



## EPN Comments on OPM's Proposal "Improving Performance, Accountability and Responsiveness in the Civil Service" Docket No: OPM-2025-0004

June 4, 2025

The [Environmental Protection Network](https://environmentalprotectionnetwork.org) (EPN) harnesses the expertise of more than 700 former Environmental Protection Agency (EPA) career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former regulators and scientists with decades of historical knowledge and subject matter expertise.

### I. Introduction.

A government workforce that demonstrates principles of expertise, professionalism, and independence from political retribution is at the heart of what defines modern democratic governments. The current framework for the civil service embodies this approach and has served this country well. The Office of Personnel Management's (OPM) proposed Schedule Policy/Career is a thinly disguised effort to remove the job security that is at the core of this framework. It is an extreme reordering of the longstanding structure of the civil service that is unlawful and threatens a core institution of our federal government.

OPM claims that it is proposing this rule to strengthen employee accountability and the democratic responsiveness of the American government, while addressing long-standing performance management challenges in the federal workforce. OPM's proposed schedule would turn large swaths of the federal workforce into at-will employees, exempt from procedural and other civil service protections found in chapters 43 and 75 of Title 5 of the United States Code. Employees covered by the new Schedule would be "required to faithfully implement administration policies to the best of their ability, consistent with their constitutional oath and the vesting of executive authority solely in the President. Failure to do so is grounds for dismissal." The grounds for dismissal would include the subjective view that the agency has "los[t] confidence" in the employee's ability to satisfy this requirement.

OPM's proposal is fatally flawed and should not be adopted. EPN's comments emphasize the following:

1. OPM's proposal is overly broad and inappropriately covers a very large percentage of the federal workforce. Based on the expansive scope of the proposal, EPN believes it is likely that more than 50% of the federal workforce would be included in this new Schedule, and the percentage could be even higher.
2. OPM's interpretation of the operative language in the statute—"policy-determining, policy-making or policy-advocating"—is inconsistent with the historical meaning of this language and its natural, ordinary meaning. OPM improperly relies upon a clear misinterpretation of a related provision concerning Senior Executive Service (SES) positions.
3. OPM's proposal is based on unsubstantiated claims that a substantial number of career employees will resist an administration's policies or are poor performers, causing major interference with the implementation of the administration's policies. The evidence OPM relies on is incredibly weak.

4. The proposed Schedule would undermine a critical function of the career civil service—the ability to candidly provide expert advice and information, based on experience, to senior managers and political appointees alike. It undercuts a long-standing foundation of the executive branch of government in a free society.
5. OPM’s overly broad proposal invites subjective, arbitrary, and politicized personnel actions against career employees, undermining the framework of the civil service.
6. The proposed Schedule is unnecessary to address insubordination based on resistance because adequate administrative controls already exist.
7. The proposed Schedule will seriously hinder workforce recruitment and retention.

## **II. OPM’s proposal is overly broad and inappropriately covers a very large percentage of the federal workforce.**

OPM’s proposal is based on an inappropriate interpretation of 5 U.S.C. 7511, which provides in part that:

(b) This subchapter does not apply to an employee— ...

(2) whose position has been determined to be of a confidential,  
*policy-determining, policy-making or policy-advocating* character by

(A) the President for a position that the President has excepted  
from the competitive service;

(B) the Office of Personnel Management for a position that the  
Office has excepted from the competitive service; or

(C) the President or the head of an agency for a position  
excepted from the competitive service by statute. (emphasis supplied)

OPM’s interpretation of the phrase “policy-determining, policy-making or policy-advocating” fails to establish a reasoned and limited scope for this phrase. Instead of identifying the group of people and positions that make or determine policy, it identifies a much more expansive group of employees whose job it is to aid in the development of a policy or to take actions to implement a policy once it has been established. The incredible breadth and almost unlimited scope of the proposed coverage is a fatal flaw. OPM’s interpretation distorts the meaning of this phrase such that it is no longer tethered to either its history or its plain meaning.

