published by the MSPB in 2016 and 2019 do not support the establishment of Schedule Policy/Career. Commenter 14463 asserts that the MSPB research is not based on objective facts nor suggests that political resistance is a problem. Commenters 19698, 30984, 35478, and 35520 criticize the research as not relevant to the class of employees who will be reassigned or hired into Schedule

Policy/Career.

OPM notes, however, that these Commenters do not dispute the MSPB's findings that establish that supervisors believe they lack the ability to effectively address poor performance and misconduct, or that few employees believe their agencies address poor performers effectively. Although the research does not discuss establishing Schedule Policy/Career to address these issues amongst senior career professionals, conversely the research does not recommend against doing so. Additionally, FEVS data published after this research and cited in the proposed and final rules indicate that these problems of employee accountability continue. In fact, Commenters 8029's and 14463's highlighting of other factors further supports this final rule as the removal of statutory adverse action procedures lessens the reliance on human resources processes and reduces leadership adversity to litigation, both driven by performance-based and adverse action procedures. OPM relies on the MSPB research to support the proposition that agencies continue to face substantive problems with poor performance and misconduct. This final rule establishes reforms consistent with the problems identified in MSPB's research and FEVS data that shows agencies face a lingering problem with addressing poor performance and misconduct.

Commenter 30426 claims that OPM failed to demonstrate that FEVS data shows that only a minority of employees believe that agencies appropriately deal with poor performers. This claim is puzzling. OPM cited to FEVS data in the proposed rulemaking showing a historical range of between 25 and 42 percent of Federal employees believe steps are taken to deal with a poor performer in their work unit who cannot or will not improve.[78] This is supported by the

[78] 90 FR 17182, 17189 (Apr. 23, 2025). We note, as Commenter 27647 pointed out, that the reference for the FEVS data was missing from the proposed rule. To remedy this, we provide the citation here, which was also provided in a subsequent footnote in the proposed rule. *See* U.S. Off. of Pers. Mgmt.*, 2020 FEVS* at 24, https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwidemanagement-report/2020/2020-governmentwidemanagement-report.pdf.

historical FEVS data available to the public on OPM's website.[79] OPM explained that employees are able to directly observe whether their agencies remove poorly performing employees or if they stay in their work unit and continue to underperform. This is a logical basis to reject the conclusion that employees do not know what steps their agencies are taking to address poor performance. They may not see intermediate steps, but they see the end result.

Commenters 29987 and 30426 also argue that OPM's data does not show whether poor performance is actually widespread, or if it merely represents a large number of employees reporting the same few individuals. Commenter 30426 also criticizes the fact that OPM cites some sources dating to the mid-2000s and mid-2010s. Commenters 0085, 3728, 6205, 7795, 14463, 29987, 35520, and others, take issue with OPM's reliance upon existing data, describing it, variously, as "incomplete," lacking "context," as not actually documenting widespread lack of accountability or poor performance, or as a "gotcha" designed to stifle opposition to the proposed rule. Commenters 0210, 3326, 2764, 16846, 18811, 27647, 29923, 30317, 31210, 34881, and 35446 assert—without evidence—that the instances cited in the proposed rule do not substantiate widespread claims of poor performance. The proposed rule provided numerous examples, case studies, surveys, and academic articles discussing poor performance in the Federal Government.[80] OPM notes that the FEVS ask employees about what happens to poor performers "in [their] work unit"[81]—generally smaller groupings of employees—which makes it

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[79] *See, e.g.,* U.S. Off. of Pers. Mgmt., *FEVS Results: Employees Influencing Change* at 29 (2015), https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2015/2015-governmentwide-management-report; U.S. Off. of Pers. Mgmt., *FEVS: Empowering Employees. Inspiring Change* at 24 (2020), https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2020/2020-governmentwide-management-report.pdf; U.S. Off. of Pers. Mgmt., *FEVS: Empowering Employees. Inspiring Change* at 15 (2021), https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2021/2021-governmentwide-management-report.pdf.

[80] 90 FR at 17189-91.

[81] *See, e.g.,* U.S. Off. of Pers. Mgmt., *FEVS Results: Employees Influencing Change* at 29 (2015), https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2015/2015-governmentwide-management-report; U.S. Off. of Pers. Mgmt., *FEVS: Empowering Employees. Inspiring Change* at 24 (2020), https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2020/2020-governmentwide-management-report.pdf; U.S. Off. of Pers. Mgmt., *FEVS: Empowering Employees. Inspiring Change* at 15 (2021), https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2021/2021-governmentwide-management-report.pdf.

unlikely the widespread negative responses represent just a few individuals across the entire agency. At a minimum, employees in a significant number of work units are reporting the presence of at least one poor performer. Furthermore, these commenters fail to provide evidence that poor performance is not widespread or that the number of poor performers is limited to a few individuals. OPM also takes note of Commenter 29987's concession that, in the experience of the former EPA officials who volunteer for Commenter's organization, performance-based actions are not easily proven or quickly effectuated, and are not infrequently challenged successfully.[82] OPM takes this admission against interest as evidence that even many Federal officials who oppose this rule recognize that performance-based actions are difficult to undertake.

Additionally, many agencies during the comment period reported to OPM that adverse action procedures make it very difficult for them to remove poor performers, and this is a significant problem.[83] OPM credits these comments. Agencies know what is occurring in their workforces and are often best positioned to evaluate challenges impacting them. The Department of Health and Human Services (HHS), for example, reported that it terminated 5, 4, and 7 career tenured employees for poor performance out of an employee population of 90,000 in fiscal years 2022, 2023, and 2024, respectively.[84] This happened despite the 2024 FEVS survey showing less than a quarter of HHS employees believe there are no poor performers in their work unit, while 30 percent reported poor performers exist in their unit, and typically remain on the job and continue to underperform, rather than being removed.[85] This is strong, contemporaneous evidence that the Government has a serious performance management problem. It is not credible

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[82] Comment 29987 at 11, 18 ("In the decades of experience of EPN volunteers, many of whom were managers at EPA, disciplinary actions for misconduct, *unlike performance-based disciplinary actions*, are easily proven, quickly effectuated, and seldom challenged successfully.") (emphasis added).
[83] *See, e.g.,* Comments 29917 and 31998 (HHS), 35535 (Department of Labor), and 35549 (Department of Veterans Affairs).
[84] Comments 29917, 31998.
[85] U.S. Off. of Pers. Mgmt., *2024 Office of Personnel Management FEVS: Report by Agency* (2024), at Tables Q16_2 & Q16_5, https://www.opm.gov/fevs/reports/data-reports/data-reports/report-by-agency/2024/2024-agency-report-excel.xlsx.

to anyone—including HHS employees—that just one in 10,000 HHS employees is a poor performer. Nonetheless, HHS performance-based dismissals still number in the single digits.

Finally, Commenters 27467, 30055, and 30426's criticism of OPM citing data from 2003 and 2014 is without merit. Specifically, the proposed rule noted that the National Commission on Public Service concluded that: "[f]ederal employees themselves are unhappy with the conditions they face. . . . They resent the protections provided to those poor performers among them who impede their own work and drag down the reputation of all government workers."[86] Employee accountability procedures have not fundamentally changed in the interim—employees operate under the same adverse action procedures as one and two decades ago. This data, together with the FEVS data, supports the conclusion that accountability of the workforce is a longstanding problem, as stated in the proposed rulemaking.

Commenters 14463, 27647, and 30426 also object to OPM citing news reports and academic research discussing surveys of Federal employees and managers without providing the actual data used by the news sources or researchers supporting their publications. In the proposed rule, OPM cited to a news article appearing in Government Executive from the mid-2010s, discussing a poll the outlet's research arm had commissioned. OPM also cited and linked to an academic survey of Senior Executive Service (SES) members conducted by researchers affiliated with Vanderbilt and Princeton Universities, that provided the precise survey questions, sample size, and margin of error data. Notwithstanding these Commenters' arguments, OPM is not required to obtain the raw microdata underlying academic studies or publicly reported polls to take note of them in a rulemaking. Commenter 27647 complained of inability to access the source cited in footnote 103 despite it being readily available through online retailers such as Amazon.

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[86] 90 FR at 17189 (quoting The Nat'l Comm'n on Pub. Serv., *Urgent Business for America: Revitalizing the Federal Government for the 21st Century* at 12 (Jan. 2003), https://www.brookings.edu/wp-content/uploads/2016/06/01governance.pdf).

Commenters 8029, 14463 19791, 28481, 30426, and 35478 argue that none of the sources OPM cites provide logical support for the changes under the proposed rule. Commenter 8029 takes issue with OPM's interpretation of the research, suggesting that there are other problems such as lack of management support and poor human resources staffing that contribute to the problems of poor performance and misconduct. Commenter 14463 points out that a Department of Homeland Security (DHS) report from June 17, 2019, points to DHS' failure to properly resource, design, and oversee the Department's disciplinary program. Commenters 19698, 30984, 35478, and 35520 criticize the research as not relevant to the class of employees who will be reassigned or hired into Schedule Policy/Career.

Instead, these Commenters argue that better processes, more flexible personnel systems, more leadership support, and more training for managers on how to use the existing performance management system would better address poor performance and misconduct. Similarly, referring to the documented instances of sexual harassment at the Federal Deposit Insurance Corporation (FDIC), Commenters 29374 and 32793 argue that it would be more effective to change the culture of the organization using existing accountability tools, rather than promulgating a new rule to implement Schedule Policy/Career.

Despite the commenters' beliefs, evidence showing the Federal performance management system is dysfunctional and prevents agencies from effectively addressing poor performance is legion. Federal employees have, for decades, responded to Federal surveys that their agencies do not effectively address poor performers. During the proposed rule's comment period, OPM received comments from Federal employees complaining that agencies rarely address poor performance. For example, OPM received comments from Federal employees and others complaining about other Federal employees "retiring in place" and continuing to draw a paycheck despite doing little work, noting that agencies do not remove these employees and that

this inaction is demoralizing to employees who want to do well.[87] This phenomenon is supported by OPM's FEVS survey data, which reflects that many supervisors report they do not believe they could remove poor performers. Agencies, too, told OPM that performance management is a serious problem and provided data to support their concerns.

Numerous reports spanning many decades[88] have recommended other options like "better training managers on how to use performance management systems," but all such initiatives have had little impact—predictably so, given the burden and complexity of the current chapter 75 and 43 removal procedures, which often involve multiple layers of appeals.[89] Commenter 30165 states that the cited cases are "primarily of issues other than policy execution or of serious misconduct," and "not of employees failing to execute agency priorities." The cited problems, however, have been longstanding and consistent. OPM believes Schedule Policy/Career would be more effective in addressing these performance management challenges in policy-influencing positions than doubling down on prior practices that have not succeeded. Further, agencies have

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[87] *See, e.g.,* Comments 1734 and 5335.

[88] Remedying Unacceptable Employee Performance, https://www.mspb.gov/studies/researchbriefs/Remedying_Unacceptable_Employee_Performance_in_the_Federal_Civil_Service_1627610.pdf.; MSPB, Addressing Misconduct in the Federal Civil Service: Management Perspectives (Dec. 2016), https://mspbpublic.azurewebsites.net/studies/researchbriefs/Addressing_Misconduct_in_the_Federal_Civil_Service_Management_Perspectives_1363799.pdf; MSPB, Addressing Poor Performers and the Law (Sept. 2009), https://mspbpublic.azurewebsites.net/studies/studies/Addressing_Poor_Performers_and_the_Law_445841.pdf; MSPB, Removing Poor Performers in the Federal Service (Sept. 1995), https://mspbpublic.azurewebsites.net/studies/studies/Removing_Poor_Performers_in_the_Federal_Service_Issue_Paper_September_1995_253662.pdf; MSPB, The Changing Federal Workplace: Employee Perspectives (1996), https://mspbpublic.azurewebsites.net/studies/studies/The_Changing_Federal_Workplace_Employee_Perspectives_253655.pdf; MSPB, The Federal Workforce for the 21st Century: Results of the Merit Principles Survey at ix (Sept. 2003), https://mspbpublic.azurewebsites.net/studies/studies/The_Federal_Workforce_for_the_21st_Century_Results_of_the_Merit_Principles_Survey_2000_253631.pdf ("While 45 percent of respondents said their supervisor retains employees based on their job performance, just 35 percent claimed that their supervisor deals effectively with misconduct on the job, and just 22 percent said their supervisor deals effectively with poor performers."); MSPB, The Other Side of the Coin: Removals for Incompetence in the Federal Service (Feb. 1982), https://mspbpublic.azurewebsites.net/studies/studies/The_Other_Side_of_the_Merit_Coin_Removals_for_Incompetence_in_the_Federal_Service_254732.pdf.

[89] OPM acknowledges the need for training supervisors and is simultaneously introducing a new government-wide training program for supervisors on performance management. OPM, "Performance Management for Federal Employees," June 17, 2025, https://www.opm.gov/chcoc/transmittals/2025/Performance%20Management%20for%20Federal%20Employees%207-17-2025.pdf. However, it understands based on long experience that enhanced training is unlikely to be enough to meaningfully change an entrenched culture, especially as this culture arose in large part due to the cumbersome nature of adverse action procedures required to remove employees.

told OPM they believe the rulemaking would be beneficial and help them manage affected employees more effectively, including holding them accountable for poor performance. OPM credits agency experience and expertise, as well as the fact that this reform addresses a major driver of the difficulty in removing poor performers.

Commenters 2222, 27432, and 30426 also take issue with the examples cited in the proposed rule to support OPM's argument that the adverse action process is protracted with an uncertain outcome. OPM presented a handful of cases as an illustration of the impediments MSPB cases impose. Commenter 30426 asserts that average case processing time in FY 2024 was 130 days. This is only for initial decisions before an administrative judge and does not include time to adjudicate a petition for review (i.e., appeal) to the full MSPB. Full MSPB review adds much more time, especially if the MSPB loses its quorum as it often has. An employee's subsequent appeal to the Federal Circuit takes even more time. Citing one stage of the MSPB appeal process for the proposition that the process is "hardly protracted" is misleading. OPM rightly takes note of the effect of the MSPB's loss of quorum on the appeals timetable. Relatedly, Commenters 17360, 24390, 30426, and 32556 point out that President Trump left MSPB without a quorum during the entirety of his first term. President Trump nominated numerous individuals to the MSPB, but the Senate did not act on those nominations. During his second Administration, the President nominated and the Senate confirmed James Woodruff to serve as a Member, creating a period of approximately eight months in which the MSPB operated without a quorum. Neither the President nor OPM can control the pace at which the Senate considers MSPB nominees, even if they leave the agency without a quorum. However, OPM must be cognizant of the fact that the pace at which the Senate considers nominees affects the resolution of MSPB appeals, creating real effects on agency operations.

Commenter 30426 argues that the best available evidence suggests poor performance is not widespread in the Federal workforce, citing FEVS data that "well over 80% of employees believe employees in their work unit "meet the needs of our customers," "contribute positively"

to agencies' performance, and "produce high-quality work." Commenter 34522 criticizes OPM's citation to research and FEVS data because the data only demonstrates a perception problem. Commenter 22688 describes low performers in the workplace as "just a fact of life," common in all large entities. Despite the commenters' interpretation, the actual FEVS data paints a more worrisome picture:

- 83.4 percent of employees believe employees in their work unit "always" or "most of the time" "produce high-quality work." 13.4 percent believe they do so "sometimes", while 3.2 percent believe they do so "rarely" or "never."[90]
- 87.7 percent of employees believe employees in their work unit "always" or "most of the time" "meet the needs of our customers." 10.3 percent believe they do so "sometimes", while 2 percent believe they do so "rarely" or "never."[91]
- 85.9 percent of employees believe employees in their work unit "always" or "most of the time" "contribute positively to their agency's performance." 11.2 percent believe they do so "sometimes", while 3 percent believe they do so "rarely" or "never."[92]

The fact that more than one-in-ten Federal employees answers "sometimes" to these questions is concerning. Agencies should not "sometimes" meet the needs of the American people. The fact that 2-3 percent answered "rarely" or "never" is even more concerning. OPM interprets the FEVS data as showing that most Federal employees believe their colleagues do high-quality work, but a meaningful number do not, and the Federal workforce has substantial performance management challenges that are not being effectively addressed. This rulemaking is not predicated on the notion that most Federal employees are poor performers. Rather, there is a cognizable amount of poor performance which, when it occurs, impairs agency performance.

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[90] U.S. Off. of Pers. Mgmt., "Federal Employee Viewpoint Survey: 2024 Governmentwide All Levels-All Index-All Items Reports," at Q22, https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-all-levels-all-index-all-items-reports/2024/2024-governmentwide-all-levels-all-index-all-items-report.xlsx.
[91] *Id.* at Q20.
[92] *Id.* at Q21.

There is no inconsistency between saying most Federal employees do good work and that a minority do not, and that the minority's underperformance needs to be addressed. This is particularly true for key policy-influencing positions that can affect the performance of an entire agency or even presidential administration.

Commenters 26624 and 28202 take issue with the assertion that poor performers remain in policy-influencing positions and criticize the lack of supporting evidence to justify the wholesale changes proposed by OPM. The Commenters point to OPM's citation of just two instances involving the Chief of the U.S. Park Police and, separately, the Executive Director of the National Council on Disability, as specifically inadequate. Respectfully these Commenters misunderstand this portion of the proposed rule and the reasons for citing to these two examples. OPM argued that the Government suffers from a long-standing problem of holding subordinates accountable for misconduct and poor performance. OPM then cited two examples of senior career officials with serious misconduct and performance issues who remained in their positions despite agency efforts to remove them from their positions. OPM cited these two examples to support our argument that failing to address misconduct and poor performance directly undermines the Merit System Principles. OPM later cited to the misconduct and corruption at other agencies such as the FDIC where a fear of litigation contributed to the tolerance of rampant sexual misconduct committed by senior officials. These examples together with the 2016 Merit Principles Survey cited in the proposed rule sufficiently detail the problem of agencies' inability to address misconduct and poor performance and how this failure undermines the Merit System Principles.

Commenter 30426 also raises concerns with OPM's statistical analysis of the number of employees terminated. Specifically, Commenter 30426 questions why OPM's analysis excluded all employees fired after less than two years of service and asserts that the exclusion of this data is arbitrary and capricious and OPM's analysis was thus insufficient. On the contrary, OPM's analysis was straightforwardly focused on the firing rates of employees covered by subchapter II

of chapter 75 to evaluate whether that process makes removals more difficult. Probationary employees and employees on trial periods do not have access to adverse action appeals, so dismissal rates among such employees do not necessarily reflect the effect of chapter 75 procedures.[93] OPM focused on permanent (i.e., excluding term and political appointees) employees with more than 2 years of tenure because these are the employees that subchapter II covers.[94] Evaluating the effect of subchapter II by examining agency experiences with employees who are covered by it is hardly arbitrary or capricious.

Commenter 14463 asserts that OPM "ignores the fact that existing procedures have resulted in the firings of tens of thousands of poor performing career employees." In support of this assertion, the Commenter cites to a 2015 MSPB report, "Adverse Actions: The Rules and the Reality."[95] According to the Commenter, the fact that only 10% of deciding and proposing officials felt employees had too many rights in the context of adverse actions, means that employees have the appropriate amount of rights. OPM disagrees, and in fact, believes the cited source further supports the need for Schedule Policy/Career. The question presented was whether deciding and proposing officials agreed with the statement: "Federal employees have too many rights." 42% of the respondents answered "neutral," while 35% answered "agree or strongly agree."[96] The fact that only 23% of deciding and proposing officials *disagree* with the statement that employees have too many rights demonstrates the need of reform to the Federal performance management system.

Several commenters, including Commenters 2241, 7611, 13583, 20991, 30426, and

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[93] Competitive service employees and preference-eligible employees in the excepted service complete their probationary and trial periods, respectively, after one year of continuous service, while non-preference eligible employees generally take two years of continuous service to complete their trial period. Thus, the appropriate comparison is employees with more than two years of tenure, as they have almost universally completed their probationary and trial periods and are covered by subchapter II. See 5 U.S.C. 7511(a)(1).

[94] We note, as Commenter 27647 pointed out, that the citation for the number of covered employees was missing in the proposed rule. This data is from the same source as the 2024 Rule, 89 FR 25039. *See* Off. of Pers. Mgmt., FedScope, Separations Trend FY 2020-FY 2024, https://www.fedscope.opm.gov/.

[95] U.S. Merit Sys. Prot. Bd., Adverse Actions: The Rules and the Reality, (Aug. 2015), https://www.mspb.gov/studies/researchbriefs/Adverse_Actions_The_Rules_and_the_Reality_1205509.pdf.

[96] *Id.* at 6.

31096, argued that the proposed rulemaking failed to cite evidence supporting its conclusion of widespread corruption in the career civil service. Commenter 30426, for example, critiques the proposed rulemaking's citation to corruption at the FDIC because the administration is closing offices that were meant to provide the training the report recommended to prevent future abuses. Commenter 30426 ignored the serious and well documented example of corruption in the civil service. The proposed rule cited examples such as the FDIC where an independent investigation documented widespread and longstanding abuses, including widespread sexual misconduct involving senior executives pressing junior female employees for sexual favors, at times providing career assistance in return.[97] The report cited in the rulemaking specifically identified adverse action procedures as creating litigation risk that made the agency extremely reluctant to take action, even when leadership was aware of misconduct.[98] Because removals created such litigation risk, the agency would move the offending employees around rather than dismiss them.[99]

Corruption is not limited to the FDIC. Since publication of the proposed rule, a Small Business Administration (SBA) loan officer pleaded guilty to making false statements to SBA in connection with loan applications for more than $550,000.[100] The employee in question abused her position by approving several fraudulent COVID-19 pandemic loans she and her relatives submitted but that SBA initially declined.[101] At the Department of the Army, the former deputy director of the U.S. Army Signal Network Enterprise Center used his position to steer business toward a specific, corrupt vendor.[102] The former official accessed contract bid and proposal

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[97] *See* 90 FR at 17190 (citing Joon H. Kim, Jennifer K. Park, and Abena Mainoo, ''Report for the Special Review Committee of the Board of Directors of the Federal Deposit Insurance Corporation,'' April 2024, https://www.fdic.gov/sites/default/files/2024-05/cleary-report-to-fdic-src.pdf (FDIC Report)).
[98] *See id.*
[99] *See* FDIC Report at 134, A-15, A-33, and A-37.
[100] News Release, U.S. Small Bus. Admin., *Former Federal Employee and Two Other Women Plead Guilty in Pandemic Fraud Cases* (Aug. 12, 2025) https://www.sba.gov/article/2025/08/12/former-federal-employee-two-other-women-plead-guilty-pandemic-fraud-cases.
[101] *Id.*
[102] Press Release, U.S. Dep't of Justice, *Former deputy director of Signal Network Enterprise Center at Fort Gordon sentenced to federal prison* (July 21, 2020), https://www.justice.gov/usao-sdga/pr/former-deputy-director-signal-network-enterprise-center-fort-gordon-sentenced-federal.

information used by a vendor to assist in winning a contract for upgrading the Army's communications infrastructure at Fort Gordon.[103] The existence of such a scheme uncovered within the U.S. Army demonstrates the ease and feasibility of such misconduct occurring at other agencies throughout the Federal Government.[104] The creation of Schedule Policy/Career offers a comprehensive solution to the government-wide problems created by the lengthy and litigious nature of the current removal procedures, at least with respect to policy-influencing positions.

OPM recognizes that chapter 75 provides a pathway for agencies to address misconduct, including removing employees from the Federal service in circumstances such as those at the FDIC and the Army. In many cases, Federal agencies have been successful in doing so. However, these processes alone have proven insufficient. They foster a sense of futility and powerlessness at agencies which understandably seek to avoid spending their limited time and resources on litigation to remove employees who perform poorly or engage in misconduct. This sense of futility and powerlessness is evidenced, as noted above and in the proposed rule, in the lack of faith in the ability of agencies to hold employees accountable for poor performance and the relatively small number of adverse actions taken by agencies across Government. OPM finds it highly disturbing that only a minority of agency supervisors are confident they could remove subordinates for serious misconduct. This survey data shows that incidents like those at the FDIC illustrate systemic problems across the Government. What is needed to address this corruption and restore integrity to the Federal service is to break this cycle of poor performance and misbehavior that undermines the faith that the American people place in Government. It is, therefore, perfectly reasonable that the President reform how the executive branch manages career officials who are most responsible for the success of his policy agenda.

Commenters 0563, 12281, and 14010 argue that the cited instances of agencies' hesitancy to take appropriate action when faced with evidence of poor performance or misconduct are

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[103] *Id*.
[104] *Id.*

insufficient to justify a rule allowing for prompt agency action. These commenters miss a critical point. Any misconduct in the Federal service is a blot on its integrity. The FDIC report concerning sexual harassment found that the agency had "generally taken a risk-averse approach to the imposition of discipline." It found that "the FDIC, like other federal agencies, risks having complaints and lawsuits" when taking adverse action against employees. Because removals created such litigation risk, the agency would move employees around rather than dismissing them.[105] Commenter 35478 takes issue with the proposed rule's citation to specific pages in the FDIC report for not supporting the proposition that adverse actions and appeals were a major reason for the lack of accountability, pointing out that the auditors identified 10 "root cause[s]" of the misconduct. However, OPM did not contend adverse action procedures were the sole reason for the problems at the FDIC and still finds sufficient evidence in the FDIC report to support its position. The FDIC report identified risk aversion to the disciplinary process perpetuating a lack of accountability in the agency as one of the root causes of its culture of corruption.[106] The report specifically quoted a senior supervisor as noting "we are so risk averse we can't do anything, scared that the employees will sue us, and the ramifications are what you are seeing."[107] The factual record clearly demonstrates that current regulations, exacerbated by the April 2024 final rule, place unwarranted burdens upon agencies, which often prevents them from taking timely adverse action when faced with poor performance, misconduct, or corruption.[108]

It is no surprise, then, that the President made the same determination. E.O. 13957, as

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[105] Some agencies reported during the comment period that their experience in dealing with poor performers or misconduct is to simply reassign employees to other positions rather than taking performance-based or adverse actions out of fear of litigation or protracted statutory procedures. Commenters 2985 (Department of Transportation), 29882 (Department of Education), and 29909 (Office of Special Counsel). OPM credits their accounts of how subchapter II affects agency decision-making.

[106] *See* FDIC Report at 154-55.

[107] *Id*. at 155.

[108] Commenter 35478 argues the fact the audit did not recommend changes to disciplinary procedures indicates they were not a major factor contributing to the FDIC's problems. Commenter's objection misses that FDIC has no authority to change those disciplinary procedures, which are set forth in statute, so such recommendations would be futile. OPM finds it unsurprising that an audit commissioned by the FDIC would not recommend changes the FDIC could not effectuate.

amended, explained that "[a]gencies need the flexibility to expeditiously remove poorly performing employees from [Schedule Policy/Career] positions without facing extensive delays or litigation."[109] It cited evidence that less than a quarter of Federal employees believed their agencies appropriately addressed poor performance, and less than half believe they could remove employees who committed serious misconduct.[110] President Trump ultimately found that the conditions of good administration still exist today warranting immediate action through executive action. As such, OPM concludes that even if the evidence discussed in this final rule were not independently persuasive and sufficient to support this final rule—and to be clear, OPM believes that it is—it would nonetheless credit the President's judgment within his core Article II authority to address the problems of poor performance, misconduct, and corruption in the civil service.

ii. Proposed Regulations Are Necessary to Strengthen Democracy and Promote a Nonpartisan Civil Service.

Commenters 1544, 9407, and 23384, and others characterize this rule as undermining democracy in favor of an authoritarian form of Government. Commenter 23384, specifically, suggests that the "independence of bureaucracy" is necessary to prevent authoritarianism. On the contrary, this rule ensures that Federal employees in policy-influencing positions are able to be appropriately disciplined for failing to faithfully implement the elected President's agenda. The U.S. Constitution provides "[t]he executive Power shall be vested in a President of the United States of America."[111] As such, the President is also the only official in the executive branch whose position is vested with executive power who is democratically accountable to the American people. Employees exercising executive power are doing so in place of—and, crucially, on behalf of—the President of the United States. Employees themselves are only properly vested with executive policy-influencing authority in so far as they exercise it faithfully

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[109] 85 FR 67631, 67632.
[110] *Id*. at 67631.
[111] U.S. Const. art. II, § 1, cl. 1.

and in accordance with the Constitution, existing law, and the President's policy agenda. The "independence of the bureaucracy," to impose policy, or to scuttle, slow-walk, or otherwise undermine the President's policy agenda would bring about the very thing with which these commenters are concerned: the erosion of democracy. An unelected bureaucracy operating autonomously and at variance with the policy priorities of the elected President undermines democratic values.

OPM notes that, because of the enormous scope and intricacy of many Federal statutes, Federal policymaking work frequently requires high levels of specialization. Further, Federal agencies are bureaucratic, characterized by division of labor, hierarchy of authority, and career orientation. Because career employees often play the principal and sometimes exclusive role in determining who is promoted through the hierarchy and on what schedule, career advancement in Federal service often has little do with effective execution of the President's priorities. This is particularly true over longer periods of time, where the professional relationships between agency personnel outlast individual Presidential administrations and the procedural rules of the agency and informal norms coalesce to form an agency culture or shared bureaucratic interests.

In some instances, the priorities of the President may conflict with an agency's culture or bureaucratic interests. This can occur, for example, when agency personnel have acclimated to executing their statutory mission in a manner that conflicts with the procedural or substantive values of the President. As the late William Niskanen (a longtime Government official) noted in his classic study, *Bureaucracy and Representative Government* (Chicago: Aldine, Atherton, 1971), the "budget-maximizing bureaucrat" will typically seek to maximize the total budget of their bureau, regardless of the public interest, in order to maximize the bureau's power and prestige. Given the incentives of a career bureaucracy, where the interests of an agency are at variance with the priorities of the President, a rational civil servant will often prioritize the institutional interests of the agency ahead of implementing the priorities of the democratically elected President. Where career employees involved in policymaking prioritize "loyalty to their

building" over faithful execution of the President's priorities and the public interest, democratic accountability is undermined.

Commenters 1994, 7378, 34746, and others argue that this rule would undermine the nonpartisan nature of the civil service by making it easier to fire employees in policy-influencing positions for political reasons, including failing to adhere to political loyalty tests.

Commenters' supposition that this rule requires, or provides for, the dismissal of employees for political reasons is wholly incorrect. OPM proposed and adopts in this final rule a prohibition against personal or political loyalty tests as a condition of employment in Schedule Policy/Career. 5 CFR 213.3601(e). EO 13957 also requires agencies to establish and enforce internal policies protecting employees from PPPs including prohibiting discrimination based on political affiliation and political coercion. Further, this rule provides that in instances in which an employee in a policy-influencing position engages in misconduct, performs poorly, or obstructs the democratic process by intentionally subverting Presidential policy directives, such employees may be quickly removed from the service.

OPM also views this rule as strengthening the nonpartisan nature of the civil service by ensuring employees in policy-influencing positions do not inject personal politics into their professional responsibilities related to implementing the President's agenda.

Bureaucratic Resistance is Evident

Commenters, including 0210, 3326, 3764, 16846, 18811, 27647, 29923, 30317, 31210, 32573, 34881, 35446, and 35478, assert that the proposed rule failed to provide evidence of widespread policy resistance. Despite these criticisms, considerable evidence supports the proposition that employees routinely inject their personal, partisan beliefs into their professional duties. Recent news reports detailed how career Federal employees resisted the changes pursued by the President during his current administration. One report detailed Federal employees

engaged in "malicious compliance" with the President's directives.[112] In a much more brazen act of defiance, a report detailed how staff of the U.S. African Development Foundation refused to allow employees of the Department of Government Efficiency to enter its building as part of the President's promise to eliminate unnecessary bureaucratic spending.[113] Relatedly, Commenter 23567 also witnessed acts of resistance by describing career employees leak, "slow walk," or deliberately perform poorly to resist changes to policies. In fact, in coordinating this final rule during the interagency comment period, a copy of the draft rule was leaked to the news media the same day that OPM briefed Federal agencies on the rule.[114] And most recently, OPM's proposed rule to modify its performance management regulations leaked within 24 hours after sharing the rule with federal agencies for interagency comments.[115] This was a clear breach of trust placed in the Federal workforce.

Another example comes from Commenter 34007 who obtained documents through a Freedom of Information Act request that uncovered career employee resistance expressed to the General Counsel of the National Labor Relation Board under the first Trump administration. In one of these emails, a former longtime NLRB employee bragged about "the brave resistance" of career NLRB employees to the presidentially appointed General Counsel's priorities.[116]

There are also widespread reports of Federal employees "pushing back," engaging in

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[112] Juliana Kaplan and Ayelet Sheffey, "Random acts of protest: How federal workers are quietly pushing back on DOGE," Business Insider, Mar. 8, 2025, *available at*: https://www.businessinsider.com/federal-workers-resist-trump-musk-doge-dei-emails-pronouns-2025-3.

[113] Robert Tait and Lauren Gambino, "'Little agency that could' cheered for act of resistance against Trump and Musk," The Guardian, Mar. 6, 2025, *available at*: https://www.theguardian.com/us-news/2025/mar/06/federal-workers-block-musks-doge-africa-development-agency.

[114] Eric Katz and Erich Wagner, "Final Schedule F regulations to describe civil service protections as 'unconstitutional overcorrections,'" Government Executive, Nov. 18, 2025, *available at*: https://www.govexec.com/workforce/2025/11/final-schedule-f-regulations-describe-civil-service-protections-unconstitutional-overcorrections/409616/; Courtney Rozen and Sarah N. Lynch, "US federal workers would lose whistleblower safeguards under Trump rule," Reuters, Nov. 18, 2025, *available at*: https://www.reuters.com/legal/government/us-federal-employees-would-lose-whistleblower-safeguards-under-trump-rule-2025-11-18/.

[115] Eric Katz, "Trump to limit top ratings for all feds and consolidate scoring in forthcoming rule," Government Executive, Dec. 17, 2025, *available at*: https://www.govexec.com/management/2025/12/trump-limit-top-ratings-all-feds-and-consolidate-scoring-forthcoming-rule/410246/.

[116] Comment 34007, at 4.

"malicious compliance," or being "subtle" about opposing administration policymaking.[117] Researchers documented that Environmental Protection Agency (EPA) career staff moved policy in the opposite direction from the Reagan Administration's goals, concluding that "the influence of elected institutions is limited when an agency has substantial bureaucratic resources and a zeal for their use."[118] Commenter 32573 claims that the proposed rule mischaracterized the findings of researchers, noting that the EPA did not have a Senate-confirmed administrator when EPA career staff moved policy in the opposite direction, and that the Reagan administration drastically changed its policy later during the President's terms. However, we note that the EPA had an acting administrator during the time in question and EPA staff were surely informed of the Reagan administration's policy.[119] The researcher found that even after the Senate confirmation of an Administrator "[t]he proclivity of EPA regulators to regulate seems to have been a factor negating the administration's ability to keep clean air enforcements to a minimum."[120] Further, it is immaterial whether the Reagan administration changed its policy later in the president's terms. This does not rebut the proposition for which the research was cited in the proposed rule. Commenter 8209 also criticizes the proposed rule's citation to a source that reported policy resistance during President Trump's first term.[121] OPM notes that Commenter 8209 does not allege that the claims are fabricated or false but instead argues it should not be used to justify a change because of an alleged bias. OPM believes that this source—one of several—demonstrates that the first Trump administration faced policy resistance.

Commenters 30055 and 34522 also allege that the proposed rule mischaracterizes one of the cited sources on page 17191. However, Commenter 30055 failed to recognize that the

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[117] Kaplan & Sheffey, *supra* note 112.
[118] B. Dan Wood, *Principals, Bureaucrats, and Responsiveness in Clean Air Enforcements*, 82 Am. Pol. Sci. Rev. 213, 213 (1988).
[119] *See* Env't Prot. Agency, *Chronology of EPA Administrators* (last updated Jan. 31, 2025), https://www.epa.gov/history/chronology-epa-administrators.
[120] B. Dan Wood, *Principals, Bureaucrats, and Responsiveness in Clean Air Enforcements*, at 228.
[121] *See* Comment 8209 (citing to Mark Moyar, Masters of Corruption: How the Federal Bureaucracy Sabotaged the Trump Presidency 83-84 (2024)).

proposed rule cited two different articles from the same author. While part of the second article discusses reciprocal hierarchy, much of the article discusses several instances of civil servant disobedience during the President's first administration. Further, the other article cited discusses disobedience in the context of the President's administration. Based on the content from both articles, we disagree with both commenters that the proposed rule mischaracterized those sources. Similarly, Commenter 34522 also claims the proposed rule fails to discuss all the relevant conclusions of another two sources.[122] We disagree. While the first source discusses other behavioral patterns and disclaims the empirical accuracy of its studies, the Commenter does not dispute that it discusses the claims made by the proposed rule. Lastly, Commenter 34522 does not dispute that the second source also discusses the claims made by the proposed rule. While we recognize that the second source comes to additional conclusions OPM does not share, we do not agree that OPM's statements regarding the source are inaccurate.

The proposed rule cited several examples of career employees stating plans to resist policies they disliked. The Washington Post reported on an EPA career employee explaining that "she and her co-workers are focused on how to make sure the new administration does not walk back environmental regulations achieved under Biden."[123] An undercover journalist documented an employee in the White House Office of Pandemic Preparedness and Response Policy explaining that career employees "slow-walk" initiatives they dislike or "pretend to work really hard on something when they're not."[124] Others, like an Equal Employment Opportunity Commission (EEOC) employee, opt not to hide their opposition, but broadcast resistance plans.

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[122] Comment 34522, n. 15 at p.9.
[123] Emily Davies, et al., *Federal Workers Prepare for Cuts, Forced Relocations in Trump's Second Term*, Wash. Post (Nov. 7, 2024), https://www.washingtonpost.com/dc-md-va/2024/11/07/trump-dc-federal-workforce-cuts/.
[124] *'The Deep State Is Real:' White House Advisor Reveals How Bureaucracy Protects "Its Own Interests," Predicts Bureaucracy Will 'Crush' RFK Jr. as HHS Secretary; "If I Was Given an Order… I Would Either Try to Block It or Resign"*, O'Keefe Media Gp. (Jan. 23, 2025), https://okeefemediagroup.com/the-deep-state-is-real-white-house-advisor-reveals-how-bureaucracy-protects-its-own-interests-predicts-bureaucracy-will-crush-rfk-jr-as-hhs-sec/. Several commenters, including Commenter 4772 and 35478, assert that the tweet and the proposed rule mischaracterize the actual video footage attached to the tweet by claiming that the individual, if given an order he disagreed with, "would either try to block it or resign." But regardless whether this particular employee would engage in policy resistance, there are plenty of other examples and additional information provided in the proposed rule that demonstrates widespread policy resistance.

Soon after President Trump took office a second time, an EEOC administrative judge[125] addressed an email to then-acting EEOC Chairwoman Andrea Lucas and sent it to all EEOC employees. The administrative judge stated, in relevant part: "I will not participate in attempts to target private citizens and colleagues through the recent illegal executive orders."[126] This employee openly professed her intention to refuse Presidential directives based purely on her personal views.[127] Commenters 13308, 34947, 34522, 35446, and 35478 claim that this is a mischaracterization of the employee's actions. In this regard, they claim that the employee viewed the "presidential directives were illegal and unconstitutional." OPM disagrees and believes the characterization is correct. The email was a general and broad statement—broadcast to the entire agency—that this employee would not follow the administration's policy directives. The email did not mention any conflicting legal precedent or discuss the policy directives in the context of any pending agency action. Line Federal employees are not statutorily authorized to unilaterally decide the constitutionality of agency policies for themselves. That authority rests with other officials, such as the Attorney General.[128] Further, none of the commenters provide any authority demonstrating that the policy directives were illegal. Therefore, the argument is faulty. OPM notes that nothing in this rule precludes an employee from discussing concerns about a presidential or agency policy with a supervisor or management.

During the previous Trump administration, multiple Federal Labor Relations Authority (FLRA) decisions publicly chastised a career regional director for "willful noncompliance" with an earlier Authority order.[129] This raises the obvious question—are chapter 75 procedures

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[125] Commenter 34947 questioned this example of an EEOC administrative judge, asserting an "administrative law judge [is] a category of employee who . . . would notably not be subject to Schedule Policy/Career." Commenter is correct that *administrative law judges* are Schedule E; however, this example is an *administrative judge*, who is not Schedule E and would potentially be eligible for Schedule Policy/Career. *See* 5 CFR 6.2.
[126] Abby Vesoulis (abbyvesoulis.bsky), Bluesky (Feb. 3, 2025, 10:12 am), https://bsky.app/profile/abbyvesoulis.bsky.social/post/3lhbtdoudfs25. OPM contacted the EEOC and obtained verification both that the email was accurate and that it was sent by an administrative judge.
[127] *See id.*
[128] *See, e.g.*, 28 U.S.C. 530D.
[129] *See U.S. Dep't of Justice, Exec. Off. for Immigration Rev.*, 72 FLRA 622, 626-28 (Jan. 21, 2022); *U.S. Dep't of Justice, Exec. Off. for Immigration Rev.*, 72 FLRA 733 (Apr. 12, 2022).

sufficient deterrent to ensure such employees are putting their partisanship aside and faithfully implementing the President's agenda?

Finally, agencies also commented on the rule and indicated that they had experienced policy resistance, it impeded their operations, and they believed the proposed rule would be helpful in addressing such misconduct. The Department of Education, for example, commented that during the First Trump Administration, career employees would not constructively assist in drafting important regulations, such as the department's Title IX regulations.[130] As a result, those regulations had to be primarily drafted by political appointees.[131] OPM credits these comments; agencies are better positioned than external parties to observe whether policy resistance occurs.

Commenter 29987 asserts that academic research[132] refutes OPM's assertion of widespread policy resistance. Specifically, the Commenter asserts "career civil servants generally do follow the president's agenda." OPM agrees with this sentiment as expressed in the proposed rule. However, this does not refute the point that *some* career employees intentionally subvert policy directives with which they disagree. In fact, the source cited by Commenter 29987 provides additional evidence of such behavior, describing instances of career employees leaking information to the press because they did not like the administration's policy directives.[133] Commenters 32573, 35478, and 35520 argue the proposed rule ignored evidence that detailed Federal workers' commitment to carrying out lawful administration policies. Again, OPM does not disagree that the majority of Federal employees faithfully perform their job duties. However, this does not refute the evidence of widespread policy resistance detailed in the proposed and this final rule. It can be both true that most Federal employees fulfill their job duties faithfully, and

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[130] Comment 29882, at 4.
[131] The proposed rule cited a report that the Education Department's Title IX rule was primarily drafted by political appointees during the President's first term because key career employees would not constructively assist with drafting it. See 90 FR 17193. Some commenters questioned the accuracy of this report. *See, e.g.*, Comment 35478 at 72. OPM credits the Education Department's statement as resolving this factual dispute and demonstrating the accuracy of the initial report.
[132] Marissa Martino Golden, What Motivates Bureaucrats?: Politics and Administration During the Reagan Years, Columbia University Press (2000).
[133] *Id.* at pp. 134-135; *see also id.* at p.13 ("career civil service is neither entirely responsive nor entirely resistant, but rather bureaucratic behavior under the conditions of the administrative presidency is a mixture of both....").

that a significant minority do not.

In a similar fashion, Commenter 35478 also argues that a Bloomberg News article published in 2017 and cited in the proposed rule does not detail policy resistance but instead details "career employees following legal requirements, implementing policy at agencies that did not have political appointees in place, or providing candid advice." We disagree with the Commenter's assessment. The Bloomberg News article provides numerous instances of policy resistance.[134] Even if this article did not support this proposition, the other sources cited in the proposed rule demonstrate widespread policy resistance.[135]

Commenters 29987, 35446, and 35478 argue that the majority of the examples describe future actions that Federal employees may or may not take, not actual past conduct. It is true that some of the examples are statements from Federal employees on what they *would* do in a specific future situation. However, to completely disregard such statements simply because they are in the context of a future situation is nonsensical. It is a universal norm to rely on and take proactive measures based on an individual's statement as to what they will do or what they think will happen. Further, as the Commenters concede, there are other examples of past policy resistance documented in the proposed rule.

Commenter 35478 also argues OPM mischaracterized the role or status of the two individuals in two of the cited examples in the proposed rule. In this regard, the proposed rule cited "a long-time federal employee's guide to 'useful tools' to 'subtly subvert...orders' without outright revolting."[136] The Commenter insists that this is a mischaracterization because the individual retired from the Federal Government. OPM disagrees. While the individual did retire,

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[134] Christopher Flavelle & Benjamin Bain, "Washington Bureaucrats are Quietly Working to Undermine Trump's Agenda," Bloomberg News, (Dec. 18, 2017), https://www.bloomberg.com/ politics/features/2017-12-18/washingtonbureaucrats-are-chipping-away-at-trump-s-agenda (State Department staff preserved programs to boost the economies of developing countries - at odds with Trump's campaign pledges - by relabeling them); *id*. (NOAA employees continuing to issue reports that are at odds with Trump administration's policies); *id*. (Pentagon staff delaying the reversal of an Obama-era directive by conducting a review of the policies).
[135] *See* 90 FR 17192-93.
[136] 90 FR 17192.

he did so after "42 years of federal service."[137] As such, referring to this individual as a "a long-time federal employee" can hardly be said to be a mischaracterization. The Commenter similarly asserts OPM mischaracterized an example of policy resistance because the article stated the individual was a "federal employee in the Department of Justice's grants division,"[138] while the proposed rule stated the individual was a "career Department of Justice employee with grantmaking responsibilities."[139] Again, this is not a mischaracterization—but instead an example of paraphrasing a source, which is common practice. Commenter objects that it is not clear from the article whether this employee had policy-influencing responsibilities. However, regardless of whether this career employee personally had such responsibilities, the employee was well positioned to observe how policy-influencing career employees in the grants division reacted to policies they did not support. Whether the employee personally slow-walked such policies, or merely observed more senior colleagues doing so, is immaterial to this rulemaking.

Commenters 19791, 28481, and 32803 critique the proposed rule for citing "sources that reflect fringe right-wing opinion and conspiracy theories." Without identifying the specific sources they are criticizing, the Commenters allege these examples should not be relied on to justify Schedule Policy/Career. OPM disagrees with the Commenters that the sources used are somehow discredited or refuted simply because they believe the sources are associated with one side of the political spectrum. Even assuming such sources are illegitimate, for sake of argument, the remaining sources and evidence still substantiate the claim of widespread policy resistance.

Commenter 30426 contends OPM has not cited a single instance in which the administration confronted an actual instance of policy resistance and was unable to use existing chapter 43 or 75 mechanisms to take action. Commenter contends this "failure is fatal" as OPM

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[137] Joe Davidson, "Many feds don't like Trump's program, but they're not revolting," Wash. Post (Feb. 1., 2017), https://www.washingtonpost.com/ news/powerpost/wp/2017/02/01/many-feds-dontlike-trumps-program-but-theyre-not-revolting.

[138] Juliet Eilperin, Lisa Rein, & Marc Fisher, "Resistance from within: Federal workers push back against Trump," Wash. Post (Jan. 31, 2017), https://www.washingtonpost.com/politics/ resistance-from-within-federal-workers-push-backagainst-trump/2017/01/31/c65b110e-e7cb-11e6- b82f-687d6e6a3e7c_story.htm

[139] 90 FR 17192.

has not explained "why the proposed solution is a necessary or appropriate response" to the problem. To the contrary, the evidence OPM has cited shows exactly this.[140] It shows policy resistance widely occurs, which demonstrates existing tools have proven insufficient to address the problem. Several agencies have told OPM that it occurs and they believe the rulemaking would ameliorate the problem. Support from affected agencies is strong evidence OPM has proposed an appropriate response

Adding further currency to this issue, a recent article appearing in Politico highlighted the deep level of resistance to Trump Administration policies that is currently playing out among career civil servants.[141] The article, openly quoting many anonymous Federal employees, states: "At the end of the day, career staffers still believe that politicians come and go and it's them who will persevere"[142] Another news outlet reported that Federal employees freely stated their intentions to resist the policies of the current Trump Administration on Reddit and to news reporters.[143]

Rather than hiding their contempt for the results of a democratic election, these employees are resisting, in some cases overtly—in many more instances covertly—the policies and direction of their own leadership. To argue that this does not constitute widespread resistance to a duly elected government is untenable. Schedule Policy/Career attempts to

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[140] OPM further notes that the *Tales from the Swamp* report, which, OPM credits (although it is far from the sole or primary basis for this rulemaking), provides examples of policy resistance stymieing policy initiatives in the first Trump Administration. For example, Education Department officials reported career staff unwillingness to meaningfully assist with drafting regulations reduced the Department's ability to write rules and prevented the Department from issuing rules that leadership considered good policy. Commenter did not dispute the accuracy of this account. Given that the Education Department has since verified, on the record, that political appointees had to draft priority regulations in the first Trump Administration, OPM considers this example highly credible. *See* James Sherk, *Tales from the Swamp: How Federal Bureaucrats Resisted President Trump*, Am. First Pol'y Inst. (Jan. 8, 2025) (*Tales from the Swamp*), at 18-19, https://www.americafirstpolicy.com/assets/uploads/files/Tales_from_the_Swamp-_How_Federal_Bureaucrats_Resisted_President_Trump_-_Revided_1.8.2025.pdf.

[141] Erin Schumaker, *The 'deep state' is proving to Trump it's a worthy foe*, POLITICO (Sept. 14, 2025), https://www.politico.com/news/2025/09/14/trump-federal-workers-deep-state-civil-service-00558940 ("[M]ore than 1,000 civil servants, some current, some former, published an open letter demanding [Trump appointee's] resignation.")

[142] *Id.*

[143] Allan Smith, "'They've radicalized me': Federal workers fight back as Trump dismantles their work," NBC News (March 2, 2025), https://www.nbcnews.com/politics/doge/federal-workers-fight-back-trump-dismantles-work-radicalized-rcna192040 (detailing social media posts encouraging resistance).

partially address this issue for a relatively small subset of employees; those who are in the most sensitive policy-influencing positions. These positions are those that have the greatest impact on ensuring that the President's policies and directions are properly implemented.

Further, the President has concluded that policy resistance is a significant problem and that Schedule Policy/Career is needed to address it. The President is the official constitutionally and statutorily vested with responsibility for the executive branch. Even if OPM was not convinced that policy-resistance is a serious enough problem to warrant creating Schedule Policy/Career—and the evidence discussed above independently persuades OPM that it is—OPM would credit the President's judgment in this regard.

Accordingly, OPM believes that career employee partisanship and policy resistance is a serious problem because it undermines democracy. If the American people do not like the policies elected officials advance, they can vote for new leadership. But Americans have little recourse when career employees advance their personal agendas or undermine elected officials' policies. They are electorally unaccountable. America was founded on the principle of government by consent of the governed. Career employees who resist elected officials' policy choices undermine the foundations of American democracy.

iii. The Policy-Influencing Terms Are Not a Term of Art

Several commenters, including Commenters 0648, 23789, 26673, 30426, and 32573, argue that the use of the terms confidential, policy-determining, policy-making, and policy-advocating in 5 U.S.C. 2302(a)(2)(B)(i) and 5 U.S.C. 7511(b)(2) is a term of art that applies only to political appointees and, therefore, cannot be applied to career Federal employees to remove adverse action procedures. As explained below, OPM disagrees with this analysis of the statutory language.

Irrelevant to the Rulemaking

First, this objection misses the point OPM made in the proposed rule that whether the policy-influencing terms are a term of art that means "political appointees" or a description of

particular duties is legally irrelevant.[144] Even assuming arguendo that the words confidential, policy-determining, policy-making, and policy-advocating are a term of art for political appointees, that construction makes no legal or practical difference. All that would mean is that E.O.s 13957 and 14151, and this rulemaking, are converting a class of positions and the employees occupying them into technically political appointments. Although this final rule is not converting career positions into political positions, nothing in Title 5 prevents the President from doing so and thereby changing an incumbent's status.

