Comment of

PROTECT DEMOCRACY

and

WALTER M. SHAUB, JR.

on

Docket ID: OPM-2025-0004
(RIN: 3206-AO80)
U.S. OFFICE OF PERSONNEL MANAGEMENT,
Improving Performance, Accountability and Responsiveness in the Civil Service

and

Memorandum from Charles Ezell, Acting Director, U.S. Office of Personnel Management,
to heads and acting heads of departments and agencies
(Jan. 27, 2025, as made final on Mar. 5 or 6, 2025)

Submitted via Federal eRulemaking Portal: https://www.regulations.gov

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INTRODUCTION

Protect Democracy and Walter M. Shaub, Jr., submit the following comment in opposition to the proposed rule "Improving Performance, Accountability and Responsiveness in the Civil Service," through which the administration seeks to politicize the civil service and override 142 years' worth of legislation enacted by the people's representatives in Congress. The U.S. Office of Personnel Management (OPM) has proposed regulations to implement Schedule Policy/Career ("Schedule PC") in an attempt to strip federal employees of civil service protections that guard the public against the establishment of a politicized federal workforce that can be weaponized against the American people. Schedule PC is a threat to a professional, expert civil service dedicated to faithfully implementing the law, as are OPM's proposed rule and its memorandum facilitating Schedule PC's establishment.[1]

Protect Democracy is a cross-ideological nonprofit group dedicated to building more resilient democratic institutions and protecting our freedom and liberal democracy. Shaub is a former Director of the U.S. Office of Government Ethics and an expert in federal employment law.

This comment—researched and prepared by Walter Shaub in partnership with Protect Democracy—offers OPM historical background on the executive branch's longstanding interpretation of legal terms and civil service protections, and it identifies policy concerns and legal flaws in OPM's proposed rulemaking and implementing memorandum. These commenters also filed a joint comment on OPM's September 18, 2023 proposed rule, the provisions of which the current administration now proposes to rescind or modify. That former comment, which is available on OPM's website, is hereby incorporated by reference as supplemental background for this comment.[2]

I. THE FINAL EZELL MEMORANDUM FAILED TO COMPLY WITH APPLICABLE NOTICE AND COMMENT REQUIREMENTS.

On January 20, 2025, President Donald Trump issued Executive Order 14,171 to reinstate and amend a previously revoked order, Executive Order 13,957, which he had issued near the end of his first term in office.[3] Executive Order 13,957 created a new excepted service schedule, Schedule F, for "[p]ositions of a confidential, policy-determining, policy-making, or policy-advocating character not normally subject to change as a result of a Presidential transition."[4] The

[1] 49 U.S.C. § 106(f)(5).

[2] Protect Democracy & Walter M. Shaub Jr., Comment on Proposed Rule Upholding Civil Service Protections and Merit System Principles, Docket No. OPM-2023-0013, Comment No. 2134 (Nov. 16, 2023), https://tinyurl.com/3t8699pw.

[3] Exec. Order No. 13,957 (Oct. 21, 2020), *reprinted in* 85 Fed. Reg. 67631, https://tinyurl.com/39smkmtm, *revoked by* Exec. Order No. 14,003 (Jan. 22, 2021), *reprinted in* 86 Fed. Reg. 7231 (Jan. 27, 2021), https://tinyurl.com/4ey3em73, *reinstated and modified by* Exec. Order No. 14,171 (Jan. 20, 2025), *reprinted in* 90 Fed. Reg. 8625 (Jan. 31, 2025), https://tinyurl.com/2x2yxua6.

[4] Exec. Order No. 13,957, § 4(i).

Trump administration failed to place any employees in Schedule F before President Joe Biden took office and revoked Executive Order 13,957.[5]

Executive Order 14,171 made several modifications to the reinstated Executive Order 13,957. Among other changes, it renamed the new excepted service schedule "Schedule Policy/Career."[6] It revised the definition of Schedule PC to expressly state that it purported to cover only career employee positions, not political appointees: "Career positions of a confidential, policy-determining, policy-making, or policy-advocating character not normally subject to change as a result of a Presidential transition."[7] It broadened the criteria previously established in Executive Order 13,957 for determining which positions to place in Schedule PC.[8] And it also modified Executive Order 13,957 by granting OPM independent discretionary authority to add its own criteria for positions to be placed into Schedule PC.[9]

On January 27, 2025, acting OPM Director Charles Ezell issued a memorandum to all executive departments and agencies providing directions for implementing Executive Order 13,957, as amended by Executive Order 14,171.[10] OPM subsequently altered Ezell's memorandum by adding a label at the top of the document declaring: "Agencies should treat this memorandum as final guidance."[11] We refer to this memorandum as the "Final Ezell Memorandum."

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[5] GOV'T ACCOUNTABILITY OFF., AGENCY RESPONSES & PERSPECTIVES ON FORMER EXECUTIVE ORDER TO CREATE A NEW SCHEDULE F CATEGORY OF FED. POSITIONS, GAO-22-105504, 10 (Sept. 2022), https://tinyurl.com/mua2yv95.

[6] Exec. Order No. 13,957, § 4, *as amended by* Exec. Order No. 14,171, § 3(a).

[7] *Id.* at § 4(i), *as amended by* Exec. Order No. 14,171, § 3(a), (c).

[8] *Id.* at § 5(c), *as amended by* Exec. Order No. 14,171, § 3(e)(ii) ("(c) When conducting the review required by subsection (a) of this section, each agency head should give particular consideration to the appropriateness of either petitioning the Director to place in Schedule Policy/Career or including in the determination published in the Federal Register, as applicable, positions whose duties include the following: (i) substantive participation in the advocacy for or development or formulation of policy, especially: (A) substantive participation in the development or drafting of regulations and guidance; or (B) substantive policy-related work in an agency or agency component that primarily focuses on policy; (ii) the supervision of attorneys; (iii) substantial discretion to determine the manner in which the agency exercises functions committed to the agency by law; (iv) viewing, circulating, or otherwise working with proposed regulations, guidance, executive orders, or other non-public policy proposals or deliberations generally covered by deliberative process privilege and either: (A) directly reporting to or regularly working with an individual appointed by either the President or an agency head who is paid at a rate not less than that earned by employees at Grade 13 of the General Schedule; or (B) working in the agency or agency component executive secretariat (or equivalent); (v) conducting, on the agency's behalf, collective bargaining negotiations under chapter 71 of title 5, United States Code; (vi) directly or indirectly supervising employees in Schedule Policy/Career positions; (vii) duties that the Director indicates are otherwise appropriate for inclusion in Schedule Policy/Career.").

[9] *Id.* at § 5(c)(vii), *as amended by* Exec. Order No. 14,171, § 3(e)(ii).

[10] Memorandum from Charles Ezell, Acting Dir., OPM, to heads and acting heads of departments and agencies (Jan. 27, 2025), https://tinyurl.com/2fu67xmy (hereinafter "Original Ezell Memorandum").

[11] Memorandum from Charles Ezell, Acting Dir., OPM, to heads and acting heads of departments and agencies (Jan. 27, 2025, as altered by Mar. 6, 2025), https://tinyurl.com/y6fzbjh7 (hereinafter "Final Ezell Memorandum"). The Original Ezell Memorandum advised agencies and stakeholders that its terms were non-final and that OPM would issue final guidance by February 19, 2025, Original Ezell Memorandum, at 2 n.4, but no such additional guidance was issued. A review of the Internet Archive reveals that the memorandum was unchanged from its original form as late as 7:57 p.m. on March 5, 2025, and that it was altered before 10:25 p.m. on March 6, 2025. Compare Internet Archive (entry dated 7:57:04 March 5, 2025), https://tinyurl.com/yufx4y2h, with Internet Archive (entry dated 10:25:19 March 6, 2025), https://tinyurl.com/ysxc8prx.

Exercising the independent regulatory authority that Executive Order 14,171 granted to OPM, the Final Ezell Memorandum established several new criteria that executive agencies must consider when determining which positions to recommend for inclusion in Schedule PC.[12] These new criteria went beyond the criteria that President Trump established in Executive Order 13,957, as amended by Executive Order 14,171.

OPM's final action establishing additional criteria for implementing the executive order was issued in violation of the CSRA's requirement that OPM comply with notice and comment requirements of 5 U.S.C. § 553(b)(1), (2) and (3).[13] Notice and comment requirements applied to the Final Ezell Memorandum because that guidance constituted final agency action that determined the scope of positions that qualify for placement in Schedule PC. The fact that the directive was issued pursuant to a Presidential order does not insulate it from the CSRA's and APA's procedural requirements.[14] OPM acknowledged as much in the Final Ezell Memorandum, indicating that it was independently acting on the discretionary authority the President delegated to it in section 5 of Executive Order 14,171 to establish additional applicable criteria for identifying positions to recommend for inclusion in Schedule PC.[15]

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[12] Final Ezell Memorandum, at 2-3 ("Such positions are those whose duties include: ·functions statutorily described as important policy-making or policy-determining functions, principally: °directing the work of an organizational unit; °being held accountable for the success of one or more specific programs or projects; or °monitoring progress toward organizational goals and periodically evaluating and making appropriate adjustments to such goals; ·authority to bind the agency to a position, policy, or course of action either without higher-level review or with only limited higher-level review; ·delegated or subdelegated authority to make decisions committed by law to the discretion of the agency head; ·substantive participation and discretionary authority in agency grantmaking, such as the substantive exercise of discretion in the drafting of funding opportunity announcements, evaluation of grant applications, or recommending or selecting grant recipients; ·advocating for the policies (including future appropriations) of the agency or the administration before different governmental entities, such as by performing functions typically undertaken by an agency office of legislative affairs or intergovernmental affairs, or by presenting program resource requirements to examiners from the Office of Management and Budget in preparation of the annual President's Budget Request; ·publicly advocating for the policies of the agency or the administration, including before the news media or on social media; or ·positions described by their position descriptions as entailing policy-making, policy-determining, or policy-advocating duties."); *id*. at 32 n.5 ("5 U.S.C. 3132(a)(2) defines the Senior Executive Service as positions classified above GS-15 that perform various important policy-making or policy-determining functions. Positions classified at or below grade 15 of the General Schedule that perform those same functions are consequently policy-determining or policy-making and appropriate for consideration for inclusion in Schedule Policy/Career.").

[13] 5 U.S.C. §§ 553, 1103(b), 1105. OPM also failed to comply with its regulations on notice regarding such issuances. 5 C.F.R. § 110.101 ("OPM will issue a notice that will provide information for Federal agencies, employees, managers, and other stakeholders on each of its new proposed, interim, and final regulations."). *See also Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000) ("That the issuance of a guideline or guidance may constitute final agency action has been settled in this circuit for many years.").

[14] *Nebrasksa v. Su*, 121 F.4th 1, 15 (9th Cir. 2024) ("The Supreme Court has never excepted a final rule from APA review because it carried out a presidential directive. Nor have we—or any other circuit"); *AIDS Vaccine Advoc. Coal. v. U.S. Dep't of State*, No. 25-CV-00400, 2025 WL 485324, at *5 (D.D.C. Feb. 13, 2025), *enforced*, No. CV 25-00400 (AHA), 2025 WL 569381 (D.D.C. Feb. 20, 2025) ("Defendants' argument, at least as it has been articulated to date, proves too much—it would allow the President and agencies to simply reframe agency action as orders or directives originating from the President to avoid APA review."); *O.A. v. Trump*, 404 F. Supp. 3d 109, 147 (D.D.C. 2019) ("The Court, moreover, need not pause over the fact that presidential actions are not themselves subject to APA review because it is the [agency's] Rule, and not the [presidential] Proclamation, that has operative effect." (citations omitted)). The APA applies even to ministerial implementation, but OPM's discretionary action here is even more obviously subject to the APA because it went beyond the four corners of the executive order.

[15] Final Ezell Memorandum at 2.

The Memorandum establishing criteria that agencies must apply is inextricably intertwined with OPM's proposed regulations, which propose to remove the definition of "[c]onfidential, policy-determining, policy-making or policy-advocating" at 5 C.F.R. § 210.102(b)(3). That recission would effectively make the criteria OPM established in the Final Ezell Memorandum part of a new definition of "confidential, policy-determining, policy-making or policy-advocating." That definition, therefore, must be considered part of OPM's proposed regulations and should have been subject to notice and comment.

II. THE PROPOSED REGULATION IS UNSUPPORTED BY THE RECORD, IS BAD POLICY AND WILL WEAKEN INSTITUTIONAL SAFEGUARDS AGAINST ABUSES OF POWER.

The proposed rule proposes changes to 5 C.F.R. parts 210, 212, 213, 302, 432, 451, and 752 in an effort to remove perceived or real obstacles to the implementation of Executive Order 14,171 and the implementing Final Ezell Memorandum. The proposed rule, like the order and implementing memorandum, represents bad policy and seeks only to weaken institutional safeguards against abuses of power.

A. OPM's stated purposes for this rulemaking are unsupported by the record.

OPM's stated purposes for this rulemaking are unsupported by the record. The proposed regulation will produce effects that are directly contrary to each of these stated purposes.

OPM claims that a purpose of Schedule PC is to increase accountability,[16] but the Trump administration's own history makes clear that Schedule PC will *reduce* accountability by facilitating unchecked retaliation against whistleblowers and employees who refuse to comply with illegal orders.[17] If implemented, the rulemaking would remove accountability for politicized hiring and removal practices.[18]

OPM claims that another purpose is to strengthen democracy,[19] but Schedule PC would remove a check on unlawful agency actions.[20] Civil service protections guard the public's interest by ensuring that the day-to-day functions of government uphold the Constitution and the rule of law. They ensure that employees cannot be fired for refusing to carry out unlawful orders,[21] are retained based on merit rather than political loyalty,[22] and serve as the eyes and ears

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[16] Improving Performance, Accountability and Responsiveness in the Civil Service, 90 Fed. Reg. 17182 (Apr. 23, 2025) (hereinafter, "90 Fed. Reg. at [pin cite]").

[17] *See, e.g.*, Brian Stelter, *Trump attacks whistleblower in tweetstorm full of rants and conspiracies*, CNN (Dec. 28, 2019), https://tinyurl.com/3zcp4ua2; Rashaan Ayesh, *Federal watchdog finds OMB violated law by withholding Ukraine aid*, AXIOS (Jan. 16, 2020), https://tinyurl.com/27vmcfkx.

[18] *See* 5 U.S.C. § 2302(a)(2)(B)(i); *see also* 5 U.S.C. §§ 1204, 1214, 1221, 7701, 7703.

[19] 90 Fed. Reg. at 17203.

[20] *See* 5 U.S.C. § 2302(a)(2)(B)(1) (excluding "confidential, policy-determining, policy-making or policy-advocating positions from coverage of prohibited personnel practices statute), (b)(9)(D) (protecting covered employees against disciplinary action for refusing illegal orders).

[21] 5 U.S.C. §§ 2302(b)(9)(D), 7513.

[22] *Id*. §§ 2302(b)(10)(12), 7513.

of the public for reporting wrongdoing and waste to inspectors general, the Special Counsel, Congress, and others.[23]

OPM claims that another purpose of Schedule PC is to ensure "nonpartisanship in the civil service,"[24] but Schedule PC and OPM's implementing regulations would allow—and appear to be intended to allow—previously prohibited partisanship to flourish in the civil service.[25] OPM seeks to assure the reader that the Trump administration will voluntarily follow the same hiring practices for Schedule PC positions that it now uses for other positions, pledging to keep politics out of hiring. But the evidence undermines that claim. In an executive order, President Trump has ordered agencies to involve the Department of Government Efficiency in career-level hiring decisions, ensuring a political influence over the hiring process.[26] President Trump said on the day of his inauguration that all federal employees should be fired.[27] Throughout the Department of Justice, the Trump administration has been taking politically motivated personnel actions involving career employees.[28] News reports indicate that the administration's political appointees are also interfering in the hiring for career positions in law enforcement and intelligence agencies.[29] White House deputy press secretary Anna Kelly

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[23] *Id*. §§ 1221, 2302(b)(8), 7211, 7513.

[24] 90 Fed. Reg. at 17203.

[25] *See, e.g*., Adam Goldman, *F.B.I. Suspends Employee on Patel's So-Called Enemies List*, N.Y. TIMES (Apr. 11, 2025), https://tinyurl.com/sna5jzdt; Andrew Goudsward & Sarah N. Lynch, *Trump administration reassigns close to 20 Justice Department officials, sources say,* REUTERS (Jan. 23, 2025), https://tinyurl.com/4r3xpfbj; Laura Barrón-López, Ali Schmitz & Taylor Bowie, *Democrats ask OMB nominee Vought about goals of replacing civil servants with appointees*, PBS NEWS (Jan. 15, 2025) (quoting Russell Vought as saying "We have to solve the woke and the weaponized bureaucracy and have the president take control of the executive branch."), https://tinyurl.com/yv54hhh5; Joe Davidson, *Trump's second-term agenda plans a purge of the federal workforce*, WASH. POST (July 26, 2024) (recounting that JD Vance's advice for President Trump: "[F]ire every single mid-level bureaucrat, every civil servant in the administrative state. Replace them with our people."), https://tinyurl.com/5crb87a2; Am. First Policy Inst., Comment on Proposed Rule Upholding Civil Service Protections and Merit System Principles, Docket No. OPM-2023-0013, Comment No. 3156, 1 (Nov. 17, 2023) ("[C]areer federal employees … show little ideological divergence from Democratic party-political appointees."), https://tinyurl.com/txce5dtf; John Knefel, *Charlie Kirk and Christian nationalist Russ Vought promote "ideological purity tests" to implement Schedule F*, MEDIA MATTERS FOR AMERICA (Sept. 26, 2022) (Russell Vought complaining of "woke" employees at the Office of Management and Budget while recounting development of Schedule F), https://tinyurl.com/yc6jkbb3; Russell Vought, *A Commitment to End Woke and Weaponized Government*, CTR. FOR RENEWING AM., at 51, 70 (2022) (discussing "woke bureaucrats" in report issued by Russell Vought), https://tinyurl.com/59afef7h.

[26] Exec. Order No. 14,210, § 3(b)(i) (Feb. 11, 2025), *reprinted in* Implementing the President's "Department of Government Efficiency" Workforce Optimization Initiative, 90 Fed. Reg. 9669 (Feb. 14, 2024).

[27] Erich Wagner, *Trump: Agencies should fire 'all' bureaucrats*, GOV'T EXEC. (Jan. 20, 2025) ("'Most of those bureaucrats are being fired, they're gone,' Trump said at a rally Monday afternoon while referring to his planned signing of a freeze on new federal regulations. 'It should be all of them.'"), https://tinyurl.com/283h58cx.

[28] Perry Stein & Jeremy Roebuck, *With many career lawyers gone, Justice Dept. hires Trump loyalists for court*, WASH. POST (Apr. 10, 2025), https://tinyurl.com/7cv9ytj8; *Trump Justice Department fires more career officials*, REUTERS (Mar. 10, 2025), https://tinyurl.com/mrxapyx6; Ken Dilanian & Ryan J. *Reilly, Trump administration fires DOJ officials who worked on criminal investigations of the president*, NBC NEWS (Jan. 27, 2025), https://tinyurl.com/4de3fhan; Andrew Goudsward & Sarah N. Lynch, *Trump administration reassigns close to 20 Justice Department officials, sources say*, REUTERS (Jan. 23, 2025), https://tinyurl.com/4r3xpfbj; Julia Ainsley, *Trump fired four top immigration court officials hours after taking office*, NBC NEWS (Jan. 21, 2025), https://tinyurl.com/bds8f4cr.

[29] Ellen Nakashima & Warren P. Strobel, *U.S. intelligence, law enforcement candidates face Trump loyalty test*, WASH. POST (Feb. 9, 2025), https://tinyurl.com/ntv3hyt8.

defended this misconduct.[30] In short, OPM's assurances do not match the Trump administration's words and actions.

OPM also claims, without citing evidence of widespread corruption in the career ranks of government, that Schedule PC is needed specifically to fight corruption.[31] Schedule PC and OPM's implementing regulations, however, would only *increase* the potential for corruption by freeing political appointees to retaliate against subordinates who blow the whistle on corruption.[32] This claim is an astonishing one given the failure to cite to any evidence of widespread corruption in the career civil service and in light of other steps the Administration has taken to weaken oversight. OPM's notice of proposed rulemaking comes on the heels of the President already having fired the Director of the Office of Government Ethics,[33] the Special Counsel of the Office of Special Counsel,[34] numerous Inspectors General,[35] and members of the Merit Systems Protection Board and the Federal Labor Relations Authority,[36] among other essential guardians of public integrity.[37]

Illustrating the disingenuousness of the stated reasons for this rulemaking is OPM's discussion of severe personnel abuses at the Federal Deposit Insurance Corporation (FDIC).[38] The notice of proposed rulemaking cites the report of an independent investigation that found widespread misconduct, discrimination and even sexual harassment by FDIC managers.[39] The report emphasized the victimized employees' "fear of retaliation" in coming forward with

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[30] *Id*.

[31] 90 Fed. Reg. at 17203.

[32] *See, e.g*., Jonathan Katz & Renée Rippberger, *US democracy at risk as corruption threats grow*, BROOKINGS INST. (Apr. 3, 2025), https://tinyurl.com/4v83ujmh; Sheryl Gay Stolberg, *Federal Watchdog Says Coronavirus Whistle-Blower Should Be Reinstated as It Investigates*, N.Y. TIMES (May 8, 2020, updated Aug. 9, 2021), https://tinyurl.com/5n8pw6y2; Erik Katz, *Agency Officials Are Increasingly Retaliating Against Whistleblowers With Impunity, IG Says*, GOV'T EXEC. (Jan. 28, 2020), https://tinyurl.com/4dp5fsw3; Charlie Savage & Michael D. Shear, *Trump Attack on Envoy During Testimony Raises Charges of Witness Intimidation*, N.Y. TIMES (Nov. 15, 2019), https://tinyurl.com/mr3zbhbe; Isaac Arnsdorf, *Trump Appointees Used "Whistleblower Protection" Law to Target Whistleblowers, Review Finds*, PROPUBLICA (Oct. 24, 2019), https://tinyurl.com/2p9rtjj8; Emily Tillett, *Trump says "flipping" like Michael Cohen should be "illegal," tears into Jeff Sessions*, CBS NEWS (Aug. 23, 2018), https://tinyurl.com/mwyea8ak.

[33] Kathryn Watson, *Trump ousts director of Office of Government Ethics*, CBS NEWS (Feb. 10, 2025), https://tinyurl.com/3xdtf34p.

[34] Jacob Rosen & Melissa Quinn, *Head of federal whistleblower office drops legal battle challenging his firing*, CBS NEWS (Mar. 7, 2025), https://tinyurl.com/mu8kbchn.

[35] Aneeta Mathur-Ashton, *What Happens When the Watchdogs Are Fired? America Is About to Find Out*, U.S. NEWS & WORLD REPORT (Apr. 15, 2025), https://tinyurl.com/4x2ccxdw.

[36] Sean Michael Newhouse, *Supreme Court lets Trump fire Democratic members of labor boards, for now*, GOV'T EXEC (Apr. 9, 2025), https://tinyurl.com/2hy4euv3.

[37] *See, e.g*., Perry Stein, Shayna Jacobs, Carol D. Leonnig & Ann E. Marimow, *Several top career officials ousted at Justice Department*, WASH. POST (Mar. 7, 2025) (reporting firing of head of Office of Professional Responsibility), https://tinyurl.com/9edstjn9; Sarah N. Lynch, *Senior Justice Department ethics official resigns over sidelining by Trump appointees, source says*, REUTERS (Feb. 19, 2025), https://tinyurl.com/yxhwumzv; Charlie Savage, *Two Members of Privacy Watchdog, Summarily Fired by Trump, File Lawsuit*, N.Y. TIMES (Feb. 24, 2025), https://tinyurl.com/2s39au22.

[38] 90 Fed. Reg. at 17190.

[39] *Id*. at n.109.

complaints.[40] But the Trump administration has ordered the FDIC to close the offices meant to provide the training that the report recommended to prevent future abuses.[41] And the administration's proposed solution is now to try to strip federal employees of protections against the very types of abuses that allegedly occurred at the FDIC, including the right to challenge whistleblower retaliation and unwarranted personnel actions before the MSPB.[42]

Schedule PC would strip career federal employees of protection against any of the personnel practices prohibited under 5 U.S.C. § 2302.[43] Executive Order 13,957 includes a requirement that agencies issue regulations prohibiting the same personnel practices,[44] but both executive orders definitively declare that nothing in them provides any employee (or anyone else) with any enforceable right.[45] The effect of the orders is to strip federal employees of access to the Office of Special Counsel (OSC) and the MSPB, leaving them to complain to political appointees in their agencies even if political appointees in those same agencies are the very ones committing the prohibited personnel practices. Moreover, without adverse action appeal rights, employees will know that availing themselves of this envisioned complaint process—even if any agency actually issues the envisioned regulations—would potentially expose them to retaliatory removal without recourse to the MSPB.

OPM also consistently claims that those who are moved to Schedule PC will keep their jobs as long as they perform well. But the administration's actions over the past four months make clear that this is an empty promise. Take, for example, the administration's widespread, en masse termination of probationary employees. As multiple district courts, the Office of Special Counsel, and the Merit Systems Protection Board all determined, these terminations were not based on any individualized assessment of probationary employees' perfomance or conduct, but instead were carried out because the administration believed that these employees lacked due process protections. There is every reason to believe that the administration would treat Schedule PC employees the exact same way—if they lack protections, the administration would fire them, regardless of their performance or conduct.

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[40] Joon H. Kim, Jennifer Kennedy Park & Abena Mainoo for Cleary Gottlieb Steen & Hamilton, LLP, *Report for the Special Review Committee of the Board of Directors of the Federal Deposit Insurance Corporation*, FED. DEPOSIT INS. CORP., at 1 (2024) (hereinafter "*Cleary Gottleib Report*"), https://tinyurl.com/426j992d.

[41] John Heltman, *Trump's DEI order collides with the FDIC workplace scandal*, AM. BANKER (Jan. 30, 2025) ("President Donald Trump issued a sweeping order last week to crack down on diversity, equity and inclusion initiatives at federal agencies and in doing so may have made it harder for the new leadership at the Federal Deposit Insurance Corp. to dig out from the workplace-harassment scandal that has dogged the agency for the last year.") (2025 WLNR 2433348), https://tinyurl.com/3v7m75n9; id. ("The FDIC confirmed that the Office of Minority and Women Inclusion—an office established at each of the financial regulators as part of Dodd-Frank—has been identified as a DEI office per the OPM memo . . . ."); *Cleary Gottleib Report*, at 170 ("Develop and implement a more effective training program on workplace conduct, culture, and leadership for all employees. . . . Develop and implement a mandatory, core curriculum for all employees on inclusive leadership and that is grade and role appropriate.").

[42] *See e.g.*, 90 Fed. Reg. at 17182 ("[Schedule PC positions] will be at-will positions excepted from adverse action procedures or appeals.").

[43] 5 U.S.C. § 2302(a)(2)(B)(i).

[44] Exec. Order 13,957, § 6, *as amended by* Exec. Order 14,171.

[45] Exec. Order 13,957, § 7; Exec. Order 14,171, § 7.

B. The changes OPM proposes must be made by Congress.

The heart of OPM's argument in favor of its regulatory changes is a claim that widespread poor performance and misconduct are going unaddressed.[46] As discussed below, OPM's conclusion is not supported by the rulemaking record. But in any event, this complaint misses the point entirely. What matters is that Congress, not the President, is the constitutional body authorized to enact new laws to address alleged poor performance and misconduct, if there is dissatisfaction with existing ones.

OPM admits in its notice of proposed rulemaking that Executive Order 14,171 "seeks to return to the efficient, merit-based system enacted by the Pendleton Act [of 1883]."[47] Much of OPM's notice of proposed rulemaking merely laments the administration's subjective frustration with laws that Congress enacted to protect the American people against a politicized civil service.[48] These complaints about the CSRA demonstrate that Schedule PC and OPM's proposed regulations are designed not to implement the CSRA but to thwart it.

If the adverse action procedures that Congress provided are too cumbersome to implement effectively—a showing that OPM has not made—then the proper response is to ask Congress to change the law, not to seek to strip a subset of career federal employees of those protections guaranteed by the law. That is, not only has OPM failed to show the existence of a problem, but its proposed solution is neither rationally related to the asserted problem nor available under existing law.[49]

C. The record does not support OPM's conclusions.

OPM rests its proposed rulemaking on two factual conclusions: that "chapter 43 and 75 procedures significantly impair agencies' ability to hold Federal employees accountable for poor performance or misconduct,"[50] and that "policy resistance is a serious concern—indeed, a serious threat to democratic self-government."[51] But the sources cited by OPM do not adequately support

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[46] *See, e.g.*, 90 Fed. Reg. at 17182 ("As described below, decades of experience have shown that chapter 43 and 75 procedures make it very difficult for agencies to hold employees accountable for their performance or conduct.").

[47] 90 Fed. Reg. at 17208.

[48] *See, e.g.*, *id.* at 17182 ("The [CSRA] processes are time-consuming and difficult, and removals are not infrequently subject to a protracted appeal process with an uncertain outcome."); *id*. at 17,190 (managers "often find taking warranted adverse actions too difficult and uncertain to be worth the effort"); *id*. at 17206 ("[a]dditional bureaucracy and extended litigation do not promote the efficiency of the federal service"); *id*. at 17217 ("chapter 43 and 75 procedures make it difficult for supervisors to effectively address poor performance or misconduct"); *id*. at 17218 ("adverse action procedures and appeals make it prohibitively difficult for agencies to remove employees for all but the worst performance and conduct").

[49] *See, e.g*., *Dep't of Com. v. New York*, 588 U.S. 752, 785 (2019) ("We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process."); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (regulations must be "supported by the reasons that the agencies adduce"); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 22 (2020) (rejecting an agency's new explanations for its regulatory action as "only as impermissible post hoc rationalizations").

[50] 90 Fed. Reg. at 17191; *see also id*. at 17189-91 (discussing issue).

[51] *Id*. at 17191; *see also id*. at 17191-94 (discussing issue).

these conclusions and OPM fails to explain why its findings—even if accurate—would require the solution it proposes.

Adverse-action procedures. With respect to adverse-action procedures, OPM relies on (i) selected survey results from OPM's Federal Employee Viewpoint Survey (FEVS) and a 2016 Merit Principles Survey (MPS), (ii) three third-party sources, (iii) two MSPB cases, and (iv) the above-referenced report about the FDIC. None of these sources support OPM's conclusion or its selected "solution" to this purported problem.

OPM's reliance on FEVS and MPS data is unsupported and mistaken. OPM states that FEVS data historically showed only a minority of employees surveyed believed that poor performers were appropriately dealt with, but OPM cites no source for this conclusion.[52] In any event, the 2024 rule OPM rulemaking appropriately recognized that employees generally do not know what steps their agency takes to address another employee's underperformance. OPM's rationale for now rejecting this logic is that it allegedly "demeans" federal employees.[53] But that is not a reasoned basis upon which to reject a conclusion, as it fails to explain why the conclusion was incorrect. OPM also cites 2020 and 2023 FEVS data that shows that roughly half of respondents believe that poor performers remain on the job and continue to underperform.[54] OPM's reliance on this data is also flawed, as there is no way to know whether it represents a few instances of poor performers remaining in role (but reported by multiple respondents) or a more widespread phenomenon.

OPM's reliance on three third-party sources is similarly unavailing. First, the outdated data relied on is from 2003 and 2014 (with a third source having no date).[55] Second, none of the sources provide sufficient data to assess the basis for their conclusion and OPM has inappropriately failed to provide that data.[56] Perhaps most importantly, none of the sources—even if credited—provide logical support for the changes proposed by OPM, as opposed to other changes like better training managers on how to use the existing performance management system.[57]

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[52] *Id.* at 17189. OPM also cites the 2016 MPS data for this conclusion. *Id.* n.95

[53] *Id.* at 17190.

[54] *Id.* at 17189 & n.97.

[55] *Id.* at 17189 nn. 98 (2014 data), 99 (undated data), 100 (2003 report).

[56] *See Solite Corp. v. U.S. Env't Prot. Agency*, 952 F.2d 473, 484 (D.C. Cir. 1991) (agency has "duty to identify and make available … data that it has employed in reaching the decisions to propose particular rules") (cleaned up).

[57] Indeed, one of the reports OPM relies on expressly recommends that "[e]mployees government wide should continue to have the basic employment guarantees of merit hiring, nondiscrimination, and protection from arbitrary or political personnel actions." Report of the National Comm'n on Public Serv. (January 2003), 16, https://tinyurl.com/556wy4mk, cited in 90 Fed. Reg. at 17189 n.100. *See also* U.S. Merit Sys. Prot. Bd., Addressing Poor Performers and the Law (Sep. 2009), 27 ("It appears that many barriers are not caused by regulations or the statute, but rather are inherent to performance management. The subjective nature of assessing performance, the challenges in creating standards for different positions, the uncomfortable nature of telling someone you are displeased with his or her performance—these things cannot be changed by a statute, they simply exist. What agencies can do is try to give managers the training and support to perform these tasks as well as possible and create a culture where performance matters."), https://tinyurl.com/4hnnsu4d. For some reason, OPM relies instead on the nearly thirty-year-old version of this report. 90 Fed. Reg. at 17190 & n.104 (citing 1995 version of report).

OPM's reliance on two MSPB cases to support the contention that the adverse action process is "a protracted administrative process with an uncertain outcome" is unserious.[58] First, two examples over nearly fifty years of MSPB adjudications cannot reasonably form the basis for *any* conclusion. Second, OPM fails to mention that one case involved whistleblower retaliation (as found by the Federal Circuit),[59] which is what led to the employee's reinstatement, and the second case turned on the agency's failure to properly designate the position at issue as one of a "confidential, policy-determining, policy-making, or policy-advocating" character.[60] Neither case supports OPM's otherwise unsupported assertion that the administrative process is either protracted or leads to an uncertain outcome.[61] In fact, the average MSPB case processing time for FY2024 was 130 days.[62] And 94 percent of MSPB decisions decided on the merits by the Federal Circuit were affirmed.[63] That is hardly protracted or uncertain.

The FDIC scandal referenced in the proposed rule similarly does not support the establishment of Schedule PC both for the reasons explained above and because the cited report does not in fact attribute the problems at the FDIC to adverse action procedures. Although the proposed rule states that "[a]dverse action procedures made it difficult for FDIC to hold senior officials accountable,"[64] the report says no such thing. The report does acknowledge that federal employees are entitled to adverse-action procedures, but it does not blame the existence of those procedures. Instead, it squarely blames the "extremely risk-averse approach" adopted by FDIC managers, who "underestimated the risks of not taking sufficiently forceful action."[65]

Finally, to the extent that OPM's proposed solution is based on the notion that poor performance is widespread in the federal workforce,[66] the available evidence suggests otherwise. OPM's relies on a single study of federal employees from 2003 to support this assertion[67]—a plainly insufficient evidentiary basis, especially when more recent data indicate otherwise.[68] Similarly, OPM's discussion of the number of federal employees dismissed each year for

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[58] 90 Fed. Reg. at 17190 & nn. 105, 106, 107.

[59] *Id*. at 17190 & nn. 105, 106 (*citing Chambers v. Dep't of the Interior*, 116 M.S.P.R. 17 (2011)).

[60] *Id.* at n.107 (*citing Briggs v. Nat'l Council on Disability*, 68 M.S.P.R. 296 (1995), 60 M.S.P.R. 331 (1994)).

[61] OPM complaining about an allegedly protracted appeal process is particularly ironic, given that President Trump left the MSPB without a quorum for his entire first term, and he recently purported to fire a Democratic appointee on the MSPB without cause, which would strip the MSPB's board of a quorum again. Ana Popovich & Geoff Schweller, *Merit Systems Protection Board Regains Quorum for First Time in Over Five Years*, Whistleblower Network News (Mar. 2, 2022), https://tinyurl.com/zsfprbyc.

[62] U.S. Merit Sys. Prot. Bd., Annual Perf. Rep. for Fiscal Year 2024 (Jan. 17, 2025), 6, https://tinyurl.com/2eynadz9.

[63] *Id.* at 7.

[64] 90 Fed. Reg. at 17190.

[65] Joon H. Kim, Jennifer K. Park, & Abena Mainoo, ''Report for the Special Review Committee of the Board of Directors of the Federal Deposit Insurance Corporation" (April 2024), 154-45, https://tinyurl.com/3nzx2ra6, cited in 90 Fed. Reg. at 17190 n.109.

[66] 90 Fed. Reg. at 17191.

[67] *Id.* at n.123.

[68] *See, e.g.*, OPM FEVS Dashboard, https://tinyurl.com/387hrrr4 (slide 6, lines 20-22) (well over 80% of employees believe employees in their work unit "meet the needs of our customers," "contribute positively" to agency's performance, and "produce high-quality work"). *See also* U.S. Merit Sys. Prot. Bd., 2021 Merit Principles Survey Release Dataset. https://www.mspb.gov/foia/SurveyData.htm.

performance or misconduct does not adequately explain OPM's rationale in discounting the numbers cited in the 2024 rulemaking.[69]

So-called widespread "policy resistance." OPM relies on a variety of anecdotes and studies for its assertion that so-called "policy resistance" is a widespread problem. In some instances, the sources it relies on have been debunked, and OPM's continued reliance on these sources calls its conclusions into grave doubt.[70] In other instances, OPM cites news stories with anecdotes but fails to acknowledge that even those stories contain statements such as "there is no evidence we are seeing of a widespread federal bureaucracy revolt,"[71] "there is no verifiable revolt by the workforce against him,"[72] and "the fidelity of federal employees to serving the public through the work of their agencies" is clear.[73] OPM's reliance on various academic studies is similarly misplaced. In one case, it relies on a purely academic study that contains zero evidence of the actual existence of the problem OPM purports to be solving.[74] In another case, it relies on a study limited to procurement officers that made assumptions about political affiliation based on race and minority status.[75] Similarly, a handful of anecdotes of alleged policy resistance, including one dating back to the Reagan administration, hardly constitutes an evidentiary basis to assert that such alleged resistance is currently a "widespread problem."

Most importantly, OPM has failed to cite a single instance in which the administration confronted an actual instance of such "policy resistance" and was unable to use existing

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[69] *See* 90 Fed. Reg. at 17190. Notably, OPM cites statistics of federal employee firings, which OPM claims occurs too rarely, without citing any comparative statistics for the private or nonprofit sectors. That, of course, would have been difficult to do because statistical analyses of the private sector generally do not distinguish between layoffs and performance-based or conduct-based firings, and they generally do not segregate employees fired during their first two years of employment from data pools, as OPM does. *Id.* Also relevant would be to understand why OPM's analysis in the notice of proposed rulemaking excluded all employees fired after less than two years of service, *id.*, given that competitive service employees accrue MSPB appeal rights after only one year, see 5 U.S.C. § 7511(a)(1)(A), and reinstated career employees, or in some cases career-conditional employees, who have completed probationary periods in similar positions have MSPB appeal rights immediately upon appointment, *see* 5 C.F.R. §§ 315.401-.402, 752.201(b)(2). Indeed, it is not clear why OPM excluded any probationary employee terminations from its analysis, if the goal is to demonstrate that the government fires too few employees. OPM's exclusion of data regarding employees fired after less than two years' service is arbitrary and capricious and insufficiently informative for the cited purposes.

[70] For example, OPM cites an unscholarly series of anecdotes that has been discredited for its anonymous sourcing; its misattribution of management failures by political appointees to career staff; and, in some cases, the outright implausibility of the anonymous anecdotes. *See* 90 Fed. Reg. at 17192 n.142, 17193 n.151 (citing James Sherk, *Tales from the Swamp*, AM. FIRST POLICY INST. (Feb. 1, 2022, updated Jan. 8, 2025)). In a comment submitted to OPM on the prior proposed rulemaking in 2023, Democracy Forward thoroughly discredited claims in that document. Democracy Forward, Comment on Proposed Rule concerning Upholding Civil Service Protections and Merit System Principles, Docket No. OPM-2023-0013, Comment No. 2822 (Nov. 17, 2025), https://tinyurl.com/nhhxm7du,. Additional criticism of "Tales From the Swamp" has highlighted its shortcomings. *See, e.g.*, Walter M. Shaub, Jr., *The Corruption Playbook*, NEW YORK REVIEW OF BOOKS (Apr. 18, 2024), https://tinyurl.com/yptmc3mp. The Democracy Forward comment and *The Corruption Playbook* are incorporated herein.

[71] Juliet Eilperin, Lisa Rein, & Marc Fisher, *Resistance from within: Federal workers push back against Trump*, WASH. POST (Jan. 31, 2017), https://tinyurl.com/nkjnyy2c, cited in 90 Fed. Reg. at 17192 n. 138.

[72] Joe Davidson, *Many feds don't like Trump's program, but they're not revolting*, WASH. POST (Feb. 1., 2017), https://tinyurl.com/4vk8fxc5, cited in 90 Fed. Reg. at 17192 n.140.

[73] *Id.*

[74] 90 Fed. Reg. at 17191 n.130.

[75] *Id*. at 17192 n. 134.

mechanisms under Chapters 43 and 75 to take appropriate action. That failure is fatal, as OPM has failed to explain why the proposed solution is a necessary or appropriate response to this alleged problem. That is, OPM fails to explain the leap from its finding that "policy resistance" is "widespread" to its conclusion that "these challenges make Schedule Policy/Career necessary to increase policy-influencing officials' accountability to the President and effectively discipline employees who engage in such behavior."[76] Current law already allows agencies to take actions against employees who fail or refuse to implement legal policy directives. Put another way, OPM fails to articulate a "rational connection between the facts found and the choice made."[77]

D. Even if they were lawful, OPM's proposed changes would be bad policy.

Tearing out the guardrails Congress provided is also bad policy. Congress did not enact the civil service laws in a vacuum; rather, it did so in response to the rampant corruption and inefficiency of the system of political patronage that dominated the nineteenth century, the so-called "spoils system." Under the spoils system, political operatives and other bad actors abused governmental power to serve their own selfish interests, rather than the public's interests. The government was also notoriously ineffective, with talent leaving the government at the end of each administration and positions being awarded to unqualified political operatives based solely on party affiliation instead of merit. This history is not in dispute: the preamble of OPM's notice of proposed rulemaking concedes that the spoils system was a calamitous failure for the nation.[78] OPM is right about another thing: political hires have "often provided poor services that frustrated the President, members of Congress, and the voting public."[79]

The civil service laws aim to protect employees who blow the whistle on corruption,[80] refuse to violate the law for their political leaders,[81] communicate with Congress,[82] or exercise their right to participate outside work on the political processes of democracy.[83] It is precisely these qualities of the existing system that the proposed rule would change.

No one should be mistaken about what OPM is proposing: Schedule PC follows a well-worn course charted by others in nations that have experienced democratic backsliding. Viktor Orbán began his assault on democracy in part with the dismantling of civil service protections.[84] Much the same thing happened under Jair Bolsonaro in Brazil,[85] in Poland while the Law and

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[76] *Id.* at 17194.

[77] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (internal citation omitted).

[78] 90 Fed. Reg. at 17183-84.

[79] *Id.* at 17184.

[80] 5 U.S.C. § 2302(b)(8), (9)(A)(i), (B)-(D).

[81] *Id.* § 2302(b)(9)(D).

[82] *Id.* § 7211 (Lloyd-LaFollette Act, as amended).

[83] *Id.* § 2302(b)(1)(E), (3), (10), (12); *see also id.* § 7321.

[84] *See* Kim Lane Scheppele, *Hungary and the End of Politics*, THE NATION (May 6, 2014), https://tinyurl.com/4numc2s3.

[85] Michelle Morais de Sá e Silva, *Policy dismantling by capacity manipulation in a context of democratic backsliding: The bureaucracy in disarray in Bolsonaro's Brazil*, INT'L REV. OF PUB. POL'Y, vol. 4, 272-92 (2022), https://doi.org/10.4000/irpp.3001.

Justice Party held sway,[86] in Venezuela under Presidents Hugo Chávez and Nicolás Maduro,[87] in Benin under Patrice Talon,[88] and in Peru under Alberto Fujimori,[89] to name just several examples. Civil service purges have, likewise, been a feature of Recep Tayyip Erdoğan's autocratic reign in Turkey.[90] It is a tactic of the aspiring autocrat Javier Milei in Argentina.[91] Merit system principles were an early target of Vladimir Putin.[92]

Implementing Schedule PC would take the nation down a dangerous path. The consolidation of power it represents is not something that will end with the current administration. A future administration could just as easily abuse Schedule PC in the ways described above. Schedule PC and OPM's implementing regulations would be bad for the republic now, and they would be bad for the republic under future administrations.

III. THE PROPOSED REGULATORY CHANGES AND SCHEDULE PC ITSELF ARE CONTRARY TO LAW.

The proposed regulation and Schedule PC itself are contrary to law. In seeking to move a vast swath of the Federal workforce into an at-will employment status, the administration is abusing narrow exclusions in the CSRA to produce a result that is contrary to law. The statutory provisions on which the administration has founded Schedule PC—5 U.S.C. § 7511(b)(2) and 5 U.S.C. § 2302(a)(2)(B)(i)—are narrow exclusions that apply only to political appointees, and their use cannot involuntarily strip civil service protections that a career federal employee has already accrued.

A. The relevant statutory provisions apply only to political appointees.

The preamble of OPM's notice of proposed rulemaking emphasizes the importance of 5 U.S.C. § 7511(b)(2) to the attempted stripping of civil service protections.[93] That is because the President's establishment of a new excepted service schedule under 5 U.S.C. § 3302 has no bearing on the scope of an employee's protections under the CSRA, other than to the extent it

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[86] Rob Schmitz & Greg Dixon, *Rebuilding Democracy in Poland*, NPR (Feb. 26, 2024), https://tinyurl.com/ynjff4zu.

[87] Michael Angeloni, *How civil service purges have played out around the world*, IF YOU CAN KEEP IT (Jun 24, 2024), https://tinyurl.com/3u2jfejt.

[88] Erica Frantz, Andrea Kendall-Taylor & Joe Wright, *Firing civil servants and dismantling government departments is how aspiring strongmen consolidate personal power – lessons from around the globe*, THE CONVERSATION (Feb. 18, 2025), https://tinyurl.com/376c6kpx.

[89] Michael W Bauer and Stefan Becker, *Democratic Backsliding, Populism, and Public Administration*, PERSPECTIVES ON PUB. MGMT. & GOVERNANCE, Vol. 3, Iss.1, at 19-31, (Jan. 9, 2020), https://doi.org/10.1093/ppmgov/gvz026.

[90] Henry Ridgwell, *Amnesty: 130,000 Purged Public Workers Waiting for Justice in Turkey*, VOICE OF AMERICA (Oct. 30, 2018), https://tinyurl.com/ytn7wmcv; Kareem Fahim, *As Erdogan prepares for new term, Turkey dismisses more than 18,000 civil servants*, WASH. POST (July 8, 2018), https://tinyurl.com/rfwwpmnb.

[91] Mar Centenera & Constanza Lambertucci, *President Javier Milei fires 24,000 government workers in Argentina: 'No one knows who will be next'*, EL PAÍS (Apr. 2, 2025), https://tinyurl.com/5ftzv52j.

[92] *Id*.

[93] 90 Fed. Reg. at 17182 n.7 (citing 5 U.S.C. § 7511(b)(2) as the authority for stripping adverse action rights), 17186 ("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 their associated MSPB appeals.").

affects the amount of time required to accrue certain rights.[94] Both competitive service and excepted service employees can be covered by the CSRA's major protections.[95] That is why the Final Ezell Memorandum identifies two CSRA provisions, 5 U.S.C. § 7511(b)(2) and 5 U.S.C. § 2302(a)(2)(B)(i), as the authority on which the plan to strip civil service protections rests. These little-used provisions provide narrow exclusions from key civil service protections for positions of a "confidential, policy-determining, policy-making or policy-advocating" character. This phrase is a term of art that refers to political appointees—individuals who have no expectation of continued employment beyond the end of the presidential administration that appointed them.[96]

1. Congress has made clear in numerous laws that "confidential, policy-determining, policy-making or policy-advocating" positions are exclusively for political appointees.

The meaning of the term of art "confidential, policy-determining, policy-making or policy-advocating positions" is not open to interpretation by OPM; Congress has spoken unambiguously as to its meaning. Four federal laws define the term "political appointee" to include individuals appointed to political positions, and they expressly list "confidential, policy-determining, policy-making or policy-advocating" positions as political appointee positions: 5 U.S.C. § 9803(c)(2); 6 U.S.C. § 349(d)(3); 7 U.S.C. § 6992(e)(2); 38 U.S.C. § 725(c). All four laws clearly state that such positions are for political appointees, and other laws further affirm this meaning of the term of art. This statutory use of the term renders OPM's proposed use of the term inconsistent with law.

As with the other three statutes, 7 U.S.C. § 6992 explicitly defines the term "political appointee" to mean, among other positions, "a position which has been excepted from the competitive service by reason of its confidential, policy-determining, or policy-advocating character."[97] Congress was clear about its reason for including this definition in 7 U.S.C. § 6992, which covers employees in the National Appeals Division of the U.S. Department of Agriculture. That statutory section is in a subchapter establishing an appeals process for participants in certain federal farming programs, who include farmers and other beneficiaries of government payments and loan guarantees.[98] To protect these farmers from the dangers of political patronage, Congress prohibited political appointees from working in the division that processes their appeals: "Each position of the Division shall be filled by an individual who is not a political appointee."[99] It then furnishes a definition of "political appointee" that is the exact same language that OPM is now attempting to improperly apply to career civil servants.[100]

The other three laws similarly provide that the term "confidential, policy-determining, policy-making or policy-advocating" applies only to positions for political appointees. One

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[94] *Compare* 5 U.S.C. § 7511(a)(1)(A) *with* 5 U.S.C. § 7511(a)(1)(C).

[95] *See, e.g.,* 5 U.S.C. § 7511(a)(1)(A), (B) & (C).

[96] *O'Brien v. Off. of Indep. Couns*., 74 M.S.P.R. 192, 207 (1997); *Special Couns. v. Peace Corps*, 31 M.S.P.R. 225, 231 (1986).

[97] 7 U.S.C. § 6992(e)(2)(D).

[98] 7 U.S.C. ch. 98, subch. VIII.

[99] 7 U.S.C. § 6992(e)(1).

[100] *Id.* § 6992(e)(2).

subpart of title 5 authorizes recruitment and retention bonuses and leave accrual enhancements for career employees of the National Aeronautics and Space Administration (NASA).[101] But, within that subpart, 5 U.S.C. § 9803 prohibits NASA from using these special authorities for "political appointee[s]."[102] It defines "political appointee" to mean a noncareer SES member or an individual in "a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character."[103]

Likewise, 6 U.S.C. § 349, establishes similar definitions applicable to a component of the Department of Homeland Security. The law defines "career employee" to mean any employee who is not a political appointee,[104] and it defines "political appointee" to mean "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."[105]

A law applicable to the Department of Veterans Affairs (VA), 38 U.S.C. § 725, directs the VA secretary to create a performance system "for each political appointee" that is similar to the system for career members of the SES.[106] That section defines "political appointee" to mean (1) a noncareer SES member or (2) an individual in "a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character."[107]

Two other laws—38 U.S.C. § 714(h)(5)(C) and 15 U.S.C. § 278s(e)(4)(B)(iii) (which incorporates 38 U.S.C. § 714(h)(5)(C))—define "political appointee," in part, as incumbents of positions "of a confidential or policy-determining character under Schedule C of [5 C.F. R. part 213, subpart C]" or a "successor regulation." A successor regulation would be OPM's proposed 5 C.F.R. § 213.3501, which would be in the same subpart and cover positions of a "confidential, policy-determining, policy-making or policy-advocating" character.[108] Here too, the statutory definition of "political appointee" would encompass positions that under OPM's proposed rule would be career civil servants.