The unreasonable scope of OPM’s interpretation can be seen in the examples it provides from Executive Order (EO) 14171 and in OPM’s January 27, 2025, Guidance on the Executive Order. Under EO 14171, which revised EO 13957, “making” or “determining” policy would include “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.”<sup>1</sup> Under this guidance, any staff whose job it is to draft a regulation or guidance document for review by their superiors, including first-line staff, would be brought within the scope of the proposed Schedule. The typical process for developing new guidance or regulations in EPA is that a decision-maker determines the policy, which for example might be a decision that EPA should issue a rulemaking adopting or revising an emissions standard for a specified group of sources. The staff below the decision-maker would then implement this decision. This process includes first-line staff, such as engineers, scientists, lawyers, program analysts and/or other personnel, who draft the proposed rule using their knowledge and information to provide scientific, technical, legal, economic, and other reasons that best support the political leadership’s decision. At key points in the process, staff evaluate and provide options for the decision-maker, who would then provide additional direction for the rule development. Drafts are typically elevated for review throughout the chain of command, sometimes with numerous and lengthy revisions and changes being made, to develop the best proposal to implement the policy direction made by the decision-maker.

Under OPM’s proposal, all of these people, from first-line staff up through the management positions that supervise the process, including the political appointee who makes the policy decision, would be considered “policy-determining, or policy-making” positions. All of these career employees could be assigned to the proposed Schedule Policy/Career. This obliterates the distinction between the limited group of people who *actually* make or determine policy, and the much larger group of people charged with providing the background information and analyses needed by the ultimate decision-makers to finalize a particular policy, and those charged with then implementing it.

OPM states that “[t]he best reading of 5 U.S.C. 7511(b)(2) is that the terms “confidential, policy-determining, policy-making, or policy-advocating” have their ordinary, plain English meaning and describe positions “*involved in* determining, making, or advocating for policy, or confidential positions”(emphasis supplied).<sup>2</sup> OPM calls all these positions “policy-*influencing*” (emphasis supplied).

OPM’s proposal seriously misreads this provision. The statute does not refer to all the various positions that might be “involved in” making policy, or that might “influence” policy making. The statute refers to positions that make or determine policy. “[I]nvolvement” in the development of policy is not the same as “determining,” “making,” or “advocating for” a policy. “Determining” and “making” policy entail coming to a definitive position – settling on the final content of a policy. Before that, the contents of the potential policy are only under discussion. Only those people who have the final say are “determining” or “making” policy.

For example, before a policy is made, a decision-maker will often receive briefings and advice on a wide variety of issues that are important to consider. These might be briefings on scientific, technical, economic, and legal issues, as well as information on the agency’s prior experience in an area. They might involve providing information or analysis that is either required by law or has been requested by the decision-maker or both. The projected consequences of various policy options are often discussed. All the staff and managers involved in providing this important information to the decision-maker could be considered

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<sup>1</sup> “Guidance on Implementing President Trump’s Executive Order titled, “Restoring Accountability To Policy-Influencing Positions Within the Federal Workforce”, OPM January 27, 2025 (hereafter “OPM 2025 Guidance”) at 2.

<sup>2</sup> 90 FR 17182, 17195 (April 23, 2025). Also see Id. at 17194.

persons “involved” in the development of policy or persons who “influenced” the policy and, therefore, could be covered by the proposed Schedule. However, their actions do not make them decision-makers. They do not make or determine policies; at most, they might inform their development. OPM improperly attempts to bring all such people into the scope of the proposed schedule under the faulty view that they make or determine policy.

Likewise, “advocating for” policy implies that there is a final, settled policy. Government staff who may express opinions about the content of a potential policy are not advocating for the final policy itself, but rather are advancing ideas about what the policy might be. Further, discussions within the government are typically withheld from public disclosure. Thus, “advocating” for policy should be closely limited to those who speak publicly and officially on behalf of an agency's policy – for example, government employees called to testify before Congress. They are typically a much smaller number of people than those who might have offered information or identified considerations during the internal discussion of the potential content of a policy.<sup>3</sup>

A similar example is found in the designation of “persons who supervise attorneys.”<sup>4</sup> In EPA's Office of General Counsel, this would include all levels of management, including the first-line supervisor, an Assistant General Counsel position. These and other managers do not make or determine policy. They supervise the staff attorneys and others in their purview who help develop and then implement and defend the policy determined by the decision-maker in the client office in EPA.<sup>5</sup>

OPM's interpretation also fails to recognize the distinction between people who make policy and people who implement the policy that has been determined. Part of OPM's mistake is its view that the exercise of discretion in the process of implementing policy transforms someone into a person who makes, determines, or advocates for policy. When a decision-maker decides that a certain regulation is to be issued, the large group of people who implement this policy take their accumulated expertise and develop the technical, scientific, legal, and other analyses that best support the policy. Staff also provide the best policy arguments, based on the agency's experience and the policy direction from the policy-maker. This process inherently and properly involves discretion: What provides the best technical support for the rulemaking? What is the best science and the best legal analysis that supports the action? What are the best points to make based on the agency's experience with this issue? What are the likely arguments and claims that may be raised against the agency, and what is the best way to rebut them? Implementing a policy may also call for exercising discretion in applying a policy to specific facts on the ground.