Rather, the text of 5 U.S.C. 2302(a)(2)(B) implies an inflection point at which the nature of the position changes when an appropriate authority determines it is policy-influencing. The provision states that positions covered by PPP requirements do not include positions of a policy-influencing nature, provided that the PPP occurred prior to the designation of the position as policy-influencing. This implies that positions may be declared policy-influencing both prior to and subsequent to a personnel action occurring, as well as during the tenure of a single incumbent. The Senate's decision in 1994 to adopt a substitute amendment explicitly inserting this language into a House-passed bill would be pointless if positions could only be declared policy-influencing prior to appointment. If that were the case, the Senate's re-write of what became codified at 5 U.S.C. 2302(a)(2)(B) would necessarily mean it was adding mere surplusage to the statute. Congress did not amend 5 U.S.C. 2302(a)(2)(B) to add empty surplusage.[145] In 1994, therefore, Congress recognized the President's authority to declare encumbered positions policy-influencing and thereby alter their legal status. If the President were to exercise that authority, an agency could thereafter take a previously proscribed PPP against an incumbent holder of the position, such as transferring him or her based on his or her political affiliation. Congress has thus recognized that the President can convert encumbered career

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[144] 90 FR at 17197.

[145] *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955), (*citing Inhabitants of Montclair Tp. v. Ramsdell*, 107 U.S. 147, 152 (1883) ("It is our duty 'to give effect, if possible, to every clause and word of a statute[.]'")).

positions to political appointments.[146]

At most, under these Commenters' reading of the policy-influencing terms, an executive order transferring career positions into Schedule Policy/Career would convert them into technically political appointments. However, as OPM explained in the April 2025 proposed rule, under that construction E.O. 13957, as amended, simply uses the President's constitutional and executive discretion to direct his subordinates to treat such nominally political positions as career positions, and to label and treat them as such, including by requiring agencies to establish protections against PPPs for Schedule Policy/Career employees. This is a perfectly lawful and common practice. It is well established that the President may treat technically political appointments as career positions. Consider that most offices in the executive branch subject to the Constitution's Appointments Clause are, constitutionally speaking, political appointments.

Apart from the Senate's constitutional role in the confirmation process for Presidentially Appointed, Senate Confirmed (PAS) appointments, Congress holds extremely limited authority to substantively control the appointment of Officers of the United States. That prerogative is reserved for the executive branch. The Supreme Court has clarified as much, stating "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement."[147]. While the Senate may decline to confirm a nominee to a PAS position, Congress may not, for example, prohibit the President by law from nominating individuals based on political considerations. Similarly, the Supreme Court has well-clarified the President's extremely broad constitutional

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[146] In the April 2024 final rule OPM argued that 5 U.S.C. 2302(a)(2)(B) had implications only for employee relief from PPPs and not chapter 75 actions. *See* 89 FR at 25025. Nonetheless, OPM recognizes that this statutory amendment presupposes that the President can convert career positions, and the incumbents in them, into political appointees by exempting them from prohibitions on discrimination based upon political affiliation. *See* 5 U.S.C. 2302(a)(2)(B) (excluding from coverage any position "excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration").

[147] *Buckley v. Valeo*, 424 U.S. 1, 139 (1976) (quoting *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928)).

discretion to dismiss PAS officers extends to politically motivated dismissals.[148] Nor can Congress restrict the President from removing, for political reasons, inferior officers who, acting alone, wield significant administrative or policymaking authority.[149]

The President and Congress nonetheless have the discretion to treat Federal offices that are, as a constitutional matter, political appointments as career positions, label them as such, and often have done both. For example, ambassadors are constitutionally obligated to be PAS appointments.[150] But there is widespread practice of treating some ambassadorships as career positions, appointing career foreign service officers to serve.

Similarly, under 22 U.S.C. 3942(a)(1) most Foreign Service positions are PAS appointments. Constitutionally, Congress may not require particular screening procedures before the President submits nominations for PAS offices to the Senate. The President has plenary authority to nominate whomever he deems best. Nor can Congress require the President to delegate authority to dismiss PAS officeholders to a nonpartisan appeals board. Purely executive PAS officials serve at the pleasure of the President.[151] However, Congress has passed laws, to which Presidents have voluntarily adhered, extensively regulating selection of nominees to, and dismissals from, PAS Foreign Service positions, even going so far as to label some as "career members" of the Foreign Service.[152] The executive branch has routinely treated technically political PAS Foreign Service positions as career appointments because successive Presidents

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[148] *Myers v. United States*, 272 U.S. 52, 176 (1926) ("[I]t therefore follows that the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so.").

[149] *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 238 (2020) (*Seila Law*).

[150] *See* U.S. Const. Art. II, Sec. II, Cl. II.

[151] *See, e.g., Humphrey's Executor v. United States*, 295 U.S. 602, 631-32 (1935) (*Humphrey's Executor*) ("the Myers decision, affirming the power of the President alone to make the removal, is confined to purely executive officers" (citing *Myers*, 272 U.S. 52)). The Supreme Court has recognized an exception to the rule that PAS officials serve at the pleasure of the President, holding that it does not apply to officials who lead multimember agencies that do not wield substantial executive power. *See id.*; *Seila Law*, 591 U.S. at 198. The continuing validity of this exception is in question as the Supreme Court recently granted certiorari for the purpose of reconsidering *Humphrey's Executor*. *See Trump v. Slaughter*, No. 25A264, No. 25-332, 2025 WL 2692050 (U.S. Sept. 22, 2025). Regardless, the *Humphrey's Executor* exception is inapplicable to PAS foreign service members.

[152] *See* 22 U.S.C. 3942(a)(1); *see also* 22 U.S.C. 3946 ("[T]he Secretary shall decide whether to recommend to the President that the candidate be given a career appointment under section 3942 of this title."); 22 U.S.C. 4137(b)(4) (giving the Foreign Service Grievance Board the authority to reinstate a removed foreign service officer).

have found that doing so helps them carry out their constitutional responsibilities. This, however, is an act of Presidential discretion, not legal obligation. Congress may not enforce these restrictions except through the Senate's advice and consent role in the confirmation process. Technically, PAS Foreign Service positions remain political appointments,[153] though both Congress and the President have found it advantageous to treat and describe them as career positions.

If the President wishes to appoint and dismiss officials in technically political positions without regard to political affiliation or personal political views, he is free to do so (and to direct his subordinates to do so). The fact that the President can legally appoint and vacate positions on a political basis does not mean that he must do so. The President can also label formally political positions as career positions to make it clear how he wants his subordinates to treat them. Such practices are not uncommon.

Consequently, even if the policy-influencing terms were a term of art that described political appointments, the President could still designate these positions as Schedule Policy/Career to make it clear subordinate officials are to fill and vacate them without regard for political affiliation. This is no more legally problematic than Congress and the executive branch designating PAS officers as "career members" of the Foreign Service[154] notwithstanding the President's plenary constitutional authority to nominate candidates for and dismiss incumbents from such positions. As a result, whether the policy-influencing terms technically designate political appointments is administratively and practically irrelevant.

Even if the commenters are correct that the policy-influencing terms are a term of art referring exclusively to political appointments, the commenters have not explained how this makes any difference to the rule's legality or the administration's ability to execute it.

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[153] *See* 22 U.S.C. 3942(a)(1) ("The President may, by and with the advice and consent of the Senate, appoint an individual . . . as a career member of the Senior Foreign Service, or as a Foreign Service officer.").
[154] *See id.*

Specifically, if the policy-influencing terms are descriptors of positions with a nexus to confidential duties or policy, then, under the E.O.s and Notice of Proposed Rulemaking, positions moved into Schedule Policy/Career remain career positions. If the policy-influencing terms are a term of art meant to refer to political appointees, then, under the E.O.s and the proposed rule, positions moved into Schedule Policy/Career are converted into technically political positions that by Presidential directive will be filled and vacated without regard to political affiliation. These positions will be labeled and treated as career positions, similar to career members of the Foreign Service whose PAS positions are technically constitutionally political but are, in practice, treated as career positions. In sum, the distinction between the two interpretations of the policy-influencing terms is substantively meaningless.

Textual Analysis

Several commenters took the position that "confidential, policy-determining, policy-making, or policy-advocating" is a term of art which refers solely to political appointees. As discussed above, accepting this view has no legal or practical effect on the rule's validity. Moreover, as OPM explained in the proposed rule, the best interpretation of the CSRA is that each of the policy-influencing terms bear their constituent meanings. That is Congress used the terms "confidential," "policy-making," "policy-determining," and "policy-advocating" to describe the types of positions that are eligible for the 5 U.S.C. 2302(a)(2)(B) and 7511(b)(2) exceptions.

Multiple canons of statutory construction point to this conclusion. First, meaningful variation in statutory language is presumed to entail a change in meaning. Congress used specific language in the CSRA to explicitly distinguish between career and political appointees in the SES, namely "career" and "noncareer" appointments.[155] In subchapter V of chapter 75 Congress expressly gave all "career" SES officials adverse action procedures while excluding noncareer

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[155] *See* 5 U.S.C. 3132 and 3134.

officials.[156] Congress separately used quite different language—namely the policy-influencing terms—to describe exceptions from adverse action appeals for non-SES employees in subchapter II. [157] Canons of statutory construction indicate this shift in language implies a shift in meaning: the policy-influencing terms are not synonyms for "noncareer." OPM is mindful of the Supreme Court's directive that "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended."[158]

Second, under the presumption of consistent usage the "normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning."[159] This matters because Congress used the policy-influencing terms elsewhere in the CSRA in a manner that is inconsistent with their being a term of art for political appointees. In 5 U.S.C. 3132(a)(2)—also part of the CSRA—Congress defined SES positions as those graded above GS-15 that "direct[] the work of an organizational unit; [are] held accountable for the success of one or more specific programs or projects; monitor[] progress toward organizational goals and periodically evaluates and makes adjustments to such goals; or otherwise exercise[] important *policy-making, policy-determining, or other executive functions*."[160] In 5 U.S.C. 3134(b), Congress prohibited more than 10 percent of SES positions from being filled by noncareer (e.g., political) appointees.[161] Consequently, at least nine-tenths of SES positions—which are definitionally "policy-making" or "policy-determining" executives—must be held by career officials.

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[156] *See* 5 U.S.C. 7541(1) (defining "employee" as "a career appointee in the Senior Executive Service"); U.S.C. 3132(a)(4) (defining "career appointee" as "an individual in a Senior Executive Service position whose appointment was based on approval by the Office of Personnel Management of the executive qualifications of such individual").
[157] The fact that the CSRA uses terms whose ordinary meanings describe officials who can and cannot expect to stay in Government across presidential administrations, namely "career" and "noncareer", further suggests Congress saw no need to use a term of art to distinguish political appointees from career officials. This reinforces the conclusion that the policy-influencing terms bear their ordinary, constituent meanings.
[158] *See Sosa v. Alvarez–Machain*, 542 U.S. 692, 711 n.9 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46:06, p. 194 (6th rev. ed. 2000)).
[159] *Gustafson v. Alloyd Co., Inc*., 513 U.S. 561, 570 (1995) (quoting *Dep't of Revenue of Ore. v. ACF Indus., Inc*., 510 U.S. 332, 342 (1994) (internal quotation marks omitted)).
[160] 5 U.S.C. 3132(a)(2) (emphasis added).
[161] *See* 5 U.S.C. 3134(b) ("The total number of noncareer appointees in all agencies may not exceed 10 percent of the total number of Senior Executive Service positions in all agencies.").

Congress's decision to use "policy-making" and "policy-determining" to define a class of employees which must be at least 90% career employees is incompatible with those terms being merely subcomponents of a single term of art which can refer only to political appointees. Moreover, the presumption of consistent usage most strongly applies to terms appearing in the same enactment, as these did.[162] Congress's use of the terms "policy-making" and "policy-determining" to describe career positions in one part of the CSRA strongly suggests these terms are not mere synonyms for the different term used to describe political appointees elsewhere in the statute.

Looking at the CSRA as a whole makes construing the policy-influencing terms as a specialized term of art describing only political appointees untenable. Congress knew how to categorically grant all career employees adverse action procedures in chapter 75 but used quite different language when drafting subchapter II of that chapter. Congress also used the policy-influencing terms employed in subchapter II to separately describe primarily career positions. The better reading of 5 U.S.C. 7511(b)(2) is that the terms in the expression "confidential, policy-determining, policy-making, or policy-advocating" have their ordinary, plain English meaning and describe positions involved in determining, making, or advocating for policy, or confidential positions. Such positions include but are not limited to political appointments.

This construction gives the same meaning to the terms "policy-making" and "policy-determining" throughout the CSRA while recognizing that the terms "career" and "noncareer" have an orthogonal meaning, referring to civil service and political appointments respectively. This interpretation also recognizes that Congress specifically gave adverse action procedures to career SES members and denied them to noncareer SES appointees, while using very different

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[162] *See United States v. Castleman*, 572 U.S. 157, 174 (2014) (Concurring Opinion of Justice Scalia) ("[T]he presumption of consistent usage [is] the rule of thumb that a term generally means the same thing each time it is used[,]" and "is most commonly applied to terms appearing in the same enactment."); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) ("[T]he normal rule of statutory interpretation [is] that identical words used in different parts of the same statute are generally presumed to have the same meaning."). *See also Azar v. Allina Health Servs.*, 587 U.S. 566, 574 (2019) ("This Court does not lightly assume that Congress silently attaches different meanings to the same term in the same or related statutes.").

language in the section of chapter 75 governing the competitive and excepted services. These factors indicate the policy-influencing exclusion from subchapter II should not be read as a term of art that applies only to political appointees.

Commenters raised various objections to this conclusion and argued the policy-influencing terms should be read as a singular term of art whose meaning is divorced from its constituent terms. They assert that these terms mean only and exclusively "political appointee." OPM disagrees with these comments, for the reasons set forth below.

Otherwise Exercises

Commenter 29987 suggests that 5 U.S.C. 3132(a)(2) should be read to define SES employees to include officials above the GS-15 level who exercise policy-making, policy-determining, or executive functions, but that this does not imply that officials who perform the other duties set forth in that subsection have policy-making or policy-determining functions. In Commenter's view, the use of "policy-making" and "policy-determining" in section 3132(a)(2) supplies additional criteria for defining SES positions but does not imply the other enumerated criteria are policy-determining or policy-making functions.

OPM respectfully disagrees. Commenter's construction would make sense if 5 U.S.C. 3132(a)(2)(E) did not describe SES positions as "*otherwise* exercise[ing] important policy-making, policy-determining, or other executive functions" (emphasis added). In English, the use of the term "otherwise" in this manner indicates that the functions that precede the "otherwise" are of the same type as those that follow it. Congressional use of "otherwise" implies the criteria such as "[being] held responsible for the success of one or more specific programs or projects" or "monitor[ing] progress towards organizational goals and periodically evaluat[ing] and mak[ing] appropriate adjustments to such goals" are important policy-determining, policy-making, or executive functions.

Contrary to Commenter's suggestion, OPM also believes the functions expressly enumerated in section 3132(a)(2) cannot be characterized as only "executive" functions with no

connection to policy. That construction would render the use of the terms "otherwise" "policy-making" and "policy-determining" in section 3132(a)(2)(E) mere surplusage. If none of the expressly enumerated functions are policy-making or policy-determining, it would make no sense to describe an employee as "otherwise" exercising such policy functions. Further, OPM believes it is natural to consider responsibilities such as making adjustments to organizational goals as involving policy-making and not purely executive functions.

Location of 7511(b)(2) does not Limit Policy-Influencing Terms to Political Appointees

Commenter 30426 argues that 5 U.S.C. 7511(b)(2) was originally one of only two exclusions in section 7511(b), both of which only addressed political appointee positions. In its current form, paragraph (b)(2) is sandwiched between two other political appointee exclusions, one for PAS positions, and one for PA positions. This simply shows that Congress intended the exception to apply to political appointees, as it surely does.

OPM does not dispute that 5 U.S.C. 7511(b)(2) was added largely for the purpose of allowing exceptions for political appointees from adverse action appeals. However, OPM asserts that the exception can cover both political appointees and some policy-influencing career employees. The addition of a third exception presupposes congressional intent that the other two were insufficient to cover the universe of appointees to whom Congress intended to apply the exception. Commenter 30426 does not explain how this placement is an argument for construction of 5 U.S.C. 7511(b)(2) to exclusively cover political appointees, rather than it covering political appointees as well as a broader potential application subject to discretion to exercise that application.

Congressional Purpose does not Override Statutory Text

Commenter 30426 similarly argues that in the CSRA itself, Congress declared that one of its purposes is to ensure that Federal employees "receive appropriate protections through increasing the authority of the MSPB in processing hearings and appeals affecting [f]ederal employees."

OPM concurs in the view that the CSRA was intended to provide MSPB coverage, which it will continue to provide to the vast majority of employees under this reading. That purpose can and does coexist with the statutory exceptions from MSPB coverage, including those for policy-influencing positions. As the Supreme Court has clarified, "[i]ndeed, it is quite mistaken to assume … that 'whatever' might appear to 'further[] the statute's primary objective must be the law.'"[163] Commenter's other arguments that CSRA adverse action exemptions should be read narrowly in light of other sections, including 2302(a)(2)(B)(i) have the same answer: OPM is reading the restrictions narrowly, just not as narrowly as the Commenter suggests. Further, 5 U.S.C. 2302(a)(2)(B)(ii) permits the President to except "any position"—not just policy-influencing positions—from PPP prohibitions if he determines it necessary and consistent with principles of good administration. If giving the President broad discretion to except any position he deems necessary from PPP prohibitions is consistent with the broader purpose of the CSRA, and 5 U.S.C. 2302, then reading 7511(b)(2) to authorize the President to except just policy-influencing career positions is also consistent with the CSRA's purpose.

OPM's Interpretation is Consistent with the CSRA and Other Title 5 Authorities

Commenters 16670, 23789, 30426, and others argued that construing the policy-influencing terms to bear their ordinary, constituent meaning would be "incoherent" because it would give members of the SES, who wield more authority over policy, stronger removal protections than subordinate employees in the General Schedule covered by subchapter II with less authority over policy. They criticize OPM for failing to explain why Congress would make an "illogical" choice to create a "giant" exception from adverse action procedures for lower-ranking employees but not the more powerful senior executives who supervise them.

As OPM explained in the proposed rule, this objection misses statutory SES management

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[163] *Henson v. Santander Consumer USA Inc*., 582 U.S. 79, 89 (2017) (*citing Rodriguez v. United States*, 480 U.S. 522, 526 (1987)).

flexibilities. Agency heads can reassign SES members at-will[164] and have broad discretion to demote them from the SES for poor performance without external appeals.[165] The President and OPM can also take agencies out of the SES and create alternative senior executive management systems.[166] Section 7511(b)(2) of 5 U.S.C. would then allow the President to exclude employees in those alternative systems from chapter 75.[167] Congress could have easily seen the need for greater authority to remove policy-influencing employees below the SES precisely because agencies do not have the same degree of management flexibility. Congress could have also drafted section 7511(b)(2) more expansively in part to ensure the President could make senior executives entirely at-will if he takes their agencies out of the SES.[168] The commenters also failed to consider that the President proactively exercised his executive authority to extend protections from PPPs to Schedule Policy/Career positions by requiring agencies to establish and enforce internal policies protecting these career employees from, for example, whistleblower reprisal.

Commenter 30426 rejected this analysis as "absurd" because it suggests Congress's intricate work crafting the CSRA, with the creation of the SES the crown jewel of that work, is meant only to "cohere" in agencies that are excepted from the SES. Commenter 30426 also objected that this would imply Congress gave the President the authority to fire a single member of the SES, but only if he excepted the entire agency from the SES system, a conclusion the Commenter similarly described as absurd. Commenter 30426 further argued that SES management flexibilities are not as significant as OPM explained, reasoning that reassignment at will and unappealable performance-based demotions of SES members are not comparable to at-

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[164] *See* 5 U.S.C. 3395
[165] *See* 5 U.S.C. 4312(d) and 4314(b)(3).
[166] 5 U.S.C. 3132(c).
[167] 5 U.S.C. 7511(b)(2) (excluding from chapter 75 any position that "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").
[168] For example, unlike SES members, competitive and excepted service employees can appeal removals based on unacceptable performance to the MSPB. *See* 5 U.S.C. 4303(e).

will dismissal of sub-SES employees. The Commenter uses this observation to buttress the argument that it would be illogical to construe the CSRA to give the President more flexibility over junior employees than senior executives.

On the contrary, OPM believes construing 7511(b)(2) to allow the President to make policy-influencing excepted and competitive service employees at-will makes rational sense. Congress could reasonably have expected that heightened SES management flexibility would generally be sufficient to address performance issues or policy resistance, while recognizing that in some cases they would not. In those cases, Congress left the President backstop authority to exclude an agency or agency subunit entirely from the SES and use 7511(b)(2) to make such senior executives at-will employees. Congress may have expected this backstop authority to be the exception, not the rule. But construing the CSRA to provide such backstop authority, while expecting it would rarely need to be used, is a coherent construction of the statute.

In addition, employees in the competitive and excepted services can appeal performance-based demotions to the MSPB.[169] SES members cannot.[170] These are considerably greater management flexibilities than Congress has given agencies over sub-SES officials.[171] Congress could have rationally expected SES management flexibilities would generally suffice and not see the need to provide for at-will SES removals in the mine run of agencies that the President elects to keep in the SES.[172]

Moreover, OPM notes that 7511(b)(2) authority only applies to the small subset of sub-

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[169] *See* 5 U.S.C. 4303(e), 7513(d).
[170] *See* 5 U.S.C. 4312(d), 4314(b).
[171] The Supreme Court similarly recognized these SES management flexibilities as noteworthy in evaluating the constitutionality of removal protections for officers exercising executive power. *Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd*., 561 U.S. 477, 506–07 (2010) (noting that "members of the Senior Executive Service may be reassigned or reviewed by agency heads (and entire agencies may be excluded from that Service by the President)" (citing 5 U.S.C. 3132(c), 3395(a), 4312(d), 4314(b)(3) and (c)(3)). *Free Enterprise Fund* also cited the fact that "[s]enior or policymaking positions in government may be excepted from the competitive service to ensure Presidential control" as another factor distinguishing the rules governing the civil service from the "significant and unusual protections from Presidential oversight" enjoyed by the board members at issue in *Free Enterprise Fund*. *Id*. at 506 (citing 5 U.S.C. 2302(a)(2)(B), 3302, 7511(b)(2)).
[172] Indeed, any interpretation of the CSRA or any other law that restricted the President from removing an officer with significant "policymaking or administrative authority" would be constitutionally suspect. *See Seila Law*, 591 U.S. at 218.

SES employees in policy-influencing positions. Under the CSRA the rule is that agencies have more management authority over SES members than the vast majority of competitive and excepted service employees. It could easily be rational, rather than illogical, for Congress to conclude the President needed heightened management authority over the small subset of policy-influencing employees covered by 5 U.S.C 7511(b)(2).

OPM recognizes that the 7511(b)(2) exception was enacted for the purpose of permitting the executive branch to except political appointees from adverse action procedures. It has consistently been applied for that purpose. However, the text Congress used to draft this exception makes positions eligible based on the types of duties they perform—not the political nature of the incumbent's appointment. Nothing in the text of 7511(b)(2) restricts its application to employees hired on a political basis, or to employees who are expected to be dismissed upon a change of administration. Some members of Congress may have assumed that the exception would only apply to political appointees, but nothing in the enacted text of subchapter II requires that view. It is the text of statutes Congress enacts that binds as law.[173]

Relatedly, SES members generally supervise organizational units. Thus, the authority granted in 5 U.S.C. 3132(c) to remove an agency "unit" will generally suffice to allow OPM and the President to except a single individual from the SES. Contrary to Commenter 30426's statement, it is generally unnecessary to except an entire agency from the SES to hold accountable a single SES member.

OPM's Interpretation is Consistent with 5 U.S.C. 2302

Commenter 30426 argues that OPM's argument that the terms "policy-making" and "policy-determining" in 5 U.S.C. 3132(a)(2) have the same meaning as in 5 U.S.C.

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[173] *See Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) ("[A] statute is not to be confined to the 'particular application[s] . . . contemplated by the legislators.'" (quoting *Barr v. United States*, 324 U.S. 83, 90 (1945))); *Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."); *see also Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 653 (2020) ("[T]he limits of the drafters' imagination supply no reason to ignore the law's demands.").

2302(a)(2)(B) and 7511(b)(2) ignores the fact that Congress expressly included career SES in the coverage of 5 U.S.C. 2302, even though it excluded "confidential, policy-determining, policy-making or policy-advocating" excepted service positions from that section. Commenter contends that if the words used in 5 U.S.C. 3132 had the same meaning as the distinct term of art in 5 U.S.C. 2302(a)(2)(B)(i), then the express coverage of career SES members by 5 U.S.C. 2302 would make little sense, as all SES members would be expressly included by section 5 U.S.C. 2302(a)(2)(B), but then excluded under 5 U.S.C. 2302(a)(2)(B)(i).

Commenter's argument in this regard misses the fact that SES positions—both career and noncareer—are definitionally not in the excepted service but exist in a separate statutory category. Section 2103(a) of Title 5, U.S. Code, provides that the "excepted service" are those "civil service positions which are not in the competitive service or the Senior Executive Service." Section 2302(a)(2)(B)(i) of Title 5, U.S. Code, does not apply to SES members, because it covers "any position which is excepted from the competitive service because of its confidential, policy-determining, policy-making or policy-advocating character." In this way, SES positions are not "excepted from the competitive service," but rather exist within a separate service.

Consequently, there is no contradiction as Commenter 30426 proposes. Section 2302(a)(2)(B) includes many positions, including career SES, under protections from PPPs, while 5 U.S.C. 2302(a)(2)(B)(i) excludes policy-influencing positions in the excepted service from coverage under 5 U.S.C. 2302. That exclusion for policy-influencing excepted service positions does not apply to any SES positions because they are not part of the excepted service, no matter the policy-nature of their duties. OPM further notes that Schedule Policy/Career will not apply to the SES, which operates under separate statutory authority. Consequently, the concerns expressed by Commenters 26624 and 28202 for SES employees are also inapplicable.

E.O. 13957 and the Final Rule do not Expand the Meaning of the CSRA

Commenter 30426 criticizes Section 5(c) of E.O. 13957, as amended, and OPM's January

2025 Memorandum, as atextually expanding the use of "confidential, policy-determining, policy-making or policy-advocating" to include duties that are policy-related and develop or formulate policy. Commenter 30426 points to other descriptors used in the E.O. to describe policy-influencing positions, namely policy "viewing," "circulating," and "working", and concludes that the E.O. expands the statutory terms under 5 U.S.C. 7511(b)(2) towards covering those involved in the daily administration of Government.

Commenter 30426 misreads the categories in subsection 5(c) of E.O. 13957 and OPM's January 2025 Memorandum requiring agencies to focus analysis on certain types of positions. Commenter 30426 construes these categories as definitions of the policy-influencing terms. As explained in this rule, they are not definitions, but rather are guideposts to focus agency analysis and recommendations on positions that are more likely to be policy-influencing. It is not the case that every position that falls within these criteria will be included in Schedule Policy/Career, nor is it the case that every position not described by these guideposts will not be held to be policy-influencing. OPM's January 2025 Memorandum expressly advised agencies that these guideposts were not controlling but merely factors to consider. This guidance encompasses employees who have access to confidential, deliberative policy information by virtue of their close working relationship with agency leadership and management, given GS-13 and higher are the management grades in the Federal Government. While these positions may not, in an agency's determination, fall within the scope of the terms policy-making or policy-determining, they may execute confidential duties within the bounds of 5 U.S.C. 7511(b)(2). Commenter 30426 provides no argument as to why such positions should not be considered confidential.

Commenter 30426's conclusion is similarly confusing. Commenter 30426 does not explain how authority over the policies governing the daily administration of government are *not* policy-making authorities in and of themselves. Determining the manner in which agencies carry out their work is government policy. Agencies have substantial discretionary authority to determine how the government carries out its statutory responsibilities, and that authority is the

authority to make policy if not determine it. In lay terms, the "how" and the "what" of a policy are interdependent and, in fact, inextricably linked considerations.

Commenter 30426 similarly argues that E.O. 13957, as amended, drifts away from the statutory focus on the "character" of a position towards the location of a position within an organization when, for example, it purports to cover positions situated in an executive secretariat. However, Executive Secretariat positions are often heavily involved with circulating draft proposals and documents with agency heads. Many, though not necessarily all, of them are appropriately considered confidential.

All Supervisors are Not Included in Schedule Policy/Career

Commenter 30426 and others take issue with OPM's January 2025 Memorandum that provides guideposts to agencies to implement E.O.s 13957 and 14171. Commenter 30426 argues that by including the 5 U.S.C. 3132(a)(2) terms defining SES positions in the January 2025 Memorandum, OPM has effectively advanced a view that the CSRA authorizes exclusion of nearly all supervisory positions in Government. Commenter 30426 points to the separate probationary period for new supervisors authorized by Congress in 5 U.S.C. 3321(a)(2).

The CSRA defines SES positions as positions above the GS-15 level that perform certain enumerated functions or "otherwise exercise[] important policy-determining, policy-making, or other executive functions."[174] From these enumerated functions the January 2025 Memorandum did not include "supervising the work of employees other than personal assistants,"[175] and thus does not include most line supervisors who perform executive functions without the same degree of responsibility for agency policy. However, it included executives whose responsibilities include "directing the work of an organizational unit", "being held accountable for one or more specific programs or projects", and "monitoring progress toward organizational goals, and

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[174] *See* 5 U.S.C. 3132(a)(2).
[175] *Id.*

periodically evaluating and making appropriate adjustments to such goals."[176] Such duties go beyond executive supervision to involvement in making or setting the policies of an agency. Congress considered these to be important policy-determining and policy-making functions. Many agency executives below the level of the SES who perform these functions thus meet the criteria for Schedule Policy/Career. Further, the supervisory probationary period remains relevant because most supervisors do not exercise these higher-level functions. Generally, only more senior executives in the rungs immediately below the SES meet these criteria, while line supervisors do not.

While SES members will not be included in Schedule Policy/Career because they are appointed to a service separate and distinct from the competitive and excepted services, Schedule Policy/Career complements the SES structure and ensures those non-SES personnel executing similar duties are appropriately accountable to the President. Thus, Commenter 30426's complaint is with congressional judgment, not OPM's guidance on positions to review that follows these statutory guideposts.

OPM's Interpretation is Consistent with the Use of Policy-Influencing Terms in Individual Agencies' Organic Statutes

Commenter 30426 also points to several other statutory provisions within title 5 that do not define excepted service policy-influencing positions as political appointments *per se* but that classify such employees along with political appointees for certain purposes. For example, Commenter 30426 discusses 5 U.S.C. 5753(a)(2)(C) and 5 U.S.C. 5754(a)(2) recruitment and retention bonuses. They do not apply to Presidential appointees, noncareer SES, or a "position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character." In addition, Commenter raises the Intergovernmental Personnel Act, which authorizes the head of a Federal agency to detail an employee to state and local governments so long as employees commit to serving in their

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[176] *Id.*

original position for the same length of time. Under the Intergovernmental Personnel Act, Congress excluded employees in a confidential, policy-making, policy-determining, or policy-advocating position along with noncareer SES and temporary SES personnel.[177] Commenter argues these laws show policy-influencing positions were treated the same as political appointees (and different from career employees) and that this sheds light on interpreting the CSRA. Commenter 30426 further argues, "applying this term to career civil servants would produce an absurd outcome: career officials who occupy positions of a "confidential, policy-determining, policy-making or policy-advocating" character would be ineligible for recruitment or retention bonuses, whereas all other career officials could receive them."[178] This rulemaking addresses these arguments in the next section.

Commenter 30426 also argues that various Federal laws define political appointees as individuals occupying policy-influencing positions in the excepted service and that is relevant to interpreting the CSRA. In support, Commenter 30426 asserts that the Supreme Court's decision in *United States v. Fausto* compels OPM to interpret 5 U.S.C. 7511(b)(2) and 2302(a)(2)(B)(i) in a manner consistent with the definitions these other statutes supply. They purportedly reflect the consistent understanding of Congress that the term of art "confidential, policy-determining, policy-making, or policy-advocating" applies only to political appointee positions. In other words, Congress defined the concept of a political appointee in other laws based on the understanding of the term of art.

But there is no inconsistency between these statutes and OPM's construction of the policy-influencing terms. As discussed previously, the textual interpretation and statutory analysis, as well as the history of these terms' usage, which Commenter supplies and is discussed in a later section, reinforces the conclusion that the meaning of these terms at the time of the CSRA and the DPAA was clear and the terms bear their ordinary meaning: positions involved in

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[177] 5 U.S.C. 3372(a)(1).
[178] Comment 30426, at 16.

determining, making, or advocating for policy, or confidential positions. At the same time, as a matter of Presidential discretion, the executive branch limited the application of the 7511(b)(2) exception to political appointments, principally Schedule C positions.[179] Subsequently, Congress passed a handful of provisions scattered across the U.S. Code that define policy-influencing positions as political appointments for certain narrow applications. This occurred because, until 2020, the policy-influencing exception had only been applied to political appointments. So at the time these laws were enacted, the terms only described political appointments. At the same time, Congress expressly limited the application of these definitions to whichever inferior subdivision of Title 5 was at issue, using limiting language like "for purposes of this section" or "this subsection." At no point did Congress provide a global definition across Title 5 for the meaning of those terms or interpret those terms for purposes of 7511(b)(2). Rather, Congress legislated against the backdrop of contemporary executive branch practice. Construing those terms now to implicitly provide a global definition of the policy-influencing terms for Title 5 as a term of art would construe these laws to implicitly and retroactively modify the scope of 7511(b)(2)—ignoring Congress's direct statutory command that these are to be narrow and local definitions that do not control across all of Title 5.[180]

Additionally, each of the four instances Commenter 30426 cites of policy-influencing positions being defined as political appointees are compatible with E.O.s 13957 and 14171, as well as this rulemaking. First, 7 U.S.C. 6992(e)—passed by Congress and signed into law in 2018—prohibits any "political appointee" from being employed in the U.S. Department of Agriculture National Appeals Division, defining the term political appointee, "in this subsection" to mean, *inter alia*, "a position which has been excepted from the competitive service by reason

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[179] Notably, Presidential discretion has resulted in many, but not all, policy-influencing positions being placed into the excepted service. Some have been so-designated by agency heads. *See Stanley v. Gonzales*, 476 F.3d 653, 658-59 (9th Cir. 2007) (evaluating the Attorney General's redesignation of a position as "confidential or policy-making").

[180] Further, there is nothing problematic with treating some career positions as political appointments for narrowly defined purposes, like performance review procedures or details to state or local government.

of its confidential, policy-determining, policy-making, or policy-advocating character." This provision prohibits the President from using 7511(b)(2) to remove adverse action appeals from employees within the Appeals Division. It does not purport to define any employees holding policy-influencing positions outside the Appeals Division as political appointees. By its own terms, it has no bearing on that question.

Second, 5 U.S.C. Chapter 98 provides the National Aeronautics and Space Administration (NASA) with a variety of compensation flexibilities, such as recruitment and retention bonuses, and leave accrual enhancements. Section 9803(c)(2) of Title 5, U.S. Code—enacted in 2004—prohibits exercising these flexibilities with respect to political appointees, defining that term, "For purposes of this subsection," to mean, *inter alia*, "a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character." This means that NASA could not use these pay flexibilities for either Schedule C, Schedule G, or Schedule Policy/Career, or any other position covered under 5 U.S.C. 7511(b)(2). Congress passed this prohibition because at the time of its enactment, only political appointees were covered by that exception. However, the inability to use certain pay flexibilities available would not prevent NASA from filling or vacating section 7511(b)(2) positions on a nonpartisan basis, nor would doing so create any conflicts with E.O.s 13957 and 14171. Rather, this section cabins off the application of compensation flexibilities within NASA. Nothing else.

Third, 6 U.S.C. 349(d)—enacted in 2016—authorizes the Secretary of DHS to appoint a Deputy Under Secretary to support the Under Secretary for Strategy, Policy, and Plans, but in exercising that discretion, requires the Secretary to appoint a career employee to the position, defining a career employee as a non-political appointee and defining a "political appointee" "for purposes of [this] paragraph" as "any employee who occupies a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-

making, or policy-advocating character."[181] This prohibition simply prevents the President from applying the section 7511(b)(2) prohibition to a single position at the DHS. It does not, and on its own terms does not attempt to, limit the application of section 7511(b)(2) elsewhere within DHS. In addition, it does not purport to apply a generally applicable definition of career employee or political appointee. Under 6 U.S.C. 349(d)(3) a noncareer SES member can be considered a "career employee" and not a "political appointee" because SES positions are not "excepted from the competitive service" and thus are outside the definition of political appointees. Looking to this subsection to interpret the scope of political appointments or delineate political from career positions in the Federal workforce would be highly problematic. This is no doubt one reason Congress expressly said not to do so.

Fourth, 38 U.S.C. 725, enacted in 2017, requires the Secretary of Veterans Affairs (VA Secretary) to give specific performance evaluations to each "political appointee" in the VA that covers certain congressionally mandated metrics, such as engaging and motivating employees, and recruiting and retaining well-qualified individuals in the VA. "In this section the term 'political appointee' means an employee of the Department who holds … a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character."[182] This language requires the VA Secretary to evaluate employees with important policy responsibilities based on categories of interest to Congress. This section also does not purport to generally define political appointees, as it excludes PAS positions and Presidentially Appointed (PA) positions, of which VA has both. PAS and PA positions are obviously political appointments, but not in scope for the purposes Congress intended section 725 to cover, so they are not covered by the definition (though the VA Secretary has limited authority to review the performance of Presidential appointees). Section 725 of title 38, U.S. Code, should therefore not be read to define the 7511(b)(2) exception as

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[181] 6 U.S.C. 349(d)(3).
[182] 38 U.S.C. 725(c).

limited to political appointees any more than it should be read to declare PAS and PA appointees not to be political appointees. It simply does not speak to that question, a view Congress expressly endorsed by cabining off the scope of the definition exclusively to 38 U.S.C. 725.

Additionally, Congress elsewhere defined "political appointee" more narrowly to only encompass Schedule C appointees. For example, 49 U.S.C. 106(f)(5)(C) provides that political appointee, for the purpose of operations of the Federal Aviation Administration, is to mean any individual who is "employed in a position in the executive branch of the Government in a confidential or policy-determining character under schedule C of subpart C of part 213 of title 5 of the Code of Federal Regulations." A note to 5 U.S.C. 3101 (Pub. L. 114–136, sec. 4, 130 Stat. 305, March 18, 2016) defines political appointees for purposes of reports on officials burrowing into career positions as, in relevant part, "a position in the executive branch of the Government of a confidential or policy-determining character under schedule C of subpart C of part 213 of title 5, Code of Federal Regulations." So, it is not the case, as Commenter 30426 suggests, that Congress consistently uses the policy-influencing terms as a unified term of art to define political appointees. Rather, in some sections, Congress specifically described Schedule C positions and not the broader policy-influencing phrase. These are local definitions and should be treated as such.

Historical Context Supports OPM's Interpretation

Commenters 23789, 30055, 30426, and others presented arguments that historical context shows the policy-influencing phrase "positions of a confidential, policy-determining, policy-making, or policy-advocating character" is a singular term of art. They pointed to legislative history, MSPB decisions, amicus briefs, and statements of legislators, among other sources, to conclude that Congress used the policy-influencing terms to describe political appointments. Commenters conclude that it is a fallacy to focus on the meaning of the distinct component terms of this term of art, and that its meaning can only be understood by looking at the phrase as a whole.

There is no doubt that Congress meant the policy-influencing terms to encompass political positions. What is at issue is whether Congress used the terms as a singular term of art that definitionally describes only political appointments, or used the terms in their ordinary sense and employed language that can, at the President's discretion, also cover some career positions. Reviewing this history, OPM concludes that phrase "positions of a confidential, policy-determining, policy-making, or policy-advocating character" is not a singular term of art, but the components in this phrase bear their ordinary meaning. That meaning certainly encompasses, but is not limited to, politically appointed positions.

OPM notes that the phrase "confidential, policy-determining, policy-making, or policy-advocating" was not used as a term of art, or even as a singular phrase, before the CSRA's enactment in any source OPM or commenters have identified. This strongly implies Congress did not use this phrase as a term of art. The history that commenters point to instead used 7511(b)(2)'s constituent terms as separate descriptors. For example, the Brownlow Report spoke of "policy-determining posts."[183] The Senate debate over the First and Second Hoover Commission Reports used the terms "policy-making" and "policy-determining" respectively.[184] E.O. 10440, which created Schedule C, used the phrase "positions of a confidential or policy-determining character."

The CSRA, by contrast, did not use any of these pre-existing terms or phrases. It instead used a broader and more expansive formulation: "confidential, policy-determining, policy-making, or policy-advocating." Even if, *arguendo*, commenters' argument was correct that the expression "confidential or policy-determining," used in E.O. 10440 in describing Schedule C

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[183] *See generally* President's Comm. On Admin. Mgmt., Report of the Committee with Studies of Administrative Management in the Federal Government, Gov't Printing Office, Wash., D.C. (1937).

[184] 124 Cong. Rec. 27540 (Senate) (Aug. 24, 1978) (remarks of Sen. Ted Stevens (R-AK)) ("The Hoover Commission believed that in a true career service, the employee could go as far as his ability and initiative and qualifications indicated, excepting only decisionmaking or confidential posts. It held: [`]Top policy-making officials must and should be appointed by the President. But all employment activities below these levels, including some positions now in the exempt category, should be carried on within the framework of (the civil service system).[']"), https://www.govinfo.gov/content/pkg/GPO-CRECB-1978-pt20/pdf/GPO-CRECB-1978-pt20-7-1.pdf.

positions, was an accepted term of art that referred exclusively to political appointees, the natural implication is that Congress intended to add two other categories of employees to the exceptions contained in 5 U.S.C. 7511(b)(2)—those employees who did not fall into the Schedule C classification but were "policy-making" or "policy-advocating."[185] Under the reading advanced by Commenters, these additions would be mere surplusage, serving no practical purpose other than to needlessly confuse a reader familiar with the pre-existing term of art. Congress's deliberate decision to add additional new terms to the prior formulation suggests each term is meant to have independent meaning. The alternative reading would depart from "[f]ollowing the axiom that words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary[.]"[186]

Additionally, Congress's use of "or" rather than "and" in 7511(b)(2) implies that it intended (b)(2) to describe a *list* of characteristics building on existing determinations made by President Eisenhower (in creating Schedule C) and others rather than a self-contained term of art created from whole cloth. Had Congress intended to classify this term as a term of art, it was well able to do so. Congress did in fact do so many times for other terms of art used elsewhere in the CSRA, including in 5 U.S.C. 7511 itself.[187] The choice *not* to provide a unified definition in the section in which the phrase is used, while doing so for terms of art Congress did use in the very section in question, cuts sharply against Commenter 30426's and others' assertion that this list of duties should be understood to be a term of art.

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[185] OPM accepted similar arguments in the April 2024 rule. OPM now rejects this conclusion, for the same reason it rejects commenters' arguments.

[186] *See Burns v. Alcala*, 420 U.S. 575, 580-81 (1975) (citing *Banks v. Chicago Grain Trimmers*, 390 U.S. 459, 465 (1968); *Minor v. Mechanics Bank of Alexandria*, 26 U.S. 46, 64 (1828)).

[187] Chapter 75 precisely defines the scope on an "employee" subject to its provisions. *See* 5 U.S.C. 7511(a)(1). The CSRA also defines the terms "career appointee" and "noncareer appointee." *See* 5 U.S.C. 3132(a)(4) and (7). The CSRA elsewhere expressly defines many specific terms of art. *See, e.g.,* 5 U.S.C. 3391 (including separate definitions for "career appointee" and "noncareer employee"), 3591 (same), 3401(2) (defining "part-time career employment"), 4301(3) (defining "unacceptable performance"), 4311 (defining "senior executive" and "career appointee"), 4507(a) (same), 5381 (same), 4701(a)(4) and (5) (defining "demonstration project" and "research program"), 5351(2) (defining "student-employee"), 7103(a)(10), (11), and (13) (defining, e.g., "supervisor," "management official," and "confidential employee"), 7501 (defining "employee" and "suspension"), and 7541(same).

Not only did Congress elect not to define the policy-influencing terms as a term of art in section 7511 along with the other terms it defined in that section, it used portions of these terms elsewhere in other contexts. As discussed previously in this final rule, Congress established the SES which defined the duties of SES members to include policy-making and policy-determining functions but left out confidential or policy-advocating functions. This makes sense as career SES do not necessarily perform confidential duties, nor are they necessarily expected to advocate for administration policy. In section 3132(a), which was part of the CSRA, Congress treated the policy-influencing terms as separate descriptors, applying only those terms that described the duties of career senior executives and omitting those which did not.

This understanding is most consistent with OPM's near contemporaneous interpretation of the CSRA when it issued implementing regulations. Specifically, in 1981, OPM updated its regulations governing Schedule C appointments and did not extend them to cover "policy-making" or "policy-advocating positions."[188] However, OPM did clarify what positions "confidential or policy determining" described. In 1981, OPM modified 5 CFR 213.3301 to provide that the Schedule C exception for "[p]ositions of a confidential or policy-determining character" applied to "positions in grades GS-15 and below which are policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials."[189] OPM contemporaneously treated the words "confidential" and "policy determining" as functional descriptions of the types of duties that make positions eligible for placement in Schedule C. It treated them as having separate meanings—not a singular phrase synonymous with a "political appointee." This usage of these terms as having a functional and

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[188] OPM has not expanded the scope of Schedule C positions in its regulations because Civil Service Rule 6.2 does not place positions of a policy-making or policy-advocating character in Schedule C. E.O. 14317 recently amended Rule 6.2 to place such positions in Schedule G of the excepted service. *See* E.O. 14317, *Creating Schedule G in the Excepted Service*, 90 FR 34753, 34754 (July 17, 2025).

[189] 46 FR 20146, 20148 (Apr. 3, 1981).

separate meaning from one another lasted from 1981 to 2024.[190] Thus, OPM credits this historical evidence from both Congress and its prior interpretation historically treating the terms "confidential," "policy-determining," "policy-making," and "policy-advocating" as individual words bearing individual constituent meanings used to describe position duties, not as a singular term of art. Accordingly, 7511(b)(2) can only be understood by examining the meaning of its constituent words, individually, and not as a cohesive term, especially as several of these constituent words are used elsewhere in the same statute to define primarily career appointments.

The historical record relied upon by Commenter 30426 shows several parties asserting that "policy-determining" and "policy-forming" positions should not be subject to civil service removal procedures. President Truman issued E.O. 9830 in 1947 in which he moved "Positions excepted from the competitive service … [b]ecause of their confidential or policy-determining character" into Schedules A and B, and provided further that the agencies may request that the CSC except additional positions from the competitive service on an ongoing basis, requiring the Commission to furnish an annual report "of the positions which it has excepted from the competitive service under this section during such year."[191] President Eisenhower thereafter issued E.O. 10440 in 1953, in which he authorized the Commission to except positions that "are of a confidential or policy-determining character" from the competitive service, and moved positions of a confidential or policy-determining character into schedule C.[192]

Throughout this history, the terms were not used as a synonym for or "term of art" that was shorthand for "political appointee." Rather, they were used to describe the types of duties that made a position inappropriate for coverage under civil service protections and eligible to be converted into political appointments. The terms described the types of duties that would

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[190] Treatment of the terms as having separate meanings extends to other roughly contemporaneous sources outside the CSRA. *See*, *e.g., Branti v. Finkel*, 445 U.S. 507, 519-20 (1980) (in discussing whether county public defenders can be treated as purely political appointees, found that the "confidential" information they possessed, concerning individual defendants represented, was not the sort of confidential information which necessitated that result).
[191] E.O. 9830, 12 FR 1259, 1263 (Feb. 25, 1947).
[192] E.O. 10440, 18 CFR 1823, 1823 (Apr. 2, 1953).

appertain to positions that could, or should, be made political appointments. They did not mean political appointments themselves.

This view is supported by contemporaneous evidence, such as President Eisenhower's press conference and press statement accompanying E.O. 10440, which discusses positions "that do not belong in the Civil Service System."[193] In a press release, the White House described those positions as ones where they "shape the policies of the Government" as well as those where these is "a close personal and confidential relationship between the incumbent of the position and the head of the agency."[194] Further, in answering questions regarding his E.O., President Eisenhower himself asserted the necessity of not putting policy into the hands of people who are not subject to removal by the electorate.[195] Shortly thereafter, Schedule C was created for positions of a confidential or policy-determining character. E.O. 10440 treated the terms "confidential" and "policy-determining" as independent, specific terms the words of which have specific meanings which set forth which positions were eligible for Schedule C, not a "term of art" synonymous with "political appointee."

As Commenter 30426 notes, over time it became the case that employees appointed to Schedule C positions were often performing policy-making or policy-advocating work as well. Commenter quotes a number of lawmakers and officials describing Schedule C appointees, including CSC Chairman Robert Hampton who said, while testifying in 1972 to the House Committee on Post Office and Civil Service, that "[t]hese generally are positions [Schedule C] which have responsibility for the formulation or advocacy of administration policies, or which involve a confidential relationship with a Presidential appointee."[196] Chairman Hampton's characterization, and the characterization by others, are descriptions of the position's duties.

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[193] Pres. Dwight D. Eisenhower, President's News Conference (Mar. 19, 1953), https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-459.
[194] *Id*.
[195] *Id.*
[196] *See* Commenter 30426, at 23 (citing *The Federal Executive Service: Hearings on H.R. 3807 Before the Subcomm. on Manpower & Civil Serv. Of the H. Comm. On Post Off. & Civil Serv.,* 92 Cong. 13 (1972).

Subsequently, Congress enacted 5 U.S.C. 7511(b)(2), providing for exceptions from adverse action appeals for excepted positions using the descriptors "confidential, policy-determining, policy-making, or policy-advocating character." This choice added "policy-making" and "policy-advocating" to the already-existing scope of Schedule C pursuant to E.O. 10440. As already discussed, if Commenter 30246 is correct and "confidential or policy-determining" was a term of art, Congress deliberately chose to add words to an existing term (describing Schedule C) which serves no purpose other than to confuse readers who knew the existing term. Conversely, if Congress used the terms as separate descriptors the additions of additional functions is easily explained.

Prior Presidential Administration Practices do not Limit the Scope of the Final Rule

Commenter 30426 argues that longstanding practice cabins the policy-influencing terms to cover a small number of positions, about 1,600. Commenter 30426 contends, "[t]he long history of this interpretation further evidences that only a few positions can satisfy the criteria of having a 'confidential or policy determining' or 'confidential, policy-determining, policy-making, or policy-advocating' character."

This argument conflates successive administration's policy decisions to limit political appointments—precisely because of the benefits of expert career civil servants that commenters discuss and with which OPM agrees—with a substantive limit on the scope of 5 U.S.C. 7511(b)(2). Congress has been clear when it caps the number of positions exempt from adverse action procedures. The CSRA caps the number of noncareer SES at no more than 10 percent government-wide and 25 percent in any one agency.[197] Other statutes also cap the number of positions that can be given 5 U.S.C. 7511(b)(2) determinations. Title 42 caps the number of

[197] *See* 5 U.S.C. 3134(b) and (d)(1).

policy-influencing positions in the Social Security Administration at no more than 20.[198] Elsewhere in statute, the Department of Veterans Affairs is capped at no more than 15 positions excepted from competitive service because of their "confidential or policy-determining character."[199]

It is a basic canon of statutory construction that if "Congress includes particular language in one section of a statute but omits it in another section of the same [statute], it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."[200] Consequently, Congress declining to specify in statute a numerical limitation in 5 U.S.C. 7511(b)(2) when it opted to do so elsewhere is telling. This indicates the number of positions that can be held policy-influencing is left, in other cases, to the discretion of the executive branch. Commenter provides no argument grounded in statutory text that the President is, outside agencies with express statutory restrictions, limited to determining a small number of positions are policy-influencing.

Further, accepting Commenter's construction would raise serious constitutional concerns, as discussed in more detail below. Briefly, reading 7511(b)(2) to implicitly limit how many positions can be declared policy-influencing means the President cannot generally except policymaking inferior officers in the General Schedule from removal restrictions and subchapter II appeals. In that case the CSRA is unconstitutional as applied to those offices because Congress cannot restrict the President's ability to dismiss inferior officers with substantive policymaking or administrative responsibilities. Reading 7511(b)(2) to not contain such an unenumerated numerical limit largely sidesteps this constitutional concern.