The proposed rule's attempt to ignore the historical meaning of the term of art "confidential, policy-determining, policy-making or policy-advocating" will lead to direct statutory conflicts due to the inconsistency between the proposed rule and other laws applicable to federal employees. Any career employee subject to one of these other statutes who is moved into a Schedule PC position—which applies to positions of a "confidential, policy-determining, policy-making or policy advocating" character—would, based on the terms of the other statute, be considered a "political appointee." By its very terms, however, Schedule PC applies only to "[c]areer positions" in the government.[109] These employees, therefore, would be considered

[101] 5 U.S.C. pt. III, subpt. I, ch. 98.
[102] *Id.* § 9803(c)(1).
[103] *Id.* § 9803(c)(2) (emphasis added).
[104] 6 U.S.C. § 349(d)(3)(A).
[105] *Id.* § 349(d)(3)(B) (emphasis added).
[106] 38 U.S.C. § 725(a).
[107] *Id.* § 725(c) (emphasis added).
[108] 90 Fed Reg. at 17222.
[109] *Id.* at 17200.

political and career employees at the same time; that is a nonsensical result that demonstrates the problem with OPM's approach.

Numerous other statutes similarly treat employees in "confidential, policy-determining, policy-making or policy-advocating" positions as political appointees.[110] These statutory provisions treat appointees in positions covered by section 7511(b)(2) or 2302(a)(2)(B)(i) like other political appointees and differently than career federal employees. The laws are only reconcilable with sections 7511(b)(2) and 2302(a)(2)(B)(i) if sections 7511(b)(2) and 2302(a)(2)(B)(i) are inapplicable to career employees—i.e., employees whose employment continues from one presidential administration to the next. These laws demonstrate that Congress has always considered the narrow exclusions in sections 7511(b)(2) and 2302(a)(2)(B)(i) to be applicable only to political appointees—i.e., individuals holding patronage jobs with no expectation of continued employment beyond the end of the presidential administration that appointed them. Appendix 2 to this comment contains a lengthy list of dozens of these laws.

Congress has, for instance, treated career employees and political appointees differently for purposes of recruitment and retention bonuses. Congress authorized such bonuses under sections 5753 and 5754 of title 5; however, those laws prohibit paying the bonuses to any Senate-confirmed presidential appointee, noncareer SES member, or employee in "a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character."[111] As explained in the Senate committee report for this legislation, the restriction was added by a bipartisan amendment that "differed from the original bill by, among other things . . . prohibiting the use of the enhanced bonus authority for *political appointees*."[112] Both the amendment and the bill passed, and the reference in the Senate report to employees in these categories as "political appointees" shows exactly what the term of art "confidential, policy-determining, policy-making or policy-advocating" means. And, moreover, as with the other statutes that use the relevant term of art to refer to political appointees, 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. There is no reasonable argument that Congress intended this result.

Some of the laws listed in Appendix 2 refer to positions of a "confidential, policy-determining, policy-making or policy-advocating" character, while others refer either to Schedule C positions directly or to "confidential or policy-determining" positions (which defines Schedule C positions[113]). The latter categories—of statutes referring to Schedule C positions or their equivalent—is relevant because, at the time it enacted these laws, Congress had no reason to refer to excepted service schedules other than Schedule C, since none had ever been subject

[110] *See, e.g.*, 5 U.S.C. §§ 3372(a)(1), 4107(b)(3), 5753(a)(2)(C), 5379(a)(2), 5754(a)(2)(C), 5757(b), 8432 (referencing "policy-determining character" of positions), 10104(d)(3), 10105(d)(2)(C); 12 U.S.C. § 5432(a)(3)(B), 5584(a)(9)(B); 22 U.S.C. § 3983(d)(3); 38 U.S.C. § 308(d)(2). *See also* 5 U.S.C. § 3301 note (Pub. L. No. 102-484, div. D, tit. XLIV, § 4432(d)(3)(B), 106 Stat. 2720 (1992)); 12 U.S.C. § 4511 note (Pub. L. No. 110-289, § 1133(c)(2)(A), 122 Stat. 2729 (2008)); Pub. L. No. 101-73, tit. IV, § 404(3)(B), 103 Stat. 362 (1989).

[111] 5 U.S.C. §§ 5753(a)(2)(C), 5754(a)(2)(C).

[112] S. REP. NO. 108-223, at 10 (2004), https://tinyurl.com/2ddvfb7j.

[113] 5 C.F.R. § 213.3301(a).

to section 7511(b)(2) or section 2302(a)(2)(B)(i).[114] That is, Schedule C positions have always represented the universe of excepted service schedule positions subject to the section 7511(b)(2) or 2302(a)(2)(B)(i) exclusions. And Congress was clear in treating them as political appointee positions. That treatment matters because, except in President Trump's executive order establishing Schedule F, nothing in the relevant executive orders or regulations defining Schedule C expressly limited use of that excepted service schedule to political appointees.[115] The limitation to political appointees was based not on executive order or regulation but on common understanding of the term of art used in sections 7511(b)(2) and 2302(a)(2)(B)(i). Therefore, in seeking the meaning of the term of art "confidential, policy-determining, policy-making or policy-advocating," the laws listed in Appendix 2 that address Schedule C are as relevant as the laws listed in Appendix 2 that, instead, use the term of art "confidential, policy-determining, policy-making or policy-advocating." In both cases, Congress was referring to political appointee positions.

Referenced in Appendix 2 is a law applicable to the Social Security Administration (SSA), 42 U.S.C. § 904(c). That law limits the SSA to employing no more than *an aggregate total of 20 individuals* in noncareer SES positions and "confidential, policy-determining, policy-making, or policy-advocating" positions.[116] A Freedom of Information Act response by the SSA indicated that the Trump administration employed at least five noncareer SES employees at that agency in 2019,[117] and OPM's online PLUM Data identifies six Schedule C positions.[118] If those numbers are consistent with the current situation at SSA, *that leaves room for only nine (9) Schedule PC employees in all of SSA*. The restriction would seem entirely arbitrary if section 7511(b)(2) did not apply only to political appointees. This limitation in the SSA statute highlights the degree to which OPM's new and entirely novel reading of 5 U.S.C. § 7511(b)(2) represents a radical departure from the well understood usage of the term of art. Not only would this restriction seem arbitrary, but it would mean that SSA's Schedule PC plans are contrary to SSA's own statute. In an April 7, 2025 email to staff, the then-Acting SSA Commissioner outlined plans to reclassify thousands of positions, including every employee in numerous offices, into Schedule PC.[119] In other words, implementing Schedule PC as proposed at SSA would violate SSA's organic statute.

Another of the laws that treats political appointees differently than career employees has been part of the CSRA since Congress enacted that law in 1978.[120] Under 5 U.S.C. § 3372, a career employee may be detailed to a state or local agency for a specified period, subject to a

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[114] *See* GOV'T ACCOUNTABILITY OFF., AGENCY RESPONSES & PERSPECTIVES ON FORMER EXECUTIVE ORDER TO CREATE A NEW SCHED. F CATEGORY OF FED. POSITIONS, GAO-22-105504, 10 (2022), https://tinyurl.com/mua2yv95.

[115] *See, e.g.*, Exec. Order No. 13,562, § 7(ii) (Dec. 27, 2010), *reprinted in* 75 Fed. Reg. 82587 (Dec. 30, 2010) https://tinyurl.com/3jwbdr3j; Exec. Order No. 10,577 (Nov. 22, 1954) *reprinted in* 19 Fed. Reg. 7,521 (Nov. 23, 1954), https://tinyurl.com/y5yxkcwt; 5 C.F.R. § 6.2 (2016) ("Schedule C. Positions of a confidential or policy-determining character shall be listed in Schedule C."), https://tinyurl.com/3r7vcuma; 5 C.F.R. § 213.3301(a) (2016).

[116] 42 U.S.C. § 904(c).

[117] *See* SSA Response to FOIA No. FOIA-SSA-2019-003676, https://tinyurl.com/ycxhmpzk (last visited May 24, 2025).

[118] U.S. Off. of Pers. Mgmt., PLUM Reporting, https://tinyurl.com/32s49sd5 (last visited May 24, 2025).

[119] Erich Wagner, *Dudek calls for entire SSA offices to be converted to new Schedule F*, Gov. Exec. (Apr. 22, 2025), https://tinyurl.com/fjzvefab (last visited May 24, 2025).

[120] Pub. L. No. 95-454, § 603(c), 92 Stat. 1111, 1189-90 (1978) (codified at 5 U.S.C. § 3372).

requirement that the employee then serve for the same length of time upon return to the original federal position.[121] The CSRA amended that law to exclude from its coverage employees in "confidential, policy-making, policy-making or policy-advocating" positions, noncareer SES members, and temporary SES members.[122] Career SES members, however, are not excluded.[123] The exclusion makes sense only if 5 U.S.C. § 7511(b)(2) applies exclusively to political appointees, inasmuch as employees with no expectation of continuing employment beyond the administration that appointed them could not necessarily honor this service commitment.

Laws listed in Appendix 2 that were enacted after Congress passed the CSRA are also relevant to understanding the term of art "confidential, policy-determining, policy-making or policy advocating." While a subsequently enacted law does not control a law's interpretation, "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction" according to Supreme Court precedent.[124] The Supreme Court has further explained that, "[a]t the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings."[125] The Supreme Court invoked this commonsense principle with respect to the CSRA in *United States v. Fausto*, observing that courts "frequently … interpret a statutory text in the light of surrounding texts that happen to have been subsequently enacted."[126] The *Fausto* court explained: "This classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute."[127] Given this interpretive principle, sections 7511(b)(2) and 2302(a)(2)(B)(i) must be read in a manner consistent with the definitions these other statutes supply. They 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. As discussed in this section, Congress defined the concept of a political appointee in other laws based on this understanding of the term of art.

2. The history of the term "confidential, policy-determining, policy-making or policy-advocating" confirms that it is a term of art.

OPM attempts in its notice of proposed rulemaking to ignore, downplay, or reject the extensive evidence that "confidential, policy-determining, policy-making or policy-advocating"

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[121] 5 U.S.C. § 3372(c).

[122] *Id.* § 3372(a)(1).

[123] *Id*.

[124] *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 380-81 (1969). *Cf. Planned Parenthood of Greater Tex. Surgical Health Servs. v. City of Lubbock*, 542 F. Supp. 3d 465, 495 (N.D. Tex. 2021).

[125] *Food & Drug Admin. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 143 (2000).

[126] *United States v. Fausto*, 484 U.S. 439, 453 (1988); *accord Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 786 n.17 (2000) ("[I]t is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes, even those subsequently enacted.").

[127] *Fausto*, 484 U.S. at 453. *See also Brown & Williamson Tobacco Corp.*, 529 U.S. at 143 (same); *Med. Imaging & Tech. All. v. Libr. of Cong*., 103 F.4th 830, 841 (D.C. Cir. 2024) ("We interpret the statutes as a symmetrical and coherent regulatory scheme, reconciling many laws enacted over time, and getting them to make sense in combination." (citations and quotations marks omitted)); *PDS Consultants, Inc. v. United States*, 907 F.3d 1345, 1357 (Fed. Cir. 2018) ("We must read the words in their context and with a view to their place in the overall statutory scheme. This is because statutory ambiguity is a creature not of definitional possibilities but of statutory context." (cleaned up)).

is a term of art that has always been understood to refer to political appointees with no expectation of continued service beyond the administration that appointed them. But this does not insulate OPM's rulemaking from the fact that this phrase is indeed a term of art and has always been understood to be one. Although OPM's preamble largely dismisses legislative history as irrelevant, that legislative history is instructive because it affirms that lawmakers at the time of the CSRA's enactment and afterward understood this term of art to mean positions exclusively for political appointees. Further confirmation of the phrase's status as a term of art can be found in the history of its application by all other Republican and Democratic presidential administrations alike since 1978—and even by the Trump administration before October 21, 2020 (and, in at least one instance, after that date). This history affirms that the original (and continuing) public meaning of the term of art "confidential, policy-determining, policy-making or policy-advocating" was as a reference to positions exclusively for political appointees.

The history of the exclusion at 5 U.S.C. § 7511(b)(2), on which the exclusion at 5 U.S.C. § 2302(a)(2)(B)(ii) is largely based, is rooted in lawmakers' familiarity with Schedule C when they enacted the CSRA. Schedule C was by then a quarter-century old, functioning as an excepted service schedule covering only political appointees.[128] Although an executive order defined Schedule C as covering "confidential or policy-determining" positions,[129] Congress did not intend to reach positions beyond the scope of the existing Schedule C in 1978 when it employed its own statutory language to describe political positions as "confidential, policy-determining, policy-making or policy-advocating."[130] Before Congress enacted the CSRA, OPM's practices with respect to Schedule C and related executive positions had already swept the concepts of "policy-making" and "policy-advocating" under the label "policy-determining." Both OPM and members of Congress used these terms interchangeably.

The relevant history begins at least as early as 1936. In June that year, the Republican Party adopted a national platform declaring unequivocal support for the merit system and accusing President Franklin Roosevelt of having backslid toward the "spoils system" in his first term.[131] Two weeks later, the Democratic Party responded with a platform sounding a similar note of support for merit principles and pledging to move all "non-policy-making positions" to the classified service (now called the competitive service).[132]

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[128] Exec. Order No. 10,440, § 6.2, 1953 WL 49879 (Mar. 31, 1953), *reprinted in* 18 Fed. Reg. 1823 (Apr. 2, 1953).

[129] *Id*.

[130] Pub. L. No. 95-454, tit. II, § 204(a), 92 Stat. 1111, 1135-36 (1978) (codified at 5 U.S.C. § 7511(b)(2)), https://tinyurl.com/44xmy6am.

[131] REPUBLICAN PARTY PLATFORMS, REPUBLICAN PARTY PLATFORM OF 1936 (June 9, 1936) ("The Civil Service has been sacrificed to create a national political machine. As a result the Federal Government has never presented such a picture of confusion and inefficiency. We pledge ourselves to the merit system, virtually destroyed by New Deal spoilsmen. It should be restored, improved and extended."), *reprinted online by* THE AM. PRESIDENCY PROJ., U. OF CALIF., SANTA BARBARA, https://tinyurl.com/5ejpmh6p.

[132] THE DEMOCRATIC PARTY, DEMOCRATIC PARTY PLATFORM OF 1936 (June 23, 1936) ("For the protection of government itself and promotion of its efficiency, we pledge the immediate extension of the merit system through the classified civil service … to all non-policy-making positions in the Federal service."), *reprinted online by* THE AMERICAN PRESIDENCY PROJECT, UNIV. OF CAL., SANTA BARBARA, https://tinyurl.com/3zdjfhnm.

Though the merit system had, indeed, retreated somewhat in Roosevelt's first term,[133] the president echoed this reference to "non-policy-making" positions by calling for the placement of all but "policy-forming" positions in the classified service.[134] In 1937, Roosevelt and the Civil Service Commission (CSC) separately urged Congress to move all positions that were not "policy-forming" under the protection of civil service laws.[135] Roosevelt then made good on his promises, beginning with his issuance of two executive orders in June 1938 that created a framework for granting competitive status to employees in excepted service positions other than those in "policy-determining" positions and "other positions which special circumstances require should be exempted."[136] OPM has said that these orders "[e]xtended the competitive service almost to the limit of the President's authority."[137] Full implementation of Roosevelt's plan was delayed as the administration formulated its approach to certain professional positions.[138] Then, in 1940, Congress enacted the Ramspeck Act, granting Roosevelt further authority to expand the competitive service.[139]

But Congress largely thwarted Roosevelt's efforts to move attorney positions permanently into the competitive service with the rest of Schedule A, blocking new attorney hires into the competitive service.[140] Lawmakers' objection was not that attorneys were policymakers but that the executive branch should not examine attorneys who had already passed state bar exams.[141] By the time President Harry Truman moved attorney positions back into

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[133] *See* LORENZO CASTELLANI, THE HISTORY OF THE UNITED STATES CIVIL SERVICE, 60 (Routledge 2021).

[134] U.S. COMM'N ON ORG. OF THE EXEC. BRANCH OF THE GOV'T, TASK FORCE ON PERS. & CIVIL SERV., REPORT ON PERSONNEL AND CIVIL SERVICE, at 6 (1955), https://tinyurl.com/2zh2y9af.

[135] U.S. CIVIL SERV. COMM'N, FIFTY-FOURTH ANNUAL REPORT, at 2, 26 (1937), https://tinyurl.com/y2ec9vzt. The Brownlow Commission, which Roosevelt commissioned to study the civil service, recommended limiting the policy-forming exception to "the heads of executive departments, under secretaries and assistant secretaries, the members of the regulatory commissions, the heads of a few of the large bureaus engaged in activities with important policy implications, the chief diplomatic posts, and a limited number of other key positions." PRESIDENT'S COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES, at 7-8 (1937), https://tinyurl.com/y84hjc33; *Reorganization of the Executive Departments: Hearings Before Joint Comm. on Gov't Org.*, 75th Cong., at 112 (1937) (testimony of Louis Brownlow), https://tinyurl.com/mr3hf3zx.

[136] Exec. Order 7916 (June 24, 1938), https://tinyurl.com/zycf3zrd. *See also* Exec. Order 7915 (June 24, 1938), https://tinyurl.com/bderk9fb; U.S. CIVIL SERV. COMM'N, FIFTY-SIXTH ANNUAL REPORT, 58 (Nov. 15, 1939), https://tinyurl.com/53cnu86b.

[137] U.S. OFF. OF PERS. MGMT., BIOGRAPHY OF AN IDEAL: A HISTORY OF THE FEDERAL CIVIL SERVICE, 227 (2003), https://tinyurl.com/3nmavkw4. *See also* Exec. Order 7915 (June 24, 1938), https://tinyurl.com/anbc3p8k.

[138] *See, e.g.,* Exec. Order 8044 (1939), https://tinyurl.com/8vnnspkr. *See also* U.S. CIVIL SERV. COMM'N, REP. TO THE S. COMM. ON POST OFF. AND CIVIL SERV., 93D CONG., STATUTORY EXCEPTIONS TO THE COMPETITIVE SERVICE, 227 (1973), https://tinyurl.com/y4xrz39p.

[139] Ramspeck Act, Pub. L. No. 76-880, §1, 54 Stat. 1211 (1940) ("[N]otwithstanding any provisions of law to the contrary, the President is authorized by Executive Order to cover into the classified civil service any offices or positions in or under an executive department, independent establishment, or other agency of the Government...."), https://tinyurl.com/y5uhe5he.

[140] President Theodore Roosevelt created Schedule A in 1903, simultaneously placing attorney positions in that excepted service schedule. Exec. Order 209 (Mar. 20, 1903), https://tinyurl.com/3r5c43h2.

[141] *See Fiorentino v. United States*, 607 F.2d 963, 965-66 (Ct. Cl. 1979) ("It has long been known around this 'island' of Washington, and we may notice it under Federal Rules of Evidence s 201, that the Congress has been always opposed to Civil Service Commission (CSC) testing and examining of attorney positions in the Executive branch under the competitive system. The Commission has been equally unwilling to admit them to the 'competitive' service without such testing."). *See also* U.S. CIVIL SERV. COMM'N, REP. TO THE S. COMM. ON POST OFF. & CIVIL SERV., 93RD CONG., STATUTORY EXCEPTIONS TO THE COMPETITIVE SERVICE, at 227 (Comm. Print 1973) (discussing struggle between President Roosevelt and Congress over attorney examinations),

Schedules A and B in 1947,[142] many attorneys who had served during the Roosevelt administration had accrued competitive status.[143] They retained that status following their involuntary move back into the excepted service.[144]

The reestablished Schedules A and B commingled career employees and political appointees.[145] The CSC listed positions under these schedules in the Code of Federal Regulations with annotations indicating which of them were career positions.[146] Then, in 1953, President Dwight Eisenhower issued Executive Order 10,440 to create excepted service Schedule C for confidential and policy-determining positions, segregating political positions from career positions.[147] Thereafter, CSC regulations identified "confidential or policy-determining" positions in Schedule C.[148] In 1967, the executive branch redesignated executive-level Schedule C positions as noncareer executive assignments (NEA).[149] One basis for establishing a position in this new NEA offshoot of Schedule C was that the political appointee in the job would be "deeply involved in the *advocacy* of Administration programs and support of their controversial aspects."[150]

As a reflection of the narrow and inherently political nature of the new excepted service schedule, the CSC explained that Schedule C aimed "to enable the Administration to make appointments directly to those positions involving the determination of *major* executive policies."[151] The CSC also explained that the purpose of Schedule C was "to make a clear

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https://tinyurl.com/mw69s8sa; Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, 138 Stat. 460, 560 (H. R. 2882-101) ("[N]o part of this appropriation shall be available for salaries and expenses of the Legal Examining Unit of OPM established pursuant to Executive Order No. 9358 of July 1, 1943, or any successor unit of like purpose…."), https://tinyurl.com/4vf36skz.

[142] Exec. Order No. 9830, pt. III (Feb. 24, 1947), *reprinted in* 12 Fed. Reg. 1259 (Feb. 25, 1947), https://tinyurl.com/5b8kjact.

[143] *Roth v. Brownell*, 215 F.2d 500, 502 (D.C. Cir. 1954) ("But Order 9830 was apparently intended, when it was issued, not to apply to attorneys who, like Roth, were already in the classified civil service. Until the District Court decided this case, the Civil Service Commission interpreted Order 9830 as not applying to these attorneys."). *See also* VETERANS PREFERENCE ACT—HIRING PROCEDURES FOR ATTORNEYS—EXCEPTED SERVICE, 3 Op. O.L.C. 140, 145 n.7 (1979) ("[Attorneys] were, pursuant to Exec. Order No. 8743, in the competitive service."), https://tinyurl.com/mry4f2cv.

[144] *See Roth*, 215 F.2d at 501.

[145] *See* 5 C.F.R. §§ 6.1(a), (f) (1949), https://tinyurl.com/5emtxfjb.

[146] *See, e.g.,* 5 C.F.R. §§ 6.100, 6.200 (1949) ("NOTE: In accordance with § 6.1(f) the Commission has designated the positions in Schedule A which are not of a primarily confidential or policy-determining character by inserting before the appropriate provision the letters 'NC/PD.'"), https://tinyurl.com/5emtxfjb.

[147] Exec. Order No. 10,440, § 6.2, 1953 WL 49879 (Mar. 31, 1953), *reprinted in* 18 Fed. Reg. 1823 (Apr. 2, 1953), https://tinyurl.com/y2435vju *and online in original form by* THE AMERICAN PRESIDENCY PROJECT, U. OF CALIF., SANTA BARBARA, https://tinyurl.com/3mw6t76n (last visited May 24, 2025).

[148] *See, e.g.,* 5 C.F.R. § 6.2 (1961), https://tinyurl.com/mr2c5erj; 5 C.F.R. § 6.300 (1961), https://tinyurl.com/2ns7pmrc.

[149] H. COMM. ON POST OFF. AND CIVIL SERV., 94TH CONG., THE MERIT SYSTEM IN THE UNITED STATES CIVIL SERVICE, 22 n.1 (Comm. Print 1975) (monograph by Bernard Rosen), https://tinyurl.com/y79bunbe.

[150] 5 C.F.R. § 9.20(a) (1977) (emphasis added), https://tinyurl.com/2x9vyz9f. *See also* 305.601(b) (1977) (same), https://tinyurl.com/mtnvywth.

[151] *See* MEMORANDUM FROM PHILIP YOUNG, CHAIRMAN, CIVIL SERV. COMM'N, TO HEADS OF DEPTS. AND INDEP. ESTABS. (Apr. 1, 1953) (emphasis added), *copy provided in* Protect Democracy & Walter M. Shaub Jr., Comment on Proposed Rule Upholding Civil Service Protections and Merit System Principles, Docket No. OPM-2023-0013, Comment No. 2134, Attachment 1, at 34-38 (Nov. 16, 2023), https://tinyurl.com/3t8699pw.

distinction between jobs which belong in the career service and those which should be subject to change with a change in administration."[152]

Recognizing that the universe of political positions was small, the Eisenhower administration showed restraint in redesignating or creating Schedule C positions. The CSC reported that only 223 positions were moved into Schedule C between March 31 and June 30, 1953, adding that "[t]his is indicative of the relatively small number of positions that are expected to be placed in this schedule."[153] A full year after issuance of Executive Order 10,440, the administration had placed only 991 positions in Schedule C and rejected recommendations to place 909 other positions in that schedule.[154] By late July 1954, there were still only 1,086 Schedule C positions.[155] As of March 1960, the year before President Kennedy took office, there were only 1,218 positions in Schedule C.[156] Because many of these positions were left vacant, there were fewer Schedule C appointees than there were Schedule C positions.[157] By 1975, that number was 1,014 positions. The number never reached 1,600 positions during the administrations of Presidents John Kennedy, Lyndon Johnson, Richard Nixon, Gerald Ford, or Jimmy Carter.[158] Across the last 72 years, the number consistently hovered at around 1,500 positions, with only a few exceptions exceeding this number by roughly 100 to 300 more positions.[159]

By the 1970s, the CSC understood the phrase "confidential or policy-determining" in its Schedule C regulations to cover concepts of policymaking and policy-advocacy, as well. CSC

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[152] U.S. CIVIL SERV. COMM'N, 70TH ANNUAL REPORT, 2 (Nov. 16, 1953), https://tinyurl.com/5n994a7j; *see also* Press Release, U.S. Civil Serv. Comm'n, at 2 (Aug. 25, 1955) ("Policy-making and confidential positions are placed in Schedule C and exempted from civil-service requirements in order to make a clear distinction between the career service and the policy-making or confidential positions which exist primarily to carry out the objectives of any national administration."), *copy provided in* Protect Democracy & Walter M. Shaub Jr., Comment on Proposed Rule Upholding Civil Service Protections and Merit System Principles, Docket No. OPM-2023-0013, Comment No. 2134, Attachment 1, at 2-3 (Nov. 16, 2023), https://tinyurl.com/3t8699pw.

[153] U.S. CIVIL SERV. COMM'N, 70TH ANNUAL REPORT, 10-11 (Nov. 16, 1953), https://tinyurl.com/5n994a7j.

[154] Press Release, U.S. Civil Serv. Comm'n, at 2 (Apr. 8, 1954), *copy provided in* Protect Democracy & Walter M. Shaub Jr., Comment on Proposed Rule Upholding Civil Service Protections and Merit System Principles, Docket No. OPM-2023-0013, Comment No. 2134, Attachment 1, at 24-25 (Nov. 16, 2023), https://tinyurl.com/3t8699pw.

[155] *See* Press Release, U.S. Civil Serv. Comm'n, at 2 (Aug. 6, 1954) and U.S. CIVIL SERV. COMM'N, SCHEDULE C APPROVALS AND DISAPPROVALS BY AGENCY BASED UPON CIVIL SERVICE COMMISSION DECISIONS (Jul. 23, 1954), *copies provided in* Protect Democracy & Walter M. Shaub Jr., Comment on Proposed Rule Upholding Civil Service Protections and Merit System Principles, Docket No. OPM-2023-0013, Comment No. 2134, Attachment 1, at 19 and 21 (Nov. 16, 2023), https://tinyurl.com/3t8699pw.

[156] U.S. CIVIL SERV. COMM'N, REP. TO THE H. COMM. ON POST OFF. & CIVIL SERV., 86TH CONG., MAINTAINING THE INTEGRITY OF THE CAREER CIVIL SERVICE, 10 (1960), https://tinyurl.com/ye2ax4ja.

[157] In March 1960, about 22 percent (271) of 1218 Schedule C positions were vacant, and agencies planned to fill only a fraction of the vacancies in the next quarter. *Id.*, https://tinyurl.com/ye2ax4ja. For most years between 1953 and 1975, the vacancy rate was "twenty to twenty-five percent of the total positions," and the vacancy rate was higher in 1971. H. COMM. ON POST OFF. AND CIVIL SERV., 94TH CONG., THE MERIT SYSTEM IN THE UNITED STATES CIVIL SERVICE, 22 n.2 (Comm. Print 1975), https://tinyurl.com/mrxje2p4.

[158] Mike Causey, *Reagan's Plum Book Plumper Than Carters*, WASH. POST (May 10, 1984), https://tinyurl.com/5bzt2sn4; Attachment to Memorandum from Raymond Jacobson, Executive Director, U.S. Civil Serv. Comm'n, to Dirs. of Pers., at 5 (Nov. 10, 1976), https://tinyurl.com/4yttr4px (page 10 of pdf); H. COMM. ON POST OFF. AND CIVIL SERV., 94TH CONG., THE MERIT SYSTEM IN THE UNITED STATES CIVIL SERVICE, 22 n.1 (Comm. Print 1975) (monograph by Bernard Rosen), https://tinyurl.com/mrxje2p4.

[159] *See* Appendix 1.

Chairman Robert Hampton told the House Committee on Post Office and Civil Service in 1972 that "[t]hese generally are positions which have responsibility for the formulation or *advocacy of administration policies*, or which involve a confidential relationship with a Presidential appointee."[160] Hampton testified before that committee again on a bill titled "Civil Service Amendments of 1976," which was an early part of the reform effort that culminated two years later in the CSRA's passage: "Leaving aside the comparatively small number of jobs—about 1,500—that the Commission has excepted because of their *advocacy*, confidential, or *policymaking* nature, we think political considerations must play no part in filling the approximately 1 million other excepted positions."[161] Hampton's choice of language was significant because the CSC's regulation still defined Schedule C as covering positions of a "confidential or policy-determining" character.[162] The reference to "advocacy" and "policymaking" tracks the language of 5 U.S.C. § 7511(b)(2) that Congress would ultimately adopt in 1978.

This type of language was used throughout the hearing. In a colloquy with Hampton during the 1976 hearing, Representative David Henderson (D-NC) described Schedule C positions as being involved in "policymaking."[163] Representative Trent Lott (R-MI) questioned Hampton and two other CSC officials, Commissioner L. J. Andolsek and Executive Director Raymond Jacobson, and their exchange employed the terms "policy-making" and "policy-advocating" to describe Schedule C positions and to distinguish them from career federal positions:

> Mr. LOTT. On section 3003, page 14 of the bill, dealing with the prohibition of personnel recommendations or referrals for jobs – you may have already commented on this; if you have I apologize – but it is something we are concerned about and is dear to our heart. I have two or three questions. Does that section seem to you to prevent a Member of Congress from making a recommendation to the President who should be in his cabinet?
>
> Mr. JACOBSON. No, sir.
>
> Mr. HAMPTON. No, sir.

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[160] *The Federal Executive Service: Hearings on H.R. 3807 Before the Subcomm. on Manpower & Civil Serv. of the H. Comm. on Post Off. and Civil Serv.,* 92d Cong. 13 (1972) (emphasis added) (Statement of Robert E. Hampton, Chairman, Civil Serv. Comm'n.), https://tinyurl.com/yc49x8m3.

[161] *Civil Service Amendments of 1976: Hearings on H.R. 12080 Before the Subcomm. on Manpower & Civil Serv. of the H. Comm. on Post Off. and Civil Serv.,* 94th Cong. 7 (1976) (emphasis added) (Statement of Robert E. Hampton, Chairman, Civil Serv. Comm'n.), https://tinyurl.com/3v23948d.

[162] 5 C.F.R. § 6.2 (1976) ("Positions of a confidential or policy-determining character shall be listed in Schedule C."), https://tinyurl.com/4n2zruay. *See also* 5 C.F.R. § 6.2 (1978) (same), https://tinyurl.com/c2yxfa87.

[163] *See e.g.*, *Civil Service Amendments of 1976, Hearings on H.R. 12080, Before the Subcomm. on Manpower & Civil Serv. of the H. Comm. on Post Off. and Civil Serv.,* 94th Cong. 11 (1976) ("Mr. HENDERSON. …. I think you have recognized that it is the intention of the bill to provide clearly for excepted positions that are needed by the President and the agency heads for *policymaking*, confidentiality, et cetera. I believe that in your statement you mention in there some 1,500 positions that fall into that category." (emphasis added)).

> Mr. LOTT. I would think not. Does it seem to you to prevent a Member of Congress from making a recommendation to a cabinet officer as to who might be a good confidential secretary or policymaking executive for him?
>
> Mr. HAMPTON. No, sir.
>
> Mr. LOTT. Now that section does seem to prohibit a Member of Congress or anyone else from recommending someone for a schedule C *policymaking or policy-advocating position*; is that incorrect?
>
> Mr. HAMPTON. That's incorrect.
>
> Mr. ANDOLSEK. Just career service.
>
> Mr. LOTT. Thank you, Mr. Chairman.[164]

As the reform effort stretched across 1976 and through October 1978, deliberations over the CSRA and related or competing bills similarly reflected congressional awareness of the CSC's practices for political appointee positions. At a hearing on the CSRA, CSC Chairman Alan Campbell described the CSC's actual practices in terms that fleshed out the meaning of the phrase "confidential or policy-determining" in the regulatory language:

> Outside the senior executive service, the system is one in which agencies request noncareer positions, not necessarily conversion, but the creation of new positions, on the basis that those positions fulfill certain criteria.
>
> Those criteria include *policy making, policy advocacy and policy confidentiality*.[165]

Members of Congress would certainly have been aware of this practical history of Schedule C when they enacted the CSRA in 1978. During debates, Senator Charles Mathias (R-MD) demonstrated an intimate working knowledge of how Schedule C had been applied prior to enactment of the CSRA.[166] Senator Ted Stevens (R-AK) discussed reports of the two Hoover Commissions and cited language advocating for excluding only "[t]op policy-making officials" appointed by the president from civil service protections.[167]

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[164] *Id.* at 29 (emphasis added).

[165] *Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings on S. 2640, S. 2707 and S. 2830 Before S. Comm. on Governmental Affs.*, 95th Cong. 47-48 (1978) (testimony of CSC Chairman Alan Campbell) (emphasis added), https://tinyurl.com/msxekpux.

[166] *See, e.g.*, *id.* ("The Commission rarely reverses the staff's recommendations because agency requests are thoroughly reviewed and those that are received and do not meet Schedule C criteria are, in the majority of cases, closed without action and returned to the agency. Agencies are aware that the requests are closely scrutinized on an individual basis and generally submit well-documented cases."), https://tinyurl.com/3cmj59mk.

[167] 124 CONG. REC. 27540 (Senate) (Aug. 24, 1978) (remarks of Senator 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

Ultimately, the dispositive proof that "confidential, policy-determining, policy-making or policy-advocating" meant the same thing as the old language of Schedule C executive orders, which referred to "confidential or policy-determining" positions, is the express declaration of the House committee that the new phrase referred to the types of positions already included in Schedule C and Noncareer Executive Assignments—in other words, positions for political appointees. The committee wrote:

> Subsection (b) identifies the three groups of positions to which this subchapter does not apply. The first exception is for positions which require Senate confirmation. The exception is continued from current law.
>
> *The second, a new exception for positions of a confidential, policy determining, policy-making or policy advocating character, is an extension of the exception for appointments confirmed by the Senate. These positions are currently placed in Schedule C* (positions at GS-15 and below), or filled by Non-Career Executive Assignment (GS-16, -17, and -18).[168]

Limiting exclusions from civil service protections to political appointees accorded with the principles that guided lawmakers in enacting the CSRA. From 1976 through most of 1978, Congress had conducted a searching review of the patchwork of civil service laws and replaced

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positions now in the exempt category, should be carried on within the framework of (the civil service system).[']"), https://tinyurl.com/5f4kn42h.

[168] H. COMM. ON POST OFF. AND CIVIL SERV., LEGISLATIVE HISTORY OF THE CIVIL SERVICE REFORM ACT OF 1978, vol. II, 1512 (Comm. Print 96-2 1979) (emphasis added), https://tinyurl.com/ya9x22ej. Note that the characterization of § 7511(b)(2) as a "new" extension was a reference to its absence from any statute prior to the CSRA. The Veterans' Preference Act of 1944, as amended, contained no such exception. *See* Exec. Order No. 10440, § 6.4 (Mar. 31, 1953) (acknowledging that Veterans Preference Act appeal rights applied to preference-eligible incumbents of Schedule C positions); Act of August 4, 1947, Pub. L. No. 80-325, 80 Cong. Ch. 447, 61 Stat. 723 (1947) (codified at 5 U.S.C. § 863 (1946, Supplement 1)) (requiring agencies to comply with CSC orders following adjudication of a preference-eligible employee's appeal), https://tinyurl.com/339ykk2y; Veterans' Preference Act, Pub. L. No. 78–359, § 14, 58 Stat. 387, 390-91 (1944) (granting appeal rights to preference eligible employees), https://tinyurl.com/mc4k8jd3. As a result, non-probationary preference-eligible Schedule C employees had a statutory right of appeal before enactment of the CSRA, due to the lack of any statutory exception like the one later included in section 7511(b)(2). In the case of non-preference eligible employees, however, a regulatory appeal process already excluded them unless they had accrued competitive status prior to an involuntary movement to Schedule C. *See* Press Release, U.S. Civil Serv. Comm'n, 1 (Jan. 24, 1955) (same), *copy provided in* Protect Democracy & Walter M. Shaub Jr., Comment on Proposed Rule Upholding Civil Service Protections and Merit System Principles, Docket No. OPM-2023-0013, Comment No. 2134, Attachment 1, at 8-9 (Nov. 16, 2023), https://tinyurl.com/3t8699pw. Thus, the exception in 5 U.S.C. § 7511(b)(2) was new only with respect to statutory appeals by non-probationary preference-eligible employees and was not new with respect to regulatory appeals by non-preference eligible employees who either lacked competitive status or moved voluntarily into Schedule C. (As discussed in Part III(B) of this comment, however, the exception at section 7511(b)(2) would not apply to preference-eligible employees with competitive status upon *involuntary* movement to Schedule C, nor would it apply to non-preference eligible excepted service employees who, after the Civil Service Due Process Amendments of 1990, accrued appeal rights and were moved involuntarily to Schedule C). *See* APPEALS FROM EMPLOYEES ENTITLED TO BUT DENIED PROTECTION OF LLOYD-LAFOLLETTE ACT, CIVIL SERV. COMM'N PROP. REG. 5 C.F.R. PTS. 9 & 20, 20 FED. REG. 599, 599, 601 (Jan. 28, 1955) (affirming the right of employees with competitive status to appeal terminations after involuntary movement to Schedule C), https://tinyurl.com/yek5y492; *Roth*, 215 F.2d 500 (confirming that employees with competitive status retained their appeal rights upon involuntary movement to the excepted service).

them with a comprehensive statutory scheme, the Civil Service Reform Act.[169] In doing so, Congress balanced the goal of ensuring that "employees are hired and fired solely on the basis of their ability" with the "need of managers and policymakers to have flexibility to perform their jobs."[170] Rather than authorizing the free-for-all chaos of at-will employment, Congress put the public's interests first:

> [T]he Committee has viewed civil service reform from the standpoint of the public, rather than the more limited perspective of either the employee or manager. The "rights of employees" to be selected and removed only on the basis of their competence are concomitant with the public's need to have its business conducted competently. Similarly, the need for Federal executives to manage their personnel responsibilities effectively can only be justified by the benefit derived by the public from such management flexibility. *An employee has no right to be incompetent; a manager has no right to hire political bed fellows*.[171]

A decade after Congress enacted the CSRA, lawmakers enacted another law that treated section 7511(b)(2) positions as political appointee positions. That law redesignated the Veterans Administration as the Department of Veterans Affairs, elevating it to a cabinet agency, and included safeguards to prevent the politicization of the new department.[172] One such safeguard was a provision requiring that candidates for two-thirds of the department's deputy assistant secretary positions must have five years of prior continuous federal service other than in a "confidential, policy-determining, policy-making, or policy-advocating position" or other political appointee position.[173] The provision makes no sense unless the phrase "of a confidential, policy-determining, policy-making, or policy-advocating character" is understood to mean a political position, as there would be no reason to exclude policy-making career employees from such positions. Another provision limited the number of Schedule C appointees in the department, who comprised the universe of excepted service schedule employees subject to 5 U.S.C. § 7511(b)(2).[174]

In 1990, Congress amended 5 U.S.C. § 7511 to provide MSPB appeal rights to non-preference eligible excepted service employees.[175] Part of the legislation amended section 7511(b)(2) to cover positions excepted from the competitive service by the president.[176] The

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[169] *Fausto*, 484 U.S. at 444-45.

[170] S. REP. NO. 95-969, 4 (1978), https://tinyurl.com/5hxrk8t3.

[171] *Id.* at 4.

[172] *See* Department of Veterans Affairs Act, Pub. L. No. 100-527, 102 Stat. 2635 (Oct. 25, 1988), https://tinyurl.com/26pemx99.

[173] *Id.* § 5, 102 Stat. 2639-40.

[174] 134 CONG. REC. 17489 (Senate) (July 11, 1988) (remarks of Sen. John Glenn (D-OH)) ("The bill also places caps on the number of noncareer appointments to the Senior Executive Service and on the number of schedule C personal and confidential assistants. By limiting the number of noncareer SES to 5 percent of the total SES appointees in the Department, and by limiting the number of schedule Cs to 15, the legislation places clear obstacles to the politicization of the Department by any President, regardless of party or ideology."), https://tinyurl.com/yvm9xw2d.

[175] Civil Service Due Process Amendments of 1990, Pub. L. No. 101-376, 104 Stat. 461 (Aug. 17, 1990), https://tinyurl.com/2fu9pdcd.

[176] *Id.* at 462 (redesignating subparagraphs (A) & (B) as (B) & (C), respectively, and adding a new (A)), https://tinyurl.com/p8t4w69f.

House committee report emphasized that that the amendment would not change the treatment of "Schedule C, positions of a confidential or policy-determining character," whose incumbents it described as "political appointees who are specifically excluded from coverage under section 7511(b)."[177]

There is no need to speculate about the congressional understanding of section 7511(b)(2) after these 1990 amendments. The House report for the 1990 amendments explained that the legislation was a reaction to the Supreme Court's decision in *United States v. Fausto*, which had "cut off an alternative method of judicial review for excepted service employees."[178] The report specifically declared the legislative goal of ensuring that government attorneys and other career employees in the excepted service would have MSPB appeal rights.[179] "They should have the same right to be free from arbitrary removal as do competitive service employees."[180] This language confirms that Congress sought to expand due process protections for employees with 5 U.S.C. § 7511, not narrow them.

As with the CSRA, deliberations over the 1990 amendments reflected a common understanding that the section 7511(b)(2) exception was for political appointees. On the day Rep. Gerry Sikorski (D-MN) introduced the House version of the bill, he explained that the exclusions in section 7511(b) would cover "Presidential appointees, including White House staff and schedule C's."[181] During a hearing on the amendments, the Bush administration's OPM director, Constance Newman, characterized the section 7511(b) exclusions as denying MSPB appeal rights to "[p]olitical appointees and certain special groups, such as the foreign service and intelligence agency employees."[182]

The House committee report emphasized that the exclusions in paragraphs (b)(1), (b)(2), and (b)(3) applied to political appointees:

> Employees in Schedule A positions include attorneys, teachers, chaplains, scientists, as well as presidential appointees and temporary and intermittent workers. The bill generally extends procedural rights to attorneys, teachers, chaplains, and scientists, but not to presidential appointees. The requirement that an employee serve one continuous year before becoming eligible for appeal rights will keep temporary employees from clogging up the Merit Systems Protection Board appeals system. *Again, the key to the distinction between those to whom appeal rights are extended and those to whom such rights are not extended is the expectation of continuing employment with the Federal Government.* Lawyers,

[177] H.R. REP. 101-328, 5, *reprinted in* 1990 U.S.C.C.A.N. 695, 698 (1989), https://tinyurl.com/bdhrtj72.

[178] *Id*. at 4 ("Last year's Supreme Court decision in United States v. Fausto [484 U.S. 439 (1988)] makes this legislation all the more urgent.").

[179] *Id.* at 3.

[180] *Id.* at 4.

[181] 135 CONG. REC. E2784-02, 1989 WL 182302 (H.R.) (Nov. 9, 1989) (extension of remarks of Rep. Gerry Sikorski (D-MN)) (listing the agencies excluded from MSPB appeal rights and indicating that, "[i]n the case of these agencies, we maintained *the status quo* and thereby avoided eroding the rights of veterans but did not expand the class of covered employees."), https://tinyurl.com/2wehbrpf.

[182] *Excepted Service Appeal Rights: Hearing on H.R. 3086 Before the Subcomm. on the Civil Serv., Comm. on Post Off. & Civil Serv.*, 101st Cong., Serial No. 101-23, 3 (Sep. 12, 1989) (emphasis added), https://tinyurl.com/4xpyb89r. .

> teachers, chaplains, and scientists have such expectations; presidential appointees and temporary workers do not.[183]

The committee report drove this point home with language that directly refutes the definition of Schedule PC. Executive Order 13,957, as amended by Executive Order 14,171, indicates that Schedule PC applies to positions "*not normally subject to change as a result of a Presidential transition*."[184] But the committee report provides:

> The bill explicitly denies procedural protections to presidential appointees [under (b)(3)], individuals in Schedule C positions [under (b)(2)] and individuals appointed by the President and confirmed by the Senate [under (b)(1)]. Employees in *each of these categories have little expectation of continuing employment beyond the administration during which they were appointed*.[185]

Reflecting this history, OPM amended its regulations in 2024 to acknowledge the longstanding status of the phrase "confidential, policy-determining, policy-making or policy-advocating" as a term of art.[186] History bears out this claim. In 1992, for example, a bipartisan group of Senators and congressional Representatives filed an amicus brief emphasizing that "the effective synonym for confidential policy positions is 'political appointees.'"[187] Two of these members, Chuck Grassley (R-IA) and Pat Schroeder (D-CO), had been in Congress when it debated and passed the CSRA.[188] Their brief cited an MSPB decision that had noted the terms "confidential," "policy-making" and "policy-advocating" were part of a longer statutory phrase that was, "after all, only a shorthand way of describing positions to be filled by so-called 'political appointees.'"[189] In 1996, OPM was explicit about the political nature of these positions in a response to Senator Christopher Shays (R-CT): "OPM has authority to except positions from

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[183] H.R. REP. 101-328, at 4 (emphasis added), https://tinyurl.com/mvc97scf.

[184] Exec. Order No. 13,957, § 4(i), *as amended by* Exec. Order No. 14,171, § 3(c) (emphasis added).

[185] H.R. Rep. 101-328, 5 (1989) (emphasis added), https://tinyurl.com/bdhrtj72.

[186] Upholding Civil Service Protections and Merit System Principles, 89 Fed. Reg. 24982, 24991 (Apr. 9, 2024) ("As discussed extensively throughout this final rule, the term of art, 'confidential, policy-determining, policy-making or policy-advocating,' has a longstanding meaning that equates to political appointments, typically made under Schedule C."), https://tinyurl.com/62jvsd8d.

[187] Amicus Curiae Brief of Sens. Charles Grassley and David Pryor and Reps. Connie Morella, Patricia Schroeder, and Gerry Sikorski, reprinted in *Reauthorization of the Office of Special Counsel: Hearing on S. 1981 To Extend Authorization of Appropriations for the U.S. Office of Special Counsel, and for Other Purposes Before the Subcomm. On Fed. Sevs., Post Off., and Civil Serv. of the S. Comm. on Govt'l Affs*., 102d Cong., 101-10 (1992), https://tinyurl.com/mtvcxxk7 (hereinafter "*Grassley Brief*"). In its notice of proposed rulemaking, OPM is dismissive of this amicus brief, arguing that such briefs "show the desires of individual legislators," *see* 90 Fed. Reg. 17197, although OPM had previously cited it as persuasive authority in its 2024 rulemaking, *see* Upholding Civil Service Protections and Merit System Principles, 89 Fed. Reg. at 25023 & n.318, 25025-26. OPM misconstrues the point of the amicus brief. It does not reflect the "desires" of its authors, but rather reflects testimony supporting the common understanding of the term at issue.

[188] Congress.gov, *Senator Chuck Grassley*, https://tinyurl.com/y3em4hn8 (last visited May 24, 2025); Katharine Seelye, *Patricia Schroeder, Feminist Force in Congress, Dies at 82*, N.Y. TIMES (Mar. 14, 2023), https://tinyurl.com/cw7wtzre.

[189] *Peace Corps*, 31 M.S.P.R. at 231, cited in *Grassley Brief,* at 106-07 ("the effective synonym for confidential policy positions is 'political appointees.' *Special Counsel v. Corps*, 31 M.S.P.R. 225 (1986).").

the competitive service on the basis that they are of a confidential or policy-making, policy-determining, or policy-advocating character ('political positions')."[190]

The common understanding of the phrase "confidential, policy-determining, policy-making or policy-advocating" has always been that it refers to political appointee positions. From the time of the CSRA's enactment in 1978 through 2024, the executive branch did not place employees in any excepted service schedule covered by 5 U.S.C. § 7511(b)(2) other than Schedule C.[191] Presidents have, therefore, uniformly treated the universe of positions excluded under section 7511(b)(2) as available only to political appointees. In the 47 years since Congress enacted the CSRA, the executive branch has consistently applied section 7511(b)(2) to only about 1,500 positions at a time, all of which have been grouped in Schedule C.[192] In fact, the executive branch has consistently maintained only about 1,500 Schedule C positions across the entire 72 years since President Eisenhower first created that excepted service schedule.[193]

Tellingly, a top Justice Department official in the first Trump administration, James R. McHenry III, acknowledged that the coverage of section 7511(b)(2) was limited to political appointees. In a preamble to a 2020 final rulemaking notice—promulgated two months after President Trump issued Executive Order 13,957 to establish Schedule F—McHenry wrote that a "political appointee" was a "presidential or vice-presidential appointee, a non-career Senior Executive Service ("SES") (or other similar system) appointee, or an appointee to *a position that has been excepted from the competitive service by reason of being of a confidential or policy-making character* (Schedule C and *other positions excepted under comparable criteria*)…."[194] In this formal regulatory issuance, the department effectively admitted that section 7511(b)(2) was only for political appointees. McHenry, who issued the final rule, later served as acting attorney general at the beginning of Trump's second term.

3. OPM is applying the wrong legal standard in its reliance on sections 7511(b)(2) and 2302(a)(2)(B)(i)

Not only does OPM misinterpret the term of art "confidential, policy-determining, policy-making or policy advocating" more broadly than "political appointee," but it also re-interprets the provision to encompass any allegedly policy-related career position. OPM warned of this problem during the last administration.[195] OPM's current recharacterization of the term

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[190] *Recommendations by Members of Congress Relating to Federal Employment: Hearing before the S. Comm. on Govt'l Affairs*, 104th Cong, S. Hrg. 104-483, 20, 92 (Feb. 7, 1996) (responses of U.S. Off. of Pers. Mgmt. to Questions for the Record by Rep. C. Shays (Mar. 21, 1996) as read into the record by Chairman Ted Stevens (R-AK)), https://tinyurl.com/y2wtvtxr.

[191] *See* U.S. GOV'T ACCOUNTABILITY OFF., AGENCY RESPONSES & PERSPECTIVES ON FORMER EXECUTIVE ORDER TO CREATE A NEW SCHED. F CATEGORY OF FED. POSITIONS, GAO-22-105504, 9-10 (2022), https://tinyurl.com/mua2yv95.

[192] The Trump administration did not move any positions into Schedule F before it ended in January 2021. U.S. GOV'T ACCOUNTABILITY OFF., AGENCY RESPONSES & PERSPECTIVES ON FORMER EXECUTIVE ORDER TO CREATE A NEW SCHEDULE F CATEGORY OF FEDERAL POSITIONS, GAO-22-105504, 10 (2022), https://tinyurl.com/mua2yv95.

[193] *See* Appendix 1.

[194] Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588 (Nov. 16, 2020) (emphasis added), https://tinyurl.com/284mruez.