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<sup>3</sup> OPM appears to recognize this distinction to some extent. See OPM 2025 Guidance at 3. (“[a]dvocating 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.”) OPM needs to strictly construe the reference to “policy-advocating.” Policy-advocating does not encompass a broad range of employees, such as those who may express opinions or provide advice or information at various points in the development or implementation of a policy. Throughout these comments EPN will refer to policy-making and policy-determining, often without specific reference to policy-advocating. While OPM appears to recognize that persons who are policy-advocating are a narrow group of employees, all the arguments raised concerning policy-making and policy-determining also apply to positions that would be classified as policy-advocating.

<sup>4</sup> OPM 2025 Guidance at 2.

<sup>5</sup> OPM's rationale to include “persons who supervise attorneys” is confusing because typically attorneys, including ones who supervise attorneys, are already covered under an excepted service.

Answering such questions calls for the exercise of discretion by people with experience and knowledge on these issues, but the staff who contribute such expertise do not have the responsibility or authority to make or determine the policy that is being implemented. All their work will be reviewed by potentially several layers of management before there is a final document released to the public, or other action is taken to implement a policy. Their work does not transform them into policy-makers or people who determine policy. They implement the policy, but do not make or determine it. OPM's proposal improperly puts them all in the category of policy-making or policy-determining. This is an inaccurate and improper characterization of the process of implementing a policy.

OPM also interprets 5 U.S.C. 7511 to include all persons who perform functions of:

- 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.<sup>6</sup>

This would include almost any supervisor or “team leader” position up through an organizational unit’s chain of command. They all direct the work of an organizational unit and are typically held accountable for the success of the projects assigned to the unit. They monitor progress toward achieving the goals set for the organizational unit, monitor workload, and make changes within the unit as appropriate so the goals are achieved. OPM’s proposal would bring in almost all supervisors and team leaders in the agency, even though they are not policy-makers or people who determine policy.

OPM’s proposal misleadingly understates the potential range of positions that would fall within the broad scope of its interpretation of the phrase “policy-determining, policy-making or policy-advocating.” OPM estimates that it would affect only about 50,000 positions, about two percent of the federal workforce.<sup>7</sup> However, OPM does not explain how it arrived at this number. This estimate is clearly inconsistent with the broad and almost unlimited scope of the activities it describes in its 2025 guidance. For example, there are five or six levels of supervision in most of the federal government’s larger agencies and the recommended ratio of supervisors to staff is 1:10. OPM’s proposal would include most if not all supervisors in the proposed Schedule, reaching closer to at least 300,000 employees. Further, there are many non-supervisory staff who, under the OPM proposal, could also be deemed to have policy-making or policy-determining roles.

OPM’s current estimate is also inconsistent with how agencies responded to the similarly worded Schedule F under EO 13957. For example, in response to its establishment of Schedule F, OMB recommended inclusion of almost 70 percent of its own workforce in the new Schedule.<sup>8</sup> The administration intended OMB’s submission to be an example for other agencies to follow.<sup>9</sup> FERC determined that more than half of its positions met Schedule F criteria. Four other agencies indicated that 10 percent or less of their positions

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<sup>6</sup> OPM 2025 Guidance at 3, fn5. As discussed below, OPM bases this part of its guidance on a misinterpretation of a related statutory provision that addresses SES positions.

<sup>7</sup> 90 FR at 17220.

<sup>8</sup> 89 FR 24982, 24990 (April 9, 2024); “CIVIL SERVICE - Agency Responses and Perspectives on Former Executive Order to Create a New Schedule F Category of Federal Positions,” Government Accountability Office, GAO-22-105504 September 2022 (hereafter “GAO 2022 Report”) at 14.