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[198] *See* 42 U.S.C. 904(c). OPM notes that 42 U.S.C. 904(c)(2) explicitly presupposes the authority of the President, or OPM, to exclude positions from the competitive service that have been "determined … to be of a confidential, policy-making, or policy-advocating character and have been excepted from the competitive service thereby." This directly refutes the contention that the President cannot except positions from the competitive service for purposes of bringing them within the 5 U.S.C. 7511(b)(2) exception.

[199] 38 U.S.C. 709(b).

[200] *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted)).

Prior Interpretative Statements from Other Agencies are not Controlling

Commenter 30426 also argues that a 2020 Department of Justice (DOJ) rulemaking described political appointees as policy-influencing positions. Respectfully, Commenter 30426 misinterprets the DOJ rulemaking. DOJ was responding to concerns that giving authority to the Director of the Executive Office of Immigration Review would lead to these decisions being subject to political influence. At the time that rule was issued, no positions had been transferred into the former Schedule F—in DOJ or elsewhere—so all positions that had been excepted under section 7511(b)(2) at the time were political appointees. DOJ's point was that all employees in the Executive Office of Immigration Review were selected on a non-partisan basis, including the EOIR Director, who is a career SES member. DOJ was not attempting to define how section 7511(b)(2) could be applied, including under E.O. 13957, but how it was then applied in EOIR.

Reliance on MSPB's Decisions in Thompson *and* Briggs *is Inapposite*

Commenters 30426 and 35519, among others, argue that the MSPB held that a determination under 5 U.S.C. 7511(b)(2) is not adequate unless it is made before the employee is appointed to the position. As OPM explained in the proposed rule, the MSPB's statements to this effect in *Thompson v. Department of Justice* and *Briggs v. National Council on Disability* are unreasoned dicta.[201] *Thompson* itself merely cited *Briggs* for this proposition without further analysis. However, in neither case was the issue of whether an incumbent employee could lose adverse action protections when a policy-influencing declaration was made actually before the Board. In *Briggs* the MSPB never analyzed the text of CSRA to assess whether policy-influencing determinations could be applied to current employees. It simply asserted without any statutory analysis that determination had to be made before appointment. However, this ruling was not necessary to the MSPB's holding, as Briggs's position was found to have never been declared policy-influencing as a matter of fact.[202] In *Thompson*, it was not clear if the decision

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[201] *See Briggs*, 60 M.S.P.R. 331, 335-36 (1994) and *Thompson*, 61 M.S.P.R. 364, 368-69 (1994).
[202] *Briggs*, 60 M.S.P.R. at 335-36.

declaring the position policy-influencing was ever properly made, and if it had been made it must have occurred after the employee was removed.[203] OPM agrees an agency cannot sanction a removal by retroactively declaring the incumbent's position policy-influencing.[204]

Subsequent MSPB cases simply cite *Briggs* and *Thompson* for the proposition that 7511(b)(2) determinations must be made prior to a position being filled. None of these cases provided further analysis. OPM rejects the position that MSPB dicta trumps the plain language of the CSRA insofar as the latter forecloses adverse action appeals for positions that are statutorily excluded from coverage. Nothing in chapter 75 requires that 7511(b)(2) determinations be made prior to appointment for the determination to be effective. Given the significant restriction on Presidential authority this would impose, and the severe constitutional concerns it would raise (discussed below), OPM believes at the very least a clear statement from Congress would be necessary to insulate senior policymaking employees from accountability to the President.

In response to the Department of Justice's conduct at issue in *Thompson*, Congress in 1994 amended 5 U.S.C. 2302(a)(2)(B) to expressly state that policy-influencing determinations had to be made prior to a personnel action for the exception from PPPs to apply. Commenter 30426 argues that this legislation did not "disturb" *Thompson's* statement that chapter 75 policy-influencing determinations would need to be made prior to an incumbent filling a position to lose entitlement to adverse action procedures. Commenter concludes that while section 7511(b)(2) determinations would have to be made prior to an employee's acceptance of a position, section 2302(a)(2)(B) determinations would have to be made prior to the relevant personnel action.

OPM disagrees that this analysis is relevant. The fact that Congress did not amend the CSRA in response to MSPB dicta implies nothing about how chapters 23 and 75 operate.

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[203] *Thompson*, 61 M.S.P.R. at 368-69.

Commenter 30426 also points to the MSPB's decision in *Chambers v. Department of the Interior*,[205] arguing that a 7511(b)(2) policy-influencing determination must be made before an employee is appointed to a position. As with precedents discussed above, the relevant discussions are dicta and conducted no analysis of the underlying statutory text. *Chambers* is also inapposite, as the policy-influencing determination was never made and the issue was not before the MSPB.[206]

Commenter 30426 also argues that the exclusion's applicability was necessarily before the court in *Briggs*, because its applicability would have stripped the Federal Circuit of jurisdiction. According to the Commenter, if paragraph (b)(2) exclusion had applied, the Federal Circuit would have had to reverse and remand the case with instructions that the MSPB dismiss it for lack of jurisdiction. The court would have had no power to adjudicate the case. However, the issue of whether a position can be declared policy-influencing after someone is appointed to it was not before the Federal Circuit. Its opinion thus says nothing about whether it would have jurisdiction if an appropriate authority had declared the position policy-influencing.

Commenter 21374 argued that the proposed rule is not in accord with *Hamlett v. Department of Justice*.[207] In *Hamlett*, much like *Briggs*, the MSPB held that a non-preference eligible Assistant U.S. Attorney who had completed a two-year trial period, could challenge their chapter 75 removal before the Board under the DPAA.[208] Notably, the Board found that neither the President nor OPM had made a determination that the incumbent occupied a policy-influencing position under 5 U.S.C. 7511(b)(2).[209] However, the MSPB did not foreclose the possibility that such a determination could have been made. OPM believes *Hamlett* recognizes that if such a decision had been made by the President or OPM, that Hamlett would not have been entitled to challenge her removal.

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[205] 116 M.S.P.R. 17 (2011).
[206] *See id.*
[207] 90 M.S.P.R. 674 (2002).
[208] *Id.* at 680.
[209] *Id.* at 678.

MSPB's Interpretation of Policy-Influencing Terms in O'Brien *are not Dispositive*

Commenter 8019 argues that the MSPB's opinions in *Special Counsel v. Peace Corps* and *O'Brien v. Office of Independent Counsel* that the usage of the term "confidential, policymaking" in the CRSA is no more than shorthand for positions to be filled by "political appointees."[210] With respect, OPM declines to accept those Board opinions as controlling the interpretation of these terms for section 7511(b)(2) for several reasons.

OPM first notes that Congress vested the President and OPM, not the MSPB, with authority to determine whether excepted service positions were policy-influencing. The MSPB has no authority to countermand Presidential or OPM determinations in this regard. Further, as the *O'Brien* Board explicitly noted, there is nothing in the interpretation of the relevant provisions of the legislative history of the CRSA or the Whistleblower Protection Act, the statute at issue in that proceeding, to compel the MSPB's interpretation.[211] The Board relied largely on the authority of its earlier *Special Counsel v. Peace Corps* opinion.[212] *Special Counsel* cited no authority whatsoever for its determination that the terms "confidential," "policy-making," and "policy-determining" are mere shorthand for "political appointee," and it made no argument of any kind for that position.[213] It seemed to take as dispositive the President's authority to unilaterally appoint and remove occupants of such positions "notwithstanding any provision of law,"[214] but it also stated that positions falling under those terms "can be identified by their relationship to the President or the administration officials in furthering the goals of the President."[215] The first suggestion seems to rely on an untenable bifurcation of employees with and without protection from presidential removal, one that fails to comport with the actual variety of excepted service positions or with a functional appraisal of the importance of the

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[210] 31 M.S.P.R. 225 (1986) and 74 M.S.P.R. 192 (1997), respectively.
[211] 74 M.S.P.R. at 204 (stating that the CRSA had "little discussion of the phrase" and the WPA "does not indicate what Congress intended.").
[212] *Id.* at 205-06.
[213] 31 M.S.P.R. at 231.
[214] *Id.* at 229.
[215] *Id*. at 232.

position in advancing the President's priorities. And, considering OPM's position that Schedule Policy/Career positions should be exempted for much the same reason that the Board suggested that political appointees should be in *Special Counsel*—based on the centrality of the role in advancing the President's priorities—it is unclear that the actual reasoning of *Special Counsel* cuts against the present rulemaking. The proposed rule discussed at length its textual analysis of the CRSA which led it to reject the position, advanced by the Commenter, that the policy-influencing terms are mere terms of art; this final rule expands on those arguments above.[216] Ultimately, OPM respectfully declines to accept MPSB's opinion as controlling.

Employees do not Accrue Appeal Rights

Commenter 30426 also argues that *Roth v. Brownell* [217] and other cases point to the long historical tradition of applying civil service protections based on the employee's accrual of status or rights. The Commenter argues that this tradition was well understood by members of Congress when they enacted the CSRA and that they assumed it would continue. On the contrary, *Roth* was concerned with interpreting provisions of the Lloyd-La Follette Act.[218] As OPM explained in the proposed rule, Congress abolished that statutory requirement for adverse action procedures upon transfer out of the competitive service when it enacted the CSRA, and Congress did not replace it with any comparable language providing adverse action procedures upon reclassification. It is well settled that it is the text of the law that governs, not legislators' assumptions.[219]

Commenter 30426 also argues that inherent in the structure of the CSRA is the fundamental notion that employees who accrue civil service protections, particularly with respect

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[216] *See* 90 FR at 17194-97 (discussing why "positions of a confidential, policy-determining, policy-making, or policy-advocating character" should not be read as a term of art meaning "political appointee.").
[217] 215 F.2d 500 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 863 (1954).
[218] *Id.* at 502.
[219] *See Diamond*, 447 U.S. at 315 ("[A] statute is not to be confined to the 'particular application[s] . . . contemplated by the legislators.'" (quoting *Barr*, 324 U.S. at 90)); *Oncale*, 523 U.S. at 79 ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."); *see also Bostock*, 590 U.S. at 653 ("[T]he limits of the drafters' imagination supply no reason to ignore the law's demands.").

to adverse actions, retain those protections unless they either forfeit them voluntarily by accepting a new appointment or lose them due to poor performance or misconduct through the application of the CSRA's procedures. However, Commenter 30426 points to no statutory authority for this proposition, only a handful of isolated court cases, which universally involve statutory analysis of pre-CSRA laws.

Commenter 30426 also points to non-judicial materials, such as a 1980 Comptroller General opinion and 1988 transition guidance. The transition guidance was interpreting 1968 OPM regulations that were still in effect then but are not now. The Comptroller General opinion was based on a 1963 Court of Claims decision interpreting the now-repealed Lloyd-La Follette Act. And the Commenter's citation to *Casman v. Dulles* is similarly unavailing, as that case concerned statutory interpretation of the Veteran's Preference Act.

Involuntary Reassignment into Schedule Policy/Career does not Continue MSPB Jurisdiction

Commenter 30426 argues that the Federal Circuit's decision in *Williams v. Merit Systems Protection Board*[220] requires that the agencies must give employees a choice to be moved into Schedule Policy/Career. The Commenter infers that accepting appointment in a position excepted from chapter 75 is a choice, and on that basis that employees must have an implicit choice about whether their positions are declared policy-determining for that determination to be effective. Otherwise, according to Commenter 30426, the act of reassigning the employee to Schedule Policy/Career is an involuntary movement and, therefore, does not strip the MSPB of jurisdiction.

OPM disagrees with Commenter 30426's assessment of the court's decision in *Williams*. The employee in *Williams* voluntarily applied and was selected for a position without MSPB appeal rights within the same agency.[221] And despite not being fully apprised of the

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[220] 892 F.3d 1156 (Fed. Cir. 2018).
[221] *Id.* at 1163.

consequences of accepting the new position, the court ultimately found that appeal rights will not attach to the new position because he did not meet the definition of employee under 7511(a)(1)(B)(ii).[222] The court analogized the facts in *Williams* with prior decisions finding that employees who voluntarily move to positions without appeal rights do not bring those rights with them.[223] Moreover, the Federal Circuit expressly declined to rule in *Williams* whether an employee retains MSPB appeal rights after an involuntary or coerced intra-agency transfer to a position.[224]

While neither the Federal Circuit nor MSPB have since ruled whether an employee retains statutory appeal rights following involuntary movement to a position without them, OPM believes that they do not. Consistent with the Federal Circuit's views on voluntary movement of personnel, 7511(b)(2) clearly excludes policy-influencing positions from coverage under chapter 75 adverse action procedures. Congress did not establish in statute a savings provision for employees impacted by 7511(b)(2) determinations to retain their procedural rights under chapter 75. The text of the law instead applies to all positions that have been determined policy-influencing, without respect to the personal status of the employees encumbering the position.

Schedule Policy/Career Determinations may be Made While a Position is Encumbered

Commenter 30246 argues that 7511(b)(2) determinations cannot be made while the position is encumbered due to the text of 7511(b). Commenter 30426 also argues that other exclusions in section 7511(b) describe a condition that exists only in the present. For example, (b)(10) excludes an employee "who holds a position" in a particular agency component and (b)(9) excludes an employee "who is described" in another statute. Only (b)(2) uses the present perfect tense: "whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character." Commenter 30426 argues that the Supreme

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[222] *Id.* at 1162.
[223] *Id.* at 1162-63.
[224] *Id.* at 1163 ("[T]here may be situations in which an agency coerces or deceives an employee into accepting a new position. We need not consider those scenarios here.").

Court has characterized the present perfect tense as "denoting an act that has been completed." Commenter concludes that because Congress did not use the present tense and drafted 7511(b)(2) as applying to an employee "who holds a position" subject to the requisite determination, that indicates the exception is not meant to be applied to currently encumbered positions.

Respectfully, Commenter 30246 misstates how the Supreme Court characterizes the present perfect tense. *Hewitt v. United States* explained that the present perfect tense can refer to "'a past action that comes up to and touches the present'"[225] and elaborated that "one might employ the present-perfect tense to describe situations 'involv[ing] a specific change of state' that produces a 'continuing result.'"[226] 7511(b)(2) determinations are exactly this: a past change of state which produces an ongoing result. The determination that a position is policy-determining is a one-time event that occurs in the past and has been completed, but produces a specific change of state with ongoing relevance. In contrast, using the present tense in 7511(b)(2) would make little sense. The President or OPM do not determine a position is policy-influencing as an ongoing event. Further, 7511(b)(10) also uses the same grammar: "who holds a position within the Veterans Health Administration which *has been* excluded from the competitive service . . . ."

Commenter 30426 also argues that reading 7511(b)(2) to only apply to determinations made prior to an employee accepting a position, and to thus have no application to currently encumbered positions, is supported by viewing section 7511(b)(2) in the context of the other exceptions in section 7511(b). Commenter argues that the other exceptions in section 7511(b) apply only when an employee has made a choice, and this indicates the same applies to 7511(b)(2).

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[225] 606 U.S. 419, 427-28 (2025) (quoting Chi. Manual of Style § 5.132, at 145 (17th ed. 2017))
[226] *Id.* at 428 (quoting R. Huddleston & G. Pullum, The Cambridge Grammar of the English Language at 145 (2002)).

OPM disagrees. Nothing in 7511(b) discusses giving employees an affirmative choice. 7511(b) instead categorically excepts entire agencies and classes of positions, like those in the CIA, the FBI, the Foreign Service, and entire categories of individuals like reemployed annuitants and foreign nationals working overseas. Commenter 30426 infers that accepting appointment in a position excepted from chapter 75 is a choice, and on that basis that employees must have an implicit choice about whether their positions are declared policy-determining for that determination to be effective. This does not follow, and, as discussed below, that construction raises serious constitutional concerns.

Employee Position Descriptions are not Dispositive of Policy-Influencing Duties

Commenter 30426 also argues that OPM's January 2025 Memorandum sweeps into consideration for Schedule Policy/Career every position for which a position description mentions policy work. OPM has long-established position classification standards for agencies to implement the Classification Act of 1949. Some standards use terms related to policy work for the purpose of determining a position's grade level. Commenter argues, without supporting evidence, that the use of the word "policy" in position descriptions pursuant to the Classification Act of 1949 has no bearing on the meaning or scope of the term as used throughout the CSRA. Commenter asserts the term "policy" in position descriptions implicates grade-determining functions, not rights-determining ones.

As a preliminary matter, OPM does not expect to recommend every position described as entailing policy work for Schedule Policy/Career, but the fact that a position entails policy work is a natural factor for consideration when formulating recommendations. Commenter presents no evidence that Congress intended the term "policy" in section 7511(b)(2) to be divorced from that terms' use in implementing the Classification Act.

Rather, OPM believes Commenter's argument strengthens the point that Congress did not intend the word "policy" to describe only a few hundred political appointments in light of the executive branch's longstanding preexisting practice of describing tens of thousands of career

positions as developing or establishing policy. Congress surely understood this when it passed the CSRA.

Schedule Policy/Career does not Target Attorneys

Commenter 30426 also argues that this rulemaking targets attorneys throughout the Federal Government, without regard to attorneys' responsibilities or their lack of authority to do more than suggest ideas. Commenter 30426 alleges that this arbitrary targeting of attorneys runs contrary to the function of the DPAA, which the congressional committee responsible for that law indicated was expressly meant to provide attorneys with MSPB appeal rights. Commenter 29987 and others similarly argue that employees (including but not limited to attorneys) involved in the policy process through activities such as reviewing, editing, or drafting regulations should not be considered policy-determining or policy-making employees because they lack authority to decide the content of those regulations and are merely advisors or assistants in the policy process. In Commenter 29987's view, "[o]nly those people who have the final say are 'determining' or 'making' policy."

OPM believes this approach reads the terms "policy-making" and "policy-determining" too narrowly. In general, authority to issue regulations is statutorily vested in agency heads, who are excluded from subchapter II's provisions. Reading the term "policy-determining" to mean only those with ultimate decisional control over policy decisions would rule out its application to virtually every employee covered by subchapter II and render the 5 U.S.C. 7511(b)(2) exemption for policy-determining positions a nullity. In statutory context, "policy-determining" covers more officials than principal officers given the final say over policy decisions.

OPM also finds it significant that the CSRA added "policy-making" to the pre-existing term "policy-determining." The canon against surplusage indicates this addition implies "policy-making" and "policy-determining" are distinct categories. OPM believes that it is reasonable to construe employees substantively involved in the policy process, such as through drafting or editing policy documents, or providing policy advice, as "making" policy even if they do not

"determine" it. As Commenter 29887 points out, to "make" something ordinarily means to produce or create it. Just as a factory's employees are understood to be "making" manufactured goods, even though they do not determine what the factory will produce, employees substantively involved in the policy process are naturally seen as "making" policy even though they do not unilaterally "determine" policy decisions. OPM believes that viewing policy-determining as describing (delegated) authority to make policy decisions and policy-making as involvement in policy production is a natural reading of the terms.[227]

Unlike Commenter 29887's construction, this interpretation treats "policy-making" and "policy-determining" as distinct, rather than redundant terms. Commenter does not explain why OPM should read the Congressional addition of the new term "policy-making" as entirely synonymous with the pre-existing term "policy-determining." In addition to avoiding surplusage, construing employees substantively involved in the policy process as "making" policy also reflects the significant real-world authority that such employees can wield.

The authority to suggest policy ideas or to produce or edit draft policy documents is often a significant policy-making role. This is easily seen in other contexts. White House staff, for example, typically have no formal authority over agency policymaking—merely the authority to suggest ideas, review proposals and flag concerns, or produce initial drafts of executive orders. But it would be naïve to imagine White House staff's role has negligible impact on the policy process because they do not possess formal decisional authority. Positions that involve drafting regulations and guidance or suggesting or otherwise advising on policy decisions are similarly reasonably viewed as having a policy-making character, even if they are not necessarily policy-determining.

Commenter 30426 provides no support for the contention that attorney positions that involve such functions do not have a policy-making character. Attorneys with authority to direct

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[227] OPM has no authority over how the President interprets or applies the policy-influencing terms, and this discussion is not a regulatory definition of the policy-influencing terms.

other attorneys in the exercise of their functions, setting responsibilities and priorities and deciding on arguments the Government will advance (or not) are more likely to be policy-determining or policy-making, though OPM recognizes that not all supervising attorneys are appropriate for Schedule Policy/Career. That said, only a minority of attorneys are likely to be reclassified into Schedule Policy/Career. The DPAA will continue to cover a majority of Federal attorneys—just not those with policy-making, policy-determining or policy-advocating responsibilities.

OPM consequently agrees with the notion that the DPAA was intended to provide MSPB appeal rights to attorneys in the Federal Government. The proposed rule is consistent with that expansion and purpose. Previously, adverse action appeals in the excepted service were categorically limited to preference eligible employees in the non-policy influencing positions. The DPAA extended coverage to all excepted service employees in non-policy influencing positions. OPM expects that most line attorneys will not be held to occupy policy-influencing positions, so that the DPAA's expansion of appeal rights will not be rendered void by this interpretation.

Policy-Influencing Terms Covers Political Appointees and Few Career Employees

Commenter 30426 also argues that the text and purpose of 5 U.S.C. 7511(b)(2) support the interpretation that career positions should continue to be covered under the adverse action procedures codified in chapter 75 of Title 5. Commenter 30426 argues that narrow exceptions, such as those found in sections 7511(b)(2) and 2302(a)(2)(B)(i), must not be read to swallow or alter the rules they modify. Exceptions must be read "fairly," which sometimes means "narrowly in order to preserve the primary operation of the provision" to which they apply.

OPM largely agrees with this analysis and believes a fair reading of the policy-influencing terms is that they cover all political appointees and a relatively small minority of career employees. As described above, this construction aligns with the historical usage of these terms as bearing their individual component meanings, and with Congress' usage of some of

these terms in the CSRA itself to describe thousands of career SES members. In the proposed rule, OPM estimated that Schedule Policy/Career would apply to approximately two percent of the Federal workforce. Under this construction, adverse action procedures will continue to apply to the overwhelming majority of the civil service. That is a far cry from the exception swallowing the rule.

Relatedly, many commenters suggest that OPM's estimate of approximately 50,000 positions moving into Schedule Policy/Career is "misleading" and that the guideposts set forth in E.O. 13957, as amended, and OPM's January Memorandum suggest an order of magnitude more positions will be converted. See, e.g., Comment 29887. Having conducted initial review of agency recommendations for Schedule Policy/Career conversions, OPM can state that its initial estimate of 50,000 positions was a reasonable approximation of potential conversions.

Policy-Influencing is a Short-Hand Descriptor for Statutory Terms

Commenters 0821, 24251, 30426, 35350, and others criticized E.O. 13957, as amended, and the proposed rule for using a vaguely defined term "policy-influencing" to describe the types of positions to be placed in Schedule Policy/Career. They argue that this term impermissibly expands upon the statutory terms "confidential," "policy-determining," "policy-making," and "policy-advocating."

OPM recognizes that the terms "confidential," "policy-determining," "policy-making," and "policy-advocating" are not synonymous with "policy-influencing" but, as OPM has explained, bear their individual constituent meanings. However, using the term "positions of a confidential, policy-determining, policy-making, or policy-advocating character" constantly throughout this rulemaking would be needlessly cumbersome. OPM suspects the White House invoked "policy-influencing" in its fact sheet and E.O. for the same reason, though the White House did not consult with OPM about doing so. OPM is consequently using "policy-influencing" as a shorthand for the longer phrase, while recognizing the longer statutory phrase and not OPM's shorthand is legally controlling.

D. OPM's Authority to Regulate

A number of commenters argued that the Rule exceeds the OPM Director's authority under 5 U.S.C. 1103. OPM strongly disagrees. This rule falls squarely within the OPM Director's authority under 5 U.S.C. 1103. Under subsection (a)(5), the Director of OPM is vested with the functions of "executing, administering, and enforcing the civil service rules and regulations of the President and the Office and the laws governing the civil service…." Paragraph (a)(7) of this section further provides that the Director of OPM is responsible for "aiding the President, as the President may request, in preparing such civil service rules as the President prescribes…." Additionally, 5 U.S.C. 1104 provides that the President may delegate his authority for personnel management functions to the OPM Director, and 5 U.S.C. 3301 authorizes the President to "(1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service." 5 U.S.C. 1104(b)(3) further presupposes the OPM Director has responsibility for prescribing civil service regulations.

Even if OPM were to accept the argument put forth – and it does not – that the Director's authority only extends to advising agencies, but does not include executing, administering, or overseeing the Civil Service Rules or regulations of the President (an argument that is conclusively refuted by the plain statutory text), the Director is subject to direction from the President in establishing such Civil Service Rules as the President shall from time-to-time promulgate. The President's authority to manage the civil service is a core function of the office based on Article II of the Constitution.[228] Pursuant to his constitutional authority, the President issued E.O. 14171, directing the Director of OPM to issue regulations implementing this E.O. The President will make all decisions regarding positions to be placed under Schedule Policy/Career.

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[228] *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd*., 561 U.S. 477, 483 (2010); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

In addition, under 5 U.S.C. 7511(b), and historically, determining whether positions are "of a confidential, policy-determining, policy-making or policy-advocating character" and thus exempt from adverse action procedures, is a part of the core Article II power of the President to manage the executive branch. Congress has delegated to the President this power. When a statutory delegation invokes the President's discretion in exercising core Article II responsibilities—such as managing the internal affairs of the executive branch,[229]— "his authority is at its maximum."[230] Our constitutional structure presumes that Federal officers and agencies will be "subject to [the President's] superintendence,"[231] and the President concomitantly "bears responsibility for the actions of the many departments and agencies within the executive branch."[232] Federal agencies depend for their "legitimacy and accountability to the public [on] a 'clear and effective chain of command' down from the President, on whom all the people vote."[233]

OPM has for many decades administered, on the President's behalf and pursuant to delegations, the rules and regulations pertaining to the excepted service.[234] These OPM rules are issued pursuant to Presidential E.O.s authorizing appointments under Schedules A, B, C, D and E. For example, OPM's predecessor agency, the CSC had, as early as passage of the Pendleton Act, promulgated rules relating to what is known today as Schedule A.[235] In 1953, President Eisenhower issued E.O. 10440[236] providing for Schedule C in the excepted service. Although Schedule C appointments are made by agencies, generally in coordination with the Office of Presidential Personnel, it is OPM that publishes the periodic list of such appointments. Similarly, President Obama issued E.O. 13562 on December 27, 2010, creating Schedule D in the excepted

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[229] *See Nixon v. Fitzgerald*, 457 U.S. 731, 756-57 (1982).
[230] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (*Youngstown Sheet*) (Concurring Opinion of Justice Jackson).
[231] THE FEDERALIST NO. 72, at 487 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
[232] *Trump v. United States*, 603 U.S. 593, 607 (2024).
[233] *United States v. Arthrex, Inc*., 594 U.S. 1, 11 (2021) (citation omitted); *cf.* Elena Kagan, *Presidential Administration*, 114 Harvard L. Rev. 2245, 2331-2339 (2001).
[234] *See* 5 CFR parts 213 and 302.
[235] Van Riper at 207.
[236] E.O. 10440, 18 FR 1823.

service, "Recruiting and Hiring Students and Recent Graduates."[237] Subsequently, OPM issued proposed[238] and final rules[239] implementing this E.O.

More recently, to address issues concerning the constitutionality of the appointment of administrative law judges performing various administrative adjudication functions within executive agencies, President Trump issued E.O. 13843 on July 10, 2018, "Excepting Administrative Law Judges from the Competitive Service."[240] This E.O. established Schedule E within the excepted service. OPM issued a final rule establishing, *inter alia*, criteria for pay setting for administrative law judges under Schedule E and had previously issued a proposed rule addressing issues governing the service of administrative law judges at executive agencies.[241] The numerous instances in which OPM has issued rules governing appointments to positions placed in the excepted service by the President under an E.O. makes clear that OPM's role in the administration of excepted hiring authorities is backed by longstanding precedent. Accordingly, this rulemaking is fully in accord with the authorities found at 5 U.S.C. 1103(a)(5) and (7).

In establishing Schedule Policy/Career, the President has directed OPM to follow certain procedural requirements to broadly develop rules governing the administration of positions placed under Schedule Policy/Career. Recommendations for which positions should be placed under Schedule Policy/Career will initially be made by agency heads. These recommendations will be sent to and reviewed by OPM, and the final decision made by the President.

Although OPM believes its Director has broad authority to undertake this rulemaking, the Director in prescribing rules for the administration of Schedule Policy/Career is also simultaneously following Presidential direction and authorization. Accordingly, this rulemaking is fully in accord with the authorities found at 5 U.S.C. 1103(a)(5) and (7) and 1104(a)(1).

OPM also notes that commenters' argument proves too much. Assuming, arguendo, that

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[237] E.O. 13562, 75 FR 82585, 82585-87 (Dec. 30, 2010).
[238] 76 FR 47495 (Aug. 5, 2011).
[239] 77 FR 28194 (May 11, 2012).
[240] 83 FR 32755 (July 13, 2018).
[241] *See* 85 FR 59207 (Sep. 21, 2020).

OPM lacks regulatory authority to modify civil service rules and regulations of the President, then it follows that OPM lacked authority to issue the changes made by the 2024 final rule. In that case OPM would be obligated to withdraw its prior unlawful regulations. So even accepting that argument reinforces the case for rescinding the changes made by the 2024 final rule.

IV. Regulatory Amendments and Related Comments

OPM is amending its regulations in 5 CFR chapter I, subchapter B, as discussed below to strengthen employee accountability and improve the management of the Federal workforce. In the following sections, we summarize and respond to the public comments that are most appropriately addressed by reference to the specific portion of the regulations to which the comments applied.

A. Incorporating Schedule Policy/Career into the Civil Service Regulations

In this final rule, OPM amends its 5 CFR part 213 regulations (the Excepted Service) to incorporate Schedule Policy/Career into OPM's civil service regulations.

Part 213 – Excepted Service, Subpart A

Section 213.101 Definitions.

Section 213.101 defines terms relating to the excepted service. This rule amends these definitions to add two new definitions of "career position" and "noncareer position" for purposes of part 213. These definitions clarify the distinction between noncareer Schedule C positions and career Schedule Policy/Career positions. Commenter 33529 raised concerns that OPM's proposed definition of a noncareer position as one who will normally resign upon a Presidential transition does not take into account that expectations of resignation may change with each new Presidential administration. Commenter 33328 also recommends revising 5 CFR 213.101(b)(1) to clarify that a career position means any position other than a non-career position, including positions of a temporary or time-limited nature.

OPM appreciates this perspective. However, in the proposed rule OPM clarified that the definition of noncareer position is taken from Section 2 of E.O. 13957, as amended, with

additional clarity that such positions are subject to preclearance by the White House Office of Presidential Personnel. Any employee holding a noncareer position at the time of a Presidential transition will be subject to a decision by the White House Office of Presidential Personnel to retain the noncareer employee.

Section 213.102 Identification of Positions in Schedule A, B, C, D, or Policy/Career

This rule amends § 213.102 to state that the President may place positions in Schedule Policy/Career. While Civil Service Rule 6.2 now authorizes OPM to place positions in Schedule Policy/Career, E.O. 13957, as amended, directs OPM to make recommendations to the President about what positions should go into that schedule rather than approve agency petitions itself. President Trump has reserved to himself the final decision about which positions will go in Schedule Policy/Career.

Commenter 27012 points out that the proposed rule does not list comprehensive characteristics for positions included in Schedule Policy/Career. Other commenters, such as Commenter 7547, 13168, 16850, 30426, and 35031 also expressed concern that there is little guidance to agencies on who will be included in Schedule Policy/Career and that the guidance provided is very broad. Similar to the implementation of other new rules and executive orders, OPM notes that it published the January 2025 Memorandum to provide agencies with guideposts to help agencies identify positions that are more likely to be policy-influencing.[242] Further, OPM notes that within the universe of positions that are eligible for transfer to Schedule Policy/Career because of their policy duties or confidential character, exactly which positions will move to Schedule Policy/Career is a discretionary Presidential policy decision that OPM has no authority over. OPM is not in a position to issue regulations or guidance restricting Presidential discretion in this matter. OPM accordingly is not in a position to list

[242] U.S. Off. Of Pers. Mgmt., "Restoring Accountability To Policy-Influencing Positions Within the Federal Workforce" (Jan. 27, 2025), https://www.opm.gov/chcoc/latest-memos/guidance-on-implementing-president-trump-s-executive-order-titled-restoring-accountability-to-policy-influencing-positions-within-the-federal-workforce.pdf.

comprehensive characteristics of positions that will be moved to Schedule Policy/Career.

Separately, Commenter 30426 criticizes the guidance in the January 2025 Memorandum. The Commenter argues that memorandum incorrectly focuses on the significance of a position's authority rather than on the position's character. The Commenter also points to the memorandum's discussion of the "authority to bind the agency" to a "course of action" or holding "delegated or subdelegated authority to make decisions committed by law to the discretion of the agency head. OPM's position is that the authority to legally bind the Government will often be indicative of a policy-making or policy-determining role which justifies placing the position into Schedule Policy/Career. Again, this is one factor to be considered as OPM and the White House exercise discretionary judgment.

That said, the specific positions to which Commenter 30426 objects also have an obvious connection to the section 7511(b)(2) exceptions. For example, Commenter 30426 objects to positions involved in presenting program resource requirements to OMB examiners. These positions advocate for agency policy and secretarial priorities, expressed through funding requests, within the executive branch. They have a straightforward connection to policy-advocacy. Nothing in the policy-advocating exception requires that advocacy be directed toward the general public. Advocacy before other branches of government, or within the executive branch, also can qualify. Similarly, if an employee is policy-making, policy-advocating, or policy-determining, then those above them in the chain of command with authority to tell that employee what to do will likely be policy-determining, policy-making, or policy-advocating as well. Where an employee qualifies for the confidential exception based on their confidential relationship to a senior official, that official is also likely policy-making or policy-determining.

Commenters 18409 and 18642 argue that those engaged in grantmaking, particularly scientific grantmaking, are inappropriate for Schedule Policy/Career inclusion because the grantmaking decision is not a policymaking decision. Consequently, Commenter 18409 argues that it makes no sense to reclassify all the reviewers, program officers, advisory councils, and

leadership at science funding agencies as political in nature. OPM notes that eligibility for Schedule Policy/Career is distinct from whether a position will actually be moved into that Schedule. Beyond that, OPM disagrees that such positions are not eligible. The scientific nature of a particular job is not determinative of whether or not the position is policy-influencing. As this Commenter, and others, point out, some positions in scientific grantmaking influence public policy. Those positions, as well as any others that are policy-influencing, are appropriate candidates for Schedule Policy/Career. OPM agrees that many positions involved in grantmaking do not determine or make agency policy. OPM will not recommend such positions for reclassification into Schedule Policy/Career.

Commenter 30426 argues that the proposed paragraph (d) at 5 CFR 213.102 is unusual because it states that the President may directly places positions in Schedule Policy/Career when the President already has that statutory authority. OPM appreciates the Commenter's concerns. The Constitution gives the President the power to set workforce policy and 5 U.S.C. 3302(1) vests the President with the power to exempt positions from the competitive service. OPM, of course, recognizes it is not vesting the President with any authority he does not already possess. OPM is modifying its regulations to reflect how Schedule Policy/Career will be implemented. OPM believes that maintaining regulations that clarify to relevant stakeholders and the public how Schedule Policy/Career will operate is beneficial in its own right.

Commenter 31616 maintains that centralizing the power to move positions into Schedule Policy/Career with the President raises concerns over politicization. Commenter's concerns are with the Pendleton Act, not this rulemaking. Under the relevant provision of the Pendleton Act, now codified at 5 U.S.C. 3302(1), the President determines what exceptions from the competitive service are necessary. OPM's authority to place positions in the excepted service is only a delegation of this Presidential authority. OPM has no authority to modify this statutory hierarchy of authority. Commenter also overlooks the role that OPM will still play in the process of designating positions. For instance, OPM issued the January 2025 Memorandum,

and will issue additional guidance as needed to assist agencies in identifying Schedule Policy/Career positions and implement these regulations. However, the ultimate decision concerning moving employees to Schedule Policy/Career lies with the President. Finally, as discussed below, OPM believes that concerns over politicization are misplaced because the President has made it clear that the jobs of Schedule Policy/Career employees who perform their duties effectively and with integrity and efficiency are safe, irrespective of their personal politics.

Commenter 8019 states that there has only been one case – *National Treasury Employees Union v. Horner* (*Horner*)[243] – interpreting relevant statutory language, contained at 5 U.S.C. 3302(1), which allows the President to make exceptions from the competitive service which are necessary and consistent with good administration. Commenter correctly notes that the court in that case ruled OPM's rulemaking arbitrary and capricious under the APA. However, the case has limited if any precedential value.

In *Horner*, OPM attempted to reclassify a large number of competitive service positions into Schedule B on the grounds that, in the aftermath of the *Luevano* consent decree,[244] it had no competitive examinations available that would be sufficient to choose appropriate candidates for hire.[245] Because OPM claimed it was unable to promptly develop new competitive examinations, it attempted to exempt the positions from examination requirements altogether. As the commenter notes, the court found OPM's decision to be arbitrary and capricious. However, the court did so because OPM requested that the court "defer to its 'expert judgment regarding the costs of developing new examinations'" with there being "no indication in the record, however, that OPM ever made an expert judgment about what those costs would be."[246] In other words, while the court recognized that, under APA review, it must accord great deference to OPM's

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[243] 854 F.2d 490 (D.C. Cir. 1988).
[244] *Luevano v. Campbell*, 93 F.R.D. 68 (D.D.C. 1981).
[245] *Horner*, 854 F.2d at 492-93.
[246] *Id*. at 499.

reasoned decision-making, it saw no evidence that OPM had come to a reasoned decision at all. Particularly, OPM had not "considered cost to even the minimally meaningful degree required to command judicial deference to its administrative judgment."[247] Thus in *Horner*, the circuit court could not even reach OPM's arguments concerning reclassification into the excepted service on the merits because nothing in the rulemaking materials gave it the ability to do so. Such a situation is clearly inapposite here to the extent that, in both the proposed and this final rule, OPM has explained at length its decision to implement Schedule Policy/Career. Further, as other commenters note, numerous provisions in Title 5 and throughout presuppose that conditions of good administration warrant excepting positions from the competitive service because of their policy-influencing duties.[248]

Section 213.103 Publication of excepted appointing authorities

OPM amends § 213.103 to include references to Schedule Policy/Career where applicable throughout.

Section 213.104 Special provisions for temporary, time-limited, or intermittent or seasonal appointments

OPM amends § 213.104 to include references to Schedule Policy/Career where applicable throughout, as well as references to existing excepted service Schedules A, B, C, and D throughout. As with § 213.102, this rule does not add references to Schedule E administrative law judges, retaining that for a future rulemaking.

Part 213 – Excepted Service, Subpart C

Section 213.3301 Positions of a Confidential or Policy-Determining Character.

Section 213.3301 sets forth the criteria for Schedule C appointments. This rule amends the heading to align with the text of Civil Service Rule 6.2, as amended by E.O. 13957.

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[247] *Id. at* 501.

[248] *See, e.g.,* 5 U.S.C. 2302(a)(2)(B)(i) (a "covered position … does not include any position … excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character").

Accordingly, Schedule C positions are those of a confidential or policy-determining character normally subject to change as a result of a presidential transition, rather than just positions of a confidential or policy-determining character.

Commenter 33328 recommended amending this heading by using the definition of Schedule C positions at § 213.101. OPM considered making this change but ultimately decided against adopting this recommendation both to streamline the text of the regulation and because it finds the proposed change is not necessary.

This rule also modifies the body of § 213.3301 to expressly define Schedule C positions as noncareer positions. Under these amendments, agencies can "make appointments under this section to *noncareer* positions that are of a confidential or policy-determining character" (emphasis supplied). The definition of noncareer follows that which OPM is adding to § 213.101.

OPM is also eliminating the reference in this section to the § 210.102 definition of "confidential or policy-determining." E.O. 14171 rendered this definition inoperative and, as discussed below, OPM is removing it from the civil service regulations.

Section 213.3601 Career Positions of a Confidential, Policy-Determining, Policy-Making, or Policy-Advocating Character.

The proposed rule added a new § 213.3501 to subpart C for appointments to Schedule Policy/Career of the excepted service. Schedule Policy/Career covers "career positions of a confidential, policy-determining, policy-making, or policy-advocating character that are not in the Senior Executive Service." OPM notes that it is making an administrative change to renumber the proposed § 213.3501 to § 213.3601 to accommodate a future rulemaking.

Commenters 13602 and 30426 argue that OPM's proposal to convey competitive status after one year of service in Schedule Policy/Career under paragraph (c) of 5 CFR 213.3501 would be unlawful and enhance the capacity of political appointees to burrow into Government at the end of the Trump administration. Several other commenters submitted similar concerns about the entire rule enabling burrowing-in.

In accordance with Section 4 (b) of E.O. 13957, OPM is exercising its long-standing discretionary authority under 5 CFR 6.3(a) to provide competitive status to excepted service employees who were appointed in the same manner as competitive service employees. Therefore, only individuals appointed to Schedule Policy/Career positions through the merit hiring procedures that would have otherwise been used had the position not been moved into Policy/Career may acquire competitive status. Individuals appointed to positions that, but for their placement in Schedule Policy/Career, would be hired using excepted service hiring procedures, such as Schedule A for attorneys, may not acquire competitive status. OPM also notes that it modified the final rule at § 212.401 to make clear that an employee who has competitive status at the time his or her position is first listed in an excepted service schedule, such as Schedule Policy/Career, or who is moved to a position in the excepted service, will retain competitive status.

However, OPM appreciates the concerns raised by commenters and, therefore, is increasing the time-period necessary to acquire competitive status from 1 year to 2 years of continuous employment which is consistent with other service requirements (e.g., length of trial periods for nonpreference eligible employees) associated with employment in the excepted service. OPM is also modifying § 213.3601 to detail the requirements for agencies in making appointments to positions in Schedule Policy/Career. As explained in greater detail below, these changes impose merit-based hiring requirements currently used by agencies in making appointments when filling these positions. Together with the expansion of the time required to gain competitive status, these changes adequately address concerns of burrowing-in as raised by the Commenters. OPM will also monitor movement of noncareer personnel into Schedule Policy/Career positions to ensure appointments of current or recent political appointees comply with merit system principles and applicable civil service laws.

Commenter 30426 also argues that OPM is stripping statutory veterans' preference entitlements including the rights of employees to seek corrective action at the MSPB when a

veteran is not hired for a position in Schedule Policy/Career. Respectfully, OPM rejects this hyperbole. Section 4 of E.O. 13957, as amended, requires agencies to follow the principle of veterans' preference as far as administratively feasible. Accordingly, OPM is modifying § 213.3601(d) to require that agencies must apply the principles of veterans' preference as far as administratively feasible based on the rating, ranking, and selection processes used for making appointments to Schedule Policy/Career positions. Section 213.3601(d) also specifies that, where numerical ratings are used in the evaluation and referral of candidates, agencies shall follow the regulations related to veterans' preference in competitive examining found in part 302 and subpart A of part 337 of this chapter, where applicable. When category ratings are used, agencies will follow subpart C of part 337 of this chapter. And where another process is used, veterans' preference must be considered a positive factor.

These changes to § 213.3601(d) are consistent with the understanding of the term "administratively feasible" found in *Patterson v. Department of Interior*,[249] which suggests that it is "administratively feasible" to apply veterans' preference as a "set increase[] in the rating of preference eligibles who receive a passing score on an agency's examination" where numerical ratings are used in the evaluation or referral of candidates.[250] For attorney positions, or other positions for which competitive examining is not permitted or is otherwise not appropriate, agencies may treat veteran status as a "positive factor" in the evaluation of candidates.[251]

Once the President determines to place positions in Schedule Policy/Career, therefore, the positions will continue to be subject to the application of veterans' preference whether they are moved from the competitive service or another schedule in the excepted service. Additionally, applicants for positions in Schedule Policy/Career will still be able to seek corrective action, first, through the Department of Labor and, later, at the MSPB, based on allegations that an

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[249] 424 F.3d 1151 (Fed. Cir. 2005)
[250] *Id.* at 1159.
[251] *Id*. at 1159-1160.

agency failed to apply veterans' preference, as others have done for excepted service positions.[252]

OPM is also modifying 5 CFR 213.3601 to identify the minimum merit-based competitive hiring procedures agencies must follow in appointing employees to Schedule Policy/Career positions. At a minimum, agencies will be required to publicly announce job opportunities; evaluate applicants based on valid, job-related assessments; and make selections of highly qualified individuals based on merit. OPM also clarifies the application of veterans' preference when hiring for positions in Schedule Policy/Career in § 213.3601. Consistent with E.O. 13957's amendments to Civil Service Rule 6.2 (5 CFR 6.2), agencies are required to follow the principle of veterans' preference when making appointments to Schedule Policy/Career positions.

Commenter 33204 recommends modifying 5 CFR 213.3601 to provide opportunities for former and current employees appointed to Schedule Policy/Career to obtain positions outside the new excepted service schedule. The Commenter suggests establishing a non-competitive reappointment authority for former Schedule Policy/Career employees initially hired under excepted status, providing the same grade advancement opportunities available to former competitive service employees under existing Enhanced Reinstatement Authority. The Commenter also suggests establishing clear pathways for exceptional Schedule Policy/Career employees to be converted to competitive service positions without competitive examination, based on performance and agency need. OPM appreciates the proposal and will consider modifying these regulations as proposed at a future date, if necessary. However, OPM notes that, by providing competitive status to certain individuals appointed under Schedule Policy/Career, those employees may be appointed to competitive service positions and be reinstated back into the civil service, noncompetitively (without a competitive examining announcement).

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[252] *See Jarrard v. Social Security Administration,* 115 M.S.P.R. 397, 399-400 (2010), *aff'd sub nom. Jarrard v. Dep't of Justice,* 669 F.3d 1320 (Fed. Cir. 2012).

Commenter 0210 also characterizes Schedule Policy/Career as a solution in search of a problem as they do not see rampant poor performance or misconduct at their agency. If this is in fact that case, this agency should keep most policy-influencing employees after the implementation of Schedule Policy/Career. However, this one employee's observations do not mean that all Federal agencies are free of the problems of weak employee accountability as documented in the proposed rule.

Moreover, Commenter 30055 asserts that various groups, including civil servants, researchers, and scholars, argue that the implementation of Schedule Policy/Career will politicize the civil service such that employees will be hesitant to advise political leaders on policy options based on evidence. Commenter 0210, and others, agree with this sentiment. *See* Comments 66, 85, 209, 338, 1122, 27012, 30464, and 31616. As explained in the proposed rule, maintaining Federal staff who have a diversity of views and opinions will help identify issues that may have been overlooked during the policymaking process. Even the strongest advocates of E.O. 13957 and opponents of career staff resistance have reported that policymakers under the last Trump administration found career staff criticism to be highly valuable.[253] Therefore, there would be no incentive to dismiss career employees who provide reasoned, candid advice. Consistent with the President's express directives in E.O. 13957, OPM expects that employees who provide frank and candid advice, then faithfully implement agency leadership's ultimate decision irrespective of their personal preferences, have nothing to fear from Schedule Policy/Career. Finally, as OPM stated in the proposed rule, since Schedule Policy/Career is an entirely new schedule, OPM will be closely monitoring its implementation and will recommend additional measures to prevent any abuse by agency personnel who attempt to circumvent the purpose behind Schedule Policy/Career's creation.

Several commenters, including 30426 and 27012 also argue that evidence of the

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[253] *See Tales from the Swamp* at 5.

administration's contempt for career Federal employees and sustained effort to politicize the Federal workforce is abundant. President Trump called career Federal employees "crooked," "dishonest" and "corrupt", etc. Commenter 30426 also argues that employees will feel pressured to wear MAGA hats and pro-Trump slogans in the Federal workplace, including in offices that deal directly with the public. This purported pressure would mean that political appointees and supervisors in agencies will know which Schedule Policy/Career employees fervently support the President politically and which do not. Commenter argues the results of that revelation are predictable—the spoils system will return to a large segment of the Federal workforce.

This criticism is baseless. Commenters overlook the many times the President has praised and lauded Federal employees as a whole, including in public proclamations.[254] The President has also praised specific categories of Federal employees, such as when he told Immigration and Customs Enforcement employees "we love you, we support you, and we will always have your back."[255] Commenters inaccurately conflate the President's criticisms of some Federal employees who have engaged in problematic behavior with a disdain for Federal employees writ large. And as discussed extensively below, the President and OPM flatly reject the notion that this final rule constitutes a return to the patronage system. Further, as discussed throughout this rule, and in more detail below, the President has directed that Schedule Policy/Career include numerous safeguards to prevent politicization. These include retaining merit-based competitive hiring procedures for positions transferred from the competitive service, and a prohibition on dismissing employees based on their personal political affiliation or views. OPM will help the President ensure these safeguards are effectively implemented.

Commenter 30426 also argues that Trump purported to fire a Democratic appointee on

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[254] *See, e.g.,* Presidential Proclamation No. 9744, Public Service Recognition Week, 2018, 83 FR 22169 (May 11, 2018).

[255] Brian Naylor, *Trump Calls ICE Opponents 'Big Loudmouths,' Praises Agents As 'Great Patriots'*, Nat'l Pub. Radio, Aug. 20, 2018, https://www.npr.org/2018/08/20/640307567/trump-calls-ice-opponents-big-loudmouths-praises-agents-as-great-patriots (internal quotations omitted).

the MSPB without cause, which if successful after the conclusion of pending litigation would strip the MSPB's board of the quorum needed to adjudicate cases because only one member, a Republican appointee, would remain on that board. Commenter argues that President Trump left the MSPB without a quorum for his entire first term. Therefore, Commenter concludes this action is a blatant attempt to gut the CSRA's statutory remedial mechanism for correcting unwarranted adverse actions, including those that constitute PPPs.

This criticism is also baseless. The Supreme Court has ruled that the President is likely to succeed in defending the legal merits of this action. *See Trump. v Wilcox*, 145 S.Ct. 1415 (2025). The President also promptly nominated a new MSPB nominee. That nominee was recently confirmed by the Senate and appointed to the Board, restoring a quorum. Commenter's concerns about a lack of quorum in the President's first term is more appropriately addressed to the Senate, as the President also repeatedly nominated MSPB members in his first term but the Senate did not vote on their nominations.

Commenter 33328 pointed out that the proposed rule conflicts with E.O. 14284, "Strengthening Probationary Periods in the Federal Service," April 24, 2025, because it exempts Schedule Policy/Career employees from serving a trial period. Under Section 3 of E.O. 14284, the President established a new Civil Service Rule XI to require all employees in the excepted service to serve a trial period. 5 CFR 11.3 establishes the requirement for excepted service employees to serve a trial period as well as certain rules for administering trial periods including crediting prior service. OPM agrees with the Commenter that establishing an exception to serving a trial period for employees in Schedule Policy/Career positions would conflict with E.O. 14284 and 5 CFR 11.3. Therefore, OPM establishes in the final rule that employees in Schedule Policy/Career positions must serve a trial period unless otherwise excepted under the Civil Service Rules or other legal authority. OPM notes that the President or Congress may nonetheless except such employees through a future executive order or change in law, respectively.

Commenters 0610, 0630, 1154, 1477, 1681, 16152, 23876, 26587, 30426, and others, also argue that in these and other ways, the administration has actively demonstrated that it will, indeed, politicize the Federal workforce once it has removed the guardrails protecting the American people against a return of the spoils system. Commenters 30055 and 30408 provide a collection of research on the topic of public policy, specifically the politicization of the U.S. Government and its effect on performance. Commenter 30055 posits that civil service protections lead to a reduction in turnover, a greater investment in skills, lower costs, greater democratic capacity and responsiveness to more than the President, greater communication of program flaws, and an increase in public trust. The creation of Schedule Policy/Career, on the other hand, increases political control on the civil service beyond what was contemplated by Congress in the CSRA and concentrates that control with the President, who has already demonstrated that he will fire employees without regard to their performance. As discussed in Section V(A) below, OPM strongly disagrees with the notion that the final rule returns the Federal civil service to the spoils system or will lead to mass firings without regard for employee performance.