[195] Upholding Civil Service Protections and Merit System Principles, 89 Fed. Reg. 24982, 25021, 24994 (Apr. 9, 2024) ("Confirming that the number of employees that would have been subject to Schedule F extends beyond

of art "confidential, policy-determining, policy-making or policy-advocating" as "*policy-influencing*" positions, which does not appear anywhere in section 7511(b)(2), reflects just how loosely OPM is interpreting the coverage of that section .[196]

Executive Order 13,957, as amended by Executive Order 14,171, (collectively "the executive orders") defines the term of art "confidential, policy-determining, policy-making or policy-advocating" by atextually substituting its component parts with more expansive language like "policy-related"[197] and "development or formulation of policy."[198] Included in the executive orders' description of positions covered by section 7511(b)(2) are new concepts of policy "viewing,"[199] policy "circulating"[200] and policy "working"[201] that appear nowhere in the statute.[202] In one place, the order even equates "policy" with "guidance."[203] The executive orders depart further from the statutory language by shifting the exclusions' focus from "policy-making" to the daily administration of government by purporting to cover positions involved in determining "the manner" in which agencies carry out their work.[204]

The executive orders target positions whose duties include "viewing" or "circulating" proposed regulations, guidance or other policy proposals.[205] Although limited to such positions that either report to or "regularly work[]" with GS-13-equivalent political appointees or those in an agency's executive secretariat, on its face this provision would encompass secretarial or other junior staff responsible for proofreading or sharing documents, even if they have no role in making—let alone determining—policy. The Final Ezell Memorandum similarly targets positions with relatively low-level duties, like merely helping to draft funding opportunity announcements, evaluating grant applications, or posting material on agency social media accounts.[206] These criteria would, for instance, include a GS-07 position in the Department of

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senior positions responsible for agency policy, Comment 4097 included a spreadsheet labelling a career line attorney at an agency's general counsel's office as a 'policy' employee. OPM notes that government attorneys are generally Schedule A employees, and therefore, by definition, are specifically 'not of a confidential or policy-determining character,' but in any event, whatever limiting principles commenter may have in mind for justifying Schedule F, they remain unclear. While commenter states that two to three percent of the federal workforce would have been impacted by Schedule F, commenter then suggests that up to 10 percent of jobs could fit its interpretation of confidential and policy positions, which would equate to approximately 250,000 employees. The number of positions that could be covered by a Schedule F-type action is thus indeterminate and without meaningful boundary."). *See also* Comment of the America First Policy Institute in Opposition to the Proposed Rule Upholding Civil Service Protections and Merit System Principles, Docket No. OPM-2023-0013, Comment No. 4097 (Nov. 17, 2023), https://tinyurl.com/2z3a7xev.

[196] *See, e.g.*, 90 Fed. Reg. at 17182 ("The proposed rule lets policy-influencing positions be moved into Schedule Policy/Career."); *id.* (defining "positions of a 'confidential, policy-determining, policy-making, or policy-advocating character'" as "policy-*influencing*" positions (emphasis added)).

[197] Exec. Order No. 13,957, § 5(c)(i)(B), *as amended by* Exec. Order No. 14,171.

[198] *Id*. at § 5(c)(i).

[199] *Id*. at § 5(c)(iv).

[200] *Id*. at § 5(c)(iv).

[201] *Id*. at § 5(c)(iv).

[202] *Id*. at § 5(c)(iv).

[203] *Id*. at § 5(c)(iv).

[204] *Id*. at § 5(c)(iii).

[205] Exec. Order No. 13,957, § 5(c)(iv), *as amended by* Exec. Order No. 14,171.

[206] Final Ezell Memorandum, at 3.

Interior whose duties include evaluation of grant applications.[207] The department has characterized that position as a "trainee position."[208] The new criteria would also sweep into Schedule PC a Social Media Specialist position for which the Air Force accepted applications in February 2025.[209] The hourly wage offered for the position was $18.[210]

The executive orders drift away from the statutory focus on the "character" of a position to the location of a position within an organization. They purport to cover positions situated in an "executive secretariate (or equivalent)"[211]—which can translate in some departments to all components of the Office of the Secretary, rather than only the Secretary's immediate office.[212] Relatedly, the orders bizarrely tie coverage by sections 7511(b)(2) and 2302(a)(B)(2)(i) to an employee's regularly working with a lower-level GS-13 Schedule C political appointee, which has no basis whatsoever in the language of those exclusions.[213]

The executive orders target attorney positions throughout the government, without regard to attorneys' responsibilities or their lack of authority to do more than suggest ideas. They do so, for example, by purporting to cover mere "participation" in developing or drafting regulations or "guidance."[214] They capture even career first-level attorney supervisors, who generally report to *career* second-level supervisory positions.[215] This arbitrary targeting of attorneys runs contrary to the function of the Civil Service Due Process Amendments of 1990, which the congressional committee responsible for that law indicated was expressly meant to provide *attorneys* with MSPB appeal rights.[216]

The Final Ezell Memorandum goes even further beyond the statutory language of sections 7511(b)(2) and 2302(a)(B)(2)(i) than the executive orders do by providing new substantive grounds for including positions in Schedule PC. For example, OPM adds positions involved in "directing the work of an organizational unit," which is plainly lifted from the definition of "Senior Executive Service position," presumably on the grounds that the definition of SES positions includes a list of functions and a catch-all phrase "otherwise exercises important policy-making, policy-determining *or other executive functions.*"[217] OPM includes other criteria

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[207] U.S. Dep't of the Interior, Grants Management Specialist (Developmental Position), GS-1109-07, Position Description No. DL00400, at 3, https://tinyurl.com/y9jsuvu2 (last visited May 24, 2025).

[208] *Id*., cover sheet (Form HC-08).

[209] U.S. Off. of Pers. Mgmt., USA JOBS, *Social Media Specialist*, Announcement No. 259EFSK736720, Control No. 830784000 (Feb. 7, 2025), https://tinyurl.com/ur64pe7m (internet archive).

[210] *Id*.

[211] Exec. Order No. 13,957, § 5(c)(iv)(B), *as amended by* Exec. Order No. 14,171.

[212] *See e.g*., U.S. Dep't of Health & Human Servs., *HHS Organizational Charts [for] Office of Secretary and Divisions* (listing 15 components in the Office of the Secretary situated outside the Immediate Office of the Secretary), https://tinyurl.com/5yfd8n4f (last visited May 24, 2025); U.S. Dep't of Health & Human Servs., *Immediate Office of the Secretary*, https://tinyurl.com/mry8256c (last visited May 24, 2025).

[213] *Id*. at § 5(c)(iv)(A).

[214] *Id*. at § 5(c)(i)(A).

[215] *Id*. at § 5(c)(ii).

[216] H.R. REP. NO. 101-328, 4 (1989) (emphasis added), https://tinyurl.com/bdhxd3yc ("The bill generally extends procedural rights to attorneys, teachers, chaplains, and scientists, but not to presidential appointees. … Again, the key to the distinction between those to whom appeal rights are extended and those to whom such rights are not extended is the expectation of continuing employment with the Federal Government. Lawyers, teachers, chaplains, and scientists have such expectations; presidential appointees and temporary workers do not.").

[217] 5 U.S.C. § 3132(a)(2)(E) (emphasis added). *See* 90 Fed. Reg. at 17194-96.

lifted from the SES definition that are similarly focused not on the statutory language but on supervisory status, such as "being held accountable for the success of one or more specific programs or projects" and "monitoring progress toward organizational goals and periodically evaluating and making appropriate adjustments to such goals."[218] With these additions, OPM has effectively advanced a view that the CSRA authorizes exclusion of nearly all supervisory positions in government, which is clearly not what the language of section 7511(b)(2) and section 2302(a)(B)(2)(i) authorizes—and, if it did, Congress would not have needed to authorize a second probationary period for new supervisors.[219]

Some of the criteria that the Final Ezell Memorandum introduces focus on the significance of a position's authority rather than on the position's character. Much is revealed by items addressing 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."[220] This language appears to derive from an alternative standard some have proposed as a replacement for the existing legal standard for determining which officials qualify as inferior officers.[221] But sections 7511(b)(2) and 2302(a)(B)(2)(i) do not seek to define "inferior officer," they establish a legal standard for the exclusion of positions from certain statutory protections.

Some of the criteria the Final Ezell Memorandum has established are so vague as to give agencies room to dump any number of positions into Schedule PC. The memorandum provides, for instance, that Schedule PC includes positions "presenting program resource requirements to examiners from the Office of Management and Budget in preparation of the annual President's Budget Request."[222] This language is so vague that it could include every member of an agency's budget formulation staff, as well as every first- and second-level supervisor who submits information on their offices' needs during an agency-wide budget formulation data call. Another criterion includes any position that "indirectly" supervises a Schedule PC employee, vague language that could capture a wide range of activities.

The Final Ezell Memorandum also sweeps into the coverage of Schedule PC every position for which a position description mentions any policy work.[223] But the use of such language in a position description does not match its use in sections 7511(b)(2) and 2302(a)(B)(2)(i). OPM has long established position classification standards for agencies to implement the Classification Act of 1949.[224] Some standards use terms related to policy work for the purpose of determining a position's grade level, not for the purpose of determining the applicability of adverse action procedures.[225] For example, the section of OPM's position classification handbook on "Administrative or Support Series" positions describes certain

[218] Compare Final Ezell Memorandum, at 3 with 5 U.S.C. § 3132(a)(2).

[219] 5 U.S.C. § 3321(a)(2).

[220] Final Ezell Memorandum, at 3.

[221] *See, e.g.*, Jennifer Mascott, *Who Are 'Officers of the United States'?*, 70 Stan. L. Rev. 443 (2018); *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73 (2007).

[222] Final Ezell Memorandum, at 3.

[223] *Id.*

[224] 5 U.S.C. ch. 51.

[225] Ensuring that agencies meet minimum standards for grading positions is a statutory responsibility of OPM. 5 U.S.C. §§ 5104, 5112. *See also* U.S. OFF. PERS. MGMT., INTRODUCTION TO THE POSITION CLASSIFICATION STANDARDS, TS-134 July 1995, TS-107 (revised 2009), https://tinyurl.com/a5z43n85.

essentially clerical roles as entailing policy: "Administrative work often involves planning for and developing systems, functions, and services; formulating, developing, recommending, and establishing policies, operating methods, or procedures; and adapting established policy to the unique requirements of a particular program."[226] These are grade-determining functions, not rights-determining ones.

The proposed rule continues this attempt to stretch the reach of sections 7511(b)(2) and 2302(a)(2)(B)(i) beyond any reasonable limits. This distortion is evident in OPM's use of the novel term "*policy-influencing*" as shorthand for the statutory term of art "confidential, policy-determining, policy-making or policy-advocating" throughout the preamble. The White House's fact sheet on Schedule PC similarly uses the phrase "policy-influencing" to describe the President's intentions for determining which positions to move into that schedule.[227] Even the title of Executive Order 14,171 is "Restoring Accountability to *Policy-Influencing* Positions Within the Federal Workforce."[228] But even if sections 7511(b)(2) and 2302(a)(2)(B)(i) were capable of being construed more broadly than "political appointees," there would be no argument for interpreting them to cover "policy-influencing" positions, a term that does not appear in the statute..[229]

Further evidence of OPM's misconstruction of the narrow exclusions at sections 7511(b)(2) and 2302(a)(2)(B)(i) is apparent in the Final Ezell Memorandum. That memorandum attempted to obscure the purpose of the exclusions by parsing the term of art "confidential, policy-determining, policy-making or policy-advocating" into four distinct terms.[230] But, "where a phrase in a statute appears to have become a term of art, … any attempt to break down the term into its constituent words is not apt to illuminate its meaning."[231] Applying this principle, the MSPB has warned that "an excessive preoccupation with the meaning of each term in isolation distorts the purpose of the exception found at 5 U.S.C. § 2302(a)(2)(B)(i)," adding that "[t]hese terms are, after all, only a shorthand way of describing positions to be filled by so-called 'political appointees.'"[232] The Ezell Memorandum also asserted somewhat remarkably that Supreme Court decisions limiting patronage to "policymaking" positions were not applicable because those cases did not address Presidential powers.[233]

The result of this abuse of the narrow exclusions would be a radical change to government not seen since the dark days of the spoils system and not permissible without congressional involvement. Even OPM's "preliminary" estimate of 50,000 positions would exponentially exceed the traditional number of around 1,500 such positions. It should not be ignored that Schedule C—the only excepted service schedule ever covered by the exclusions—has remained

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[226] U.S. OFF. OF PERS. MGMT., THE CLASSIFIER'S HANDBOOK, at 33 (1991), https://tinyurl.com/mzxbkky4.

[227] Press Release, White House, *Fact Sheet: President Donald J. Trump Creates New Federal Employee Category to Enhance Accountability* (Apr. 18, 2025) ("This rule empowers federal agencies to swiftly remove employees in policy-influencing roles."), https://tinyurl.com/4j487t4x.

[228] Exec. Order 14,171 (Jan. 20, 2025) (emphasis added), *reprinted in* 90 Fed. Reg. 8625 (Jan. 30, 2025).

[229] *See* 5 U.S.C. § 7511(b)(2).

[230] Final Ezell Memorandum, at 1.

[231] *Sullivan v. Stroop*, 496 U.S. 478, 483 (1990).

[232] *Peace Corps*, 31 M.S.P.R. at 231-32.

[233] Final Ezell Memorandum, at 1. *See also Branti v. Finkel*, 445 U.S. 507, 515 (1980); *Elrod v. Burns*, 427 U.S. 347, 367-68 (1976).

relatively constant for the last 73 years.[234] But the terms of the executive orders, the proposed rule, and the Final Ezell Memorandum are written vaguely enough to cover far more than 50,000 positions if the exclusion is not limited, as Congress intended and as OPM reiterated in 2024, to political appointees.[235]

In determining the breadth of these exclusions, a court or the MSPB would need to examine the "the CSRA's text, structure, and purpose."[236] These considerations point to the conclusion that the term "confidential, policy-determining, policy-making or policy-advocating" is a term of art referring to positions exclusively for political appointees:

- Narrow exclusions, such as sections 7511(b)(2) and 2302(a)(2)(B)(i), must not be read to swallow or significantly alter the rules they modify. Exceptions must be read "fairly,"[237] which sometimes means "narrowly in order to preserve the primary operation of the provision" to which they apply.[238] "To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people" through their elected representatives in Congress.[239] Federal appellate courts have recognized that this means avoiding overbroad interpretations of exceptions.[240] Therefore, the exclusions at

[234] *See* Protect Democracy & Walter M. Shaub Jr., Comment on Proposed Rule Upholding Civil Service Protections and Merit System Principles, Docket No. OPM-2023-0013, Comment No. 2134, at 44-54 (Nov. 16, 2023), https://tinyurl.com/3t8699pw.

[235] *See* Final Ezell Memorandum at 3.

[236] *Elgin v. Dep't of Treasury*, 567 U.S. 1, 10 (2012).

[237] *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 594 U.S. 382, 396 (2021).

[238] *Garland v. Aleman Gonzalez*, 596 U.S. 543, 555 n.6 (2022). *See also Maracich v. Spears*, 570 U.S. 48, 60 (2013) (quoting *Commissioner v. Clark*, 489 U.S. 726, 739 (1989), for proposition that exceptions must be read narrowly); *Clark*, 489 U.S. at 739 ("In construing [statutes] in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision."); *Piedmont & N. Ry. Co. v. Interstate Com. Comm'n*, 286 U.S. 299, 311–12 (1932) ("The Transportation Act was remedial legislation, and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended."); 2A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION, 6th ED. § 47:11, 246–47 (2000) ("Subsidiary clauses which limit the generality of a rule are narrowly construed, as they are considered exceptions.").

[239] *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). *See also Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 530 (2009) (interpreting exception narrowly to avoid swallowing rule to which it applied); *Kosak v. United States*, 465 U.S. 848, 854 n.9 (1984) ("[U]nduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute.").

[240] *See, e.g.*, *In re Woods*, 743 F.3d 689, 699 (10th Cir. 2014) ("Because this is a scheme whereby a default rule is subject to an exception, we are guided by the interpretive principle that exceptions to a general proposition should be construed narrowly."); *Baude v. United States*, 955 F.3d 1290, 1301 (Fed. Cir. 2020) ("[W]e decline the government's invitation to interpret [the exception for] 'unusual circumstances' so broadly as to 'operate to the farthest reach of [its] linguistic possibilities' in a manner that 'contravene[s] the statutory design.'" (citation omitted)); *Starry Assocs., Inc. v. United States*, 892 F.3d 1372, 1381 (Fed. Cir. 2018) ("[W]e decline Starry's invitation to construe the 'special factor' exception to 'operate to the farthest reach of [its] linguistic possibilities' in a manner that 'contravene[s] the statutory design.'"); *Gentry v. Harborage Cottages-Stuart, LLLP,* 654 F.3d 1247, 1258 (11th Cir. 2011) ("When interpreting exemptions in a remedial statute such as the ILSFDA, the general rule is that exemptions should be narrowly construed."); *Markowitz v. Ne. Land Co*., 906 F.2d 100, 105 (3d Cir. 1990) (construing exceptions narrowly); *De Luz Ranchos Inv., Ltd. v. Coldwell Banker & Co*., 608 F.2d 1297, 1302 (9th Cir.1979) (construing exceptions narrowly).

sections 7511(b)(2) and 2302(a)(2)(B)(i) must be read in a way that does not do violence to the civil service protections that sections 7511 and 2302 establish.

- Structurally, paragraph (b)(2) was originally one of only two exclusions in section 7511(b), both of which addressed only political appointee positions.[241] The relevant Senate committee report explained that the exclusion at paragraph (b)(2) was an "extension" of the exclusion in paragraph (b)(1) for Senate-confirmed presidential appointees.[242]

- In its current form, paragraph (b)(2) is sandwiched between the other two political appointee exclusions, one for Senate-confirmed presidential appointees and one for other presidential appointees.[243]

- In the CSRA itself, Congress declared that one of its purposes is to ensure that federal employees "receive appropriate protection through increasing the authority and powers of the Merit Systems Protection Board in processing hearings and appeals affecting Federal employees."[244]

- Of relevance to the exclusion at 5 U.S.C. § 2302(a)(2)(B)(i), two of the other declared purposes stated directly in the CSRA's text are to ensure that—

    - federal personnel management is "implemented consistent with merit system principles and free from prohibited personnel practices"; and

    - "the authority and power of the Special Counsel [] be increased so that the Special Counsel may investigate allegations involving prohibited personnel practices and reprisals against Federal employees for the lawful disclosure of certain information and may file complaints against agency officials and employees who engage in such conduct."[245]

- In addition, two merit principles stated in 5 U.S.C. chapter 23 are that employees should be "protected against arbitrary action, personal favoritism, or coercion for partisan political purposes" and "should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences. . . a violation of any law, rule, or regulation, or . . . mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."[246]

- When the Civil Service Due Process Amendments of 1990 amended provisions in section 7511, including paragraph (b)(2), that law's function was to expand, not contract,

[241] Pub. L. No. 95-454, tit. II, § 202(a), 92 Stat. 1111, 1135-36 (1978) (codified at 5 U.S.C. § 7511(b)(2)).
[242] S. REP. 95-969, at 48 (1978).
[243] 5 U.S.C. § 7511(b)(1)-(3).
[244] Pub. L. No. 95-454, § 3, 92 Stat. 1112 (1978).
[245] *Id*. at §§ 3(1), 3(4).
[246] 5 U.S.C. § 2301(b)(8)(A) & (9).

the MSPB's jurisdiction.[247] Moreover, a specific aim of that expansion was to provide federal attorneys with MSPB appeal rights.[248]

- The career employees, who continue working across presidential administrations, are meant to have MSPB appeal rights, while political appointees with no expectation of continued employment are not.[249]

OPM's new reinterpretation of the term of art "confidential, policy-determining, policy-making or policy-advocating" and attempted radical expansion of the coverage of sections 7511(b)(2) and 2302(a)(2)(B)(i) does not align with any of these considerations.

4. OPM's argument regarding the constitutional necessity of Schedule PC is wrong.

OPM's preamble includes a lengthy discussion of its claim that chapter 75, subchapter II would raise serious constitutional concerns if it is interpreted to limit section 7511(b) to political appointees.[250] OPM bases this argument on the questionable notion that many excepted service employees otherwise covered by removal protections are inferior officers for whom removal protections would be unconstitutional.[251] The discussion rehashes an issue that OPM rejected in its April 9, 2024, final rulemaking notice. OPM now asserts that it has reconsidered its position on the issue.

OPM's argument boils down to an invalid syllogism: some career employees with removal protections under subchapter II are inferior officers; the Constitution bars some inferior officers from having removal protections; therefore, subchapter II is unconstitutional unless the administration can strip removal protections by placing career employees in Schedule PC.[252] Even if OPM had not exaggerated the premises, the conclusion is a non-sequitur fallacy.

OPM's first premise does not properly answer its 2024 rejection of the constitutional avoidance argument. In its April 9, 2024, rulemaking, OPM expressed skepticism regarding the claim that "many senior career officials are inferior officers."[253] OPM noted that it was "not aware of any judicial decision holding so and the comments cite none."[254] This challenge has

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[247] H.R. REP. 101-328, at 1 (1989) ("The purpose of this legislation is to extend to certain employees in the excepted service who are not preference eligibles the same administrative notice and appeal procedures currently provided employees in the competitive service and preference eligible employees in the excepted service."). *See also Lal v. M.S.P.B.*, 821 F.3d 1376, 1379 (Fed. Cir. 2016) ("Recognizing a gap in administrative and judicial appeal rights for non-preference eligible members of the excepted service, Congress enacted the Civil Service Due Process Amendments of 1990 (the Due Process Amendments), Pub.L. No. 101–376, 104 Stat. 461 (Aug. 17, 1990) (codified in relevant part at 5 U.S.C. § 7511). *See Bennett v. M.S.P.B*, 635 F.3d 1215, 1220 (Fed. Cir. 2011) (recognizing that Congress enacted the Due Process Amendments in response to the Supreme Court's decision in *Fausto*, where the Court held that the CSRA precluded judicial review for non-preference eligible members of the excepted service).

[248] H.R. REP. 101-328, at 4.

[249] H.R. REP. 101-328, at 4-5.

[250] 90 Fed. Reg. at 17211-15.

[251] *Id.*

[252] *Id*.

[253] 89 Fed. Reg. at 25007.

[254] *Id*.

gone unanswered in the notice of proposed rulemaking. The notice asserts that "OPM has found multiple continuing positions covered by chapter 75 that satisfy this test for a constitutional officer."[255] But the 2025 notice of proposed rulemaking cites no case to back up this claim or explain its about-face from the 2024 final rule.

Instead, the notice offers only OPM's own view that it has identified two categories of positions that qualify as inferior officers: GS-15 Field Directors in the EEOC and certain GS-14 field supervisors in OSHA.[256] OPM applies one of the two criteria for inferior officer status expansively to conclude that these employees have "significant" duties and are, therefore, inferior officers who cannot have removal protections. OPM identifies no decision in which any court has applied this criterion so broadly as to determine that a particular employee at a middle management level in a remote office was an inferior officer.

In *Lucia v. SEC*, the Supreme Court set forth a standard that, to be an officer, an individual must satisfy two criteria by (1) holding a continuing position established by law and (2) exercising significant authority pursuant to the laws of the United States.[257] Justice Thomas has said in concurring opinions that "established by law" means that Congress created the position by statute.[258] Along these lines, *Lucia* highlighted the relevance of inquiring whether a statute specifies "the duties, salary, and means of appointment" of a position.[259]

The notice of proposed rulemaking cites no law establishing the EEOC Field Directors as continuing positions. The EEOC's organic statute establishes the positions of five Commissioners and one General Counsel, but it does not establish Field Director as a continuing position by law.[260] It provides only that the commission "may" establish regional or state offices.[261] That law does not require the commission to create regional or state offices, it does not require the commission to continue to maintain such offices on a continuing basis, it does not require the commission to create "satellite" field offices[262] within regional or state offices, and it does not require anyone to lead a field office.[263]

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[255] 90 Fed. Reg. at 17,212.

[256] *Id.*

[257] *Lucia*, 585 U.S. at 245 ("[A]n individual must occupy a 'continuing' position established by law to qualify as an officer."); *see also Al Bahlul v. United States*, 967 F.3d 858, 869 (D.C. Cir. 2020). ("In the constitutional context, an 'officer' is someone who 'occup[ies] a continuing position established by law' and who 'exercis[es] significant authority pursuant to the laws of the United States.'" (citing *Lucia*)).

[258] *Trump v. United States*, 603 U.S. 593, 644-45 (2024) (Thomas, J., concurring) ("Before the President or a Department Head can appoint any officer, however, the Constitution requires that the underlying office be 'established by Law.' The Constitution itself creates some offices, most obviously that of the President and Vice President. See § 1. Although the Constitution contemplates that there will be 'other Officers of the United States, whose Appointments are not herein otherwise provided for,' it clearly requires that those offices 'shall be established by Law.' § 2, cl. 2. and, 'established by law' refers to an office that Congress creates 'by statute.' *Lucia v. SEC*, 585 U.S. 237, 254, 138 S.Ct. 2044, 201 L.Ed.2d 464 (2018) (Thomas, J., concurring); *see also United States v. Maurice*, 26 F.Cas. 1211, 1213, (C.C.D. Va. 1823) (No. 15,747) (Marshall, C. J.).").

[259] *Lucia*, 585 U.S. at 246-47.

[260] 42 U.S.C. § 2000e-4(a), (b).

[261] *Id*. § 2000e-4(f).

[262] OPM's notice of explains that a Field Director supervises only a subcomponent "satellite office" of a district office. 90 Fed. Reg. at 17212.

[263] 42 U.S.C. § 2000e-4.

OPM similarly fails to cite any law establishing middle management GS-14 OSHA field positions in the Department of Labor as continuing positions.[264] The applicable statute establishes only one position in OSHA: "One of such Assistant Secretaries [of the Department of Labor] shall be an Assistant Secretary of Labor for Occupational Safety and Health."[265] There is no mention of middle managers.

Although the proposed rule states that "OPM has found multiple continuing Federal positions covered by chapter 75 that satisfy [the] test for a constitutional officer," OPM abandons the search for such inferior officers allegedly covered by subchapter II after offering these two dubious examples.[266] The notice of proposed rulemaking suggests that it would be too hard for the government's central personnel office to find other examples of inferior officers with removal protections,[267] but it insists without evidence that "there are a significant number of such positions in absolute terms."[268] Falling short of the standard of reasoned decision making, OPM's current notice of proposed rulemaking fails to justify abandoning its prior determination in the 2024 notice of final rulemaking: "[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."[269]

None of this is to suggest that subchapter II covers no inferior officer positions. There is a type of inferior officer who is covered by subchapter II: an Administrative Patent Judge (APJ).[270] In *United States v. Arthrex*, the Supreme Court found that APJs were officers.[271] As to what qualified as "significant" authority, the magnitude of an APJ's authority is unlike that of an OSHA or EEOC middle manager: "The Board, composed largely of Administrative Patent Judges appointed by the Secretary of Commerce, has the final word within the Executive Branch on the validity of a challenged patent. Billions of dollars can turn on a Board decision."[272] More importantly, unlike EEOC and OSHA middle managers, APJ positions are established by law.[273] At the same time, like EEOC and OSHA middle managers, APJs have removal protections under

[264] *See* 90 Fed. Reg. at 17212.

[265] 29 U.S.C. § 553. Although OSHA is mentioned in various laws, *see e.g.*, 15 U.S.C. § 2229(c)(3)(I)(i), its structure and, more importantly, any positions below the Assistant Secretary are not established by law, much less established as continuing positions. *See* 29 U.S.C. ch. 12.

[266] 90 Fed. Reg. at 17212. *See also id.* at 17214 (stating that "further review has uncovered numerous positions that are likely inferior officers covered by chapter 75" but not identifying any such positions); *id.* (stating "OPM has since identified numerous positions covered by chapter 75 where the incumbents are likely inferior officers" but not listing any such positions). Either OPM has identified such positions and failed to identify them in the notice of proposed rulemaking or it has only identified the two positions discussed above that are not officers. Either way, OPM's reliance on this argument fails—either it has failed to make public the findings upon which it relies or no such findings exist.

[267] *Id.* at 17213 ("Cataloguing every position covered by chapter 75 that is likely an inferior office with substantive administrative or policymaking responsibilities is beyond the scope of this rulemaking.").

[268] *Id.* at 17213.

[269] *See* Upholding Civil Service Protections and Merit System Principles, 89 Fed. Reg. at 25007.

[270] *United States v. Arthrex, Inc*., 594 U.S. 1, 3 (2021) (identifying 5 U.S.C. § 7513 as applicable to Administrative Patent Judges).

[271] *Id*. at 13.

[272] *Id*. at 6.

[273] 35 U.S.C. §§ 3(b)(6), 6. *See also Arthrex*, 594 U.S. at 8 (identifying 35 U.S.C. § 6 as the statutory authority establishing Administrative Patent Judges as continuing positions).

subchapter II.[274]

Upon finding that APJs were officers, the Court of Appeals for the Federal Circuit addressed the plaintiff's claim that the statutory scheme violated the Constitution's Appointments Clause. The court found problematic that "[n]o presidentially-appointed officer has independent statutory authority to review a final written decision by the APJs."[275] As a remedy the court concluded that "severing the portion of the Patent Act restricting removal of the APJs is sufficient to render the APJs inferior officers and remedy the constitutional appointment problem."[276] The court reasoned that "[t]he Supreme Court [has] viewed removal power over an officer as 'a powerful tool for control' when it was unlimited."[277] The case then went to the Supreme Court, which likewise found an Appointments Clause violation.[278]

Where the Supreme Court disagreed with the Federal Circuit was not in determining the nature of the problem, which both courts found to be an Appointments Clause violation, but in determining the appropriate remedy. Instead of stripping removal protections as the Federal Circuit had done, the Supreme Court held that the proper remedy was to make APJ decisions reviewable by the Director of the Patent Trademark Office.[279] The Supreme Court found this remedy less disruptive of the statutory scheme than the remedy that the Federal Circuit had fashioned.[280] It also found the result—inferior officers with removal protections supervised by others—to accord with the Constitution.[281]

The notice of proposed rulemaking dismisses OPM's prior reliance on *Arthrex* by stating that "OPM now recognizes that the narrow remedy the Supreme Court crafted in *Arthrex* does not imply chapter 75 can be construed to restrict the President's ability to remove inferior officers with substantive policymaking or administrative authority, or to give inferior officers in independent agencies presidentially binding multilevel removal restrictions."[282] Yet *Arthrex* expressly approved of removal restrictions for inferior officers with substantial authority.

OPM has failed to identify any officials covered by subchapter II who have the sort of significant authority that APJs exercise, hold positions established by law, and have been found constitutionally ineligible for their coverage under subchapter II. Instead, OPM cites three cases that determined the question of whether principal officers, not inferior officers, could have removal protections, and where the Court held that the appropriate remedy was to invalidate the

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[274] *Arthrex*, 594 U.S. at 3, 25-26.

[275] *Arthrex, Inc. v. Smith & Nephew, Inc*., 941 F.3d 1320, 1329 (Fed. Cir. 2019), *vacated and remanded sub nom. United States v. Arthrex, Inc*., 594 U.S. 1 (2021); *see also id.* at 1331 ("Thus, APJs have substantial power to issue final decisions on behalf of the United States without any review by a presidentially-appointed officer. We find that there is insufficient review within the agency over APJ panel decisions.").

[276] *Id*. at 1325.

[277] *Id*. at 1332.

[278] *Arthrex*, 594 U.S. at 23.

[279] *Id*. at 24.

[280] *Id*. at 26 ("But regardless whether the Government is correct that at-will removal by the Secretary would cure the constitutional problem, review by the Director better reflects the structure of supervision within the PTO and the nature of APJs' duties, for the reasons we have explained.").

[281] *See also* 90 Fed. Reg. at 17215 (acknowledging that "[t]he Supreme Court has upheld restrictions on removing some inferior officers").

[282] *Id*. at 17214.

removal restriction.[283] To justify its proposed regulation, OPM relies on an overbroad reading of *dicta* concerning inferior officers in two of those cited principal officer cases.[284] Both of those decisions, however, predated *Arthrex*.

OPM's discussion of *Arthrex* contains an interesting admission regarding the remedy in that case. OPM admits that the Supreme Court crafted a solution designed to remedy a constitutional violation "without further disruption to the statutory framework."[285] That admission puts to bed OPM's claim that applying 5 U.S.C. § 7511(b)(2) exclusively to political appointees—as the government has done for nearly half a century—would render the statute unconstitutional as to all covered employees. As *Arthrex* established, applying subchapter II to inferior officers who are career employees does not violate the Constitution.

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. 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.[286] And *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 5 U.S.C. chapter 75, subchapter II.

5. OPM's argument about the language of the SES statute is irrelevant and unpersuasive.

In its notice of proposed rulemaking, OPM makes a convoluted argument that the words "policy-making" and "policy-determining" in a statute applicable only to SES members—who are not covered by chapter 75, subchapter II but instead are covered by separate statutory adverse action procedures—makes it impossible that the distinct term "confidential, policy-determining,

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[283] 90 Fed. Reg. at 17214 n.306 ("*Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010); *Seila Law v. Consumer Finance Protection Bureau*, 591 U.S. 197 (2020); *Collins v. Yellen*, 594 U.S. 220 (2021).").

[284] 90 Fed. Reg. at 17210-15. OPM relies on dicta in a part of *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.* in which, after having laid out the basis for its decision, the majority respond briefly to a dissent by asserting that its decision would not have the sweeping effect that the dissent suggested. 90 Fed. Reg. at 17214 & n.301 (citing *Free Enter. Fund.*, 561 U.S. at 506-07). OPM also emphasizes dicta in *Seila Law*, which was a case about a Senate-confirmed *principal* officer who led a federal agency, not an inferior officer. 90 Fed. Reg. 17215 (citing *Seila Law,* 591 U.S. at 218). As for the overbreadth of OPM's reading of *Free Enterprise* and *Seila Law*, *see Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1132 (9th Cir. 2021). The Fifth Circuit and Ninth Circuit are split on the meaning of Supreme Court precedent. Compare *id*. at 1132 with *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446, 463-64 (5th Cir. 2022), *aff'd on other grounds sub nom Sec. & Exch. Comm'n v. Jarkesy*, 603 U.S. 109 (2024). But *Decker* and *Jarkesy* addressed Administrative Law Judges, who are not covered by 5 U.S.C. chapter 75, subchapter II, while *Arthrex* resolved the issue at hand by addressing inferior officers who are covered specifically by subchapter II.

[285] 90 Fed. Reg. at 17214.

[286] "The canon of constitutional avoidance does not supplant traditional modes of statutory interpretation." *Boumediene v. Bush*, 553 U.S. 723, 787 (2008).

policy-making or policy-advocating" in chapter 75, subchapter II is a term of art.[287] The SES provision, 5 U.S.C. § 3132, identifies positions that may be included in the SES, among which are positions in which an employee "otherwise exercises important policy-making, policy-determining, or other executive functions."[288]

OPM's argument is unconvincing for several reasons. First, section 3132 does not use the term of art that section 7511(b)(2) uses. Second, sections 3132 and 7511 are in different chapters of title 5 and apply to different categories of employees. Third, the more obvious points of reference for understanding section 7511(b)(2) are the four statutes that expressly use the term of art "confidential, policy-determining, policy-making or policy-advocating" position to define a "political appointee" and not section 3132.[289] Fourth, OPM makes too much of the fact that section 3132 originated with the CSRA, while these other provisions are the products of subsequent enactments; what matters more is that section 3132 does not apply to excepted service employees covered by section 7511(b)(2), and these other provisions do apply to them. That is, one cannot reconcile OPM's new interpretation with those four statutes that use the term of art, but can readily reconcile OPM's prior interpretation with section 3132. Fifth, OPM's argument ignores the fact that Congress expressly included career SES members in the coverage of 5 U.S.C. § 2302 (forbidding prohibited personnel practices), even though it excluded "confidential, policy-determining, policy-making or policy-advocating" excepted service positions from that section.[290] If the words used in section 3132 ("policy-making, policy-determining, or other executive functions") had the same meaning as the distinct term of art in section 2302(a)(2)(B)(i), then the express coverage of career SES members by section 2302 would make little sense, as all SES members would be expressly included by section 2302(a)(2)(B) but then excluded by section 2302(a)(2)(B)(i).[291]

At bottom, OPM's reliance on section 3132 is predicated on the notion that the term "confidential, policy-determining, policy-making or policy-advocating" includes each of its separate component parts such that all SES employees fall within its purview because section 3132 separately uses the terms "policy-making" and "policy-determining." That, according to the proposed rule, is problematic because 5 U.S.C. § 3134(b) prohibits more than

[287] 90 Fed. Reg. 17194-96.

[288] 5 U.S.C. § 3132(a)(2)(E).

[289] *Id*. § 9803(c)(2); 6 U.S.C. § 349(d)(3); 7 U.S.C. § 6992(e)(2); 38 U.S.C. § 725(c).

[290] 5 U.S.C. § 2302(a)(2)(B) (including career SES positions); *id.* § 2302(a)(2)(B)(i) (excluding "confidential, policy-determining, policy-making or policy-advocating" excepted service positions).

[291] OPM cannot salvage its argument by suggesting that Congress provided civil service protections for SES positions covered by paragraphs (A) through (D) of 5 U.S.C. § 3132, which do not mention policymaking, while excluding only the subset of SES positions covered by paragraph (E), which mentions "policymaking" and "policy-determining" work. That would mean that Congress meant to ***deny*** civil service protections to positions covered by paragraph (E)—which are so lacking in authority that they ***do not*** direct organizational units, as do positions covered by paragraph (A), ***do not*** face accountability for the success of programs and projects, as do positions covered by paragraph (B), ***do not*** monitor and adjust organizational goals, as do positions covered by paragraph (C), and ***do not*** have any significant supervisory responsibilities, as do positions covered by paragraph (D). OPM would have the reader believe that Congress ***granted*** civil service protections to all of these more important SES positions described in paragraphs (A) through (D), which do have these responsibilities, but denied civil service protections to less important SES positions described in paragraph (E), which do not. Such an argument would make no sense. In addition, OPM's reliance on § 3132 is predicated on the notion that paragraphs (A)-(D) also describe "policy-making, policy-determining or other executive functions," meaning that those positions would also be excluded from the prohibited personnel practices prohibition by operation of § 2302(a)(2)(B)(i).

10 percent of SES employees from being political appointees.[292] The fallacy of OPM's argument is its insistence on focusing on the component parts of the term of art. If, instead, OPM construed the entire phrase as having a singular meaning (as OPM did in its 2024 final rule) then there is no conflict with section 3134(b) and also no conflict with the other statutes that use the term of art.

In fact, as OPM explained in its 2024 final rule, the interpretation of the phrase "confidential, policy-determining, policy-making or policy-advocating" in 7511(b)(2)—as inapplicable to career civil servants—is the *only* interpretation that makes sense with the SES provisions of the CSRA.[293] That is because Congress explicitly provided adverse action protections to career members of the SES, with no exceptions based on the type of work that SES members perform. It would be incoherent for Congress to provide adverse actions protections to career SES, while giving the President the ability to strip those adverse action protections for a lower-ranking level of civil servants. President Trump himself has asserted that "SES officials have enormous influence over the functioning of the Federal Government, and thus the well-being of hundreds of millions of Americans."[294] And OPM recently noted in its SES rulemaking that "[t]he Senior Executive Service (SES) is a corps of top-level Federal executives who provide leadership and oversee government operations, bridging the gap between political appointees and career civil servants."[295]

OPM has no meaningful response to this point. It instead claims that this argument—which OPM articulated in its 2024 final rule—"ignored SES management flexibilities" and that "Congress could have easily seen the need for greater authority to remove employees below the SES precisely because agencies do not have the same degree of management flexibility with them."[296] OPM points to three "SES management flexibilities," none of which ultimately support OPM's position.

First, OPM argues that "[t]he President and OPM can also take agencies out of the SES and create alternative senior executive management systems. Section 7511(b)(2) of 5 U.S.C. would then allow the President to exclude employees in those alternative systems from chapter 75."[297] This argument is utterly nonsensical. It rests on the premise that "Congress' careful work in crafting the intricate remedial scheme of the CSRA,"[298] with its "comprehensive and integrated" remedial scheme for adverse actions,[299] *was meant to yield an SES system designed to make sense only in agencies where it ceases to exist*. Given that the establishment of the SES was considered a crowning jewel of the CSRA,[300] it would be absurd to claim that the CSRA's

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[292] 90 Fed. Reg. at 17194.

[293] Upholding Civil Service Protections and Merit System Principles, 89 Fed. Reg. at 25025.

[294] *Presidential Memorandum, Restoring Accountability for Career Senior Executives* (Jan. 20, 2025) (emphasis added), *reprinted in* 90 Fed. Reg. 8481 (Jan. 30, 2025).

[295] *Assuring Responsive and Accountable Federal Executive Management*, 90 Fed. Reg. 18820 (May 2, 2025).

[296] 90 Fed. Reg. at 17195.

[297] *Id.*

[298] *Steadman v. Governor, U.S. Soldiers' & Airmen's Home*, 918 F.2d 963, 965 (D.C. Cir. 1990).

[299] *United States v. Fausto*, 484 U.S. 439, 454-55 (1988) (describing CSRA as a "comprehensive system" with a "comprehensive and integrated review scheme").

[300] *See, e.g.*, S. REP. NO. 95-969, 67 (1978) ("Title IV contains one of the most significant elements of the Civil Service Reform Act: Provision for the creation of a corps of top management leaders in a Senior Executive Service. The greatest asset and strength of any government is its top leadership."), https://tinyurl.com/bdhm8n52;

framework is constructed to cohere only if that crowning jewel is removed.[301] Moreover, OPM's reliance on this particular flexibility would mean that OPM believes Congress gave the President the ability to fire a *single member* of the SES but only if the President first removes the individual's *entire agency* from the SES system. To state the problem is to reveal its absurdity.

Second, OPM notes that agency heads can reassign members of the SES to a different SES position.[302] But a reassignment *within the SES* is hardly the same thing as *removing* an employee for no reason whatsoever, which is precisely what OPM's interpretation of the CSRA would allow for non-SES civil servants who are moved into Schedule PC.

Third, OPM claims that an agency head can "unilaterally demote [SES members] from the SES for poor performance."[303] This claim is misleading, at best. The statute does not provide anything close to unlimited "flexibility" for an agency head to demote career SES members for performance. Instead, the statute lays out a detailed performance review scheme, which includes requirements for agencies to create performance appraisal systems for providing performance ratings to SES members, and those ratings in turn serve as the basis for any negative retention determinations.[304] Even more significant, as the D.C. Circuit recently held, career members of the SES have a property interest, protected by the Due Process Clause, in their SES status even in performance cases.[305] Needless to say, due process prevents an agency head from using a "management flexibility" to extinguish a property right.

In short, Congress indisputably provided career members of SES (who are past their probationary periods) with substantive adverse action protections and procedural performance action protections, with no exceptions. OPM fails to explain why Congress would make the illogical choice to create a giant exception from adverse action protections for lower-level career civil servants while granting these more significant protections to the SES members to whom they report. Nor could OPM do so, because this is not the decision that Congress made. To the contrary, in creating the 7511(b)(2) exception, Congress plainly meant to exclude political appointees, not career civil servants.

B. Moving positions into Schedule PC cannot strip accrued adverse action rights under 5 U.S.C. chapter 75, subchapter II.

Even if section 7511(b)(2) were applicable to career employees in the new Schedule PC, involuntary movement to Schedule PC would not strip current employees of their accrued civil service protections. While career employees can forfeit their accrued rights voluntarily by accepting political appointments, the administration cannot strip their rights involuntarily by

President Jimmy Carter, Federal Civil Service Reform Message to the Congress (Mar. 2, 1978) ("A critical factor in determining whether Federal programs succeed or fail is the ability of the senior managers who run them. . . . To help solve these problems I am proposing legislation to create a Senior Executive Service . . . ."), https://tinyurl.com/37emu6pp.

[301] Even when an administration does use this authority, Congress has commanded that "[a]ny agency or unit which is excluded from coverage . . . of this section shall make a sustained effort to bring its personnel system into conformity with the Senior Executive Service to the extent practicable." 5 U.S.C. § 3132(d).

[302] *Id.*

[303] *Id.*

[304] *See, e.g.*, 5 U.S.C. §§ 3393(g), 3592(a)(2), 4312, 4314.

[305] *Esparraguera v. Dep't of the Army,* 101 F.4th 28, 30, 40 (D.C. Cir. 2024).

placing their positions in Schedule PC. Inherent in the CSRA's comprehensive framework is a principle that accrued rights under subchapter II are retained following involuntary personnel actions.

1. A section 7511(b)(2) determination is invalid unless made before an employee accepted a position.

The exclusion at section 7511(b)(2) does not cover positions filled by career federal employees; even if it did, it could not involuntarily strip their previously accrued civil service protections. For section 7511(b)(2) to apply, the government must have made the requisite determination that an employee's position is of a "confidential, policy-determining, policy-making or policy-advocating" character before the employee accepted an appointment to the position. The employee's acceptance of the position also must be voluntary. These requirements are reflected in the language of the CSRA, as well as decisions of the Federal Circuit, the MSPB, and the Department of Justice.

Section 7511(b)(2) refers to a position that "has been determined" to be of a "confidential, policy-determining, policy-making or policy-advocating" character; however, it does not expressly specify the timing of the determination. Evidence as to the timing can be found in the separate but related exclusion in chapter 23, 5 U.S.C. § 2302(a)(2)(B)(i). Congress provided that the chapter 23 exclusion would apply if the position's exception from the competitive service occurred "prior to the personnel action" alleged to constitute a prohibited personnel practice.[306] Because the phrase "prior to the personnel action" is lacking in chapter 75, the only reasonable way to read the two exclusions in concert is that the determination described in section 7511(b)(2) must be made earlier than the determination described in section 2302(a)(2)(B)(i).

The alternative, allowing the government to make a section 7511(b)(2) determination after it has already taken an adverse employment action, would defy every notion of fairness and implicate due process considerations.[307] It would also run afoul of principles of statutory interpretation. As a remedial scheme providing for the redress of unwarranted adverse actions against federal employees, the CSRA was remedial legislation;[308] so too was the Civil Service Due Process Amendments Act of 1990, which amended section 7511 to remedy a gap in civil service protections.[309] "Remedial legislation is traditionally construed 'broadly to effectuate its purposes,' with exceptions 'narrowly construed.'"[310]

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[306] 5 U.S.C. § 2302(a)(2)(B).

[307] *See Stone v. F.D.I.C.*, 179 F.3d 1368, 1376 (Fed. Cir. 1999) (holding that the remedial mechanism for adverse actions under 5 U.S.C. § 7513 "is premised on the procedural fairness at each stage of the removal proceedings"); *Thompson v. Dep't of Just.*, 61 M.S.P.R 364, 368-369 (1994) (holding that § 7511(b)(2) determination must be made before employee accepts position).

[308] 5 U.S.C. §§ 1204(a)(1)-(2) (granting MSPB authority to adjudicate and to direct agencies to comply with its corrective action orders), 5596(b)(1) (authorizing backpay in case of "unjustified or unwarranted personnel action"), 7701 (authorizing the board to grant relief from unwarranted adverse actions and award attorney fees). *See also Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 448 (D.C. Cir. 2009) (holding that the CSRA "constitutes *the* remedial regime for federal employment and personnel complaints" (emphasis in original)).

[309] Pub. L. No. 101-376, 104 Stat. 461 (1990), https://tinyurl.com/2fu9pdcd.

[310] *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 706 (D.C. Cir. 1971). *See also Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977) (recognizing a need to take an "expansive view" of

The CSRA provides that one of its core purposes is to ensure that "Federal employees . . . receive appropriate protection through increasing the authority and powers of the Merit Systems Protection Board in processing hearings and appeals affecting Federal employees."[311] The 1990 amendments, enacted in response to the Supreme Court's holding in *United States v. Fausto*,[312] expanded the coverage of adverse action procedures. The legislation provided protection to career non-preference eligible excepted service employees because, unlike political appointees, they had an "expectation of continuing employment with the Federal Government."[313]

Allowing an agency to make a self-serving section 7511(b)(2) determination—essentially as a litigation tactic—for the first time after an adverse action would frustrate these remedial purposes of the CSRA. In *Thompson v. Department of Justice*, the MSPB rejected an attempt by the Department of Justice to make a section 7511(b)(2) determination after it had removed an employee.[314] 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," and the Federal Circuit affirmed the MSPB's decision.[315]

The MSPB's 1994 decision in *Thompson* left open a question as to the timing of the exclusion at 5 U.S.C. § 2302(a)(2)(B)(i), which was not at issue in the case.[316] In direct response

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"remedial legislation"); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (citing "the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes"); *Cobb v. Cont. Transp., Inc*., 452 F.3d 543, 559 (6th Cir.2006) ("[T]he worksite provision of the FMLA is an exclusionary provision in a remedial statute. Following traditional canons of statutory interpretation, remedial statutes should be construed broadly to extend coverage and their exclusions or exceptions should be construed narrowly." (citation omitted)); *E.E.O.C. v. Fox Point-Bayside Sch. Dist*., 772 F.2d 1294, 1302 (7th Cir. 1985) (holding that "an exception to a remedial statute … is to be construed narrowly").

[311] Pub. L. No. 95-454, § 3(3), 92 Stat. 1111, 1112 (1978), https://tinyurl.com/33vmfc2c.

[312] H.R. REP. 101-328, at 4 ("Last year's Supreme Court decision in *United States v. Fausto* [484 U.S. 439, 453 (1988)] makes this legislation all the more urgent. In its decision, the Supreme Court cut off an alternative method of judicial review for excepted service employees, saying that Congress, in passing the Civil Service Reform Act of 1978, had intended to deprive excepted service employees, other than those who were veterans preference eligible, of the right to challenge adverse actions. This bill explicitly provides those rights."), https://tinyurl.com/mvc97scf.

[313] H.R. REP. 101-328, at 4 ("[T]he key to the distinction between those to whom appeal rights are extended and those to whom such rights are not extended is the expectation of continuing employment with the Federal Government. Lawyers, teachers, chaplains, and scientists have such expectations; presidential appointees and temporary workers do not."), https://tinyurl.com/mvc97scf.

[314] *Thompson*, 61 M.S.P.R at 368-369. The Government Accountability Project filed an amicus brief in *Thompson* on behalf of Senator Chuck Grassley and other members of Congress who objected to the Attorney General's conduct in the case. Amicus Curiae Brief of Sens. Charles Grassley and David Pryor and Reps. Connie Morella, Patricia Schroeder, and Gerry Sikorski, *reprinted in Reauthorization of the Office of Special Counsel: Hearing on S. 1981 to Extend Authorization of Appropriations for the U.S. Office of Special Counsel, and for Other Purposes Before the Subcomm. On Fed. Sevs., Post Off., and Civil Serv. of the S. Comm. on Govt'l Affs.*, 102d Cong., 101-10 (1992) ("Even if the exclusion were defensible on policy grounds, the manner in which it was implemented represents a dangerous, unacceptable precedent. Whistleblower protection may not be canceled ex post facto, particularly as a litigation tactic."), https://tinyurl.com/mtvcxxk7.

[315] *Thompson*, 61 M.S.P.R. at 369 (1994), *aff'd* 106 F.3d 426 (Fed. Cir. 1997).

[316] *Id*. at 369 n.4 ("If he reaches this issue, the administrative judge should address the appellant's argument that the determination required under 5 U.S.C. § 7511(b)(2) is not relevant to the issue of whether an employee is covered by 5 U.S.C. § 2302(a)(2)(B) and whether, therefore, the employee may file an appeal under 5 U.S.C. § 1221(a).").

to the Justice Department's conduct in *Thompson*,[317] Congress moved quickly to address this open question.[318] The 1994 legislation amending section 2302(a)(2)(B) did not go as far as the rulings of the MSPB and Federal Circuit as to the timing of section 7511(b)(2), but Congress chose not to disturb those rulings.[319] While section 7511(b)(2) determinations would have to be made prior to an employee's acceptance of a position,[320] section 2302(a)(2)(B) determinations would have to be made prior to the relevant personnel action.[321] Requiring an agency to make a section 7511(b)(2) determination sooner than the CSRA requires the agency to make a section 2302(a)(2)(B)(i) determination is consistent with the fact that chapter 75 covers more significant personnel actions, including removal, while chapter 23 can cover less severe actions, such as any significant change in "working conditions."[322]

If the exclusion of a position under section 7511(b)(2) must be made earlier than under section 2302(a)(2)(B)(i), the potentially relevant triggering events are the employee's acceptance

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[317] S. REP. 103-358, 9, 1994 U.S.C.C.A.N. 3549, 3557 (1994) ("Section 5(b) limits the exclusion of confidential, policy making positions from coverage under the Whistleblower Protection Act to those employees that are not designated prior to the personnel action taken against the individual. This section addresses the situation faced by a Justice Department employee who was designated as a confidential policy-making, policy-advocating, or policy-determining employee over a year after the employee was terminated, a month after the employee filed a Whistleblower Protection Act Individual Right of Action, and less than three weeks before the administrative judge ruled on the employee's case. Section 5(b) will ensure that employee receive the protection of the Whistleblower Protection Act unless they were designated as policy-making employees before making the otherwise protected disclosure."), https://tinyurl.com/fk3928be.

[318] Pub. L. No. 103-424, § 5(b), 108 Stat. 4361, 4364 (1994), https://tinyurl.com/ms6udutx.

[319] *Id*.

[320] *Thompson*, 61 M.S.P.R. at 369.

[321] 108 Stat. at 4364.

[322] Compare 5 U.S.C. § 7512(1) with 5 U.S.C. 2302(a)(2)(A)(xii). *See also Feds for Med. Freedom v. Biden*, 63 F.4th 366, 371 n.1 (5th Cir.), *vacated as moot* 144 S. Ct. 480 (2023) ("Throughout this opinion, we use 'Chapter 23 personnel actions' to refer to the non-Chapter-75, *less-severe employment actions* listed in § 2302. We use 'Chapter 75 personnel actions' or 'Chapter 75 actions' to refer to the *more-severe employment actions* such as demotion and termination listed in § 7512." (emphasis added)); *Payne v. Biden*, 602 F. Supp. 3d 147, 155 (D.D.C. 2022), *aff'd*, 62 F.4th 598 (D.C. Cir. 2023), *vacated as moot*, 144 S. Ct. 480 (2023) ("Chapter 23 governs less severe personnel practices against executive-branch employees. … The other section of the CSRA of primary relevance here, Chapter 75, governs *more severe personnel actions* against covered federal employees." (emphasis added)); *Zachariasiewicz v. U.S. Dep't of Just*., 48 F.4th 237, 242-43 (4th Cir. 2022) ("Pursuant to the CSRA, an employee may appeal a major personnel action, such as termination, directly to the MSPB.... To challenge other, less serious personnel actions that violate certain prohibited personnel practices, the employee must first file a complaint in the OSC...." (internal quotation marks omitted, cleaned up)); *Rydie v. Biden*, No. 21-2359, 2022 WL 1153249, at *3 (4th Cir. 2022) (unpublished) ("Chapter 75 governs more serious agency actions against executive-branch employees."); *Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1434 (D.C. Cir. 1996) ("Although the OSC discretion adds an element of uncertainty that is distinct from the ordinary vicissitudes of agency proceedings, Congress evidently thought it adequate in view of the relatively minor character of the wrongs whose redress it left to OSC discretion [under chapter 23], perhaps fearing that a universal right of appeal to the MSPB would cause trivial claims to delay and crowd out more serious ones."); *Carducci v. Regan*, 714 F.2d 171, 175 (D.C.Cir.1983) (referring to "major personnel actions specified in the statute ('adverse actions')" appealable directly to the MSPB under chapter 75 and to "specified minor personnel actions infected by particularly heinous motivations or disregard of law ('prohibited personnel actions')" subject to review by the Office of Special Counsel under chapter 23); *Nat'l Ass'n of Immigr. Judges v. Neal*, 693 F. Supp. 3d 549, 567-68 (E.D. Va. 2023), *appeal docketed*, No. 23-2235 (4th Cir. Nov. 29, 2023) ("Chapter 23 lays out 'merit systems principles' by which agencies must abide. … A federal employee who has experienced a 'prohibited personnel practice' must file the allegation with the Office of Special Counsel ('OSC' or the 'Special Counsel'). … Federal employees can challenge more serious personnel actions, that is adverse actions,' through the second statutory scheme outlined in Chapter 75 of the CSRA.").

of a position or the agency's creation of the position. This reading is supported by viewing section 7511(b)(2) in the context of the other exceptions in section 7511(b). All of the other exceptions apply only when an employee has made a *choice*. Paragraphs (b)(1) and (b)(3) exclude from the coverage of chapter 75, subchapter II, individuals who made the *choice* to accept appointments from the President. Paragraph (b)(4) excludes reemployed annuitants only if they *choose* to continue receiving annuity payments. Paragraphs (b)(6) through (b)(8) and (b)(10) exclude employees who made the *choice* to accept positions in the Foreign Service or in certain specified agencies. Paragraph (b)(9) excludes foreign nationals who made the *choice* to accept jobs with the United States overseas. Paragraph (b)(2) must be read in this context to also require a *choice*, namely the choice to accept appointment to a position for which a determination "has been" made.

This interpretation makes sense because courts must "interpret [a] statute as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into an harmonious whole."[323] Often, the meaning of statutory language "may only become evident when placed in context."[324] The logical reading of paragraph (b)(2), therefore, is that it excludes an employee only if the employee makes the *choice* to accept a position that "has been" determined to be of a "confidential, policy-determining, policy-making or policy-advocating" character. For acceptance of a position to represent a choice—in other words, to be voluntary—the determination as to the position's character must have been made *before* the employee accepted appointment to the position. This approach to reading the subsection (b) exceptions is consistent with the *noscitur a sociis* canon.[325]

Further evidence as to the timing of the exception in section 7511(b)(2) is found in the verb tense of the exceptions. The Supreme Court has indicated that, "[c]onsistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach."[326] Other exclusions in subsection (b) of section 7511 describe a condition that exists only in the present: (b)(10) excludes an employee "who *holds* a position" in a particular agency component; (b)(9) excludes an employee "who *is* described" in another statute; (b)(8) and (b)(7) each exclude an employee "whose position *is* within" a specified agency; (b)(6) excludes an employee "who *is* a member of the Foreign Service"; (b)(4) excludes an employee "who *is* receiving an annuity"; and (b)(1) and (b)(3) both exclude an employee "whose appointment *is* made" by the president with or without Senate-confirmation.[327] 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."[328] The Supreme Court has characterized the present perfect tense as "denoting an act that has been completed."[329]

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[323] *Brown & Williamson Tobacco Corp*., 529 U.S. at 133 (citations and internal quotation marks omitted).
[324] *Id.* at 132.
[325] *See Rizo v. Yovino*, 950 F.3d 1217, 1224 (9th Cir. 2020).
[326] *Carr v. United States*, 560 U.S. 438, 448 (2010).
[327] 5 U.S.C. § 7511(b)(1), (3)-(4), (6)-(10) (emphasis added).
[328] *Id*. § 7511(b)(2) (emphasis added).
[329] *Barrett v. United States*, 423 U.S. 212, 216 (1976) ("It is to be noted, furthermore, that while the proscribed act, 'to receive any firearm,' is in the present tense, the interstate commerce reference is in the present perfect tense, denoting an act that has been completed."). In contrast, "words used in the present tense include the future as well as the present." 1 U.S.C. § 1.

Congress could have used the present tense in section 7511(b)(2) to apply the provision to an employee "who *holds* a position" that is subject to the requisite determination. Congress used that formulation in paragraph (b)(10) to refer to an employee "who *holds* a position within the Veterans Health Administration which has been excluded from the competitive service…." Congress could have adopted that formulation for paragraph (b)(2) when it added (b)(10) in 1992.[330] In fact, Congress had opportunities to conform the language of (b)(2) to the language of (b)(10) when it amended the bill in 1992,[331] 1994,[332] 1996,[333] and 2016,[334] but it chose not to do so (notwithstanding the holding in *Thompson* and Congress' amendment of section 2302(a)(2)(B)). This history reflects a choice by Congress to make section 7511(b)(2) applicable only when the determination is made before an employee accepts a position.

The MSPB and the courts have applied this interpretation for years. Consistent with its holding in *Thompson v. Department of Justice*, the MSPB has reiterated, at both the board and administrative judge levels, that a (b)(2) determination must be made before an employee accepts a position.[335] In *Chambers v. Department of the Interior*, the board's two-member majority assumed, without comment, that the board had jurisdiction over the appeal of an agency head challenging her termination.[336] In a concurring opinion, the Republican member, Mary Rose (a former Heritage Foundation visiting fellow),[337] flagged the oddity of an agency head having an MSPB appeal right.[338] The agency had never made the necessary section 7511(b)(2) determination. Member Rose expressed frustration with that omission but agreed with the board's decision to overturn the termination, noting that "the appropriate official must designate the position in question as confidential, policy-determining, policy-making, or policy-advocating *before the individual is appointed*."[339]

The MSPB explained in *Briggs v. National Council on Disability* that "fairness and due process considerations require that any determination as to the character of the position at issue here have been made in such a manner as to put the appellant on notice of the nature of the position she was considering accepting."[340] The board remanded the case to the administrative

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[330] Pub. L. No. 102-378, § 6(a)(4), 106 Stat. 1346, 1358 (1992) (emphasis added), https://tinyurl.com/rwvaefcy.

[331] Pub. L. No. 102-378, § 6, 106 Stat. 1346, 1358 (1992), https://tinyurl.com/3cmwc7sh.

[332] Pub. L. No. 103-359, § 502, 108 Stat. 3423, 3430 (1994), https://tinyurl.com/2t6hn6ba.

[333] Pub. L. No. 104-201, § 1634, 110 Stat. 2422, 2752 (1996), https://tinyurl.com/y8n2ymcx.

[334] Pub. L. No. 114-328, § 512, 130 Stat. 2000, 2112 (2016), https://tinyurl.com/wvtvuha6.

[335] *See, e.g.*, *Owens v. Dep't of Health & Human Servs.*, No. AT-0752-17-0516-I-1, 2017 WL 3400172 (M.S.P.B. July 31, 2017) (nonprecedential decision by administrative judge) ("[A] determination under 5 U.S.C. § 751l(b)(2) is not adequate unless it is made before the employee is appointed to the position"); *Vergos v. Dep't of Justice*, No. AT-0752-03-0372-I-1, 2003 WL 21417091 n.1 (M.S.P.B. June 6, 2003) (nonprecedential decision by Administrative Judge, citing *Thompson* for the proposition that a "determination under the 5 U.S.C. § 7511(b)(2) is not adequate unless it is made before the employee is appointed to the position").

[336] *Chambers v. Dep't of the Interior*, 116 M.S.P.R. 17 (Jan. 11, 2011).

[337] U.S. Merit Sys. Prot. Bd., ANN. REP., FISCAL YEAR 2005 (2006) (biography of Member Mary Rose), https://tinyurl.com/4d8dzubf (last visited May 24, 2025).

[338] *Chambers*, 116 M.S.P.R. at 62 (Member Rose concurring) ("What makes the present case unique is that, despite the appellant's status as head of an agency, she was a tenured employee in the competitive service with the right to appeal her removal to the Board.").

[339] *Chambers*, 116 M.S.P.R. at 63 (Member Rose concurring) (emphasis added).

[340] *Briggs v. Nat'l Council on Disability*, 60 M.S.P.R. 331, 334-36 (Jan. 7, 1994) (remanding to administrative judge for jurisdictional hearing) (hereinafter "*Briggs I*"), *subsequent history at* 65 M.S.P.R. 509 (Dec. 7, 1994) (Table) (affirming administrative judge's finding on remand that MSPB had jurisdiction), *aff'd sub nom. King v.*

judge (AJ) to consider whether a determination under section 7511(b)(2) had been made before the employee accepted the position.[341] The AJ found that section 7511(b)(2) was inapplicable, and the board rejected the government's petition for review of the AJ's decision. OPM intervened and petitioned the Federal Circuit for review of the board's determination.

The Federal Circuit upheld the determination that the MSPB had jurisdiction over the employee's appeal in *Briggs*.[342] Though OPM pursued issues other than the timing of a section 7511(b)(2) determination in its petition for review, the court's review of the MSPB's jurisdictional finding was *de novo*.[343] Significantly, the Federal Circuit's own jurisdiction over a petition for review from an adverse action appeal is dependent on the MSPB having had jurisdiction,[344] and "[t]he objection that a federal court lacks subject-matter jurisdiction ... may be raised … by a court on its own initiative…."[345] If the MSPB had lacked jurisdiction, the Federal Circuit would have dismissed the case. The Federal Circuit's decision demonstrated that the court was aware of all the relevant facts needed for a determination as to its jurisdiction:

> In its May 1994 remand decision, the AJ found that the Council had "never made a determination that [Briggs'] position was a confidential, policy-making, policy-determining, or policy-advocating position" and thus excluded from the definition of "employee" in section 7511(a). In addition, the AJ found that, even if the Council had made such a determination, it "never communicated that fact to" Briggs. On the basis of these findings, the AJ concluded that Briggs was not excluded from the definition of "employee" in section 7511(a), and that the Board had removed her without following the applicable merit systems procedural requirements. Briggs was ordered reinstated with back pay.[346]

OPM does not deny that the MSPB has issued these decisions, but it argues in its preamble that the question of the section 7511(b)(2) exclusion was not before the Federal Circuit in *Briggs*.[347] The problem for OPM is that the question of the exclusion's applicability was necessarily before the court in *Briggs*. Though the applicability of the (b)(2) exclusion was not actively challenged before the court in *Briggs*, the exclusion's applicability would have stripped the Federal Circuit of jurisdiction.[348] The court always has the responsibility to examine its

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Briggs, 83 F.3d 1384 (Fed. Cir. 1996) (affirming MSPB opinion finding it had jurisdiction) (hereinafter "*Briggs II*").

[341] *Briggs I*, 60 M.S.P.R. at 336.

[342] *Briggs II*, 83 F.3d at 1386.

[343] *Briggs II*, 83 F.3d at 1387 ("The scope of the Board's jurisdiction presents a question of law that we review de novo.").

[344] *Manning v. Merit Sys. Prot. Bd.*, 742 F.2d 1424, 1427 (Fed. Cir. 1984) ("[F]or cases brought under section 7701, the scope of the subject matter jurisdiction of this court is no broader than the scope of the jurisdiction of the MSPB. *See Rosano v. Dep't of the Navy*, 699 F.2d 1315, 1318 (Fed .Cir. 1983). If the MSPB does not have jurisdiction, then neither do we, except to the extent that we always have the inherent power to determine our own jurisdiction, *C.R. Bard, Inc. v. Schwartz*, 716 F.2d 874, 877 (Fed. Cir. 1983)."). *See also Schmittling v. Dep't of Army*, 219 F.3d 1332, 1337 (Fed. Cir. 2000) (quoting *Manning*).

[345] *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006).

[346] *Briggs II*, 83 F.3d at 1387 (Fed. Cir. 1996).

[347] 90 Fed. Reg. 17200.

[348] 5 U.S.C. §§ 7511(b)(2), 7513, 7701, 7703; 28 U.S.C. § 1295(a)(9).

jurisdiction over a case de novo,[349] with no deference to the MSPB's determination as to its own jurisdiction. The Federal Circuit has explained: "We begin with jurisdiction, as 'the court is bound to ask and answer for itself' whether jurisdiction is proper 'even when not otherwise suggested.'"[350] If the 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.[351] The court would have had no power to adjudicate the case without jurisdiction.[352] Therefore, the Federal Circuit's adjudication of these cases at all stands as an affirmation of the MSPB's conclusion that it had jurisdiction based on the inapplicability of 5 U.S.C. § 7511(b)(2).

Another case, *Stanley v. Department of Justice*, demonstrates the principle that the section 7511(b)(2) determination must be made before an employee accepts a position. The case involved the claims of two individuals who were serving five-year terms as bankruptcy trustees. The court found that one year and two years into their initial five-year terms, respectively, "Attorney General Janet Reno proclaimed that the position of Trustee [was] 'confidential, policy-determining, policy-making, or policy-advocating [in] character' and, as such, 'exempted from the civil service due process requirements set forth in Title 5 of the United States Code.'"[353] Despite this determination under section 7511(b)(2), however, the Justice Department acknowledged in writing that, as the court described, "Trustees appointed prior to the proclamation would not be affected—they would retain appeal rights—but that all those appointed after the proclamation were exempt from the due process provisions contained in Title 5."[354]

The initial five-year terms of these two individuals later expired and they *chose* to accept new five-year appointments to the positions, which had been moved to Schedule C by Reno's determination.[355] Before they completed their second terms, a new presidential administration terminated them.[356] Though the Attorney General's section 7511(b)(2) determination had not applied to them during their initial five-year appointments, the Federal Circuit found that the *voluntariness* of their acceptance of new appointments subjected them to that determination: "*Once they accepted reappointment*, they occupied no different position than any other individual appointed after Reno's order."[357]

In *Williams v. Merit Systems Protection Board*, the Federal Circuit reiterated its view that an employee's resignation would not be deemed voluntary in cases where an agency coerced or

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[349] *Briggs II*, 83 F.3d at 1387.

[350] *Mote v. United States*, 110 F.4th 1345, 1351 (Fed. Cir. 2024) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900))).

[351] *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 54 (1986) ("[E]very federal appellate court has a special obligation to satisfy itself ... of its own jurisdiction ... even though the parties are prepared to concede it.") (cleaned up).

[352] "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868)).

[353] *Stanley v. Dep't of Just.*, 423 F.3d 1271, 1272 (Fed. Cir. 2005) (second alteration in original).

[354] *Id*. at 1273.

[355] *Id*.

[356] *Id*.

[357] *Id*. at 1274 (emphasis added).

deceived the employee into resigning.[358] "[I]n those cases, we have held that an employee could exercise appeal rights to the Board."[359] If that principle holds true when coercion or deception renders an employee's choice involuntary, it must be all the more true when the employee has been given no choice at all. An employee's *involuntary* movement to an excepted service schedule, therefore, does not strip the MSPB of jurisdiction over a subsequent adverse action.

2. Cases predating the CSRA provide helpful historical context and point the way to understanding section 7511(b)(2).

Cases predating the CSRA provide helpful historical context and point the way to understanding section 7511(b)(2). While these earlier cases involved other laws, those laws either laid the foundation for, or were incorporated in, the CSRA's adverse action mechanisms. Though not directly applicable to the CSRA, the cases reflect the evolution of a concept of retained status that lawmakers brought to their understanding of section 7511(b)(2) in 1978. What those cases reveal is a longstanding expectation that revocation of previously accrued rights will not be authorized implicitly or vaguely. This history was accurately described in the notice of final rulemaking that OPM issued on April 4, 2024, and accurately captured in regulatory amendments that rulemaking effected.

A comment that Protect Democracy submitted in response to OPM's September 18, 2023, rulemaking discussed the history of cases predating the CSRA, including *Roth v. Brownell* among others, and OPM agreed that they were informative with respect to interpreting 5 U.S.C. § 7511(b)(2).[360] That prior comment is incorporated into this comment by reference.[361] In OPM's latest notice of proposed rulemaking, it challenges the discussion of that history in its April 4, 2024, rulemaking.[362] However, OPM misunderstands its relevance. *Roth v. Brownell* and the other cases discussed point to the long historical tradition of applying civil service protections based on the employee's accrual of status or rights.[363] That tradition was well understood by members of Congress when they enacted the CSRA, and they assumed it would continue—*as it has for nearly half a century under the CSRA*.

Roth v. Brownell illustrated the concept of retention of status under the Lloyd-LaFollette Act upon an employee's involuntary movement from the competitive service (then called the classified service) to an excepted service schedule. In 1953, Attorney General Herbert Brownell fired a Justice Department lawyer named Leo Roth without observing statutory requirements for terminating competitive service employees.[364] Roth was a non-preference eligible employee

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[358] *Williams v. Merit Sys. Prot. Bd.*, 892 F.3d 1156 (Fed. Cir. 2018).

[359] *Id*. at 1163.

[360] Upholding Civil Service Protections and Merit System Principles, 89 Fed. Reg. 24982, 24993, 25010, 2515 (Apr. 9. 2024), https://tinyurl.com/62jvsd8d.

[361] Protect Democracy & Walter M. Shaub Jr., Comment on Proposed Rule Upholding Civil Service Protections and Merit System Principles, Docket No. OPM-2023-0013, Comment No. 2134, at 44-54 (Nov. 16, 2023), https://tinyurl.com/3t8699pw. One correction to both that prior submission and the notice of proposed rulemaking (see 90 Fed. Reg. at 17185) is that, rather than moving Mr. Roth to Schedule C in 1953, Attorney General Brownell fired him from Schedule A. *Roth*, 215 F.2d at 501. The analysis remains the same because, like Schedule C appointees, nonpreference eligible Schedule A employees lacked adverse action appeal rights.

[362] 90 Fed. Reg. at 17199.

[363] *See Saltzman v. United States*, 161 Ct. Cl. 634, 638 (1963); *Roth*, 215 F.2d 500.

[364] *Roth v. Brownell*, 117 F. Supp. 362, 364 (D.D.C 1953), *rev'd*, 215 F.2d 500 (D.C. Cir. 1954).

serving in a Schedule A position at the time, but he had accrued competitive status while his position was previously in the competitive service.[365]

Roth filed a civil action in federal district court, alleging that, as an employee with competitive status, the protections of the Lloyd LaFollette Act applied to him. The district court rejected Roth's claim that he was entitled to those protections, but the D.C. Circuit overturned that decision and found in favor of Roth.[366] The government had argued that Roth's accrual of competitive status was irrelevant because, at the time of his firing, he held an excepted service position.[367] The government emphasized that, by its terms, the Lloyd-LaFollette Act applied to a "person in the classified civil service of the United States."[368] Because Roth had held an excepted service position at the time of his firing, the government claimed that it had not removed him from the classified service. The D.C. circuit rejected this argument: "This is a paradox. Roth was once in the classified civil service, did not leave it voluntarily, and is now out of it. It follows that he was removed from it."[369]

In November 1954, a month after the *Roth* decision, President Eisenhower issued Executive Order 10,577 to provide that "an employee who is in the competitive service at the time his position is first listed under Schedule A, B, or C shall be considered as continuing in the competitive service as long as he continues to occupy such position."[370] The CSC then issued regulations codifying the Eisenhower administration's recognition of these court-enforced rights.[371] Contemporaneous with these events, President Eisenhower had established Schedule C by executive order in 1953.[372] Although *Roth* had involved a competitive service employee who was moved involuntarily to Schedule A, the decision applied equally to an involuntary movement to Schedule C.[373] Consistent with this principle, the executive branch recognized that 11 percent of the incumbents of Schedule C positions still retained competitive status seven years after President Eisenhower created Schedule C.[374] The CSC explained in a 1960 report that these

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[365] *Roth*, 215 F.2d at 500-01.

[366] *Roth*, 117 F. Supp. 362 (D.D.C 1953), *rev'd*, 215 F.2d 500 (D.C. Cir. 1954).

[367] *Roth*, 215 F.2d at 502.

[368] *Id.* at 501 ("The Lloyd-LaFollette Act … provides: 'No 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.'").

[369] *Id.* at 502.

[370] Exec. Order No. 10,577, § 1.3(d) (Nov. 22, 1954), *reprinted in* 19 Fed. Reg. 7521 (Nov. 23, 1954). A CSC press release citing *Roth* announced in January 1955: "An employee who is serving with competitive status in a competitive position at the time his position is listed under Schedules A, B, or C, continues with his position to be in the competitive service during his occupancy of that position." Press Release, U.S. Civil Sev. Comm'n, 1 (Jan. 24, 1955), *copy provided in* Protect Democracy & Walter M. Shaub Jr., Comment on Proposed Rule Upholding Civil Service Protections and Merit System Principles, Docket No. OPM-2023-0013, Comment No. 2134, Attachment 1, at 8-9 (Nov. 16, 2023), https://tinyurl.com/3t8699pw.

[371] 20 Fed. Reg. 599, 599, 601 (Jan. 28, 1955), https://tinyurl.com/yek5y492.

[372] Exec. Order No. 10,440, § 6.2, 1953 WL 49879 (Mar. 31, 1953), *reprinted in* 18 Fed. Reg. 1823 (Apr. 2, 1953).

[373] Exec. Order No. 10,577, § 1.3(d) (Nov. 22, 1954); *see also*, Press Release, U.S. Civil Serv. Comm'n, 3 (May 12, 1955), *copy provided in* Protect Democracy & Walter M. Shaub Jr., Comment on Proposed Rule Upholding Civil Service Protections and Merit System Principles, Docket No. OPM-2023-0013, Comment No. 2134, Attachment 1, at 4-6 (Nov. 16, 2023), https://tinyurl.com/3t8699pw.

[374] U.S. CIVIL SERV. COMM'N, REP. TO THE H. COMM. ON POST OFF. & CIVIL SERV., 86TH CONG., MAINTAINING THE INTEGRITY OF THE CAREER CIVIL SERVICE, 10 (1960), https://tinyurl.com/3tzjsurx.

incumbents had been "serving with status in competitive positions at the time the positions were placed in schedule C."[375] According to the CSC, this meant that non-preference eligible employees remained covered by protections afforded under its regulations and the Lloyd-La Follette Act of 1912, while the preference-eligible employees remained covered by the Veterans Preference Act.[376]

In 1963, the former U.S. Claims Court decided a case that was similar to *Roth v. Brownell*, and its decision mirrored the D.C. Circuit's reasoning. The Court of Claims held in *Saltzman v. United States* that an agency "exceeded its authority when it took out of the classified civil service employees already in it, and thus deprived them of their rights under the civil service laws."[377] The court held that an employee whose position was moved from the competitive service to the excepted service retained his competitive status under the applicable statute. Despite occupying a position that was now in the excepted service, he "never lost the rights he acquired under the Lloyd LaFollette Act when he acquired permanent competitive status in the classified civil service."[378]

The principle of retained civil service protections continued through subsequent presidential administrations. The Kennedy administration recodified the Eisenhower administration's regulation on the retention of competitive status in 1963, at 5 C.F.R. § 212.401.[379] The Johnson administration continued that provision in regulations it updated in 1968.[380] Under President Gerald Ford, the CSC acknowledged the continuing relevance of the *Roth* decision in a memorandum emphasizing that employees retained accrued status and civil service protections upon involuntary movement to positions designated as confidential or policy-determining: "The same basic procedures used for removals from Noncareer Executive Assignments apply to removals from Schedule C positions. Individuals who are preference eligibles or have status in the position are covered by [5 C.F.R.] Part 752. (See Roth v. Brownell, 215 F. 2d 500)."[381] A related Ford administration handout for officials with presidential transition responsibilities explained that Schedule C employees with status were entitled to appeal their removal to the CSC under the commission's regulations at 5 C.F.R. part 752.[382]

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[375] *Id*.

[376] *Id*.

[377] *Saltzman*, 161 Ct. Cl. at 638.

[378] *Id*. at 639.

[379] 5 C.F.R. § 212.401(b) (1964) ("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."), https://tinyurl.com/yr54env3; 28 Fed. Reg. 10022, 10030 (Sep. 14, 1963), https://tinyurl.com/3tavcxhh.

[380] Revision of Regulations, Final Reg., 5 C.F.R. ch. I, subch. B (other than pt. 213), 33 Fed. Reg. 12402-08 (Sep. 4, 1968) ("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."), https://tinyurl.com/5n7kry6w.

[381] Memorandum from Raymond Jacobson, Exec. Dir., U.S. Civil Serv. Comm'n, to Directors of Pers., 5 (Nov. 10, 1976), https://tinyurl.com/4yttr4px.

[382] CIVIL SERV. COMM'N, PROCEDURES FOR REMOVALS FROM EXCEPTED POSITIONS, 2 (1976) ("An employee has status in his position if (a) he was serving, with civil service status, in a position in the competitive service when the Civil Service Commission listed the position in Schedule A, B, or C, and (b) he is still serving in that position. This covers employees in attorney positions on January 23, 1955, who were serving with civil service status in attorney positions on May 1, 1947, and who have served continuously in attorney positions between those dates, even though movement to a different agency or activity between those dates may have been effected as an "excepted appointment."), https://tinyurl.com/4yttr4px.

When Congress enacted the CSRA in 1978, it carried forward key provisions of law related to these earlier decisions and guidance documents. The Federal Circuit explained in *Lovshin v. Department of Navy*: "The substantive ground for taking an adverse action under Chapter 75 has been in the civil service law essentially unchanged since 1912 with enactment of the landmark Lloyd-LaFollette Act. A single basis for disciplinary action has been continuously provided therein: 'only for such cause as will promote the efficiency of the service.'"[383] Under the CSRA, the new chapter 75, subchapter II, combined core principles of the procedural protections under the Lloyd-LaFollette Act, the Veterans' Preference Act, and the CSC's regulations.[384] A federal appeals court characterized "[t]he Lloyd-LaFollette Act, as now codified at 5 U.S.C. § 7513."[385] Just as before Congress enacted the CSRA, the government must show that an "employee's misconduct is likely to have an adverse impact on the agency's performance of its functions."[386] Under the CSRA, the MSPB would assume the CSC's former responsibility for adjudicating adverse actions appeals under that continuing standard.[387] This degree of continuity of statutory principles and processes necessarily informs any analysis of the CSRA.

Where the original Lloyd-LaFollette Act had referred to "removal" from the classified service (i.e., competitive service), the CSRA did not qualify the term "removal" as being limited to removal from the competitive service. That is because, as originally enacted in 1978, the CSRA's adverse action procedures applied both to competitive service employees and preference eligible excepted service employees.[388] In this context, the reference to "removal" could no longer refer only to the competitive service. The term "removal" necessarily applied to removal from the civil service, regardless of whether the employee was in the competitive service or was a preference-eligible employee in the excepted service.

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[383] *Lovshin v. Dep't of Navy*, 767 F.2d 826, 830 (Fed. Cir. 1985). *Compare* Pub. L. No. 95-454, § 204, 92 Stat. 1111, 1136 (1978) (enacting 5 U.S.C. § 7513(a) to provide for removal "only for such cause as will promote the efficiency of the service"), https://tinyurl.com/aj9eww3w, *with* Lloyd-LaFollette Act, § 6, 37 Stat. 555 (1912) (barring removal "except for such cause as will promote the efficiency of said service"), https://tinyurl.com/myeyww8v.

[384] Before Congress enacted the CSRA, the Lloyd LaFollette Act's protections for competitive service employees had been codified in 5 U.S.C. § 7501(a) (1976), https://tinyurl.com/ydfsacda. *See United States v. Testan*, 424 U.S. 392, 406 (1976) (referring to "the Lloyd-LaFollette Act, 5 U.S.C. § 7501"); *Arnett v. Kennedy*, 416 U.S. 134, 137 (1974) (referring to "the Lloyd-La Follette Act, 5 U.S.C. § 7501"). Appeal rights for preference eligible employees under the Veterans' Preference Act protections had been codified in 5 U.S.C. § 7701 (1976), https://tinyurl.com/yd9emjpm. *See Fitzgerald v. U.S. Civ. Serv. Comm'n*, 554 F.2d 1186, 1187 (D.C. Cir. 1977) (referring to "section 14 of the Veterans' Preference Act of 1944, as amended in 1947, 5 U.S.C. § 7701"). Regulations of the Civil Service Commission had established the right of competitive service employees to file administrative appeals with that agency. 5 C.F.R. § 752.203 (1976), https://tinyurl.com/cth5ycc5.

[385] *Fowler v. United States*, 633 F.2d 1258, 1259 (8th Cir. 1980).

[386] *Gonzalez v. Dep't of Educ*., No. 2023-2001, 2025 WL 816239, at *10 (Fed. Cir. Mar. 14, 2025) (quoting *Brown v. Dep't of the Navy*, 229 F.3d 1356,1358 (Fed. Cir. 2000) (citing *Mings v. Dept. of Justice*, 813 F.2d 384, 389-90 (Fed. Cir. 1987)). *See also Arnett*, 416 U.S. at 162 (holding that the "efficiency of the service" standard applies to "employee behavior . . . which is detrimental to the efficiency of the employing agency.").

[387] 5 U.S.C. §§ 1204(a), 7513(d), 7701. *See also Bush v. Lucas*, 462 U.S. 367, 388 n.33 (1983) ("The 1978 Civil Service Reform Act gave the Commission's adjudicative functions to the Merit Systems Protection Board (MSPB).").

[388] Pub. L. No. 95-454, § 204, 92 Stat. 1136 (1978). Congress later amended the CSRA in 1990 to grant the same rights to non-preference eligible excepted service employees. Civil Service Due Process Amendments of 1990, Pub. L. No. 101-376, 104 Stat. 461, https://tinyurl.com/2fu9pdcd.

OPM is correct in asserting in its preamble that, to the extent *Roth v. Brownell* applied the literal terms of the pre-CSRA Lloyd-LaFollette Act, the specific terms of that law have changed. But a significant feature of *Roth v. Brownell*, which OPM's preamble overlooks, is that the D.C. Circuit also rejected the district court's view that the president's authority trumped the employee's statutory rights, holding instead that the opposite was true.

> We think [Roth] was removed from [the classified service] in 1953. But whether he was removed from it in 1947 or in 1953 there was no compliance with the Lloyd-LaFollette Act. Neither the formula of 'excepting' the kind of position a person holds, nor any other formula, can obviate the requirement of the Lloyd-LaFollette Act that 'No person in the classified civil service of the United States shall be removed * * * therefrom' without notice and reasons given in writing. *The power of Congress thus to limit the President's otherwise plenary control over appointments and removals is clear*.[389]

Following enactment of the CSRA, the legislative branch's Comptroller General opined in 1980 "that employees who transfer to the Peace Corps would be transferred incident to a transfer of functions and accordingly would retain their status as employees with competitive civil service appointments notwithstanding that the Peace Corps' appointment authority is solely under the foreign service act of 1946 as amended."[390] In support of its view, the Comptroller General's opinion observed that "[t]he Court of Claims has concluded that *authority to take away an employee's civil service rights already acquired cannot be implied*. See *Saltzman v. United States* 161 Ct.Cl. 634, 638 (1963)."[391] The opinion also cited the D.C. federal district court's decision in *Casman v. Dulles*, which had held that Veterans' Preference Rights continued to apply to an employee whom the government had transferred involuntarily to a personnel system to which that law did not apply.[392]

In 1988, a decade after Congress enacted the CSRA, OPM issued a government-wide advisory that cited *Roth v. Brownell* as establishing the guiding principle for removing employees with retained status from Schedule C positions.[393] That Reagan-era memorandum explained that the retention of MSPB appeal rights applied to employees "who were serving in a position in the competitive service when OPM authorized its conversion to Schedule C and who still serve in those positions (i.e., have status in the position -- cf. Roth v. Brownell, 215 F.2d 500 (D.C. Cir. 1954)."[394] The signal "cf." reflected an awareness that, due to changes in the law, *Roth v. Brownell* no longer directly addressed the memorandum's point.[395] Instead, it was the principle inherent in both the earlier version of the Lloyd-LaFollette Act and the post-CSRA

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[389] Roth, 215 F.2d at 502 (emphasis added).

[390] MATTER OF CLEMENT J. ZABLOCKI, HOUSE OF REPRESENTATIVES, B-198187 L/M, 1980 WL 16731 (Comp. Gen. 1980) (original text in all capital lettering), https://tinyurl.com/yc3s69yv.

[391] *Id*. (emphasis added).

[392] *Id*. (citing *Casman v. Dulles*, 129 F. Supp. 428, 429 (D.D.C 1955)).

[393] Memorandum from Constance Horner, Director, U.S. Off. of Pers. Mgmt. to heads of departments and agencies, *Civil Service and Transition to a New Presidential Administration*, 8-9 (Nov. 30, 1988), https://tinyurl.com/3rh8kkvd.

[394] *Id*.

[395] *See* THE BLUEBOOK, 21ST ED., THE HARVARD L. REV. ASSOC., at 63, Rule 1.2 Introductory Signals (2022) (3d printing) (explaining "*Cf.*" as follows: "Cited authority supports a proposition different from the main proposition but sufficiently analogous to lend support. Literally, 'cf.' means 'compare.'").

5 U.S.C. § 7513 to which the Reagan administration cited, i.e., that authority to take away an employee's accrued civil service rights already acquired cannot be implied.

Although civil service laws have changed over the years, this history has informed how the two political branches have understood the underlying principles that Congress carried forward into the CSRA and the Civil Service Due Process Amendments Act of 1990. Inherent in the structure of the law is the fundamental notion that employees who accrue civil service protections, particularly with respect 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. No presidential administration questioned this general principle before the end of President Trump's first term on October 21, 2020. President Biden then reclaimed faith with this longstanding principle.[396] In April 2024, OPM amended its regulations to respond to the abortive attempt to establish Schedule F and make explicit its recognition that the involuntary movement of an employee to an excepted service schedule, such as Schedule PC—whether the employee moved from the competitive service or from another excepted service schedule—cannot strip previously accrued MSPB appeal rights.[397]

Executive Order 14,171, the Final Ezell Memorandum, and OPM's proposed rule now attempt to erase this long history, along with the well understood meaning of "confidential, policy-determining, policy-making or policy-advocating." But that history must inform any interpretation of sections 2302(a)(2)(B)(i) and 7511(b)(2). The notion of employees retaining accrued civil service protections is not novel; the novelty lies in the administration's insistence that it can overrule Congress and radically transform the civil service in ways that the CSRA and laws predating it have never been interpreted to allow.

IV. EXECUTIVE ORDER 14,171, THE FINAL EZELL MEMORANDUM, AND OPM'S PROPOSED RULEMAKING RAISE SERIOUS CONSTITUTIONAL CONCERNS.

Executive Order 14,171, the Final Ezell Memorandum, and OPM's proposed rulemaking raise serious constitutional concerns. As conceived, Schedule PC would violate the Fifth Amendment due process rights of career federal employees who have accrued civil service protections whose positions are transferred to Schedule PC. The plans would also violate the First Amendment rights of career federal employees in non-political appointee positions to be free of political affiliation discrimination.

A. Schedule PC and OPM's regulatory issuances would, if implemented as planned, violate the Fifth Amendment's due process clause.

If applied to career federal employees who have accrued for-cause termination rights and accrued adverse action appeal rights under 5 U.S.C. § 7511, the administration's plans for Schedule PC would violate constitutional due process requirements. The Final Ezell

[396] Exec. Order No. 14,003 (Jan. 22, 2021), *reprinted in* 86 Fed. Reg. 7231 (Jan. 27, 2021), https://tinyurl.com/4ey3em73.

[397] 89 Fed. Reg. at 25046-49 (codified at 5 C.F.R. §§ 212.401, 302.601-.603, 752.201, 752.401).

Memorandum and the notice of proposed rulemaking indicate that the Trump administration will attempt to apply 5 U.S.C. § 7511(b)(2) to these employees.[398] That action would deprive career employees of accrued property interests in for-cause termination rights without due process required by the Constitution's Fifth Amendment.

In the preamble to its notice of proposed rulemaking, OPM does not dispute that employees with accrued MSPB appeal rights have a property interest in continued employment and that the government cannot deprive them of that interest without due process.[399] For that proposition, OPM cites the plurality opinion in *Arnett v. Kennedy*, though it fails to acknowledge that opinion's significant modification by the majority in *Cleveland Board of Education v. Loudermill*.[400] Nonetheless, OPM's preamble does not seek to place this principle in doubt. OPM's arguments focus instead on the question of whether the executive branch can, without due process, extinguish the statutory rights through which Congress has conferred that property interest on career federal employees.[401]

Before addressing OPM's arguments, it bears clarifying an issue that OPM's preamble muddles. OPM conflates the President's authority to establish an excepted service schedule under 5 U.S.C. § 3302 with the effect of 5 U.S.C. § 7511(b)(2).[402] The President's authority to create an excepted service schedule is not in dispute. OPM insists, however, that the President can exclude incumbent employees from the coverage of chapter 75 by creating an excepted service schedule.[403] That assertion is incorrect because, among other reasons, employees in excepted service schedules can accrue and retain adverse action protections under chapter 75, subchapter II, just as employees in the competitive service can.[404] The fact that the President may create an excepted service schedule under 5 U.S.C. § 3302 has no bearing on whether the President may use the narrow exclusion at 5 U.S.C. § 7511(b)(2) to deprive excepted service employees of adverse action protections they have previously accrued under chapter 75, subchapter II. The President plainly cannot strip employees of those adverse action protections without violating their constitutional right to due process.

1. Federal employees who have accrued for-cause termination rights under 5 U.S.C. chapter 75, subchapter II have property interests in their continued employment.

The baseline for any examination of the due process question is that federal employees who have accrued adverse action protections under 5 U.S.C. chapter 75, subchapter II

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[398] *See* Final Ezell Memorandum, at 1-3; 90 Fed. Reg. at 17183.

[399] *See* 90 Fed. Reg. at 17185 (citing *Arnett v. Kennedy*, 416 U.S. 134 (1974)); *id*. at 17210 (citing comments on OPM's 2024 rulemaking).

[400] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541-43 (1985) (rejecting *Arnett*'s "bitter with the sweet" approach).

[401] 90 Fed. Reg. at 17210-11.

[402] *Id*. at 17210 ("OPM also believes that the President has authority to except positions from the competitive service for the purpose of excluding them from chapter 75 procedures and that doing so does not raise due process concerns. . . .).

[403] *Id*. at 17210 ("[S]ection 3302's text, history, and precedents demonstrates that it allows the President to except positions from the competitive service for any reason he finds necessary, including excluding them from chapter 75.").

[404] 5 U.S.C. §§ 7511(a)(1)(B) & (C), 7513.

("subchapter II") have property interests in their continued employment.[405] Citing subchapter II, the Federal Circuit has stated plainly that "the federal employment scheme plainly creates a property interest in continued employment."[406] Once such property interests attach, the Constitution guarantees minimum procedural protections for their deprivation. This much does not appear to be disputed by OPM, but the baseline is worth setting because the language of the seminal case, *Cleveland Board of Education v. Loudermill*, is important to the rest of the analysis.[407]

In *Loudermill*, the court considered the due process claims of public employees whose local government employers had terminated without offering them the opportunity to respond before termination. An applicable Ohio statute provided them with a right to be removed only for cause, and it established procedures for post-termination hearings. The employers complied with the statute, but the Supreme Court held that the statute fell short of satisfying constitutional due process requirements. Though the Ohio statute had created the employees' property interests, it was the Constitution, not the statute, that established the minimum procedural requirements for deprivation of those interests:

> [T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."[408]

In *Stone v. FDIC*, the Federal Circuit applied these principles to a federal employee who could be removed only for cause under 5 U.S.C. § 7513(a). The court emphasized that, while the CSRA created the employee's property interest, "his property interest is not defined by, or

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[405] *See Loudermill*, 470 U.S. 532; *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). The fact that *Loudermill* and *Roth* addressed due process under the Fourteenth Amendment, rather than the Fifth Amendment, is irrelevant. *Stone v. F.D.I.C.*, 179 F.3d 1368, 1374 n.2 (Fed. Cir. 1999) ("A Federal agency may not, consistently with the Fifth Amendment Due Process Clause, do that which a State is forbidden to do by the Fourteenth Amendment Due Process Clause.").

[406] *Stone v. F.D.I.C.*, 179 F.3d 1368, 1375 (Fed. Cir. 1999) (citing 5 U.S.C. § 7513 and 5 U.S.C. § 4303).

[407] *Loudermill*, 470 U.S. 532.

[408] *Id.* at 541 (second alteration in original) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in result in part)). *Loudermill* focused on the employers' failure to provide pretermination hearings, but only because that was all the relief the plaintiffs sought. *Id.* at 546. They had already received post-termination hearings under the Ohio law, *id*. at 535-537, and the court emphasized that its "holding rest[ed] in part on the provisions in Ohio law for a full post-termination hearing," *id*. at 546. Justice Thurgood Marshall emphasized in a concurrence that notice and a pre-termination opportunity to respond were not the only procedural protections due employees with property interests in continued employment. *Id*. at 548 (Marshall, J., concurring). In its unanimous opinion in *Gilbert v. Homar*, the Supreme Court characterized *Loudermill* as holding that due process required "a very limited hearing prior to … termination, to be followed by a more comprehensive post-termination hearing." 520 U.S. 924, 929 (1997).

conditioned on, Congress' choice of procedures for its deprivation."[409] The deprivation of his property interest in continued employment triggered due process requirements.

The pre-termination opportunity to respond and the post-termination hearing must be meaningful.[410] Generally, where an employee did not receive a full pre-termination hearing, the post-termination hearing must allow the employee "to attend the hearing, to have the assistance of counsel, to call witnesses and produce evidence on his own behalf, and to know and have an opportunity to challenge the evidence against him."[411] The concept that due process requires an impartial tribunal is well established. If the government does not provide a neutral decisionmaker at the pretermination stage, it must provide one at the post-termination hearing.[412]

2. Federal employees who have accrued for-cause termination rights under 5 U.S.C. chapter 75, subchapter II also have property interests in those rights, which can be extinguished only in accordance with due process requirements.

The due process principles applicable to termination would apply equally to the deprivation of a career federal employee's for-cause termination rights under 5 U.S.C. § 7513(a). Beyond the property interest in continued employment, several judicial opinions have addressed deprivations of for-cause termination rights. Some of these opinions have clearly concluded that

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[409] *Stone*, 179 F.3d at 1375.

[410] *LaChance v. Erickson*, 522 U.S. 262, 266 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard."); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).").

[411] *Carter v. W. Rsrv. Psychiatric Habilitation Ctr*., 767 F.2d 270, 273 (6th Cir. 1985); *see also Farhat v. Jopke*, 370 F.3d 580, 596 (6th Cir. 2004).

[412] *Sutton v. Bailey*, 702 F.3d 444, 449 (8th Cir. 2012) ("An impartial decisionmaker is not required at the pre-termination stage *so long as the employee has access to post-termination proceedings before an impartial adjudicator*." (emphasis added)); *Riggins v. Goodman*, 572 F.3d 1101, 1112 (10th Cir. 2009) ("Impartiality of the tribunal is an essential element of due process."); *Farhat v. Jopke*, 370 F.3d 580, 595–96 (6th Cir. 2004) ("It is at the post-deprivation stage where a neutral decisionmaker is needed to adjudicate the evidence."); *Locurto v. Safir*, 264 F.3d 154, 173 (2d Cir. 2001) ("[W]e conclude that due process is satisfied so long as the government provides a neutral adjudicator at the post-termination hearing for a tenured public employee…."); *Head v. Chi. Sch. Reform Bd. of Trs.*, 225 F.3d 794, 804 (7th Cir. 2000) ("[T]he chosen decisionmaker must be impartial."); *McDaniels v. Flick*, 59 F.3d 446, 460 (3d Cir.1995) ([W]e do not think that … excessive pretermination precaution is necessary where the state provides a neutral tribunal at the post-termination stage that can resolve charges of improper motives."); *McKinney v. Pate*, 20 F.3d 1550, 1561 (11th Cir. 1994) ("It is axiomatic that, in general, the Constitution requires that the state provide fair procedures and an impartial decisionmaker before infringing on a person's interest in life, liberty, or property. More specifically, the Supreme Court has explained that a "tenured employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" before a state or state agency may terminate an employee. *Loudermill*, 470 U.S. at 546, 105 S.Ct. at 1495."); *Walker v. City of Berkeley*, 951 F.2d 182, 184 (9th Cir.1991) ("[F]ailure to provide an impartial decisionmaker at the pretermination stage, of itself, does not create liability, so long as the decisionmaker at the post-termination hearing is impartial."); *Newman v. Burgin*, 930 F.2d 955, 960 (1st Cir. 1991) (finding public employer satisfied due process by providing employee "a trial-type hearing in which she was given an opportunity to present proofs and arguments and to challenge the proofs and arguments of others, *all before neutral decision makers*, who prepared written findings of fact and reasons for their decision" (emphasis added)); *Garraghty v. Jordan*, 830 F.2d 1295, 1302 (4th Cir. 1987) ("[M]ost courts have not required that pre-termination hearings be conducted by a neutral party so long as grievance procedures provide for a post-termination hearing before a neutral body." (emphasis added)).

due process requirements apply,[413] while others have articulated a principle that is consistent with the application of due process requirements.[414] When courts have found due process requirements inapplicable, the cases generally have involved appointment in violation of law, reorganizations (discussed below), or laws that granted public employers unfettered discretion,[415] unlike the narrow exclusion established in section 7511(b)(2) that is applicable only to an individual position.[416] The implementation of Schedule PC as set forth in Executive Order 14,171, the Final Ezell Memorandum, and the proposed rulemaking fits best into the category of cases in which due process requirements applied.

Even a legislature is subject to due process requirements, though the legislative process usually suffices to meet those requirements. Key cases addressing a legislature's power to extinguish statutorily created employment rights illustrate the applicability of due process requirements to such lawmaking. In *Logan v. Zimmerman Brush Company*, the Supreme Court explained that, when a state legislature eliminates statutorily created rights, "the legislative determination provides all the process that is due."[417] Other Supreme Court and circuit decisions have reiterated this point that due process requirements are satisfied by a legitimate legislative process.[418] But the need to satisfy due process requirements at all with respect to the legislature extinguishment of statutory rights is confirmation that such statutory rights themselves are property, inasmuch as "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."[419]

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[413] *See, e.g.*, *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."), *aff'd*, 483 F. App'x 943 (6th Cir. 2012); *Heneghan v. Northampton Cmty. Coll*., 2010 WL 2730638, at *4 (E.D. Pa. July 8, 2010) (No. CIV.A. 09-04979) ("[Plaintiff] does have a procedural due process right entitling him to notice and a hearing before his tenured status can be revoked.").

[414] *See, e.g.*, *Leff v. Clark Cnty. Sch. Dist*., 210 F. Supp. 3d 1242, 1249 (D. Nev. 2016) ("The property right interest in the tenure status is indistinguishable from the property right interest in the tenured employment itself.").

[415] *See, e.g., Glasstetter v. Rehab. Servs. Comm'n*, No. 2:07-CV-125, 2008 WL 886137, at *6 (S.D. Ohio Mar. 28, 2008); *Treciak v. State*, 117 F.3d 1421 (6th Cir. 1997); *Collins v. Marina-Martinez*, 894 F.2d 474, 478 (1st Cir. 1990). *But see Wallace v. Shreve Mem'l Libr*., 97 F.3d 746, 749 (5th Cir. 1996) (holding, under Louisiana law, that government's failure to comply with civil service hiring procedures did not deprive employee of for-cause termination rights).

[416] The phrase "individual position" refers to a position within an agency at a particular grade level in a particular series, as defined by the relevant position description. The usage is distinguished from the number of appointments to such a position that an agency may choose to make under the same position description. More than one employee may hold an individual position, though the number of employees holding an individual position is often relatively small.

[417] *Logan v. Zimmerman Brush Co*., 455 U.S. 422, 433 (1982).