Several commenters mentioned the effects of Schedule Policy/Career on the National Science Foundation (NSF), the National Institutes of Health (NIH), and the scientific community. They argue that positions at these and other agencies will be particularly affected by converting career employees to Schedule Policy/Career. Commenters argue that politics will erode the public trust in science; Schedule Policy/Career positions will be filled by individuals who do not have the required level of expertise; and that career employees outside of Schedule Policy/Career are needed over many years to accomplish the mission.

OPM believes that these commenters overstate the impact on agencies' scientific missions and the scientific community as a whole. These concerns are buttressed more by fear than actual evidence to support their conclusions. Rather, the creation of Schedule Policy/Career is intended to ensure nonpartisan, senior career officials follow executive direction from the

President. Freeing these positions from the adverse action appeals process will ensure that only the best candidates will fill these jobs. As these commenters noted, Federal work in the sciences could be undermined by the politicization of this type of work which Schedule Policy/Career is deliberately designed to prevent from occurring. Schedule Policy/Career is not a political appointment – that is reserved for noncareer positions. While policy-influencing positions can encompass political appointments under Schedule C, they are not exclusively limited to political appointments. As noted in the proposed rule, policymaking, or policy-influencing, is not tantamount to being a political appointee. Adding Schedule Policy/Career will not erode the scientific principles that are implicit in the jobs that this Commenter, and others, describe by changing them to political appointments. Further, OPM notes that Schedule Policy/Career does not alter agency hiring procedures. Positions that are currently filled through competitive hiring will continue to be so filled after being moved to Schedule Policy/Career. By presidential directive, the White House office tasked with selecting political appointees is forbidden from playing any role in the selection of Schedule Policy/Career employees. E.O.s 13957 and 14171 expressly reject treating Schedule Policy/Career positions as political appointments. OPM expects and understands that agencies will follow this Presidential command.

B. Meaning of the Phrase "Positions of Confidential, Policy-Determining, Policy-Making, or Policy-Advocating Character"

This rule amends 5 CFR part 210 (Basic Concepts and Definitions (General)), to remove the definitions for the terms "confidential, policy-determining, policy-making, or policy-advocating" and "confidential or policy-determining" from 5 CFR 210.102(b)(3) and (b)(4) added by the April 2024 final rule. These definitions equate these phrases with political appointees.

Several commenters (0630, 19994, 30408, 30426, and 31616, for example) expressed concerned about the removal of these definitions and the lack of a definition of "policy-influencing." In particular, Commenter 30408 states that the lack of a definition will lead to an

inconsistent application of Schedule Policy/Career.

As explained in the proposed rule, E.O. 14171 requires OPM to rescind these restrictive definitions of confidential, policy-determining, policy-making, or policy-advocating established at 5 CFR 210.102(b)(3) and (b)(4); definitions determined to be inconsistent with statutory text that also raised grave constitutional concerns. Moreover, removing these definitions will clarify that both political and career positions can be policy-influencing, and that the President's decision to strengthen accountability in policy-influencing positions by removing adverse action procedures does not simultaneously impose a personal loyalty test. Removing these definitions also has no practical legal effect because the President has already rendered them inoperative and without effect. The primary effect of these regulatory changes is to update OPM regulations to accord with the operative legal standards.

The ultimate decision about which positions will be moved to Schedule Policy/Career is a discretionary presidential policy determination. OPM has no control over how the President exercises this discretion. Using delegated presidential authority to issue regulatory definitions cabining presidential discretion in defiance of a presidential directive to do the opposite would be inappropriate. Finally, OPM issued the January 2025 Memorandum addressing positions agencies should consider recommending for Schedule Policy/Career.

C. Adverse Action Procedures and Appeals

OPM rescinds the changes made in its April 2024 rulemaking that allowed employees whose positions were moved or who were involuntarily transferred into a policy-influencing excepted service position to nonetheless remain covered by chapter 75 adverse action procedures and MSPB appeals. In addition, OPM now clarifies that chapter 75 does not apply to employees in Schedule C and Schedule Policy/Career positions. OPM also amends its part 432 regulations to exclude Schedule Policy/Career positions from chapter 43 performance-based removal procedures.

Accordingly, this rule makes the following changes to 5 CFR parts 432 and 752:

Part 432—Performance Based Reductions in Grade and Removal Actions

The April 2024 final rule amended 5 CFR 432.102(f)(10) to: (1) formally exclude excepted service employees whose positions have been determined to be policy-influencing as defined by § 210.102; (2) state that if OPM put such positions in the excepted service they are Schedule C appointments; and (3) eliminate the exception if the incumbent was involuntarily moved to an excepted service position after accruing tenure. This final rule amends § 432.102(f)(10) to remove the reference to the § 210.102 definition, remove the language indicating policy-influencing positions excepted by OPM are necessarily Schedule C positions, and remove the proviso regarding incumbents moved. Retaining regulatory references to a non-existent definition is not practical.

OPM determined that it would be misleading to state that Schedule C positions are the only policy-influencing positions in the excepted service, since policy-influencing positions in schedules other than Schedule C may also exist. OPM has determined that removing the exception for involuntary transfers will bring the regulation into conformity with the amendments to part 752 and ensure that Schedule Policy/Career employees are treated consistently in chapters 43 and 75. These amendments will clarify that agencies are not required to employ chapter 43 procedures prior to removing Schedule Policy/Career employees for their poor performance.

Several commenters (3269, 20523, 22709, and 23031, for example) allege that the removal of appeal procedures for employees placed into Schedule Policy/Career would violate those employees' due process rights. However, OPM's regulations have long allowed OPM to place employees in excepted categories. A Presidential section 7511(b)(2) determination covering thousands of positions is a policy of general applicability that does not implicate

individualized due process.[256] The amendments do not violate any employee's due process claim of a property interest in continued employment.

Some commenters, including Commenters 13168 and 30426, argue that the recission of § 752.201(c)(7) is contrary to law because it "misapplies" the Policy/Career exclusion, violates due process rights, and potentially subjects Federal employees to political discrimination. Commenter 34546 also claims that rescinding § 752.201(c)(7) will dissuade qualified applicants from applying for Federal jobs and wrongly affect Federal employees who have relied on the protections in subpart B of part 752. However, for the same reasons stated below, these arguments are baseless.

Part 752—Adverse Actions, Subpart B

OPM retains the changes the April 2024 final rule made to 5 CFR 752.201—namely to modify language in 5 CFR 752.201(b)(1) to conform with the statutory language in 5 U.S.C. 7501. This change to 5 CFR 752.201(b)(1) conforms the regulatory language to the decisions of the Federal Circuit in *Van Wersch v. Department of Health & Human Services,* 197 F.3d 1144 (Fed. Cir. 1999), and *McCormick v. Department of the Air Force,* 307 F.3d 1339 (Fed. Cir. 2002). OPM's revision to § 752.201(b)(1) prescribes that, even if an employee in the competitive service who has been suspended for 14 days or less is serving a probationary or trial period, the employee has the procedural rights provided under 5 U.S.C. 7503 if the individual has completed one year of current continuous employment in the same or similar position under other than a temporary appointment limited to one year or less.

As discussed above, OPM also rescinds the changes made to § 752.201 in its April 2024 rulemaking – establishing 5 CFR 752.201(c)(7) – because it is no longer accurate based on OPM's removal of the relevant definition in 5 CFR 210.102.

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[256] *See Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (*Bi-Metallic*) (individuals affected by generally applicable laws are accorded access to the legislative process "by their power, immediate or remote, over those who make the rule").

Commenter 31616 argues that excluding career Schedule Policy/Career officials from subpart B of part 752 "could actually result in more terminations rather than progressive discipline," because Policy/Career employees do not have any appeal rights under subparts B and D of part 752. However, this comment is speculative. As stated above, the purpose of this rulemaking is to provide agencies with authority to address individual instances of unacceptable performance or misconduct by individual career Schedule Policy/Career officials. This amendment does not suggest that an employee performing policy-influencing duties will be indiscriminately terminated or wrongly disciplined.

Some commenters, including Commenters 13168 and 30426, argue that the rescission of § 752.201(c)(7) is contrary to law because it "misapplies" the Policy/Career exclusion, violates due process rights, and potentially subjects Federal employees to political discrimination. Commenter 34546 also claims that the recession of § 752.201(c)(7) will dissuade qualified applicants from applying for Federal jobs and wrongly affect Federal employees who have relied on the protections in subpart B of part 752. However, for the same reasons stated above, these arguments are baseless.

Part 752—Adverse Actions, Subpart D

Subpart D of part 752 implements subchapter II of chapter 75. Subpart D applies to removals, suspensions for more than 14 days, reductions in grade or pay, or furloughs for 30 days or less. Section 7511(b)(2) of 5 U.S.C. excludes from subchapter II, and thus subpart D, excepted service employees in policy-influencing positions. This final rule revokes the changes the April 2024 final rule made to subpart D. This rule clarifies that employees reclassified or transferred into policy-influencing positions are excluded from subpart D.

Section 752.401 Coverage.

Section 752.401 governs the scope of subpart D. Paragraph (c) lists the positions subpart D covers and paragraph (d) lists positions it excludes. As adopted by this final rule, OPM removes the phrases "including such an employee who is moved involuntarily into the excepted

service" and "including such an employee who is moved involuntarily into a different schedule of the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily" from throughout paragraph (c). These changes clarify that employees do not remain covered by subpart D or chapter 75 procedures if they or their positions are moved into Schedules C or Policy/Career.

Commenter 14305 argues that the amendment to § 752.401 is insufficient because it does not specifically define which positions are "confidential, policy-determining, policymaking, or policy-advocating." Commenter 14305 alleges that, as a result, § 752.401 will be applied "in arbitrary ways." As noted above, the President's actions in E.O.s 13957 and 14171 legally prohibit OPM and Federal agencies from implementing the April 2024 rule's definition of "confidential, policy-determining, policymaking, or policy-advocating." Consequently, § 752.401 aligns this section to current legal standards. Further, as discussed above, OPM has made an intentional policy choice not to regulatorily define the policy-influencing terms as they relate to Schedule Policy/Career because the CSRA, E.O. 13957, and E.O. 14171 leave such determinations to the President or the agency head based on an analysis of each employee's specific duties and functions.[257]

Commenter 33328 also argues that the amendments to § 752.401 conflict with E.O. 14284 on "Strengthening Probationary Periods in the Federal Service." However, Commenter 33328 does not identify, or otherwise establish, that the removal of coverage under subpart D or chapter 75 procedures for Schedule Policy/Career officials would conflict with E.O. 14284.

Many commenters, including Comments 24540, 30426, 31616, and 34546, object to amending § 752.401's coverage for many of the same reasons that have been addressed above. These commenters argue that excluding employees who involuntarily converted to Schedule

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[257] 5 U.S.C. 7511(b)(2)(B) authorizes OPM to determine that positions that OPM has excepted from the competitive service are policy-influencing for purposes of chapter 75. However, since the President will be effectuating transfers into Schedule Policy/Career directly this provision gives OPM no authority over whether Schedule Policy/Career positions are or are not policy-influencing.

Policy/Career positions from subpart D or chapter 75's coverage may result in removals for political reasons, quash candidness among Federal employees, remove valuable Federal employees for the "wrong" reasons, and discourage qualified candidates from considering Federal employment. Commenters 30426 and 31616 maintain that the amendment to § 752.401 is invalid because it "misapplies" the Schedule Policy/Career exclusion, violates the due process rights of employees who are involuntarily converted to Schedule Policy/Career, and potentially subjects Federal employees to political discrimination. Commenter 24540 also claims that the amendment violates the merit systems principles in the CSRA. However, for the same reasons stated above, these arguments are baseless. This rule modifies paragraph (c)(7) to read "employee who was in the competitive service at the time his or her position was first listed under Schedule A or B of the excepted service and who still occupies that position." This change reflects the fact that, as explained above, employees whose positions are reclassified into a policy-influencing schedule do not retain chapter 75 adverse action procedures or MSPB appeals. However, employees moved into non-policymaking positions (i.e., Schedules A or B) are generally covered by these provisions.

Section 752.405 Appeal and Grievance Rights.

Section 752.405 covers MSPB appeals of actions taken under subpart D. OPM amends § 752.405(a) to expressly state that employees in policy-influencing excepted service positions are categorically exempt from subpart D's coverage and concomitant MSPB appeals.

Some commenters, including Commenters 6205, 26433, 27258, 30426, and 35350, argue that the amendment to § 752.405 violates the long-established due process rights of Federal employees by involuntarily converting them to a career Schedule Policy/Career position and, therefore, excluding them from coverage under subpart D of part 752. For the reasons explained in Section V.C.ii., this final rule satisfies all constitutional due process rights.

Further, Commenter 35523 objects to the amendment to § 752.405 because it does not provide a mechanism for employees to challenge an involuntarily conversion to a Schedule

Policy/Career position and will, consequently, dissuade Federal employees from being forthright in the execution of their duties. However, Commenter 35523 does not identify any legal authority that permits a Federal employee to challenge the President's decision to reclassify an employee to a Schedule Policy/Career position. Further, once the President has reclassified a position to Schedule Policy/Career, OPM lacks the authority to delay the reclassification of said positions because it is a decision made by the President that OPM must implement. Also, as noted above, the President has strong incentives to keep experienced Federal employees in policy-influencing positions who do not obstruct the President's policy objectives. It also does not benefit the President to remove career employees who provide reasoned, candid advice.

Commenter 14387 also claims that OPM is acting *ultra vires* by amending § 752.405 to exclude Schedule/Policy Career positions from having MSPB appeal rights under subpart D of part 752. However, as explained in further detail in other parts of this rulemaking, the President is acting under a specific statutory authorization: 5 U.S.C. 7511(b)(2)(A). The President and OPM are thus acting *intra vires*, not *ultra vires*.

D. Agency Procedures for Moving Positions Into, or Between Excepted Service Schedules

OPM also amends 5 CFR part 212, subpart D, and part 302, subpart F, to modify the procedures for moving positions into or between excepted service schedules. Specifically, this rule removes subpart F of part 302, which was created by the April 2024 final rule. OPM also amends part 212, subpart D, to remove provisions inconsistent with the policies of E.O. 14171, as well as to clarify that competitive service employees reclassified or transferred into an excepted service schedule do not remain in the competitive service but retain their competitive status.

Part 212 – Competitive Service and Competitive Status, Subpart D

Section 212.401 Effect of competitive status on position

OPM revises 5 CFR part 212, subpart D, which governs the effect of an employee's

competitive status on the employee's position. This final rule removes from 5 CFR 212.401(b) the provision that "[a]n employee who was in the competitive service and had competitive status . . . at the time: (1) the employee's position was first listed under Schedule A, B, or C, or whose position was otherwise moved from the competitive service and listed under a schedule created after May 9, 2024; (2) or [t]he employee was moved involuntarily to a position in the excepted service, remains in the competitive service for the purposes of status and any accrued adverse action protections, while the employee occupies that position or any other position to which the employee is moved involuntarily."[258]

OPM proposed replacing this language in § 212.401 with a new paragraph (b) that provides that an employee who has competitive status at the time their position is first listed in an excepted service schedule, or who is moved to a position in the excepted service, is not in the competitive service for any purpose but shall retain competitive status for as long as they continue to occupy such position.

Commenter 30426 argues that, in attempting to revise the language of the half-century-old regulation, OPM has preserved language that is inconsistent with the rest of its revision. Specifically, the phrase "shall retain competitive status as long as he or she continues to occupy such position" in OPM's proposed amendment would no longer be accurate. According to the Commenter, OPM's proposed language purports to limit competitive status to the period that the employee holds the new or modified position, but competitive status is not limited to that period.

We agree and revise the final rule to "an employee who has competitive status at the time his or her position is first listed in an excepted service schedule, or who is moved to a position in the excepted service, shall retain competitive status."

Commenter 0629 expressed confusion over the operation of the revised § 212.401(b). The

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[258] 5 CFR 212.401(b) (2024).

revised § 212.401(b) would provide that employees with competitive status whose positions are listed in or who are moved into the excepted service retain their competitive status. This would allow them to retain their basic eligibility for noncompetitive assignment to a competitive position. This proposal recognizes that employees who were hired after competitive examination and have completed their probationary period have met the standards necessary for appointment to competitive positions, and that the President's decision to move their position into the excepted service does not void their earned competitive status.

Allowing employees in excepted service positions to retain their competitive status is consistent with OPM's statutory authorities. Title 5 provides that an individual may be appointed in the competitive service only if he or she has passed an examination or is specifically exempted from examination by the civil service rules. Employees with competitive status have met this standard. OPM can allow them to keep their competitive status while they encumber an excepted service position, and the Civil Service Rules currently provide for some excepted service employees to accrue competitive status.

Commenter 13602 argues that the proposed regulation causes confusion by using "competitive status" and "competitive service" at the same time, without explicitly explaining the distinction. We acknowledge how the two terms could be confused by the average reader; however, these are terms with clear, consistent, and well-defined meanings. "Competitive service" refers to all civil service positions in the executive branch except positions which are specifically excepted from the competitive service, PAS positions, or positions placed in the Senior Executive Service.[259] "Competitive status" is "an individual's basic eligibility for noncompetitive assignment to a competitive position" that "is acquired by completion of a probationary period under a career-conditional or career appointment . . . following open competitive examination."[260] This distinction is why, as discussed above, the proposed

[259] 5 U.S.C. 2102(a).
[260] 5 CFR 212.301 (2025).

regulation must be modified to accurately reflect how competitive status functions when an employee occupies a position in the excepted service.

Commenter 30426 argues that it is irrational for OPM to change 5 CFR 212.401(b) to take away provisions saying employees remain in the competitive service and keep any accrued adverse action protections if their positions are newly listed in an excepted service schedule and they stay in the same position. In this regard, the Commenter argues that "OPM's proffered justification for this change is only that it believes it is legally capable of making this change, but it offers no reason not to preserve the accrued rights of current career Federal employees other than that the administration finds it inconvenient to wait for attrition to result naturally in broadening the coverage of Schedule Policy/Career."

The regulation at issue was first enacted in 1968, when the Lloyd-La Follette Act expressly provided procedures that had to be followed to remove an employee from the competitive service. The 1968 version of 5 CFR 212.401(b) provided: "An employee in the competitive service at the time his position is first listed under Schedule A, B, or C remains in the competitive service while he occupies that position."[261] In 2024, 5 CFR 212.401(b) was revised, providing: "An employee who was in the competitive service and had competitive status as defined in 212.301 of this chapter at the time: (1) The employee's position was first listed under Schedule A, B, or C, or whose position was otherwise moved from the competitive service and listed under a schedule created subsequent to May 9, 2024; or (2) The employee was moved involuntarily to a position in the excepted service; remains in the competitive service for the purposes of status and any accrued adverse action protections, while the employee occupies that position or any other position to which the employee is moved involuntarily."[262] While the language was modified, the principle effect remained—employees remained in the competitive service if they occupied a position when it was first moved to the

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[261] 5 CFR 212.401(b) (1968); 33 FR 12402, 12408 (Sep. 4, 1968).
[262] 5 CFR 212.401(b) (2024); 89 FR 24982, 25046 (Apr. 9, 2024).

excepted service. OPM did not modify this principle in the regulation, because there was never a need to do so even with intervening exceptions of competitive service positions to excepted service positions. This lack of need was because the reclassifications ordered by Congress and the President explicitly allowed for employees in positions that were removed from the competitive service to remain in the competitive service while they continued to occupy said position.[263] Therefore, the regulation was still accurate and not contrary to any legal authority. However, that changed with the issuance of E.O. 13957, as amended, which does not include any explicit exception for employees moved to Schedule Policy/Career to remain in the competitive service.[264] There is now legal authority that conflicts with 5 CFR 212.401(b). As such, OPM must revise that regulation to make it consistent with existing legal authority.

Similarly, multiple commenters, including but not limited to Commenters 0230, 11707, and 31616 expressed concern with moving current employees to Schedule Policy/Career, requesting that OPM allow employees to keep their current classification and switch the position to Policy/Career when it becomes vacant. Waiting for attrition to realize the benefits of Schedule Policy/Career would reduce the President's ability to hold employees accountable for misconduct, remove poor performers, effectively address policy resistance, and otherwise realize the benefits of this rule. Additionally, OPM – as discussed above – lacks the authority to delay the reclassification of occupied positions to Schedule Policy/Career because it is a decision made by the President that OPM must implement. Nothing in subchapter II allows incumbent employees to remain covered by adverse action proceedings after the President or an agency head, as applicable, determines their position is policy-influencing. Unlike other exceptions in section 7511(b) to subchapter II's coverage, the 7511(b)(2)(A) exception is not contingent on the personal status or history of incumbent employees. As a matter of law, OPM

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[263] *See* E.O. 13843, 83 FR 32755, 32757 (July 13, 2018); Intelligence Authorization Act for Fiscal Year 2012, Pub. L. 112-87, 125 Stat. 1876, 1881 (2012).
[264] *See generally* E.O. 13957, 85 FR 67631, as amended by E.O. 14171, 90 FR 8625.

has no authority to extend subchapter II to cover employees in excepted service positions the President has determined are policy-influencing.

In this regard, Commenter 30426 argues 5 U.S.C. 7511(c) gives OPM authority to extend chapter 75 procedures to covered employees in Schedule Policy/Career. Section 7511(c) provides that OPM "may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office which is not otherwise covered by this subchapter." In the proposed rule OPM explained that this exception was inapplicable for two reasons. First, policy-influencing positions are "otherwise covered" by subchapter II and expressly excluded. And second, this authority does not extend to positions the President excludes from the competitive service.[265]

Commenter 30426 takes issue with both points. On the first, Commenter argues that OPM misconstrues what "otherwise covered by this subchapter" means. Commenter argues 7511(b) provides "this subchapter does not *apply* to an employee" meeting various criteria, while 7511(c) then expressly authorizes OPM to nonetheless "provide for the *application*" of subchapter II to those not covered by it (emphasis' in original). Commenter, pointing to this textual analysis and caselaw, argues that "not otherwise covered" in this context has the "obvious" meaning of "not otherwise covered by the protections at issue" rather than "not otherwise referenced in this subchapter." Upon further review, OPM accepts Commenter's point, and concludes 5 U.S.C. 7511(c) authorizes OPM to extend chapter 75 adverse action procedures to positions that OPM has placed in the excepted service that would otherwise be excluded under section 7511(b).

However, this conclusion has no relevance to Schedule Policy/Career or this rulemaking, as the President—not OPM—will be placing positions in Schedule Policy/Career. On this point, Commenter 30426 argues section 7511(c) also allows extending adverse actions procedures to positions excluded from the competitive service by the President. Commenter argues section

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[265] 90 FR at 17199.

7511(c) was meant to allow OPM to include under subchapter II procedures positions that the executive branch excepted from the competitive service, as opposed to legislative exclusions. Commenter contends that Schedules A and B, which were created by the President, existed at the time the CSRA passed. OPM subsequently covered Schedule B employees under subchapter II procedures, and no-one thought this was improper. Ergo, OPM extending subchapter II to employees excluded from the competitive service by the President under Schedule Policy/Career is not improper.

This argument has no foundation in the text of chapter 75, and it misunderstands the scope of OPM's authority to extend chapter 75 protections to excepted positions. Section 7511(c) provides that OPM "may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of [OPM] which is not otherwise covered by this subchapter."[266]

Under 5 U.S.C. 3302(1), the President has primary authority for excepting positions from the competitive service. The President has, on occasion, delegated that authority to OPM, but it principally rests with the President. Section 7511(c) straightforwardly allows OPM to extend subchapter II to cover positions where it has used its delegated Presidential authority to except from the competitive service, such as the Schedule A positions, listed in 5 CFR 213.3102. But it does not allow OPM to extend coverage to any positions the President directly excepted from the competitive service. OPM cannot find, and the Commenter did not provide, any legal authority that section 7511(c) means anything other than its plain language. So, while the Commenter is correct that OPM can extend subchapter II to employees OPM excepted from the competitive service, the Commenter fails to acknowledge such extensions hinge on whether OPM has been delegated the authority to determine which positions are excepted. The President has provided he will directly move positions into Schedule Policy/Career; OPM does not

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[266] 5 U.S.C. 7511(c).

control those determinations.[267] Therefore, section 7511(c) does not give OPM authority to extend subchapter II to positions directly excepted by the President.

OPM acknowledges, as Commenter 30426 points out, that Schedules A and B were created by E.O. However, the creation of a schedule does not by itself put specific positions into that schedule. The act of creating an excepted service schedule is legally distinct from the act of putting positions in that schedule. In fact, E.O.s 9830 and 10577, creating the modern Schedules A and B, explicitly delegated authority to the CSC to place positions into those schedules.[268] So it is simply not the case that most Schedule A or B positions were excepted from the competitive service by the President. The President created those schedules, but individual positions were often put in it by the CSC, and then OPM. For example, an OPM rulemaking following the CSRA's passage regulates the positions currently in Schedule A.

Section 7511(c) gives OPM authority to extend subchapter II to otherwise excluded Schedule A and B positions that it has regulatorily excepted from the competitive service. Those schedules were created by executive order, but specific positions were placed in those Schedules through OPM regulations.[269]

Schedules A and B stand in contrast to E.O. 13957, as amended, which not only created Schedule Policy/Career but maintained that the President would place individual positions in it.[270] This is similar to E.O. 13843, which created Schedule E and excepted all subsequently hired administrative law judges (ALJs) from the competitive service placing them in Schedule E.[271] OPM has no role in placing positions in Schedule E. Additionally, in that situation, the President – not OPM – explicitly provided that ALJs "who are, on July 10, 2018, in the

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[267] *See* E.O. 14171, 90 FR at 8626 ("The Director shall promptly recommend to the President which positions should be placed in Schedule Policy/Career.").
[268] *See, e.g.,* E.O. 10577, 19 FR 7521, 7524 ("The Commission is authorized to except positions from the competitive service whenever it determines that appointments thereto through competitive examination are not practicable."); *id.* ("Positions excepted by the Commission shall be listed in Schedule A, B, or C as provided in section 6.2 of this Rule...").
[269] *See* 5 CFR 213.3102 and 47 FR 28901, 28902-04 (July 2, 1982).
[270] *See generally* E.O. 13957, 85 F.R. 67631, as amended by, E.O. 14171, 90 FR. 8625.
[271] E.O. 13843, 83 FR at 32756 ("Conditions of good administration warrant that the position of administrative law judge be placed in the excepted service.").

competitive service shall remain in the competitive service as long as they remain in their current positions."[272]

Commenter 30426's misunderstanding of the distinction between how excepted service schedules are created and how individual positions get placed in those schedules leads him to conclude 7511(c) authorizes OPM to extend subchapter II to positions the President has placed in the excepted service. Commenter believes that, since 7511(c) was drafted to allow OPM to extend subchapter II to schedule A and B positions, and those schedules were created by executive order, OPM can also extend subchapter II to positions the President has directly placed in the excepted service.

This is a *non sequitur*. For the reasons discussed above, OPM has no such authority. Section 7511(b)(2) categorically excludes from subchapter II's coverage any excepted service positions an appropriate authority has determined are policy-influencing. Section 7511(c) only permits OPM to extend subchapter II to cover positions it—but not the President—has placed in the excepted service. Section 7511(c) thus does not extend to positions that the President, at a future date, places in Schedule Policy/Career. As such, the proposed changes are necessary to align regulations with OPM's statutory authority – i.e., OPM cannot extend subchapter II to cover positions Congress or the President excluded from the competitive service. The revised regulation instead reflects the reality that employees Presidentially converted from the competitive service to the excepted service, in positions the President has determined are policy-influencing, are statutorily excluded from subchapter II.

Additionally, even if Title 5 did not compel this result—and OPM believes it does—OPM would use its discretion to exclude incumbents in positions converted to Schedule Policy/Career from coverage under subchapter II. Doing so supports the policies of the President and the administration, for the reasons discussed throughout the proposed rule and this rulemaking.

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[272] *Id.* at 32757.

Lastly, Commenter 31616 asserts the revised § 212.401 violates *Loudermill*. As discussed in greater detail below, *Loudermill* does not apply as there is no statutory basis for conveying property rights for employees appointed to Schedule Policy/Career positions.

Part 302—Employment in the Excepted Service, Subpart F

Implemented as part of the April 2024 final rule, Subpart F to part 302 prescribed procedures for moving positions into or between excepted service schedules. In this final rule, OPM removes subpart F in its entirety because E.O. 14171 has rendered subpart F unenforceable and without effect.

OPM issued subpart F using delegated Presidential authority. In E.O. 14171, the President used this authority to render subpart F unenforceable and without effect. This Presidential directive is self-executing, taking precedence over OPM's subpart F regulations. While OPM can modify the civil service regulations using delegated Presidential authority, the President can directly use his constitutionally and statutorily vested authority to override those regulations. OPM and MSPB are now lawfully prohibited from giving effect to subpart F. Consistent with this self-executing Presidential directive, E.O. 14171 terminated MSPB appeal rights under subpart F. Both OPM and MSPB's regulations providing for appeals under subpart F are now obsolete. OPM therefore removes these regulations to avoid confusing Federal employees about applicable legal requirements. OPM has determined that it would not be beneficial to retain obsolete and unenforceable regulations. OPM notes that MSPB will need to make conforming amendments to its regulations at 5 CFR 1201.3(a)(12).

Commenter 30426 argues that "[a]lthough the president might arguably have had authority to issue a regulation of his own, he cannot circumvent the APA merely by purporting to suspend enforcement of a regulation that OPM issued through notice-and-comment rulemaking." OPM does not have direct statutory authority to regulate employment in the excepted service. OPM's part 302 regulations were issued using delegated Presidential authority under 5 U.S.C. 3301 and 3302, as OPM acknowledged both in the April 2024 final rule and the proposed rule.

The President can directly undo agency actions taken using delegated Presidential authority. There is no requirement that the President act through OPM when regulating the excepted service. The President can and often chooses to do so, but nothing in the law requires him to do so. If the President wishes to directly order agencies to give "no force or effect" to regulations issued under his authority he may do so. When he issues such an order, that directive supersedes the prior regulations. OPM is accordingly prohibited from giving effect to the prior subpart F regulations.

Commenter 0656 argues that E.O. 14171 violates the doctrine of separation of powers by terminating MSPB appeal rights under subpart F without having undergone the processes defined in the Administrative Procedure Act. OPM rejects this conclusion. It is well established, that when the President acts directly he is not bound to follow APA procedures.[273] Regulations under part 302 were only enacted using delegated Presidential authority under sections 3301 and 3302 of 5 U.S.C. OPM acknowledged this when enacting the April 2024 final rule. The President may undo actions that OPM has previously enacted under his delegations. Regardless, OPM is following APA notice and comment procedures when following the President's directive to remove now legally obsolete language from the CFR.

Commenter 30426 also argues that E.O. 14171 left OPM discretion as to the action it should take. Commenter 30426 misreads the operative language in the E.O. By its very terms—"[u]ntil such rescissions are effectuated"—E.O. 14171 asserts that no rescission has occurred. The order expressly leaves it to OPM to rescind regulations. But the order qualifies that directive to rescind regulations by providing OPM the discretion to do so only to the extent that OPM determines, in its discretion, that its existing regulations "impede the purposes of or would otherwise affect the implementation of Executive Order 13957." This qualification of the president's directive to OPM grants OPM discretion to determine which parts of its regulations

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[273] *Franklin v. Mass.*, 505 U.S. 788, 800-01 (1992).

pose an impediment and to determine how best to address that perceived impediment.

OPM does not have discretion to retain subpart F. Subpart F was part of a rulemaking whose express purpose was, and was openly acknowledged as, frustrating a future administration's ability to reinstate E.O. 13957 without affected employees retaining adverse action appeal rights. Subpart F imposes procedural hurdles to moving positions into Schedule Policy/Career and requires agency attestations that employees so moved would retain adverse action appeals. It plainly impedes the purposes and would affect the implementation of E.O. 13957. Accordingly, OPM has been directed to rescind subpart F, which was issued under delegated Presidential authority. Until such rescission is completed neither OPM nor any other agency can give subpart F force and effect.

The White House has confirmed this interpretation. The text of E.O. 14171 includes the provision – "impede the purposes of or would otherwise affect the implementation of [E.O.] 13957" – that allows OPM to retain language the 2024 Final rule made to subpart B of part 752 to conform to Federal Circuit decisions in *Van Wersch v. Department of Health & Human Services*[274] and *McCormick v. Department of the Air Force*.[275] It does not authorize OPM to retain provisions like subpart F designed to frustrate the purposes of E.O. 13957.

Even if OPM had discretion to keep subpart F in effect, OPM has determined several factors justify its rescission. First, subpart F was expressly adopted as part of the prior administration's policy of preventing the reinstatement of E.O. 13957. Commenter 30426 argues that the mere change in administration is not a sufficient justification for changing course. This is misguided. Elections have consequences, and Federal policy has changed with the election of a new President. OPM is removing subpart F to prevent the prior administration from impeding the current administration's priorities. The President is head of the executive branch and is constitutionally and statutorily vested with primary authority over the Federal workforce. OPM

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[274] 197 F.3d 1144, 1151 (Fed. Cir. 1999).
[275] 307 F.3d 1339, 1341-42 (Fed. Cir. 2002).

exists to support the President in performing those duties. A change in Presidential policy directives fully justifies OPM changing course.

Second, 5 U.S.C. 3302 gives the President primary responsibility for placing positions in the excepted or competitive services. OPM only excepts positions using delegated Presidential authority. E.O. 14171 set up a process for the President to place positions in Schedule Policy/Career based upon recommendations from OPM and agency heads. Even if that order had not directly overridden subpart F, it would be inconsistent with this hierarchy of authority for OPM to use delegated Presidential authority to purport to limit the President's direct exercise of section 3302 authority. Commenter 30426 also argues that this inconsistency does not actually provide a rationale for rescinding subpart F, as nothing in subpart F "impede[s] Presidential authority." Commenter argues that subpart F and the executive orders can co-exist. This is misguided. Subpart F establishes procedural requirements for Presidential movements of positions into excepted service schedules, such as obtaining certification from the Chief Human Capital Officer (CHCO) that the movement of positions is consistent with merit system principles, submitting the CHCO certification to OPM for review, and initiating any hiring actions under the excepted service authority after OPM publishes any such authorizations in the *Federal Register*. 5 CFR 602.602(b). The President can directly effectuate transfers into the excepted service. OPM regulates here with delegated Presidential authority. It is not OPM's place to limit or restrict how such direct Presidential transfers are effectuated.

Third, OPM regulations cannot create an entitlement to adverse action procedures that are denied by statute. Subpart F requires agencies to notify employees who are moved or otherwise involuntarily transferred into Schedule F (now Schedule Policy/Career) that they remain covered by chapter 43 and 75 procedures and appeals. Subpart F also authorizes MSPB to order agencies to continue to apply such procedures, and to order agencies to correct any deficient notifications. However, as discussed above, employees that the President reclassifies or transfers into a policy-influencing excepted service position do not fall within the scope of

chapter 75 as a matter of law. Section 7511(b)(2)(A) of Title 5, U.S. Code, precludes chapter 75 coverage and subsequent MSPB appeals for employees in Schedule Policy/Career, regardless of how they were notified of their reclassification. OPM cannot extend MSPB jurisdiction to appeals that are prohibited by statute. Nor can MSPB require agencies to apply chapter 75 procedures to employees who are statutorily excluded from that chapter's coverage.

Commenter 30426 also contends that subpart F does not transfer decisional authority from the President to subordinate officers, since § 302.602(b)(3) requires only that CHCOs certify that "movement is consistent with the standards set forth by the directive, as applicable, and with merit systems principles." Commenter argues that OPM provides no support for its contention that some CHCOs may be unwilling to issue certifications necessary to transfer positions into Schedule Policy/Career upon direction from the President. However, under the current regulations, a Presidential transfer into Schedule Policy/Career cannot go into effect unless the CHCO certifies that it complies with Merit System Principles. Many CHCOs are career employees who can only be dismissed for cause. It is not clear that refusing to sign a certification the CHCO did not believe was accurate would constitute cause. The point has not been tested—and will not be because the rules are currently without effect—but it is reasonable to be concerned that some CHCOs would decline to make the relevant certifications.

Section 302.603 similarly authorizes MSPB appeals over movements or transfers into Schedule Policy/Career. Subpart F noted "that an individual may choose to assert in any appeal to the MSPB that the agency committed procedural error, if applicable, by failing to act in accordance with the procedural requirements of § 302.602 while effecting any placement from the competitive service into the excepted service or from the excepted service to a different schedule of the excepted service." These procedures would allow MSPB to overturn a Presidential decision to place positions into Schedule Policy/Career. Commenter 30426 denies that this amounts to a transfer of decisional authority from the President to subordinate officers at MSPB, arguing the litigation would only concern whether employees retain their accrued status

and adverse action procedures—not which positions go in Schedule Policy/Career. However, allowing MSPB litigation over whether Schedule Policy/Career employees retain adverse action appeals would give MSPB decisional authority over which positions can be functionally classified as Schedule Policy/Career. An employee can be technically in a Schedule Policy/Career position, but if the employee retains adverse action appeals, the benefits are neutralized. The regulations thus give MSPB control over where Schedule Policy/Career takes effect, possibly in contradiction of a Presidential directive.

In the April 2024 rule, subpart F was added as part of the prior administration's effort to stymie the reintroduction of anything like Schedule F without the retention of adverse action appeal procedures. OPM now believes that, with the change in administration and administration policy, control over the Federal workforce should remain with the official constitutionally and statutorily vested with that authority—the President. OPM does not believe its regulations should give subordinate agency officials the functional ability to countermand a Presidential directive to place positions in Schedule Policy/Career. Even if the President had not directly rendered subpart F inoperative, OPM would propose these changes to restore authority to the official constitutionally vested with it and democratically accountable to the American people. The purpose of Schedule Policy/Career is to remove adverse action appeals and facilitate greater accountability to the President.

Commenter 30426 argues that OPM has provided no support for its contention that these procedural steps and MSPB appeals would produce protracted litigation or confusion, and that OPM has not adequately weighed the benefits of such procedural steps and appeals for impacted employees against the benefits of "certainty and dispatch." As explained above, the appeal process afforded most Federal employees is protracted and can take years for full resolution. Further, the "benefits" that commenter discusses are delaying the effective implementation of Schedule Policy/Career. OPM considers this a cost, not a benefit.

Commenter 34928 argues the removal of subpart F could lead to the politicization of

Federal employment and result in a high turnover rate. As explained above and in the proposed rule, E.O. 14171 and this final rule flatly reject the notion that Schedule Policy/Career will politicize the Federal service or lead to high turnover. Regarding the issue of turnover, OPM notes that the positions placed in Schedule Policy/Career will likely be among the more senior positions available throughout the Federal Government. Civil servants called to serve in these positions will be able to work closely with the most senior members of a presidential administration and make decisions or influence policy affecting the United States and abroad. OPM believes this call to service will invigorate a workforce dedicated to protecting and promoting the well-being of the American people. If the cost is rooting out those employees bound to impede this objective, then the final rule had its intended effect – removing undemocratic resistance and restoring faith in the civil service.

Authority citations

OPM is revising the authority citations for parts 210, 212, 213, 302, and 752 to comply with 1 CFR part 21, subpart B. This rule also updates the citations by adding current authorities and removing obsolete citations.

E. Retaining Career Hiring Procedures

E.O. 13957, as amended, directs OPM to provide for the application of Civil Service Rule 6.3(a) to Schedule Policy/Career positions.[276] Consistent with Rule 6.3(a), this final rule modifies 5 CFR part 302, subpart A (Employment in the Excepted Service) to clarify that appointments to Schedule Policy/Career positions will be made using the hiring procedures that would have otherwise been used had the position not been moved into Policy/Career. Positions moved into Schedule Policy/Career from the competitive service will continue to be filled using merit-based competitive hiring procedures, and positions moved from the excepted service will continue to be filled using excepted service procedures. Under this provision, a position's movement into

[276] E.O. 13957, 85 FR at 67633; E.O. 14171, 90 FR at 8625.

Schedule Policy/Career will not affect how it is filled.

§ 302.101 Positions covered by regulations.

Part 302 prescribes procedures governing excepted service hiring, and 5 CFR 302.101(c) lists exemptions from these procedures. These exemptions include certain positions included in Schedule A for which OPM agrees with the agency that the positions should be excluded.[277] OPM notes that it cannot legally extend competitive hiring procedures to some excepted service positions in Schedule A. For example, all Federal attorney positions are listed in Schedule A because a longstanding appropriations rider prohibits spending money to competitively examine lawyers.[278] That rider will continue to prohibit competitive examinations for any attorney positions moved into Schedule Policy/Career.

§ 302.102 Method of filling positions and status of incumbent.

In the proposed rule, OPM added a paragraph (d) to 5 CFR 302.102 that will provide that a position's movement into Schedule Policy/Career will not affect how it is filled. More specifically, the regulations will provide that agencies shall make appointments to positions in Schedule Policy/Career in the same manner as positions in the competitive service, unless such positions would, but for their placement in Schedule Policy/Career, be listed in another excepted service schedule. In this final rule, OPM incorporated these changes into 5 CFR 213.3601 to better streamline the regulations specific to Schedule Policy/Career. Therefore, the final rule will not include a paragraph (d) in 302.102.

Under these regulations, Schedule Policy/Career positions will by default be filled using the procedures applicable to the competitive service. Excepted service procedures will only be used if the position would have otherwise been placed in the excepted service. So, for example, agencies can still use excepted service procedures to hire applicants with severe disabilities into

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[277] 5 CFR 302.101(c)(6).
[278] Admin. Conf. of the U.S., Recruiting and Hiring Agency Attorneys, at 3, (Dec. 12, 2019), https://www.acus.gov/sites/default/files/documents/Proposed%20Recommendation%20for%20Plenary%20CLEAN%20.pdf (citing *Memorandum Op. for the Assoc. Attorney General*, 2 Op. O.L.C. 179 (1978)).

Policy/Career positions. Such positions would otherwise be placed in Schedule A, so agencies may continue to use excepted service procedures. But agencies will continue to apply merit-based competitive hiring procedures to positions moved into Schedule Policy/Career from the competitive service.

Commenter 30426 argues that as a practical matter, nothing in OPM's proposed regulations would restrain the administration from hiring Schedule Policy/Career appointees based on their political affiliation. Merit-based competitive hiring procedures generally forbid consideration of political affiliation. So does E.O. 13957, as amended. If the administration wanted to hire based on political affiliation the President could have turned these into political appointments and expressly authorized filling these positions based on political affiliation. He instead did the opposite, directing his subordinates to hire the candidates best equipped to help him carry out the law and execute his agenda, regardless of their political affiliation.

Commenter 30426 also argues that OPM does not explain how it will track the determination as to which procedures apply after an initial incumbent leaves a Schedule Policy/Career position or in the event of a subsequent reorganization in an agency, and that OPM does not explain how it will determine whether a newly created position would have been in the excepted service but for its inclusion in Schedule Policy/Career. Such determinations will be based on the nature of the position and whether other similar positions are in the excepted service. For example, all attorney positions will be treated as positions that would otherwise be in the excepted service because they would otherwise go in Schedule A. OPM will handle these through post-implementation guidance; these procedures do not need to be written into regulation.

Commenter 30426 also argues that if these positions are not too sensitive for ordinary recruitment procedures, they are not too sensitive for ordinary retention procedures. This is a non-sequitur. Different considerations motivate hiring procedures and removal restrictions. Removal restrictions facilitate accountability for the use of government power, while merit-

based hiring procedures help the government hire the best applicants.

V. Addressing Further Objections

As explained in Section II, OPM received more than 40,500 comments regarding this rulemaking whereby commenters provided a breadth of useful insights into various aspects of these regulatory amendments. The comments below relate to general concepts regarding the civil service, civil service protections, and merit principles that inform this rulemaking, and how Schedule Policy/Career will improve the civil service.

A. Schedule Policy/Career Rejects Patronage

Many commenters argue that Schedule Policy/Career embraces a return to the patronage system where agencies will fire en masse career employees in favor of political loyalists. As explained below, the President and OPM reject these fears as pure speculation.

i. Agencies will not Engage in Mass or Political Firings

Several commenters predict "mass" or political dismissals of career staff under Schedule Policy/Career. Commenters 14213, 16152, 23876, 26587, 26893, 30166, 30426, and others, argued that Schedule/Policy Career personnel will be effectively made political appointees. Commenters argued that this rule is an attempt to "abolish the professional civil service and convert it to a patronage system," in reference to resurrecting the patronage or spoils system of the past, whereby the President would replace qualified career employees en masse with unqualified political loyalists. They further argue that replacement of career employees with political loyalists would reduce or eliminate expertise within the Federal bureaucracy and degrade agencies' capacity to deliver on their missions and effective government operations. They also argued that would hurt agency recruitment and retention, as experienced professionals would be less likely to seek or remain in jobs where political affiliation was perceived to be a condition of employment. Some commenters argues that the rule ignores Merit System Principles codified at 5 U.S.C. 2301(b). Commenter 30426 speculates that the President will fire Schedule Policy/Career employees regardless of performance or conduct as he supposedly did to

probationary employees. After considering these comments, OPM concludes that these fears are misplaced.

There is nothing in the final rule that suggests, and in fact the rule flatly rejects the notion, that positions in Schedule Policy/Career are "political appointments." Under E.O. 14171, President Trump established a policy of restoring accountability to the executive branch, where Federal employees who occupy policy-influencing positions have in some cases previously demonstrated resistance to directives of their executive leadership, in other cases engaged in serious misconduct or corrupt behavior, and in other cases underperformed. In the proposed rule, OPM estimated that approximately 50,000 employees, or approximately 2 percent of the Federal workforce, could be impacted by the rule. This small percentage of positions contrasts with the early days of the Pendleton Act which reduced the patronage labor force in the Federal Government to 50 percent in 1904.[279] If the President truly wanted to return the Federal workforce to a patronage system, he could simply move the Federal workforce to positions in Schedules C or G en masse, with no need for Schedule Policy/Career. The President did not do so because that is not his policy objective. Executive Order 13957, as amended, rejects the spoils system, which is now a part of distant past and essentially beyond living memory.

Additionally, dismissing career employees holding positions under Schedule Policy/Career who perform their duties with efficiency and integrity, of whom there are many, would render vacant key positions necessary to implement the President's agenda and deprive the President of the assistance of these key employees. The President and members of his administration rely crucially on such experienced and effective career employees to implement his agenda. E.O. 13957 recognizes this expressly in noting that "[t]he Federal Government benefits from career professionals in positions that are not normally subject to change as a result of a Presidential transition but who discharge significant duties and exercise significant

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[279] Johnson & Libecap at 12.

discretion in formulating and implementing executive branch policy and programs under the laws of the United States." Both E.O.s 13957 and 14171 recognize the value of a career civil service whose members are selected and retained based on merit, not political affiliation. They simply seek to ensure heightened accountability for employees in key policy-influencing roles.

To provide this accountability, and in light of longstanding, well-documented concerns about the accountability of career employees holding these crucial roles, both the President and OPM believe that additional leeway is needed to allow agencies to swiftly remove employees holding policy-influencing positions—even at the cost of removing some procedural protections against removal that these employees would otherwise enjoy. Congress expressly allowed the President and OPM to make this choice by allowing the President and OPM to except policy-influencing employees from the adverse action procedures in chapter 75 and similarly exempting these employees from the provisions of 5 U.S.C. 2302.

Further, it would be inappropriate for an agency to use the authority under this final rule as a tool to broadly reconstruct its workforce or as a reduction in force (RIF) avoidance tool. Congress explicitly provided agencies with RIF authority in Title 5, Chapter 35. OPM's RIF regulations and procedures will continue to apply to, and protect, Schedule Policy/Career employees, requiring that RIFs affecting these employees be carried out fairly and providing for appeal rights.[280] OPM additionally has broad powers under those rules to review an agency's RIF plans "at any stage" and take corrective action regarding reduction-in-force actions that violate the "spirit and intent" of its RIF regulations or violate "employee rights or equities."[281] This final rule is intended to provide agencies with authority to address individual instances of unacceptable performance or misconduct by individual Schedule Policy/Career employees whose duties and responsibilities are policy-influencing. When an agency intends to release or terminate an employee, or many employees, under conditions that may be described in 5 CFR

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[280] *See* 5 CFR 351.202.
[281] 5 CFR 351.205.

part 351, the agency should follow those procedures, or similar procedures under similar authorities.

Additionally, this rule does not dilute or negate merit as a basis for appointment into the civil service. Schedule Policy/Career will continue to use merit-based, competitive hiring procedures when appointing personnel in positions subject to this rule. Unlike the patronage system that operated based on political affiliation, this rule does not authorize agencies to consider political affiliation during any part in the appointment process for these positions, nor could they, as merit-based assessments of candidates without regard to political considerations will be the only basis for ratings, rankings, and appointment. OPM added a new section 5 CFR 213.3501 to subpart C of 5 CFR, covering appointments to Schedule Policy/Career within the excepted service. Schedule Policy/Career covers "career positions of a confidential, policy-determining, policy-making, or policy-advocating character that are not in the Senior Executive Service." Since 5 CFR 213.101 specifically defines "career position" to exclude noncareer appointments, it is abundantly clear that political appointees cannot be placed in positions under Schedule Policy/Career. This language, as well as the schedule's name, clearly articulates that this rule is not to be used for patronage purposes and applies only to career employees hired on the basis of merit. E.O. 13957 also definitionally prohibits the White House office that selects political appointees from having any role in filling Schedule Policy/Career positions.

Moreover, a return to the spoils system would frustrate the purpose of the rule and of E.O. 14171. Improving the accountability of policy-influencing employees within the executive branch facilitates effective Presidential management of, and reduces insubordination, poor performance, and corruption in the Federal civil service. That purpose is not served by, and in fact would be undermined by, a return to patronage practices that undermine agency capacity. As established by E.O. 14171 and incorporated into the rule, employees appointed to positions in Schedule Policy/Career are not required to take a pledge of personal loyalty to the President or his policies. Rather, employees are required to diligently implement and advance, to the best of

their ability, the policies of the President and his administration. This is the opposite of the patronage system, which subjected employees to dismissal upon a Presidential transition based on political affiliation alone, irrespective of their performance. Section 6 of Executive Order 13957, as amended, further requires agencies to establish and enforce internal policies prohibiting hiring or firing based on political affiliation (or any other grounds for a PPP such as whistleblower reprisal).

OPM notes that the President has strong motivation to enforce the prohibition of loyalty pledges or terminations based upon political affiliation. As OPM and commenters previously noted, hiring less qualified personnel reduces Federal administrative capacity and efficiency. Replacing experienced career employees who are faithfully implementing Presidential directives with inexperienced political appointees would make it significantly more difficult for him to carry out his agenda. If some officials nonetheless treat Schedule Policy/Career positions as noncareer positions, OPM can help the President address that problem, if and when it arises. OPM will be heavily involved in the implementation of Schedule Policy/Career. If necessary, OPM can recommend additional measures to prevent abuse. But currently hypothetical concerns that agency personnel will ignore a Presidential directive are not grounds for failing to implement an executive order.

ii. Experiences of State Governments Reforming their Civil Service Refute Fears of Politicization and Mass Firings

Commenters 17824, 19350, 19352, 26673, 32359, and many others, noted that Schedule Policy/Career follows the practices of a number of state government that have converted much of their career workforce into "at-will" employees. These commenters point out that evidence shows these reforms have been beneficial and concerns about a return to the spoils system have not materialized. For example, surveys of state personnel directors show generally positive evaluations of at-will employment in state government without reports of states returning to patronage practices.

OPM appreciates these comments. As the commenters noted, the literature indicates that

more than 20 states have converted all or a part of their workforce into "at will" employees.[282] The results experienced so far have been largely successful. States such as Arizona, Florida, Georgia, Indiana, Mississippi, Missouri, Texas, and Utah have instituted Schedule Policy/Career type reforms and concluded that their evaluations of results have been generally quite positive. There has been no indication of any return to a patronage type of appointment system in these states. Upon consideration of these comments OPM concludes the experiences of states with at-will workforces provides another reason to reject concerns this rule will lead to a return to the spoils system, reduce administrative capacity, hurt recruitment and retention, or otherwise impair government operations. Many states have adopted similar reforms at the state level. Not only have these concerns not materialized, these states have seen beneficial effects. OPM concludes these states' experiences demonstrate that at-will employment is fully compatible with an effective and highly functioning career government workforce. OPM believes that bringing at-will employment to a small portion of the Federal workforce will be similarly beneficial.