[418] *See, e.g.*, *Atkins v. Parker*, 472 U.S. 115, 130 (1985); *Rea v. Matteucci*, 121 F.3d 483, 485 (9th Cir. 1997) (citing *Logan*); *Story v. Green*, 978 F.2d 60, 63 (2d Cir. 1992); *Packett v. Stenberg*, 969 F.2d 721, 726 (8th Cir. 1992); *Gattis v. Gravett*, 806 F.2d 778, 781 (8th Cir.1986). OPM cites several of these cases for the proposition that "government" can take away adverse action rights. 90 Fed. Reg. at 17211 & n.266. But the cases stand only for the proposition that *legislatures* can take away adverse action rights, because a valid legislative process "is all the process that is due." *Rea*, 121 F.3d at 485 (cleaned up). None of the cases cited by OPM involved anyone other than a legislature revoking adverse action rights. Not only that, but the very cases OPM cites make clear that "a legislature may not empower an administrative agency to extinguish, without notice and hearing, an employee's property interest in pursuing a fair employment practice claim…." *Gattis*, 806 F.2d at 781.

[419] *Bd. of Regents*, 408 U.S. at 569-70.

Further illustrating that due process is required for the extinguishment of statutory rights, several decisions indicate that a defect in the legislative process could override the presumption that legislative processes provide all the process that is due.[420] The Ninth Circuit has explained that "if plaintiff could show that the legislation here was arbitrary or irrational, or that the legislative process was defective, she would have a triable issue of fact as to whether she had been denied due process."[421] A federal district court in Vermont reiterated the principle that "a due process claim is available when the legislature deprives property rights with legislation that is targeted at a particular individual or small group of individuals, or that was adopted during the course of a legislative process that was somehow defective."[422]

In some cases in which courts have found that a defect-free legislative process satisfied constitutional requirements, they have nonetheless implicitly recognized that for-cause termination rights are property. The Fifth Circuit held in *McMurtray v. Holladay* that, when the Mississippi state legislature enacted a law stripping a category of employees of their for-cause termination rights for a period of one year, "the appellants' property interest was extinguished by the Act."[423] The Seventh Circuit held in *Pittman v. Chicago Board of Education* that a legislature's elimination of protected job tenure for school principals provided all the process due, but the court acknowledged that "[j]ob tenure is property within the meaning of the due process clauses."[424] In a decision affirmed by the Sixth Circuit, a federal district court found that a plaintiff had a property interest not only in her continued employment but also in her for-cause termination protections: "The protected property right was the interest in the *tenured nature of the employment itself*."[425]

For-cause termination rights are inescapably intertwined with the property interest in continued employment. If a government could simply extinguish for-cause termination rights without due process, the entire notion of due process would become meaningless. As one federal

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[420] *See, e.g*., *Story v. Green*, 978 F.2d 60, 63 (2d Cir. 1992) (legislative process provides requisite due process only "absent any indication of some defect in the legislative process"); *Jones v. Hamic*, 875 F. Supp. 2d 1334, 1356 (M.D. Ala. 2012*), aff'd sub nom. Jones v. Ward*, 514 F. App'x 843 (11th Cir. 2013); *Conway v. Searles*, 954 F. Supp. 756, 767 (D.Vt. 1997) ("[A] due process claim is available when the legislature deprives property rights with legislation … that was adopted during the course of a legislative process that was somehow defective"); *Edwards v. Shelby Cnty.*, No. 22-CV-02682-TMP, 2024 WL 2964847, at *15 (W.D. Tenn. June 12, 2024)*, appeal docketed*, No. 24-5730 (6th Cir. Aug. 13, 2024) ("Had this employee been reclassified due to improper legislative procedures, and then been fired as an unclassified employee, *Kizer* arguably would not apply because the employee was initially hired pursuant to the procedures bestowing classified status upon her."); *Hanford Exec. Mgmt. Emp. Ass'n v. City of Hanford*, 2014 WL 334200, at *17 (E.D. Cal. Jan. 29, 2014) (No. 1:11-CV-00828-AWI) (explaining that procedural due process claim could have succeeded if plaintiffs were able "to prove either that the action taken was adjudicative in nature or that there was a defect in the legislative process due to the targeting of the executive management employees"). Citing *Loudermill*, 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: "[W]e find that Appellant was wrongfully deprived of her classified civil service status without due process." *Perry v. City of New Orleans*, 104 So. 3d 453, 457 (La. App. 4th Cir. 2012).

[421] *Rea v. Matteucci*, 121 F.3d 483, 485 (9th Cir. 1997).

[422] *Conway v. Sorrell*, 894 F. Supp. 794, 802 (D. Vt. 1995).

[423] *McMurtray v. Holladay*, 11 F.3d 499, 501 (5th Cir. 1993). *See also id*. at 504 ("[T]he legislature intended to suspend the *property interests* of DED employees for one year." (emphasis added)).

[424] *Pittman v. Chi. Bd. of Educ*., 64 F.3d 1098, 1104 (7th Cir. 1995).

[425] *Savage v. City of Pontiac*, 743 F. Supp. 2d 678, 688 (E.D. Mich. 2010) (emphasis added, citations and internal quotation marks omitted), *aff'd*, 483 F. App'x 943 (6th Cir. 2012).

court put it, "[t]he property right interest in the tenure status is indistinguishable from the property right interest in the tenured employment itself."[426] Another court wrote that, in one case, a public employer's extinguishing the plaintiff's for-cause termination rights "was merely a step along the way to her termination."[427] Allowing the government to simply take away for-cause termination rights without due process would, as *Loudermill* cautioned, render the due process clause "a mere tautology." The Eleventh Circuit has said that a public employer "may in fact declare employment status to be 'not property,' but it may not do so 'after the fact' as to employees governed by the previous policy manual without clear and unmistakable notice and an opportunity to be heard."[428]

In *Gabe v. Clark County*, for example, the Ninth Circuit addressed the decision of a county court to modify its personnel policies. The new set of employment policies provided, at Rule 7.1, that judges' secretaries would no longer have the for-cause termination rights enjoyed by other employees. One judge's secretary, Paula Gabe, had previously accrued for-cause termination rights. She did not receive advance notice of the adoption of Rule 7.1. Purportedly relying on the new Rule 7.1, Gabe's supervising judge fired her summarily. The Ninth Circuit agreed with Gabe that the new rule could not strip her accrued for-cause termination rights without due process:

> We agree with the district court that the Nevada State Judiciary had the inherent authority to adopt Rule 7.1. We further agree that Rule 7.1 eliminates any expectation of a protectable interest in the legal secretary position for anyone hired after Rule 7.1 was adopted. … The enactment of Rule 7.1 could not, however, terminate Gabe's protectable job security interest by changing the status of her employment *without her knowledge and consent*.[429]

The Ninth Circuit reiterated this view in both *Beckwith v. Clark County* and *Stampfli v. Stump*. In *Beckwith*, the court found that a plaintiff had "a property right in his civil service status and that he was entitled to due process before he could be divested of that property right."[430] Its decision explained that "before an employee can be divested of civil service status or bumping rights, due process requires that the employee be given notice and an opportunity to decide whether to give up the relevant right."[431] The court affirmed the continuing validity of this principle in its unreported 2024 decision in *Stampfi*: "Our precedents also establish that procedural protections for permanent employees may not be removed without proper notice to the employee."[432]

The Eleventh Circuit has similarly said that due process requires notice before a change in status. In *Peterson v. Atlanta Housing Authority*, the court held that "as to existing employees, [the Atlanta Housing Authority (AHA)] may amend their employment status to at will as long

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[426] *See Leff v. Clark Cnty. Sch. Dist*., 210 F. Supp. 3d 1242, 1249 (D. Nev. 2016).

[427] *Savage v. City of Pontiac*, 743 F. Supp. 2d 678, 688 (E.D. Mich. 2010), *aff'd*, 483 F. App'x 943 (6th Cir. 2012).

[428] *Peterson v. Atlanta Hous. Auth*., 998 F.2d 904, 915 (11th Cir. 1993).

[429] *Gabe v. Clark Cnty*., 701 F.2d 102, 103 (9th Cir. 1983) (citations omitted, emphasis added).

[430] *Beckwith v. Clark Cnty*., 827 F.2d 595, 598 (9th Cir. 1987).

[431] *Id*.

[432] *Stampfli v. Stump*, No. 23-15346, 2024 WL 1756094, at *1 (9th Cir. 2024).

as employees are given reasonable notice and an opportunity to respond and such a change can be demonstrated as in 'the public interest,' and 'not taken as a subterfuge merely to single out and discharge particular employees.'"[433] Applying this principle to the case before it, the Eleventh Circuit explained that "AHA may in fact declare employment status to be 'not property,' but it may not do so 'after the fact' as to employees governed by the previous policy manual *without clear and unmistakable notice and an opportunity to be heard*."[434]

Two other circuits have articulated a relevant principle that should be considered in the context of changes in employee status. The Second Circuit held in *Quinn v. Syracuse Model Neighborhood Corp*. that, "although the primary source of property rights is state law, *the state may not magically declare an interest to be 'non-property' after the fact* for Fourteenth Amendment purposes if, for example, a longstanding pattern of practice has established an individual's entitlement to a particular government benefit."[435] The Fifth Circuit quoted this language in *Quinn* and indicated its agreement with the Second Circuit on this important point.[436]

Along the same lines, the Supreme Court of Kansas considered a case in which for-cause termination rights were stripped because the head of an agency found it inconvenient to comply with civil service laws. In *Darling v. Kansas Water Office*, which the U.S. Court of Appeals for the Ninth Circuit has cited approvingly,[437] the head of the state's water authority, Joseph Harkins, was "under pressure" to develop a new state water plan.[438] The court recounted that, when the state legislature asked Harkins about his progress, he claimed that "having classified employees as the professional staff involved in the preparation of the plan limited his flexibility and hindered preparation of the water plan."[439] In response, the legislature amended a civil service law for the purpose of striping all employees, other than clerical and financial management employees, in the Kansas Water Office of their for-cause termination rights and then terminating them.[440]

The change affected 17 employees who were not named in the law. The Kansas Supreme Court emphasized that the legislature had "singled out" a narrow class of employees merely "as a convenience to the agency's director so that he could have greater flexibility in operating his office."[441] This is much the same explanation OPM has offered in its notice of proposed rulemaking.[442] Under these circumstances, the *Darling* court found due process cases addressing

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[433] *Peterson v. Atlanta Hous. Auth., 998 F.2d 904, 914-15 (11th Cir. 1993).*

[434] *Id*. (emphasis added).

[435] *Quinn v. Syracuse Model Neighborhood Corp*., 613 F.2d 438, 448 (2d Cir.1980) (emphasis added). *See also Jones v. Hamic*, 875 F. Supp. 2d 1334, 1356 (M.D. Ala. 2012), *aff'd sub nom. Jones v. Ward*, 514 F. App'x 843 (11th Cir. 2013) ("State governments, therefore, may rescind rights they create, but only if they follow the dictates of procedural due process before completing the rescission.").

[436] *Winkler v. DeKalb Cnty*., 648 F.2d 411, 414 (5th Cir. 1981).

[437] *Rea v. Matteucci*, 121 F.3d 483, 485 (9th Cir. 1997).

[438] *Darling v. Kans. Water Off*., 774 P.2d 941, 942 (1989).

[439] *Id*.

[440] *Id.* at 943.

[441] *Darling*, 774 P.2d at 943.

[442] 90 Fed. Reg. at 17189 ("President Trump believes Schedule Policy/Career—the successor to Schedule F—is necessary to effectively supervise the executive branch."); *id*. at 17190 ("Federal supervisors often find taking warranted adverse actions too difficult and uncertain to be worth the effort.").

"generally-applicable legislation" to be irrelevant.[443] Instead, the court essentially treated the legislation as adjudicative and found the lack of due process violative of the Constitution.

Significantly, the court in *Darling* did not claim that the government's decision was in any way personal to the employees. This was not a case in which a public employer targeted individual employees based on their personal characteristics. Instead, the court's focus was on the public employer's motivation in circumventing civil service protections as to a small, identifiable number of employees:

> If the defendants' position is correct that the State can selectively declassify and terminate free of civil service requirements, then the whole concept of civil service is a sham. There is no real protection afforded by the civil service act. This may be likened to a university entering into a lifetime contract with a popular football coach and, after a losing season, declaring the coach legally dead.[444]

When the executive branch of a government purports to take legislative action, the courts have examined the limits of authority that the legislature has granted the executive branch. Unlike when a legislature changes a law, an executive action does not necessarily entail the sort of legislative process that could satisfy due process requirements. Moreover, while a legislature may revoke rights it has granted by statute, an executive branch agency lacks any inherent power to revoke rights that the legislature has granted.[445] To put it differently, the executive branch cannot exercise legislative authority it does not have. The Supreme Court noted in *Mistretta v. United States* that "rulemaking power originates in the Legislative Branch and becomes an executive function only when delegated by the Legislature to the Executive Branch."[446]

The delegation of authority does not come without due process requirements. In *Gattis v. Gravett*, the Eighth Circuit observed that, under *Logan*, "a legislature may not empower an administrative agency to extinguish, without notice and hearing, an employee's property interest" in an employment-related claim.[447] The court added that "the executive branch may not arbitrarily rescind entitlements guaranteed by the legislative branch," even if "the legislature itself is free to modify or eliminate statutory entitlements."[448] The First Circuit found in one case that a university professor "possessed a constitutionally protected property interest in his status," of which he was deprived without due process when his public employer simply "disregarded" his tenured status and "offered him transient full-time employment on unpalatable terms." [449] The Seventh Circuit came to a similar conclusion in a case in which a public employer refused to recognize the protected civil service status of some of its employees, distinguishing the facts

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[443] *Darling*, 774 P.2d at 944-45.

[444] *Id.* at 944. The court also observed that the case did not arise in the context of a reorganization and would not have arisen at all if the legislature had applied the rule only prospectively to new hires, with current employees allowed to retain their protections. *Id.* at 941.

[445] *Silverman v. Barry*, 727 F.2d 1121, 1125 (D.C. Cir. 1984) ("[T]he cases relied upon by the District do not allow the executive branch arbitrarily to rescind entitlements guaranteed by the legislative branch.").

[446] *Mistretta v. United States*, 488 U.S. 361, 387 n.14 (1989).

[447] *Gattis v. Gravett*, 806 F.2d 778, 781 (8th Cir. 1986).

[448] *Id.* at 781 (emphasis added) (citing *Silverman*, 727 F.2d at 1125). In *Gattis*, the public employer prevailed because the court found it was the legislature, not the employer, that had rescinded the employees' for-cause protections.

[449] *Collins v. Marina-Martinez*, 894 F.2d 474, 478, 480 (1st Cir. 1990).

of that case from cases involving legislative changes: "This case is different because the *legislature* has not attempted to change the civil service status of the employees."[450]

3. Applying a section 7511(b)(2) determination to a tenured career federal employee would trigger due process requirements.

The administration's plans for Schedule PC would run afoul of due process principles. The determination under section 7511(b)(2) may not be conducted as a single across-the-board action as to 50,000 or more employees.[451] Each section 7511(b)(2) determination would address only one individual position,[452] which may apply in many cases to a single employee or to a relatively small group of employees in a particular agency.[453] In fact, since 1981, OPM has made 5 U.S.C. § 7511(b)(2) determinations with respect to only one *employee*, rather than one position, at a time.[454] Whether applied to one employee or one position, the section 7511(b)(2) determination cannot deprive career federal employees of their accrued property interests in for-cause termination rights without due process.

As discussed above, section 7511(b)(2) is best understood as only applying to positions so designated before an individual accepts employment in the position. But even if OPM disagrees, section 7511(b)(2)—and OPM's interpretation of it—cannot control what process is due affected employees who have accrued for-cause protection. The Supreme Court in *Loudermill* found that the employers' compliance with the applicable statute did not excuse its failure to comply with minimum due process requirements under the Constitution.[455] This is what the *Loudermill* court meant when it declared that "'[p]roperty' cannot be defined by the procedures provided for its deprivation any more than can life or liberty."[456] At a minimum, the administration would have to provide employees whose positions are being moved to Schedule PC and whose for-cause protections are being terminated with pre-determination notice and an

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[450] *Carston v. Cnty. of Cook*, 962 F.2d 749, 753 (7th Cir. 1992) (emphasis added). The Seventh Circuit's decision upheld a district court ruling that the violation occurred when the defendants failed to recognize the plaintiffs' protected civil service status: "So there is no mistake about it, we there concluded, and continue to believe, that ¶ 5020 *required the Board of Commissioners to recognize the protected status of HHGC employees* and that those of the HHGC employees who had protected status did not become applicants upon the transfer of jurisdiction." *Carston v. Cnty. of Cook*, 1989 WL 165051, at *1 (N.D. Ill. Dec. 27, 1989) (No. 83 C 2919).

[451] Even were the promulgation of the final rule and establishment of a Schedule P/C a legislative act, application of the rule to each 7511(b)(2) determination is not, as explained below. *See, e.g., Texaco, Inc. v. Short*, 454 U.S. 516, 533-34 (1982) (distinguishing between legislative act of changing the rules governing mineral rights, and application of those new rules to specific properties, which requires notice and an opportunity to be heard).

[452] 5 U.S.C. § 7511(b)(2) (referring to "a position").

[453] *See, e.g.*, Letter from Dennis Kirk, Assoc. Dir., Off. of Pers. Mgmt., to Russell Vought, Dir., Off. of Mgmt. and Budget, at 2 (Jan. 11, 2021) (supplying data revealing that around 91 percent of OPM's determinations covered positions held by only five or fewer employees), https://tinyurl.com/36et9xhh.

[454] Excepted Service, Pers. Mgmt. Off. Notice, 46 Fed. Reg. 58271 (Dec. 1, 1981) ("This amendment provides for immediate revocation of excepted appointing authority under Schedule C when a position covered by such authority becomes vacant. Before making a new appointment under Schedule C, the agency must obtain OPM's approval for reestablishment of the excepted appointing authority."), https://tinyurl.com/ymupd73p. *See also* 5 C.F.R. § 213.3301(c) ("The exception from the competitive service for each position listed in Schedule C by OPM is revoked immediately upon the position becoming vacant. An agency shall notify OPM within 3 working days after a Schedule C position has been vacated.").

[455] *Loudermill*, 470 U.S. at 541.

[456] *Id.* at 541.

opportunity to respond, followed by a hearing or some comparable sort of review after the determination has been made.[457]

In the preamble to the notice of proposed rulemaking, OPM argues that due process is not required because, in its view, the section 7511(b)(2) determination is "legislative" and not adjudicative in nature.[458] During President Trump's first term, acting OPM Director Michael Rigas made the same argument in the administration's memorandum supplying agencies with instructions for implementing Executive Order 13,957.[459] In his memorandum, Rigas cited *Bi-Metallic Investment Company v. State Board of Equalization* as establishing the applicable standard, focusing on the effect of a broad government policy action and the absence of consideration of employees' personal characteristics.[460] OPM now essentially relies on this same reading of the *Bi-Metallic* standard in its current notice of proposed rulemaking, though it does not mention the case.[461] OPM seems to suggest the decision to apply section 7511(b)(2) to Schedule PC positions should be viewed as occurring on a very large scale: "Executive branch reclassification of tenured employees into Schedule Policy/Career, and the concomitant exception from adverse action procedures and appeals, are straightforwardly legislative under this framework. Like RIFs, the reclassifications would apply to groups of positions as a class rather than to specific named individuals."[462]

The Rigas memorandum characterized the language of *Bi-Metallic* as holding that individuals lack due process rights unless governmental action applies only to a "relatively small number of persons" who are "exceptionally affected, in each case upon individual grounds."[463] But this quoted language did not apply so broadly or absolutely as Rigas claimed, nor does the unspecified precedent on which OPM relies.[464] The *Bi-Metallic* court was distinguishing the circumstances before it from the circumstances it had addressed in its earlier decision in *Londoner v. City and County of Denver*.[465] The two decisions, *Bi-Metallic* and *Londoner*, stand at opposite poles, with due process requirements inapplicable to cases that are more like *Bi-Metallic* and applicable to cases that are more like *Londoner*. It would be inaccurate to suggest, as the Rigas memorandum and OPM's notice of proposed rulemaking seem to do, that the *Bi-Metallic* standard applies unless the facts of an individual situation align perfectly with *Londoner*. That is not how courts have approached due process. Many cases fall along the broad

[457] There may also be a requirement to provide a post-determination hearing or review conducted by a neutral adjudicator.

[458] 90 Fed. Reg. at 17211.

[459] Memorandum from Michael Rigas, Acting Dir., Off. of Pers. Mgmt. to Heads of Exec. Depts. and Agencies, CHCOs and HR Directors, *Instructions on Implementing Schedule F* (Oct. 23, 2020), https://tinyurl.com/ymjwrdfp (hereinafter "*Rigas Memorandum*"). The instructions suggested that officials could avoid due process requirements by refraining from considering any individual characteristics of employees when identifying positions for inclusion in Schedule F. *Id*. at 2.

[460] *Id*.

[461] *See* 90 Fed. Reg. at 17211 ("Upon further review OPM now concludes that it took 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') rather than makes individualized adjudications.").

[462] *Id*. The fallacy of the RIF analogy is discussed separately below.

[463] *Rigas Memorandum at 2* (quoting *Bi-Metallic*, 239 U.S. at 446).

[464] *See* 90 Fed. Reg. 17211 (referring to "settled precedent" without citing a case but presumably relying on the *Bi-Metallic* line of cases).

[465] *Bi-Metallic*, 239 U.S. at 443 (describing *Londoner v. City and County of Denver*, 210 U.S. 373 (1908)).

spectrum between *Londoner* and *Bi-Metallic*, and courts look for attributes making them more like one or the other.

In the more than a century since the Supreme Court issued *Bi-Metallic* and *Londoner*, the judiciary's understanding of due process has evolved partly into a distinction between "legislative" and "adjudicative" determinations. OPM's notice of proposed rulemaking oversimplifies the test for deciding which standard applies when it states that "the reclassifications [to Schedule PC] would apply to groups of positions as a class rather than to specific named individuals,"[466] just as the Rigas memorandum oversimplified the distinction by suggesting that *Bi-Metallic* applies whenever a rule is "operating on a general class."[467] But a class can be a small group, and a governmental determination is not necessarily subject to the *Bi-Metallic* merely because it covers any group. Federal appeals courts have applied both the *Bi-Metallic* and the *Londoner* standards to determinations affecting classes: "The *Londoner*/*Bi–Metallic* teaching, as applied to administrative law, is that 'orders' are usually adjudicative in nature and apply to a particular group, whereas 'rules' are more legislative in nature and have general applicability."[468]

Both *Bi-Metallic* and *Londoner* involved determinations affecting *classes*. *Bi-Metallic* addressed a tax applicable to an open population of all property owners in Denver, a determination that was aptly characterized as legislative due to its general applicability to a massive, city-wide population of owners.[469] *Londoner* addressed a special tax to cover the cost of paving a road, which was charged proportionally to all owners of properties up and down that particular road.[470] Though the assessment in *Londoner* applied to a class, the class was smaller than the class in *Bi-Metallic*. The apportionment of costs to property owners in *Londoner* involved determinations regarding the individual properties they held, but other aspects of the governmental action entailed class-wide decisions to pave upon receipt of a request signed by a sufficient number of owners, to authorize the work, to consider bids, and to ascertain the total amount of any costs to be recouped by assessing class members.[471] Between the opposing poles of *Bi-Metallic* and *Londoner* lies a continuum in which a governmental determination may bear aspects of the determinations at issue in both of those cases.[472]

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[466] 90 Fed. Reg. at 17211. This statement also suffers from being inaccurate because 5 U.S.C. § 7511(b)(2) requires determinations to be made on a position-by-position basis within a single agency; i.e., only positions covered by a single position description are affected by a § 7511(b)(2) determination.

[467] *Rigas Memorandum* at 2.

[468] *N. Am. Aviation Properties, Inc. v. Nat'l Transp. Safety Bd*., 94 F.3d 1029, 1030-31 (6th Cir. 1996) (citing Kenneth Culp Davis & Richard J. Pierce, Jr., 1 ADMIN. LAW TREATISE, § 6.1 at 227 (3rd ed.1994)).

[469] Plaintiffs in *Bi-Metallic* opposed an order "increasing the valuation of all taxable property in Denver 40 per cent." *Bi-Metallic*, 239 U.S. at 443.

[470] *Londoner*, 210 U.S. at 374 ("The plaintiffs in error began this proceeding in a state court of Colorado to relieve lands owned by them from an assessment of a tax for the cost of paving a street upon which the lands abutted.").

[471] *See id*. at 375-78, 385-86.

[472] *Garcia-Rubiera v. Fortuño*, 665 F.3d 261, 272 (1st Cir. 2011) ("As to plaintiffs' first argument, it is true that the requirements of due process vary with the particulars of the circumstance at issue. … One such variation turns on whether the government conduct affecting the protected property interest is legislative or adjudicative in nature. This is often put in terms of two poles, with a continuum in between.").

There are several aspects of a section 7511(b)(2) determination that make it more like *Londoner* than like *Bi-Metallic*. Importantly, a particular section 7511(b)(2) determination would apply to only the relatively small number of employees at the same grade level in a particular agency who function under the same position description. This is significant because *Bi-Metallic* recognized that the size of the affected class was relevant.[473] In *Bi-Metallic*, the class was enormous, comprising every property owner in the city. At the heart of the court's rationale in *Bi-Metallic* was a concern that the government could not feasibly conduct a hearing for every property owner affected by a rule of such broad applicability.[474] But that rationale has less force when a determination affects a relatively small class of individuals, as it did in *Londoner*. Courts recognize that, "when a rule adopted for general application applies only to a small number of persons, its characterization as legislation becomes suspect."[475]

Highlighting why class size matters, the Seventh Circuit emphasized that "[t]he smaller the class affected by a nominally legislative act, the weaker the democratic check…."[476] Discussing Justice Blackmun's opinion in *O'Bannon v. Town Court Nursing Center*, a federal court observed that, "where a small, identifiable group of individuals are singled-out by a legislative act …, the more likely it is that the act will be subject to procedural due process requirements since these individuals are unlikely to be able to effectively participate in the political process."[477] This concern is heightened when the class consists of public employees because they have less capacity than members of the public to effect political change. Under applicable Supreme Court precedents, the First Amendment provides them with little protection when they speak about the personnel practices of a governmental employer.[478]

While the overall number of employees moved into Schedule PC could be enormously large, the number of employees affected by any specific section 7511(b)(2) determination is likely to be small, in some instances extremely small. Evidence as to the size of the affected population can be gleaned from the first Trump administration's attempt to implement Executive Order 13,957 establishing Schedule F. In January 2021, OPM made a series of section 7511(b)(2) determinations regarding individual positions in the Office of Management and Budget (OMB). Around 91 percent of those determinations covered positions held by five or fewer employees.[479] *Nearly two thirds of OPM's determinations covered positions held by a single employee or no employees*.[480]

Determinations made to implement Schedule PC would likely affect similarly small numbers of employees. A determination under section 7511(b)(2) applies to one position

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[473] *Bi-Metallic*, 239 U.S. at 446.

[474] *Id*.

[475] *Richardson v. Town of Eastover*, 922 F.2d 1152, 1158 (4th Cir. 1991).

[476] *Coniston Corp. v. Vill. of Hoffman Ests*., 844 F.2d 461, 469 (7th Cir. 1988).

[477] *Marino v. New York*, 629 F. Supp. 912, 919 (E.D.N.Y. 1986) (discussing *O'Bannon v. Town Ct. Nursing Ctr.*, 447 U.S. 773, 800-801 & n. 8 (1980)).

[478] *Connick v. Myers*, 461 U.S. 138, 154 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). *See also LeFande v. District of Columbia*, 841 F.3d 485, 493-94 (D.C. Cir. 2016); *Murray v. Gardner*, 741 F.2d 434, 438 (D.C. Cir. 1984).

[479] Letter from Dennis Kirk, Assoc. Dir., Off. of Pers. Mgmt., to Russell Vought, Dir., Off. of Mgmt. and Budget, at 2 (Jan. 11, 2021), https://tinyurl.com/36et9xhh.

[480] *Id*.

description.[481] Because each agency is responsible for maintaining its own position descriptions, the determination would apply not only on a position-by-position basis but on an agency-by-agency basis.[482] Further narrowing the coverage of any position description within an individual agency, the Classification Act compels the executive branch to group positions "in accordance with their duties, responsibilities, and qualification requirements" and identify them by "classes and grades" in compliance with "published standards."[483] As a result, for example, the Department of Interior has six different position descriptions for Civil Engineer.[484] The Department of Commerce has 11 different position descriptions for staff-level, non-supervisory, non-executive attorney positions.[485] Illustrating the level of specificity addressed in position descriptions, OPM's position classification standards include sample position standards for "Estate Tax" attorney positions at various grade levels.[486] In this context, it is no surprise that a supermajority of OPM's section 7511(b)(2) determinations for OMB applied to positions held by no more than just one employee.

4. A section 7511(b)(2) determination will require adjudication of facts that will likely be disputed in a substantial number of cases.

The nature of a section 7511(b)(2) determination regarding a particular position supports a finding that the determination is more adjudicative than legislative in nature. The nature of that determination does not align perfectly with either *Bi-Metallic* or *Londoner*. But, when governmental decisions are both legislative and adjudicative in nature, it can become relevant to

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[481] 5 U.S.C. § 7511(b)(2) (referring to "a position"). *See also* Off. of Pers. Mgmt., THE CLASSIFIER'S HANDBOOK, ch. 3, at 18 (1991) ("A position description, commonly called a 'PD' by Federal workers, documents the major duties, responsibilities, and organizational relationships of a job. Because it serves as the official record of the classification of the job and is used to make many other personnel decisions, it should be written in clear, concise, and easy to understand language."), https://tinyurl.com/2uf6hrya.

[482] U.S. Off. of Pers. Mgmt., INTRODUCTION TO THE POSITION CLASSIFICATION STANDARDS, at 6 (2009) ("While OPM has overall responsibility for establishing the basic policies and guidance governing the classification system, each agency has the general authority and responsibility for properly classifying all of its positions covered by the General Schedule."), https://tinyurl.com/7ka4yzm7; Gov't Accountability Off., HUMAN CAPITAL, GAO-14-677, at 15 (2014) ("OPM publishes and defines a set of occupational standards that describe and differentiate all of the different types of work performed across the government, which agencies then use to develop position descriptions."), https://tinyurl.com/3p6w7dkj.

[483] 5 U.S.C. § 5101(2). *See also* 5 U.S.C. §§ 5104, 5105(a).

[484] Memorandum from Jennifer Ackerman, Dir., Off. of Hum. Cap., U.S. Dep't of Interior, to DOI Human Cap. Officers, *Standardized Position Descriptions for Civil Engineer* (Jan. 28, 2021), https://tinyurl.com/ykr758tn.

[485] U.S. Dep't of Commerce, ATTORNEY 09 TYPE I LEVEL B, https://tinyurl.com/34yynbcu (last visited May 24, 2025); U.S. Dep't of Commerce, ATTORNEY 11 TYPE I LEVEL C, https://tinyurl.com/mpb58dvp (last visited May 24, 2025); U.S. Dep't of Commerce, ATTORNEY 11 TYPE II LEVEL B, https://tinyurl.com/43cv25e9 (last visited May 24, 2025); U.S. Dep't of Commerce, ATTORNEY 12 TYPE I LEVEL D, https://tinyurl.com/4jxbwkc3 (last visited May 24, 2025); U.S. Dep't of Commerce, ATTORNEY 12 TYPE II LEVEL C, https://tinyurl.com/yckchuyt (last visited May 24, 2025); U.S. Dep't of Commerce, ATTORNEY 12 TYPE III LEVEL B, https://tinyurl.com/4puuy29c (last visited May 24, 2025); U.S. Dep't of Commerce, ATTORNEY 13 TYPE II LEVEL D, https://tinyurl.com/5f47j5sy (last visited May 24, 2025); U.S. Dep't of Commerce, ATTORNEY 13 TYPE III LEVEL C, https://tinyurl.com/chs5xrzt (last visited May 24, 2025); U.S. Dep't of Commerce, ATTORNEY 14 TYPE II LEVEL E, https://tinyurl.com/mrx38j6s (last visited May 24, 2025); U.S. Dep't of Commerce, ATTORNEY 14 TYPE III LEVEL D, https://tinyurl.com/5epnkdna (last visited May 24, 2025); U.S. Dep't of Commerce, ATTORNEY 15 TYPE III LEVEL E, https://tinyurl.com/258wjp9w (last visited May 24, 2025).

[486] U.S. Off. of Pers. Mgmt., POSITION CLASSIFICATION STANDARD FOR GENERAL ATTORNEY SERIES, GS-0905, at 26-32, https://tinyurl.com/2dur2exm (last visited May 24, 2025).

examine whether the "decisions are, in fact, fully legislative or, at least in part, adjudicative."[487] The nature of a section 7511(b)(2) determination is more like the determination at issue in *Londoner* than the one at issue in *Bi-Metallic*. In particular, a section 7511(b)(2) determination will require adjudication of facts that will likely be disputed in a substantial number of cases.

To apply section 7511(b)(2), OPM must perform a two-step task, fact-finding followed by application of a statutory standard to the facts. The first stage requires fact-finding because section 7511(b)(2) requires OPM to consider a position's "character."[488] To understand a position's character, OPM must first ascertain its duties. While OPM must consider the duties of a position, not the performance of an employee, it is foreseeable that those duties will be in dispute in many or most instances.[489] One expert testified in Congress that "[b]ecause most employee position descriptions are woefully outdated, any manager beyond the first level of supervision has little understanding of what employees do day-to-day."[490]

Federal position descriptions are perennially out of date.[491] In 2019, the MSPB indicated that 30 percent of the federal employees responding to a survey indicated that their position descriptions were inaccurate.[492] The MSPB suggested that the disconnect could be attributable to "excessive standardization" of position descriptions, with government leaders opting for the shortcut of using standardized descriptions without regard to their lack of accuracy.[493] The MSPB also cited the fact that only 58% of managers said they received assistance from human

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[487] *Thomas v. City of New York*, 143 F.3d 31, 36 n.7 (2d Cir. 1998).

[488] 5 U.S.C. § 7511(b)(2).

[489] *See Hund v. Cuomo*, 501 F. Supp. 3d 185, 204 (W.D.N.Y. 2020) (explaining that adjudicative determinations adjudicate disputed facts in particular cases).

[490] *Federal Personnel Restructuring: Hearing before H. Comm. on Oversight and Gov't Reform, Federal Workforce, Postal Service, and the District of Columbia*, 2007 WL 745456 (testimony of Robert Tobias, Dir. Pub. Sector Exec. Educ., Am. Univ.).

[491] *See, e.g.*, Hearing before S. Armed Servs. Comm., *Defense Acquisition/Industrial Workforce*, 2024 WL 890761 (Feb. 28, 2024) (testimony of Julie Lockwood, Dir. of Bus. Modernization, Inst. for Def. Analyses) ("Position descriptions maintained by OPM are frequently outdated or not well-crafted to the specific hiring need...."), https://tinyurl.com/etn8vr29; *Hearing before H. Comm. on Homeland Sec., Subcomm. on Cybersec. Infrastructure Prot., and Innovation, Cyber Talent Pipeline: Educating a Workforce*, 2021 WL 3264264 (July 29, 2021) (testimony of Max Stier, President and CEO, Partnership for Public Service) (discussing the "antiquated way [cybersecurity] jobs are classified and outdated position descriptions that do not accurately depict the skills and knowledge necessary for the role"), https://tinyurl.com/46x7pt4j; Statement of Donald Bice, Dep. Asst. Sec'y for Admin., U.S. Dep't of Agric., 2018 WL 2335210 (May 23, 2018) (testifying about effort to "decrease the number of outdated position descriptions"); GOV'T ACCOUNTABILITY OFF., FDA WORKFORCE, AGENCY-WIDE WORKFORCE PLANNING NEEDED TO ENSURE MEDICAL PRODUCT STAFF MEET CURRENT AND FUTURE NEED, GAO-22-104791, at 13-14 (2022) (citing "position descriptions and grading criteria, which may be outdated for some positions"), https://tinyurl.com/2s49wzvd; U.S. Gov't Accountability Off., FEDERAL EMERGENCY MANAGEMENT AGENCY, WORKFORCE PLANNING AND TRAINING COULD BE ENHANCED BY INCORPORATING STRATEGIC MANAGEMENT PRINCIPLES, GAO-12-487 (2012) (discussing "outdated position descriptions"), https://tinyurl.com/5dvenj6u. *See also* Drew Friedman, *Wildland firefighters at the Forest Service work beyond their job duties. Their union says that's a big problem*, FED. NEWS NETWORK (Sep. 5, 2024) ("Lenkart said the outdated position descriptions also make it more difficult for wildland firefighters to move up the career ladder."), https://tinyurl.com/bde438rv; Jared Serbu, *In Marine Corps, long-outdated job descriptions cause recruiting, retention challenges*, FED. NEWS NETWORK (Feb. 23, 2024) ("The root cause is that many of those descriptors, particularly for civilian IT employees, have not been updated in well over a decade."), https://perma.cc/MH6P-E26P.

[492] U.S. Merit Sys. Prot. Bd., *Are Federal Employee Position Descriptions Accurate? (And Why We Should Care)*, ISSUES OF MERIT, at 7 (May, 2019), https://tinyurl.com/46yfnyu3.

[493] *Id.*

resources officials in drafting position descriptions.[494] Along the same lines, the MSPB also reported in 2015 that "about 30 percent of white-collar occupational standards . . . have not been updated since 1990; some have not been updated since the 1970s.[495] The Classification Act provides that OPM must issue standards for placing positions in specified classes and grades,[496] and it provides that agencies must place positions in their proper classes and grades.[497]

All of this means that most federal managers have been creating position descriptions based on grossly outdated position classification standards, without the help of human resources and without knowledge of their employees' duties. Factual disputes regarding the character of positions in this context will be inevitable, given the rampant problems with federal position descriptions.

In making a section 7511(b)(2) determination, OPM would first have to assess the accuracy of the position description for each position, then conduct further inquiry if the position description is found to be wanting. That inquiry would necessarily entail some adjudicative fact finding. As the Fifth Circuit observed, "[t]hese two types of factfinding—adjudicative and legislative—often overlap and are frequently difficult to distinguish."[498] But OPM's inquiry would in some cases require that office to examine real-world practices of agency officials.

An agency's decision not to assign an employee the full range of duties under a position description would not necessarily mean the position description was inaccurate; however, a question of inaccuracy would arise if the agency were assigning the employee an entirely different set of duties than those listed in the position description. With the MSPB having discovered agencies using boilerplate position descriptions, that scenario is a realistic one.[499] A question of accuracy could also arise if an agency's position descriptions were old or vaguely drafted. Likewise, a position description is per se inaccurate if it describes duties that cannot be performed at a particular grade level, in a particular job series, or by a particular federal agency. Questions of accuracy would arise, for example, if an agency were to appoint non-attorneys to

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[494] *Id*.

[495] U.S. Merit Sys. Prot. Bd., THE FUTURE OF POSITION CLASSIFICATION: NOT ONLY "WHAT?" BUT "WHO?," ISSUES OF MERIT, at 7 (Spring 2015), https://tinyurl.com/y2ufb3af; *see also* Howard Risher, *What's in a Name? Everything That's Wrong With Job Classification*, GOV'T EXEC. (June 16, 2015), https://tinyurl.com/4debwjz2/.

[496] 5 U.S.C. § 5105.

[497] *Id.* §§ 5106-5107.

[498] *Cont'l Air Lines, Inc. v. Dole*, 784 F.2d 1245, 1247 (5th Cir. 1986) (citing 2 K. Davis, ADMINISTRATIVE LAW TREATISE, § 12.3 (2d Ed.1979)). *See also Ass'n of Nat. Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1184-85 (D.C. Cir. 1979) (MacKinnon, J., concurring) ("The first step is probably to recognize that the reality (of rulemaking procedures) is a spectrum rather than a dichotomy; some facts are clearly adjudicative, some are clearly legislative, some are probably one or probably the other but not clearly, and some seem impossible to classify. So the adjudicative or legislative character of facts is a variable, and other variables must also be taken into account the degree of doubt or certainty about the facts, and the degree of their bearing upon the controversy. When facts are clearly adjudicative, disputed, and critical, a party should be entitled to all the procedural protections of a trial. When facts are legislative, reasonably clear, and peripheral to the controversy, the tribunal may assume them without even mentioning them. The problem cases are those in which the three variables pull against each other.") (quoting Davis, ADMINISTRATIVE LAW OF THE SEVENTIES, § 15.00-8, at 375 (1976)).

[499] U.S. Merit Sys. Prot. Bd., *Are Federal Employee Position Descriptions Accurate? (And Why We Should Care)*, ISSUES OF MERIT, at 7 (May, 2019), https://tinyurl.com/46yfnyu3.

perform legal work or non-contracting officers to perform functions that the Federal Acquisition Regulation permits only contracting officers to perform.[500]

A position description that describes duties beyond the position's grade level or outside its job series necessarily raises two possibilities: the position is misclassified or the position description is incorrect. If the position description is incorrect, it cannot serve as the basis for ascertaining the character of the position under section 7511(b)(2). The same is true if the position description lists duties that the agency lacks authority to assign. For example, in the absence of a specific grant of statutory authority, a position description requiring an incumbent to appear in court on behalf of the agency would run afoul of the general statutory prohibition on agencies assigning their attorneys conduct litigation in court.[501]

In the Final Ezell Memorandum, OPM has issued new instructions to agencies.[502] Though the memorandum mentions position descriptions in passing, it does not require agencies to submit them to OPM for review. The memorandum indicates that OPM will issue a template for agencies to use (as it did in 2020),[503] but OPM does not appear to have made that template public.[504] If it reuses the same template as last time, that template will lack the needed direction that agencies must submit copies of position descriptions.[505] At a minimum, OPM needs to review the position descriptions and then undertake a fact-finding process to ascertain their accuracy, a process in which the covered employee(s) must have an opportunity to participate meaningfully, even if only in writing, because the facts will likely be in dispute.

5. Unlike the legislative tax policy at issue in Bi-Metallic, OPM's discretion is strictly limited under section 7511(b)(2) to applying an established statutory standard to the facts.

When the executive branch must apply a statutory standard to facts, its action is generally more adjudicative than legislative in character.[506] That is the case with the government's

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[500] *See, e.g.*, 48 C.F.R. § 1.602-1.

[501] 5 U.S.C. § 3106.

[502] Final Ezell Memorandum, at 5.

[503] GOV'T ACCOUNTABILITY OFF., AGENCY RESPONSES AND PERSPECTIVES ON FORMER EXECUTIVE ORDER TO CREATE A NEW SCHEDULE F CATEGORY OF FEDERAL POSITIONS, GAO-22-105504, at 9, Fig. 4 (2021), https://tinyurl.com/y2byntas.

[504] *Id*.

[505] GOV'T ACCOUNTABILITY OFF., AGENCY RESPONSES AND PERSPECTIVES ON FORMER EXECUTIVE ORDER TO CREATE A NEW SCHEDULE F CATEGORY OF FEDERAL POSITIONS, GAO-22-105504, at 9, Fig. 4 (2021), https://tinyurl.com/y2byntas.

[506] *See e.g.*, *Higgs v. Carver*, 286 F.3d 437, 438 (7th Cir. 2002) (explaining that "rulings applying legal standards to facts [are] the kind of rulings for which adjudicative hearings are designed"); *Provost v. Betit*, 326 F. Supp. 920, 923 (D. Vt. 1971) (observing that an "adjudicative proceeding applies set standards to an individual case"); *Battat v. Comm'r of Internal Revenue*, 148 T.C. 32, 39 (2017) ("As an adjudicative body, [the Tax Court] construes statutes passed by Congress and regulations promulgated by the Internal Revenue Service. It does not make political decisions."). *Cf. Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 846 (7th Cir. 2011) ("The absence of definite standards is more characteristic of purely political or legislative activity than of adjudication."). *Edelhertz v. City of Middletown*, 943 F. Supp. 2d 388, 395 (S.D.N.Y. 2012) ("Adjudicative decisions apply a statute or legal standard 'to a given fact situation involving particular individuals,' whereas legislative action entails 'the formulation of a general rule to be applied ... at a subsequent time.'"), *aff'd sub nom. Edelhertz v. City of Middletown*, 714 F.3d 749 (2d Cir. 2013).

section 7511(b)(2) determination as to a position, which requires the executive branch to apply (its incorrect interpretation of) the "confidential, policy-determining, policy-making or policy-advocating" standard to positions.

In *Florida East Coast Realty Co*., the court recognized a "distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other."[507] The legal standard established in section 7511(b)(2) makes the determination more adjudicative than legislative. Although the section 7511(b)(2) determination focuses on the characteristics of a position, rather than an employee in the position, the statute severely restricts the discretion of the President and OPM. Specifically, Congress has required the executive branch to apply a legal standard—i.e., the requirement that a position's character must be "confidential, policy-determining, policy-making or policy-determining"—to a set of disputed facts—i.e., the true functions of the position in question.

The President and OPM can make section 7511(b)(2) determinations *only* based on a finding that a position is of a "confidential, policy-determining, policy-making or policy-advocating" character; no other consideration regarding the position is relevant to that determination. OPM reveals in its notice of proposed rulemaking that it has failed to grasp this fundamental concept. OPM states that it "will focus on general facts relating to position duties rather than adjudicative individual conduct."[508] But OPM fails to grasp that focusing on position duties involves individualized determinations, not "general facts" related to broad swaths of positions.[509]

In that way, a section 7511(b)(2) determination is unlike a legislature's wholly discretionary and purely political decision to raise taxes, as Denver's legislature did in *Bi-Metallic*. In *Bi-Metallic* and its progeny, decisions have turned partly on the lack of criteria against which courts could evaluate pure policy questions.[510] But section 7511(b)(2) establishes a legal standard that a hearing officer or court could apply to OPM's determination regarding a position. The applicable standard is that the position must be of a "confidential, policy-determining, policy-making or policy-advocating" character. A hearing officer or court could examine the government's application of that standard to specific disputed facts as to a particular position that has been subjected to a section 7511(b)(2) determination. This would, of course, be unnecessary in the case of a vacant position, a position accepted voluntarily by an employee after the section 7511(b)(2) determination has been made, or a position held only by a political appointee with no expectation of continued employment after the end of the current presidential

[507] *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 245 (1973).

[508] 90 Fed. Reg. at 17211.

[509] OPM states incorrectly that "[m]oving positions into Schedule Policy/Career *also resolves a policy question* about the appropriate scope of removal restrictions in the civil service." 90 Fed. Reg. at 17211 (emphasis added). But despite OPM's attempt to treat section 7511(b)(2) as a waiver provision authorizing an administration to remove positions from civil service protections whenever it finds those protections inconvenient, 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.

[510] *See, e.g.*, *M.A.K. Inv. Grp., LLC v. City of Glendale*, 897 F.3d 1303, 1310 (10th Cir. 2018); *Cain v. Larson*, 879 F.2d 1424, 1426 (7th Cir. 1989).

administration. But it would be necessary if OPM were to attempt to apply section 7511(b)(2) to a career employee who has accrued adverse action protections under 5 U.S.C. chapter 75, subchapter II.

6. Providing an affected employee a meaningful opportunity to respond would not unduly burden the government.

Bi-Metallic and *Londoner* concern whether due process protections apply. *Matthews v. Eldrige* governs how to determine what process is due.[511] In *Matthews*, the Supreme Court identified three factors relevant to assessing the level of process due: (1) the interest affected, (2) the risk of erroneous deprivation of that interest through the procedures used; and (3) the government's interest, considering the function involved and the additional burden that substitute procedures would entail.[512] All three of these factors support granting employees an opportunity to respond before OPM makes a section 7511(b)(2) determination, followed by a hearing or review before a neutral hearing officer after the determination has been made (unless such hearing or review is provided at the pre-decisional stage).

The first factor supports providing individualized process because the Supreme Court has held that a tenured public employee's interest in continued employment is significant. In *Loudermill*, the Supreme Court wrote: "[T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood."[513] The interest in for-cause termination rights is inescapably intertwined with the interest in retaining employment. That is especially true in an administration that aspires to conduct mass purges of federal employees,[514] install political operatives,[515] and "aggressively" use Schedule PC.[516] In this environment, it is clear that an employee's placement in Schedule PC would be intended as merely a step along the way to removal.

The second factor supports individualized process because the government must ascertain potentially disputed facts and apply an established standard to those facts, and there is a significant risk of error—especially under the current circumstances. The risk of erroneous deprivation is great due to the inaccuracy of position descriptions and position standards, the use of boilerplate position descriptions, and the general lack of assistance to managers by human resources offices. OPM's process in implementing Schedule F revealed a sloppy effort that did not even include reviewing position descriptions, and there is no public indication that OPM will review position descriptions this time, much less conduct a searching factual review as to their accuracy. Given the level of expanding chaos in the current administration's management of

[511] *Mathews*, 424 U.S. at 335.

[512] *Id.* at 335.

[513] *Loudermill*, 470 U.S. at 543.

[514] Erik Katz, *Trump's 'DOGE' commission promises mass federal layoffs, ending telework*, GOV'T EXEC. (Nov. 18, 2024), https://tinyurl.com/4w9rkx4w.

[515] Vice President-elect J.D. Vance once called for Trump to "fire every single mid-level bureaucrat, every civil servant in the administrative state. Replace them with our people." Joe Davidson, Trump's *second-term agenda plans a purge of the federal workforce*, WASH. POST (July 26, 2024), https://tinyurl.com/yc6yhkc5.

[516] Donald J Trump for President 2024, Inc., *Agenda47: President Trump's Plan to Dismantle the Deep State and Return Power to the American People* (Mar. 21, 2023), https://tinyurl.com/ywy34t63.

government,[517] coupled with OPM's ill-timed choice to reduce its own staff,[518] it is not clear that OPM even has the remaining capacity to assist the President in the fact-finding function required for a section 7511(b)(2) determination.

The third factor also supports providing individualized process. A neutral hearing or reviewing officer would need to evaluate a mix of factual and legal questions as to section 7511(b)(2) to assess: (1) whether OPM conducted a sufficient inquiry into the nature of a position or, as it did last time, merely deferred to the employing agency; (2) whether the position is actually of a "confidential, policy-determining, policy-making, or policy-advocating" character; and (3) whether OPM gave the incumbents of the position notice the opportunity to respond before making the section 7511(b)(2) determination.[519]

OPM could easily streamline the process. For example, OPM could adopt a process that begins with delivery of written notice to each employee affected by a potential section 7511(b)(2) determination. The group could consist of as few as one employee or a relatively small number of employees on the same position description at the same grade in a particular agency. OPM could then afford this lone employee or relatively small number of employees sufficient time to respond in writing to the proposed determination. After the determination, OPM could provide the employee or relatively small group of employees affected by the specific section 7511(b)(2) determination at issue one consolidated hearing before a neutral hearing officer. (OPM could save even more time by combining the two steps and holding the hearing before making the section 7511(b)(2) determination.) Depending on the degree of dispute as to a position's duties, the neutral hearing officer could determine the appropriate method for conducting the hearing, such as by requiring all employees to appear at one time at a designated location, by conducting the hearing through video conference, or by accepting only written submissions and affidavits.

This streamlined process for a section 7511(b)(2) determination would be minimally burdensome compared to the loss of for-cause termination rights. It is entirely irrelevant that the administration may want OPM to rush an unprecedented number of determinations right away. The government's burden must be considered only with respect to each individual section 7511(b)(2) determination as to a particular position—which, in many instances, will affect only one employee or only a small group of employees. Moreover, the government can control its burden by making section 7511(b)(2) determinations at a sensible pace relative to its capacity.

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[517] *See, e.g.*, Ben Miller, *CFPB Mass Layoffs Paused as Emails Show Rush to Fire Staff*, BLOOMBERG (APR. 28, 2025), https://tinyurl.com/dpmm2mbu; Tim Reid, Alexandra Alper & Nathan Layne, *100 days of DOGE: lots of chaos, not so much efficiency*, REUTERS (Apr. 24, 2025), https://tinyurl.com/365w9up7; Christa Marshall, *DOE fires and then rehires nuclear staff*, E&E NEWS (Feb. 18, 2025), https://tinyurl.com/2ra9dxn4; Eleanor Pringle, *Trump's small business department fired staff and said it was an accident—then emailed the next day re-firing them*, FORTUNE (Feb. 12, 2025), https://tinyurl.com/yy6nyyje;

[518] Drew Friedman, *Laid-off OPM employees given 2 days to apply for identical jobs in a different office*, FED. NEWS NETWORK (Apr. 23, 2025), https://tinyurl.com/2dv6erus; David DiMolfetta and Eric Katz, *OPM fires its own probationary period staff*, GOV'T EXEC. (Feb. 13, 2025), https://tinyurl.com/6kxem64h.

[519] As previously discussed at length, only political appointees are eligible for coverage by 5 U.S.C. § 7511(b)(2). Even if this view were rejected, non-political employees would be entitled to these due process protections.

The administration's desire to blow up the civil service all at once is no more a justification for diminishing due process than would be a decision by a city's mayor to have the police arrest every resident of a neighborhood with a high crime rate. Courts would not permit the city's government to strip the due process rights of the mayor's victims simply because there were too many of them for orderly processing. Likewise, the administration cannot complain about the burden of having to make too many section 7511(b)(2) determinations when the administration, not the employees affected by such a determination, has caused that burden by attempting to undertake an exponentially greater number of section 7511(b)(2) determinations than at any time in the past while simultaneously reducing the staff of the agency responsible for processing those determinations. There are no exigent circumstances here. The current civil service system has operated since 1978. Throughout that time, the number of positions subject to section 7511(b)(2) determinations has remained consistently around 1,500.[520] Before that, the exception on which section 7511(b)(2) is based had operated since 1953.[521] And the development of the merit system has been ongoing since 1883. In that context, there is no urgency.

7. OPM's analogy to RIFs misses the mark as RIFs are not legislative acts.

OPM analogizes the redesignation of positions as being of a "confidential, policy-determining, policy-making or policy-advocating character" under section 7511(b)(2) to Reductions in Force. It states: "[t]his is why agency terminations through Reductions in Force (RIFs) raise no constitutional concerns. Although RIFs discharge tenured employees without providing individualized due process, they are 'legislative' acts that apply to unspecified persons and flow from general policy decisions."[522] OPM cites no support for its contention that RIFs are considered "legislative acts," and there is none. OPM's reliance on RIFs as support for its conclusion that determinations about specific positions under section 7511(b)(2) are legislative is unfounded.

It is true that courts have recognized that legitimate RIFs (not undertaken for pretextual purposes or without proper legal authority) do not typically require notice and a hearing before an employee is let go under what is sometimes referred to as the "reorganization exception." But the reasons for those decisions are *not* that RIFs are "legislative acts." Rather, courts have identified a number of other reasons for why notice and an opportunity to be heard are not typically required before a legitimate RIF is implemented. And none of those reasons is applicable here.

Some courts have focused on the availability of post-termination procedures for RIFs, coupled with the discretionary nature of initiating a RIF under applicable state laws.[523] Courts 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

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[520] *See* Appendix 1.

[521] Exec. Order 10440 (1953), https://tinyurl.com/nhctrf24.

[522] 90 Fed. Reg. at 17211.

[523] *See, e.g., Washington Teachers Union Local #6, Amer. Fed'n of Teachers, AFL-CIO v. Board of Ed. of the District of Columbia*, 109 F.3d 774, 776 (D.C. Cir. 1997) (in the context of a RIF conducted by the District of Columbia, noting "[t]he Due Process Clause does not require pre-termination hearings where, as here, the RIF is necessitated by a serious financial crisis, principals' decisions are highly discretionary, and D.C. law provides for post-termination challenges.").

issue, and no legal criteria applied to the decision to reduce the staff.[524] Here, by contrast, as discussed above, there would be facts to adjudicate (the nature of the duties of the positions at issue) and a legal standard to apply (whether the ascertained duties of the position meet the statutory standard of "confidential, policy-determining, policy-making, or policy-advocating").

Other courts have held that due process protections do not apply to legitimate RIFs because employees lack a property interest in continued employment in positions that no longer exist.[525] The CSRA and its implementing regulations, which give rise to federal employees' property interests, expressly provide for RIFs[526] and exclude them from the protections of subchapter II of Chapter 75 and of Chapter 43.[527] They provide an alternative set of rights under 5 U.S.C. § 3502 and its implementing regulations, pertaining to the order of retention of employees, that comprise the scope of an employee's property interests with respect a RIF.[528]

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[524] *Rodriguez-Sanchez v. Municipality of Santa Isabel*, 658 F.2d 125, 130 (1st Cir. 2011); *see also Whalen v. Mass. Trial Court*, 397 F.3d 19, 25 (2005); *Christian v. Cecil County, MD,* 817 F. Supp. 1279, 1284 (D. Md. 1993); *Hartman v. City of Providence*, 636 F. Supp. 1395, 1411 (D.R.I. 1986).

[525] *See Amer. Fed'n of Gov. Employees, AFL-CIO v. Stetson*, 640 F.2d 642, 645 (D.C. Cir. 1981) ("This section … does not create a statutory right to continued employment if the decision is made to terminate some or all employees in a given group."); *Local 2855, AFGE (AFL-CIO) v. United States*, 602 F.2d 574, 584 (3d Cir. 1979) (discussing scope of property interest in continued employment and noting: "Nothing in the civil service statute or regulations prohibits the government from abolishing positions held by veterans or other civil servants and contracting out the work previously performed by them. Indeed, as discussed above, 5 C.F.R. § 351.201 specifically allows the issuance of RIFs pursuant to a reorganization."); *Schulz v. Green Cnty., State of Wis*., 645 F.3d 949, 952 (7th Cir. 2011) (state law) ("[A]n employee has a constitutionally protected property interest in a given position—not in her employment or a particular wage—and once the government abolishes the position, the employee has nothing in which she can claim an entitlement."); *Dionne v. Mayor & City Council of Baltimore*, 40 F.3d 677, 685 (4th Cir. 1994) (state law) (finding that plaintiff "enjoyed no property right in the continued existence of his job and consequently his position could be abolished by the legislature without notice and a hearing"); *Upshaw v. Metro. Nashville Airport Auth.*, 207 F. App'x 516, 519 (6th Cir. 2006) (state law) ("[T]he nature of the specific property right that Upshaw enjoyed in his position did not extend to protection from elimination of his position in the context of a reorganization."); *Mandel v. Allen*, 81 F.3d 478, 481 (4th Cir. 1996) (state law) ("[T]here is no doubt that appellants' jobs were abolished as a result of just such a reduction in force. Accordingly, once the Governor determined that appellants' positions were to be eliminated during the downsizing, appellants possessed no entitlement, and thus no property right, to continued government employment."); *Forrest v. Trousdale Cnty. Bd. of Educ*., 954 F. Supp. 2d 720, 727 (M.D. Tenn. 2013) (state law) ("[T]he plaintiff's property interest ceases to exist once her position is eliminated pursuant to a legitimate reduction-in-force. Indeed, at that point, there is simply nothing in which she can claim an entitlement."); *Felde v. Town of Brookfield*, 570 F. Supp. 2d 1070, 1074–75 (E.D. Wis. 2008) ("[A] for-cause employee who loses his position because a legislative body abolishes it in good faith does not have a property interest in continuing to serve in the position."); *Hartman*, 636 F. Supp. at 1408 (provision of city charter "did not grant her a legitimate claim of entitlement to the executive assistance position in perpetuity; at best it gave her a property interest in the job so long as the job existed"); *cf. Amer. Fed'n of Gov. Employees, AFL-CIO v. Office of Personnel Mgmt.*, 821 F.2d 761, 767 (D.C. Cir. 1987) ("Because *Loudermill* involved a termination for cause, not a reduction-in-force, it is by no means obvious that a property interest in continued employment is even implicated here") (dicta).

[526] 5 U.S.C. §§ 3501-04; 5 C.F.R. Part 351. *See also Stetson*, 640 F.2d at 645 ("RIFs are statutorily sanctioned").

[527] 5 U.S.C. § 7512(B) (subchapter II "does not apply to … a reduction-in-force action under section 3502 of this title"); 5 U.S.C. § 4303 (limited to employment actions for "unacceptable performance"); *see also* 5 U.S.C. § 2302(a)(2)(A) (defining covered personnel actions as including those under chapters 75 and 43).

[528] *Stetson*, 640 F.2d at 643.

As a result, the property interest in continued federal employment and subchapter II adverse action procedures does not include a right to not be subject to a RIF.[529]

Conversely, career federal employees hired into positions that were not classified as "confidential, policy-determining, policy-making or policy-advocating" at the time of their hiring *do* have a property interest in both their continued employment and for-cause removal protections, as even OPM recognizes.[530]

What is clear is that courts have neither held nor suggested that RIFs are legislative acts. OPM's reliance on the unsupported assertion that they are therefore constitutes a failure of reasoned decisionmaking.

B. Schedule PC and OPM's regulatory issuances would also violate the First Amendment's prohibition on political affiliation discrimination in public employment.

The First Amendment protects public employees in non-political positions against political affiliation discrimination. Because the Trump administration insists that Schedule PC positions will not be political appointee positions, this constitutional prohibition on political affiliation discrimination will apply with full force to the administration's plans for Schedule PC. The administration's plans will violate that prohibition because the entire Schedule PC enterprise is a sham predicated on the administration's desire to discriminate against a career federal workforce that it perceives as not sharing President Trump's political views. As a result, the involuntary movement of employees into Schedule PC based on their perceived political affiliation as a group would violate the First Amendment. Moreover, even if the administration could convert tenured career employees to at-will employment status through their movement into Schedule PC, the First Amendment would continue to protect them against subsequent discriminatory terminations and other adverse personnel actions.

1. The First Amendment prohibits the government from discriminating against employees, other than those in political appointee roles, based on their perceived political affiliation, whether they are tenured career employees or at-will employees.

The Supreme Court's majority has said that "the First Amendment protects acts of

[529] The property interest in continued employment and adverse action procedures is separate from the property interest in *how* a RIF is conducted. *See Stetson*, 640 F.2d at 645 (RIF provisions "create[] rights as between employees").

[530] 90 Fed. Reg. at 17210-11. Property interests are established by "existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and support claims of entitlement to those benefits." *Bd. of Regents*, 408 U.S. at 577. Here, employees hired into positions subject to subchapter II's for-cause removal provisions at the time of hiring have a "legitimate claim of entitlement" to those adverse action protections. The mere fact that section 7511(b)(2) provides for designation of positions that are exempt from those adverse action protections does not mean that employees have no property interest in those protections because of the chance that their position might be designated in the future. Given the textual reasons discussed above to interpret section 7511(b)(2) as only applying to positions so designated before an employee is hired, and the unbroken practice of *not* applying section 7511(b)(2) designations to incumbents, the "existing rules or understandings" create a legitimate claim of entitlement to the adverse action protections.

expressive association."[531] As a corollary, the Supreme Court has also said that the right of freedom of association "plainly presupposes a freedom not to associate."[532] This right applies to political affiliation discrimination when the government acts as an employer: "If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes."[533] The Supreme Court held that "conditioning public employment on the provision of support for the favored political party unquestionably inhibits protected belief and association."[534]

In a line of cases addressing political patronage, the Supreme Court has explored the First Amendment right of public employees to be protected against political affiliation discrimination in their employment.[535] In the first of these cases, *Elrod v. Branti*, the plurality opinion cited some perceived benefits of patronage now cited by the Trump administration to justify its attempted reintroduction of the spoils system to the federal government. But the opinion acknowledged "the corruption and inefficiency of the patronage system of public employment."[536] The Court also recognized the anti-democratic side of patronage's dark history:

> Patronage practice is not new to American politics. It has existed at the federal level at least since the Presidency of Thomas Jefferson, although its popularization and legitimation primarily occurred later, in the Presidency of Andrew Jackson. The practice is not unique to American politics. It has been used in many European countries, and in darker times, it played a significant role in the Nazi rise to power in Germany and other totalitarian states.[537]

In *Elrod*, the Supreme Court rejected patronage terminations for nonconfidential, non-policymaking positions. Four years later, the Supreme Court refined its analysis of the patronage question in *Branti v. Finkel*, holding that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[538]

As did *Elrod*, *Branti* relied on the theory that patronage imposed an unconstitutional condition on government employment.[539] The court emphasized that plaintiffs do not have to prove "that they, or other employees, have been coerced into changing, either actually or

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[531] *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023).

[532] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

[533] *Branti*, 445 U.S. at 515.

[534] *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 69 (1990) (internal quotation marks omitted); *see also Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 898 (1961) (government cannot deny employment based on based on previous membership in a political party or religious group).

[535] *See, e.g.*, *Elrod*, 427 U.S. at 356–59; *Branti*, 445 U.S. at 515; *Rutan*, 497 U.S. at 69; *Heffernan v. City of Paterson*, 578 U.S. 266, 273-74 (2016).

[536] *Elrod*, 427 U.S. at 353–54. In *Elrod* the court barred a local sheriff from firing his deputies based on political affiliation.

[537] *Id*.

[538] *Branti*, 445 U.S. at 518. The *Branti* court held that a group of assistant public defenders could not be fired for partisan reasons.

[539] *See O'Hare Truck Serv., Inc. v. City of No*rthlake, 518 U.S. 712, 718, (1996) (discussing *Elrod* and *Branti*).

ostensibly, their political allegiance."[540] As a practical matter, many courts still refer to "policymaking" and "confidential" positions, using the terms as a shorthand for the *Elrod-Branti* test.[541] The Seventh Circuit has gone so far as to argue that there is little difference between *Elrod* and *Branti* in most cases.[542] At a minimum, however, *Branti* rejected the approach of relying solely on an employee's status as a "policymaker" or "confidential employee." [543] In a later decision, the Supreme Court illuminated the common rationale of *Elrod* and *Branti* by rejecting the argument that no one has a right to a government job:

> The Court has rejected for decades now the proposition that a public employee has no right to a government job and so cannot complain that termination violates First Amendment rights, a doctrine once captured in Justice Holmes' aphorism that although a policeman "may have a constitutional right to talk politics ... he has no constitutional right to be a policeman," *McAuliffe v. Mayor of New Be*dford, 155 Mass. 216, 220, 29 N.E. 517 (1892).[544]

Although *Elrod* and *Branti* addressed instances in which political affiliation was the sole motivation for a personnel action, courts have recognized that a violation of the First Amendment occurs if political affiliation discrimination is not the sole reason but was a substantial or motivating factor, such that the employer would not have taken the personnel action but for the discrimination.[545] In *Branti,* the Supreme Court held that it was sufficient for employees challenging patronage practices to prove that they were discharged for the reason that they were not affiliated with the winning party.[546] Accordingly, circuit courts have found politically motivated personnel actions against public employees actionable under *Elrod-Branti* when the employees were politically neutral as to a candidate or political party[547] or supported a losing

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[540] *Heffernan*, 578 U.S. at 273–74 (quoting *Branti*, 445 U.S. at 517).

[541] *See Hagan v. Quinn*, 867 F.3d 816, 824 (7th Cir. 2017).

[542] *Meeks v. Grimes*, 779 F.2d 417, 420 (7th Cir. 1985).

[543] *Branti*, 445 U.S. at 518 (1980).

[544] *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716-17 (1996).

[545] *See, e.g*., *Langley v. Hot Spring Cnty*., 393 F.3d 814, 817 (8th Cir. 2005) ("Like many circuits, we have extended the *Elrod-Branti* principle to include cases in which political affiliation was a motivating factor in the dismissal, rather than the sole factor."); *see also Minor v. Del. River & Bay Auth*., 70 F.4th 168, 175 (3d Cir. 2023); *Garvey v. Montgomery*, 128 F. App'x 453, 458 (6th Cir. 2005); *Jantzen v. Hawkins*, 188 F.3d 1247, 1252 (10th Cir. 1999); *Ortiz- Piñero v. Rivera-Arroyo*, 84 F.3d 7, 11-12 (1st Cir. 1996); Richard P. Shafer, Annotation, Dismissal of, or Other Adverse Personnel Action Relating to, Public Employee for Political Patronage Reasons as Violative of First Amendment, 70 A.L.R. Fed. 371 (Originally published in 1984).

[546] *Branti*, 445 U.S. at 517 (quoting *Elrod*, 427 U.S. at 350).

[547] *Welch v. Ciampa*, 542 F.3d 927, 939 (1st Cir. 2008) ("We can discern no principled basis for holding that an employee who supports an opposition group is protected by the First Amendment but one who chooses to remain neutral is vulnerable to retaliation."); *Morin v. Tormey*, 626 F.3d 40, 44 (2d Cir. 2010) ("The right to be free from retaliation based on political affiliation is not limited to members of an opposing political party, but extends to those who are perceived by those retaliating to be apolitical or insufficiently politically loyal."); *Wrobel v. Cnty. of* Erie, 692 F.3d 22, 28 (2d Cir. 2012) ("The protection of these cases has been extended to politically neutral employees who are treated less favorably than employees politically aligned with those in power."); *Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265, 272 (3d Cir. 2007) ("[T]he right not to have allegiance to the official or party in power itself is protected under the First Amendment, irrespective of whether an employee is actively affiliated with an opposing candidate or party."); *Bennis v. Gable*, 823 F.2d 723, 731 (3d Cir.1987) ("[A] citizen's right not to support a candidate is every bit as protected as his right to support one…."); *Williams v. City of River Rouge*, 909 F.2d 151, 153 n.4 (6th Cir. 1990) ("Although the dispute in *Branti* concerned membership in different political parties, the reasoning of the Supreme Court in that case has been understood to apply to political differences of any kind, not

faction within a party.[548]

In *Rutan v. Republican Party of Illinois*, the Supreme Court held that *Branti* applied not only to termination decisions but also to "promotion, *transfer*, recall, and hiring decisions," among a broad range of other personnel actions.[549] The court explained that "[u]nless … patronage practices are narrowly tailored to further vital government interests, we must conclude that they impermissibly encroach on First Amendment freedoms."[550] Circuit courts have interpreted *Rutan* to indicate *Elrod-Branti* applies to demotion and reassignment,[551] and that "even practices that only potentially threaten political association are highly suspect."[552] The Supreme Court specifically rejected an argument in *Rutan* that the personnel actions at issue were not punitive:

> Respondents next argue that the employment decisions at issue here do not violate the First Amendment because the decisions are not punitive, do not in any way adversely affect the terms of employment, and therefore do not chill the exercise of protected belief and association by public employees. This is not credible. Employees who find themselves in dead-end positions due to their political backgrounds are adversely affected. They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder. Employees denied transfers to workplaces reasonably close to their homes until

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merely differences in party membership.").

[548] *See e.g.*, *Welch*, 542 F.3d at 939.

[549] *Rutan*, 497 U.S. at 65 (emphasis added). *See also González-Piña v. Rodriguez*, 407 F.3d 425, 432 n.2 (1st Cir. 2005) ("[T]he Supreme Court held that certain deprivations less harsh than dismissal—"promotions, transfers, and recalls after layoffs based on political affiliation or support [—] are an impermissible infringement on the First Amendment rights of public employees." *Rutan*, 497 U.S. at 75, 110 S.Ct. 2729. In so holding, the Court noted that any adverse action against public employees, no matter how minor, infringes First Amendment rights. *See id*. at 76, n. 8, 110 S.Ct. 2729 ("[T]he First Amendment ... already protects state employees not only from patronage dismissals but also from even an act of retaliation as trivial as failing to hold a birthday party for a public employee ... when intended to punish her for exercising her free speech rights") (internal quotation marks and citation omitted)."); *Sharpe v. Cureton*, 172 F.3d 873 (6th Cir. 1999) ("This is an interlocutory appeal from an order denying qualified immunity to the mayor and other officials of Knoxville, Tennessee. The order was entered in a civil rights action brought against the officials and the city by five Knoxville Fire Department employees who claim to have been retaliated against for failing to support the mayor in his 1995 reelection campaign. The alleged retaliation is said to have taken the form of (among other things) job transfers, denial of consideration for discretionary pay increases and bonuses, and the withholding of a promotion. The case turns on the question whether, as of 1995, it was clearly established that retaliatory personnel actions of the type complained of here were sufficiently 'adverse' to be actionable. Upon de novo review we conclude, as did the district court, that this question must be answered in the affirmative. The denial of qualified immunity will be affirmed.").

[550] *Rutan*, 497 U.S. at 74-75, 78-79. *See also Barrett v. Thomas*, 649 F.2d 1193, 1199-1200 (5th Cir. 1981) ("Sheriff Thomas has not pointed to a vital governmental interest served by making his deputies toe the prescribed political line. He has likewise not shown that such line-toeing is the least restrictive means of achieving a legitimate objective.").

[551] *Hager v. Pike Cnty. Bd. of Educ.*, 286 F.3d 366, 371 (6th Cir. 2002).

[552] *McCloud v. Testa*, 97 F.3d 1536, 1552 (6th Cir. 1996). This language from *McCloud* has been quoted by other circuits. *Lerman v. Bd. of Elections in City of N.Y.*, 232 F.3d 135, 146–47 (2d Cir. 2000); *Krislov v. Rednour*, 226 F.3d 851, 860 (7th Cir. 2000). *See also Delong v. United States*, 621 F.2d 618, 623 (4th Cir. 1980) ("[T]he *Elrod-Branti* principle must be construed to provide protection against a wider range of patronage burdens than threatened or actual dismissals.").

> they join and work for the Republican Party will feel a daily pressure from their long commutes to do so. And employees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience.[553]

Rutan also emphasized that even at-will employees are subject to the *Elrod-Branti* test. The Supreme Court found "the assertion . . . that the employee petitioners and cross-respondents had no legal entitlement to promotion, transfer, or recall beside the point."[554] The majority recounted that *Elrod* and *Branti* had already resolved that question, inasmuch as "both cases involved state workers who were employees at will with no legal entitlement to continued employment."[555]

Crucially, the Supreme Court further extended the *Elrod-Branti* rule in 2016 to cover actions based on *perceived* political affiliation in *Heffernan v. City of Paterson, New Jersey*.[556] In *Heffernan*, a police detective was spotted speaking with the campaign staff of the mayor's challenger, with one of the challenger's yard signs in his hand.[557] The next day, his supervisors demoted him to walking patrol duty based on their mistaken belief that he was associated with the challenger.[558] The plaintiff denied supporting the challenger and explained that he had picked up the sign to take it to his bedridden mother at her request.[559] The Supreme Court treated the issue as presenting a question of political affiliation discrimination, rather than one of retaliation for political speech.[560] The Supreme Court held that the First Amendment prohibited this retaliation against an employee on the basis of perceived political affiliation:

> We conclude that … the government's reason for demoting [the employee] is what counts here. When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action

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[553] *Rutan*, 497 U.S. at 73.

[554] *Rutan*, 497 U.S. at 72. *See also Coogan v. Smyers*, 134 F.3d 479, 484 (2d Cir. 1998) ("Of particular relevance here, while there is no property interest or entitlement to be reappointed to a government position, failure to reappoint solely because of party affiliation is impermissible."); *Barrett*, 649 F.2d at 1199 ("[D]eputy sheriffs have no legal entitlement to their jobs as public employees; the sheriff may fire them for many reasons or for no articulable reason at all. Nevertheless, there are overriding limits on the sheriff's discretion in employment matters. He may not condition continuation of public employment on an employee's relinquishment of the First Amendment liberties of political belief and association.").

[555] *Id*. at 72.

[556] *Heffernan,* 578 U.S. at 268 ("In this case a government official demoted an employee because the official believed, but *incorrectly* believed, that the employee had supported a particular candidate for mayor. The question is whether the official's factual mistake makes a critical legal difference. Even though the employee had not in fact engaged in protected political activity, did his demotion 'deprive' him of a 'right ... secured by the Constitution'? 42 U.S.C. § 1983. We hold that it did.").

[557] *Id*. at 268-269.

[558] *Id*. at 269.

[559] *Id*. at 269.

[560] Any confusion that this case involved a freedom of association claim is readily dispelled by the dissent's explicit characterization of the case as a freedom of association case: "And the majority concludes that the City's demotion of Heffernan based on his wrongfully perceived association with a political campaign is no different from the City's demotion of Heffernan based on his actual association with a political campaign." *Heffernan*, 578 U.S. at 275 (JJ. Thomas and Alito dissenting).

> under the First Amendment … even if, as here, the employer makes a factual mistake about the employee's behavior.
> …
> We also consider relevant the constitutional implications of a rule that imposes liability. The constitutional harm at issue in the ordinary case consists in large part of discouraging employees—both the employee discharged (or demoted) and his or her colleagues—from engaging in protected activities. The discharge of one tells the others that they engage in protected activity at their peril. *See, e.g., Elrod*, 427 U.S., at 359, 96 S.Ct. 2673 (retaliatory employment action against one employee "unquestionably inhibits protected belief and association" of all employees). Hence, we do not require plaintiffs in political affiliation cases to "prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance." *Branti*, 445 U.S., at 517, 100 S.Ct. 1287. The employer's factual mistake does not diminish the risk of causing precisely that same harm. … The upshot is that a discharge or demotion based upon an employer's belief that the employee has engaged in protected activity can cause the same kind, and degree, of constitutional harm whether that belief does or does not rest upon a factual mistake.[561]

2. The entire Schedule PC enterprise is designed to discriminate against career federal employees based on what the administration perceives to be their political affiliation.

While OPM insists in the preamble to the NPRM that Schedule PC is not a return to the patronage system, it is clear that this is an empty promise. President Trump, members of his administration, and his allies have made clear that the entire Schedule PC enterprise is an effort to discriminate against career federal employees based on their perceived political affiliation. The legal standard discussed in the preceding section does not require that career federal employees have the political views that the administration attributes to them. As in *Heffernan*, what matters is that the administration perceives them as supporting his opposition, within either the Democratic Party or the Republican Party, or having remained neutral instead of sharing his views. Under *Rutan*, their reassignment to Schedule PC is a sufficient personnel action to trigger First Amendment protections. Therefore, creation of Schedule PC, as well as its implementation through the Final Ezell Memorandum and OPM's proposed regulations, violates the First Amendment's prohibition against political affiliation discrimination in public employment.

President Trump has been clear in declaring war on the mythical deep state, his name for federal employees he perceives as not sharing his views. In a 2023 speech in Alabama, he said "You'll see that, on the very first day of my presidency, the 'deep state' is destroying our nation. But the tables must turn, and we will quickly destroy the 'deep state.'"[562] On that first day, he issued Executive Order 14,171 reinstating Schedule F and renaming it "Schedule Policy/Career." He long ago resolved any doubt about political ideology being the defining qualification for membership in the "deep state" at a speech in New Hampshire: "We will demolish the 'deep

[561] *Heffernan*, 578 U.S. at 273-74.

[562] Calvin Woodward, *Trump offered a bountiful batch of campaign promises that come due on Day 1*, ASSOCIATED PRESS (Jan. 16, 2025), https://tinyurl.com/2dwv2jey.

state.' We will expel the warmongers from our government. We will drive out the globalists. We will cast out the communist, Marxists and fascists. We will throw off the sick political class that hates our country. We will rout the fake news media."[563]

Administration policy is clearly predicated on a political approach to the career federal civil service. President Trump says he wants to move the federal government "out of Washington to places filled with patriots who love America," the implication being that those in the D.C. metro area are too liberal.[564] His partner, Vice President J.D. Vance, has expressed a fervent desire to politicize the civil service, advising candidate Trump that he should "fire every single mid-level bureaucrat, every civil servant in the administrative state. Replace them with our people."[565] The White House has openly attacked career federal employees on partisan grounds referring to those assigned to diversity, equity and inclusion efforts as "activists."[566] On March 20, 2025, Assistant to the President Steven Miller appeared outside the White House in his official capacity for an interview in which he told *Fox News* that the Department of Education is "overwhelmingly staffed by radical left Marxist bureaucrats, who are in every way hostile to Western civilization, hostile to American interests, and hostile to our founding documents and culture."[567]

Administration officials behind Schedule PC have revealed that their intention in creating a new excepted service schedule was political. Notable among them is James Sherk, who has been credited with having "devised" Schedule F.[568] Sherk is now a White House staffer involved in civil service issues. Possible evidence of authorship of some of the administration's recent personnel issuances has been reportedly attributed to Sherk based on un-scrubbed metadata.[569] Sherk has reportedly said that, although career employees are free to have their own political views, "the extent to which those views differ from the American electorate *is of interest*."[570]

In a comment submitted in opposition to OPM's 2024 regulatory amendments regarding Schedule F, Sherk offered the following in support of Schedule F: "In the 1990s the average federal employee's campaign donations went to somewhat more liberal candidates than Americans as a whole, but not greatly so. . . . [H]owever, in the 2000's federal employees'

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[563] *Id*.

[564] Aaron Wiener, *Federal agencies given deadline for plans to move offices out of D.C. area*, WASH. POST (Feb. 26, 2025), https://tinyurl.com/b8x3t2kj.

[565] Joe Davidson, *Trump's second-term agenda plans a purge of the federal workforce*, WASH. POST (July 26, 2024), https://tinyurl.com/5crb87a2.

[566] Press Release, White House, *President Trump's America First Priorities* (Jan. 20, 2025) ("Drain the Swamp[:] . . . He will freeze bureaucrat hiring except in essential areas to end the onslaught of useless and overpaid DEI *activists* buried into the federal workforce." (emphasis added)), https://tinyurl.com/y857dyj7.

[567] *Stephen Miller says Dept of Education overwhelmingly staffed by 'radical left Marxist bureaucrats'*, FOX NEWS (Mar. 20, 2025) (video starting at about 0:01:05), https://tinyurl.com/48j7eews.

[568] Tyler Pager & Lisa Rein, *Biden administration proposes new rule that would limit Trump purge*, WASH. POST (Sep. 15, 2023), https://tinyurl.com/57f3swey; *see also* Robin Bravender, *Trump hires fed-firing mastermind*, POLITICO (Jan. 18, 2025), https://tinyurl.com/44tuw2su.

[569] Amanda Yeo, *Metadata on U.S. government memos reveals authors linked to Project 2025*, MASHABLE, INC. (Jan. 29, 2025), https://perma.cc/9T57-BCZK (reporting on metadata the outlet construed to suggest Sherk's authorship of OPM guidance).

[570] Robin Bravender, *Trump hires fed-firing mastermind*, POLITICO (Jan. 18, 2025) (emphasis added), https://tinyurl.com/ynv23csn.

campaign donations shifted decisively to the left."[571] In a second comment, he argued that the political views of career federal employees have "little ideological divergence from Democratic party-political appointees."[572] He included an attachment with information meant to support this conclusion about the overall political leanings of the federal workforce.[573]

Another of Schedule F's engineers, OMB Director Russell Vought, has been open about a perceived need to address the political views of federal employees. Vought complained of what he perceived as "woke" employees at the Office of Management and Budget as he discussed the origins of Schedule F in an interview.[574]

Vought was a coauthor of Project 2025 "Mandate for Leadership," the 887-playbook that The Heritage Foundation prepared to arm the Trump administration with plans for the transformation of government.[575] Despite then-candidate Trump's disavowal of affiliation with Project 2025, his administration has recruited a great many of its contributors.[576] That makes the playbook instructive in understanding the administration's partisan assault on the civil service. Heritage's president, Kevin Roberts penned an introduction that complains of "Woke bureaucrats at the Pentagon."[577] The playbook complains that, "[w]hereas most military personnel have had leftist priorities imposed from above, the problem at State [Department] comes largely from within."[578] The prescription for dealing with this supposedly "leftist" bureaucracy is, as Project 2025 conceived it, to strip civil service protections by reinstating Schedule F[579] and, if possible, gut the federal workforce:

> Let's be clear: The most egregious regulations promulgated by the current Administration come from one place: the Oval Office. The President cannot hide behind the agencies; as his many executive orders make clear, his is the responsibility for the regulations that threaten American communities, schools, and families. A conservative President must move swiftly to do away with these vast abuses of presidential power *and remove the career and political bureaucrats who fuel it.*[580]

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[571] Comment of the America First Policy Institute in Opposition to the Proposed Rule Upholding Civil Service Protections and Merit System Principles, Docket No. OPM-2023-0013, Comment No. 4097, at 2 (Nov. 15, 2023), https://tinyurl.com/ywwadur8.

[572] Comment of the America First Policy Institute in Opposition to the Proposed Rule Upholding Civil Service Protections and Merit System Principles, Comment No. 3156, at 1 (Nov. 17, 2023), https://tinyurl.com/37xpp33x.

[573] *Id*.

[574] John Knefel, *Charlie Kirk and Christian nationalist Russ Vought promote "ideological purity tests" to implement Schedule F*, MEDIA MATTERS FOR AM. (Sept. 26, 2022), https://tinyurl.com/yc6jkbb3; Russell Vought, *A Commitment to End Woke and Weaponized Government*, CTR. FOR RENEWING AM., at 51, 70 (2022) (discussing "woke bureaucrats" in report issued by Russell Vought), https://tinyurl.com/59afef7h.

[575] Max Matza, *Senate confirms Project 2025 co-author as Trump budget chief*, BBC NEWS (Feb. 6, 2025), https://tinyurl.com/bnvp57av.

[576] Faith Wardwell, *The key Project 2025 authors now staffing the Trump administration*, NBC NEWS (Mar. 12, 2025), https://tinyurl.com/33asxedu.

[577] Kevin Roberts, Russell Vought, et al., *Mandate for Leadership*, Heritage Foundation, at 8 (2024), https://tinyurl.com/mksd6e6a.

[578] *Id*., at 88.

[579] The playbook recommends reinstatement of Schedule F in several places. *Id*. at 271, 524, and 535.

[580] *Id*. at 8 (emphasis added).

Project 2025 also prepared for the second Trump administration by assembling a database of ideologically screened job seekers.[581] Trump has already pulled from Project 2025 for some of the government's 4,000 political posts.[582] But the database reportedly holds over 10,000 job seekers, maybe more, which portends more ominous developments.[583] *ProPublica* reports that Paul Dans, the former leader of Project 2025, wanted the database "to suggest people for roles that are currently assigned to career employees, in keeping with the plans for Schedule F."[584] "We don't want careerists," Dans has explained, "We want conservative warriors."[585] Dans recently told *Politico* that the Trump administration's implementation of Project 2025 has gone "way beyond my wildest dreams," though he warned that sustained effort will be needed because the "deep state is going to get its breath back."[586]

Trump allies worked both halves of the federal workforce replacement scheme. The Heritage Foundation gave the American Accountability Foundation (AAF) $100,000 to identify "anti-American bad actors" in government, mid-level federal workers who don't conform to its ideological standards.[587] AAF has posted names and photos of federal employees online.[588] Within hours of President Trump's inauguration, at least one of the employees on this hit list was fired.[589]

In this environment, it is not surprising that personnel moves in the Trump administration have been overtly partisan. In the days before President Trump's 2025 inauguration, news broke of his team posing partisan questions to career federal employees:

> Incoming senior Trump administration officials have begun questioning career civil servants who work on the White House National Security Council about who they voted for in the 2024 election, their political contributions and whether they

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[581] To get into the database, recruits must pass a written test of ideological purity. Jim VandeHei & Mike Allen, *Behind the Curtain — Scoop: The Trump job applications revealed*, AXIOS (Dec. 1, 2023), https://tinyurl.com/bdfkhnj4. *See also* Presidential Personnel Database & Presidential Administration Academy Questionnaire, N.Y. TIMES (Dec. 1, 2023) (document obtained from Project 2025), https://tinyurl.com/mykmzuj7.

[582] Bill Barrow, *After Trump's Project 2025 denials, he is tapping its authors and influencers for key roles*, ASSOCIATED PRESS (Nov. 23, 2024), https://tinyurl.com/2dkuyxwz; Allan Smith & Vaughn Hillyard, *Trump's transition team turns to Project 2025 after disavowing it during the campaign*, NBC NEWS (Nov. 22, 2024), https://tinyurl.com/4p62rhvv.

[583] Mark Willacy & Amy Donaldson, *The plan for power*, AUSTL. BROAD. CORP. (July 15, 2024), https://tinyurl.com/3xv55ju6.

[584] Alec MacGillis, *The Man Behind Project 2025's Most Radical Plans*, PROPUBLICA (Aug. 1, 2024), https://tinyurl.com/bp7jv88z.

[585] Isaac Arnsdorf, Josh Dawsey & Devlin Barrett, *Trump and allies plot revenge, Justice Department control in a second term*, WASH. POST (NOV. 6, 2023), https://tinyurl.com/4cewyf34.

[586] Michael Hirsh, *'Beyond My Wildest Dreams': The Architect of Project 2025 Is Ready for His Victory Lap*, POLITICO (Mar. 16, 2025), https://tinyurl.com/y6r9sewc.

[587] Press Release, Heritage Foundation, Heritage Foundation Announces New Innovation Prize for the American Accountability Foundation (May 20, 2024), https://tinyurl.com/bddpatmt; Lisa Mascaro, *Conservative-backed group is creating a list of federal workers it suspects could resist Trump plans*, ASSOC. PRESS (June 24, 2024), https://tinyurl.com/5yzvsxvu.

[588] Jonathan O'Connell, Leigh Ann Caldwell & Lisa Rein, *Conservative group's 'watch list' targets federal employees for firing*, WASH. POST (Nov. 2, 2024), https://tinyurl.com/539cnvdm.

[589] Julia Ainsley, *Trump fired four top immigration court officials hours after taking office*, NBC NEWS (Jan. 21, 2025) (reporting on the firing of Sheila McNulty), https://tinyurl.com/44vdrpt3; Am. Accountability Found., *DHS Bureaucrat Watch List TARGETS, Sheila McNulty*, https://tinyurl.com/zwf4rnwv (last visited May 24, 2025).

> have made social media posts that could be considered incriminating by President-elect Donald Trump's team, according to a U.S. official familiar with the matter.[590]

On the day of his 2025 inauguration, President Trump said that most federal employees would be fired and that it should be all of them.[591] He has ensured political interference in career hiring by ordering agencies to involve the Department of Government Efficiency in career-level hiring decisions.[592] Before long, his administration's partisan questioning of NSC career employees spread to national intelligence and law enforcement jobs.[593] Accounts surfaced of candidates being asked if they believed the lie that President Trump won the 2020 election and to indicate who they think the "real patriots" were on January 6, 2021.[594] The White House has publicly defended this line of partisan questioning of candidates for career positions.[595]

The Department of Justice has been a special focus of politicization efforts. The administration immediately began reassigning career Senior Executive Service members within the Department of Justice,[596] coupling that effort with a purge of career attorneys who had been assigned to work on cases against Trump.[597] FBI Director Kash Patel, infamous for including what has been called a political enemies list of individuals in his book "Government Gangsters,"[598] pledged that he was "going to go on a government gangster's manhunt in Washington, D. C. for our great president."[599] While Patel's nomination was pending before the Senate, Senator Dick Durbin accused him of directing a purge of FBI employees before even having been confirmed and appointed to the job of FBI Director.[600] Whether Patel was involved in such an effort or not, news outlets reported on the administration's purge of career FBI officials at the time.[601] Then, several weeks after Patel's confirmation, the FBI placed an

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[590] Aamer Madhani & Zeke Miller, *Trump team is questioning civil servants at National Security Council about commitment to his agenda*, ASSOCIATED PRESS (Jan. 13, 2025), https://tinyurl.com/32kjpkjx.

[591] Erich Wagner, *Trump: Agencies should fire 'all' bureaucrats*, GOV'T EXEC. (Jan. 20, 2025) ("'Most of those bureaucrats are being fired, they're gone,' Trump said at a rally Monday afternoon while referring to his planned signing of a freeze on new federal regulations. 'It should be all of them.'"), https://tinyurl.com/283h58cx.

[592] Exec. Order No. 14,210, § 3(b)(i) (Feb. 11, 2025), *reprinted in* Implementing the President's "Department of Government Efficiency" Workforce Optimization Initiative, 90 Fed. Reg. 9669 (Feb. 14, 2024).

[593] Ellen Nakashima & Warren P. Strobel, *U.S. intelligence, law enforcement candidates face Trump loyalty test*, WASH. POST (Feb. 9, 2025), https://tinyurl.com/ntv3hyt8.

[594] *Id*.

[595] *Id*.

[596] Ruth Marcus, *Battleground DOJ: How Trump is waging war on the so-called deep state*, WASH. POST (Jan. 24, 2025), https://tinyurl.com/swxy4hzk.

[597] Ken Dilanian & Ryan J. Reilly, *Trump administration fires DOJ officials who worked on criminal investigations of the president*, NBC NEWS (Jan. 27, 2025), https://tinyurl.com/s6827ch7.

[598] Adam Goldman, *Patel Denies His List of 60 Names Is an 'Enemies List'*, N.Y. TIMES (Jan. 30, 2025), https://tinyurl.com/3ax9n3s3; Annie Grayer & Marshall Cohen, *People on Kash Patel's so-called 'enemies list' taking drastic steps for protection before his potential FBI takeover*, CNN (Jan. 30, 2025), https://tinyurl.com/68cjhfjs.

[599] This Week with George Stephanopoulos (rush transcript), *White House National Security Adviser Jake Sullivan, Sen. Mike Rounds, and Gov.-elect Josh Stein*, ABC NEWS (Dec. 1, 2024), https://tinyurl.com/3s8b2ayz.

[600] Press Release, Office of Senator Dick Durbin (D-IL), *Durbin: Kash Patel Has Been Personally Directing The Ongoing Purge of FBI Officials* (Feb. 11, 2025), https://tinyurl.com/465y633y.

[601] Roderick M. Hills, *What Just Happened: Purges at the DOJ and FBI — How Do and Don't the Civil Service Laws Apply*, JUST SECURITY (Feb. 14, 2025), https://tinyurl.com/y644btve; Rebecca Beitsch, *Purges at FBI, DOJ trigger 'battle' for career staff*, THE HILL (Feb. 4, 2025), https://tinyurl.com/2nb38ew8.

employee who made Patel's "Government Gangsters" list on administrative leave.[602]

Even the traditionally non-political military has been a focus of the administration's attacks on political neutrality. Though military officers would not be covered by Schedule PC, their treatment is indicative of the administration's attempt to politicize parts of the government that politics should not taint. The Associated Press noted in one article that "Trump and [Secretary of Defense] Hegseth have both pledged to rid the Defense Department of what they call 'woke' generals."[603]

And to make it perfectly clear that Schedule PC is part of a broader effort to politicize the civil service, OPM recently announced that all Federal job vacancy announcements graded at GS-05 or above will include the following required essay question: "How would you help advance the President's Executive Orders and policy priorities in this role? Identify one or two relevant Executive Orders or policy initiatives that are significant to you, and explain how you would help implement them if hired."[604] Requiring applicants for merit-based roles to proclaim fealty to the administration's policies gives lie to OPM's proclamations that Schedule PC is all about a merit-based civil service.

3. Applying the legal standard to this attempted politicization of the civil service makes clear that the administration's plan for Schedule PC would violate the First Amendment.

As these factual circumstances illustrate, the entire Schedule PC enterprise is an attempt to discriminate against a workforce that the Trump administration perceives in the aggregate as not sharing President Trump's political views. The administration's plans, therefore, are violative of the First Amendment's prohibition on political affiliation discrimination in public employment.

Heffernan articulated the principle that what matters is not the employee's political affiliation but the employer's motivation for its actions, which can be based on the employer's perception as to the employee's political affiliation.[605] The administration and its members have clearly demonstrated through word and deed their perception of the federal workforce as leaning left or not fully sharing President Trump's views. That some percentage of federal employees support Trump is beside the point. The administration cannot shield itself from accountability for perceived political affiliation discrimination by sweeping broadly to move employees *en masse* into Schedule PC when its motivation for doing so is to strip the rights of a group that, while not homogenous in its political leanings, it perceives as overwhelmingly supportive of an opposing political ideology. At the heart of the administration's action remains the desire to discriminate based on political affiliation.

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[602] Adam Goldman, *F.B.I. suspends employee on Pate's So-Called Enemies List*, N.Y. TIMES (Apr. 11, 2025), https://tinyurl.com/5xnfjf3r.

[603] Lolita Baldor, *It's not clear who will lead the Pentagon when Trump takes office. What happens then?*, ASSOCIATED PRESS (Jan. 18, 2025), https://tinyurl.com/3m7ejwh2.

[604] Memorandum from Vince Haley, Assistant to the President for Domestic Policy and Charles Ezell, Acting Dir., OPM, to heads and acting heads of departments and agencies re Merit Hiring Plan (May 29, 2025), https://tinyurl.com/3xb8kt59.

[605] *Heffernan,* 578 U.S. at 268.

Movement of career employees into Schedule PC is the sort of personnel action that the First Amendment covers under *Rutan*.[606] Whether or not the action is punitive or merely administrative is irrelevant.[607] As in *Rutan*, employees moved into Schedule PC "will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder."[608] The administration's naked desire to circumvent civil service protections established by the people's representatives in Congress through the legislative process does not advance a sufficiently "vital government interest" to blow up the existing balance between political appointee positions and merit employment.[609]

Beyond the movement into Schedule PC, the Trump administration has actively increased the likelihood of a separate, second wave of political affiliation discrimination occurring after employees are moved to Schedule PC. This risk increased when the Office of Special Counsel, whose Senate-confirmed leader President Trump fired without cause, rescinded prior issuances that would have continued to prohibit employees from wearing MAGA hats and displaying other Donald Trump memorabilia in the workplace.[610] Political appointees, supervisors and coworkers in federal offices will now know which employees are ardent Trump supporters and which have targets on their back for removal based on their clothes and political paraphernalia in their workplaces. The lip service paid in Executive Order 14,171 regarding the right of employees to have their own political views does not confer any protections; rather, that executive order strips employees of access to the Office of Special Counsel and the Merit Systems Protection Board when they are subjected to political affiliation discrimination. The executive order disclaims any grant of any right to any individual.[611]

Despite these maneuvers, however, the Trump administration will still face First Amendment challenges. Even if the administration were right that movement into Schedule PC could transform career employees into at-will employees, they would retain their First Amendment right to be free of political affiliation discrimination in the federal workplace. Both the administration's contemplated movement of employees into Schedule PC and, depending on the circumstances, the subsequent firing of Schedule PC employees, would violate the First Amendment. As a result, Executive Order 14,171 is invalid, as are the Final Ezell Memorandum and OPM's proposed rulemaking.

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[606] *See Rutan*, 497 U.S. at 65; *González-Piña*, 407 F.3d at 432 n.2; *Sharpe*, 172 F.3d 873. *See also McCloud v. Testa*, 97 F.3d 1536, 1552 (6th Cir.1996) ("[E]ven practices that only potentially threaten political association are highly suspect.").

[607] *Rutan,* 497 U.S. at 73.

[608] *Id*. at 73.

[609] *See id.* at 73-75.

[610] U.S. Off. of Special Counsel, *Hatch Act Advisory Opinion Rescinding Advisory Opinions Dated May 20 and October 15, 2024* (April 25, 2025), https://tinyurl.com/bnvhxn8j. *See also* Eileen Sullivan, *Trump Officials Weaken Rules Insulating Government Workers From Politics*, N.Y. Times (April 25, 2025), https://tinyurl.com/4ca55ejm.

[611] *See* Exec. Order No. 14,171, § 7 (2025); *see also* Exec. Order 13,957, § 7.

V. SPECIFIC PROVISIONS OF OPM'S PROPOSED REGULATORY CHANGES WOULD IMPLEMENT BAD POLICY, WOULD BE CONTRARY TO LAW, AND WOULD RAISE CONSTITUTIONAL CONCERNS.

For the reasons discussed in the foregoing sections, OPM's proposed regulatory changes represent bad policy, are contrary to law and raise constitutional concerns. OPM should not finalize these regulations for those reasons. The entire discussion in the preceding sections of this comment is incorporated by reference in this section and made applicable to the proposed regulatory changes discussed herein. Below, we offer some *additional* considerations with regard to individual proposed provisions set forth in OPM's notice of proposed rulemaking, as well as material in the Final Ezell Memorandum.

A. Comments of general applicability

For the reasons discussed in the preceding sections, Executive Order 13,957, as amended by Executive Order 14,171, ("the executive orders") is contrary to law, ultra vires, and unconstitutional.[612] It is contrary to law because, for reasons discussed in the preceding sections, it constitutes executive action in violation of the CSRA, 5 U.S.C. §§ 2302, 7511, and in excess of delegated authority. It violates the Due Process clause of the Fifth Amendment and the prohibition on political affiliation discrimination under the First Amendment. Consequently, OPM has no authority to implement the executive orders, make final the proposed regulatory changes, or implement the Final Ezell Memorandum. To the extent OPM relies on the executive orders as independently justifying any of the proposed regulatory changes,[613] such reliance is similarly improper.

The proposed regulatory amendments also fail because they are inextricably tied to—and, in fact, depend on—the Final Ezell Memorandum, which OPM issued in violation of 5 U.S.C. §§ 1103(b) and 1105, as well as its own regulations, 5 C.F.R. part 110. The Memorandum is integral to this proposed rulemaking because it supplies criteria forming part of a definition of "confidential, policy-determining, policy-making or policy-advocating."[614] That definition in the Memorandum would effectively supplant the existing definition at 5 C.F.R. § 210.102(b)(3) if OPM rescinds that regulatory definition, as OPM proposes to do in its notice of proposed rulemaking without offering an alternative regulatory definition.[615] That Memorandum, therefore, would merge with this proposed regulation if it is finalized. As a result, OPM's failure

[612] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject.4 Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.").

[613] *See, e.g.,* 90 Fed. Reg. at 17189 ("Executive Order 14171 has changed the underlying legal authorities under which OPM operates. … OPM is proposing these regulations to align the civil service regulations with the President's policies and operative legal requirements."), 17200 ("the order's provisions are self-executing … it promotes clarity and reduces confusion for OPM regulations to reflect the applicable legal framework").

[614] Final Ezell Memorandum, at 3.

[615] 90 Fed. Reg. at 17221.

to comply with notice and comment requirements applicable to the Memorandum taints OPM's proposed rulemaking.

B. 5 C.F.R. part 210

In part 210, OPM proposes to remove the existing definitions of the term of art "confidential, policy-determining, policy-making or policy-advocating" and "confidential or policy determining" from its regulations at 5 C.F.R. § 210.102(b)(3) and (4), respectively, without providing substitute definitions.[616] OPM asserts in the preamble that this action merely recognizes that Executive Order 14,171 "render[s] those [provisions] inoperative."[617] OPM concedes, nonetheless, that it must take a rulemaking action to rescind paragraphs (b)(3) and (b)(4).[618]

As discussed above, the existing regulatory definitions are consistent with the meaning of the term of art "confidential, policy-determining, policy-making or policy-advocating" in 5 U.S.C. §§ 2302(a)(2)(B)(i) and 7511(b)(2). The default, in the absence of the existing regulatory definitions at 5 C.F.R. § 210.102(b)(3) and (4), will be the criteria purportedly established in the invalid executive orders, as well as the separate criteria established independently by OPM in the Final Ezell Memorandum. For those reasons, OPM's proposal with respect to 5 C.F.R. § 210.102(b)(3) and (4) is contrary to law.

C. 5 C.F.R. part 212

In part 212, OPM proposes to replace the following language of 5 C.F.R. § 212.401(b):

> (b) 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 another position to which the employee is moved involuntarily.

In its place, OPM proposes to substitute the following:

> (b) Unless expressly provided otherwise by the Civil Service Rules, an employee who has competitive status at the time his or her position is first listed in an excepted service schedule, or who is involuntarily transferred to a position in the excepted service, is not

[616] *Id.* at 17221.
[617] *Id*. at 17187-88.
[618] *Id.*

in the competitive service for any purpose but shall retain competitive status as long as he or she continues to occupy such position.[619]

This regulation originated in 1954 and has been carried forward in substantially the same form throughout 13 presidential administrations, under both Republican and Democratic presidents.[620] The change in policy is unwarranted because there has been no meaningful change in circumstances pertaining to the nature of employment in the competitive and excepted services. 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 PC.[621] That impatience falls short of the standard of reasoned decision making for a change of this magnitude affecting the rights of tens of thousands, or potentially hundreds of thousands, of employees, many with decades of loyal federal service.