Moreover, states that have adopted so-called "at will" employment practices for their public employees have noted improved employee responsiveness to agency initiatives and service delivery. For example, in Mississippi, a state that partially adopted "at will" employment, human resources directors reported that at-will employment improved employee responsiveness to the goals and priorities of agency administrators (60% agree/17% disagree), provided motivation for employee performance (56% agree/20% disagree), improved agency efficiency (53% agree/27% disagree), ensured managerial flexibility (54% agree/19% disagree), and represented an essential piece of modern government management (58% agree/15% disagree).[283]

Regarding removals, human resources directors also overwhelmingly agreed that at-will

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[282] *See* Judge Glock and Renu Mukherjee, *Radical Civil Service Reform is Not Radical: Lessons for the Federal Government from the States*, Manhattan Inst. (Mar. 4, 2025), https://manhattan.institute/article/radical-civil-service-reform-is-not-radical-lessons-for-the-federal-government-from-the-states, at 1, 21 n.2

[283] James Sherk and Jacob Sagert, *At-Will Employment in the Career Service Would Improve Mississippi State Government*, Am. First Pol'y Inst. (Nov. 3, 2022), https://www.americafirstpolicy.com/issues/20221101-at-will-employment-in-the-career-service-would-improve-mississippi-state-government.

terminations were for good cause (86% agree/5% disagree), and a large majority indicated that at-will employees were terminated due to poor performance (82% agree/5% disagree).[284] Terminations were not arbitrary.

OPM also finds it notable that commenters did not produce evidence from the specific experiences of state governments that shifted to at-will employment for their state workforces that they returned to a system of patronage, or that they experienced reduced administrative capacity, or similar harmful effects. For example, Commenter 26673 cited to a journal article highlighting the changes in Georgia and Florida but relied upon generic criticisms of removing civil service protections. Commenter 26673, like many others, failed to point to empirical evidence of harms specific states experienced with a move to at-will employment. Given the strong opposition this rule has engendered in some quarters, OPM takes opponents' silence on this point as suggestive there is little evidence at-will state employment has produced negative effects or produced a return to patronage practices. The available evidence instead affirmatively indicates it has not had this effect. This again suggests the same policy would not produce such effects at the Federal level.

In OPM's analysis of comments related to state personnel reforms as part of the 2024 rulemaking, OPM chose to give greater credibility than OPM now believes was warranted to a comment that asserted that a survey of one state's civil service reforms had engendered dissatisfaction among some employees rather than the considered assessments of human resource directors in the states that have implemented reforms. It is not surprising that individual employees will see such reforms differently than state personnel directors. Individual employees are focused on their own benefits and do not see the enterprise-wide effect of policy reforms. In contrast, state personnel directors, who have responsibility for service delivery across a broad array of governmental functions, take a more enterprise-wide view of the benefits of managing a

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[284] *Id*.

nimbler and more responsive workforce. Upon reconsideration, and reviewing comments 17824, 19350, 19352, OPM believes it was too quick to seize upon this one survey in the prior rulemaking. OPM now recognizes that it severely discounted the conclusions of state human resources directors who support the flexibility and modern management practices reflected in this rule. OPM erred in giving greater weight to the alleged viewpoints of employees who were made "at-will" rather than the more strategic assessments of state authorities responsible for managing their respective workforces.

iii. OPM will Monitor Compliance

Commenters 0210 and 30426 argue that E.O. 13957's provisions that require agencies to administratively protect Schedule Policy/Career employees from the same PPPs covered by 5 U.S.C. 2302 provide no enforcement mechanism to protect employees from whistleblowing. They argue that forcing employees to bring concerns about violations of merit systems principles by Trump appointees to Trump appointees in the same agency, in the absence of enforceable whistleblower protections and other safeguards, would leave them entirely dependent on the administration's good will toward career employees.

Commenters do not consider that the President relies on Schedule Policy/Career employees to provide guidance on highly sensitive matters, implement Presidential policies and prerogatives, and otherwise carry out executive functions on behalf of the President. The President has determined that creation of Schedule Policy/Career will ensure a high level of accountability to effectively supervise the executive branch. As OPM noted in the proposed rule and discussed extensively above, the President has strong incentives to keep and protect talented, experienced Federal employees in policy-influencing positions as long as these employees do not inhibit Presidential policy administration. The President has ample constitutional tools to address political appointees who ignore written directives and in so doing undermine their agencies' abilities to carry out the President's policies. Further, OPM will monitor agencies' compliance with E.O. 13957, as amended, and these regulations, and take

appropriate action if necessary. OPM will detail in supplementary guidance to agencies when implementing this final rule on how it plans to oversee compliance.

B. Bureaucratic Autonomy Undermines Democracy

As explained throughout this final rule, one of the core problems this rule addresses is resistance from career bureaucrats to the implementation of the President's agenda. The proposed rule cited to several sources documenting resistance the President Trump's first term. Commenters 29987, 30426, 35543, 35478 and others argue that the proposed rule's reliance on the America First Policy Institute's Tales from the Swamp report referenced in the proposed rule undermines the basis for this rulemaking. They argue that the reports of resistance and obstruction are meritless and debunked, and its analysis is unreliable. These commenters argue that a small number of anecdotes within a few agencies, and dating as far back as the Reagan administration, do not provide sufficient evidentiary support to assert that the Federal Government suffers from a widespread problem of Federal employees resisting Presidential policy changes.

OPM explained in the proposed rule that it was not persuaded by these criticisms of the report, as much of the "debunking" addressed ancillary and unrelated issues to those raised in the report.[285] For example, commenters 30426 and 35543 criticized the report in highlighting an instance at the General Services Administration (GSA) in which career staff leaked a copy of a draft executive order concerning promotion of classical architecture during the first Trump administration. The so-called debunking of this report centered on several unrelated arguments. First, Commenter 30426 argued the executive order was bad policy and therefore appropriately controversial, necessitating leaking to the public. While the GSA career staff was free to disagree with the policy, disagreement over policy is not an appropriate excuse for career employees to subvert or otherwise undermine the agenda of a democratically elected President. Second,

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[285] OPM also notes that commenters appear to be referencing an earlier version of this report. Some of commenter's criticisms are not relevant to the January 8, 2025, version of the report that OPM discussed in the proposed rule.

commenters contended that there is a lack of direct evidence that a career employee leaked the draft executive order. However, commenters fail to offer any evidence rebutting the report that the career employee leaked the draft executive order from his personal email account. OPM has also discussed this report with an official from the first Trump Administration who was familiar with the situation. That official verified the accuracy of the America First Policy Institute's reporting of the incident.

The same America First Policy Institute report included other examples of Federal career employees who resisted changes instituted by the first Trump Administration. For example, the report documented how career staff in the Department of Justice Civil Rights Division opposed, and stonewalled, an investigation into Governor Andrew Cuomo's requirement that New York nursing homes admit patients infected with COVID-19, and, later, covered up the resulting surge of deaths occurring in nursing homes in the state. Commenters criticizing the America First Policy Institute report claimed career staff appropriately questioned the investigation requests, asserting that the investigation itself was conducted for partisan political reasons, and that it was improper and a violation of Department policies to publicize the existence of the investigation in an election year.

Again, the America First Policy Institute rebuts these criticisms, to which commenters fail to provide adequate rebutting argument. The report explains that the Department of Justice investigated states that had a policy of requiring nursing homes to admit residents infected with COVID-19. These states were primarily, but not exclusively, run by Democrat governors. In fact, the Department of Justice also investigated Massachusetts, which implemented a similar policy under the direction of a Republican governor. That the Justice Department made a policy decision to investigate these states, many of which so happened to have Democrat governors, does not mean the investigations were political. Rather, the Department of Justice was focused on the consequences of policies that put the elderly at risk, and its investigation covered states run by both parties. The report also noted that the Department of Justice followed standard

protocol in announcing the investigation.

The report further argued that career employees in the Civil Rights Division's Educational Opportunity Section (EOS) would not assist with litigation challenging Yale University's use of racial preferences. As OPM explained in the proposed rule, it is a publicly verifiable fact that no EOS career attorneys participated in the Yale litigation, despite this being the section of the Civil Rights Division with responsibility for litigating against racial discrimination in educational institutions. OPM takes this evidence as supporting the accuracy of the report that, at least in this case, career EOS attorneys would not help advance litigation they personally opposed. Commenters do not offer a persuasive alternative explanation for why, if career EOS attorneys performed their duties in an impartial manner, none of them participated in this case.

The America First Policy Institute report also highlighted other instances of Federal employees attempting to resist and undermine the policy directives of President Trump in his first administration. The report documented that career staff at the Department of Education intentionally delayed priority rulemakings and produced drafts that did not reflect the policy directives they were given. As a result, administration priority rules such as Title IX regulations had to be drafted primarily by political appointees, an example confirmed by the Department in its comment (2025-0004-29882) on the proposed rule. Consequently, OPM does not accept commenters' characterization of the America First Policy Institute report as discredited. Instead, OPM views many of the examples to be clear cases of career staff engaging in policy resistance and seeking to advance their personally preferred policies over and against those of the democratically-elected President. [286]

Commenters 30426 and 35543 also object to OPM's citation of the report as argument by

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[286] OPM reiterates that this rulemaking is not primarily motivated by the America First Policy Institute study, but OPM does believe this report provides informative case-studies documenting policy resistance that unfortunately does occur within the Federal Government.

anecdote. Commenters believe that these anecdotes are not enough to show policy resistance is a pervasive problem amongst the Federal workforce. Both Commenters, however, miss the point. These examples are case studies used to evaluate the systematic problem of Federal workers inappropriately resisting Presidential policy changes. As discussed above and below, considerable additional evidence of widespread policy resistance exists including an academic study of the EPA during the Reagan administration. This indicates Chapter 75 procedures are inadequate and insufficient to address the problem. Such misconduct is just that—misconduct, meaning it should be easily able to be addressed under current procedures, resulting in relatively minor, if any, presence. Yet, the demonstrated difficulty of using of Chapter 75 renders its procedures inadequate for the task Congress provided.

OPM has previously noted in the proposed rule, and reiterates here, academic analysis of agency performance and career voting registration data show that when career staff are ideologically opposed to agency leadership, there is a lower standard of agency performance, indicating Chapter 75 procedures are insufficient to address the problem.[287] This analysis is supported by multiple additional sources. An MSPB survey showed that only two-fifths of agency supervisors are confident they would be able to remove an employee who engaged in serious misconduct while a plurality thought they could not remove them.[288] The lack of belief in these procedures by the practitioners of those who would initiate their use is proof positive that they are insufficient. External commenters, such as Comment 32359, provided additional examples of policy resistance occurring under the current administration. Some Federal employees also commented on the rule and told OPM that policy-resistance "is a real thing" and they "have seen it happen."[289] Agencies, including the Department of Transportation, Department of Education, and HHS, among others, also independently reported in comments to

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[287] Jörg L. Spenkuch, Edoardo Teso & Guo Xu, *Ideology and Performance in Public Organizations*, 91 Econometrica 1171, 1198-1200 (July 2023), https://doi.org/10.3982/ecta20355.
[288] *See* Remedying Unacceptable Employee Performance, at 6.
[289] *See, e.g.,* Comment 23567.

the proposed rule that chapter 75 procedures make it difficult for them to remove employees who engage in policy resistance (or misconduct more broadly). They provided comments of support for this rulemaking based on their belief that the revised regulations would give them the tools necessary to effectively manage their workforces. OPM credits these statements and the agencies' first-hand expertise and experience in the field regarding which they provide comment. In lay terms, if agencies believe Schedule Policy/Career would help improve the management of the Federal workforce, it is strong evidence that it will. The President—the constitutionally responsible official—supports this supposition. He concluded that Schedule Policy/Career is necessary for good administration. OPM credits the President's determination as the judgment of the individual singularly responsible for overseeing the effective operations of the executive branch. OPM would accept the President's determination even if it had not independently come to the same conclusion.

OPM also explained in the proposed rule that statistically representative polling in 2025 shows that a plurality of senior Federal employees in the Washington, D.C. area would "do what [they] thought was best," rather than follow lawful orders from President Trump that they thought were bad policy.[290] Commenters 4772, 8209, 16846, 32573, 35546, and many others, critiqued OPM's use of this poll. Some Commenters criticized the survey as politically biased in favor of Republicans. Others also criticized the quality of the polling data, survey questions, and conclusions drawn from the results of the poll. OPM respectfully disagrees with these criticisms. The poll provides information about the respondents, dates of the poll, sample size, method of the survey, polling firm, and weighting based on respondents' choices for President in the previous election. Moreover, the conclusion of the poll is supported by the polling data: 46% of Federal managers, as defined by the poll, would do what they thought best when given a lawful

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[290] *Federal Managers Are Evenly Divided As To Whether They Would Follow A Legal Order From President Trump*, Napolitan News Serv. (Jan. 21, 2025), https://napolitannews.org/posts/federal-managers-are-evenly-divided-as-to-whether-they-would-follow-a-legal-order-from-president-trump.

order by President Trump. Only 45% would follow the directive. OPM finds that a plurality of highly paid Federal employees in the Washington, D.C. metro area reporting they would defy a Presidential directive they believed was lawful but disagreed with on policy grounds highly disturbing and indicative of serious problems within the Federal workforce. And despite criticisms of the polling firm responsible for conducting the survey, Commenters present no evidence that any such political bias impacted the results.[291]

Commenter 32573 argued that better polling data exists, suggesting that a Washington Post-Ipsos poll conducted from February 28 to March 10, 2025, is a better indicator of Federal employee attitudes. Commenter specifically cites data that 95% of Federal employees feel pride in their work and that their agencies effectively use funds. OPM respectfully rejects the notion that this poll including these two data points refutes the poll cited in the proposed rule. An employee's intrinsic feeling of pride is not incompatible with political bias and resistance to the President's policy agenda. Nor is an employee's view on their agency's proper execution of taxpayer funds directly relevant to the question of policy resistance. What is more troubling about the Washington Post-Ipsos poll is that one-quarter of Federal employees believe agencies waste taxpayers' money.

Relatedly, Commenter 27647 criticized the proposed rule's characterization of comments submitted during the April 2024 rulemaking claiming that career Federal employees resisted the previous Trump Administration. Because OPM cited only two of these comments, according to the Commenter OPM either grossly exaggerated the extent of the comments or failed to properly document multiple comments. While the Commenter is correct that the proposed rule only cites two sources, the extent to which those sources document policy resistance by career employees

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[291] OPM notes that the firm responsible for this polling came within three percentage points of the actual margin of victory in the popular vote in the 2024 Presidential election, projecting Vice President Harris would win the popular vote by 1 percentage point instead of President Trump's 1.5 percentage point margin of victory. OPM takes this as evidence the polling firm produces reliable results and is not biased in favor of conservative positions. *See* Napolitan News Service, *Poll: Harris 50% Trump 49%* (Oct. 18, 2024), at https://napolitannews.org/posts/national-poll-harris-50-trump-49.

sufficiently lays the foundation for this final rule.

In short, OPM has drawn on many sources to conclude that policy resistance is a significant problem in the Federal workforce, and chapter 75 procedures have proven ineffective in addressing the problem. This creates deleterious effects and measures to address these challenges are not pretextual for creating ideological litmus tests, as Commenters suggest.

C. Schedule Policy/Career is Lawful

i. Administrative Procedure Act and PPPs

OPM received several comments that the proposed rule violated the Administrative Procedure Act (APA). Commenter 35379 argued that the comment period following the proposed rule, which extended to June 7, 2025, was unlawfully short, in violation of the APA. The Commenter based this argument on multiple sources—first, the APA's mandate that an "opportunity to participate" on proposed rules be provided following a notice of proposed rulemaking; second, E.O.s 12866 and 13563, which specify that comment periods should "generally" be at least 60 days; and, third, the Supreme Court's holding in *Perez v. Mortgage Bankers Association*, 575 U.S. 92 (2015), and related caselaw, which generally stipulate that the same procedures be used to amend a rule as were used to enact that rule.

Respectfully, OPM rejects the argument that the comment period was inadequate as a matter of law or policy. As multiple appellate courts have held, a 30-day comment period is generally the minimum needed to comply with the APA.[292] In *Chamber of Commerce of United States v. U.S. Securities and Exchange Commission*, the Fifth Circuit upheld an identical 45-day

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[292] *See Nat'l Ass'n of Indep. Television Producers and Distribs. v. Fed. Commc'ns Comm'n,* 502 F.2d 249, 254 (2d Cir. 1974) (noting that the APA provides a 30-day minimum notice period); *see also United States v. Gould,* 568 F.3d 459, 469 (4th Cir. 2009) (noting the APA provides for a minimum 30-day notice and comment period absent good cause shown); *Chamber of Com. of the U.S. v. U.S. Sec. & Exch. Comm'n*, 85 F.4th 760, 779 (5th Cir. 2023) ("... the APA generally requires only a minimum thirty-day comment period."); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992) ("Although the APA mandates no minimum comment period, some window of time, usually thirty days or more, is…allowed for interested parties to comment."); *Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n,* 921 F.3d 1102, 1117 (D.C. Cir. 2019) ("When substantial rule changes are proposed, a 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment.").

comment period against the charge that it was legally insufficient.[293] It simply is not the case that the APA requires longer than 45 days to comment.

The Commenter's reliance on E.O.s 12866 and 13563 is similarly misplaced. E.O. 14171, which prompted the current rulemaking, directs OPM to "promptly" amend its regulations to undo the April 9, 2024, rulemaking insofar as necessary to implement E.O. 13957. Implicit in President Trump's directive to act "promptly" is that the rulemaking process, including the comment period, not be needlessly long. In its proposed rule, OPM decided that a 30-day comment period would be adequate. However, at the request of Commenter 0687 and others, the comment period was extended for an additional fifteen days. [294]

E.O.s 12866 and 13563 only mandate that comment periods should "generally" be at least 60 days. The policy rationale for that mandate is that stakeholders should have adequate opportunity to meaningfully participate in the notice-and-comment process. Concerning the present rulemaking, OPM received over thirty-five thousand distinct comments, offering nuanced perspectives on virtually every aspect of the proposed rule. Factually, it cannot be said that the comment period was insufficient to allow for meaningful feedback on the proposed rule given the voluminous feedback that OPM did receive. [295]

Further, in the years since those executive orders were issued, comment periods have not infrequently been shorter, often 30 or 45 days. This is, in part, because agencies, working with the White House, have a great deal of discretion in shortening the comment period based on the facts of the situation. As courts have repeatedly held, "executive orders are not judicially

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[293] 85 F.4th at 779-80.

[294] OPM notes that the proposed rule was released for public inspection on April 18, 2025, but was not formally published in the Federal Register until April 23, 2025. So, the effective comment period from public inspection to the close of the comment period was 50 days, not 45 days.

[295] OPM additionally notes that the present rulemaking largely repeals policies implemented in the 2024 rulemaking and implements an executive order initially promulgated in 2020. The relevant policies and concepts are not new, as the volume of comments indicates. Consequently, OPM does not believe shortening the effective comment period by 10 days meaningfully impairs the public's ability to comment on the proposed rule.

enforceable."[296] That is, as a general matter, executive orders and other White House guidance on the regulatory process bind executive agencies only as a matter of the internal management of the executive branch. Thus, several Federal courts have specifically held that there is no legal requirement that agencies comply with the requirements specified in E.O.s 12866 and 13563.[297]

Additionally, Commenter 35379's citation to *Perez* is also misplaced. That case involved the revocation of a Department of Labor interpretive rule. Interpretive rules, unlike legislative rules, do not have the force of law. They merely advise interested parties of the agency's interpretation of the laws that the agency does administer, and they therefore are generally exempt from the APA's notice and comment requirement. The D.C. Circuit had previously held, under a line of its own cases, that in some circumstances the APA's notice and comment requirements must be complied with for interpretive rules; specifically, where those rules deviate sufficiently from the agency's previous interpretation. The Supreme Court stepped in to hold that APA notice and comment procedures need not be complied with to eliminate an interpretive rule, precisely because notice and comment procedures need not be followed to enact it. The Court held that the APA sets forth the full extent of judicial authority to review the procedures behind agency action, and no such requirement was found anywhere in the APA. It was thus in this context, to limit judicially imposed requirements on agencies not derived from the APA, that the Supreme Court stated that the same procedural requirements bind both enacting and repealing a rule. As just discussed, the requirement regarding duration of the comment period is generally 30 days. *Perez* did not say, and obviously did not intend to say, that the comment period for a procedure used to repeal a rule must be identical to the comment period used to enact it.

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[296] *Sierra Club v. U.S. Dep't of Energy*, 134 F.4th 568, 573 (D.C. Cir. 2025) (citing *Marin Audubon Soc'y v. Fed. Aviation Admin.*, 121 F.4th 902, 913 (D.C. Cir. 2024)); *see also Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1338-39 (4th Cir. 1995) (no private right of action to enforce executive order unless issued pursuant to a statutory mandate or delegation by Congress).

[297] *Nat'l Mining Ass'n v. United Steel Workers*, 985 F.3d 1309, 1326–27 (11th Cir. 2021) (holding that E.O. 12866 and E.O. 13563 specifically are not judicially enforceable); *Miller v. Garland*, 674 F.Supp.3d 296, 307 (E.D. Va. 2023), *appeal dismissed*, No. 23-1604, 2024 WL 4973474 (4th Cir. July 30, 2024) (holding that E.O. 12866 is not judicial enforceable).

Commenter 35379's citation to *FCC v. Prometheus Radio*,[298] is equally unavailing. In *Prometheus*, the comment period lasted only 28 days, below the 30-day minimum that, as we have seen, is recognized by multiple Federal appellate courts as the lower limit needed to comply with the APA.

Moreover, Federal appellate courts have already, at least implicitly, rejected this reading of *Perez*. In the Sixth Circuit's opinion in *Chamber of Commerce of the United States v. Securities and Exchange Commission*,[299] at issue was the repeal of a rule concerning business advice to institutional investors regarding proxy voting in shareholder meetings. The initial rule, passed under the first Trump Administration, was enacted under a 60-day comment period. Upon taking office, the Biden Administration moved quickly to repeal the rule, providing only a 30-day comment period and receiving less than a tenth of the number of comments as were received for the initial rule; it did this despite numerous complaints that the new comment period was inadequate. The court nonetheless rejected the argument that the comment period was too short.[300]

Accordingly, the 45-day comment period provided by OPM, which included a 15-day extension from the usual APA-required minimum at commenters' request, was not "truncated" but was instead well within the APA's procedural requirements and the period that should be considered reasonable in light of the President's executive order compelling agency action.

Another challenge to the proposed rule concerns guidance published by OPM to assist agencies in determining which positions should be placed in Schedule Policy/Career. Commenter 30426 argued that OPM violated the APA's notice and comment requirements when it issued the January 2025 Memorandum. Commenter argued this guidance effectively defined the scope of the policy-influencing terms as used in 5 U.S.C. 7511(b)(2), and such a definition required notice

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[298] *See* Comment 35379 at 3 (citing 652 F.3d 431, 453 (3d Cir. 2011).
[299] 115 F.4th 740 (6th Cir. 2024).
[300] *Id.* at 755-56.

and comment rulemaking.

This analysis is wrong on many levels. First, as previously discussed, OPM's guidance contained in the Memorandum does not establish a new definition of the policy-influencing terms. Respectfully, Commenter 30426 misconstrues the January 2025 Memorandum. It highlights positions that are more likely to be policy-influencing, but this likelihood is not determinative or definitional. The guideposts help agencies focus their analysis; reviewing every Federal position would be extremely burdensome and inefficient when most have no connection to policy. But Commenter 30426 is wrong that agencies must apply these criteria. The language of E.O. 14171 is precatory ("should give particular consideration"), not mandatory (must/shall include) and so is the guidance ("should consider"). The executive order and guidance in the Memorandum provide considerations to help focus agency analysis, not requirements or determinations. But, as the Memorandum noted, OPM may recommend that positions that fall within those guideposts be excluded from Schedule Policy/Career and that positions that fall outside those guideposts may be included. Similarly, agencies are not required to request that positions that meet these criteria go into Schedule Policy/Career. OPM will be making recommendations to the President based on case-by-case analysis of the underlying positions. OPM expects that it will recommend against transferring some positions that agencies have identified that meet the criteria set forth in the memo. The memo expressly does not provide a determinative construction of the policy-influencing terms or the scope of Schedule Policy/Career.[301] Its guideposts are not definitional, effectively or otherwise.

Second, OPM's January 2025 Memorandum does not constitute final agency action that triggers notice and comment requirements. It gives guidance to agencies about categories of

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[301] Office of Personnel Management Memorandum, "Guidance on Implementing President Trump's Executive Order titled, 'Restoring Accountability To Policy-Influencing Positions Within the Federal Workforce,'" Jan. 27, 2025, p. 4, *available at* https://www.opm.gov/policy-data-oversight/latest-memos/guidance-on-implementing-president-trump-s-executive-order-titled-restoring-accountability-to-policy-influencing-positions-within-the-federal-workforce.pdf ("The position attributes described in section 5(c) [of E.O. 14171] and this memorandum are guideposts; they are not determinative.").

positions they should consider including in recommendations to the President. The underlying action will be taken by the President, based on his own determinations. The January 2025 Memorandum by itself has no legal force. Nothing happens to anyone unless and until the President acts. The January 2025 Memorandum is guidance about how to formulate internal executive branch recommendations to the President. At most this is a general statement of policy, and such general statements are exempt from APA notice and comment requirements. *See* 5 U.S.C. 553(b)(A). If the final Presidential action is not subject to APA procedures, it makes no sense to construe the APA to apply to the process of formulating non-binding recommendations to the President concerning that action.

Lastly, suggesting that notice and comment procedures are required to formulate recommendations to the President, and failure to follow such notice and comment can be enforced by judicial review, would raise grave constitutional concerns. Under the Opinion Clause the President may require Department heads to give their opinions on subjects within their jurisdiction. President Trump did exactly that when he requested OPM and agencies' opinions on positions that should be placed in Schedule Policy/Career. Congress has no authority to regulate how Department heads provide such opinions, much less subject their recommendations to notice and comment followed by Article III judicial review. The President's ability to demand Department heads' unvarnished opinions is inherent Article II authority. Construing OPM providing—at the President's direction—guideposts for agencies to consider in the process of formulating recommendations to the President as final agency action subject to APA notice and comment procedures would raise serious constitutional concerns. Commenter 30426 cites no authority for the proposition that APA notice and comment procedures apply to agencies when making recommendations to the President about how he should exercise Presidentially-vested authority, and OPM is aware of none. Construing such non-final non-binding internal executive branch recommendations to the President as final agency action subject to APA procedures and judicial review would seriously tread on Presidential authority.

Under *Franklin v. Massachusetts* it would at least take an express congressional statement of intent to intrude on Presidential authority to construe the APA to do so.[302] No such express statement exists. So, respect for separation of powers indicates that courts will not construe OPM guideposts about how to focus analysis when making recommendations to the President as being subject to APA review.

Commenter 30426 also argues that the rule is unlawful because the January 2025 Memorandum supplies criteria that form part of the definition of the policy-influencing terms, and this rule is tied into that memo, but did not go through notice and comment. This is addressed above. The criteria set forth in the Memorandum are non-binding guideposts to help focus analysis on positions the President is more likely to consider policy-influencing. They are expressly not a definition and do not constrain Presidential discretion in either direction.

Nor do the criteria in the January 2025 Memorandum "effectively supplant" the prior definitions because they do not limit Presidential discretion in making section 7511(b)(2)(A) determinations. Those criteria do not bind or limit the President in any way; they are guideposts to consider when making recommendations that the President can reject or accept as he sees fits. OPM has not been given authority to cabin or limit how the President will make section 7511(b)(2) determinations. Notwithstanding commenters' protests, E.O. 14171 rendered the new 5 CFR 210.102(b)(3) and (b)(4) definitions unenforceable and without effect. Agencies are prohibited from giving effect to these definitions. OPM is simply proposing to bring its regulations into accordance with the governing legal rules.

Commenter 35379 expressed the position that OPM's implementation of Schedule Policy/Career departs from APA principles in reversing a position expressed in its April 2024 rulemaking *sub silentio*. As discussed below, the Supreme Court has held that when an agency announces a change in policy, a proper justification must at least acknowledge its change of

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[302] 505 U.S. at 800-01.

course and present an argument that the agency feels its new policy to be better than the discarded one. In essence, the commenter's argument is that OPM's April 2024 rulemaking expressed the position that a future *rulemaking* would be needed to reimplement Schedule F, with any factual or legal conclusions in a future rulemaking inconsistent with those of the April 2024 rulemaking requiring extensive justification to comply with APA requirements.[303] This supposedly contradicts OPM's current position that, even prior to this rulemaking, "several provisions of the 2024 final rule [are already] inoperative and without effect."[304] However, OPM certainly is not changing its position *sub silentio*, as both the proposed rule and the present rulemaking discuss the Biden-era executive order and OPM rulemaking and its present change of course at length. Further, the reason for OPM's current position is well-justified in its notice of proposed rulemaking.

With respect, the commenter misleadingly truncated its quotation to the April 2025 proposed rule. OPM stated that "*Executive Order 14171* rendered several provisions of the 2024 final rule inoperative and without effect."[305] The proposed rule simply recognized the fact that President Trump directly invoked Presidential authority to override changes to part 210 and 302 made through the April 2024 rulemaking which were themselves enacted pursuant to Presidential authority delegated to OPM.[306] As U.S. courts have long understood, the President is not an agency for purposes of the Administrative Procedure Act,[307] and President Trump did not need to undertake notice and comment procedures to directly invoke Presidential power through executive order. OPM's position is that it was his direct exercise of presidential authority which rendered inoperative the relevant provisions of the April 2024 final rule. In the alternative, OPM's position is that the present rulemaking is independently adequate to repeal and replace

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[303] *See* Comment 35379 (citing 89 FR at 24999).
[304] 90 FR at 17218
[305] *Id.* (emphasis added).
[306] 90 FR at 17187-88.
[307] *See*, *e.g., Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1359 (Fed. Cir. 2006) (acknowledging that review of direct presidential action is unavailable under the Administrative Procedure Act).

relevant provisions of the April 2024 rulemaking even if E.O. 14171 had not already done so.[308] This appears to have been a common misunderstanding of OPM's position in the proposed rule.

Commenter 35379 also disagrees with the proposition that "Executive Order 14171 has changed the underlying legal authorities under which OPM operates." The Commenter expressed the view that the April 2024 final rule must be valid and *in effect* until repealed by another OPM rulemaking. Another commenter, Commenter 30005, stated that the proposed rule proposes to use Trump's authority to "*make* inoperative the April 2024 final rule." Again, OPM's position is that E.O. 14171 directly overrode several provisions in the April 2024 final rule.[309] Commenter 35379's argument that agencies must use the same procedures for invoking and invalidating a final rule, citing the authority of *Perez* and 5 U.S.C. 1103(b)(1), which requires notice and comment rulemaking for OPM regulations which bind beyond OPM and its employees, is therefore inapposite.

Commenter 35379 additionally relied on the authority of *Nebraska v. Su* (*Su*)[310] for the proposition that an agency cannot be exempted from notice-and-comment rulemaking on the grounds that the agency was merely implementing an executive order. In *Su*, however, the Ninth Circuit was faced with the argument, accepted by the district court below, that notice-and-comment rulemaking was completely insulated from APA review where it was implementing an executive order. OPM is not taking that position here. Further, in *Su*, the Ninth Circuit took issue with the fact that the Department of Labor had completely failed to take account of any regulatory alternatives to its rulemaking. The Department did so because it viewed itself as having no discretion to take any course of action other than to directly implement the Biden executive order at issue, rendering consideration of alternatives unnecessary and beside the point.

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[308] OPM would independently remove 5 CFR 210.102(b)(3) and (4) and subpart F of part 302 on policy grounds, even if E.O. 14171 had not already rendered them legally inoperative and without effect.
[309] *See* 90 FR 8626 (directing OPM to rescind regulations that "impede the purposes of or would otherwise affect the implementation of [E.O.] 13957," and holding 5 CFR 210.102(b)(3) and (4) and subpart F of part 302 inoperative until such recissions).
[310] 121 F.4th 1 (9th Cir. 2024).

The agency's position in *Su* was that it did not need to comply with the minimum requirements for defending the agency's position in notice and comment rulemaking because of the executive order issued. In contrast, here, OPM has considered regulatory alternatives, notably including the alternative of not issuing regulations to create Schedule Policy/Career and to instead enhance training on how to use chapter 43 and 75 procedures more effectively.[311] In the proposed rule, OPM discussed both the inadequacy of training procedures as a substitute for issuing Schedule Policy/Career and the risk of confusion created where, as here, (a) the President has a direct right of action under delegated congressional authority without action by an Executive Agency, and (b) the President has exercised that authority in a way which would render OPM regulations misleading without conforming regulatory changes.

Su is also distinguishable insofar as the court found that President Biden's relevant executive order had exceeded the authority granted to him by the Federal Property and Administrative Services Act of 1949, *inter alia*, because it relied on the statute's statement of purpose for the substantive delegation from Congress to the President.[312] As discussed immediately below, the President's statutory and constitutional authority to manage the executive branch is explicit, not merely implied by non-substantive statutory language. Further, as discussed above in response to other commenters' APA concerns, OPM's present course of action is fully justified in accordance with APA principles even without relying on President Trump's exercise of Presidential authority.

While OPM's April 2025 proposed rule details its justification and authority for issuing the present regulations, 5 U.S.C. 3301 and 3302 delegate to the President direct authority to prescribe rules for the management of the civil service. Presidents have long exercised authority under the CSRA and predecessor statutes to define the boundaries between the competitive and

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[311] 90 FR at 17218-17219.
[312] 121 F.4th at 7-8.

executive services directly through executive order.[313] Much of this authority has been delegated to OPM (or, in earlier delegations, to its predecessor agency, the CSC).[314] However, where the President directly exercises authority delegated to him by statute, this exercise cannot be overridden by an agency regulation issued under Presidential authority subdelegated to that agency.[315] Aside from basic logic, this result is compelled in the present case by at least three general principles of legal interpretation. First, when two legal authorities conflict (here, E.O. 14171's direct invocation of presidential authority and prior delegations of the same authority to OPM), the later authority should control the earlier.[316] Second, when a more specific legal authority (here, the substantive provisions of E.O. 14171 with direct legal effect) is in tension with a more general legal authority (here, broad, comparatively nonspecific delegations of Presidential authority to OPM), the specific controls the general.[317] And, third, where a higher legal authority (here, executive order) conflicts with a lower legal authority (a regulation issued under authority delegated by executive order), the higher authority must control.

It is the inconsistency between E.O. 14171 and the 2024 final rule which invalidated several provisions of that rule and changed the effective scope of OPM's legal authority. Commenter 30005 asked whether there would be a subsequent OPM regulation to fully rescind the April 2024 final rule, expressing concern that an executive order cannot override an agency regulation. This final rule repeals the April 2024 rule as discussed herein.

Simply put, this line of commenters misconstrues the basic factual and legal situation prior to E.O. 14171 and the current rulemaking. Here, the Biden Administration candidly

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[313] *See*, *e.g.,* E.O. 10577, 19 FR 7521; Kagan, *Presidential Administration*, at 2292.
[314] *See*, *e.g.,* E.O. 12107, 44 FR 1055 (Dec. 28, 1978).
[315] At the least, OPM declines to take the constitutionally dubious position that it has the power to restrain future Presidential authority through this rulemaking or the April 2024 rulemaking. Further, to the extent the exercise of authority is fully discretionary on the President's part, "judicial review of the President's decision is not available." *Dalton v. Specter*, 511 U.S. 462, 477 (1994).
[316] *See Everytown for Gun Safety Support Fund v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 984 F.3d 30, 37 (2d Cir. 2020) ("The 'established rule' is that 'a later adopted provision takes precedence over an earlier, conflicting provision of equal stature.'") (quoting *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 518-19 (2019)).
[317] *See Kaweah Delta Health Care Dist. v. Becerra,* 123 F.4th 939, 951 (9th Cir. 2024).

attempted to block the longstanding Presidential practice of directly exercising executive branch personnel management power through constitutionally and statutorily vested authority. The Biden Administration did this by, first, invoking a delegation of statutory power[318]from the President to OPM, and then, second having OPM exercise that power so as to serve as a roadblock against an ideologically misaligned future President from invoking that authority directly in the future.[319] It did this in a domain where, as Justice Jackson explained in one of the Supreme Court's most highly cited passages, Presidential authority is at its constitutional peak.[320] Again, OPM rejects the highly dubious claim that it holds such power over the Presidency, and that such OPM regulations using delegated Presidential authority can restrict the President's direct exercise of his authority.

Further, this line of commentary fails to account for the fact that OPM has justified the present rule based on a standard APA regulatory analysis. As discussed throughout the rule, OPM did not rely solely on E.O. 14171 to justify the present rulemaking. OPM has exercised independent judgment that the present rule is both necessary and conducive to good government.[321] Thus, even if OPM had such vast authority over the President, the present rulemaking is sufficient to independently render inoperative the April 2024 rulemaking.

ii. Schedule Policy/Career Does Not Raise Due Process Concerns

In the April 2024 final rule, OPM stated that tenured Federal employees are constitutionally entitled to due process before any dismissals and any new policies affecting

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[318] OPM notes that while the April 2024 rule cites to statutory authorization under the CSRA for legal support, the President is not so limited in his authority to act. Consistent with this final rule, OPM recognizes that the inherent authority vested in the President under Article II grants him the authority to supervise the executive branch including acting as he did here in issuing E.O. 14171.

[319] *See* 89 FR 24999.

[320] *Youngstown Sheet*, 343 U.S. at 635-36 (Concurring Op. of Justice Jackson) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty.").

[321] *See*, *e.g.,* 90 FR 17198 fn. 199 ("OPM would independently propose changing the final rule to advance the policies described in this proposed rule, even if E.O. 14171 had not been issued and modified the Civil Service Rules."), 17218, 17189, 17191.

them must still provide constitutional due process.[322] Under this view, E.O. 13957 was unlawful because it permitted agencies to remove currently tenured employees without due process. Many commenters echoed this concern.

As discussed in the proposed rule, OPM has reconsidered its prior view and concludes in this final rule that Schedule Policy/Career satisfies constitutional due process requirements.[323] For-cause removal restrictions may create a property interest in continued employment. Some caselaw suggests tenured employees may also have a property interest in their tenured status as such.[324] However, this caselaw does not address whether Congress can give Officers of the United States subject to the Appointments Clause a property interest in their office or in tenure status for such office. Numerous judicial decisions hold that officers have no property right to hold office. *See, e.g., Crenshaw v. United States*, 134 U.S. 99 (1890) (An officer has "no [] interest or right" to hold office). *See also Taylor v. Beckham*, 178 U.S. 548 (1900) ("the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right").

Further, the Supreme Court has also made it clear that government can constitutionally "eliminate its statutorily created causes of action altogether" as "the legislative determination provides all the process that is due."[325] Removing adverse action appeals extinguishes the underlying property interest they create. OPM explained that Federal courts have, following these constitutional principles, repeatedly rejected challenges to laws excluding positions from state civil service systems and held that due process is satisfied by the applicable governmental body going through the necessary procedures to modify the scope of the civil service.[326]

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[322] 88 FR 63866-63867.
[323] 90 FR 17210.
[324] *See, e.g., Logan v. Zimmerman Brush Co*., 455 U.S. 422, 428-431 (1982) ("a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause"). *See also Savage v. City of Pontiac*, 743 F.Supp.2d 678, 688 (E.D. Mich. 2010) ("The protected property right was the interest in the tenured nature of the employment itself.").
[325] *Logan*, 455 U.S. at 432-433.
[326] *See, e.g., Gattis* v. *Gravett,* 806 F.2d 778 (8th Cir. 1986); *Pittman* v. *Chi. Bd. of Educ.,* 64 F.3d 1098 (7th Cir. 1985); *Rea* v. *Matteucci,* 121 F.3d 483 (9th Cir. 1997); *McMurtray* v. *Holladay,* 11 F.3d 499 (5th Cir. 1993).

Employees are not entitled to an individual adjudication before the government makes a policy decision to exclude them from adverse action procedures, and any subsequent dismissals are not governed by constitutional due process.[327]

In the April 2024 final rule OPM distinguished these cases on the basis that they involved state legislation, not administrative action.[328] Some commenters, including Commenter 32647, on this rulemaking reiterated those objections. For example, Commenter 30426 argues that "an executive action does not necessarily entail the sort of legislative process that could satisfy due process requirements." In the proposed rule, OPM explained these objections take too narrow a view of the term "legislative" as it is used in due process case law. It is settled precedent that individualized due process is not required when the government makes general policy ("legislative actions"). The distinction between whether "legislative" or "adjudicative" due process applies depends on the character of the action—not which branch of government formally undertakes it.[329]

Courts follow a three-part test for determining whether a governmental action is legislative or adjudicative for due process purposes: (1) does it apply to specific individuals or to unnamed and unspecified persons; (2) does the promulgating agency consider general facts or adjudicate a particular set of disputed facts; and (3) does the action determine policy issues or resolve specific disputes between particular parties?[330] Whether the action is formally designated legislative, adjudicatory, or administrative is irrelevant. The proposed rule explained that, under this framework, reclassifications into Schedule Policy/Career are "legislative" actions, not

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[327] *See, e.g., Gattis*, 806 F.2d at 781 (*citing Atkins v. Parker*, 472 U.S. 115, 116 (1985)) ("While the legislative alteration or elimination of a previously conferred property interest may be a 'deprivation,' the legislative process itself provides citizens with all of the 'process' they are 'due.'"); *Rea*, 121 F.3d at 485, (quoting *Bi-Metallic*, 239 U.S. at 445) ("Individuals affected by generally applicable laws are accorded access to the legislative process 'by their power, immediate or remote, over those who make the rule.'").
[328] 89 FR at 25012-13.
[329] *Halverson v. Skagit Cnty*., 42 F.3d 1257, 1260-1261 (9th Cir. 1994). ("In seeking to define when a particular governmental action is 'legislative in nature' [courts] have eschewed the 'formalistic distinctions between 'legislative' and 'adjudicatory' or 'administrative' government actions' and instead focused on the 'character of the action, rather than its label.'" (quoting *Harris v. County of Riverside*, 904 F.2d 497, 501 (9th Cir. 1990)).
[330] *Gallo v. U.S. Dist. Court for Dist. of Ariz*., 349 F.3d 1169, 1181-1183 (9th Cir. 2003).

"adjudicative", for purposes of constitutional due process. The future executive order reclassifying positions into Schedule Policy/Career will apply to a large number of positions, without reference to specific employees encumbering those positions. It will consider general facts regarding known position duties rather than adjudicate disputed facts concerning individual conduct. It will also set policy—namely the scope of adverse actions procedures in the executive branch. Consequently, legislative due process applies.

That process is satisfied by the President following statutory requirements to effectuate reclassifications into Schedule Policy/Career and providing general notice of the change by publicizing the executive order. The President is not required to provide tens of thousands of employees individualized hearings to contest his policy determination before reclassifying their positions, especially when such hearings would be futile and would not impact that ultimate policy decision. As the Supreme Court explained in *Bi-Metallic Investment Co. v. State Board of Equalization* (*Bi-Metallic*) where a rule "applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption."[331] Moreover, even if legislative action were required, Congress unambiguously vested authority in the President to effectuate these reclassifications.

Commenter 30426 takes issue with this analysis. Commenter points to the Supreme Court's decision in *Londoner v. City and County of Denver* that covers when adjudicative due process (which requires at a minimum notice and an opportunity to be heard) applies.[332] Commenter explains that cases implicating due process are evaluated on a spectrum between *Londoner* and *Bi-Metallic*, with courts looking for factors that make them more like one or the other. Commenter raises several arguments that reclassifications into Schedule Policy/Career are more like adjudicative actions governed by *Londoner* and individualized due process than legislative actions governed by *Bi-Metallic*. OPM responds to the argument commenter makes below.

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[331] 239 U.S. at 445.
[332] 210 U.S. 373 (1908).

Presidential Determinations under 7511(b)(2) do not Require Individualized Determinations

Commenter 30426 argues that "the size of the affected class [is] relevant" to determining whether a government action is legislative or adjudicative. Commenter cites judicial decisions holding that "when a rule adopted for general application applies only to a small number of persons, its characterization as legislation becomes suspect."[333] This especially applies "where a small, identifiable group of individuals are singled-out by a legislative act."[334] Commenter cites several judicial decisions where courts overturned actions removing adverse action procedures for individual employees, or a small numbers of similarly situated employees.[335] Commenter asserts that individual 5 U.S.C. 7511(b)(2) determinations will apply to a only single position description covering a single grade level because the statute authorizes making a determination as to "a position." However, many position descriptions cover just a single individual or small handful of employees. Commenter concludes that most 7511(b)(2) determinations would affect small numbers of identifiable employees, making these reclassifications more akin to *Londoner*, and consequently individualized due process applies.

Commenter is correct that the size of the affected class is a quite relevant consideration when assessing whether legislative or adjudicative due process applies. Individualized adjudicative due process generally applies to actions covering a small number of individuals, or a single individual, while legislative due process generally applies to actions that affect a large number of differently situated individuals. However, Commenter is mistaken to argue that 7511(b)(2) determinations must be issued separately for individual position descriptions. Nothing in the CSRA requires this, and this assertion is contrary to both long established practice and judicial caselaw governing Presidential determinations under the CSRA. The President can,

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[333] *Richardson v. Town of Eastover*, 922 F.2d 1152, 1158 (4th Cir. 1991).
[334] *Marino v. New York*, 629 F.Supp. 912, 919 (E.D.N.Y. 1986).
[335] *See, e.g., Darling v. Kan. Water Office*, 774 P.2d 941, 942 (Kan. 1989) (Kansas legislation removed tenure for 17 identifiable employees in a single state office); *Perry v. City of New Orleans*, 104 So.3d 453, 457 (La. App. 4 Cir. 2012) (a single employee unilaterally reclassified from classified to unclassified status).

if he so chooses, make a single 7511(b)(2) determination covering thousands of positions and employees. Such a determination would be a policy of general applicability that does not implicate individualized due process. Reviewing the cases Commenter cites reinforces OPM's conclusion that legislative due process applies to such an action.

Commenter reads far too much into 7511(b)(2) reference to "a position." Section 7511(b) excludes subchapter II's application to "an employee" who meets various criteria, and "an employee" generally only occupies a single position at a time. It would make little sense to use the plural "positions" to describe the characteristics of a single employee. "An employee whose positions are determined …" would be nonsensical. Congress' use of correct grammar implies little about how the President issues 7511(b)(2) determinations.[336]

Moreover, historical practice refutes the claim a 7511(b)(2) determination must be made only with respect to a single position description and grade level. The first direct Presidential use of this authority occurred not long after the CSRA took effect and declared multiple distinct positions in the Department of Agriculture policy-influencing. These were "Agricultural Stabilization and Conservation Service State Executive Directors, and positions in the Farmers Home Administration the incumbents of which serve as State Directors or State Directors-at-Large."[337] President Clinton subsequently modified this determination to provide that "positions the incumbents of which serve as State Executive Directors of the Consolidated Farm Service Agency and positions the incumbents of which serve as State Directors or State Directors-at-Large for Rural Economic and Community Development shall be listed in Schedule C for all grades of the General Schedule."[338] President Clinton's determination covered multiple positions and applied to all General Schedule grades. Nothing in the CSRA's text requires limiting

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[336] Commenter 30426 is correct that OPM's practice has been to limit 7511(b)(2) determinations for Schedule C positions to a single employee. This has been done purely as a policy choice, to facilitate White House control over political appointments across the executive branch. Nothing in the CSRA requires OPM to limit Schedule C determinations in this manner.
[337] E.O. 12300, 46 FR 18683 (Mar. 26, 1981).
[338] E.O. 12940, 59 FR 61519 (Nov. 30, 1994).

7511(b)(2) exemptions to a single position description covering a single grade. The President can issue a single determination covering multiple distinct positions of different grades; this has been the historical practice.

Historical practice and judicial precedent regarding other Presidential determinations under the CSRA confirms this reading. Section 7103(b)(1) of Title 5, U.S. Code, which was part of the CSRA, allows the President to except "any agency or agency subdivision" from collective bargaining obligations if he determines certain conditions are met. As with 5 U.S.C. 7511(b)(2) the phrasing is in the singular, "agency" and not "agencies." Nonetheless the first executive order making such a determination covered 45 agencies or agency subdivisions.[339] President Carter did not issue 45 separate executive orders making separate determinations for each agency or agency subdivision. Subsequent executive orders making 5 U.S.C. 7103(b)(1) determinations followed this practice and exempted multiple agency components in a single determination.[340] Some unions sued over these orders, contending they were procedurally defective because they did not list the ground(s) for the Presidential determination. The D.C. Circuit Court of Appeals rejected these claims, holding "Section 7103(b)(1) makes clear that the President may exclude an agency from the Act's coverage whenever he 'determines' that the conditions statutorily specified exist. That section does not expressly call upon the President to insert written findings into an exempting order, or indeed to utilize any particular format for such an order. The District Court, by mandating a presidential demonstration of compliance with the section, engrafted just such a demand onto the statute."[341] Section 7511(b)(2) likewise does not require the President to utilize any particular format for making policy-influencing determinations.

In sum, OPM sees nothing in the text or historical practice of section 7511(b)(2) to indicate the President must limit policy-influencing determinations to a single position and grade

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[339] E.O. 12171, 44 FR 66565 (Nov. 20, 1979).
[340] *See, e.g.,* E.O. 12559, 51 FR 18761 (May 22, 1986).
[341] *Am. Fed'n of Gov't Emps. v. Reagan*, 870 F.2d 723 (D.C. Cir. 1989).

level. Caselaw from other CSRA provisions that authorize Presidential determinations indicates that no particular format is required. OPM believes Commenter 30426 is mistaken and that Presidential policy-influencing determinations following finalization of this rule will likely encompass hundreds or thousands of positions across dozens of agencies.

The caselaw Commenter 30426 references reinforces OPM's conclusion that such a mass reclassification of thousands of disparately situated employees across many agencies is a policy of general applicability that is governed by the requirements of legislative due process, namely following the appropriate official procedures and providing public notice of the change.[342] Commenter cites to a number of cases where courts overturned on due process grounds actions removing adverse action procedures from state or local government employees. OPM has reviewed these cases. In every case commenter cites the relevant action applied to only a single employee or a small number of similarly situated employees, or the agency did not adequately inform the employee of their change in status. For example, Commenter cites a case where "a Louisiana state court reversed an employee's termination when she was removed summarily from her position after a unilateral status change from classified (protected) to unclassified (unprotected) status."[343] This case involved a single employee whose tenure status was altered, allegedly without prior notice. Commenter similarly cites a judicial decision holding the Kansas Legislature could not legislatively remove civil service protections from 17 employees in a single state office.[344] In this case the legislation applied to a small number of identifiable and similarly situated employees. OPM agrees that adjudicative due process may apply to executive (or legislative) measures that remove adverse action procedures from a single employee or a small number of similarly situated employees, or where employees are not informed of their

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[342] See *United States v. Locke*, 471 U.S. 84 (1985) ("In altering substantive rights through enactment of rules of general applicability, a legislature generally provides constitutionally adequate process simply by enacting the statute, publishing it, and, to the extent the statute regulates private conduct, affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements.")

[343] *Perry v. City of New Orleans*, 104 So.3d 453, 457 (La. App. 4 Cir. 2012).

[344] *Darling v. Kan. Water Office*, 774 P.2d 941, 942 (Kan. 1989).

change in status prior to dismissal. However, this caselaw has little application to a public Presidential 7511(b)(2) determination covering potentially tens of thousands of employees in agencies spanning the Federal Government. Such an action is a rule of general applicability for due process purposes.

Commenter references a number of cases where legislatures enacted mass reclassifications covering many differently situated employees. Courts upheld every such reclassification. For example, the Fifth Circuit Court of Appeals upheld legislation exempting the Mississippi State Department of Economic Development from civil service procedures for one year.[345] The Seventh Circuit Court of Appeals upheld legislation ending tenure for all principals in Chicago Public Schools.[346] The Eighth Circuit Court of Appeals upheld Arkansas legislation removing all persons holding the rank of major or above in county sheriff offices from the civil service system.[347] The Ninth Circuit Court of Appeals upheld Nevada's legislative reclassification of state civil service provisions applicable to hearing officers, which was one of 294 sections in a larger law revising the state's industrial insurance system.[348]

Commenter does not cite a single case where courts struck down a reclassification that applied to more than a few dozen employees and where those employees were notified of their change in status. Instead, the cases Commenter references show just the opposite. In *Marino v. New York*,[349] a Federal judge considered the constitutionality of legislation that broadly modified civil service procedures for employees of New York state courts. The judge rejected due process challenges to exclusions from the civil service, explaining that the "instant case, however, is not the case where a relatively small number of persons were exceptionally affected, in each case upon individual grounds … [i]t concerns, instead, a broad policy affecting hundreds of provisional as well as permanent civil servants and the entire court system serving the citizens of

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[345] *McMurtray v. Holladay*, 11 F.3d 499 (5th Cir. 1993).
[346] *Pittman v. Chi. Bd. of Educ.*, 64 F.3d 1098 (7th Cir. 1995)
[347] *Gattis v. Gravett*, 806 F.2d 778 (8th Cir. 1986).
[348] *Rea v. Matteucci*, 121 F.3d 483 (9th Cir. 1997).
[349] 629 F.Supp. 912 (E.D.N.Y. 1986).

eight judicial districts of the state." [350] If a state reclassification affecting hundreds of employees across eight judicial districts affects enough employees to be a policy of general applicability governed by legislative due process, then it follows *a fortiori* that a Federal reclassification of several orders of magnitude more employees (none of whom are personally identified) across dozens of agencies does as well.

In sum, OPM's review of Commenter's arguments and evidence reinforces its conclusion that a Presidential 7511(b)(2) determination covering many disparate positions is a policy of general applicability that is considered a "legislative" action for due process purposes.

Several commenters raised a variety of other due process concerns in response to the proposed rule. OPM addresses the unique issues as follows.

The President is not Restricted by Position Descriptions

Comment 30426 argues that 7511(b)(2) determinations must be based on position descriptions, and because those descriptions are often inaccurate or out of date these determinations require adjudicating disputed facts, namely the true duties of the positions in question. Determinations that require adjudicating disputed facts are more akin to *Londoner*-type actions, and the Commenter thus concludes that 7511(b)(2) determinations are "adjudicative" actions governed by individualized due process.

This argument fails for several reasons. First, the CSRA does not require the President to base 7511(b)(2) determinations on the strict text of a position description or any particular factor or set of facts. The decision is left wholly to Presidential discretion. The President may rely on such factors as he deems relevant. In particular, the President may require his agency heads and the OPM director to provide their opinions as to which positions are policy-influencing and appropriate candidates for Schedule Policy/Career, and to use that advice in making a determination. If an agency tells the President that they have employees who are substantively

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[350] *Id*. at 919 (cleaned up).

involved in drafting regulations, and those employees' work meaningfully affects agency policymaking, then the President can base a 7511(b)(2) determination on that information. Nothing in the CSRA requires the President to review individual position descriptions before making a 7511(b)(2) determination, much less hold hearings on the accuracy of those position descriptions.

Consequently, while the President may at his discretion conduct further inquiry after receiving agencies' and OPM's recommendations, and may well do so, the CSRA does not require adjudicating any disputed facts before making a 7511(b)(2) determination.[351] The President is not required to conduct public hearings to double check his agency heads' analysis.

Second, in the vast majority of cases the factual basis for OPM and agency recommendations will be undisputed and undisputable. Whether a position leads an organizational unit, has been vested with authority to make decisions committed by law to the discretion of the agency head, or is involved in drafting regulations is straightforwardly apparent. These are not facts that require adjudication to ascertain. For example, a Presidential determination that a Field Office or Regional Director belongs in Schedule Policy/Career does not involve adjudication of disputed facts. The duties of the positions are well established.

Third, the administration can in any event ensure position descriptions and employee responsibilities align with the basis of the Schedule Policy/Career recommendation. Position duties are not external facts outside of agency control that must be independently ascertained. They are, instead, administration policy choices about how to allocate work in the executive branch. Agencies can modify them as they see fit. If an employee's actual job entails substantive responsibility for agency policy, but that is not reflected in their position description, the agency can simply update the position description to reflect their actual duties. Conversely, if a position description entails policy responsibilities but particular employees are no longer performing

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[351] OPM notes that it will be undisputed within the executive branch what positions OPM and agencies have recommended—or not—for Schedule Policy/Career.

those roles, the administration can simply require those employees to begin performing those tasks. Consequently, the administration can ensure any employees transferred to Schedule Policy/Career have policy-influencing responsibilities. If an employee were to contend their position description inaccurately states they perform substantive policy work, but in fact they do not, the President or Presidential subordinates could functionally tell that employee "be that as it may, these tasks are now part of your ongoing responsibilities." The administration can consequently modify the facts under "adjudication" to conform to the President's policy decision. Under these circumstances it is not clear what the point of a pre-decisional hearing would be.

As a result, OPM concludes that 7511(b)(2) determinations do not require adjudicating a particular set of disputed facts and, thus, are rules of general applicability that constitute legislative action and do not require individualized due process.

7511(b)(2) Determinations are not Adjudicative Actions Requiring Individualized Due Process Subject to Judicial Review

Comment 30426 argues that 7511(b)(2) determinations are adjudicative actions because OPM's discretion is strictly limited to applying an established statutory standard to the facts in a given case. Commenter contends that "Congress gave the President and OPM no discretion at all to make a policy choice in connection with the section 7511(b)(2) determination. Section 7511(b)(2) authorizes only the ascertainment of facts and the application of an established legal standard to them." Commenter further argues these determinations are subject to judicial review because "section 7511(b)(2)(A) establishes a legal standard that a hearing officer or court could apply to OPM's determination regarding a position … [whether] the position [is] of a 'confidential, policy-determining, policy-making or policy-advocating' character." Commenter reasons that actions applying a legal standard to the facts of a given case that a court or administrative body could review are adjudicative actions, not legislative actions, for due process

purposes.[352]

Commenter is wrong on both counts. The policy-influencing terms provide an intelligible principle governing the Presidential exercise of statutory authority, but they are not a definite legal standard that courts could apply when reviewing a 7511(b)(2) determination—as every appeals court to consider this issue has concluded. Further, the President has broad policy discretion over which positions to exclude from subchapter II of chapter 75.

On the first point, the terms "confidential," "policy-determining," "policy-making," and "policy-advocating" are indefinite and subjective. They require a nexus to confidential duties, or determining, making, or advocating for policy, and thus provide an intelligible principle to guide Presidential decisions. But they do not define how much responsibility or what level of duties are necessary to meet this standard.

The fact that the policy-influencing terms were indefinite and left considerable executive branch discretion as a standard was known when Congress passed the CSRA. As OPM explained in the proposed rule, as early as the 1950s the Second Hoover Commission objected that the term "policy-determining" did not provide clear guidance: "[t]he term 'policy-determining' has continued to be employed without much refinement . . . . This criterion is all right as far as it goes, but it is so great an oversimplification that it does not give adequate guidance …. [w]hen the departments began to apply [the Schedule C criteria] in 1938, some decided that only the secretary and assistant secretaries determined policy. Others avowed that minor officials at the sub-bureau level were policy determiners. In departmental recommendations in 1953 and 1954 regarding schedule C, there has been an even greater diversity . . . .No decision was made as to where the lines between the political high command and the permanent civil service of the

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[352] OPM notes that if Commenter's argument that the policy-influencing terms are a term of art that exclusively means "political appointee" is correct, this argument fails completely, as there would be no standards to evaluate. The policy-influencing terms would simply mean "the Presidents wants this to be a political appointment" with nothing to cabin Presidential discretion.

Government should be drawn."[353] Nonetheless, Congress used this indefinite language in drafting section 7511(b)(2).

Commenter asserts that 7511(b)(2) is an established legal standard that courts or administrative bodies could apply in reviewing 7511(b)(2) determinations, but does not attempt to describe that standard or explain how courts would decide when a position is policy-influencing enough to justify Presidential inclusion or exclusion. The mere assertion that 7511(b)(2) is an established judicially reviewable standard does not make it so. Notably, every appeals court that has examined this question has concluded 7511(b)(2) determinations are "inherently discretionary judgement call[s]" not conducive to judicial review.[354]

On the second point, Commenter's contention that Congress gave the President "no discretion at all to make a policy choice in connection with the section 7511(b)(2) determination" fails for the same reason. Exclusion from subchapter II under section 7511(b)(2)(A) requires two elements: that the President directly place a particular position in the excepted service, and the President determine the position is policy-influencing. Both elements are discretionary policy choices.

Direct Presidential exception from the competitive service under 5 U.S.C. 3302 is straightforwardly a discretionary policy call. The President is not required to directly except any positions from the competitive service, and since the CSRA became law has only done so for a few positions.[355] The ordinary practice is for OPM to make such exceptions. And, as discussed above, 7511(b)(2) policy-influencing determinations are also an "inherently discretionary

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[353] *Citing* Comm'n on the Org. of the Exec. Branch of the Gov't, Task Force on Pers. and Civil Serv., Report on Personnel and Civil Service, at 6-7, 35 (Feb. 1955), https://www.google.com/books/edition/Report_on_Personnel_and_Civil_Service/ytR9zYFWVtwC.

[354] *See Stanley v. Dep't of Justice*, 423 F.3d 1271, 1272 (Fed. Cir. 2005) ("Here, it is undisputed that Attorney General Reno's Order in 1996 determined that the position of Trustee was of a 'confidential, policy-determining, policy-making or policy-advocating character.' This designation of the Trustee position is unreviewable by the courts because it is an 'inherently discretionary judgment call' committed to the Attorney General."); *see also Stanley v. Gonzales*, 476 F.3d 653, 658 (9th Cir. 2007) ("We also agree with the Federal Circuit that the decision to classify a given position as confidential or policy-making is not reviewable in federal court as a violation of the separation of powers doctrine.").

[355] *See* 5 CFR 6.8.

judgement call" committed to the President's discretion.[356] Nothing in the CSRA requires the President to exclude every position he believes is policy-influencing from subchapter II. So, contrary to commenter's assertion, a Presidential decision to exclude positions from adverse action appeals is a discretionary policy judgement about the appropriate scope of adverse action appeals in the executive branch, not a route application of the law to facts.

OPM does agree with Commenter's point that "[c]ourts have held that 'The absence of definite standards is more characteristic of purely political or legislative activity than of adjudication,"[357] and that judicial analysis of due process requirements "have turned partly on the lack of criteria against which courts could evaluate pure policy questions."[358] In this case the absence of definite standards that courts or adjudicators could apply to, and the discretionary nature of, 7511(b)(2) determinations is characteristic of policies of general applicability, not adjudication, and legislative due process consequently applies.

Individualized Due Process will not be Provided to Affected Employees

Comment 30426 argues that it would not be burdensome to the administration for OPM to provide individualized due process to employees affected by 7511(b)(2) determinations by providing notice and holding hearings before a neutral hearing officer.

Commenter does not appear to grasp that the President—not OPM—will be making these determinations. Neither OPM nor any hearing officers will have authority over these Presidential determinations, so hearings before subordinate officers would at most produce non-binding recommendations to the President. OPM considers it self-evident that requiring the President to personally conduct individualized hearings before making 7511(b)(2) determinations would be highly burdensome and detract from his ability to perform his constitutional functions.

RIFs and Individualized Due Process

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[356] *See Stanley v. Dep't of Justice*, 423 F.3d at 1272; *see also Stanley v. Gonzales*, 476 F.3d at 658.
[357] *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 846 (7th Cir. 2011).
[358] Comment 30426.

Commenter 30426 argues that OPM was wrong to state in the proposed rule that agency reductions in force (RIFs) raise no constitutional concerns because they implicate legislative due process. Rather, commenter argues these judicial decisions have upheld RIFs on other grounds.

Commenter is correct that courts have not specifically upheld RIFs on the grounds they are governed by legislative due process. OPM appreciates the clarification of its analysis. However, the reasoning underlying judicial holdings that individualized due process is not required for RIFs indicates that it is not required for Presidential exclusions from subchapter II's coverage either.

As Commenter notes, "[c]ourts have also focused on the fact that 'a pre-termination hearing would be a futile exercise' in the context of RIFs where there were no facts to adjudicate, as the employees' conduct was not at issue, and no legal criteria applied to the decision to reduce the staff."[359] Applying these criteria, a pre-determination 7511(b)(2) hearing would also be a futile exercise. In such a hearing there would be no facts to adjudicate, as previously discussed. Employee conduct would likewise not be at issue and would be wholly irrelevant to the policy-influencing determination. Further, such determinations are also "wholly discretionary judgement call[s]" not susceptible to judicial or administrative review for the reasons previously discussed.

Consequently, pre- or post-decisional hearings over 7511(b)(2) determinations would be pointless. If the President were to determine regulation writers, or employees in an agency policy unit, or leaders of organizational units were policy-making and subject to 7511(b)(2) they have no basis on which to contest that determination. There is no standard available to show that a position's policy responsibilities are sufficiently large or small to qualify. They would be requesting a hearing over a discretionary Presidential judgment call. There is little likelihood that such a hearing, if provided, would alter the President's analysis about the appropriate scope of

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[359] Commenter points to, *e.g., Rodriguez-Sanchez v. Municipality of Santa Isabel*, 658 F.3d 125, 130 (1st Cir. 2011), for this proposition.

7511(b)(2) exceptions. Due process does not require providing futile hearings that will have no substantive effect.

7511(b)(2) Determinations are Legislative Actions that do not Require Individualized Due Process

Comment 30426 argues that while legislative action can terminate employees' property interest in their positions or adverse action procedures, administrative action does not provide sufficient due process to do so. Commenter cites several cases where courts ruled that administrative agencies could not terminate legislatively granted civil service procedures. The executive vs. legislative distinction Commenter draws is constitutionally irrelevant. Case-law does not draw a procedural due process distinction between whether an act is formally undertaken by the executive, legislative, or judicial branches. What matters is the character of the action, not which branch formally undertakes it. For the reasons discussed above, 7511(b)(2) determinations are generally applicable legislative actions that do not require individualized notice and an opportunity to respond. In *United States v Locke,* the Supreme Court explained the due process requirements necessary to implement generally applicable rules. The Court held that legislative action is intrinsically sufficient in providing constitutionally adequate process by "enacting the statute, publishing it, and, to the extent the statute regulates private conduct, affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements."[360] Presidential executive orders fulfill these requirements just as much as congressional or state legislation. None of the cases Commenter cites involved situations where the legislative branch authorized the executive branch to exclude positions from civil service procedures and the executive branch publicly followed the relevant procedures. They instead all involve the executive branch

[360] 471 U.S. 84 (1985).

exceeding its authority or ignoring the relevant legislative rules.[361] OPM does not see these cases as standing for the proposition that a procedurally regular executive determination issued pursuant to a legislative grant of authority would be constitutionally insufficient.

This Final Rule does not Violate the Supreme Court's holding in Arnett

Several commenters raised related arguments that the rulemaking violated Supreme Court precedents pertaining to Federal employees' due process protections. Commenters 0638, 2390, 13440, 30426, and others argued that Schedule Policy/Career ignores the Supreme Court's decision in *Arnett v. Kennedy.*[362] In *Arnett*, the Supreme Court held that the Lloyd-La Follette Act's post-termination procedures as used by the agency adequately protected the interests of the Federal employee who had been removed. This contrasted with a pre-termination hearing that the appellant had sought. This case involved an employee who was in the competitive service prior to passage of the CSRA. Schedule Policy/Career will not affect the grant of post-termination hearings to employees facing adverse actions who remain in the competitive service. As previously articulated, Schedule Policy/Career is based on the ability of the President to except employees from the competitive service under 5 U.S.C. 7511(b)(2) because they are performing policy-influencing type work. Once such employees are placed in Schedule Policy/Career, they are not entitled to either a pre- or post-termination hearing for the reasons discussed above.

Loudermill *is Inapplicable to Schedule Policy/Career*

A number of commenters asserted that the rule ignores the Supreme Court's *Loudermill* decision, *Cleveland Board of Education v. Loudermill*.[363] In *Loudermill,* the Supreme Court held that certain public-sector employees can have a property interest in their employment, per Constitutional Due Process, and that this property interest entails a right to "some kind of

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[361] For example, Commenter cites cases where a university simply disregarded an employee's tenured status. *See Collins v. Marina-Martinez*, 894 F.2d 474 (1st Cir. 1990). Commenter similarly cited a case where Cook County simply disregarded legislatively granted civil service procedures. *See Carston v. Cnty. of Cook*, 962 F.2d 749, 753 (7th Cir. 1992).
[362] 416 U.S. 134 (1974).
[363] 470 U.S. 532 (1985).

hearing" before an employee may be terminated—a right to oral or written notice of charges against them, an explanation of the employer's evidence, and an opportunity to present their side of the issues. The commenters' argument hinges on whether an employee has been granted a statutory or administrative right to a notice or hearing either before or after an adverse action. Under current law, many Federal employees are entitled to a pre-termination notice and opportunity to respond, as well as a subsequent post-termination review and hearing for an adverse action. For positions in the competitive service, such hearings are required. In addition, many positions in the excepted service are also entitled to pre- and post-termination notice/hearings. Nevertheless, the right to a hearing is based the decision of a governmental entity to afford such procedures to its employees, or classes of employees. Schedule Policy/Career positions will not be entitled to a notice/hearing precisely because of legislative action expressed at 5 U.S.C. 7511(b)(2) that exempts positions that are determined to be of a confidential, policy-determining, policy-making or policy-advocating character from these procedures. The statute does not provide for a notice or hearing on the issue of whether a position is of "a confidential, policy-determining, policy-making or policy-advocating character." A Presidential decision on the issue is conclusive. For the reasons discussed above, such Presidential determinations are policies of general applicability that require following only legislative due process, and do not require prior individualized hearings and an opportunity to respond. Once positions are reclassified into this Schedule notice and an opportunity to respond is no longer required. Relatedly, no new congressional action is necessary to affect the provisions of Schedule Policy/Career since the CSRA has already spoken to the issue, and in implementing Schedule Policy/Career the executive is merely utilizing an existing authority.

The Final Rule does not Conflict with Perry

Several commenters expressed the related view that the rule is at odds with *Perry v.*

Sindermann.[364] OPM respectfully disagree with this view. The rule is not at odds with *Perry v. Sindermann* precisely because the rule provides that there is no expectation of a hearing, whether pre- or post-termination for individuals occupying positions filled under Schedule Policy-Career. In *Perry*, the plaintiff was denied renewal of his contract after 10 years of service teaching in the Texas Community College system. The plaintiff alleged that the non-renewal of his contract was based on his criticisms of Texas public officials. The Supreme Court found that the plaintiff was entitled to a due process hearing. However, this was based on the practices of the college at which he taught. Those practices established a *de facto* tenure program. There is nothing in *Perry* suggesting that the school or the State of Texas college governing body could not have amended or changed their rules to eliminate the "tenure type" protection relied upon by the plaintiff. Unlike the situation in *Perry*, employees whose positions fall under Schedule Policy/Career will be on notice that they have no right to a hearing prior to removal. There is no *de facto* or informal tenure attaching to positions under Schedule Policy/Career.

Commenters 8239 and 27012 assert that the cases relied on in the proposed rule – *Halverson v. Skagit County*[365] and *Gallo v. U.S. District Court for the District of Arizona*[366] – do not support OPM's assertion that the reclassification into Schedule Policy/Career is "legislative" in nature and therefore does not require individual due process. However, both cases support the propositions they were cited for in the proposed rule.[367] Furthermore, as discussed above, various other cases support the proposition that reclassifying positions into Schedule Policy/Career is legislative in nature and therefore satisfies due process requirements.

iii. Construing CSRA to Forbid Schedule Policy/Career Would Create Serious Constitutional Concerns

In the proposed rule, OPM explained that construing the CSRA to prohibit the President from making senior policy-influencing officials at-will would raise serious constitutional

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[364] 408 U.S. 593 (1972).
[365] 42 F.3d 1257 (9th Cir. 1994) (*Halverson*).
[366] 349 F.3d 1169 (9th Cir. 2003) (*Gallo*).
[367] *See* 90 FR 17211; *Halverson*, 42 F.3d at 1260-61; *Gallo*, 349 F.3d at 1182.

concerns. The constitution's Appointments Clause governs the appointment of "Officers of the United States"—officials who exercise significant authority pursuant to Federal law in continuing positions established by law. These officers are divided into two classes; principal officers who exercise final authority for the executive branch and are supervised, in their use of that authority, only by the President, and inferior officers whose actions are supervised by a principal officer. Constitutionally, most Federal officials are neither principal nor inferior officers, but employees without "significant authority" who assist constitutional officers in the performance of their duties.

The Supreme Court explained in *Seila Law LLC v. Consumer Financial Protection Bureau* (*Seila Law*) that Congress has little power to insulate constitutional officers (as opposed to employees) from accountability to the President. Article II of the Constitution vests all Federal executive power in the President. Consequently, the President must have authority to supervise—and if necessary, remove—the officers who wield his delegated authority. "[T]he outermost constitutional limits of permissible congressional restrictions on the President's removal power" is restricting removals of "inferior officers with limited duties and no policymaking or administrative authority."[368] As OPM explained in the proposed rule, chapter 75 covers some inferior officers with substantive policymaking or administrative authority. Construing the CSRA to prevent the President from dismissing these officers at-will would contravene Article II's vesting executive power in the President. Construing 7511(b)(2) to allow the President to remove these officers' adverse action procedures eliminates the constitutional difficulty, as the removal protections would exist at the President's sufferance.[369] OPM believes that this is the best reading of the CSRA regardless. However, under the doctrine of "constitutional avoidance"

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[368] *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197 (2020). The Court also recognized a second exception for the principal officers who lead multimember independent agencies that do not exercise significant executive power. Such principal officers are not covered by chapter 75 and thus not at issue in this rulemaking. Regardless, the Supreme Court recently heard oral argument in a case that will re-examine the continued validity of this exception for the heads of some independent agencies. *See Trump v. Slaughter*, No. 25A264, No. 25-332, 2025 WL 2692050 (U.S. Sept. 22, 2025).

[369] 90 FR 17182, 17215 (Apr. 23, 2025).

courts interpret statutes, if possible, to avoid grave constitutional issues. Even if interpreting 7511(b)(2) to allow the President to remove incumbent officials' adverse action procedures was not the most natural interpretation of the law, it is a permissible one. OPM accordingly concluded the doctrine of constitutional avoidance would require this construction.

Commenter 30426 argues that OPM's reliance on this reasoning is flawed. In this regard, Commenter 30426 asserts that (1) OPM failed to identify any statutorily-established civil service positions determined by the courts to be inferior officers, and more broadly that OPM has only identified two specific positions that are offices covered by subchapter II and Commenter disputes their status as offices; and (2) the Court's decision in *United States v. Arthrex* (2021) establishes that inferior officers with significant power may constitutionally possess removal protections.[370] Therefore, Commenter 30426 argues that OPM fails to justify abandoning its prior determination in the 2024 final rule that subchapter II raises no constitutional concerns.[371]

Contrary to Commenter 30426's first argument, OPM has identified examples of positions that are likely inferior officers whose removal protections are unconstitutional if subchapter II binds the President. Commenter 30426 argues that OPM is required to cite specific judicial decisions to justify each position that OPM labels as being occupied by an inferior officer. However, this onerous requirement would lead to the conclusion that almost no inferior officers exist in the Federal Government beyond those explicitly labelled by Federal courts. Such a conclusion does not follow from court precedent and Commenter 30426's "requirement" misrepresents how judicial decisions are implemented.

A judicial decision holds that a specific position is—or is not—a constitutional office. The executive branch then applies the principles established by the courts in reaching these holdings to assess when other positions are likely offices. For example, the U.S. Department of

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[370] 594 U.S. 1 (2021).

[371] *See* 89 FR at 25007 ("[T]hese comments are mistaken in their assertion that 'many senior career officials are inferior officers.' OPM is not aware of any judicial decision holding so and the comments cite none.").

Labor has applied the principles of *Seila Law*,[372] *Arthrex*,[373] and *Lucia v. Securities and Exchange Commission*[374] to arguments raised in cases regarding the constitutionality of removal protections for its administrative law judges.[375] Similarly, OPM – applying these same principles – found many positions that are likely inferior officers covered by subchapter II, even though these positions are not directly governed by prior cases.[376]

For example, as OPM noted in the proposed rule, EEOC office directors in the field, including directors of district, area, field, and local offices, are likely inferior officers with unconstitutional removal protections. Such directors are expressly created by law. Title 42 provides that the EEOC "Chairman … shall appoint, in accordance with the provisions of title 5 governing appointments in the competitive service, such officers, agents, attorneys, administrative law judges, and employees as he deems necessary to assist it in the performance of its functions … The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this subchapter.[377] Pursuant to this express legislative authorization, the EEOC has by regulation created offices in the field, including district, area, field, and local offices, to assist in its administration and enforcement of the Civil Rights Act, and the EEOC Chair has appointed directors to lead these offices. These positions continue as long as the EEOC regulations remain in effect. Therefore, directors occupy continuing positions

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[372] 591 U.S. 197 (2020).
[373] 594 U.S. 1 (2021).
[374] 585 U.S. 237 (2018).
[375] *See Howard v. Apogee Coal Co*., BLR, BRB No. 20-0229, slip op. at 3-5 (Oct. 18, 2022).
[376] While not relevant to this rulemaking, OPM acknowledges that there also may be inferior officers with removal protections in the Senior Executive Service, such as Regional Directors at the Federal Labor Relations Authority (FLRA RDs), that would raise similar constitutional concerns. FLRA RDs have significant delegated authority under 5 U.S.C. 7105(e)(1), which includes the authority (1) to determine whether a group of employees is an appropriate unit; (2) to conduct investigations and to provide for hearings; (3) to determine whether a question of representation exists and to direct an election; and (4) to supervise or conduct secret ballot elections and certify the results thereof. *See* 5 U.S.C. 7105(e)(1).
[377] 42 U.S.C. 2000e-4(a), (f).

established by law.[378]

Further, as detailed in the proposed rule,[379] district, area, field, and local office directors clearly exercise significant authority pursuant to EEOC regulations, including authority to serve notices of charges, make a final determination of reasonable cause, negotiate and sign conciliation agreements, negotiate settlements, withdraw charges, issue no-cause determinations, and issue notices of right to sue.[380] District, area, field, and local directors thus exercise significant authority pursuant to law, which is why EEOC regulations have long described them as "officers."[381]

Commenter dismisses this analysis because "OPM identifies no decision in which any court has … determine[d] that a particular employee at a middle management level in a remote office was an inferior officer." However, Commenter identifies no case in which courts held an official who wielded the significant authority of an EEOC district, area, field, or local office director was not a constitutional officer either. In the absence of controlling precedents, the executive branch looks to the reasoning underlying Appointments Clause precedents. That reasoning indicates EEOC district, area and local office directors are inferior officers covered by the Appointments Clause because they wield significant administrative authority pursuant to law

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[378] Commenter 30426 also argues that EEOC Field Office Directors cannot be constitutional officers because their offices are established by regulation and not specifically established by statute. Commenter's source for this assertion is a concurring opinion signed by a single Supreme Court justice. Respectfully, concurrences represent the views of the justices who issue them, but they are not the law. Caselaw has frequently recognized that offices can be established by regulation if those regulations are themselves authorized by statute. *See, e.g., United States v. Mouat*, 124 U.S. 303, 307-08 (1888). In *United States v. Maurice*, 26 F.Cas. 1211, 1215 (No. 15,747) (C.C.D. Va. 1823) Justice Marshall concluded that, at least for purposes of a suit to enforce a purported officeholder's bond, the office of agent of fortifications had been created by congressionally approved and authorized Army regulations. So positions created by legislatively authorized regulations can be offices and have been consistently held as such since the earliest days of the Republic. Regardless, as discussed above, the relevant statutory provisions directly authorize the EEOC to create regional offices and appoint officers, so Commenter's objection is inapposite.

[379] 90 FR at 17212.

[380] *See* 5 CFR 1601.10, 1601.14, 1601.18, 1601.19, 1601.20, 1601.21, 1601.24. Field Office Directors do not have unreviewable or final authority to bring charges of violations of the Civil Rights Act. However, unreviewable authority distinguishes principal vs. inferior officers - not between officers and employees. *See, e.g., Freytag v. C.I.R.*, 501 U.S. 868, 881-82 (1991) (finding that special tax judges were officers not employees even though they did not have final decisional authority but issued opinions that did not take effect unless adopted by a higher-ranking official).

[381] *See* 29 CFR 1601.5 ("The term 'district director' shall refer to that person designated as the Commission's chief officer in each district.").

in continuing positions established by law. Under *Seila Law* these inferior officers cannot constitutionally be insulated from Presidential removal. Accepting Commenter's construction of the CSRA makes applying subchapter II to these officers unconstitutional.

OPM is aware of many other positions that are likely offices wielding significant policymaking or administrative authority that are covered by subchapter II. For example, National Labor Relations Board (NLRB) Regional Attorneys (Regional Attorneys) are also likely inferior officers. The office of Regional Attorneys is provided for by statute, including an express requirement they be appointed by the NLRB and giving them direct statutory authority to bring – or decline to bring – civil actions seeking injunctive relief in Federal court for specific violations of the law.[382] Statutory authority to seek – or decline to seek – an injunction in Federal court to vindicate public rights is a well-established significant authority of an officer.[383] OPM is aware that NLRB policies currently require Regional Attorneys to obtain approval from the Presidentially-appointed Board before exercising their statutory authority to seek an injunction. But whether their significant authority is subject to higher level review is determinative of whether Regional Attorneys are principal or inferior officers, not whether they are officers at all.[384] Statutorily vested responsibility for seeking a Federal court injunction is significant authority for Appointments Clause purposes. Thus, it seems likely that Regional Attorneys – who exercise significant authority pursuant to law in continuing positions provided for by law –

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[382] *See* 29 U.S.C. 154 ("The Board shall appoint . . . such attorneys, examiners, and regional directors . . . as it may from time to time find necessary for the proper performance of its duties."); 29 U.S.C. 160(l) ("Whenever it is charged that any person has engaged in an unfair labor practice … preliminary investigation of such charge shall be made … If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter."); 29 CFR 101.37 ("the officer or regional attorney to whom the matter has been referred will make application for appropriate temporary relief or restraining order in the district court of the United States within which the unfair labor practice is alleged to have occurred or within which the party sought to be enjoined resides or transacts business.").

[383] *See Buckley v. Valeo*, 424 U.S. 1, 141 & n.177 (1976) (finding authority to "bring civil action (including proceedings for injunctions) against any person who has engaged or who may engage in acts or practices which violate" the law is reserved to officers).

[384] *See, e.g., Freytag v. C.I.R.*, 501 U.S. at 881-82 (finding that special tax judges were officers even though they did not have final decisional authority but issued opinions that did not take effect unless adopted by a higher-ranking official).

are Officers of the United States. They also exercise considerable administrative authority. Consequently, under *Seila Law* interpreting 7511(b)(2) to prevent the President from holding them accountable would raise grave constitutional concerns.

Additionally, under *Freytag v. Commissioner*[385] *and Lucia*,[386] officials who perform duties typically assigned to administrative adjudicators are constitutional officers. Scholars have documented that agencies employ over 10,000 non-administrative law judge adjudicators, who are generally employed in either senior General Schedule grades or as Senior Level employees and are covered by subchapter II.[387] These adjudicators frequently exercise substantive administrative or policy-making authority through their decisions. Under *Seila Law*, construing the CSRA to insulate these officers from Presidential supervision is unconstitutional.

For example, the MSPB employs dozens of administrative judges to hear adverse action appeals. These administrative judges occupy "continuing positions established by law" under the Appointments Clause.[388] Most importantly, these administrative judges exercise significant authority that mirrors the authority highlighted by the Court in *Freytag* and *Lucia*: they "take testimony" by receiving evidence, examine witnesses at hearings, and taking pre-hearing depositions;[389] "[c]onduct trials" by administering oaths, ruling on motions, and generally regulate the course of a hearing and the conduct of parties and counsel;[390] "rule on the admissibility of evidence;"[391] they have "[p]ower to enforce compliance with discovery

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[385] 501 U.S. at 868, 881-82 (1991).
[386] 585 U.S. at 248-49.
[387] Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 Ga. L. Rev., 1, 33-34 (2018) https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2294&context=fac_artchop. OPM discusses non-ALJ adjudicators here because ALJs are not covered by subchapter II of chapter 75.
[388] Section 1204(a)(1) of Title 5, U.S. Code, provides for the MSPB to "hear, adjudicate, or provide for the hearing or adjudication of all matters within" MSPB's jurisdiction. Section 1204(h) of Title 5, U.S. Code, further authorizes the MSPB "to prescribe such regulations as may be necessary for the performance of its functions," and 5 U.S.C. 1204(j) authorizes the MSPB Chair to "appoint such personnel as may be necessary to perform the functions of the Board." Pursuant to this statutory authorization, the MSPB promulgated regulations that authorize (1) the designation of administrative employees as "judges" who perform adjudicatory functions, *see* 5 CFR 1201.4(a), and (2) the appointment of "[j]udges in the regional and field offices [to] hear and decide initial appeals and other assigned cases as provided for in the Board's regulations," 5 CFR 1201.10(c).
[389] *Freytag,* 501 U.S. at 881; *see* 5 CFR 1201.41(b).
[390] *Freytag*, 501 U.S. at 882; *see* 5 CFR 1201.41(b).
[391] *Freytag*, 501 U.S. at 882; *see* 5 CFR 1201.41(b).

orders;"[392] and they may punish all contemptuous conduct, including violations of those orders "by means as severe as excluding the offender from the hearing."[393] Therefore, pursuant to *Freytag* and *Lucia*, MSPB administrative judges meet all the criteria for a constitutional officer. The MSPB recognizes this and requires agency-head appointments to AJ positions. Further, MSPB AJs exercise substantial administrative authority because they decide whether to uphold or reverse employee removals, demotions, and long-term suspensions across the executive branch.[394] If the CSRA is construed to prevent the President from waiving their adverse action procedures, then under *Seila Law*, *Lucia*, and *Freytag*, chapter 75 cannot be constitutionally applied to MSPB administrative judges. This reasoning likely applies to many more non-ALJ administrative adjudicators across the executive branch.

Many additional other Federal positions are likely constitutional offices. OPM is mindful of Justice Breyer's analysis in *Free Enterprise Fund v. Public Company Accounting Oversight Board* (2010). Justice Breyer noted "that the term 'inferior officer' is indefinite but [] efforts to define it inevitably conclude that the term's sweep is unusually broad"[395] Justice Breyer observed that the Supreme Court has held the following officials "officers": (1) a district court clerk;[396] (2) "thousands of clerks in the Departments of the Treasury, Interior and the othe[r]" departments,[397] who are responsible for "the records, books, and papers appertaining to the office,"[398] (3) a clerk to "the assistant treasurer" stationed "at Boston;"[399] (4) and (5) an "assistant-surgeon" and a "cadet-engineer" appointed by the Secretary of the Navy;[400] (6) election monitors;[401] (7) United

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[392] *Freytag*, 501 U.S. at 882; *see* 5 CFR 1201.41(b).
[393] *Lucia*, 585 U.S. at 248; *see* 5 CFR 1201.43.
[394] 5 U.S.C. 7701(b)(2)(A).
[395] *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd*., 561 U.S. 477, 539 (2010) (Breyer, J. dissenting).
[396] *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839).
[397] *United States v. Germaine*, 99 U.S. 508, 511 (1878).
[398] *Ex parte Hennen*, 38 U.S. at 259.
[399] *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 392 (1868).
[400] *United States v. Moore*, 95 U.S. 760, 762 (1878); *Perkins*, 116 U.S. at 484.
[401] *Ex parte Siebold*, 100 U.S. 371, 397-99 (1879).

States attorneys;[402] (8) Federal marshals;[403] (9) military judges;[404] and (10) judges in Article I courts.[405] Given the breadth and depth of the positions the Court has held are offices, OPM thinks it likely that there are many more positions covered by subchapter II that are constitutional offices with significant administrative or policymaking authority. Accordingly, construing the CSRA to prevent the President from waiving the application of subchapter II to policy-influencing positions would create serious constitutional challenges.

OPM also notes that restrictions on removing some non-officer employees may also be constitutionally problematic. To date, the Court has not decided whether restrictions on removing non-officer employees are categorically constitutional. In *Free Enterprise Fund*, the Court stated "[w]e 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."[406] This issue has not properly been before the Court because the President has statutory authority to waive Chapter 75's application to policy-influencing employees. The Supreme Court and lower court judges have pointed out that "[s]enior or policymaking positions in government may be excepted from the competitive service to ensure Presidential control."[407] Therefore, the Court has not needed to address the constitutionality of the CSRA's application to non-officer employees with substantive policymaking or administrative authority.

However, the implication of the Court's Article II precedents is that Congress cannot shield non-officer employees who exercise meaningful executive power from accountability to the President. The Supreme Court has held that executive officials at all grades must be

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[402] *Myers v. United States*, 272 U.S. at 159.
[403] *Morrison v. Olson*, 487 U.S. 654, 676 (1988); *Ex parte Siebold*, 100 U.S. at 397.
[404] *Weiss v. United States*, 510 U S. 163, 170 (1994).
[405] *Freytag*, 501 U.S. at 880-81.
[406] 561 U.S. at 506 (internal quotation marks omitted).
[407] *Id*.; *see Free Enterprise Fund v. Public Co. Accounting Oversight Bd*., 537 F.3d 667, 686-87 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

accountable to the President so that the government is accountable to the people.[408] Under this logic, officials who meaningfully and substantively shape Federal policy through the performance of their duties – even if they do not formally exercise "significant" enough authority to be considered an Officer of the United States – must be accountable to the President. Otherwise, the public could not determine where the blame for a "pernicious measure, or series of measures ought really to fall."[409]

If the CSRA is construed to prevent the President from holding senior employees with policy-making or policy-determining responsibilities accountable, then the "chain of dependence" between government policy and the people would be broken, and the President would not be fully responsible for the executive power wielded in his name.[410] To construe the CSRA in the manner suggested by Commenters 30426 and 32647[411] would force courts to determine whether Congress can categorically shield policy-making, sub-officer employees from Presidential accountability, and, if not, where the line between permissible and impermissible restrictions runs. These are weighty constitutional questions. Construing the CSRA to allow the President to exempt positions he determines are policy-influencing avoids the need to judicially resolve these grave constitutional issues.

Commenter 30426 makes a second argument against OPM's conclusion that the canon of constitutional avoidance requires construing the CSRA to permit the instant rulemaking. Commenter contends that the Supreme Court's decision in *Arthrex* approved of removal

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[408] *Seila Law*, 591 U.S. at 203-04 ("[A]s a general matter the Constitution gives the President the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.") (internal quotation marks omitted); *Free Enterprise Fund*, 561 U.S. at 497-98 ("[T]he Framers sought to ensure that those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.") (internal quotation marks omitted).

[409] *Free Enterprise Fund*, 561 U.S. at 498.

[410] *See id.*

[411] Commenter 32647 also argues the proposed rule cited dicta from *Free Enterprise Fund*. OPM disagrees as the cited language is clearly part of the analysis in the decision. *Compare* 90 FR 17212 *with Free Enterprise Fund*, 561 U.S. at 497-506.

restrictions for inferior officers with substantial authority.[412] In *Arthrex* the Supreme Court held subjecting administrative patent judges' (APJ) decisions to higher level review, rather than striking down their removal protections, was the appropriate remedy to situate them as inferior officers rather than principal officers.

OPM rejects Commenter's analysis. Nothing in *Arthrex* suggests that restricting the President's ability to remove inferior officers with substantial authority is constitutionally permissible.[413] The issue of whether APJs could constitutionally possess removal restrictions that bind the President – as opposed to whether severing those removal protections was the appropriate remedy to situate them as inferior officers instead of principal officers – was neither briefed nor decided by the Court.

The *Arthrex* court did allow APJs—constitutional officers—to remain covered by subchapter II of Chapter 75. However, when the Court issued *Arthrex* President Biden made it clear he supported CSRA adverse action procedures and wanted them to apply broadly to career employees. He had rescinded E.O. 13957 and expressed strong opposition to it on policy grounds.[414] Therefore, the issue of Presidentially-binding removal restrictions was not before the Court.[415] The court evaluated a system where inferior officers had removal protections that the President could waive, but expressly had chosen to retain as a policy matter.[416] That is constitutionally quite different. The Court has previously explained that Chapter 75 removal restrictions for senior employees do not raise constitutional issues precisely because the

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[412] 594 U.S. at 25-26.
[413] *See id.*
[414] E.O. 14003, 86 FR 7231 (Jan. 22, 2021).
[415] *Free Enterprise Fund*, 561 U.S. at 507 ("While the full extent of that authority is not before us, any such authority is of course wholly absent with respect to the Board. 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.").
[416] *See id.*

President can waive them—they do not restrict *his* power.[417, 418]

Consequently, OPM correctly noted in the proposed rule that the *Arthrex* remedy was focused on the line dividing principal and inferior officers, not accountability to the President's Article II executive authority. The Court's remedy appropriately addressed the relevant constitutional defect – unreviewable decisional authority being vested in officers who were not appointed as principal officers – without needing to consider the issue of Article II accountability to the President.[419]

Commenter 30246 also argues that OPM has failed to identify any officials covered by subchapter II who have the sort of significant authority that administrative judges exercise, hold positions established by law, and have been found constitutionally ineligible for adverse action coverage under subchapter II. Commenter misses OPM's point that these cases do not exist because 5 U.S.C. 7511(b)(2) generally provides the President with (heretofore latent) authority to exempt relevant positions from those procedures. As a result, courts have not had to confront this question. As for specific positions adjudicated by a court, as explained above, under *Freytag*,[420] *Lucia*,[421] and *Arthrex*,[422] adjudicatory positions such as MSPB administrative judges are generally offices. If 5 U.S.C. 7511(b)(2) does not allow the President to exclude these positions from subchapter II's coverage, and their adjudicatory duties have substantive administrative or policymaking consequences, then under *Selia Law* any Presidentially-binding removal restrictions are unconstitutional.

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[417] *See Free Enterprise Fund*, 561 U.S. at 506-07 ("Nor do the employees referenced by the dissent enjoy the same significant and unusual protections from Presidential oversight as members of the Board. Senior or policymaking positions in government may be excepted from the competitive service to ensure Presidential control, and members of the Senior Executive Service may be reassigned or reviewed by agency heads (and entire agencies may be excluded from that Service by the President).") (internal quotation marks omitted).

[418] OPM notes that the regulations this rulemaking rescinds prevent the President from waiving subchapter II's applicability to incumbent officers and employees. As long as these regulations remain in effect, subchapter II procedures present serious constitutional challenges because they do not apply to policy-influencing positions at the President's discretion.

[419] The Appointments Clause requires all principal officers to be appointed by the President with Senate consent, but permits Congress to authorize the President or agency heads to appoint inferior officers without Senate involvement.

[420] 501 U.S. at 881-82.

[421] 585 U.S. at 248-49.

[422] 594 U.S. at 23.

Commenter 30426 further argues that having failed to identify any actual inferior officers subject to section 7511(b)(2)'s protections, and in light of *Arthrex's* holding that even such officers—if they existed—can constitutionally have removal restrictions, OPM fails to support its argument that the doctrine of constitutional avoidance requires reading the term of art "confidential, policy-determining, policy-making or policy-advocating" as including career employees. OPM rejects this analysis for the reasons discussed above. OPM has identified such offices, and this reading misconstrues *Arthrex's* holding.

Commenter 30426 also argues that "even if OPM could identify any such officers, it may well be, as in *Arthrex*, that a simple change to the nature of their relationship with their supervisors would remedy any perceived constitutional issues, while also honoring Congress' grant of adverse action appeal rights to all career employees." Commenter 30426 also claims that "*Arthrex* teaches that no change would be required at all if their work is already subject to review by supervisors possessing the authority to overrule them or render final decisions, as would likely be the case with an employee covered by" subchapter II.

Commenter 30426 misunderstands *Arthrex* and Appointments Clause caselaw. The test for an officer is wielding "significant authority."[423] Inferior officers are frequently subject to higher level review and often do not have ultimate authority on disputed matters[424] Providing additional supervision of an inferior officer's duties, or changing their reporting lines, could ensure that they are not principal officers but would not still leave them inferior officers wielding significant authority. If this authority involves substantive administrative or policymaking responsibilities, they must constitutionally be accountable to the President.

Commenters 8019, 13440, 13602, and others argued that Schedule Policy/Career and OPM's reasoning is contrary to the Supreme Court's decisions in *Morrison v. Olson*,[425] and/or

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[423] *Lucia*, 585 U.S. at 245.
[424] *See, e.g., Freytag*, 501 U.S. at 881-82 (holding that the judges were inferior officers, who had significant authority, despite issuing decisions that did not take effect unless approved by a superior).
[425] 487 U.S. 654 (1988).

United States v. Perkins,[426] both of which upheld restrictions on Presidential removal of inferior officers. *Morrison* upheld such restrictions for the position of Independent Counsel, while *Perkins* upheld them for a naval cadet engineer. Commenters similarly pointed to *Myers v. United States*,[427] where the Supreme Court held Congress could restrict the President's ability to remove inferior officers appointed without Senate consent.[428] Commenters also pointed to *Humphrey's Executor v United States*,[429] which upheld congressional restrictions on removal of Federal Trade Commission members—principal officers. Commenters argue that these cases show restrictions on removing even senior officers are constitutionally unproblematic.

As discussed extensively above, OPM believes modern Supreme Court caselaw reinforces the case for this rulemaking. In *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197 (2020), the Court clarified *Morrison* and *Perkins* as a narrow exceptions that stand only for the proposition that Congress can restrict removals of inferior officers "with limited duties and no policymaking or administrative authority."[430] The Court also held that restrictions on removals of such officers constitute "the outermost constitutional limits of permissible congressional restrictions on the President's removal power."[431] Consequently, following *Seila Law*, OPM does not construe *Perkins*, *Morrison*, or *Myers* as standing for the proposition that Congress can restrict the President's ability to remove inferior officers who wield substantive administrative or policymaking authority. OPM instead believes, and agrees with Commenter 35512, that the modern caselaw strongly suggests that the narrow *Morrison* and *Perkins* exception would be unlikely to apply to most inferior officers who perform policy-influencing duties that would qualify for inclusion in Schedule Policy/Career.

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[426] 116 U.S. 483 (1886).
[427] 272 U.S. 52 (1926).
[428] The Supreme Court made a similar finding in *Perkins*, holding "[w]e 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. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed." *See* 116 U.S. at 485.
[429] 295 U.S. 602 (1935).
[430] 591 U.S. at 212.
[431] *Id*. at 218.

While this rule applies to policy-influencing positions as defined at 5 U.S.C. 7511(b)(2) rather than strictly to inferior officers, OPM recognizes that there may be an overlap between these roles in a number of circumstances. Given the broad concerns expressed by the Court in *Free Enterprise Fund* that "[t]he President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them,"[432] OPM believes the better interpretation of these precedents is that the President and/or agency heads may remove inferior officers despite putative statutory restrictions on such removals. Accordingly, to the extent this rule may apply to policy-influencing officials who are also deemed to be inferior officers, OPM believes that the President and/or his agency heads must have sufficient constitutional authority to effect removals when deemed necessary. Interpreting subchapter II to deny the President this flexibility would render the statute unconstitutional in these applications. By contrast, OPM's reading of the CSRA—that the President can discretionarily remove adverse action procedures from policy-influencing positions—eliminates this constitutional difficulty.

OPM also believes reliance on *Humphrey's Executor* to rebuff this rulemaking is misplaced. The Supreme Court's decision in *Humphrey's Executor* pertains to PAS members of multi-member regulatory boards and commissions that do not wield substantial executive power. Presidential appointees are not covered by subchapter II and are not the subject of this rule. The Supreme Court has also recently announced it will consider whether to overrule *Humphrey's Executor* and has stayed lower-court orders directing the reinstatement of tenure-protected independent agency heads that President Trump dismissed.[433] Consequently, OPM infers that *Humphrey's Executor* may not be good law for long.

Commenter 8019 also argues that the justification for Schedule Policy/Career ignores the tripartite categorization of Federal workers between Principal Officers, Inferior Officers, and

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[432] *Free Enterprise Fund*, 561 U.S. at 484.
[433] *See, e.g., Trump v. Wilcox*, 595 U.S. ___, 145 S.Ct. 1415 (2025), (granting stay).

employees set forth in cases such as *Lucia v. Securities and Exchange Commission,* with the Supreme Court expressing no concerns with removal restrictions on mere employees.[434] However, as the commenter notes, the *Lucia* court refused to take up the question of the constitutionality of "for cause" removal protections,[435] and, indeed, Justice Breyer, writing for three justices in partial concurrence, specifically complained about the Court majority's refusal to take the questions specifically at issue in Commenter 8019's argument. *In Free Enterprise Fund* (2010) the Roberts Court similarly expressly declined to reach the question of how much accountability "lesser functionaries" must have to the President while noting that section 7511(b)(2) authorizes the President to except policymaking positions "to ensure Presidential control."[436] OPM believes that modern separation of powers jurisprudence indicates that Congress cannot insulate inferior officers with administrative or policymaking responsibilities from accountability to the President. For the reasons already discussed, OPM does not accept as controlling Commenter's argument that subchapter II raises no constitutional questions: subchapter II covers some inferior officers which raises clear constitutional problems, and it is not well-established Congress can insulate policymaking but non-officer employees from Presidential accountability. The Court's reasoning in cases like *Free Enterprise Fund* and *Seila Law* suggests but that, at least for some policymaking employees, Congress cannot.

iv. Additional Objections

Commenter 30426 argues that the proposed amendments are contrary to law, ultra vires, and unconstitutional. He footnotes to Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* on the President taking measures incompatible with the expressed or implied will of Congress his power is at its lowest ebb.

As the Supreme Court recently explained, ultra vires applies only when an agency has

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[434] 585 U.S. 237, 244-45 (2018).
[435] *See Lucia*, 585 U.S. 237, 255-56 (2018) (Breyer, J., concurring in part and concurring in the judgment) (disagreeing with the majority's decision of the case on constitutional grounds where they did not also take up the question of removal).
[436] 561 U.S. at 506.

taken action entirely "in excess of its delegated powers and contrary to a specific prohibition" in a statute.[437] By contrast, here the President is not acting contrary to a specific statute but under specific statutory authorization—5 U.S.C. 7511(b)(2)(A). This rule falls under Justice Jackson's category one: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[438] This rule is a fully lawful *intra vires* action, backed by the full power of the President and of Congress.

Commenter 30426 argues that public employees have less capacity than members of the general public to effect political change because applicable First Amendment precedents give them little protection when speaking out about personnel practices of a governmental employer. Commenter argues this heightens due process concerns. This is demonstrably untrue. In fact, political scientists have long documented that Federal employees are in fact a powerful and effective interest group.[439]

Commenter 30426 cites a 2016 Supreme Court case holding that the First Amendment prohibits discrimination against government employees based on their perceived political affiliation, not just their actual political affiliation, and that the entire Schedule Policy/Career enterprise is designed to discriminate against Federal employees because of their perceived political affiliation, therefore, violating the First Amendment.

OPM respectfully disagrees with Commenter 30426's premises and reading of the First Amendment. To succeed on a First Amendment retaliation claim a plaintiff must prove that the current career employees bound for Schedule Policy/Career engaged in conduct protected under the First Amendment; the President, OPM, and/or their employing agencies took sufficient action to deter a person of ordinary firmness from exercising their First Amendment rights; and that a

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[437] *Nuclear Regul. Comm'n v. Texas*, 605 U.S. 665, 681 (2025).
[438] *Youngstown Sheet*, 333 U.S. at 635-36.
[439] *See, e.g.,* Johnson & Libecap at 17.

causal link exists between the exercise of their First Amendment rights and the reassignment to Schedule Policy/Career.[440] Commenter's argument fails every step of this analysis.