Relatedly, nearly fifty years after passage of the CSRA, OPM now claims that it lacks authority to extend the coverage of 5 U.S.C. chapter 75, subchapter II, to employees involuntarily moved into Schedule PC.[622] This claim amounts to an indirect assertion that OPM lacked authority to issue the current and prior versions of 5 C.F.R. § 212.401. This assertion is incorrect as to this half-century-old regulation.

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[619] *Id.* at 17221

[620] 5 C.F.R. § 212.401(b) (2025) (" (b) 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 another position to which the employee is moved involuntarily."), https://tinyurl.com/y9xjbfnv; Upholding Civil Service Protections and Merit System Principles, 89 Fed. Reg. 24982, 25046 (Apr. 4, 2024), https://tinyurl.com/yx49xb5j; 5 C.F.R. § 212.401(b) (1969), https://tinyurl.com/2phexpss; 33 Fed. Reg. 12402, 12408 (Sep. 4, 1968) (" (b) 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."), https://tinyurl.com/bd6yu7rs; 5 C.F.R. § 212.401(b) (1964) (" (b) 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."), https://tinyurl.com/mw6p43eb; 28 Fed. Reg. 10022, 10030 (Sep. 14, 1963), https://tinyurl.com/2tfpn783; 5 C.F.R. § 01.3(d) (1955) ("An employee shall be considered as being in the competitive service when he has a competitive status and occupies a competitive position unless he is serving under a temporary appointment: Provided, That an employee who is in the competitive service at the time his position is first listed under Schedule A, B, or C shall be considered as continuing in the competitive service as long as he continues to occupy such position."), https://tinyurl.com/bdh9mpse; Amending the Civil Service Rules and Authorizing A New Appointment System for the Competitive Service, 19 Fed. Reg. 7521 (Nov. 23, 1954) (codified at 5 C.F.R. § 01.3(d)), https://tinyurl.com/mtba9pv3; Exec. Order 10577, § 101 (Nov. 22, 1954) ("(d) An employee shall be considered as being in the competitive service when he has a competitive status and occupies a competitive position unless he is serving under a temporary appointment: Provided, That an employee who is in the competitive service at the time his position is first listed under Schedule A, B, or C shall be considered as continuing in the competitive service as long as he continues to occupy such position."), https://tinyurl.com/mn5kjam4.

[621] 90 Fed. Reg. at 17219 ("As a matter of policy, applying Schedule Policy/Career prospectively would negate most of the benefits of the rule during this presidential administration.").

[622] *Id.* ("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.").

OPM incorrectly dismisses the legal authority that Congress granted OPM in section 7511(c) to make subchapter II applicable "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."[623] OPM posits two reasons this subsection is inapplicable, but OPM is wrong on both counts. First, OPM asserts that positions of a confidential, policy-determining, policy-making or policy-advocating character *are* "'otherwise covered' by subchapter II—and expressly excluded."[624] But OPM misconstrues what "otherwise covered by this subchapter" means. It does not mean "otherwise referenced in this subchapter"—which is the effect of OPM's interpretation—but rather otherwise covered by the grant of adverse-action protections that are the focus of the subchapter. That commonsense reading of this remedial legislation is made clear by the statutory text. The exclusions of subsection (b) are implemented by statutory text that provides that "[t]his subchapter does not *apply* to an employee" meeting the criteria of the various paragraphs of subparagraph (b), including 7511(b)(2).[625] Subsection (c) then expressly provides that OPM "may provide for the *application* of" subchapter II to those not covered by it.[626] "Covered" in this context has an obvious meaning—covered by the protections at issue.[627] Had Congress intended the convoluted meaning ascribed by OPM it would have excluded from section 7511(c)'s scope those positions "excluded" by section 7511.

Caselaw interpreting subsection 7511(c) further supports this conclusion. Thus, in discussing 7511(c), the Federal Circuit has described it as "authoriz[ing] the Office of Personnel Management ('OPM') to extend 5 U.S.C. § 7513(d) appeal rights to any position in the excepted service not otherwise covered," making clear that "covered" refers to eligibility for appeal rights, and not to being referenced elsewhere in subchapter II.[628]

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[623] 5 U.S.C. § 7511(c). *See also Dep't of Treasury v. Fed. Lab. Rels. Auth.*, 873 F.2d 1467, 1471 n.7 (D.C. Cir. 1989) ("Intervenor NTEU argues that Congress never meant for OPM to have complete discretion in this area, but only discretion to determine which excepted service employees held positions of confidential or policymaking character (and should thus be excluded from MSPB review). Although there is some legislative history indicating that Congress meant for OPM to perform the sorting function that intervenor suggests, we cannot read that legislative history to narrow drastically the broad grant of discretion given by the plain language (and the legislative history) of § 7511(c). *See* S.REP. No. 969, 95th Cong., 2d Sess. 49 (1978) U.S.Code Cong. & Admin.News 1978, p. 2723 (subsection 7511(c) "permits the Office of Personnel Management, *in its discretion*, to extend adverse action and appeal coverage to positions or groups of positions [in the excepted service]") (emphasis added).").

[624] 90 Fed. Reg. at 17199.

[625] 5 U.S.C. § 7511(b) (emphasis added).

[626] *Id*. § 7511(c) (emphasis added).

[627] *Cf.* Merriam-Webster Dictionary, *cover* (defining "cover" as "to afford protection or security to" and providing as an example "a policy covering the traveler in all kinds of accidents"). https://www.merriam-webster.com/dictionary/cover (last visited May 24, 2025).

[628] *May v. Merit Sys. Prot. Bd.*, 250 F.3d 756 (Fed. Cir. 2000). *See Schwartz v. Dep't of Transp.*, 714 F.2d 1581, 1583 (Fed. Cir. 1983) ("For example, in 5 U.S.C. § 7511(c) (1982), Congress specifically authorized OPM to extend the provisions of subchapter II of chapter 75 on adverse actions, 5 U.S.C. §§ 7511–7514, to 'any position or group of positions excepted from the competitive service by regulation of the Office [OPM].'"). The use of the verb "extend" in both cases comports with the understanding that "covered" means subject to the subchapter II protections—as in, to "extend coverage" of an insurance policy. *See also Dep't of the Treasury*, 873 F.2d at 1468 ("This right to appeal adverse actions under either chapter is not granted to NEES employees, id. § 4303(e), § 7511(a), although Congress delegated to the Office of Personnel Management authority to grant any category of the excepted service the right to appeal to the MSPB (and thereby to the Federal Circuit) adverse disciplinary actions under chapter 75 (but not adverse actions under chapter 43). Id. § 7511(c).").

Nor does OPM's second rationale for dismissing subsection 7511(c)—that it only applies to positions that OPM excepts from the competitive service, and not to exceptions made by the President—withstand scrutiny.[629] The limitation in section 7511(c) to positions excepted from the competitive service by OPM is intended to distinguish legislatively created excepted service positions from those excepted from the competitive service by the executive branch. At the time of the CSRA's adoption, subchapter II protections did not extend to employees in Schedule A and Schedule B positions who were not preference eligible.[630] Subsection 7511(c) was intended to enable OPM to extend such protections to non-preference eligible employees in those positions—even though both Schedule A and Schedule B—like Schedule C and Schedule PC—were initially created by presidential executive order and then implemented by Civil Service Commission regulations (that OPM carried forward upon enactment of the CSRA).[631] OPM subsequently used its authority to extend subchapter II protections to Schedule B employees; Congress was aware of this fact and expressed no concern that it was somehow improper.[632]

For the reasons discussed in the previous sections of the comment, this proposed change is contrary to OPM's longstanding interpretation of the nature of competitive service. The change is also unconstitutional because it strips career employees of a property interest in accrued civil service protections.

Finally, it bears noting 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. 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.[633]

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[629] 90 Fed. Reg. at 17199.

[630] *See* Pub. L. No. 95-454, tit. II, § 202(a), 92 Stat. 1111, 1135 (1978) (codified at 5 U.S.C. § 7511(a)(1)(B)).

[631] *See, e.g.*, 5 C.F.R. § 6.2; 5 C.F.R. §§ 213.3101, 213.3201, 213.3301 (2025); 5 C.F.R. §§ 213.3101, 213.3201, 213.3301 (1980) (Schedules A, B and C post-CSRA enactment), https://tinyurl.com/yyvk9pvt; 5 C.F.R. §§ 213.3101, 213.3201, 213.3301 (1976) (Schedules A, B and C pre-CSRA enactment), https://tinyurl.com/2mt3vakx; Exec. Order 10,440 (Mar. 31, 1953) (creating Schedule C), https://tinyurl.com/nhctrf24; Exec. Order No. 6134 (May 18, 1933) (amending Schedules A and B), https://tinyurl.com/3x5hud7p; Executive Order 1180, Civil Service Rule III (Mar. 23, 1910) (creating Schedule B), https://tinyurl.com/39pxbfhs; Exec. Order 209, Civil Service Rule II (Mar. 20, 1903) (creating Schedule A), https://tinyurl.com/2vp44pc2.

[632] *See* H.R. Rep. 101-328 (Nov. 3, 1989), at 7 (noting without concern that OPM "has used this authority [under § 7511(c)] to extend adverse action protection to Schedule B employees in professional and administrative positions."). The Civil Service Due Process Amendments Act extended subchapter II protections to certain previously excluded excepted service employees.

[633] 5 U.S.C. § 3304a ("Competitive service; career appointment after 3 years' temporary service"); 5 C.F.R. § 210.102 ("Reinstatement means the noncompetitive reemployment for service as a career or career-conditional employee of a person formerly employed in the competitive service who had a competitive status or was serving probation when he was separated from the service."); 5 C.F.R. § 315.201 (requiring three years of creditable service for competitive status as a "career" employee); Memorandum from Jeff Pon, Dir., U.S. Off. of Pers. Mgmt., to Chief Human Capital Officers, Attachment, *Career and Career-Conditional Employment[;] 5 CFR 315, Subpart B[;] Questions and Answers* (Apr. 6, 2018) ("Individuals with career tenure have lifetime reinstatement eligibility."). https://tinyurl.com/3awfd7ef (memorandum), https://tinyurl.com/4xkze96h (attachment). *See also* U.S. Off. of Pers. Mgmt., Questions ("What does it mean when the job opportunity announcement's 'Who May Apply' section says 'All Sources' or 'Status Applicants' and/or 'Reinstatement Eligibles'?"), https://tinyurl.com/y39s7d89 (last visited May 24, 2025).

D. 5 C.F.R. part 213

In part 213, OPM proposes several changes.

1. 5 C.F.R. § 213.101

In 5 C.F.R. § 213.101, OPM proposes to add the phrase: "An employee encumbering an excepted position is in the excepted service, irrespective of whether they possess competitive status."[634] This change would make bad policy and is contrary to law and the Constitution for reasons discussed above in connection with OPM's proposed changes to 5 C.F.R. § 212.401(b).

2. 5 C.F.R. § 213.102

OPM proposes to create a very unusual new provision in subsection (d) at 5 C.F.R. § 213.102.[635] The new subsection purports to authorize the President to place positions in Schedule PC. This assertion that OPM could confer any authority on the President is, to say the least, surprising. In any event, the President may place positions in Schedule PC.[636] What he may not do is apply 5 U.S.C. § 7511(b)(2) or 5 U.S.C. § 2302(a)(2)(B)(i) to career employees, nor may he strip career employees of accrued civil service protections.

3. 5 C.F.R. §§ 213.103 and 213.104

OPM proposes to make conforming changes to 5 C.F.R. §§ 213.103 and 213.104 to ensure that these provisions reference Executive Order 13957 and Executive Order 14171.[637] The problem with these changes is that they seek to implement executive orders that are invalid for reasons discussed in prior sections of this comment.

4. 5 C.F.R. § 213.3301

OPM proposes to amend 5 C.F.R. § 213.3301 to reflect that Schedule C appointees are political appointees with no expectation of continued employment beyond the administration that appointed them.[638] This change is consistent with 5 U.S.C. §§ 2302(a)(2)(B)(i) and 7511(b)(2), which apply only to political appointees with no expectation of continued employment beyond the administration that appointed them. (In the case of some Schedule C appointees who support term-limited political appointees of a presidential administration, the concept of the end of an administration is understood to correspond with the end of the term of the term-limited appointee.) The same is true of appointees to Schedule PC.

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[634] 90 Fed. Reg. at 17221.
[635] *Id.* at 17222.
[636] 5 U.S.C. § 3302.
[637] 90 Fed. Reg. at 17222.
[638] *Id*. at 17222.

5. 5 C.F.R. § 213.3501—generally

OPM proposes to create a new 5 C.F.R. § 213.3501 to indicate that Schedule PC applies to career employees who reasonably expect to continue working beyond the end of a presidential administration, absent performance or conduct issues warranting removal.[639] Because Schedule PC purports to apply 5 U.S.C. § 2302(a)(2)(B)(i) and 5 U.S.C. § 7511(b)(2) to career employees, it is contrary to law for the reasons discussed above. To the extent the administration intends to apply 5 U.S.C. § 2302(a)(2)(B)(i) or 5 U.S.C. § 7511(b)(2) to all such employees moved involuntarily into Schedule PC, despite having accrued civil service protections, this provision is contrary to law and the Constitution for all the reasons discussed in previous sections of this comment.

Ironically, OPM insists that the language of the proposed § 213.3501 will "make[] it clear that Schedule Policy/Career is not to be used for patronage purposes."[640] The administration has made precisely the opposite clear, as discussed earlier. The creation of Schedule PC is intended to strip the OSC and the MSPB of jurisdiction to enforce anti-patronage protections and leaves career civil servants with no recourse. The executive order provisions purporting to recreate the prohibited personnel practices law provide that nothing in them is enforceable by any person.[641] 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—of which the administration has demonstrated that is has none. Evidence of the administration's contempt for career federal employees and sustained effort to politicize the federal workforce is abundant:

- President Trump has called career federal employees "crooked," "dishonest" and "corrupt."[642] On the first day of his second term, he declared that "most" federal employees "are being fired" and that "it should be all of them."[643]

- President Trump fired the Special Counsel,[644] replacing that Senate-confirmed appointee with a loyalist acting official who promptly dismissed thousands of prohibited personnel practice claims.[645] That official also issued new guidance authorizing federal employees to wear and post candidate materials in the workplace after an election.[646] This change

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[639] *Id*. at 17222.

[640] *Id*. at 17201.

[641] Exec. Order 13,957, § 7; Exec. Order 14,171, § 7.

[642] Erich Wagner, *Trump's second-term agenda: Breaking the bureaucracy*, GOV'T EXEC. (Sep. 16, 2024), https://tinyurl.com/msauddjt; Erich Wagner, *Trump calls federal workforce 'crooked,' vows to hold them 'accountable'*, DEFENSE ONE (Aug. 28, 2024), https://tinyurl.com/456twry5.

[643] Erich Wagner, *Trump: Agencies should fire 'all' bureaucrats*, GOV'T EXEC. (Jan. 20, 2025), https://tinyurl.com/283h58cx;

[644] Jacob Rosen & Melissa Quinn, *Head of federal whistleblower office drops legal battle challenging his firing*, CBS NEWS (Mar. 7, 2025), https://tinyurl.com/mu8kbchn.

[645] Eileen Sullivan, *Government Watchdog Drops Inquiries Into Mass Firings of Probationary Workers*, N.Y. TIMES (Apr. 21, 2025), https://tinyurl.com/5475ambf.

[646] U.S. Off. of Special Counsel, *Hatch Act Advisory Opinion Rescinding Advisory Opinions Dated May 20 and October 15, 2024* (April 25, 2025), https://tinyurl.com/bnvhxn8j. *See also* Eileen Sullivan, *Trump Officials Weaken Rules Insulating Government Workers From Politics*, N.Y. TIMES (April 25, 2025), https://tinyurl.com/4ca55ejm.

means that employees can—and likely 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 significant change means that political appointees and supervisors in agencies will know which Schedule PC employees fervently support the President politically and which do not. The results of that revelation are predictable—the spoils system will return to a large segment of the federal workforce.

- Trump purported to fire a Democratic appointee on 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. Trump left the MSPB without a quorum for his entire first term.[647] Therefore, this action appears to be a blatant attempt to gut the CSRA's statutory remedial mechanism for correcting unwarranted adverse actions, including those that constitute prohibited personnel practices.[648]

- President Trump has similarly purported to fire a member of the Federal Labor Relations Authority board.[649] That case too is in litigation.

- President Trump has purported to exercise authority to bar collective bargaining activity for hundreds of thousands of federal employees,[650] seeking to deprive them of access to grievance and arbitration procedures for addressing unwarranted adverse actions, including those that constitute prohibited personnel practices[651]

- President Trump fired the Inspectors General to whom most federal employees would ordinarily blow the whistle on wrongdoing by powerful political appointees and report widespread whistleblower retaliation when the Special Counsel does not act.[652]

- OMB Director Russell Vought and acting OPM Director Charles Ezell issued a memorandum in February about what they called the "corrupt federal bureaucracy."[653] Vought has also notoriously proclaimed:

> "We want the bureaucrats to be traumatically affected," he said. "When they wake up in the morning, we want them to not want to go to work

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[647] Ana Popovich & Geoff Schweller, *Merit Systems Protection Board Regains Quorum for First Time in Over Five Years*, WHISTLEBLOWER NETWORK NEWS (Mar. 2, 2022), https://tinyurl.com/zsfprbyc.

[648] *Special Couns. ex rel. Klein v. Dep't of Veterans Affs*., 124 M.S.P.R. 191, 193 (2017) (indicating board must have more than one member for quorum).

[649] Erich Wagner, *Trump apparently fires FLRA chairwoman*, GOV'T EXEC. (Feb. 11, 2025), https://tinyurl.com/ypvrpz4c.

[650] Michael Kunzelman, *Judge blocks Trump administration from nixing collective bargaining for most federal employees*, ASSOCIATED PRESS (Apr. 25, 2025), https://tinyurl.com/38tk6bzb.

[651] 5 U.S.C. § 7121.

[652] Aneeta Mathur-Ashton, *What Happens When the Watchdogs Are Fired? America Is About to Find Out*, U.S. NEWS & WORLD REPORT (Apr. 15, 2025), https://tinyurl.com/4x2ccxdw.

[653] Memorandum from Russell Vought, Dir., Off. of Mgmt. & Budget, and Charles Ezell, Dir., Off. of Pers. Mgmt., to heads of executive departments and agencies, *Guidance on Agency RIF and Reorganization Plans Requested by Implementing The President's "Department of Government Efficiency" Workforce Optimization Initiative* (Feb. 26, 2025), https://tinyurl.com/shwak7ar.

> because they are increasingly viewed as the villains. We want their funding to be shut down so that the EPA can't do all of the rules against our energy industry because they have no bandwidth financially to do so.
>
> "We want to put them in trauma."[654]

- Vice President JD Vance once said that President Trump should: "fire every single mid-level bureaucrat, every civil servant in the administrative state. Replace them with our people.[655]

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. By perverting two narrow exclusions in the CSRA, the President and his administration are trying to overturn the work of the people's representatives in Congress over more than a century.[656] OPM's merely stating that the administration will not bring back patronage practices does not suffice when the revised rule would eliminate any enforcement mechanism with respect to that promise.

6. 5 C.F.R. § 213.3501—enhanced facilitation of burrowing by political appointees

OPM proposes to provide in subsection (c) of 5 C.F.R. § 213.3501 that Schedule PC employees will receive competitive status after one year of service: "Individuals appointed to positions in Schedule Policy/Career are not subject to probationary or trial periods and acquire competitive status after completing one year of continuous service."[657] This language would convert all Schedule PC employees to competitive status after one year of service, regardless of whether their positions would ordinarily have been included in the competitive service or an excepted service schedule. By its terms, therefore, subsection (c) purports to grant competitive status to attorneys who are placed in Schedule PC, who ordinarily serve in Schedule A.[658] Granting attorneys competitive status is contrary to the intention behind a statutory prohibition carried forward in appropriations laws since the first half of the twentieth century that bars administering civil service tests to attorneys.[659] Congress has been clear since the time of

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[654] Molly Redden, Andy Kroll & Nick Surgey, *"Put Them in Trauma": Inside a Key MAGA Leader's Plans for a New Trump Agenda*, PROPUBLICA (Oct. 28, 2024), https://tinyurl.com/yc63uatv.

[655] Joe Davidson, *Trump's second-term agenda plans a purge of the federal workforce*, WASH. POST (July 26, 2024), https://tinyurl.com/5crb87a2.

[656] Covering the results of a recent Siena poll, the *New York Times* observed that "Voters said he had 'gone too far' on . . . his cuts to the federal work force." Shane Goldmacher, Ruth Igielnik & Camille Baker, *Voters See Trump's Use of Power as Overreaching, Times/Siena Poll Finds*, N.Y. TIMES (Apr. 25, 2025), https://tinyurl.com/h2rrnran.

[657] 90 Fed. Reg. at 17222.

[658] 5 C.F.R. § 213.3102.

[659] Full-Year Continuing Appropriations and Extensions Act, 2025, Pub. L. No. 119-4, 139 Stat. 9 (2025) (carrying forward requirements of 2024 appropriations acts), https://tinyurl.com/54dn8kuj; Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, 138 Stat. 460, 560 (H. R. 2882-101) ("[N]o part of this appropriation shall be available for salaries and expenses of the Legal Examining Unit of OPM established pursuant to Executive Order No. 9358 of July 1, 1943, or any successor unit of like purpose…."), https://tinyurl.com/4vf36skz; *see also Fiorentino v. United States*, 607 F.2d 963, 965-66 (Ct. Cl. 1979) ("It has long been known around this 'island' of

President Franklin Roosevelt that it did not want attorneys included in the competitive service.[660]

More importantly, this provision will enhance the capacity of political appointees to burrow into government at the end of the Trump administration. Given that there is no meaningful protection against politicized hiring, as discussed in connection with proposed 5 C.F.R. § 302.102(d), below, new hires into Schedule PC are likely to be chosen based on their political allegiances. Therefore, this grant of competitive status to Schedule PC appointees will facilitate individuals who are effectively political appointees burrowing into government at the end of the Trump administration. They will be able to compete for competitive service positions for which they would not otherwise be eligible to compete.

E. 5 C.F.R. part 302

OPM proposes to make three changes in part 302: to remove procedural protections from career employees moved involuntarily into Schedule PC; to establish requirements for hiring new employees into Schedule PC positions; and to facilitate Trump administration appointees burrowing into the civil service by granting all Schedule PC employees competitive status after one year of service.

1. 5 C.F.R. part 302, subpart F.

OPM proposes to revoke subpart F of 5 C.F.R. part 302. Subpart F protects employees against abuses of section 7511(b)(2) by requiring a review of any movement of an employee or an employee's position into an excepted service schedule and by providing an employee an avenue to address an agency's failure to recognize that such action does not strip accrued civil service protections under the CSRA.

OPM mistakenly asserts that "subpart F . . . no longer remains in effect" due to presidential action.[661] That claim is incorrect for three reasons:

(1) although 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;

(2) the president did not rescind the regulation, nor did he purport to do so; and

(3) the executive order left OPM discretion as to the action it should take.

Washington, and we may notice it under Federal Rules of Evidence s 201, that the Congress has been always opposed to Civil Service Commission (CSC) testing and examining of attorney positions in the Executive branch under the competitive system. The Commission has been equally unwilling to admit them to the 'competitive' service without such testing.").

[660] U.S. CIVIL SERV. COMM'N, REP. TO THE S. COMM. ON POST OFF. AND CIVIL SERV., 93D CONG., STATUTORY EXCEPTIONS TO THE COMPETITIVE SERVICE, at 227 (Comm. Print 1973) (discussing struggle between President Roosevelt and Congress over placing attorney positions in the competitive service), https://tinyurl.com/mw69s8sa.

[661] 90 Fed. Reg. 17205-06.

A review of the executive order confirms the facts underlying reasons (2) and (3). Rather than purporting to issue or rescind a regulation, President Trump wrote: "Until 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."[662] By its very terms—"[u]ntil such rescissions are effectuated"— the executive order asserts that no rescission has occurred. The order expressly leaves it to OPM to rescind regulations.[663] 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."[664] This qualification of the president's directive to OPM grants OPM discretion to determine which parts of its regulations pose an impediment and to determine how best to address that perceived impediment. With such discretion, OPM's issuance of this proposed regulation is not shielded from APA requirements by Executive Order 14,171.[665]

Although OPM has authority to rescind subpart F through notice and comment rulemaking, it must do so using the same procedures it used to issue the regulations,[666] and the requirements of reasoned decisionmaking will apply with full force.[667] The decisions set forth in the preamble do not meet this standard.

First, the mere change in administration is not a sufficient justification for changing course.[668]

Second, nothing in subpart F applies to the President seeking an agency head's opinion such that it would implicate the Opinion Clause of the Constitution.[669] Subpart F applies "when an agency moves" positions or employees under the circumstances there specified.[670] Nothing in the existing regulation purports to prevent the President from seeking "agency heads'" unvarnished opinions about what positions belong in Schedule Policy/Career; subpart F only governs the actual movement of such positions.

Third, the purported "inconsisten[cy] with the hierarchy of authority" between OPM and the President does not actually provide a rationale for rescinding subpart F, as nothing in

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[662] Exec. Order No. 14,171, § 4.

[663] *Id*. (providing that the OPM Director "shall . . . rescind"). OPM admits as much, though it exaggerates the scope of the presidential directive by implying that Executive Order 14,171 required a full rescission of all provisions that OPM amended on April 9, 2024: "Executive Order 14171 requires that OPM rescind the amendments made by the April 2024 final rule." 90 Fed. Reg. at 17187.

[664] Exec. Order No. 14,171, § 4.

[665] *See, e.g*., *AIDS Vaccine Advoc. Coal. v. U.S. Dep't of State*, No. 25-CV-00400, 2025 WL 485324, at *5 (D.D.C. Feb. 13, 2025), *enforced*, No. 25-CV0-00400, 2025 WL 569381 (D.D.C. Feb. 20, 2025); *Milligan v. Pompeo*, 502 F. Supp. 3d 302, 314 (D.D.C. 2020); *O.A. v. Trump*, 404 F. Supp. 3d 109, 147 (D.D.C. 2019).

[666] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015).

[667] *See, e.g*., *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (regulations must be "supported by the reasons that the agencies adduce").

[668] 90 Fed. Reg. at 17206. *See Federal Communications Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *id.* at 536 (Kennedy, J., concurring).

[669] 90 Fed. Reg. at 17206.

[670] 5 C.F.R. § 302.601.

subpart F "impede[s] Presidential authority." Subpart F does not purport to prohibit the establishment of Schedule PC or the movement of incumbent employees into such an excepted service schedule. Put simply, subpart F and the executive orders can co-exist, so this purported inconsistency in hierarchy does not provide a reasoned decision for rescinding subpart F.

Fourth, subpart F does not "create an entitlement to adverse action procedures that is denied by statute,"[671] for the reasons discussed above with respect to 5 C.F.R. part 212.

Fifth, supbart F does not "transfer[] decisional authority over which positions can go into Schedule PC from the President to subordinate officers.[672] Section 302.602(b)(3),[673] which requires Chief Human Capital Officer (CHCO) certification that "movement is consistent with the standards set forth by the directive, as applicable, and with merit systems principles" does not transfer decisional authority to CHCOs. OPM provides absolutely no support for its contention that "[s]ome CHCOs may be unwilling to issue certifications necessary to transfer positions into Schedule Policy/Career, even if the President directs the move."[674] Such unsupported surmise is an insufficient basis for regulatory action. Nor does allowing MSPB appeals *concerning continued accrued status*[675] transfer any decisional authority "over which positions can go into Schedule Policy/Career."[676]

Finally, OPM provides no support for its contention that these procedural steps and MSPB appeals will produce "protracted litigation" or confusion.[677] Nor does OPM weigh the benefits of such procedural steps and appeals for impacted employees against the asserted benefits of "certainty and dispatch."[678] As with several of OPM's other justifications, just saying something is so does not constitute reasoned decisionmaking.

2. 5 C.F.R. § 302.102(d)

OPM proposes to add a new subsection (d) to 5 C.F.R. § 302.102. Subsection (d) would purport to require agencies to make appointments to Schedule PC—presumably only with respect to new hires, rather than employees in redesignated positions—"in the same manner as to positions in the competitive service, unless such positions would, but for their placement in Schedule Policy/Career, be listed in another excepted service schedule."[679]

OPM does not explain what procedures, rights or obligations it deems covered by the phrase "same manner." Under ordinary competitive hiring procedures, applicants would have the right to file prohibited personnel practice complaints with the Office of Special Counsel. OPM offers no assurances that the right to file OSC complaints is covered by this vague

[671] 90 Fed. Reg. at 17206.
[672] *Id*. at 17206.
[673] OPM incorrectly cites Section 602(b)(2). *Id*. at 17206.
[674] *Id*. at 17206.
[675] 5 C.F.R. § 302.603.
[676] 90 Fed. Reg. at 17206.
[677] *Id.*
[678] *Id.*
[679] *Id*. at 17223.

language, nor could it given its position that Schedule PC employees will have no right to file OSC complaints.

As a practical matter, nothing in OPM's proposed regulations would restrain the administration from hiring Schedule PC appointees based on their political affiliation. As discussed earlier, the executive orders offer only that political appointees in an employee's agency will review whether appointees in the same agency violated merit system principles,[680] and both executive orders expressly disclaim any right on the part of any individual to have even that meaningless requirement followed.[681]

There is also a lack of clarity as to how the new subsection (d) will apply to veterans. Under ordinary competitive hiring procedures, a preference eligible veteran or other preference eligible would have the right to appeal a nonselection to the MSPB after first filing a complaint with the Secretary of the Department of Labor.[682] Such an individual would also have the right to seek judicial relief regarding the nonselection.[683] OPM does not state clearly whether it is stripping veterans of these statutory protections intended to acknowledge their service and sacrifice to this nation.

There are other problems with OPM's proposed addition of subsection (d). OPM does not explain how it will track the determination as to which procedures apply after an initial incumbent leaves a Schedule PC position or in the event of a subsequent reorganization in an agency.[684] 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 PC.[685] Moreover, OPM's application of competitive hiring procedures for some Schedule PC positions undermines the determination that the positions are, indeed, of a "confidential, policy-determining, policy-making or policy-advocating" nature. If these positions are not too sensitive for ordinary recruitment procedures, they are not too sensitive for ordinary retention procedures.

F. 5 C.F.R. part 432

OPM proposes to add Schedule PC positions to a list of exclusions from performance-based adverse action procedures otherwise applicable to competitive service employees and many excepted service employees at 5 C.F.R. § 432.102.[686] This change would be unremarkable if OPM were to properly place only political appointee positions in Schedule PC. Because the administration proposes to include the positions of career employees, this change is flawed for all the reasons previously discussed in this comment.

In addition, this change is inconsistent with the purpose of the exception at 5 U.S.C. § 4301(2)(G) on which OPM relies. The Senate committee in which the CSRA originated explained in its report on the bill that section 4301 was never meant to give OPM authority to

[680] Exec. Order 13,957, § 6, *as amended by* Exec. Order 14,171.
[681] Exec. Order 13,957, § 7; Exec. Order 14,171, § 7.
[682] 5 U.S.C. §§ 3330a, 3330c.
[683] *Id*. § 3330b.
[684] 90 Fed. Reg. at 17207.
[685] *Id*.
[686] *Id*. at 17203.

destabilize the CSRA's framework for employment in the federal civil service by excluding a significant swath of the workforce from the statutory performance accountability system:

> This section also authorizes the Office of Personnel Management to exclude an agency or positions not in the competitive service from this subchapter. This authorization gives OPM the flexibility to make exceptions to the coverage of this subchapter whenever it determines that an exception is in the interest of good administration, and to revoke an administrative exception when no longer warranted. *It is expected that this authority to exempt agencies or positions will be used sparingly*.[687]

In the past, OPM has authorized exclusions on a case-by-case basis for certain positions, for political appointee positions, and for certain temporary positions.[688] Given that OPM is proposing to cover at least 50,000 employees by the performance exception—and, in actuality, may cover hundreds of thousands of employees—OPM's stated justification for defying the purpose for which Congress enacted this provision is inadequate. Far from increasing accountability for performance, this proposed exception will *reduce* accountability for political appointees who seek to retaliate against employees for whistleblowing, discriminate based on political affiliation, or otherwise abuse their authority. It will further increase the capacity of the administration to reinstate the spoils system in a significant segment of the federal workforce.

G. 5 C.F.R. part 451

In 2024, OPM amended 5 C.F.R. § 451.302(b)(3)(ii) to ensure consistent use of language throughout OPM's regulations by replacing the phrase "confidential or policy-making" with the phrase "confidential or policy-determining."[689] OPM now proposes to rescind that change for no discernible reason.[690] Its explanation is that: "This [proposed change] reflects OPM's belief that 'policy-determining' and 'policymaking' are not synonyms for political appointees but refer to individuals involved in determining or making agency policy, respectively."[691] OPM does not explain what relevance the meaning of these discrete phrases has to the meaning of the term of art "confidential, policy-determining, policy-making or policy-advocating." More importantly, OPM does not explain why swapping one of these discrete phrases for the other addresses OPM's stated goal of demonstrating that they do not refer to political appointees.[692] Given that OPM is also proposing to remove the definition of "confidential or policy-determining" at 5 C.F.R. § 210.102(b)(4),[693] the explanation for this change to 5 C.F.R. § 451.302(b)(3)(ii) is incoherent.

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[687] S. REP. 95-969, 41 (1978) (emphasis added).

[688] 5 C.F.R. § 430.202(c)-(d). *See also* U.S. Off. of Pers. Mgmt., Performance Management and Recognition System, 50 Fed. Reg. 35488, 35496 (1985) (excluding noncareer executive assignment positions).

[689] Upholding Civil Service Protections and Merit System Principles, 88 Fed. Reg. 63862, 63872 (Sep. 18, 2023), https://perma.cc/BB5Z-XMBV.

[690] 90 Fed. Reg. at 17223.

[691] *Id*. at 17202.

[692] *Id*.

[693] *Id*. at 17221.

H. 5 C.F.R. part 752

OPM proposes to amend 5 C.F.R. §§ 752.201, 752.401, 752.405 in an effort to ensure that employees placed in Schedule PC lack the right to appeal adverse actions to the MSPB or to file complaints with the Office of Special Counsel.[694] The proposed action is contrary to law because it misapplies 5 U.S.C. § 7511(b)(2) and 5 U.S.C. § 2302(a)(2)(B)(i), and it is unconstitutional because it is predicated on political affiliation discrimination and seeks to strip property interests without due process.

VI. CONCLUSION

Ultimately, the administration is trying to dismantle a cornerstone of American democracy: a federal civil service hired and retained based on employees' abilities, not their fealty to a politician. This effort directly challenges the will of the American people, whose elected representatives in Congress have worked for over a century to protect them by ensuring that federal employees loyally implement the laws of this nation and faithfully deliver services to the public, without fear of political retaliation.

Executive Order 14,171 is contrary to federal law and the United States Constitution, as are the Final Ezell Memorandum and OPM's proposed regulations. In the case of the Final Ezell Memorandum, OPM also violated the requirement to use notice and comment procedures.

[694] *Id*. at 17223-24.

APPENDIX 1

APPENDIX 1 — Historical usage of Schedule C

There have been consistently only around 1,500 positions in Schedule C since that excepted service schedule began 72 years ago. Since the enactment of the Civil Service Reform Act (CSRA) in 1978, no other excepted service schedule has been covered by 5 U.S.C. § 7511(b)(2) or § 2302(a)(2)(B)(i). Therefore, the historical use of Schedule C is instructive as to the meaning of those narrow exclusions because positions in that excepted service represent the universe of positions that Republican and Democratic Presidents alike have interpreted as amenable to coverage by section 7511(b)(2) or 2302(a)(2)(B)(i).

The longstanding interpretation of the executive branch has been that language describing positions of a "confidential, policy-determining, policy-making, or policy-advocating" or "confidential or policy-determining" character refers to positions that are occupied by political appointees with no expectation of continued employment beyond the administration that appointed them or, in some cases, the term of the political appointee they support. The 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.

These positions have been listed under Schedule C or, between 1967 and 1978, designated as Noncareer Executive Assignments (NEA). The CSRA replaced the latter category, NEA positions, with Senior Executive Service (SES) positions and severely limited the number of noncareer SES positions.[695] This section discusses the limited use of Schedule C positions. For over 70 years, the government has recognized that there are only about 1,500 non-executive positions in the executive branch that legitimately qualify as confidential or policy positions.

President Eisenhower's creation of Schedule C in 1953 sparked fears of a massive shift away from merit principles in favor of patronage. The Eisenhower administration sought to reassure the public that it understood how few positions could legitimately be characterized as confidential or policy-determining. In a 1958 book on the civil service, author Paul Van Riper indicated that the Civil Service Commission (CSC) had "promised from the beginning that only a relatively small number of Federal positions will be placed in this schedule."[696] The CSC issued a series of press releases from 1953 through 1955 showing that it was moving only small numbers of positions to Schedule C and had rejected about the same number of agency requests to move positions as it had approved.[697] The CSC's 1954 annual report published a pie chart showing that the creation of Schedule C had affected a negligible portion of the civil service:[698]

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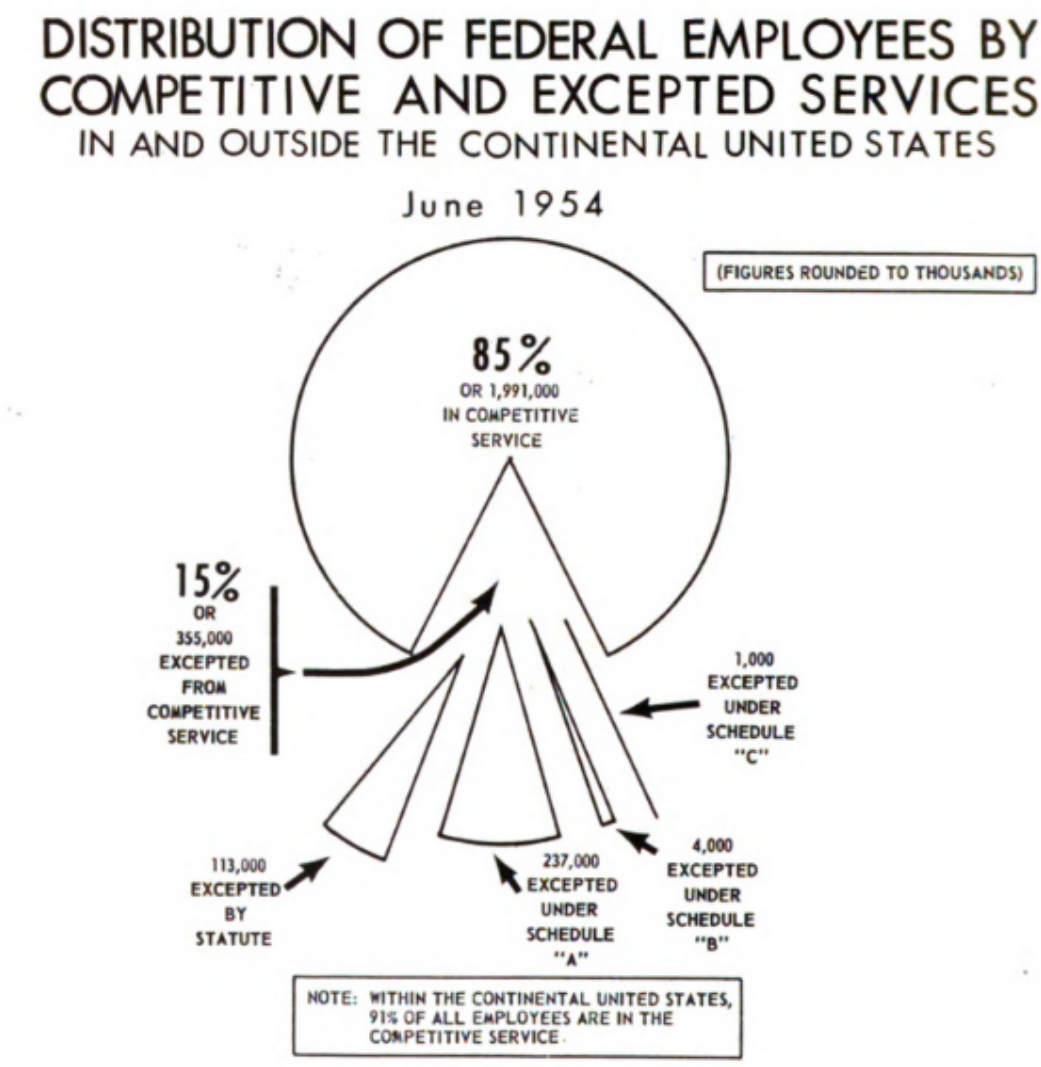
[695] 5 U.S.C. § 3134(b).

[696] PAUL P. VAN RIPER, HISTORY OF THE U.S. CIVIL SERVICE, at 496 (Row, Peterson & Co., 1958; reprinted by Greenwood Press, 1976), https://tinyurl.com/b6rdpjwe.

[697] *See* Protect Democracy & Walter M. Shaub Jr., Comment on Proposed Rule Upholding Civil Service Protections and Merit System Principles, Docket No. OPM-2023-0013, Comment No. 2134, Attachment 1, at 2-20 and 22-32 (Nov. 16, 2023), https://tinyurl.com/3t8699pw.

[698] U.S. CIVIL SERV. COMM'N, 1954 ANNUAL REPORT, 10 (1954), https://tinyurl.com/2pkyenb7.



The CSC was explicit in that report about the purpose of designating these positions as confidential or policy-determining:

> To maintain the integrity of the merit system, it is essential that career employees not become identified with the policy-determining function of particular programs of any administration. The Commission gave early recognition to the need for removing from the competitive civil service *positions of a policy-determining nature, the incumbents of which should be subject to change with each new political administration of the Federal Government*. Executive Order 10440 of March 31, 1953, established Schedule C as a special group of policy-determining and confidential positions exempt from the provisions of the civil-service rules as a means of meeting this need.[699]

[699] U.S. CIVIL SERV. COMM'N, 1954 ANNUAL REPORT, 8 (1954) (emphasis added), https://tinyurl.com/4wshua7r.

Over the next 70 years, the executive branch never substantially expanded the number of positions designated as confidential or policy-related. President Donald Trump attempted unsuccessfully to create and fill a new Schedule F, but no positions were ever moved into that schedule.

Because Schedule F failed, the universe of non-executive confidential or policy positions has, since 1953, consisted of Schedule C positions. This means that the history of Schedule C, therefore, is the history of the meaning of the terms "confidential or policy-determining" or "confidential, policy-determining, policy-making, or policy-advocating." That history is one of consistency. In 1976, CSC Chairman Robert E. Hampton told a House committee that "[o]ur experience over the past 20 years has been the number of administrative exceptions has remained fairly constant."[700] Based on the research represented in the table below, the number of Schedule C positions also remained fairly constant between 1966 and 2022. That is because Democratic and Republican administrations alike have demonstrated through their actions a common understanding that only about 1,200 to 1,500 executive branch positions can be characterized as "confidential or policy-determining" or "confidential, policy-determining, policy-making, or policy-advocating."

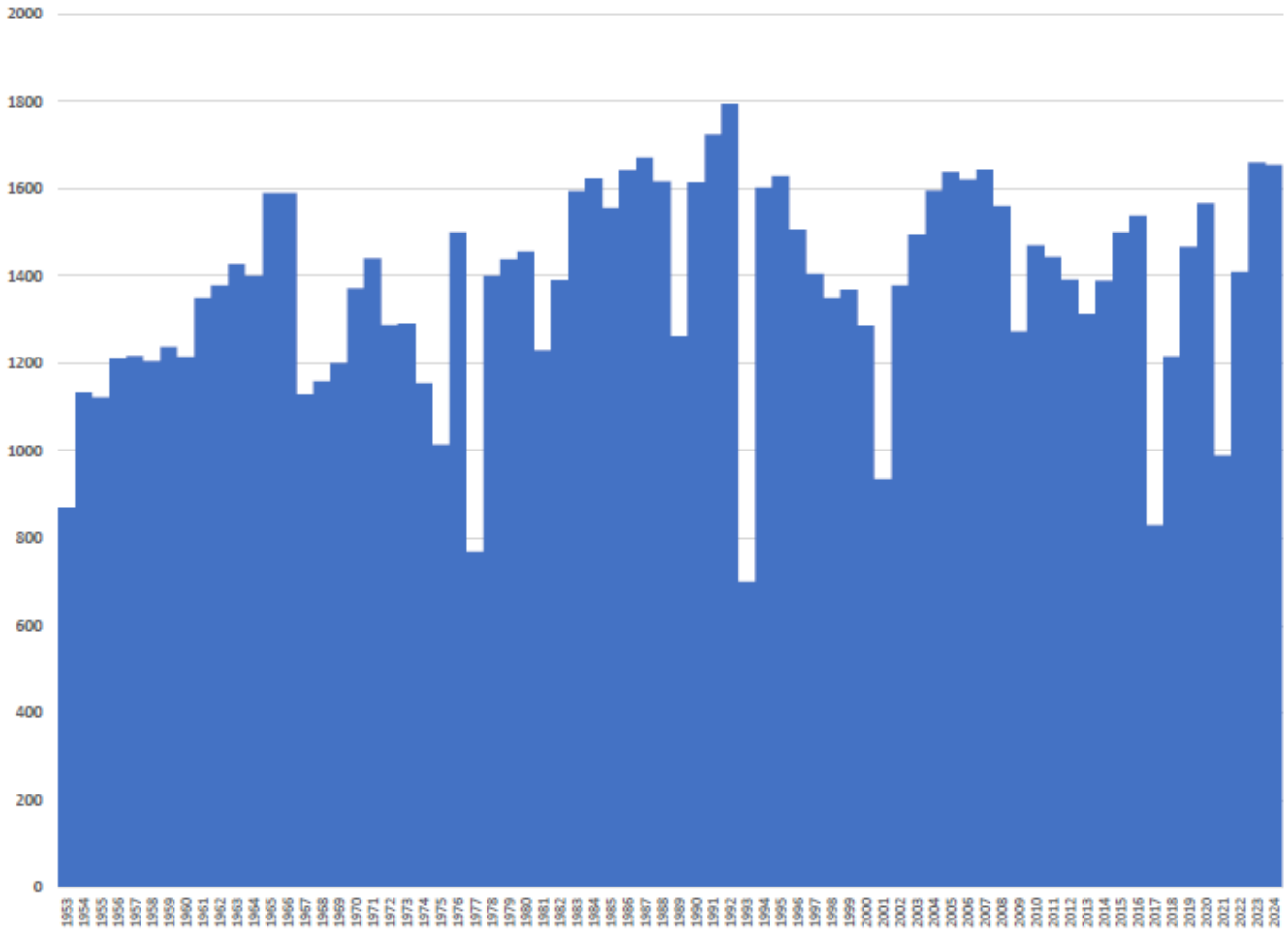
The bar chart below illustrates the number of Schedule C positions over the last 70 years. Figures for the early years of Schedule C were slightly inflated because they included executive positions. President Johnson pulled super-grade positions (GS-16, GS-17, and GS-18) out of Schedule C in a 1966 executive order that created the NEA category.[701] In 1978, the CSRA replaced the NEA category with the noncareer SES, which is limited to no more than 10% of all SES positions, which, as of March 2023, amounted to only 764 employees.[702] The data for this bar chart is pulled from the table including later in this section, the sources for which are cited in footnotes for the individual (year) entries.

[700] *Civil Service Amendments of 1976: Hearings on H.R. 12080, Before the Subcomm. on Manpower & Civil Serv. of the H. Comm. on Post Off. and Civil Serv., 94th Cong.*, 7 (1976) (testimony of R. Hampton), https://tinyurl.com/4y8kdf58.

[701] The executive order provided that the new NEA system would become effective not later than one year after its date of issuance. Exec. Order 11315 (1966), https://tinyurl.com/2s3hw3jv.

[702] 5 U.S.C. § 3134(b); U.S. Off. of Pers. Mgmt., FedScope, https://tinyurl.com/3vra4348.

Bar chart of Schedule C appointments (1953-2024)



As indicated earlier, the table printed below contains the data for the above chart. The second column of the table identifies the number of Schedule C positions in each year. The following explanatory notes pertain to the entries in the table tallying the number of Schedule C positions for each year from 1953 to 2023:

- *Data limited to September 30, 2024.* The most recent data in FedScope covers the end of fiscal year 2024. Data for 2025 does not appear to be available yet.

- *Executive positions were included in the tally prior to 1967*. For years prior to 1967, when the Noncareer Executive Assignment (NEA) category was created, the number of positions listed in this table includes executive-level positions.[703] Beginning on November 17, 1967, NEA positions were tracked separately.[704]

[703] H. COMM. ON POST OFF. AND CIVIL SERV., 94TH CONG., THE MERIT SYSTEM IN THE UNITED STATES CIVIL SERVICE, 22 n.1 (Comm. Print 94-10 1975) (monograph by Bernard Rosen), https://tinyurl.com/bde34pyw.

[704] 5 C.F.R. § 213.3301a (1977) (p. 50) ("The exception from the competitive service for each position in the executive branch listed in Schedule C which is classified in grade GS-16, GS-17, or GS-18, and is covered by Civil

- *Some Schedule C positions included in the tally for earlier years were vacant*. Some of the listed numbers of positions may have been vacant in years prior to 1982 because authorizations for Schedule C positions were not automatically revoked immediately upon becoming vacant. For most years between 1953 and 1975, the vacancy rate was "twenty to twenty-five percent of the total positions," but the rate was approximately 32 percent in 1971.[705]

    - In 1973, the CSC instituted a policy of automatically revoking the authorization for any Schedule C position at the GS-15 level or below that remained vacant for 60 days, with the possibility of an extension of 60 more days.[706] As a result, the vacancy rate was probably lower in 1973 and in subsequent years than it had been in years prior to 1973. (For a little over four months before May 1977, OPM extended the period to 120 days, with no possibility of an extension.)[707]

    - In 1981, OPM decided to publish annual consolidated lists of Schedule C positions in the Federal Register.[708] Before then, OPM listed authorized positions in 5 C.F.R.

Service Rule IX (§ 9.1 of Subchapter A of this chapter) is revoked effective November 17, 1967. Each such position is removed from Schedule C effective November 17, 1967."), https://tinyurl.com/4xepv4ym.

[705] H. COMM. ON POST OFF. AND CIVIL SERV., 94TH CONG., THE MERIT SYSTEM IN THE UNITED STATES CIVIL SERVICE, 22 n.2 (Print 94-10 1975), https://tinyurl.com/bde34pyw.

[706] *Id*.

[707] Excepted Service, Pers. Mgmt. Off. Notice, 41 Fed. Reg. 55507 (Dec. 21, 1976) ("Section 213.3301b is temporarily amended to show that until May 1, 1977, each Schedule C position at grade GS-15 and below in the executive branch is revoked when the position has been vacant for 120 calendar days or more and cannot be extended. (After May 1, 1977, the Commission will revert back to the limitation of 60 calendar days.)"), https://tinyurl.com/mwd3nmpm.