Commenter 30426's claims the President perceives Federal employees to be politically hostile is incomplete and misleading. While the President has taken issue with the conduct of some Federal employees, the President believes there are many other hard-working Federal employees performing valuable work for the American people. Commenter ignores the many times, discussed above, that the President has praised the work of Federal employees. Reading a few hyperbolic remarks literally and with no further context is highly misleading and does not establish a "perceived political affiliation" for the entire Federal workforce that triggers First Amendment scrutiny.

Moreover, there is no retaliatory action. The entire Schedule Policy/Career process is proceeding without any regard to political affiliation. OPM action in reviewing agencies' requests for placement of employees in Schedule Policy/Career does not include review of any employee's identity or other information that could reveal an employee's political affiliation. Schedule Policy/Career recommendations are focused on position duties, not individual traits of incumbent employees. There is simply no consideration of Federal employees' political views at any time, and thus no retaliatory action for employees' putative perceived political affiliations.

Additionally, there is no causal nexus between the putative First Amendment activity and placement in Schedule Policy/Career. In E.O. 14171 the President explained his motivation for issuing the order, namely the difficulty of removing poor performers and those who engage in misconduct (including policy resistance). Commenter 30426 does not show that the President was not motivated by these concerns. Nor could Commenter 30426, because these concerns—as OPM has documented —are real and serious and are why the President issued the order. OPM agrees with the Commenter that Schedule Policy/Career employees retain their First Amendment

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[440] *See Black Lives Matter D.C. v. Trump*, 544 F.Supp.3d 15, 46 (D.D.C. 2021).

right to be free from political discrimination, and the President has separately commanded as much.[441] So long as Schedule Policy/Career employees work effectively to carry out the President's agenda, their jobs will be safe, no matter their personal political views.

Various commenters asserted that the rule violates *Pickering v. Board of Education*,[442] *Rutan v. Republican Party*,[443] *Janus v. AFSCME*,[444] *Branti v. Finkel*,[445] by requiring "compelled speech", viewpoint discrimination, and other mandatory viewpoints, thus allegedly violating the First Amendment. E.O. 14171 explicitly emphasizes that patronage remains prohibited by defining Schedule Policy/Career to only cover "career positions." It also expressly describes what is and is not required of Schedule Policy/Career employees prohibiting any requirements that employees pledge personal or political support for the President or his policies. The order and this rule also retain merit-based competitive hiring procedures. In short, the President has repeatedly forbidden treating Schedule Policy/Career as patronage positions and consequently this rule raises no such constitutional concerns.

Some commenters asserted that the rule will encourage manipulation of data, e.g., scientific and economic, for political purposes. Several commenters suggested that the proposed rule, by modifying standards for discipline and dismissal, will allow political appointees to threaten or punish career appointees in Schedule Policy/Career positions in order to manipulate, alter, or withhold data necessary for informed scientific and economic decision-making. The operative theory behind the comment appears to be that professional standards can only be maintained if extensive regulatory and administrative hurdles exist with respect to discipline or dismissal of employees. To the contrary, most employees throughout the American economy

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[441] OPM also notes that under First Amendment precedents governing public employees, government actions that restrict constitutionally protected speech are subject to a balancing test that weighs the value of the employees' speech interest against the government's need for efficient operations. *See Connick v. Myers*, 461 U.S. 138 (1983). OPM believes that this rulemaking would pass this balancing test if it was subject to First Amendment scrutiny as the rule will promote efficient management of the executive branch. However, for the reasons outlined above, OPM does not believe First Amendment scrutiny is triggered and so courts would not reach this balancing test.
[442] 391 U.S. 563 (1968).
[443] 497 U.S. 62 (1990).
[444] 585 U.S. 878 (2018).
[445] 445 U.S. 507 (1980).

enjoy limited or non-existent restrictions on their removal for performance or disciplinary reasons. This has not affected the quality of the output of most employees who serve under "at will" employment circumstances. There is no reason to believe that employees serving under Schedule Policy/Career will be subject to lesser standards or professional expectations. One reason for establishing Schedule Policy/Career is to hold employees to higher standards of performance without the need for supervisors and/or managers to subject themselves to time consuming and often crippling procedures for correction of substandard or unprofessional work. Moreover, as noted *supra*, E.O. 14171 reinstates and retains the language provided in E.O. 13957 that requires agencies to establish rules to prohibit the same personnel practices prohibited by section 2302(b) of title 5, United States Code, with respect to any employee or applicant for employment in Schedule Policy/Career. Thus, in the very rare circumstances where employees may be improperly influenced to take action that is not warranted by professional standards, procedures will be in place to ensure that PPPs will not be tolerated for positions determined to be included under Schedule Policy/Career. OPM notes that commenters do not provide examples of at-will employment of employees with scientific responsibilities in state government resulting in such abuses, which strongly suggests such abuses under at-will employment systems are rare.

Commenters 3768, 13112, and others, expressed significant concern with the ability of agencies to subvert reduction in force procedures through placement of personnel in Schedule Policy/Career and subsequently terminating them. OPM believes such actions would be inconsistent with the purpose of the final rule. It would be inappropriate for agencies to exercise authority under this rule as a tool to conduct broad workforce reshaping simply to avoid reduction-in-force procedures. The proposed rule is intended to provide agencies with authority to address individual instances of unacceptable performance or misconduct demonstrated by career Schedule Policy/Career officials whose duties and responsibilities are critical to executing the President's policy agenda. Where an agency intends to release or terminate an employee or employees under conditions described in part 351 of this chapter, the agency should follow those

procedures, or like procedures under similar authorities. Moreover, OPM is unaware of any initiatives to use Schedule Policy/Career as an alternative to RIFs for workforce restructuring and has no reason to believe the administration is contemplating such a measure. Baseless and inaccurate speculation is not a reason to decline to finalize the proposed rule.

Various commenters suggested that the rule violates the Major Questions Doctrine.[446] The Major Questions Doctrine is a principle of statutory interpretation in administrative law that limits the authority of Federal agencies to regulate matters of major political or economic significance unless Congress provides explicit authorization.[447] This rule does not violate the Major Questions Doctrine for four reasons. First, Congress has explicitly authorized these actions. Section 7511(b)(2) provides for excluding positions in the excepted service that are policy-influencing from subchapter II's coverage. Congress has spoken clearly and said the President can do this. Second, the Major Questions Doctrine is a tool for interpreting the scope of congressional delegation of authority to the executive branch. It is not clear this doctrine applies when interpreting the scope of congressional restrictions on the President's Article II authority over the executive branch. In such cases the President's own constitutional authority must also be considered. So, the Major Question Doctrine may not apply regardless. Third, this rule is expected to affect only about 2 percent of the Federal workforce (50,000 positions out of 2.2 million). This modest level of affected employees is not significant enough to implicate the Major Questions Doctrine. Finally, Presidents have commonly created or modified new groups of excepted positions within the civil service. Congress could hardly have failed to anticipate this routine use of Presidential authority. In the last 15 years, four new categories of excepted service positions have been created by both a Democratic and Republican President. Accordingly, OPM believes the Major Questions Doctrine is inapplicable to this rulemaking.

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[446] *West Virginia v. Env't Prot. Agency*, 597 U.S. 697 (2022).
[447] OPM notes that the Major Questions Doctrine applies to placing limits on congressional delegations to the executive branch. It has no application to inherent Article II authorities.

In a similar vein, other commenters asserted that Schedule Policy/Career violates the Non-Delegation Doctrine. The Non-Delegation Doctrine is a concept that holds that one branch of government cannot delegate to another branch of government the power invested in that branch.[448] OPM presumes that the commenter is suggesting that the creation of Schedule Policy/Career in the excepted service requires legislative branch action. OPM first notes that the constitution gives the President responsibility for supervising the executive branch. Consequently section 7511(b)(2) is not a delegation of congressional authority to the President but a limitation on congressional restrictions on pre-existing Presidential authority. This does not raise non-delegation concerns because Congress is not "delegating" executive power to the President in the first place. It is declining to restrict power the President already possesses. Second, even if non-delegation principles apply the Supreme Court's caselaw requires only an "intelligible principle" to guide executive branch action.[449] The policy-influencing terms supply exactly that, so non-delegation requirements are satisfied regardless. Third, even assuming *arguendo* the commenter is correct on this point and Schedule Policy/Career requires legislative action, the commenter fails to account for that Title 5 already gives the President authority to take these actions, as discussed throughout this rulemaking. OPM also notes that is would create serious Constitutional concerns under separation of powers doctrine to suggest that the President cannot hold policy-influencing subordinates accountable. Thus, Schedule Policy/Career does not run afoul of the Non-Delegation Doctrine.

Other commenters asserted that Schedule Policy/Career is arbitrary and capricious under *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*[450] The preamble to the rule clearly articulates the benefits of Schedule/Policy Career and provides a reasoned analysis. Section 7511(b)(2) permits the President to establish a new category of

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[448] *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).
[449] *See, e.g., Fed. Commc'ns Comm'n v. Consumers Rsch*., 606 U.S. 656 (2025).
[450] 463 U.S. 29 (1983).

positions in the excepted service. OPM's April 2024 final rule purposely misinterpreted section 7511(b)(2) as a "term of art" in order to avoid the plain meaning of the language of the statute, and to create a roadblock[451] to a future Administration properly interpreting this language. Moreover, OPM has established cost savings accruing to government agencies through use of Schedule Policy/Career rather than the use of traditional adverse action procedures.

Commenter 18863 asserts that the proposed rule improperly justifies use of E.O. 14171 to nullify the April 2024 final rule. Presumably, this commenter would require OPM to first "reverse" the April 2024 rule before proceeding to promulgate the instant rule. OPM strongly disagrees with this clumsy and unnecessary approach. The President establishes civil service policies in accordance with statutory authorities and OPM implements these policies.[452] Even assuming *arguendo* that the April 2024 final rule must be rescinded in order for the current rule to be effected, the commenter provides no reason why OPM cannot both rescind the 2024 rule and *simultaneously* promulgate a replacement rule – which is exactly what this rulemaking action accomplishes.

Some commenters tried to argue that Schedule Policy/Career will upend labor-management relations. The premise of this comment appears to be that placing policy-influencing positions into an "at will" status will substantially disturb the relationship between management and non-management employees within Federal agencies. At this time, OPM estimates that approximately 50,000 positions governmentwide will be placed into Schedule Policy/Career. This represents about 2 percent of the entire executive branch employment total (excluding U.S. Postal Service). For about 98 percent of employees, there will be no change in pre- and post-termination notice and due process procedures. The charge that changing removal procedures for 2 percent of all Federal employees will significantly upend and disturb labor

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[451] National Active and Retired Federal Employees Association, "OPM Proposes Rule Designed to Prevent Another Schedule F," (Sept. 19, 2023), https://www.narfe.org/blog/2023/09/19/opm-proposes-rule-designed-to-prevent-another-schedule-f/.
[452] 5 U.S.C. 1103(a)(5-7).

relations seems designed to foment hysteria. Moreover, the vast majority of employees who will be affected by these proposed changes will typically be employed in more prominent and higher-graded positions that involve policy-influencing work. In particular, OPM expects that relatively few Federal employees represented by labor unions will be transferred into Schedule Policy/Career. This is because 5 U.S.C. 7103(a)(11) and 7112(b)(1) statutorily exclude from collective bargaining management officials engaged in formulating, determining, or influencing agency policy. As a result, few bargaining unit employees perform duties that would make their positions eligible for Schedule Policy/Career.

One commenter asserted that the rule is a violation of 5 U.S.C. 555(b). This statutory provision relates to persons who are compelled to appear before an agency. They have a right to be represented by counsel or in some cases by another qualified party. Schedule Policy/Career contains no provision compelling an appearance before an agency representative.

Various commenters asserted that Schedule Policy/Career violates the Antideficiency Act ADA because it will necessitate unauthorized spending on training and implementation. Nothing in Schedule Policy/Career rule *requires* expenditures of appropriated funds beyond that which are normally appropriated to agencies for carrying out personnel management functions.

Other commenters argued that Schedule Policy/Career violates the Paperwork Reduction Act. This rule does not violate the PRA because it imposes no paperwork requirements on parties, whether current employees, employees converted to Schedule Policy-Career, or applicants for Federal employment including applicants for positions under Schedule Policy-Career.

D. Schedule Policy/Career Will Improve Government Performance

OPM believes that implementing E.O. 14171 would improve the Federal Government's performance and accountability to the American people for several reasons.

i. Recruitment and Retention are Unharmed by this Rule

Commenter 30765 and others argue implementation of Schedule Policy/Career will

exacerbate recruitment and retention problems as applicants might be leery of taking jobs classified as Schedule Policy/Career if they knew they could be removed after a change in administration. This commenter, and others, voiced concerns that this rule would undermine agency recruitment and retention efforts. Some, like Commenter 16246, feared it would eliminate a competitive advantage in Federal hiring and recruitment, and that fear of job loss or reprisal or politicization would reduce the attractiveness of Federal jobs. Others, like Commenter 10727, were concerned that instituting Schedule Policy/Career would open the door to retribution and argued that individuals "considering whether to accept a career civil service position need to know that they will be valued for their knowledge, skills, and abilities; evaluated based on merit; and not only protected from retribution for offering their candid opinions but encouraged to do so." Relatedly, many of these commenters suggested that agency missions would be adversely affected by the destabilizing of the civil service, with large numbers of experienced staff leaving their positions during each change of administration.

OPM believes that the new Schedule Policy/Career will not create substantive recruitment and retention concerns or service disruption. OPM considers the commenters to fundamentally misunderstand the operations of this rule and Schedule Policy/Career more broadly. Commenters appear to characterize this rule as an attempt to politicize career positions and thereby create a new *de facto* schedule for political appointees. As discussed above, Schedule Policy/Career flatly rejects a return to the patronage system. OPM notes that E.O. 14171 defines Schedule Policy/Career positions as career positions, not political appointments. It was redesignated from "Schedule F" to "Schedule Policy/Career" precisely to clarify this status. Therefore, the E.O. not only provides, but generally requires, that Schedule Policy/Career positions be filled using merit-based competitive hiring procedures. As part of this process, political loyalty to the President is forbidden from being a prerequisite of holding a Schedule Policy/Career position. The E.O. goes a step further, requiring agencies to proactively establish procedures to ensure compliance with that directive, to the extent those procedures are not

already in place.

Moreover, employees in Schedule Policy/Career positions who perform well, and faithfully implement the President's agenda to the best of their ability, have little reason to fear dismissal based on non-merit factors. As discussed above, firing experienced policy-influencing employees who perform their duties with integrity and excellence would be counterproductive. While dismissing Schedule Policy/Career employees for poor performance or misconduct may create some disruption, over the long-term the government benefits from employing a high-performing and ethical workforce that understands that democracy requires subordinating their personal policy preferences to those of the voters. Consequently, OPM expects Schedule Policy/Career will not bring about the destabilizing separations commenters fear will occur, nor will it lead to losses of institutional knowledge or reduced employee investment in skills within agencies.

OPM also does not believe that Schedule Policy/Career would impair Federal recruitment and hiring efforts, as some commenters, including but not limited to Commenters 0941, 13414, and 16276, suggest. As noted, nothing in this rule permits political loyalty or litmus tests as part of the hiring process. Employees considering whether to apply for a Policy/Career position will know that if hired, it is because they were evaluated based on merit, taking their knowledge, skills, and abilities into account, not their political affiliation. They would also be filling long-term positions that do not typically disappear upon a change in administration. OPM also notes that systematically retaining poor performers, or those who engage in serious misconduct such as that which occurred at the FDIC and elsewhere, due to an inability to successfully utilize chapter 75 procedures, harms employee morale and can hurt recruitment and retention, especially when the individuals being retained are in influential positions such as those that will be classified as Schedule Policy/Career.

OPM agrees with Commenters 2104, 3624, 7170, 26062, and others who argue that adverse action procedures and appeals give Federal employees greater job security than exist in

most other jobs. To the extent that employees value this job security, Schedule Policy/Career's removal of adverse action procedures would reduce the relative value of Federal employment to them. However, OPM no longer believes that this change will significantly impair Federal recruitment or hiring. As Commenter 32359 notes, Federal employees appear to place relatively little value on the availability of adverse action procedures.[453] Eliminating these procedures for a small fraction of the Federal workforce is thus unlikely to meaningfully affect agency recruitment and retention. In addition, to the extent some employees may seek to leave the Federal Government for lack of job security, OPM views this as a positive result, opening the position to be filled by an employee who would seek to excel in a policy-influencing position who is committed to executing on the President's policy agenda and less concerned about personal job security and bureaucratic processes.

Even excluding the nominal value of job security, the Federal Government offers a more generous benefits package than most comparable private-sector employers. For example, the Federal Government provides its employees with both defined benefit and defined contribution retirement plans. Very few private employers offer comparably generous retirement benefits. As a result, the Government generally offers Federal employees a benefits package that exceeds what they could expect to earn in the private sector for similar work. Congressional Budget Office data shows that Federal employees with a bachelor's degree receive $31.70 an hour in non-wage benefits, while comparable private-sector workers receive only $22.00 an hour in non-wage benefits.[454] For employees with a Master's degree, those figures are $33.50 and $26.20 an hour in the Federal and private sectors, respectively.[455] Even if Schedule Policy/Career reduces

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[453] Comment 32359 draws OPM's attention to a recent Congressional Budget Office evaluation that concluded three-quarters of Federal employees value adverse action protections at less than 5 percent of their salary. *See* Congressional Budget Office Cost Estimate, *Reconciliation Recommendations of the House Committee on Oversight and Government Reform* at 6-7 (May 13, 2025), https://www.cbo.gov/system/files/2025-05/HouseOversight2025Reconciliation.pdf. OPM hereby incorporates this cost estimate into the administrative record and takes it to imply that, while job security is a benefit of Federal employment, Federal employees do not see it as a major element of their compensation packages.

[454] Congressional Budget Office, *Comparing the Compensation of Federal and Private-Sector Employees in 2022* at 15 (Apr. 2024), https://www.cbo.gov/system/files/2024-04/59970-Compensation.pdf.

[455] *Id*.

job security to some degree, the Federal Government will still offer a highly competitive benefits package necessary to attract quality talent.

Commenters such as 8375, 31460, and others characterize the rule as creating, functionally, at-will employees, and that this will drive knowledgeable employees into the private sector where they, in the words of the commenters, will not be unfairly targeted for dismissal for arbitrary reasons. This criticism, however, neglects that the vast majority of American employers also operate at-will. Consequently, agencies will not operate at a disadvantage in this regard vis-à-vis alternative jobs that prospective civil servants could apply for. To the extent this assessment is mistaken, however, OPM believes benefits of Schedule Policy/Career outweigh any such potential costs.

Commenters 14729, 23838, 28756, and 32822 argue that this rule could impede agencies' ability to hire scientific and technical personnel, particularly for scientific and cybersecurity positions. They assert that scientists require independence from agency leadership to adhere to the scientific method free from political intrusion and so scientists would opt to go elsewhere. Similarly, commenters suggest that technical positions in high demand, like cybersecurity, being classified as Schedule Policy/Career would harm the Federal Government's ability to recruit talent.

OPM believes these commenters are exaggerating the scope or impact of the proposed rule on the scientific, cybersecurity, and technical communities. E.O. 14171 focuses coverage of Schedule Policy/Career on policy-influencing positions that exercise significant authority to shape and implement actions that significantly impact all Americans. These positions exercise authority delegated to them by the President. Although the E.O. does not specifically exclude these highly technical positions (e.g., scientists, cybersecurity experts, etc.) from inclusion in Schedule Policy/Career, it would be inappropriate to include or exclude these positions solely based on these duties. Rather, agencies will need to assess each position's duties within the meaning of their "confidential, policy-determining, policy-making, or policy-advocating

character." It is certainly possible that agencies will identify scientific and technical positions for inclusion in Schedule Policy/Career. However, OPM expects those positions will reflect policy-influencing duties that, for example, directs which scientific projects should be resourced throughout the agency or whether to advocate to Congress for additional appropriated funds to carry-out new projects. Each agency's determination about the policy-influencing character of these positions, not the fact that they conduct research or perform highly technical duties or functions will determine whether or not they are recommended for inclusion in Schedule Policy/Career. OPM expects that, generally, relatively few of these line scientific, cybersecurity, or technical positions will be moved into Schedule Policy/Career because most do not perform policy-influencing work. And as described elsewhere in this final rule, the number of impacted employees across the entire Federal civil service is relatively small – approximately 2%.

Finally, even if OPM believed that Schedule Policy/Career would impair agency recruitment and retention efforts, such costs must be considered alongside the benefits discussed above. Commenter 32359 draws OPM's attention to McKinsey research showing underperforming employees can reduce overall team productivity by 30 percent. OPM agrees this is a significant impairment on agency operations and believes the benefits of facilitating removal of underperforming employees who impair agency performance exceed the costs.

Moreover, the President has determined that the benefits of Schedule Policy/Career—which include enabling agencies to promptly dismiss underperforming senior employees who drag down their agencies' overall performance—outweigh the costs. Constitutionally and statutorily, the President is individually authorized to weigh those policy costs and benefits and decide which course of action to pursue. The President has determined that the challenges discussed above necessitate creating Schedule Policy/Career. It is OPM's responsibility to assist the President in the carrying out of his duties, not vice versa. Consequently, even if OPM were not independently persuaded that the benefits of Schedule Policy/Career outweigh the costs—and OPM is—OPM would credit a Presidential judgement on the matter and adopt the same

conclusion.

ii. This Rule will Improve Performance Management

Commenters 0563, 1152, 1142, and others argue Schedule Policy/Career is a solution in search of a problem because it seeks to bypass the performance management shortcomings that have plagued Federal agencies. They suggest that it is a poorly designed tool to improve performance management because OPM has failed to provide evidence to suggest that all poor performers are policy-influencing employees, and, therefore, streamlining terminations based on the type of work an employee performs rather than how well the employee performs is suboptimal. OPM agrees that were Schedule Policy/Career designed to be a performance management tool for the entire Federal workforce it would be poorly designed. However, commenters misunderstand the purpose of E.O.s 13957 and 14171, and thereby, this rule, because it is not intended to be a performance management tool for the entire Federal workforce.

Neither E.O.s 13957 and 14171 nor this final rule claim to solve performance management challenges across the entire Federal workforce. Instead, the E.O.s and this rule explain that poor performance by policy-influencing employees is especially problematic because those are the employees who shape how the agency itself executes its mission. So, while OPM agrees with the fact that an employee encumbers a policy-influencing position says nothing about their individual performance, OPM recognizes that it says a lot about the ramifications if they perform poorly. OPM also acknowledges that chapter 43 and 75 procedures make it difficult for supervisors to effectively address poor performance or misconduct. The President has determined that heightened performance accountability is necessary in policy-influencing positions. This rulemaking and the executive orders underpinning it are not intended to address all performance management across the entire Federal workforce. Rather, the final rule is intended to address the serious consequences of poor performance, misconduct, or anti-democratic resistance committed by career employees critical to executing the President's agenda.

Commenters 12636, 13363, 19094, 34954, and others, expressed concern that Schedule Policy/Career employees should retain collateral rights such as freedom from unlawful discrimination on the basis of race, sex, religion, and other protected characteristics. They also argued that employees will be subject to more discrimination as a result of the rule. OPM notes that nothing in this rule precludes an employee covered by this final rule from filing complaints of discrimination with the EEOC. This rule provides for termination for misconduct or poor performance, and discrimination complaint processing is out of scope for this rule. Where an employee complains of discrimination, he or she can seek protection from unlawful practices through the EEO complaint process. Also, commenters' concerns that covered employees will be at more risk of experiencing invidious discrimination as a result of this rule are mere speculation. While covered employees may seek redress of terminations or other adverse actions at the EEOC, any such increase is not, on its own, indicative of more discrimination. And any such increase in the number of complaints brought before the EEOC is outweighed by the benefit to the public by enabling the President to execute on his constitutional prerogative to enact his agenda as endorsed by voters.

Commenters 14285 and 35065 argue that without access to appeal procedures under chapters 43 and 75, employees will pursue their claims in Federal district court. However, binding Supreme Court precedent holds that the CSRA is the exclusive remedial statutory framework for adverse action appeals and judicial review. *See United States v. Fausto*, 484 U.S. 439 (1988). Thus, employees whom the CSRA statutorily precludes from appealing adverse actions cannot obtain judicial review in Federal court. Indeed, the CSRA was passed in large part to create a unified framework for judicial review of adverse actions instead of a patchwork of district court rulings. Rather than reliance on Article III courts, E.O. 13957 provides for internal executive branch procedures to prohibit unlawful discrimination. The CSRA does not give district courts jurisdiction to hear challenges to actions ordinarily covered under chapters 43 and 75 taken against Schedule Policy/Career employees.

iii. Compensation Incentives

Comment 3727 raised questions on whether employees appointed under Schedule Policy/Career will be eligible for various compensation incentives including student loan repayment, awards, recruitment, relocation, and retention incentives ("3Rs"), and severance pay. Commenter 1876 suggested OPM implement retention incentives for long-tenured employees placed into Schedule Policy/Career to prevent brain drain in critical policy areas.

OPM appreciates these comments and recognizes that reassigning employees to positions in Schedule Policy/Career may result in ineligibility for certain incentives. These tools are used to recruit, retain, and relocate talent to positions critical to the agencies' missions and should remain available to agencies on a limited basis as positions transition to Schedule Policy/Career. OPM is basing this decision on needing to provide a grace period for continuation of receipt of an incentive(s) upon principles of equity and good conscience, to ensure that the government upholds its agreements with employees, and to mitigate the impact described by Commenter 1876. Therefore, OPM is modifying its regulations as immediately discussed below to allow agencies and employees under an applicable incentive agreement to complete the terms of their agreements or continue retention incentive payments when no service agreement is required as warranted.

Schedule Policy/Career employees would normally be ineligible for payments under the Student Loan Repayment Program in 5 U.S.C. 5379, given the statutory exclusion of any employee who "occupies a position that is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character." 5 U.S.C. 5379(a)(2). OPM is therefore modifying its regulations at part 537 to allow employees whose positions are moved into Schedule Policy/Career to continue to receive student loan repayment benefits under the terms of the applicable service agreement unless eligibility is lost as described in 5 CFR 537.108.

Schedule Policy/Career employees would normally be ineligible for 3Rs under 5 U.S.C.

5753(a)(2)(C) and 5754(a)(2)(C). If employees receiving one of the 3Rs have already entered into agreements with their agency, maintenance of the status quo is strongly desired, provided the employees are otherwise fulfilling the terms of their service agreements. OPM is, therefore, modifying its regulations at subparts A, B, and C of part 575 to allow agencies to continue paying any outstanding 3Rs under the terms of any existing service agreements. For recruitment and relocation incentives, agencies will still be able to terminate service agreements under 5 CFR 575.111(a) and 575.211(a), respectively, for employees whose positions are moved into Schedule Policy/Career. Employees would be entitled to all recruitment or relocation incentive payments that are attributable to completed service and to retain any portion of a recruitment or relocation incentive payment that they received that is attributable to uncompleted service as provided in 5 CFR 575.111(e) and 575.211(e). For retention incentives, OPM is authorizing agencies to continue paying the incentives to employees whose positions are moved into Schedule Policy/Career at the time when the employee is receiving a retention incentive based on the terms of an applicable service agreement, or when the employee is receiving a retention incentive without a service agreement as long as the agency finds the payment is warranted under 5 CFR 575.311(f).

However, agencies will continue to have the discretion to use other compensation flexibilities to assist in recruiting and retaining Schedule Policy/Career employees. This includes the GS superior qualifications and special needs pay setting authority to set pay above step 1 for employees newly appointed or reappointed after a 90-day break in service (5 U.S.C. 5333 and 5 CFR 531.212). Other examples include the GS maximum payable rate rule, which allows agencies to set GS pay based on a higher rate of pay the employee previously received in another Federal job (5 CFR 531.221-223); critical position pay, which allows OPM (in consultation with OMB) to provide an agency authority to fix the rate of basic pay for one or more positions requiring an extremely high level of expertise at a higher rate than would otherwise be payable, up to level I of the Executive Schedule or higher with the approval of the President (5 U.S.C.

5377 and 5 CFR part 535); and authority to approve creditable service for annual leave accrual rates based on non-Federal civil service work and uniformed service experience (5 U.S.C. 6303(e) and 5 CFR 630.205).

Schedule Policy/Career employees will also be eligible for awards under 5 U.S.C. chapter 45 to the extent permitted under Administration policies. In the past, some Administrations have barred awards for noncareer political appointees, but this was done via policy, not because of a statutory requirement. An Administration could establish a policy barring awards for noncareer political appointees (e.g., Schedule C employees, noncareer appointees in the SES, and Presidential appointees in the Executive Schedule) while allowing awards for Schedule Policy/Career employees.

Schedule Policy/Career employees who hold an appointment without a time limitation will be considered to hold a qualifying appointment that conveys potential eligibility for severance pay, subject to meeting all other eligibility requirements. OPM regulations provide that a nonqualifying appointment for severance pay eligibility includes a Schedule C appointment, a noncareer SES appointment, or "an equivalent appointment made for similar purposes." A Schedule Policy/Career appointment is not such an equivalent appointment since its purpose is to provide for career employment.

iv. Other Legal and Policy Arguments are not Persuasive or Relevant

Several commenters raised a variety of arguments challenging the legality of the proposed rule. OPM will address these arguments below.

The Supreme Court's Decision in Elrod *is not Instructive*

Commenter 8019 expressed concern with the legality of Schedule Policy/Career with respect to a set of legal precedents which, in that commenter's opinion, render Schedule Policy/Career unlawful. OPM has carefully considered and rejected each of these arguments. As

Commenter 8019 notes, *Elrod v. Burns*[456] began a line of Supreme Court precedents which dealt with the legality of political patronage-based firing practices. *Elrod* concerned a practice in the Cook County, Illinois sheriff's department of, upon a change in administration, replacing roughly half of the employees hired by the outgoing party with new employees of the incoming party.[457] The outgoing employees were terminated as a matter of course simply because they lacked adequate sponsorship by the incoming party. The issue in that case was whether this practice violated the First Amendment rights of terminated employees, even though those employees had no specific tenure protections under any statute or regulation. A majority of the *Elrod* court held that purely partisan dismissals were an intrusion on employees' First Amendment freedoms of assembly and expression; it further held that this intrusion could not be justified for reason of enhancing the efficiency of the civil service, nor for reason of ensuring loyalty to the political administration.[458]

Commenter 8019 asserts that the arguments made for allowing the at-will dismissal of the *Elrod* plaintiffs are identical to the arguments made on behalf of Schedule Policy/Career today. It is true that the *Elrod* court considered and rejected three arguments against tenure protection—one argument based on bureaucratic efficiency, one based on bureaucratic responsiveness to politics, and one based on the preservation of the role of parties and partisan politics in the democratic process more generally, and that the first two of these arguments bear at least superficial resemblance to arguments made in OPM's proposal rule. However, the arguments arose in a radically different context, and the difference in context colors their legal force. In *Elrod*, it was understood that appointments and dismissals to plaintiffs' positions were made on the basis of partisan politics alone, and the core legal issue was whether the democracy and efficiency arguments made in favor of patronage dismissal outweighed the employees' First

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[456] 427 U.S. 347 (1976).
[457] The other half of employees were "merit" employees with some form of tenure protection.
[458] Only three justices joined the plurality opinion. Two members of the majority would have ruled on narrower grounds.

Amendment rights, which the plurality believed to be seriously imperiled by the sheriff department's practice. The plurality rejected out-of-hand any separation of powers concerns that might otherwise be implicated, because it viewed the First Amendment as the core issue.[459] The plurality reasoned that because, to hold their jobs, plaintiffs must have "pledge[d] their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party…,"[460] they had to choose between their First Amendment rights and their government jobs. The Court thus found that something like "coerced belief" was thus a condition of plaintiffs' continued employment.[461]

This framing in *Elrod* created a hostile stance toward arguments for at-will employment as part of the procedural posture of the case, such that the arguments had to meet an overwhelming threshold of persuasiveness to be accepted by the Court.[462] Still, even in this context, the Court suggested that it was merely "not persuaded" by arguments for at-will employment or found them "not without force, but…inadequate…to validate patronage wholesale."[463] In other words, the Supreme Court found that arguments for at-will employment had merit, but they did not have the kind of merit which could override serious impediments to the exercise of constitutional rights as implicated by pure patronage firings.

Contrast this with the present situation. Both E.O. 14171 and the present rule make clear that those encumbering Schedule Policy/Career positions "are neither expected nor required to personally support the President or his policies."[464] They merely must "faithfully implement

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[459] *See* 427 U.S. *at* 352-53 (rejecting the applicability of *Myers v. United States* on the ground that "[T]here can be no impairment of executive power, whether on the state or federal level, where actions pursuant to that power are impermissible under the Constitution. Where there is no power, there can be no impairment of power.").
[460] *Id*. at 355. *See also id.* at 357 (referring to "Patronage…to the extent it compels or restrains belief or association.").
[461] *Id*.
[462] *Id.* at 362 ("It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny…. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest.").
[463] *Id*. at 364, 367.
[464] 90 FR 8626; 90 FR 17208 ("Contrary to fears of a return to the spoils system, the President expressly forbid political loyalty tests for Policy/Career employees.").

administration policies to the best of their ability, consistent with their constitutional oath and the vesting of executive authority solely in the President."[465] Like most private sector employees, and many state government employees, Schedule Policy/Career employees will be terminable for poor performance or insubordination but are protected from purely partisan dismissals, completely sidestepping the core issue in *Elrod*. With both the E.O. and the present rule, then, the compelled speech issue which framed the *Elrod* decision is not present.

As Commenter 8019 suggests, *Elrod*'s logic was extended to "confidential" employees by *Branti v. Finkel*,[466] which dealt with assistant county public defenders. In that case, the trial court specifically held, and the Supreme Court accepted, that the plaintiffs "had been selected for termination solely because they were Republicans."[467] At issue, again, was solely where to draw the line between employees who can be dismissed because of their party affiliations and those who cannot. The Court held that "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."[468] *Branti,* thus, also has no real applicability to Schedule Policy/Career. Not only was the case about patronage firing, but it also dealt with employees who, the Court held, had no information or duties which related to partisan political concerns of the sort implicated by those career positions which are directly related to advancing the policy priorities of the President. For the same reason, Commenter 8019's references to *Wieman v. Updegraff*,[469] *In Cafeteria Workers v. McElroy,*[470] and *Keyishian v. Board of Regents*,[471] which concern the extent to which employees can be disciplined by the government for membership in a subversive political

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[465] 90 FR 8626.
[466] 445 U.S. 507 (1980).
[467] *Id.* at 510.
[468] *Id*. at 519.
[469] 344 U.S. 183 (1952).
[470] 367 U.S. 886 (1961).
[471] 385 U.S. 589 (1967).

organization, are inapplicable.

Somewhat recognizing the distinction between *Elrod* and the present situation, Commenter 8019 suggests that the language protecting Schedule Policy/Career employees from patronage-based dismissal is pretextual, citing several supposed occurrences of partisan firing since President Trump's second inauguration. Commenter's examples, however, are primarily cases where employees were dismissed based upon their conduct in office, not their personal political views. Such conduct-based dismissals do not implicate the First Amendment. Commenter's sole example of alleged screening based on political views was the administration ending the details of career employees temporarily assigned to the White House National Security Council and returning them to their home agencies. The employees were not fired and, even if they had been, White House policy council positions with national security responsibilities are among the most sensitive policymaking positions in government. Terminations from such positions, much less reassignments from them, raise zero First Amendment concerns. Accordingly, there is no basis on the record to suggest that OPM's current rulemaking is a pretext for mass firings of public servants.

The Final Rule is Consistent with the CSRA and DPAA

Some commenters asserted that Schedule Policy/Career dismissal procedures violate the Lloyd-La Follette Act, requiring certain procedural notice before removal of an employee can be effected. Although the Lloyd-La Follette Act was superseded by the CSRA, the CSRA contains procedural requirements applying to adverse actions and also generally provides for appeals of adverse actions, including dismissals, to the MSPB. In a similar fashion, the DPAA extended the rights of non-preference eligibles to receive pre-termination notice, and also to appeal adverse decisions to the MSPB. As discussed in the proposed rule and above, both the CSRA and the DPAA authorize OPM and the President to exempt employees in policy-influencing positions from access to chapter 75 adverse action procedures and appeals. Thus, this rule maintains harmony with both the CSRA and the Due Process Amendments.

The Final Rule does not Promote Hatch Act Violations

Commenters 3778, 4652, 13159, 30292, and others, raise concerns that the establishment of Schedule Policy/Career will increase Hatch Act violations or vitiate the law in its entirety by obscuring the distinction between political and career employees. All Federal employees in the executive branch, with the exception of the President and Vice-President, are subject to the requirements of the Hatch Act concerning restrictions on political activity. Certain employees are subject to further restrictions, depending on their employing agency or the roles/functions they perform. The Hatch Act makes no distinction between career and political appointees in terms of application, except for appointees appointed by the President after Senate confirmation, and certain employees paid by an appropriation covering the Executive Office of the President. Even those exceptions primarily relate to enforcement of the Hatch Act rather than covering the substance of the restrictions on political activity. These commenters misconstrue the Hatch Act as allowing political appointees to engage in partisan activity while prohibiting career employees from engaging in the same activity. In fact, all appointed executive branch employees must abide by the Hatch Act restrictions made applicable to their agency or their particular position. Accordingly, OPM does not believe that Hatch Act concerns attach to this rule.

No Impacts to Retirement Benefits

One commenter raised concerns that placement in Schedule Policy/Career will impact retirement benefits. Retirement benefits are not impacted as a result of this rulemaking. If an employee is terminated—with or without cause—retirement eligibility is determined based on their age and years of Federal service. Eligibility for a voluntary or involuntary immediate retirement (one that begins within 30 days of separation) would permit the former employee to retain their Federal Employees Health Benefits (FEHB) health insurance benefits provided that they meet the eligibility requirements for continued coverage (i.e., the employee has been enrolled in the FEHB program from their first opportunity to enroll or for the full five years of service immediately preceding retirement). If an employee is terminated and the only retirement

eligibility is for a deferred annuity, the FEHB insurance terminates and cannot be reinstated in retirement. For employees terminated for cause, they would not be eligible for a discontinued service retirement or voluntary early retirement authority (i.e., VERA). They may be eligible for voluntary immediate retirement options (e.g., Minimum Retirement Age + 10) that may allow them to keep or, after postponing their retirement, reinstate their FEHB health insurance benefits prospectively, provided that the employee meets the eligibility requirements to retain FEHB coverage into retirement.

Other Concerns

A few commenters argued that this rulemaking violates 38 U.S.C. 4214 by denying veterans certain hiring and retention preferences. Nothing in this rule bears upon or affects veterans preference in employment as provided for at 38 U.S.C. 4214.

Some commenters argued that this rulemaking violates 5 U.S.C. 609(b) because OPM failed to convene a small business advocacy review panel before issuing the proposed rule. OPM disagrees. This rule has no impact on any small business. It affects only current or prospective Federal employees.

A few commenters argued that this rulemaking fails to provide information required under Section 515 of the Information Quality Act, Pub. L. 106-554. Relatedly, commenters (14463, 16846, 30317, and 30433) further allege that OPM did not verify the information presented by the sources. On the contrary, OPM used publicly available sources, including data maintained in OPM's own FedScope database. OPM believes that the data sets relied upon represent the best available information concerning the size, scope, and duties of Federal employees, as well as data concerning both disciplinary and performance-based actions.

One commenter argued that this rulemaking is incompatible with the Rehabilitation Act, 29 U.S.C. 791, because it fails to account for disproportionate impacts on Federal employees with disabilities. Despite this assertion, the commenter does not present any evidence that this rulemaking would disproportionately impact Federal employees with disabilities. There is

nothing in the rule that affects the hiring of individuals with disabilities into Federal employment. The hiring of such individuals will continue to be governed by applicable law and regulation. To the extent that the commenter argues that this rulemaking violates the Rehabilitation Act under a disparate-impact theory of liability, the President has made clear that such a theory is contrary to the Constitution.[472]

A few commenters argued that the rulemaking is incompatible with the holding in *Bowen v. Georgetown University Hospital*.[473] In *Bowen*, the Supreme Court held that an agency's rulemaking is not retroactive unless Congress expressly authorized retroactivity. This rule does not contain any regulatory provisions that are retroactive in nature. *Georgetown University* explicitly addressed a statutory scheme which the Court determined did not provide for retroactive regulatory coverage, although the agency had, in fact, invoked coverage on a retroactive basis. There is nothing in this rule that provides for retroactive reclassification of positions under Schedule Policy/Career, especially insomuch as the rule only applies prospectively.

Another commenter argues that this rulemaking runs afoul of the Supreme Court's holding in *Service v Dulles*.[474] In *Service*, the Supreme Court held that the dismissal of a Foreign Service Officer by the Secretary of State was invalid because the Secretary had violated his own internal rules regarding a dismissal which was based on a security violation. The Court found that having promulgated the rules the Secretary was bound by them. Schedule Policy/Career does not implicate the Court's decision in *Service* because Schedule Policy/Career employees will serve on an "at will" basis, and dismissals will not need to be based on "for cause" reasoning.

Lastly, OPM notes that some employees reassigned or hired into Schedule Policy/Career positions may be subject to public financial disclosure reporting under regulations prescribed by

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[472] E.O. 14281, "Restoring Equality of Opportunity and Meritocracy," 90 FR 17537 (April 23, 2025).
[473] 488 U.S. 204 (1988).
[474] 354 U.S. 363 (1957).

the Office of Government Ethics (OGE).[475] Under 5 CFR 2634.202(e), public filers subject to public financial disclosure reporting include employees whose positions are excepted from the competitive service due to their positions being of a confidential or policy-making character. While no commenters raised concerns over the application or impacts associated with the application of these regulations and this final rule, OPM will work with OGE to provide guidance to agencies on ensuring that they appropriately identify employees subject to these disclosure requirements.

E. Reliance Interests

As discussed in the proposed rule, OPM has concluded that prior expectations or reliance interests in maintaining chapters 43 and 75 procedures as articulated in the April 2024 rulemaking are outweighed by the policy benefits of the current rulemaking. Several commenters, including but not limited to Commenters 1550, 16323, 18739, and 35517 argued the rule undermines the American public's reliance on a non-partisan civil service in many aspects of their lives, including, as Commenter 35517 asserts, "help[ing] families in the wake of hurricanes and deadly fires, facilitat[ing] access to lifesaving payments like Social Security and unemployment insurance, and protect[ing] national security."

These concerns are unfounded and are untethered to the substance of the rule. The rule solely impacts those who occupy policy-influencing positions. Few line employees responsible for executing service delivery meet these criteria. Further, as discussed extensively above, Schedule Policy/Career positions will remain nonpartisan career positions filled and vacated without regard to employees' personal political affiliation. Those such as Commenter 35517 who raise concerns that this rule will adversely impact the public by undermining its ability to rely on service delivery are seemingly arguing against an imaginary two-step, that reclassifying employees into Schedule Policy/Career will *ipso facto* result in a reduction in overall headcount

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[475] See 5 CFR part 2634, subpart B.

amongst Federal employees. Reduction in headcount is an issue unrelated to this rule and moreover, employees who faithfully perform their jobs to the best of their ability have little to fear from Schedule Policy/Career. The order expressly prohibits discrimination based on political affiliation, and agencies have strong incentives not to dismiss employees who are competently performing their assigned duties. Doing so would undermine their ability to complete their mission. Employees should be assumed to understand their performance expectations when they take their jobs. Merit Principle Four requires employees to maintain high standards of integrity and conduct, and Merit Principle Six directs agencies to separate employees who do not improve inadequate performance. The employees at risk of dismissal are those who fail to perform adequately or who engage in serious misconduct such as corruption or injecting their personal politics into the performance of their official duties. Congress has made it clear that the civil service benefits from such employees' removal. In such instances, an employee's actual reliance interest is the ability to violate merit principles with little risk of removal—which is not a legitimate reliance interest.

Other commenters, such as 10344, 21721, 30863, and 34821 assert that Federal employees who have invested in agency-specific expertise on the premise they would possess adverse action and procedural protection rights, i.e., job security, have developed settled expectations and reliance interests in those rights. Reclassifying such employees as Schedule Policy/Career, when appropriate, does in fact upset those reliance interests.

However, OPM believes that the prejudice to such employee reliance interests is small and does not believe the thousands of civil servants who perform their duties with integrity and excellence will leave the Federal service for lack of protections. Regardless, removal restrictions provide little benefit to the many employees who perform high quality work and are at little risk of dismissal. As previously discussed, and as Commenter 32359 noted, the Congressional Budget Office estimates that most Federal employees place a relatively low value on access to adverse action appeals. OPM believes this is likely because fully successful employees know

they have little need of them.

Even if the prejudice to employee reliance interests were not small, the policy benefits to the executive branch would outweigh them. Poor performing employees who engage in misconduct, corruption, or inject partisanship into the performance of their official duties present a serious concern that undermines the efficiency and integrity of the civil service writ large. The corruption and misconduct at the FDIC demonstrate this clearly. Democracy depends on a nonpartisan civil service in which career employees effectively and faithfully implement the law and the policies of the elected President to the best of their ability. In our system of governance, any reliance interests on so-called "job security" should be subordinate to the necessity of a competent, ethical, and democratically accountable civil service.

Many commenters argued that the proposed rule will create a "chilling effect" on Schedule Policy/Career employees in the performance of their duties, particularly in offering candid advice to agency leadership. Commenters expressed concern that employees would choose not to provide this advice out of fear that doing so would lead to removal if political leadership disagreed. In the April 2024 rule, OPM made a similar assertion that Schedule F "would chill employees broadly and interfere with their willingness to present objective analyses and frank views in carrying out their duties, thus diminishing the reasoned consideration of policy options."[476]

OPM understands these commenters' concern but respectfully disagrees that the rule will create a chilling effect for the following reasons. First, the purpose of this rule is to reinforce the merit-based, nonpartisan character of the civil service and improve the democratic responsiveness of the Federal Government. The rule clarifies that Schedule Policy/Employees must be able to serve the public and carry out the policies of the elected Administration and agency heads without regard to their personal political beliefs. Nothing in the rule authorizes or

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[476] 89 FR at 25037.

encourages discipline or removal of employees based on the content of their good-faith professional advice.

Second, the rule expressly recognizes that robust, candid internal deliberation and professional disagreement are an essential part of effective government decision-making. As the proposed rule explains, policy-influencing Federal employees are not expected to simply say yes to what they are told. Rather, they "provide their frank and fearless advice to agency leadership."[477] This includes advice that challenges assumptions, identifies legal or operational risks, or proposes alternatives, so long as they ultimately implement the lawful decisions of agency leadership. This final rule is directed at ensuring faithful execution of leadership's final, lawful decisions, not at suppressing the process of reaching those decisions.

Third, commenters' fear that the rule creates a chilling-effect is speculative and is already addressed by longstanding principles of civil service law that predate this rule. All Federal employees swear an oath to the Constitution which requires them to "faithfully discharge the duties of the office" that they hold.[478] In fulfilling their oaths, all Federal employees are expected to provide their best professional judgment and implement lawful policy decisions once made, even where they personally disagree. The rule does not alter that balance. It neither expands agency authority to discipline employees for expressing dissenting professional views in appropriate channels, nor eliminates protections taken against Schedule Policy/Career employees based on PPPs.[479] The President took proactive steps to guard against arbitrary actions prohibited under 5 U.S.C. 2302(b) by requiring agencies to establish through internal agency policies protections for Schedule Policy/Career employees from PPPs including whistleblower reprisal. Data from the most recent FEVS shows that 72% of Federal employees report positively that

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[477] 90 FR at 17208-09.
[478] 5 U.S.C. 3331.
[479] *See* Section 6 of E.O. 13957.

they can disclose suspected violations of any law, rule, or regulation without fear of reprisal.[480] In a 2011 MSPB report, employees are more willing to "blow the whistle" when the wrongdoer is a political appointee compared to their supervisor or manager.[481]

Fourth, OPM takes note of empirical research surveying state personnel directors in six states with fully or partially at-will workforces: Colorado, Florida, Georgia, Kansas, Missouri, and South Carolina. This research shows only a small minority of state directors believe at-will employment discourages government employees from either whistleblowing or freely voicing objectives to management directives, while an absolute majority affirmatively believe it does not have these effects.[482] OPM credits this research and takes it as empirical evidence that at-will employment will not significantly deter whistleblowing or create a chilling effect in the Federal workforce. OPM also notes that commenters failed to provide concrete evidence or examples of a chilling effect in the many states, for example, that currently operate their workforces fully or partially at-will.[483]

Fifth, the rule is designed to reduce the risk of chilled speech by clearly delineating the boundary between protected professional disagreement and unprotected refusal to carry out lawful instructions. By expressly prohibiting agencies from taking personnel actions against

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[480] U.S. Off. of Pers. Mgmt., *Federal Employee Viewpoint Survey: 2024 Governmentwide All Levels-All Index-All Items Reports* at Q8, https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-all-levels-all-index-all-items-reports/2024/2024-governmentwide-all-levels-all-index-all-items-report.xlsx.

[481] MSPB, *Blowing the Whistle: Barriers to Federal Employees Making Disclosures* at 37-38 (Nov. 2011), https://www.mspb.gov/studies/studies/Blowing_The_Whistle_Barriers_to_Federal_Employees_Making_Disclosures_662503.pdf.

[482] J. Kim & J. Edward Kellough, *At-Will Employment in the States, Examining the Perceptions of Agency Personnel Directors*, 34(2) Rev. of Pub. Pers. Admin 218-236 (2014), Table 2.

[483] Comment 26673, submitted by a coalition of Attorneys General affiliated with the Democratic party, draws OPM's attention to a study published in 2006 examining the effect of at-will employment in Florida state government, shortly after Florida passed legislation making most managers at-will employees. This study shows that some managers believed the reform had negative effects on employee's willingness to speak out, while others disagreed. This study does not provide any concrete examples of a chilling effect, nor does it attempt to quantify the extent to which mangers believe it had a chilling effect. OPM takes it to show that shortly after the reform took effect Florida managers had equivocal perceptions of whether at-will employment creates a chilling effect. OPM finds Kim and Kellough's (2014) analysis more predictive of the likely effect of at-will employment in the Federal government. Their more recent study has significantly larger sample size across six states, rather than an analysis of a single state shortly after reforms were effectuated. Their study also empirically assesses the extent to which personnel directors perceive a chilling effect and finds that only about one-in-seven do so. This study thus does make empirical estimates, has a smaller margin of error, and is more likely to reflect the effects of at-will employment generally rather than idiosyncrasies affecting implementation in a single state.

Schedule Policy/Career employees based on political affiliation and requiring political loyalty pledges, and by reaffirming that disagreement with policy—without more—is not a lawful basis for removal, the rule provides employees with clearer guidance and greater assurance that they may offer forthright advice without jeopardizing their careers. Consequently, between the proactive steps taken by the President in E.O. 13957 to extend PPP protections to Schedule Policy/Career positions and these data points, the so-called chilling effect is unlikely to emerge from this rule.

Commenter 27705 and others argue that regulated entities and private sector companies engaging with the Federal Government rely on stability amongst interpretations of law and information analysis that will dissipate with the implementation of Schedule Policy/Career. These concerns presuppose similar imagined mass removals as discussed above, as well as see-saw changes in interpretation from administration to administration. The Supreme Court's recent ruling in *Loper Bright Enterprises v. Raimondo*,[484] which came after OPM's prior rulemaking, should also minimize concerns of such "whipsaw changes" in Federal regulations. Courts and litigants now look to the best interpretation of a statute rather than allowing agencies to construe ambiguous terms. The former doctrine of *Chevron* deference allowed agency leadership to read its policy preferences into statutory ambiguities, which could produce drastic policy changes with each new presidential administration. The end of *Chevron* deference gives the executive branch much less discretion to unilaterally change course without authorization from Congress. This will provide regulated entities with greater regulatory certainty, minimizing the potential for "turmoil."

Finally, the President has determined that the harms discussed above and in the relevant executive orders outweigh any reliance interests in the status quo. The President is the individual statutorily and constitutionally vested with authority to make that determination. Even if OPM

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[484] 603 U.S. 369 (2024).

were not independently convinced of that fact—and it is—OPM would credit a Presidential determination weighing the costs and benefits of prospective changes to the civil service rules and regulations.

At least one commenter, Commenter 1785, expressed concern that this rulemaking may be invalid under the authority of *FCC v. Fox Television Stations, Inc.*[485] *Fox* held, following the Court's earlier opinion in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,[486] that while there is generally not a higher standard for a change in agency policy under APA Section 706(2)(a) arbitrary and capricious review (as compared to the announcement of a completely new policy), there are some relevant differences when the agency changes course. First, as discussed above, when an agency announces a change in policy through notice-and-comment rulemaking, a minimum reasoned explanation must show awareness that there exists a change in policy; it cannot "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."[487] The agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates."[488] In *Fox*, the Supreme Court suggested two circumstances in which the agency might have a higher evidentiary burden when changing course, as opposed to when simply announcing a new policy: "when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account."[489]

Commenter 1785 raises the issue that, without justifying its failure to address reliance interests, the present rulemaking may be arbitrary and capricious. The commenter does so

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[485] 556 U.S. 502 (2009).
[486] 463 U.S. 29 (1983).
[487] 556 U.S. at 515.
[488] *Id*.
[489] *Id.*

without elaborating.[490] It is thus unclear what reliance interests the commenter has exactly in mind. However, case law decided after the *Fox* decision suggests that the reliance interests at issue must generally be quite strong to outweigh an agency's authority to undertake an otherwise valid change of course for purposes of APA arbitrary and capricious review. For example, in *Encino Motorcars, LLC v. Navarro*,[491] the Department of Labor, in a 2011 rulemaking, reversed course from regulations dating to 1978 which held that service advisors at automotive dealerships are exempt from FLSA overtime pay requirements. The Court held that the heightened threshold based on the reliance interests discussed in *Fox* was not met. The Court recognized that compensation packages for auto dealership workers had been negotiated for decades with the prior interpretation of the FLSA as a background assumption, so that the change in policy might require an industrywide rethinking of compensation schemes for covered employees. The heightened *Fox* threshold was not met, because, in the Court's view, the agency said almost nothing to justify its complete about-face on the issue.[492]

It is unclear that the agency's scant attempt to justify its new policy in *Encino Motorcars* would have met even the usual, highly deferential standard for arbitrary and capricious review under the APA, given the almost complete absence of justification for the new policy on the record. The rulemaking thus might be compared to *United States Telecom Ass'n v. Federal Communications Commission*.[493] There, the FCC proposed to change its classification of broadband internet services from an information service to a telecommunications service in furtherance of net neutrality. Industry argued that their infrastructure investment was sufficiently based on the existing regulatory regime that, under the authority of *Fox*, the FCC should not be allowed to change course. The court disagreed. In its rulemaking, the court explained that the

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[490]As a threshold matter, an agency need not consider reliance interests which are merely hinted at in passing, without adequate elaboration. *See Mingo Logan Coal Co. v. Env't Prot. Agency*, 829 F.3d 710, 722 (D.C. Cir. 2016) ("An agency cannot be faulted for failing to discuss at length matters only cursorily raised before it.").
[491] 579 U.S. 211 (2016).
[492] "It did not analyze or explain why the statute should be interpreted [as the new policy required]." *Id*. at 224.
[493] 825 F.3d 674 (D.C. Cir. 2016).

agency had specifically taken the industry's reliance interests into account and taken action despite those interests; the FCC had determined that the burdens tied to choice of regulatory regime were a comparatively minor driver of industry investment, compared to demand and competition, such that the industry's reliance interests were not sufficient to override the agency policy.[494]

Nothing like the industry-wide reliance interests at issue in *Encino Motorcars* are present here. It is debatable whether the industry reliance interests overridden in *U.S. Telecom. Ass'n* are present for that matter. Whatever reliance interests career Federal employees occupying policy-influencing roles may possess, such as reliance in the availability of chapter 75 and chapter 43 proceedings despite their reclassification into the excepted service, would seem to be a comparatively minor driver of the decision to, for example, accept the role. Nothing implicated in Schedule Policy/Career has anything like the economic impact of the regulatory scheme at issue in *Encino Motorcars*, as we are dealing with a very small proportion of the Federal workforce compared to all employees in a given industry. Further, it is unlikely that the availability of specific forms of review over termination proceedings is as important a driver of individual employment decisions for Federal workers as, for example, salary, position in the organization, occupational autonomy, and prestige.[495] OPM also notes again that this rulemaking deals with a small proportion of the Federal workforce—only an estimated 2% of Federal workers, will likely be moved into Schedule Policy/Career—and with the availability of procedural protections which are far less central to employment decisions than the pay provisions at issue in *Encino Motorcars*.

Even if this were not the case, and Schedule Policy/Career applied more broadly and had great economic significance to employees, the President has determined and OPM concurs that

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[494] *See also Solar Energy Indus. Ass'n v. Federal Energy Regul. Comm'n*, 80 F.4th 956 (9th Cir. 2023).
[495] OPM views the Congressional Budget Office's analysis that three-quarters of Federal employees value the availability of adverse action procedures at less than five percent of their salary as indicating it plays a relatively small role in the overall Federal compensation package.

the benefits of strengthening performance management and democratic accountability in the Federal workforce would outweigh these concerns.[496]

VI. Regulatory Analysis

A. Statement of Need

The President has determined, and OPM independently agrees, that implementing E.O. 14171 and effectuating Schedule Policy/Career is necessary to improve executive branch operations. This rule will assist in carrying out that policy. As discussed throughout the preamble, adverse action procedures and appeals make it prohibitively difficult for agencies to remove employees for all but the worst performance and conduct. This has led to significant problems with serious misconduct and corruption going unaddressed in contravention of Merit Principle Four, agencies failing to separate persistent poor performers in violation of Merit Principle Six, and many employees injecting partisanship into their duties and seeking to advance their personal political agendas while on the job. These problems are particularly acute in policy-influencing positions. Moving policy-influencing positions into Schedule Policy/Career will remove procedural impediments to holding career officials accountable for their performance and conduct, while retaining their status as career employees appointed based on merit.

Further, the principal provisions of the April 2024 final rule have either been rendered inoperative or OPM has concluded they exceed its statutory authority. OPM believes it is inappropriate to maintain obsolete or unlawful regulatory provisions.

B. Regulatory Alternatives

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[496] And, as Justice Ginsburg wrote in her *Encino Motorcars* concurrence, "[R]eliance does not overwhelm good reasons for a policy change. Even if the Department's changed position would necessitate systemic, significant changes to the dealerships' compensation arrangements, the Department would not be disarmed from determining that the benefits of overtime coverage outweigh those costs. 'If the action rests upon an exercise of judgment in an area which Congress has entrusted to the agency, of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so.'" 579 U.S. at 226-27 (*quoting SEC v. Chenery Corp.,* 318 U.S. 80, 94 (1943) (cleaned up)).

An alternative to this rulemaking is to not issue a regulation while increasing training for managers and supervisors in how to use the procedures under chapters 43 and 75. OPM has concluded this is not a viable option. Prior attempts to address the management challenges created by adverse action procedures and appeals through better use of the existing framework have failed. MSPB research shows that only two-fifths of Federal supervisors are confident they could remove an employee for serious misconduct, and just one quarter are confident they could remove an employee for poor performance.[497] Neither OPM nor the President believe that additional training or greater management support would be sufficient to effectively address agencies' difficulty in holding employees accountable, when necessary, for underperformance or misconduct.

Furthermore, OPM is statutorily tasked with executing, administering, and enforcing the civil service rules and regulations of the President.[498] E.O. 13957 amended the civil service rules to create Schedule Policy/Career. Declining to help the President execute this directive would be a dereliction of OPM's statutory duty.

Relatedly, E.O. 14171 rendered several provisions of the 2024 final rule inoperative and without effect. Subpart F of part 302 and § 210.102(b)(3) and (b)(4) of title 5, Code of Federal Regulations, no longer reflect the operative legal standards governing the Federal workforce. As OPM explained in the 2023 notice of proposed rulemaking for the prior rule, retaining out-of-date information in regulations can confuse agencies, managers, and employees and produce unintended outcomes. Human resources specialists or managers may inadvertently rely on these particular regulations.[499]

For example, employees moved into Schedule Policy/Career who review OPM's § 210.102 definitions could be given the mistaken impression that they have been converted into

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[497] Remedying Unacceptable Employee Performance at 6, 15.
[498] 5 U.S.C. 1103(a)(5).
[499] 88 FR 63879.

political appointees because those regulations state policy-influencing positions are only political appointments. However, E.O. 13957, as amended, provides that employees in Schedule Policy/Career remain career appointees who can expect to keep their jobs across changes of administration as long as they perform effectively. OPM also considered implementing E.O. 13957, as amended, but permitting incumbent employees who are reclassified or moved into Schedule Policy/Career to retain adverse action procedures and appeals. This would functionally make Schedule Policy/Career effective only for new hires, not existing employees, and would entirely sidestep concerns about impairing employee property interests in their jobs. OPM nonetheless concluded that this approach would not satisfy policy or legal concerns.

As a matter of policy, applying Schedule Policy/Career prospectively would negate most of the benefits of the rule during this presidential administration. The heightened accountability would apply only to new employees, who are a minority of the policy-influencing workforce. Most employees in policy-influencing positions would retain the adverse action procedures and appeals that substantially reduce their accountability to the President. Moreover, the most senior and experienced policy-influencing employees would remain exempt. These are the employees most important to cover under the rule, as poor performance or misconduct in the course of their duties has the largest impact on agency operations. E.O. 13957, as amended, also requires agencies to include existing positions in their reviews.[500] It would frustrate the purposes of the order to allow employees moved into Schedule Policy/Career to remain covered by chapter 75 procedures.

OPM also considered, based off the suggestion of Commenter 13578, implementing E.O. 13957, as amended, but offering individuals occupying positions converted to Schedule Policy/Career Voluntary Early Retirement (VERA) or Voluntary Separation Incentives (VSIP). VERA/VSIP are authorized in situations where an agency is undergoing substantial

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[500] E.O. 13957, sec. 5(b).

restructuring, reshaping, downsizing, transfer of function, or organization,[501] or where employees are in surplus positions or have skills that are no longer needed in the workforce.[502] Neither of these situations are applicable here, where employees are occupying positions that are *converted* to Schedule Policy/Career – not eliminated. As such, this suggested alternative is not viable. Such VERA or VSIP offers could also foster the sort of retention problems that other commenters warned against. OPM believes employees in positions transferred to Schedule Policy/Career are doing important work and OPM does not want to encourage their departure.

As a matter of law, OPM has, as previously discussed, concluded that the 2024 rulemaking's additions to part 752, subpart D exceeded its statutory authority. Section 7511(b)(2) of 5 U.S.C. categorically excludes from chapter 75 procedures excepted service employees in policy-influencing positions. As explained in the proposed rule, nothing in the CSRA or elsewhere in title 5 provides for incumbents in such positions to retain adverse action procedures and appeals. Congress drafted section 7511(b)(2) to categorically apply to all excepted service positions that an appropriate authority has determined are policy-influencing. Unlike other provisions in section 7511(b), the (b)(2) exception for policy-influencing positions applies without regard to the personal status or history of the employee encumbering the position.[503] OPM cannot by regulation extend adverse action procedures to positions statutorily excluded from coverage. Even if OPM wanted to extend adverse action procedures and appeals to employees moved into Schedule Policy/Career, it lacks statutory authority to do so. Retaining the subpart D amendments that purport to provide such adverse action procedures is thus not legally viable.

C. Impact

OPM is making these revisions to align the civil service regulations with operative legal

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[501] 5 U.S.C. 8336(d)(2)(D), 8414(b)(1)(B),
[502] *See* 5 U.S.C. 3521-3523; 5 C.F.R. § 576.101.
[503] For example, 5 U.S.C. 7511(b)(4) excludes reemployed annuitants from chapter 75's coverage.

requirements in E.O. 13957, as amended. OPM believes that E.O. 14171 rendered 5 CFR 210.102(b)(3) and (b)(4)'s definition of the policy-influencing terms inoperative, as well as 5 CFR part 302, subpart F. To the extent these rules as finalized simply comport OPM regulations to existing law, OPM believes that they will have a negligible impact on agencies. The main change that finalizing OPM's proposed regulations will cause is reversing the April 2024 final rule's amendments to part 752, subpart D. Under OPM's amended regulations, employees reclassified or moved into Schedule Policy/Career positions will no longer remain covered by chapter 43 and 75 procedures or MSPB appeals. As discussed above and in the proposed rule, OPM now believes that the changes made by the 2024 final rule exceeded its statutory authority and thus were unenforceable in any event. To the extent policy-influencing employees who are engaged in misconduct or performing poorly respond to this heightened accountability by improving their performance and conduct, the rule will generally improve agency operations irrespective of whether separations occur. However, agencies may find it necessary to use this authority to expeditiously separate some policy-influencing employees for poor performance or misconduct. Such removal proceedings will occur more quickly and at lower cost than under current procedures.

D. Costs

In the 2024 rulemaking, OPM concluded that implementing Schedule F would adversely affect agency recruitment and retention efforts. As discussed above, OPM has reconsidered those concerns and finds them unpersuasive. They were predicated on the assumption that the policy-influencing exception to chapter 75 would be used to resurrect the spoils system and convert large numbers of career positions to short-term political appointments. E.O. 13957, as amended, provides that Schedule Policy/Career positions remain career appointments, filled using civil service merit hiring procedures, and forbids agencies from filling them based on political contributions or affiliation. Schedule Policy/Career maintains merit-based competitive hiring procedures, the original purpose of the Pendleton Act, while providing for expeditious removal

of poorly performing employees. The Congressional Budget Office's analysis that most Federal employees place a relatively low value on the availability of adverse action appeals reinforces OPM's conclusion that the rule would create minimal recruitment and retention issues. Accordingly, OPM concludes that Schedule Policy/Career will not incur the costs it previously expected of Schedule F.

Agencies, if they have not done so already, must also update their internal policies and procedures to ensure compliance with E.O. 13957, as amended, and the amendments it made to the civil service rules. OPM is conforming its regulations to the operative legal requirements. This will not impose additional costs on agencies. However, agencies will be required to update their internal policies and procedures to conform to the regulatory amendments this rule makes to parts 432 and 752. Since these revisions rescind existing regulatory requirements to follow adverse action procedures and appeals, the rule will not increase agency compliance costs beyond updating internal procedures. In addition, this rulemaking will relieve agencies of any litigation costs that would have arisen under the amendments made by the April 2024 final rule. The rule will affect the operations of more than 80 Federal agencies, ranging from cabinet-level departments to small independent agencies. The cost analysis to update policies and procedures assumes an average salary rate of Federal employees performing work at the 2025 rate for a GS-14, step 5, from the Washington, DC, locality pay table ($161,486 annual locality rate and $77.38 hourly locality rate). As in the 2024 rulemaking, OPM assumes the total dollar value of labor, which includes wages, and OPM estimates that the cost to comply with updating policies and procedures in the first year would require an average of 40 hours of work by employees with an average hourly cost of $154.76 per hour. Upon effectuation of the final rule, this may result in first-year estimated costs of about $6,200 per agency, and about $495,000 government-wide. There are ongoing costs associated with routinely reviewing and updating internal policies and procedures, but these costs will be incurred with or without the changes made here.

OPM estimates that approximately 50,000 positions will be moved or transferred into

Schedule Policy/Career, about two percent of the Federal civilian workforce. The President may move a greater or smaller number of positions, but OPM believes this is a reasonable preliminary estimate. Of those positions moved into Schedule Policy/Career, OPM estimates 45,000 will be filled by incumbent employees and 5,000 will be vacant and filled by new hires.[504]

OPM estimates that the 45,000 incumbent employees whose positions are moved into Schedule Policy/Career will incur some costs associated with these changes in the first year following publication of this rule. These employees will need to familiarize themselves with the changes in their rights and responsibilities due to their shift to Schedule Policy/Career. Once they have familiarized themselves with these changes, they may reconsider their approach to various work assignments, for example to improve performance, and some may consider seeking alternative employment. Consistent with historical data, OPM estimates 7.3% of employees at the Senior Level and General Schedule 14 and 15 grade levels will voluntarily leave their positions for positions internal and external to the Federal Government.[505] OPM also estimates these 45,000 employees 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. OPM assumes that these employees have average salary equivalent to Federal employees at GS-14, step 5 in the Washington, DC locality. This assumption is based on the nature, scope, and type of duties described in E.O. 13957, as amended.[506] As above, this implies hourly costs of $154.76. This implies total first year costs along these lines of approximately $27.9 million. OPM estimates that new hires will incur no additional costs related to changes made in this rulemaking.

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[504] E.O. 14171 directly exempts newly filled Schedule Policy/Career positions from chapter 75 procedures, so the changes to part 752 authorizing incumbent employees moved into a policy-influencing position to retain coverage under that part will not affect new hires filling such positions.

[505] *See* Off. of Pers. Mgmt., FedScope, Separations Trend FY 2015-FY 2024, https://www.fedscope.opm.gov/. This figure represents a weighted average across all three levels of positions. The unweighted average would be 8.2%. OPM limited its focus on these three levels as these populations will likely see the greatest number of positions placed in Schedule Policy/Career. However, OPM acknowledges that employees at lower grade levels may also be impacted.

[506] Section 5(c) of E.O. 13957.

Commenter 35379 and others expressed skepticism regarding OPM's estimate that approximately 50,000 employees will be transferred into Schedule Policy/Career. Several commenters expressed suspicions that the real number of Policy/Career employees would be in the hundreds of thousands. Some commenters relied on the short-lived implementation efforts of Schedule F before its repeal by President Biden. Commenters noted that OPM authorized the Office of Management and Budget's submission which would have placed 416 of its 610 employees, about two thirds, into Schedule F. However, the Office of Management and Budget, a component of the Executive Office of the President almost uniquely devoted to the fulfillment of the President's policy mission, is not the normal case for an executive branch agency. In the short time between E.O. 13957 and the repeal of Schedule F, six agencies expressed to OPM that they would move *no* employees into Schedule F, and one agency requested that OPM place five positions (containing a total of five employees) out of a total workforce of 234 into Schedule F.[507] Thus, roughly half the agencies which responded to the call to submit petitions to OPM regarding Schedule F indicated either that they did not intend to place *anyone* into Schedule F or that they intended to do so for a comparatively trivial proportion of their overall workforce, consistent with OPM's estimate that a small proportion of the civil service would be moved into Schedule Policy/Career. Contrary to commenters' fears, the evidence under prior Schedule F does not support the suspicion that a large proportion of the Federal workforce, numbering hundreds of thousands of employees, will be placed into Schedule Policy/Career.

Further, under both former Schedule F and current Schedule Policy/Career, agencies must submit their requests to place positions into the Schedule with OPM, which has an oversight function to, amongst other things, prevent overinclusion into the Schedule. The President, after reviewing OPM's recommendations, will transfer positions into Schedule Policy/Career by executive order, exercising an additional layer of oversight as compared to even

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[507] *See* 2022 GAO report, at 16, 18-19.

former Schedule F. Both OPM and the White House have discretion to act if agencies attempt to overclassify. Commenters' reliance on statements made by individuals who are now Trump Administration officials as private citizens do not reflect OPM's official position, are not binding on OPM, and cannot be used to override OPM's estimates.

E. Benefits

Excepting incumbent employees from chapter 43 and 75 procedures and MSPB appeals will reduce agency expenses during separations. Currently, approximately one-quarter of one percent of tenured Federal employees are dismissed for performance or conduct annually. Applying that percentage to the 45,000 incumbents estimated to be moved into Schedule Policy/Career implies that, in the absence of the rulemaking, agencies will be expected to separate 112 such employees annually.

OPM assumes that the exemption from chapter 75 will reduce the time agency supervisors and senior human resources staff must spend on each separation, prior to any administrative appeals, by a collective 600 hours, or 67,200 hours across all separations. OPM expects that supervisors will continue to document the basis for separations, but less time will be needed to prepare such documentation because supervisors will no longer have to comply with *Ward/Stone* due process requirements, which will no longer be needed to support an appeal in which the burden of proof lies with the agency.[508]

This cost analysis assumes an average salary rate of Federal supervisors and senior HR personnel performing this work at the 2025 rate for a GS-15, step 5, from the Washington, DC, locality pay table ($189,950 annual locality rate and $91.02 hourly locality rate). OPM again assumes the total value of labor is 200 percent of the hourly wage rate, for a total average hourly cost of $182.04. This implies total annual agency savings of $12.2 million.

OPM further assumes that one-quarter of those separations would have otherwise resulted

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[508] *See Ward v. U.S. Postal Serv.*, 634 F.3d 1274 (Fed. Cir. 2011); *Stone v. Federal Deposit Ins. Corp.*, 179 F.3d 1368 (Fed. Cir. 1999).

in initial MSPB appeals, or 28 appeals in total. OPM assumes supervisors and other senior agency HR personnel would spend 120 hours preparing evidence, providing testimony, and otherwise preparing for each such appeal, and agency attorneys would spend a further 100 hours reviewing evidence, preparing submissions, and arguing each appeal. OPM assumes initial MSPB decisions will be decided by MSPB AJs who are also paid at the GS-15, step 5 level, and they will spend 20 hours conducting each hearing and preparing their decision. This cost analysis again assumes an average hourly cost of $182.04 for supervisors and HR personnel, and the same labor cost for MSPB administrative judges. The attorneys are assumed to be GS-14, step 5 employees receiving Washington, D.C. locality pay ($161,486 annual locality rate and $77.38 hourly locality rate). With the total value of labor at 200 percent of hourly pay, the hourly cost of an attorney is $154.76 per hour. This implies that agencies save $33,000 for each MSPB appeal forgone, for a total of $0.9 million in annual savings government-wide.

Thus, having these separations proceed through Schedule Policy/Career procedures instead of chapter 43 or 75 would be expected to save agencies approximately $13.2 million annually.[509] This figure excludes the cost of appeals to the full MSPB and potentially Federal court. As another consideration with respect to potential litigation, OPM notes that the number of Equal Employment Opportunity (EEO) complaints may increase as employees placed under Schedule Policy/Career will no longer be able to file initial appeals with the MSPB. Employees may turn to EEO as another avenue to contest agency actions. Consequently, some of the savings might not be realized. However, we do not have data on the potential number of EEO complaints, and it would be speculative to assign a cost.[510] OPM also views the risk of adverse outcomes from EEO complaints as low as agencies are properly incentivized to make appropriate recommendations to the President for reclassifying a position to Schedule Policy/Career. The

[509] For purposes of E.O. 14192 accounting, these benefits are considered cost savings.
[510] Please note that, with regard to PPPs, there will not be an increase in complaints to the Office of Special Counsel because Schedule Policy/Career positions are excluded from 5 U.S.C. 2302(a)(2)(B)(i).

authority to place positions into Schedule Policy/Career rests with the President who is not subject to Federal employment anti-discrimination laws.[511] And while complainants may attempt to impute liability on employing agencies for carrying out the President's orders, OPM views the risk of an adverse outcome resulting from this as minimal. Likewise, OPM also views the risk from adverse outcomes resulting from agencies taking appropriate personnel actions and otherwise complying, or failing to do so, with Federal anti-discrimination laws as low. Agencies are appropriately incentivized and directed under E.O. 13957 not to treat Schedule Policy/Career in violation of PPPs including discrimination based on protected characteristics such as religion, disability, color, and others.

OPM thus estimates that these reforms would produce $27.9 million in one-time first year costs, against $13.2 million in annual savings. Over a 10-year period, this represents considerable savings. However, OPM expects that there will be significant additional benefits from this final rule that are harder to quantify. Commenter 32359 notes research showing that underperforming employees reduce their work unit's productivity by 30 percent. Facilitating the removal of poor performers in senior policy-influencing roles could thus have a large impact on agency operations. However, because agency productivity generally cannot be measured in terms of economic output the way private employment can, it is difficult to economically quantify the scope of these benefits.

Nonetheless, OPM anticipates that EEO complaints often cost less than MSPB appeals because, with the exception of failure to accommodate claims, employees have the burden of proof before the EEOC. Further, unlike the MSPB, the EEOC has summary judgment. Accordingly, agencies would avoid the costs associated with hearings in a percentage of EEO cases. Increased accountability would also be expected to incentivize employees, where

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[511] *Trump v. United States*, 603 U.S. 593, 611 (2024) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982) ("the President must be absolutely immune from damages liability for acts within the outer perimeter of his official responsibility) (internal quotations omitted).

applicable, to improve problematic performance and conduct. This would produce large gains in agency efficiency, but OPM does not have a reasonable basis for estimating the magnitude of these gains and thus cannot quantify them across agencies. Similarly, higher employee performance and greater adherence to nonpartisan norms would be expected to reduce the costs associated with waste and lost efficiency. A final benefit of this rule is that it will align OPM regulations with the operative legal standards. This will promote greater agency and employee understanding of the procedures governing the civil service. OPM consequently expects that the rule will have substantial net benefits, even though most of those benefits are difficult to quantify.

One commenter took issue with OPM's cost estimates. Commenter 4558 asserted that OPM's refusal to disclose cost impact models violates the Administrative Procedure Act under *Chamber of Commerce*. This assertion is unavailing. Under the Administrative Procedure Act, there is no cost impact on the general public or on persons who are appointed to or converted to Schedule Policy/Career. Nevertheless, the costs and benefits explained in this section of the rule show a significant internal savings for Government agencies in addressing adverse personnel decisions under Schedule Policy/Career.

VII. Procedural Issues and Regulatory Review

A. Severability

If any of the provisions of this rule as finalized are held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, it shall be severable from its respective section(s) and shall not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other dissimilar circumstances. In enforcing civil service protections and merit system principles, OPM will comply with all applicable legal requirements.

Commenter 8203 expressed the concern that the components of the present rulemaking are so deeply connected that, should any part of the rulemaking be invalidated, courts may be

forced to invalidate the entire rulemaking, notwithstanding the severability clause.[512] As a general rule, courts will respect the severability clause in an agency's regulation.[513] Courts will respect a severability clause if "the remainder of the regulation could function sensibly without the stricken provisions."[514] Courts "adhere to the text of a severability clause in the absence of extraordinary circumstances."[515] In other words, a severability clause will be respected if any coherent regulatory purpose remains after the offending portions of the regulation are invalidated.

The Fifth Circuit's decision in *Texas v. United States* evidences the lengths that courts will go to in order to preserve the non-defective portions of a regulation in light of a severability clause and a partial invalidation. There, the court found invalid DHS regulations concerning the Deferred Action for Childhood Arrivals (DACA) program. The district court found the Biden-era regulations invalid as in contravention of the Immigration and Nationality Act to the extent that certain benefits provided to DACA recipients were in violation of statute. However, the Fifth Circuit reversed the district court's refusal to respect the severability clause (and, as a consequence, the district court's reversal of the entire rulemaking). The Fifth Circuit found that, even if the benefits provided to DACA recipients were legally invalid, the policy of forbearance from removal action contained in the regulatory scheme provided a sufficient purpose for respecting them as valid. Since these provisions could be preserved and rationally defended after severing the unlawful portions, the severability clause was given effect.

OPM cannot fully anticipate either future challenges to this rulemaking or the judicial resolution to those challenges. For the reasons previously discussed OPM believes the rule is lawful and should be upheld in full. OPM declines to comment in detail concerning whether any

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[512] For the severability clause, *see* 90 FR 17221.
[513] *See*, *e.g., Am. Fuel & Petrochemical Mfrs. v. Env't Prot. Agency*, 3 F.4th 373, 384 (D.C. Cir. 2021) ("Severability depends on the issuing agency's intent….") (cleaned up); *Texas v. United States*, 126 F.4th 392 (5th Cir. 2025).
[514] *Texas*, 126 F.4th at 419 (cleaned up).
[515] *Id*. (cleaned up).

portion of the present rulemaking would survive as severable should any of the present regulatory changes be deemed invalid. However, while much of the present rulemaking is intended to advance the creation of Schedule Policy/Career, other portions, such as the repeal of subpart F of part 302, are legally and analytically distinct. OPM thus reiterates that it intends for the severability clause in the present rulemaking to be effectuated if possible.

B. Regulatory Flexibility Act

The Director of the Office of Personnel Management certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities because the rule will apply only to Federal agencies and employees.

C. Regulatory Review

OPM has examined the impact of this rulemaking as required by E.O.s 12866 (Sept. 30, 1993) and 13563 (Jan. 18, 2011), which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. A regulatory impact analysis must be prepared for major rules with effects of $100 million or more in any one year. This rulemaking does not reach that threshold but has otherwise been designated as a "significant regulatory action" under section 3(f) of E.O. 12866. This action is considered an Executive Order 14192 deregulatory action. We estimate that this rule generates $9.94 million in annualized cost savings at a 7% discount rate, discounted relative to year 2024, over a perpetual time horizon.

D. Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with E.O. 13132 (Aug. 10, 1999), it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

E. Civil Justice Reform

This regulation meets the applicable standards set forth in section 3(a) and (b)(2) of E.O. 12988 (Feb. 7, 1996).

F. Unfunded Mandates Reform Act of 1995

This rulemaking will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually (adjusted annually for inflation with the base year 1995). Thus, no written assessment of unfunded mandates is required.

G. Congressional Review Act

OMB's Office of Information and Regulatory Affairs has determined this rule does not satisfy the criteria listed in 5 U.S.C. 804(2).

H. Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35)

This regulatory action will not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects

5 CFR Parts 210 and 212

Government employees.

5 CFR Part 213

Government employees, Reporting and recordkeeping requirements.

5 CFR Parts 302 and 432

Government employees.

5 CFR Part 451

Decorations, Government employees.

5 CFR Part 537

Government employees, Wages.

5 CFR Part 575

Government employees, Wages.

5 CFR Part 752

Government employees.

Accordingly, for the reasons stated in the preamble, OPM amends 5 CFR parts 210, 212, 213, 302, 432, 451, 537, 575, and 752 as follows:

PART 210—BASIC CONCEPTS AND DEFINITIONS (GENERAL)

1. The authority citation for part 210 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302; E.O. 10577, 19 FR 7521, 3 CFR, 1954–1958 Comp., p. 218.

Subpart A—Applicability of Regulations; Definitions

§ 210.102 [Amended]

2. Amend § 210.102 by:

a. Removing paragraphs (b)(3) and (4); and

b. Redesignating paragraphs (b)(5) through (b)(20) as (b)(3) through (b)(18).

PART 212—COMPETITIVE SERVICE AND COMPETITIVE STATUS

3. The authority citation for part 212 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302; E.O. 10577, 19 FR 7521, 3 CFR, 1954–1958 Comp., p. 218; E.O. 14171, 90 FR 8625.

Subpart D—Effect of Competitive Status on Promotion

4. Amend § 212.401 by revising paragraph (b) to read as follows:

§ 212.401 Effect of competitive status on position.

* * * * *

(b) Unless expressly stated otherwise in 5 CFR Chapter I, Subchapter A, an employee with competitive status at the time that his or her position is first listed in an excepted service schedule, or that the employee moved to a position in the excepted service, is no longer in the competitive service but retains competitive status.

PART 213—EXCEPTED SERVICE

5. The authority citation for part 213 is revised to read as follows:

Authority: 5 U.S.C. 3161, 3301 and 3302; 38 U.S.C. 4301 *et seq*. E.O. 10577, 19 FR 7521, 3 CFR 1954-1958 Comp., p. 218; E.O. 14171, 90 FR 8625.

Sec. 213.101 also issued under 5 U.S.C. 2103.

Sec. 213.3102 also issued under 5 U.S.C. 3307, 8337(h), 8456; 38 U.S.C. 4301 *et seq.* E.O. 12125, 44 FR 16879, 3 CFR, 1979 Comp., p. 375; E.O. 13124, 64 FR 31103, 3 CFR, 1999 Comp., p. 192; E.O. 13562, 75 FR 82585, 3 CFR, 2010 Comp, p. 291; E.O. 14217, 90 FR 10577; and Presidential Memorandum of May 11, 2010, 75 FR 27157, 3 CFR, 2010 Comp., p. 327.

Sec. 213.3202 also issued under 5 U.S.C. 3304.

Subpart A—General Provisions

6. Revise § 213.101 to read as follows:

§ 213.101 Definitions.

(a) In this chapter:

(1) *Excepted service* has the meaning given that term by section 2103 of title 5, United States Code, and includes all positions in the Executive Branch of the Federal Government which are specifically excepted from the competitive service by or pursuant to statute, by the President, or by the Office of Personnel Management, and which are not in the Senior Executive Service. An employee encumbering an excepted position is in the excepted service, irrespective of whether the employee possesses competitive status.

(2) *Excepted position* means a position in the excepted service.

(b) In this part:

(1) *Career position* means a position that is not a noncareer position.

(2) *Noncareer position* means a position associated with an appointment that carries no expectation of continued employment beyond the Presidential administration during which the appointment occurred and whose occupant is normally, as a matter of practice, expected to resign

upon a Presidential transition. This phrase encompasses all positions whose appointments involve preclearance by the White House Office of Presidential Personnel.

7. Amend § 213.102 by revising the section heading and adding paragraph (d) to read as follows:

§ 213.102 Identification of positions in Schedule A, B, C, D, or Policy/Career.

* * * * *

(d) The President may directly place positions in Schedule Policy/Career.

8. Revise § 213.103 to read as follows:

§ 213.103 Publication of excepted appointing authorities in Schedules A, B, C, D, and Policy/Career.

(a) Schedule A, B, C, D, and Policy/Career appointing authorities available for use by all agencies will be published as regulations in the Federal Register and the Code of Federal Regulations.

(b) Establishment and revocation of Schedule A, B, C, and Policy/Career appointing authorities applicable to a single agency shall be published monthly in the Notices section of the Federal Register.

(c) A consolidated listing of all Schedule A, B, C, and Policy/Career authorities current as of June 30 of each year, with assigned authority numbers, shall be published annually as a notice in the Federal Register.

9. Revise and republish § 213.104 to read as follows:

§ 213.104 Special provisions for temporary, time-limited, intermittent, or seasonal appointments in Schedule A, B, C, D, or Policy/Career.

(a) When OPM specifies that appointments under a particular Schedule A, B, C, D, or Policy/Career authority must be temporary, intermittent, or seasonal, or when agencies elect to make temporary, intermittent, or seasonal appointments in Schedule A, B, C, D, or Policy/Career, those terms have the following meaning:

(1) *Temporary appointments*, unless otherwise specified in a particular Schedule A, B, C, D, or Policy/Career exception, are made for a specified period not to exceed 1 year and are subject to the time limits in paragraph (b) of this section. Time-limited appointments made for more than 1 year are not considered to be temporary appointments and are not subject to the time limits.

(2) *Intermittent positions* are positions in which work recurs at sporadic or irregular intervals so that an employee's tour of duty cannot be scheduled in advance of the administrative workweek.

(3) *Seasonal positions* involve annually recurring periods of employment lasting less than 12 months each year.

(b) Temporary appointments, as defined in paragraph (a)(1) of this section, are subject to the following limits:

(1) *Service limits*. Agencies may make temporary appointments for a period not to exceed 1 year, unless the applicable Schedule A, B, C, D, or Policy/Career authority specifies a shorter period. Except as provided in paragraph (b)(3) of this section, agencies may extend temporary appointments for no more than 1 additional year (24 months of total service). Appointment to a successor position (i.e., a position that replaces and absorbs the original position) is considered to be an extension of the original appointment. Appointment to a position involving the same basic duties, in the same major subdivision of the agency, and in the same local commuting area, is also considered to be an extension of the original appointment.

(2) *Restrictions on refilling positions under temporary appointments*. Except as provided in paragraph (b)(3) of this section, an agency may not fill any position (or its successor) by a temporary appointment in Schedule A, B, C, D, or Policy/Career if that position had previously been filled by temporary appointment(s) in either the competitive or excepted service for an aggregate of 2 years, or 24 months, within the preceding 3-year period. This limitation does not apply to programs established to provide for systematic exchange between a Federal agency and

non-Federal organizations.

(3) *Exceptions to the general limits*. The service limits and restrictions on refilling positions set out in this section do not apply when:

(i) Positions involve intermittent or seasonal work, and employment in the same or a successor position under one or more appointing authorities totals less than 6 months (1,040 hours), excluding overtime, in a service year. The service year is the calendar year that begins on the date of the employee's initial appointment in the agency. Should employment in a position filled under this exception total 6 months or more in any service year, the general limits set out in this section will apply to subsequent extension or reappointment unless OPM approves continued exception under this section. An individual may be employed for training for up to 120 days following initial appointment and up to 2 weeks a year thereafter without regard to the service year limitation.

(ii) Positions are filled under an authority established for the purpose of enabling the appointees to continue or enhance their education, or to meet academic or professional qualification requirements. These include the authorities set out in § 213.3102(r) and (s) and § 213.3402(a), (b), and (c), and authorities granted to individual agencies for use in connection with internship, fellowship, residency, or student programs.

(iii) OPM approves extension of specific temporary appointments beyond 2 years (24 months total service) when necessitated by major reorganizations or base closings or other rare and unusual circumstances. Requests based on major reorganization, base closing, restructuring, or other unusual circumstances that apply agencywide must be made by an official at the headquarters level of the Department or agency. Requests involving extension of appointments to a specific position or project based on other unusual circumstances may be submitted by the employing office to the appropriate OPM service center.

Subpart C—Excepted Schedules

10. Amend § 213.3301 by revising the section heading and paragraph (a) to read as

follows:

§ 213.3301 Positions of a confidential or policy-determining character normally subject to change as a result of a Presidential transition.

(a) Upon specific authorization by OPM, agencies may make appointments under this section to noncareer positions that are of a confidential or policy-determining character and are normally subject to change as a result of a Presidential transition. Positions filled under this authority are excepted from the competitive service and constitute Schedule C. Each position will be assigned a number from 213.3302 through 213.3399, or other appropriate number, to be used by the agency in recording appointments made under that authorization.

* * * * *

11. Add a new undesignated, centered heading after § 213.3402 to read as follows:

SCHEDULE POLICY/CAREER

12. Add § 213.3601 below the undesignated heading SCHEDULE POLICY/CAREER.

§ 213.3601 Career positions of a confidential, policy-determining, policy-making, or policy-advocating character.

(a) As authorized by the President, agencies may make appointments under this section to career positions of a confidential, policy-determining, policy-making, or policy-advocating character that are not in the Senior Executive Service. Positions filled under this authority are excepted from the competitive service and constitute Schedule Policy/Career. For positions covered by this section, OPM will assign a number from 213.3602 through 213.3699, or other appropriate number, to be used by the appointing agency in recording appointments made under this section.

(b) Except as provided in paragraph (c) of this section, agencies must make appointments to positions in Schedule Policy/Career of the excepted service in the same manner as to positions in the competitive service, to include:

(1) Public notification of job opportunities;

(2) Applicant evaluation based on valid, job-related assessments; and

(3) Selections of highly qualified individuals based on merit.

(c) Agencies must make appointments to positions in Schedule Policy/Career of the excepted service that, but for their placement in Schedule Policy/Career, would be listed in another excepted service schedule pursuant to the rules applicable to such positions in the corresponding schedule.

(d) In making appointments under paragraphs (b) and (c) of this section, agencies must follow the principles of veterans' preference as far as administratively feasible based on the rating, ranking, and selection processes used for making appointments. Except as otherwise authorized in part 302 of this chapter, where numerical ratings are used in the evaluation and referral of candidates, agencies shall follow the regulations related to veterans' preference in part 302 and subpart A of part 337 of this chapter, as applicable. When category rating is used, agencies shall follow the procedures related to veterans' preference in subpart C of part 337 of this chapter. Where another process is used, veteran status must be considered a positive factor.

(e) 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. Employees in Schedule Policy/Career positions must 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.

(f) Individuals appointed to positions in Schedule Policy/Career are subject to trial periods as required by 5 CFR part 11. If they are appointed in the same manner as appointments in the competitive service, they acquire competitive status after completing two years of continuing service in the same or similar positions.

PART 302—EMPLOYMENT IN THE EXCEPTED SERVICE

13. The authority citation for part 302 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302, 3317, 3318, 3319, 3320, 8151; E.O. 10577, 19

FR 7521, 3 CFR, 1954-1958 Comp., p. 218; E.O. 14171, 90 FR 8625.

Sec. 302.105 also issued under 5 U.S.C. 1104; sec. 3(5), Pub. L. 95-454, 92 Stat. 1112 (5 U.S.C. 1101 note).

Sec. 302.107 also issued under 5 U.S.C. 9201-9206; sec. 1122(b)(1), Pub. L. 116-92, 133 Stat. 1605 (5 U.S.C. 9201 note).

Sec. 302.501 also issued under 5 U.S.C. ch. 77.

Subpart A—General Provisions

14. Amend § 302.101 by revising paragraphs (c)(7) and (8), and adding paragraph (c)(12) to read as follows:

§ 302.101 Positions covered by regulations.

* * * * *

(c) * * *

(7) Positions included in Schedule C (see subpart C of part 213 of this chapter);

(8) Attorney positions;

* * * * *

(12) Confidential, policy-determining, policy-making or policy-advocating positions filled under Schedule Policy/Career authorized under Executive Order 13957, as amended. Appointments under this authority must be made in accordance with the provisions of § 213.3601 of this chapter.

15. Amend § 302.102 by revising the last sentence of paragraph (c) to read as follows:

§ 302.102 Method of filling positions and status of incumbent.

* * * * *

(c) * * * Persons appointed pursuant to a specific authorization by OPM under this paragraph may acquire competitive status.

Subpart F [Removed]

16. Remove subpart F, “Moving Employees and Positions into and Within the Excepted

Service", consisting of §§ 302.601 through 302.603.

PART 432—PERFORMANCE BASED REDUCTION IN GRADE AND REMOVAL ACTIONS

17. The authority citation for part 432 continues to read as follows:

Authority: 5 U.S.C. 4303, 4305.

18. Amend § 432.102 by revising paragraph (f)(10) to read as follows:

§ 432.102 Coverage.

* * * * *

(f) * * *

(10) An employee occupying a position in Schedule C or Schedule Policy/Career as authorized under part 213 of this chapter;

* * * * *

PART 451—AWARDS

19. The authority citation for part 451 continues to read as follows:

Authority: 5 U.S.C. 4302, 4501–4509; E.O. 11438, 33 FR 18085, 3 CFR, 1966–1970 Comp., p. 755; E.O. 12828, 58 FR 2965, 3 CFR, 1993 Comp., p. 569.

Subpart C—Presidential Rank Awards

20. Amend § 451.302 by revising paragraph (b)(3)(ii) to read as follows:

§ 451.302 Ranks for senior career employees.

* * * * *

(b) * * *

(3) * * *

(ii) To positions that are excepted from the competitive service because of their confidential or policy-making character.

* * * * *

PART 537—STUDENT LOAN REPAYMENTS

21. The authority citation for part 537 continues to read as follows:

Authority: 5 U.S.C. 2301, 2302, and 5379(g). E.O. 11478, 3 CFR, 1966-1970 Comp., p. 803, unless otherwise noted; E.O. 13087, 63 FR 30097, 3 CFR, 1998 Comp., p. 191; and E.O. 13152, 65 FR 26115, 3 CFR, 2000 Comp., p. 264.

22. Amend § 537.104 by revising paragraph (b) to read as follows:

§ 537.104 Employee eligibility.

* * * * *

(b) An employee occupying a position that is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character is ineligible for student loan repayment benefits, except that an employee whose position is moved into Schedule Policy/Career may continue to receive student loan repayment benefits based on the terms of the existing applicable service agreement, unless eligibility is lost as described in § 537.108.

* * * * *

PART 575—RECRUITMENT, RELOCATION, AND RETENTION INCENTIVES; SUPERVISORY DIFFERENTIALS; AND EXTENDED ASSIGNMENT INCENTIVES

23. The authority citation for part 575 is revised to read as follows:

Authority: 5 U.S.C. 1104(a)(2) and 5307. Subparts A and B also issued under 5 U.S.C. 5753. Subpart C also issued under 5 U.S.C. 5754. Subpart D also issued under 5 U.S.C. 5755. Subpart E also issued under 5 U.S.C. 5757 and sec. 207 Pub. L. 107-273, 116 Stat. 1780 (5 U.S.C. 5307 note).

Subpart A—Recruitment Incentives

24. Revise and republish § 575.104 to read as follows:

§ 575.104 Ineligible categories of employees.

An agency may not pay a recruitment incentive to an employee in——

(a)(1) A position to which an individual is appointed by the President, by and with the

advice and consent of the Senate;

(2) A position in the Senior Executive Service as a noncareer appointee (as defined in 5 U.S.C. 3132(a)(7));

(3) A position excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character; or

(4) A position not otherwise covered by the exclusions in paragraphs (a), (b), and (c) of this section—

(i) To which an individual is appointed by the President without the advice and consent of the Senate, except a Senior Executive Service position in which the individual serves as a career appointee (as defined in 5 U.S.C. 3132(a)(4));

(ii) Designated as the head of an agency, including an agency headed by a collegial body composed of two or more individual members;

(iii) In which the employee is expected to receive an appointment as the head of an agency; or

(iv) To which an individual is appointed as a Senior Executive Service limited term appointee or limited emergency appointee (as defined in 5 U.S.C. 3132(a)(5) and (a)(6), respectively) when the appointment must be cleared through the White House Office of Presidential Personnel.

(b) Notwithstanding any other provision in this subpart, an agency may—

(1) Based on the terms of the applicable service agreement, continue to pay any outstanding recruitment incentive payments to an employee whose position is moved into Schedule Policy/Career and require the employee to fulfill that term; or

(2) Terminate the service agreement under the conditions in § 575.111(a) for an employee whose position is moved into Schedule Policy/Career.

Subpart B—Relocation Incentives

25. Revise and republish § 575.204 to read as follows:

§ 575.204 Ineligible categories of employees.

An agency may not pay a relocation incentive to an employee in—

(a)(1) A position to which an individual is appointed by the President, by and with the advice and consent of the Senate;

(2) A position in the Senior Executive Service as a noncareer appointee (as defined in 5 U.S.C. 3132(a)(7));

(3) A position excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character; or

(4) A position not otherwise covered by the exclusions in paragraphs (a), (b), and (c) of this section—

(i) To which an individual is appointed by the President without the advice and consent of the Senate, except a Senior Executive Service position in which the individual serves as a career appointee (as defined in 5 U.S.C. 3132(a)(4));

(ii) Designated as the head of an agency, including an agency headed by a collegial body composed of two or more individual members;

(iii) In which the employee is expected to receive an appointment as the head of an agency; or

(iv) To which an individual is appointed as a Senior Executive Service limited term appointee or limited emergency appointee (as defined in 5 U.S.C. 3132(a)(5) and (a)(6), respectively) when the appointment must be cleared through the White House Office of Presidential Personnel.

(b) Notwithstanding any other provision in this subpart, an agency may—

(1) Based on the terms of the applicable service agreement, continue to pay any outstanding relocation incentive payments to an employee whose position is moved into Schedule Policy/Career and require the employee to fulfill that agreed-upon service period; or

(2) Terminate the service agreement under the conditions in § 575.211(a) for an

employee whose position is moved into Schedule Policy/Career.

Subpart C—Retention Incentives

26. Revise § 575.304 to read as follows:

§ 575.304 Ineligible categories of employees.

An agency may not pay a retention incentive to an employee in—

(a)(1) A position to which an individual is appointed by the President, by and with the advice and consent of the Senate;

(2) A position in the Senior Executive Service as a noncareer appointee (as defined in 5 U.S.C. 3132(a)(7));

(3) A position excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character; or

(4) A position not otherwise covered by the exclusions in paragraphs (a), (b), and (c) of this section—

(i) To which an individual is appointed by the President without the advice and consent of the Senate, except a Senior Executive Service position in which the individual serves as a career appointee (as defined in 5 U.S.C. 3132(a)(4));

(ii) Designated as the head of an agency, including an agency headed by a collegial body composed of two or more individual members;

(iii) In which the employee is expected to receive an appointment as the head of an agency; or

(iv) To which an individual is appointed as a Senior Executive Service limited term appointee or limited emergency appointee (as defined in 5 U.S.C. 3132(a)(5) and (a)(6), respectively) when the appointment must be cleared through the White House Office of Presidential Personnel.

(b) Notwithstanding any provision in this subpart, an agency may—

(1) Continue to pay a retention incentive to an employee whose position is moved into

Schedule Policy/Career based on the terms of the service agreement and require the employee to fulfill that agreed-upon service period; and

(2) Continue to pay a retention incentive to an employee whose position is moved into Schedule Policy/Career at a time when the employee is receiving a retention incentive without a service agreement, so long as the agency finds that the payment otherwise continues to be warranted in consideration of the factors set forth in § 575.311(f).

PART 752—ADVERSE ACTIONS

27. The authority citation for part 752 is revised to read as follows:

Authority: 5 U.S.C. 6329b, 7504, 7514, 7515, and 7543; 38 U.S.C. 7403. E.O. 10577, 19 FR 7521, 3 CFR, 1954-1958 Comp., p. 218.

Subpart B—Regulatory Requirements for Suspension for 14 Days or Less

28. Amend § 752.201 by:

a. Revising paragraphs (b), (c)(5) and (6), and;

b. Removing paragraph (c)(7).

The revisions read as follows:

§ 752.201 Coverage.

* * * * *

(b) *Employees covered.* This subpart covers:

(1) An employee in the competitive service who has completed a probationary or trial period, or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less;

(2) An employee in the competitive service serving in an appointment which requires no probationary or trial period, and who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less;

(3) An employee with competitive status who occupies a position under Schedule B of part 213 of this chapter;

(4) An employee who was in the competitive service at the time his or her position was first listed under Schedule A or B of the excepted service and still occupies that position;

(5) An employee of the Department of Veterans Affairs appointed under 38 U.S.C. 7401(3); and

(6) An employee of the Government Publishing Office.

(c) * * *

(5) Of a National Guard Technician; or

(6) Taken under 5 U.S.C. 7515.

* * * * *

Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

29. Amend § 752.401 by revising paragraphs (c) and (d)(2) to read as follows:

§ 752.401 Coverage.

* * * * *

(c) *Employees covered.* This subpart covers:

(1) A career or career conditional employee in the competitive service who is not serving a probationary or trial period;

(2) An employee in the competitive service—

(i) Who is not serving a probationary or trial period under an initial appointment; or

(ii) Who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(3) An employee in the excepted service who is a preference eligible in an Executive agency as defined at section 105 of title 5, United States Code, the U.S. Postal Service, or the Postal Regulatory Commission and who has completed 1 year of current continuous service in the same or similar positions;

(4) A Postal Service employee covered by Public Law 100-90 who has completed 1 year

of current continuous service in the same or similar positions and who is either a supervisory or management employee or an employee engaged in personnel work in other than a purely nonconfidential clerical capacity;

(5) An employee in the excepted service who is a nonpreference eligible in an Executive agency as defined at 5 U.S.C. 105, and who has completed 2 years of current continuous service in the same or similar positions under other than a temporary appointment limited to 2 years or less;

(6) An employee with competitive status who occupies a position in Schedule B of part 213 of this chapter;

(7) An employee who was in the competitive service at the time his or her position was first listed under Schedule A or B of the excepted service and who still occupies that position;

(8) An employee of the Department of Veterans Affairs appointed under 38 U.S.C. 7401(3); and

(9) An employee of the Government Publishing Office.

(d) * * *

(2) An employee whose position is in Schedule C or Schedule Policy/Career.

* * * * *

30. Amend § 752.405 by revising paragraph (a) to read as follows:

§ 752.405 Appeal and grievance rights.

(a) *Appeal rights.* Under the provisions of 5 U.S.C. 7513(d), an employee against whom an action is taken under this subpart is entitled to appeal to the Merit Systems Protection Board. Employees listed under § 752.401(d) may not appeal to the Merit Systems Protection Board under this section, irrespective of whether they or their positions were previously covered by this subpart.

* * * * *

The Director of OPM, Scott Kupor, reviewed and approved this document and has authorized

the undersigned to electronically sign and submit this document to the Office of the Federal Register for publication.

Jerson Matias

Federal Register Liaison

Office of Personnel Management

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