[708] OPM declared in April 1981 that it would begin publishing consolidated lists annually, starting that year; however, it published notice of a delay later that year and does not appear to have published its first consolidated list until 1982. Excepted Service, Pers. Mgmt. Off. Notice, 47 Fed. Reg. 28901 (July 2, 1982) ("[F]inal regulations published April 3, 1981, provided that excepted authorities approved by the Director of the Office of Personnel Management solely for use by a specific agency would be published only as notices in the Federal Register and would not be incorporated in 5 CFR. The Supplementary Information to those regulations stated that notice of authorities established and revoked would be published monthly and that a consolidated notice of all authorities, current as of June 30, would be published annually."), https://tinyurl.com/mv94tb4h; OFF. OF THE FED. REGISTER, NAT'L ARCHIVES AND RECORDS ADMIN., FEDERAL REGISTER INDEX, JANUARY-DECEMBER 1981, VOLUME 46 (Dec. 31, 1981) (no reference to a consolidated listing of Schedule C positions in 1981), https://tinyurl.com/j72rkjc6; Excepted Service, Pers. Mgmt. Off. Notice, 46 Fed. Reg. 43912, 43913 (Sep. 1, 1981) ("A consolidated listing of all authorities, scheduled to be published as of June 30 of each year, will be delayed this year until early September (notice of the delay was published at 46 FR 30227)."), https://tinyurl.com/yu9a7m54; Excepted Service, Pers. Mgmt. Off. Notice, 46 Fed. Reg. 30227 (June 5, 1981) ("In final regulations published April 3,1981, which decodified individual schedule A, B and C appointing authorities, OPM announced its intention to publish an annual notice of all such authorities, current as of June 30, in the Federal Register. Because of' the time required to prepare the consolidated notice for publication, the first annual notice will instead be prepared as of August 31, 1981, and will be published in early September. Thereafter, the consolidated annual notice of Schedule A, B and C authorities will be published as of June 30 of each year."), https://tinyurl.com/275kuk87; Excepted Service; Listing of Appointing Authorities, Pers. Mgmt. Off. Notice, 46 Fed. Reg. 20146 (Apr. 3, 1981) ("A consolidated notice of all authorities current as of June 30 will be published each year in the Federal Register."), https://tinyurl.com/5dmk55vf; Excepted Service, Pers. Mgmt. Off. Notice, 45 Fed. Reg. 84808 (Dec. 23,1980) ("OPM proposes to eliminate the individual listings of these authorities from Part 213. . . . Once a year, OPM would publish in the Federal Register a notice of all authorities current as of

part 213, but they were not listed in a manner that facilitated a precise count. It is not clear whether OPM followed through on issuing a consolidated listing for 1981, so OPM's consolidated listing for 1982 may have been the first one published in the Federal Register.[709]

- Since December 1, 1981, OPM has tied each Schedule C authorization at the GS-15 level or below to an individual appointee, with the authorization being revoked automatically upon the individual's separation from the position.[710] After that date, there have been no authorized vacant Schedule C positions.

- *The tally for six of the listed years is based on our own manual count*. Every effort was made to ensure that the count of positions was as accurate as possible, but the numbers are identified as approximate due to the difficulty of conducting manual counts.
  - A good-faith manual count was performed for the following six years: 1982, 1990, 1993, 1994, 1995, and 1997.
  - For some of these six years, the number indicated in the table includes certain judicial branch Schedule C positions. It is not clear why OPM included judicial positions in its lists (or how Schedule C applied to the judicial branch).
  - The symbol "~" before the tally for each of these six years is intended to mean "approximately."

- *FedScope citations generally refer to the quarterly tally for September of the indicated year*. For 2023, FedScope data was drawn from the quarter ending March 31; for all other indicated years, FedScope data was drawn from the quarter ending September 30.

Schedule C positions (1953-2024)

Date	#	Source/Notes
1953	871	House committee print[711] (the number indicated is consistent with a CivilService Commission press release that there were 886 positions as of

June 30 of that year. This would replace the annual republication of Part 213 which OPM previously has published each December."), https://tinyurl.com/27myujta.

[709] Consolidated Listing of Schedules A, B, and C Exceptions, Pers. Mgmt. Off. Notice, 47 Fed, Reg. 49292, 49306-49320 (Oct. 29, 1982), https://tinyurl.com/pp5d8268.

[710] Excepted Service, Pers. Mgmt. Off. Notice, 46 Fed. Reg. 58271 (Dec. 1, 1981) ("This amendment provides for immediate revocation of excepted appointing authority under Schedule C when a position covered by such authority becomes vacant. Before making a new appointment under Schedule C, the agency must obtain OPM's approval for reestablishment of the excepted appointing authority."), https://tinyurl.com/ymupd73p.

[711] H. COMM. ON POST OFF. AND CIVIL SERV., 94TH CONG., THE MERIT SYSTEM IN THE UNITED STATES CIVIL SERVICE, 22 n.1 (Comm. Print 94-10 1975) (monograph by Bernard Rosen), https://tinyurl.com/3y4wy8p3 (hereinafter "*Rosen Monograph*").

Date	#	Source/Notes
		January 15, 1954[712])
1954	1,133	House committee print[713] (the number indicated is consistent with a December 31, 1954, press release by the CSC, which indicated there were 1,134 Schedule C positions;[714] consistent with the report of the Commission on the Organization of the Executive Branch of the Government, authorized by Pub. L. No. 83-108, which identified 1,098 positions as of Sep. 9, 1954;[715] and consistent with Van Riper's book, which cited sources indicating there were 868 Schedule C positions by January 5, 1954, and 1,127 by October 11, 1954[716])
1955	1,122	House committee print[717] (the number indicated is the same number the CSC indicated in an August 25, 1955, press release[718])
1956	1,211	House committee print[719]
1957	1,218	House committee print[720]
1958	1,205	House committee print[721]
1959	1,238	House committee print[722]
1960	1,215	House committee print[723] (the number indicated is consistent with a CSC publication, which identified "about 1,200" positions in 1960;[724] and it is consistent with another CSC publication that identified 1218 positions as of

[712] Press Release, U.S. Civil Serv. Comm'n, 1 (Jan. 15, 1954), *copy provided in* Protect Democracy & Walter M. Shaub Jr., Comment on Proposed Rule Upholding Civil Service Protections and Merit System Principles, Docket No. OPM-2023-0013, Comment No. 2134, Attachment 1, at 32 (Nov. 16, 2023), https://tinyurl.com/3t8699pw.

[713] *Rosen Monograph, at 22.*

[714] Press Release, U.S. Civil Serv. Comm'n, 2 (Dec. 31, 1954), *copy provided in* Protect Democracy & Walter M. Shaub Jr., Comment on Proposed Rule Upholding Civil Service Protections and Merit System Principles, Docket No. OPM-2023-0013, Comment No. 2134, Attachment 1, at 10-11 (Nov. 16, 2023), https://tinyurl.com/3t8699pw.

[715] Paul Van Riper, *History of the U.S. Civil Service*, at 496 (Row, Peterson and Company, 1958; reprinted by Greenwood Press, 1976), https://tinyurl.com/4udk3w4c.

[716] TASK FORCE ON PERSONNEL AND CIVIL SERV., COMM'N ON ORG. OF THE EXEC. BRANCH OF THE GOV'T, REPORT ON PERSONNEL AND CIVIL SERVICE, at 192 (Feb. 6, 1955), https://tinyurl.com/3w7zx5as.

[717] *Rosen Monograph, at 22.*

[718] Press Release, U.S. Civil Serv. Comm'n, 1 (Aug. 25, 1955) ("The number of Schedule C positions, all policy-making or confidential, declined from 1,134 to 1,122 during the first six months of 1955, the Civil Service Commission announced today."), *copy provided in* Protect Democracy & Walter M. Shaub Jr., Comment on Proposed Rule Upholding Civil Service Protections and Merit System Principles, Docket No. OPM-2023-0013, Comment No. 2134, Attachment 1, at 2-3 (Nov. 16, 2023), https://tinyurl.com/3t8699pw.

[719] *Rosen Monograph, at 22.*

[720] *Id.*

[721] *Id.*

[722] *Id.*

[723] *Id.*

[724] U.S. CIVIL SERV. COMM'N, THE GOVERNMENT PERSONNEL SYSTEM, PERSONNEL MANAGEMENT SERIES NO. 4, at 4 (Nov. 1960) (revised edition), https://tinyurl.com/ywzsbm8s.

Date	#	Source/Notes
		March 31, 1960[725])
1961	1,349	House committee print[726]
1962	1,379	House committee print[727]
1963	1,428	House committee print[728]
1964	1,400	House committee print[729]
1965	1,590	House committee print[730]
1966	1,590	House committee print[731]
1967	1,128	House committee print[732]
1968	1,160	House committee print[733] (the number indicated is consistent with a manual count of Schedule C positions in the 1968 Code of Federal Regulations, which indicated that there were approximately 1,100 such positions as of January 1, 1968,[734] and a manual count of Schedule C positions listed in the 1968 Plum Book, which indicated that there were approximately 1,015 such position as of Sep. 30, 1968[735])
1969	1,200	House committee print[736]
1970	1,372	House committee print[737]
1971	1,441	House committee print (note: approximately 32% of these 1,441 positions were vacant[738])
1972	1,289	House committee print[739]
1973	1,292	House committee print[740]

[725] U.S. Civil Serv. Comm'n, Rep. to the H. Comm. on Post Off. & Civil Serv., 86th Cong., Maintaining the Integrity of the Career Civil Service, 10 (1960), https://tinyurl.com/mrxr3pue.

[726] *Rosen Monograph, at 22*.

[727] *Id.*

[728] *Id.*

[729] *Id.*

[730] *Id.*

[731] *Id.*

[732] *Id.*

[733] *Id.*

[734] 5 C.F.R. § 213.3301 (1968), https://tinyurl.com/bdhywzub.

[735] H. COMM. ON POST OFF. AND CIVIL SERV., 90TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS (Comm. Print 1968), https://tinyurl.com/yfhbcaus.

[736] *Rosen Monograph, at 22*.

[737] *Id.*

[738] *Id.*

[739] *Id.*

[740] *Id.*

Date	#	Source/Notes
1974	1,155	House committee print[741]
1975	1,014	House committee print[742]
March 1976	~ 1,500	House hearing testimony[743] (estimate by the chair of the Civil Service Commission) (note that, later the same year, the Civil Service Commission estimated that there were about 1,000 positions as of November, but that was after the election when the Ford administration was outgoing[744])
early 1977	769	*Washington Post*[745] (note: Schedule C positions were listed in 5 C.F.R for 1977 but were not described in a way that is amenable to a precise count without additional research[746])
1978	~ 1,400 or < 1,566	this is an estimate based on the following quote from the *Washington Post* and the number of appointees in 1979: "The high point for the Carter administration was reached in August 1980, just a few months before the election. At that time the number of Schedule C appointments had reached 1,566."[747]
Sep. 30, 1979	1,439	GAO[748] (the number indicated is consistent with an OPM memorandum that said that "[a]s of November 4, 1980, there were a total of 1,828 Schedule C positions,1,520 occupied and 308 vacant"[749])

[741] *Id.*

[742] *Id.*

[743] *Civil Service Amendments of 1976: Hearings on H.R. 12080, Before the Subcomm. on Manpower & Civil Serv. of the H. Comm. on Post Off. and Civil Serv.*, 94th Cong., 7 (1976) (testimony of R. Hampton), https://tinyurl.com/4y8kdf58.

[744] Attachment to Memorandum from Raymond Jacobson, Exec. Dir., U.S. Civil Sev. Comm'n, to Dirs. of Pers., at 5 (Nov. 10, 1976), https://tinyurl.com/ycxta8br.

[745] Mike Causey, *Reagan's Plum Book Plumper Than Carters*, WASH. POST (May 11, 1984), https://tinyurl.com/273s5wbd/.

[746] Research would need to be conducted into the number of certain senior positions to which Schedule C appointees were assigned because the regulations contain such language as "One Confidential Assistant *to each Member of the Council*" and "One Private Secretary or Confidential Assistant to the Secretary, to the Under Secretary, and *to each Assistant Secretary of the Army*." 5 C.F.R. §§ 213.3303(g)(2), 213.3307(a) (1977) (emphasis added), https://tinyurl.com/4w2p7knj.

[747] Mike Causey, *Reagan's Plum Book Plumper Than Carters*, WASH. POST (May 11, 1984), https://tinyurl.com/273s5wbd/.

[748] GEN. ACCT. OFF., POLITICAL APPOINTEES IN FEDERAL AGENCIES, GAO/T-GGD-90-4, at 2 and 5 (Oct. 26, 1989) (indicating number of appointees p. 5 and date on p. 2), https://www.gao.gov/assets/t-ggd-90-4.pdf (hereinafter "GAO/T-GGD-90-4").

[749] Memorandum from Alan Campbell, Director, U.S. Off. of Pers. Mgmt. to Edwin Meese, at 2 (Nov. 10, 1980), https://tinyurl.com/3zuhd2uy.

Date	#	Source/Notes
1980	1,456	GAO[750] (the number indicated is somewhat consistent with *Washington Post* reporting of 1,566[751])
1981	1,231	GAO[752] (this number is somewhat higher than *Washington Post* reporting of 1,046 in February 1981, but the new Reagan administration had only just begun[753])
1982	~ 1,390	this number is based on a manual count of positions listed in OPMs consolidated Federal Register notice[754]
1983	1,595	GAO[755] (the number indicated is roughly consistent both with another GAO report that identified 1,471 Schedule C positions in 1983,[756] and it is consistent with *Washington Post* reporting of 1,662 Schedule C positions in April 1983[757])
May 1984	1,623	*Washington Post*[758] (the number indicated is somewhat lower than the number of Schedule C positions that a rough manual count of the Plum Book for 1984 identified, which found approximately 1,750 positions, but the Plum Book was issued later in the year[759])
1985	1,555	GAO[760]
1986	1,643	GAO[761]
Sep. 1987	1,671	GAO[762] (the number indicated is roughly consistent with a subsequent GAO

[750] GEN. ACCT. OFF., FEDERAL EMPLOYEES; TRENDS IN CAREER AND NONCAREER EMPLOYEE APPOINTMENTS IN THE EXECUTIVE BRANCH, GAO/GGD-87-96FS, at 10 (1987) (hereinafter "GAO/GGD-87-96FS"), https://www.gao.gov/assets/ggd-87-96fs.pdf.

[751] Mike Causey, *Reagan's Plum Book Plumper Than Carters*, WASH. POST (May 11, 1984). https://tinyurl.com/273s5wbd.

[752] GEN. ACCT. OFFICE, POLITICAL APPOINTEES; 10-YEAR STAFFING TRENDS AT 30 FEDERAL AGENCIES, GAO/GGD-93-74FS, at 6 (1993) (hereinafter "GAO/GGD-93-74FS"), https://perma.cc/YA5U-KBNX.

[753] Mike Causey, *Reagan's Plum Book Plumper Than Carters*, WASH. POST (May 11, 1984), https://tinyurl.com/273s5wbd.

[754] Excepted Service, Consolidated Listing of Schedules A, B, and C Exceptions, Pers. Mgmt. Off. Notice, 47 Fed. Reg. 49292, 49306-49320 (Oct. 29, 1982), https://tinyurl.com/pp5d8268.

[755] GAO/GGD-87-96FS, at 10 (July 1987).

[756] A subsequent GAO report in 1993 indicated that there were 1,471 Schedule C positions in 1983. GAO/GGD-93-74FS, at 6.

[757] Mike Causey, *Reagan's Plum Book Plumper Than Carters*, WASH. POST (May 11, 1984), https://tinyurl.com/273s5wbd/.

[758] Mike Causey, *Reagan's Plum Book Plumper Than Carters*, WASH. POST (May 11, 1984), https://tinyurl.com/273s5wbd/.

[759] The 1984 Plum Book does not provide a tally of Schedule C positions, but it does list the positions authorized. S. COMM. ON GOVERNMENTAL AFFAIRS, 98TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS, 201 (Comm. Print 98-286 1984), https://tinyurl.com/jr853nun. The Plum Book was issued on December 31, 1984, but it does not indicate the cutoff date for the data collection. *Id.*

[760] GAO/GGD-93-74FS, at 6.

[761] GAO/GGD-87-96FS, at 10.

[762] GAO/T-GGD-90-4, at 2 and 5.

Date	#	Source/Notes
		report that identified 1,527 Schedule C positions in 1987[763])
Sep. 1988	1,616	OPM[764] (the number indicated is apparently consistent with a GAO report, which identified 1,516 positions but which may have omitted 100 created by Executive Order that were identified in the cited OPM source[765])
June 30, 1989	1,262	GAO[766] (the number indicated is somewhat higher than indicated in an earlier GAO report, which found 1,005 Schedule C positions[767])
June 30, 1990	~ 1,614	this number is based on a manual count of positions listed in OPMs consolidated Federal Register notice[768] (an earlier GAO report indicated that there were 1,005 Schedule C positions in June 1989; however, 1989 was a presidential transition year, so the number likely grew before the end of the year[769])
Dec. 31, 1991	1,725	GAO[770] (the number indicated is somewhat higher than indicated in a subsequent GAO report, which found 1,574[771])
June 30, 1992	1,794	Plum Book[772]
June 30, 1993	~ 700	this number is based on a manual count of positions listed in OPM's consolidated Federal Register notice[773]
June 30, 1994	~ 1,602	this number is based on a manual count of positions listed in OPM's

[763] GAO/GGD-93-74FS, at 6.

[764] OPM indicated that it had authorized 1,516 Schedule C positions but that another 100 had been authorized by Executive Order, for a total of 1,616 positions. U.S. OFF. OF PERS. MGMT., FEDERAL CIVILIAN WORKFORCE STATISTICS: EMPLOYMENT AND TRENDS AS OF JANUARY 1989, at 83 (1989) (hereinafter "OPM E&T 1989"), https://tinyurl.com/bdejwyfv.

[765] The GAO report indicated that there were 1,516 Schedule C positions, which is how many OPM had authorized, but GAO may have omitted an additional 100 positions that were authorized by Executive Order. GAO/T-GGD-90-4, at 4; OPM E&T 1989, at 83.

[766] The GAO report indicated that there were 1,516 Schedule C positions, which is how many OPM had authorized, but GAO may have omitted an additional 100 positions that were authorized by Executive Order. GAO/T-GGD-90-4; OPM E&T 1989, at 83.

[767] An earlier GAO report indicated that there were 1,005 Schedule C positions in June 1989; however, 1989 was a presidential transition year, so the number likely grew before the end of the year. GAO/T-GGD-90-4, at 4.

[768] Excepted Service; Consolidated Listing of Schedules A, B, and C Exceptions, Pers. Mgmt. Off. Notice, 55 Fed. Reg. 39086-01, 1990 WL 327294 (Sep. 24, 1990).

[769] An earlier GAO report indicated that there were 1,005 Schedule C positions in June 1989; however, 1989 was a presidential transition year, so the number likely grew before the end of the year. GAO/T-GGD-90-4, at 4.

[770] GEN. ACCT. OFF., POLITICAL APPOINTEES: NUMBER OF NONCAREER SES AND SCHEDULE C EMPLOYEES IN FEDERAL AGENCIES, GAO/GGD-92-lOlFS, at 14 (1992) (Fact Sheet for the Chairman, Subcomm. on Civil Service, Comm. on Post Office and Civil Service, U.S. House of Representatives), https://tinyurl.com/5b82ea6j.

[771] GAO/GGD-93-74FS, at 6.

[772] S. COMM. ON GOVERNMENTAL AFFAIRS, 102D CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS, 201 (Comm. Print 102-509 1992), https://tinyurl.com/4j22kcee.

[773] Excepted Service; Consolidated Listing of Schedules A, B, and C Exceptions, Pers. Mgmt. Off. Notice, 58 Fed. Reg. 50589 (Sep. 28, 1993), https://archives.federalregister.gov/issue_slice/1993/9/28/50571-50602.pdf.

Date	#	Source/Notes
		consolidated Federal Register notice[774]
June 30, 1995	~ 1,628	this number is based on a manual count of positions listed in OPM's consolidated Federal Register notice[775]
Sep. 1, 1996	1,507	Plum Book[776] (the cited version of the Plumb Book was published after the version that appears on GPO's website, which reported 1,465[777])
1997	~ 1,405	this number is based on a manual count of positions listed in OPM's consolidated Federal Register notice[778]
Sep. 30, 1998	1,349	FEDSCOPE[779]
Sep. 30, 1999	1,369	FEDSCOPE[780]
Sep. 1, 2000	1,287	Plum Book[781] (the number indicated is consistent with FEDSCOPE, which indicates that there were 1,228 Schedule C positions as of Sep. 30, 2000[782])
Sep. 30, 2001	936	FEDSCOPE[783]
Sep. 30, 2002	1,379	FEDSCOPE[784]
Sep. 30, 2003	1,494	FEDSCOPE[785]
Sep. 30, 2004	1,596	Plum Book[786] (the number indicated is roughly consistent with FEDSCOPE, which indicates that there were 1,526 Schedule C positions as of Sep. 30, 2004[787])
Sep. 30, 2005	1,638	FEDSCOPE[788]

[774] Excepted Service; Consolidated Listing of Schedules A, B, and C Exceptions, Pers. Mgmt. Off. Notice, 59 Fed. Reg. 50261 (Oct. 3, 1994), https://www.federalregister.gov/citation/59-FR-50261.

[775] Excepted Service; Consolidated Listing of Schedules A, B, and C Exceptions, Pers. Mgmt. Off. Notice, 60 Fed. Reg. 45216 (Aug. 30, 1995), https://www.govinfo.gov/content/pkg/FR-1995-08-30/pdf/95-21329.pdf.

[776] H. COMM. ON GOV'T REFORM AND OVERSIGHT, 104TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS, 248 (Comm. Print 1996) (Nov. 13, 1996 ed.) https://tinyurl.com/375z6f5c.

[777] H. COMM. ON GOV'T REFORM AND OVERSIGHT, 104TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS, 239 (Comm. Print 1996) (Nov. 4, 1996 ed.), https://tinyurl.com/28ws28fx.

[778] Excepted Service; Consolidated Listing of Schedules A, B, and C Exceptions, Pers. Mgmt. Off. Notice, 62 Fed. Reg. 49078 (Sep. 18, 1997), https://tinyurl.com/ys7u3re2.

[779] U.S. Off. of Pers. Mgmt., FedScope for September 1998, https://tinyurl.com/2xcj8yhd.

[780] U.S. Off. of Pers. Mgmt., FedScope for September 1999, https://tinyurl.com/525w599p.

[781] S. COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, 106TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS, 323 (Comm. Print 2000), https://tinyurl.com/94u5w3xc.

[782] U.S. Off. of Pers. Mgmt., FedScope for September 2000, https://tinyurl.com/ym256bm4.

[783] U.S. Off. of Pers. Mgmt., FedScope for September 2001, https://tinyurl.com/34zwxcr2.

[784] U.S. Off. of Pers. Mgmt., FedScope for September 2002, https://tinyurl.com/mryacbku.

[785] U.S. Off. of Pers. Mgmt., FedScope for September 2003, https://tinyurl.com/4kb69jda.

[786] H. COMM. ON GOV'T REFORM, 108TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS, 215 (Comm. Print 2004), https://tinyurl.com/5n8uszr4.

[787] U.S. Off. of Pers. Mgmt., FedScope for September 2004, https://tinyurl.com/3mnbfvhj.

[788] U.S. Off. of Pers. Mgmt., FedScope for September 2005, https://tinyurl.com/yc649rmw.

Date	#	Source/Notes
Sep. 30, 2006	1,620	FEDSCOPE[789]
Sep. 30, 2007	1,644	FEDSCOPE[790]
Sep. 1, 2008	1,559	Plum Book[791] (the number indicated is consistent with FEDSCOPE, which indicates that there were 1,510 Schedule C positions on Sep. 30, 2008[792])
Sep. 30, 2009	1,272	FEDSCOPE[793]
Sep. 30, 2010	1,470	FEDSCOPE[794]
Sep. 30, 2011	1,444	FEDSCOPE[795]
June 30, 2012	1,392	Plum Book[796] (the number indicated is consistent with FEDSCOPE, which indicates that there were 1,416 Schedule C positions as of Sep. 30, 2012[797])
Sep. 30, 2013	1,313	FEDSCOPE[798]
Sep. 30, 2014	1,389	FEDSCOPE[799]
Sep. 30, 2015	1,500	FEDSCOPE[800]
June 30, 2016	1,538	Plum Book[801] (the number indicated is consistent with FEDSCOPE, which indicates that there were 1,520 Schedule C positions on Sep. 30, 2016[802])
Sep. 30, 2017	830	FEDSCOPE[803] (the number indicated is consistent with a manual count of positions listed in the Federal Register, which identified 828 such positions as of June 30, 2017[804])
Sep. 30, 2018	1,217	FEDSCOPE[805]

[789] U.S. Off. of Pers. Mgmt., FedScope for September 2006, https://tinyurl.com/kd58euv8.
[790] U.S. Off. of Pers. Mgmt., FedScope for September 2007, https://tinyurl.com/bdejhkyn.
[791] S. COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, 110TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS, 199 (Comm. Print 2008), https://tinyurl.com/yy3esrdu.
[792] U.S. Off. of Pers. Mgmt., FedScope for September 2008, https://tinyurl.com/57vpc32h.
[793] U.S. Off. of Pers. Mgmt., FedScope for September 2009, https://tinyurl.com/43n6b4r7.
[794] U.S. Off. of Pers. Mgmt., FedScope for September 2010, https://tinyurl.com/3y2ccrf8.
[795] U.S. Off. of Pers. Mgmt., FedScope for September 2011, https://tinyurl.com/5n8cketd.
[796] H. COMM. ON OVERSIGHT AND GOV'T REFORM, 112TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS, 200 (Comm. Print 2012), https://tinyurl.com/4x923w96.
[797] U.S. Off. of Pers. Mgmt., FedScope for September 2012, https://tinyurl.com/4n89c2a4.
[798] U.S. Off. of Pers. Mgmt., FedScope for September 2013, https://tinyurl.com/4vjhmzyy.
[799] U.S. Off. of Pers. Mgmt., FedScope for September 2014, https://tinyurl.com/mryp73wj.
[800] U.S. Off. of Pers. Mgmt., FedScope for September 2015, https://tinyurl.com/4dpjj56e.
[801] S. COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, 114TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS, 216 (Comm. Print 2016), https://tinyurl.com/yr4xbhjy.
[802] U.S. Off. of Pers. Mgmt., FedScope for September 2016, https://tinyurl.com/2s4999ap.
[803] U.S. Off. of Pers. Mgmt., FedScope for September 2017, https://tinyurl.com/yc878aua.
[804] Excepted Service; Consolidated Listing of Schedules A, B, and C Exceptions, Pers. Mgmt. Off. Notice, 83 Fed. Reg. 19340 (May 2, 2018), https://tinyurl.com/47tdzurd.
[805] U.S. Off. of Pers. Mgmt., FedScope for September 2018, https://tinyurl.com/2ft8mxrv.

Date	#	Source/Notes
Sep. 30, 2019	1,467	FEDSCOPE[806]
June 30, 2020	1,566	Plum Book[807] (the number indicated is consistent with FEDSCOPE, which indicates that there were 1,642 Schedule C positions as of Sep. 30, 2020[808])
Sep. 30, 2021	989	FEDSCOPE[809]
Sep. 30, 2022	1,409	FEDSCOPE[810]
Sep. 30, 2023	1,660	FEDSCOPE[811]
Sep. 30, 2024	1,655	FEDSCOPE[812]

[806] U.S. Off. of Pers. Mgmt., FedScope for September 2019, https://tinyurl.com/mw3x2f7y.

[807] H. COMM. ON OVERSIGHT AND GOV'T REFORM, 116TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS, 212 (Comm. Print 2020), https://tinyurl.com/3kmpjffm.

[808] U.S. Off. of Pers. Mgmt., FedScope for September 2020, https://tinyurl.com/yt857etk.

[809] U.S. Off. of Pers. Mgmt., FedScope for September 2021, https://tinyurl.com/3hek3dnr.

[810] U.S. Off. of Pers. Mgmt., FedScope for September 2022, https://tinyurl.com/26k9aef9.

[811] U.S. Off. of Pers. Mgmt., FedScope for September 2023, https://tinyurl.com/bdfbvdne.

[812] U.S. Off. of Pers. Mgmt., FedScope for September 2024, https://tinyurl.com/3adzcyed.

APPENDIX 2

Appendix 2: Statutes that treat either "confidential, policy-determining, policy-making or policy-advocating" positions or Schedule C positions as political appointee positions

As discussed in Protect Democracy's comment, dozens of statutory provisions treat appointees in positions covered by section 7511(b)(2) or 2302(a)(2)(B)(i) like other political appointees and differently than career federal employees. The laws cannot make sense unless sections 7511(b)(2) and 2302(a)(2)(B)(i) are inapplicable to career employees—i.e., employees whose employment continues from one presidential administration to the next. These laws demonstrate that Congress has always considered positions covered by these narrow exclusions to be applicable only to political appointees—i.e., individuals holding patronage jobs with no expectation of continued employment beyond the end of the presidential administration that appointed them.

Below is an extensive list of laws that have treated employees in positions subject to sections 7511(b)(2) and 2302(a)(2)(B)(i) differently than career employees. This list may not be comprehensive, but an effort was made to find as many such laws as possible.

Some of these laws refer to "confidential, policy-determining, policy-making or policy-advocating" positions, while other laws listed below refer to Schedule C positions directly or as "confidential or policy-determining" positions. These Schedule C-related laws, too, are relevant because Congress had no reason to refer to other excepted service schedule positions, inasmuch as none had ever been subject to section 7511(b)(2) or 2302(a)(2)(B)(i).[813] Schedule C positions have always represented the universe of excepted service schedule positions subject to those exclusions, and Congress was clear in treating them as political appointee positions. That treatment matters because, until President Trump's executive order establishing Schedule F, nothing in the relevant executive orders or regulations defining Schedule C expressly limited use of that excepted service schedule to political appointees.[814] The limitation was based not on executive order or regulation but on common understanding of the term of art used in sections 7511(b)(2) and 2302(a)(2)(B)(i). Therefore, in seeking the meaning of the term of art "confidential, policy-determining, policy-making or policy-advocating," the laws listed below that address Schedule C are as relevant as the laws listed below that, instead, use the term of art "confidential, policy-determining, policy-making or policy-advocating."

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[813] *See* GOV'T ACCOUNTABILITY OFF., AGENCY RESPONSES & PERSPECTIVES ON FORMER EXECUTIVE ORDER TO CREATE A NEW SCHED. F CATEGORY OF FED. POSITIONS, 10 (2022), https://tinyurl.com/mua2yv95.

[814] *See, e.g.*, Exec. Order No. 13,562, § 7(ii) (Dec. 27, 2010), *reprinted in* 75 Fed. Reg. 82587 (Dec. 30, 2010), https://tinyurl.com/3jwbdr3j; Exec. Order No. 10,577 (Nov. 22, 1954) *reprinted in* 19 Fed. Reg. 7,521 (Nov. 23, 1954), https://tinyurl.com/y5yxkcwt; 5 C.F.R. § 6.2 (2016) ("Schedule C. Positions of a confidential or policy-determining character shall be listed in Schedule C."), https://tinyurl.com/3r7vcuma; 5 C.F.R. § 213.3301 (2016) ("(a) Upon specific authorization by OPM, agencies may make appointments under this section to positions which are policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials. 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 to §213.3999, or other appropriate number, to be used by the agency in recording appointments made under that authorization."), https://tinyurl.com/yc7ebzmm.

These laws, cited in footnotes, can be grouped into the following categories:

- Four laws have defined "political appointee" as including employees in positions of a "*confidential, policy-determining, policy-making or policy-advocating*" character.[815]

- One law has limited the number of "*confidential, policy-determining, policy-making or policy-advocating*" positions in the Social Security Administration.[816]

- Six laws have treated employees in "*confidential, policy-determining, policy-making or policy-advocating positions*" the same as: noncareer SES members.[817]

- Four laws have treated individuals in "*confidential, policy-determining, policy-making or policy-advocating*" positions the same as:
    - Senate-confirmed presidential appointees, and
    - noncareer SES members (or, in the case of 39 U.S.C., the equivalent).[818]

- One law has treated individuals in "*confidential, policy-determining, policy-making or policy-advocating*" positions the same as:
    - Senate-confirmed presidential appointees,
    - Executive Schedule political appointees (i.e., political appointees to positions listed in 5 U.S.C. §§ 5312-5317), and
    - noncareer SES members.[819]

- One law and two former laws have treated individuals in "*confidential, policy-determining, policy-making or policy-advocating*" positions the same as:
    - Senate-confirmed presidential appointees,
    - other presidential appointees, and
    - noncareer SES members.[820]

- Two former laws treated individuals in "*confidential, policy-determining, policy-making or policy-advocating*" positions the same as:
    - elected officials (except the president),
    - Senate-confirmed presidential appointees,
    - other Executive Schedule political appointees (i.e., political appointees to positions listed in 5 U.S.C. §§ 5312-5317),
    - White House staffers, and

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[815] 5 U.S.C. § 9803(c)(2); 6 U.S.C. § 349(d)(3); 7 U.S.C. § 6992(e)(2); 38 U.S.C. § 725(c).

[816] 42 U.S.C. § 904(c).

[817] 5 U.S.C. § 3372(a)(1); 5 U.S.C. § 4107(b)(3); Pub. L. No. 110-289 § 1133(c)(2), 122 Stat. 2654 (2008), codified at 12 U.S.C. § 4511 note [link]; 12 U.S.C. § 5584(a)(9)(B); 22 U.S.C. § 3983(d)(3); Pub. L. No. 101-73, § 404(3)(B), 103 Stat. 183, 362 (1989) [link].

[818] 5 U.S.C. §§ 5753(a)(2)(C), 5754(a)(2)(C), 10104(d)(3), 10105(d)(2)(C).

[819] *Id.* § 8432.

[820] *Id.* § 3303 (1995) (former law) [link]; Pub. L. No. 100-527, § 5(c)(2), 102 Stat. 2635, 2639, codified at 38 U.S.C. § 201 note (1991) (former law) [link]; 38 U.S.C. § 308(d)(2).

- noncareer SES members.[821]

- Four laws have treated employees in "*confidential, policy-determining, policy-making, or policy-advocating*" positions differently than career employees.[822]

- One law has treated employees in "*confidential, policy-determining, policy-making or policy-advocating*" positions differently than career employees with regard to satisfying minimum federal service requirements to qualify for certain nonpolitical positions.[823]

- One law has treated employees in positions of a "*confidential or policymaking*" character differently than career employees by requiring employees in confidential or policymaking positions to file public financial disclosure reports.[824]

- Two laws have defined "political appointee" to include incumbents of positions listed "under schedule C of subpart C of part 213 of title 5, Code of Federal Regulations, *or successor regulation*," which would include OPM regulations concerning Schedule PC.[825]

- Three laws have defined "political appointee" or "senior politically appointed officer" to include employees in Schedule C positions, which represented the universe of excepted service schedule employees covered by section 7511(b)(2) or 2302(a)(2)(B)(i) at the time Congress enacted these laws.[826]

- One former law treated individuals in "*confidential or policy-determining*" positions the same as:
  - Senate-confirmed presidential appointees, and
  - noncareer executives.[827]

- Four current and former statutory provisions have treated Schedule C employees in the Office of National Drug Control Policy differently than career employees.[828]

- One law has treated employees in positions of a "*confidential or policy-determining*" character differently than career employees by restricting the number of such positions in the Department of Veterans Affairs.[829]

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[821] 5 U.S.C. §§ 8343a(f)(2)(vi) (1992) [link], 8420a(f)(2)(vi) (1992) (former law) [link].

[822] 5 U.S.C. §§ 5379(a)(2), 5757(b); 12 U.S.C. § 5432(a)(3)(B); 5 U.S.C. § 3301 note (Pub. L. No. 102-484, div. D, tit. XLIV, § 4432, 106 Stat. 2720 (1992) [link]).

[823] 38 U.S.C. § 308(d)(2).

[824] 5 U.S.C. § 13103(f)(5) (emphasis added).

[825] 38 U.S.C. § 714(h)(5)(C) (emphasis added); 15 U.S.C. § 278s(e)(4)(B)(iii) (incorporating 38 U.S.C. § 714(h)(5)(C)).

[826] 5 U.S.C. § 3101 note (Pub. L. No. 114-136, §4(a)(4)-(5), 130 Stat. 305 (2016) [link]); 5 U.S.C. § 4508; 49 U.S.C. § 106(f)(5).

[827] 39 U.S.C. § 1001 note (Pub. L. No. 91-375, § 13 (1970) [link]) .

[828] 21 U.S.C. § 1708(f)(5)(D); Pub. L. No. 105-277, div. D, tit. III, § 103, 112 Stat. 2681-753 (1998) (Drug-Free Media Campaign Act of 1998) (codified at 21 U.S.C. 1801 note, *repealed* Pub. L. No. 109-469, tit. V, § 501(b), 120 Stat. 3533 (2006)) [link]; Pub. L. No. 105-277, 112 Stat. 2681, 2681-496 - 2681-497 (1998) [link]; Pub. L. No. 105-61, tit. III, 111 Stat. 1272, 1294-1295 (1997) [link].

[829] 38 U.S.C. § 709(b).

- Several other pieces of legislation demonstrate that Congress has treated the universe of positions covered by section 7511(b)(2) or 2302(a)(2)(B)(i) differently than career positions. At least 32 appropriations act provisions have prohibited the use of appropriated funds to pay for Schedule C positions unless the head of the employing agency certifies that the position was not created solely to detail appointees to the White House.[830]

- At least 37 appropriations act provisions have limited the number of Schedule C positions at the Commission on Civil Rights.[831] These laws, too, have treated all positions subject to

[830] Pub. L. No. 117-328, div. E, tit. VII, § 712, 136 Stat. 4706-07 (2022) [link]; Pub. L. No. 117-03, div. E, tit. VII, § 712, 136 Stat. 295 (2022) [link]; Pub. L. No. 116-260, div. D, tit. VII, § 712, 134 Stat. 1432 (2020) [link]; Pub. L. No. 116-93, div. C, tit. VII, § 712, 133 Stat. 2486 (2019) [link]; Pub. L. No. 116-6, div. D, tit. VII, § 712, 133 Stat. 189 (2019) [link]; Pub. L. No. 115-141, div. E, tit. VII, 132 stat. 379 (2018) [link]; Pub. L. No. 115-31, div. E, tit. VII, §712, 131 Stat. 379 (2017) [link]; Pub. L. No. 114-113, div. E, tit. VII, § 712, 129 Stat. 2475 (2015) [link]; Pub. L. No. 113-76, div. E, tit. VII, § 712, 128 Stat. 232-33 (2014) [link]; Pub. L. No. 113-6, div. F, tit. I, § 1102, 127 Stat. 412 (Mar. 26, 2013) (making appropriations available "to the extent and in the manner that would be provided by the pertinent appropriations Act") [link]; Pub. L. No. 112-74, div. C, tit. VII, 125 Stat. 931 (2011) [link]; Pub. L. No. 111-242, § 103, 124 Stat. 2607 (Sep. 30, 2010) (making appropriations available "to the extent and in the manner that would be provided by the pertinent appropriations Act") [link]; Pub. L. No. 111-117, div. C, tit. VII, § 712, 123 Stat. 3208 (2009) [link]; Pub. L. No. 111-8, div. D, tit. VII, § 713, 123 stat. 683-84 (2009) [link]; Pub. L. No. 110-161, div. D, tit. VII, sec. 715, 121 Stat. 2023 (2007) [link]; Pub. L 110-5, div. B, tit. I, § 102, 121 Stat. 9 (2007) (making appropriations available "to the extent and in the manner that would be provided by the pertinent appropriations Act") [link]; Pub. L. No. 109-115, div. A, tit. VIII, § 816, 119 Stat. 2499 (2005) [link]; Pub. L. No. 108-447, div. H, tit. VI, sec. 616, 118 Stat. 3276-77 (2004) [link]; Pub. L. No. 108-199, div. F, tit. VI, sec. 616, 118 Stat. 354 (2004) [link]; Pub. L. No. 108-7, tit. VI, § 617, 117 Stat. 467 (2003) [link]; Pub. L. No. 107-67, § 617, 115 Stat. 549 (2001) [link]; Pub. L. No. 106-554, app. A, § 617, 114 Stat. 2763A-159 (2000) [link]; Pub. L. No. 106-58, tit. VI, § 617, 113 Stat. 469-70 (1999) [link]; Pub. L. No. 105-277, tit. VI, § 618, 112 Stat. 2681 (1998) [link]; Pub. L. No. 105-61, tit. VI, § 618, 111 Stat. 1313 (1997) [link]; Pub. L. No. 104-208, tit. VI, § 620, 110 Stat. 3009-358 (1996) [link]; Pub. L. No. 104-52, tit. VI, § 621, 109 Stat. 501-02 (1995) [link]; Pub. L. No. 103-329, tit. VI, § 626, 108 Stat. 2423 (1994) [link]; Pub. L. No. 103-123, tit. VI, sec. 624, 107 Stat. 1266 (1993) [link]; Pub. L. No. 102-393, tit. VI, § 626, 106 Stat. 1772 (1992) [link]; Pub. L. No. 102-141, tit. VI, § 626, 105 Stat. 873-74 (1991) [link]; Pub. L. No. 101-509, tit. VI, § 628,104 Stat. 1478 (1990) [link].

[831] Pub. L. No. 117-328, div. B, tit. IV, 136 Stat. 4551-52 (2022) [link]; Pub. L. No. 117-328, div. B, tit. IV, 136 Stat. 4551-52 (2022) [link]; Pub. L. No. 117-103, div. B, tit. IV, 136 Stat. 141 (2022) [link]; Pub. L. No. 116-260, div. B, tit. IV, 134 Stat. 1182, 1273 (2020) [link]; Pub. L. No. 116-93, div. B, tit. IV, 133 Stat. 2421 (2019) [link]; Pub. L. No. 116-6, div. C, tit. IV, 133 stat. 126 (2019) [link]; Pub. L. No. 115-141, div. B, tit. IV, 132 Stat. 433 (2018) [link]; Pub. L. No. 115-31, div. B, tit. IV, 131 Stat. 217 (2017) [link]; Pub. L. No. 114-113, div. B, tit. IV, 129 Stat. 2320 (2015) [link]; Pub. L. No. 113-76, div. B, tit. IV, 128 Stat. 75 (2014) [link]; Pub. L. No. 113-6, div. F, tit. I, § 1102, 127 Stat. 412 (Mar. 26, 2013) (making appropriations available "to the extent and in the manner that would be provided by the pertinent appropriations Act") [link]; Pub. L. No. 112-55, div. B, tit. IV, 125 Stat. 628 (2011) [link]; Pub. L. No. 111-242, § 103, 124 Stat. 2607 (Sep. 30, 2010) (making appropriations available "to the extent and in the manner that would be provided by the pertinent appropriations Act") [link]; Pub. L. No. 111-117, div. B, tit. IV, 123 Stat. 3034, 3147 (2009) [link]; Pub. L. No. 111-8, div. B, tit. IV, 123 stat. 592 (2009) [link]; Pub. L. No. 110-161, div. B, tit. IV, 121 stat. 1922 (2007) [link]; Pub. L 110-5, div. B, tit. I, § 102 (2007) (making appropriations available "to the extent and in the manner that would be provided by the pertinent appropriations Act") [link]; Pub. L. No. 109-108, tit. IV, 119 Stat. 2328 (2005) [link]; Pub. L. No. 108-447, div. H, tit. V, sec. 616, 118 Stat. 2906 (2004) [link]; Pub. L. No. 108-199, div. B, tit. V, sec. 616, 118 Stat. 87 (2004) [link]; Pub. L. No. 108-7, div. B, tit. V, 117 Stat. 94 (2003) [link]; Pub. L. No. 107-77, tit. V, 115 Stat. 792 (2001) [link]; Pub. L. No. 106-553, app. B (H.R. 5548), tit. V, 114 Stat. 2762A-98 [link]; (2000) [link]; Pub. L. No. 106-113, app. A, div. A, tit. V, 113 Stat. 1501A-47 (1999) [link]; Pub. L. No. 105-277, tit. V, 112 Stat. 2681–105 (1998) [link]; Pub. L. No. 105-119, tit. V, 111 Stat. 2507 (1997) [link]; Pub. L. No. 104-208, tit. V, 110 Stat. 3009-57 (1996) [link]; Pub. L. No. 104-134, tit. V, 110 Stat. 1321-47 (1996) [link]; Pub. L. No. 103-317, tit. I, 108 Stat. 1737 (1994) [link]; Pub. L. No. 103-121, tit. I, 107 Stat. 1153, 1166 (1993) [link]; Pub. L. No. 102-395, tit. I, 106, Stat. 1845 (1992) [link]; Pub. L. No. 102-140, tit. I, 105 Stat. 796 (1991)

section 7511(b)(2) or 2302(a)(2)(B)(i) differently than positions for career federal employees.

- 39 appropriations acts since 1986 have limited the number of "political appointees" or "political or presidential appointees" in the Department of Transportation and, since 2014, in the Federal Aviation Authority (FAA).[832] While the term "political appointees" is undefined in these appropriations acts, a congressional hearing transcript and agency responses to questions for the records demonstrate that Congress and the Department of Transportation believed from the start that the term "political appointees" referred to Schedule C appointees, which was the only category of employees subject to 5 U.S.C.

[link]; Pub. L. No. 101-515, tit. I, 104 Stat. 2135 (1990) [link]; Pub. L. No. 101-162, tit. V, 103 Stat. 1018-19 (1989) [link]; Pub. L. No. 100-459, tit. V, 102 Stat. 2215 (1988) [link]; Pub. L. No. 100-202, tit. V, 101 Stat. 1329-30 (1987) [link]; and Pub. L. No. 99-591, tit. V, 100 Stat. 3341-66 (1986) [link].

[832] Act of Dec. 19, 1985, Pub. L. No. 99-190, Dep't of Transp. & Related Agencies Approps. Act, 1986, tit. III, § 314, 99 Stat. 1286 (1985) ("SEC. 314. None of the funds in this Act shall be available for salaries and expenses of more than one hundred thirty-eight political appointees in the Department of Transportation.") [link]; Pub. L. No. 99-591, 100 Stat. 3341-308 (1986) (continuing appropriations "to the extent and in the manner provided for in the conference report and joint explanatory statement of the committee of conference" and referencing (referencing H.R. REP. 99-976 (1986) [link])) [link]; Pub. L. No. 100-202, tit. III, § 311, 101 stat. 1329 (1987) [link]; Pub. L. No. 100-457, tit. III, § 311, 102 Stat. 2125 (1988) [link]; Pub. L. No. 101-164, tit. III, § 311, 103 Stat. 1069 (1989) [link]; Pub. L. No. 101-516, tit. III, § 311, 104 Stat. 2155 (1990) [link]; Pub. L. No. 102-143, tit. III, § 311, 105 Stat. 917 (1991) [link]; Pub. L. No. 102–388, tit. III, § 311, 106 Stat. 1520 (1992) [link]; Pub. L. No. 103-122, tit. III, § 311, 107 Stat. 1198 (1993) [link]; Pub. L. No. 103-331, tit. III, § 311, 108 Stat. 2471 (1994) [link]; Pub. L. No. 104-50, tit. III, § 311, 109 Stat. 436 (1995) [link]; Pub. L. No. 104-205, tit. III, § 305, 110 Stat. 2951 (1996) [link]; Pub. L. No. 105-66, tit. III, § 305, 111 Stat. 1425 (1997) [link]; Pub. L. No. 105-277, tit. III, § 305, 112 Stat. 2681 (1998) [link]; Pub. L. No. 106-69, tit. III, § 305, 113 Stat. 986 (1999) [link]; Pub. L. No. 106-346, tit. III, § 305, 114 Stat. 1356 (2000) [link]; Pub. L. No. 107-87, tit. III, § 304, 115 Stat. 833 (2001) [link]; Pub. L. No. 107-117, div. B, § 1107, 115 Stat. 2230 (2002) [link]; Pub. L. No. 108-7, 117 stat. 11, div. I, tit. III, § 304 (2003) [link]; Pub. L. No. 108-199, 118 stat. 3, div. F, tit. V, § 504 (2004) [link]; Pub. L. No. 108-447, div. H, tit. I, § 187, 118 stat. 2809 (2004) [link]; Pub. L. No. 109-115, div. A, tit. I, § 162, 119 stat. 2396 (2005) [link]; Pub. L 110-5, div. B, tit. I, § 102 (2007) (making appropriations available "to the extent and in the manner that would be provided by the pertinent appropriations Act") [link]; Pub. L. No. 110-161, div. K, tit. I, § 182, 121 stat. 1844 (2007) [link]; Pub. L. No. 111-8, div. I, tit. I, § 182, 123 stat. 524 (2009) [link]; P.L. 111-117, div. A, tit. I, § 182, 123 Stat. 3034, 3070 (2009) [link]; Pub. L. No. 111-242, § 103, 124 Stat. 2607 (Sep. 30, 2010) (making appropriations available "to the extent and in the manner that would be provided by the pertinent appropriations Act") [link]; Pub. L. No. 112-55, div. C, tit. I,§ 182, 125 stat. 552 (2011) [link]; Pub. L. No. 113-6, div. F, tit. I, § 1102, 127 Stat. 198, 412 (Mar. 26, 2013) (making appropriations available "to the extent and in the manner that would be provided by the pertinent appropriations Act") [link]; Pub. L. No. 113-76, div. L, tit. I, §§ 119A, 182, 128 stat. 5, 582, 601 (2014) [link]; Pub. L. No. 113-235, div. K, tit. I, §§ 119A, 182, 128 stat. 2130, 2704, 2725 (2014) [link]; Pub. L. No. 114-113, div. L, tit. I, §§ 119, 182, 129 stat. 2242, 2843, 2864 (2015) [link]; Pub. L. No. 115-31, div. K, tit. I, §§ 118, 182, 131 stat. 135, 733, 754 (2017) [link]; Pub. L. No. 115-141, div. L, tit. I, §§ 118, 183, 132 stat. 348, 544, 100 (2018) [link]; Pub. L. No. 116-6, div. G, tit. 1, §§ 118, 183, 133 stat. 13, 405, 429 (2019) [link]; Pub. L. No. 116-94, div. H, tit. 1, §§ 118, 183, 133 stat. 2534, 2944, 2970 (2019) [link]; Pub. L. No. 116-260, div. L, tit. I, §§ 117, 193, 134 stat. 1182, 1834, 1862 (2021) [link]; Pub. L. No. 117-103, div. L, tit. I, §§ 117, 183, 136 stat. 49, 696, 723 (2022) [link]; and Pub. L. No. 117-328, div. L, tit. I, §§ 117, 183, 136 stat. 4459, 5107, 5137 (2022) ("SEC. 117. None of the funds made available by this Act shall be available for salaries and expenses of more than nine political and Presidential appointees in the Federal Aviation Administration. …SEC. 183. None of the funds made available by this Act shall be available for salaries and expenses of more than 125 political and Presidential appointees in the Department of Transportation…."), https://tinyurl.com/bdfjkbtw.

§ 7511(b)(2) or § 2302(a)(2)(B)(i) at the time.[833] In addition, the U.S. Code title addressing aviation, title 49, defines "political appointee" to include Schedule C positions.[834]

These provisions confirm that the phrase "confidential, policy-determining, policy-making or policy-advocating" refers exclusively to positions for political appointees.

[833] *Hearing on Department of Transportation and Related Agencies Appropriations for 1986*, *before Subcomm. on Dep't of Transp. and Related Agencies of the H. Comm. on Approps.,* 99th Cong., Part 4, at 770-74 (1985) ("Mr. LEHMAN. Please also provide a historical breakdown of all political appointees for fiscal years 1980 through 1986, listing the title and salary of each position filled at the end of each year. [The information follows:] … Confidential Secretary $21,449 (Stenography)[;] Staff Assistant $21,449[;] Special Assistant $34,706[;] Special Assistant to the Administrator $29,187…." (first alteration in original)), https://tinyurl.com/46c7jy4m.

[834] 49 U.S.C. § 106(f)(5).