<sup>9</sup> GAO 2022 Report at 16.

would be included in Schedule F.<sup>10</sup> Recent news articles report that then acting Social Security Commissioner Dudek instructed staff to convert several offices and large numbers of employees, including some employees at pay scales as low as \$40,000 per year, under the new Schedule.<sup>11</sup>

All the indications are that the broad scope of OPM's proposed Schedule Policy/Career would be used to move a very large percentage of the federal workforce into this new excepted service, removing many important civil service protections currently available to employees. EPN projects that greater than 50% of the federal workforce or more than 1.5 million people are likely to lose their existing civil service protections under this proposal, and the percentage could be much higher, such as the 70% previously recommended by OMB for inclusion in Schedule F.

### **III. OPM's overly broad interpretation is inconsistent with both the historical meaning and the natural, ordinary meaning of the statutory terms, and relies on a clear misinterpretation of a related provision.**

In its 2024 rulemaking, OPM determined that the phrase “policy-determining, policy-making or policy-advocating” refers to political appointees, and does not include career employees. Just one year later, OPM has dramatically changed its view and now rejects that interpretation. OPM now claims that career employees can be included within that phrase based on its view of the history of these terms and their natural and ordinary meaning, as well as OMB's interpretation of a related statutory provision authorizing the SES program.

EPN agrees with the interpretation OPM made in its 2024 rulemaking, for all the reasons provided in that rulemaking.<sup>12</sup> OPM's proposed interpretation of the statute should be rejected for all the legal, policy, and other reasons relied upon in the 2024 rulemaking.

In addition, OPM's interpretation is contrary to the natural and ordinary meaning of these terms. As discussed above, OPM states that these terms “have their plain English meaning—confidential positions or those that determine, make, or advocate for policy.”<sup>13</sup> OPM also states that “[t]he best reading ... is that the terms “confidential, policy-determining, policy-making, or policy-advocating” have their ordinary, plain English meaning and describe positions *involved in* determining, making, or advocating for policy, or confidential positions.” (emphasis supplied)<sup>14</sup> OPM calls these positions “policy-*influencing*” (emphasis supplied).<sup>15</sup>

The statute does not refer to positions that might be “involved in” making policy, or that might “influence” the making of policy. Instead, the statute refers to positions that make, determine, or advocate for policy. All

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<sup>10</sup> Id. at 17.

<sup>11</sup> “Dudek calls for entire SSA offices to be converted to new Schedule F,” *Government Executive* (April 22, 2025) <https://www.govexec.com/workforce/2025/04/dudek-calls-entire-ssa-offices-be-converted-new-schedule-f/404755/>.

<sup>12</sup> See, e.g., 89 FR at 25019-028 (April 9, 2024).

<sup>13</sup> 90 FR at 17202. OPM's 2024 rulemaking also analyzed various issues concerning the President's authority to manage the civil service. EPN supports OPM's analysis and conclusions in that rulemaking and is not further addressing the issues of Presidential authority in these comments.

<sup>14</sup> Id. at 17195. Also see id. at 17194.

<sup>15</sup> Id. at 17182, 17194.

the staff and managers involved in the development of a policy or who influence the making of the policy or who are involved in implementing a policy do not themselves make the policy. OPM improperly attempts to bring all such persons into the scope of the proposed schedule under the faulty view that they are persons who make or determine policy.

This is readily seen in the common and accepted meaning of these terms. The term “making” ordinarily means producing or creating something.<sup>16</sup> The term “make” commonly means enact or establish, such as “make a law,” or to produce or create something.<sup>17</sup>

The term “determining” is the present participle of “determine,” which means to decide what will happen, to fix conclusively or authoritatively, such as “determine national policy.”<sup>18</sup>

All the employees who are involved in developing or influencing the adoption of a policy, or in implementing it, are not employees who have made or determined the policy. They are important to the process, but they are not the decision-makers. They do not create, establish, set, or enact a policy. They do not conclusively or authoritatively establish a policy.

Case law reflects this common understanding of these terms.

*Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135, 142-143 (June 13, 2011) (“For purposes of Rule 10b–5, *the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not “make” a statement in its own right. ... This rule might best be exemplified by the relationship between a speechwriter and a speaker. Even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit—or blame—for what is ultimately said.*”) (emphasis supplied).

*Abbott v. Abbott*, 560 U.S. 1, 11 (May 17, 2010) (“[D]etermine” can mean “[t]o fix conclusively or authoritatively,” Webster’s New International Dictionary 711 (2d ed. 1954) (2d definition), but it can also mean “[t]o set bounds or limits to,” *ibid.* (1st definition), which is what Mr. Abbott’s *ne exeat* right allows by ensuring that A. J. A. cannot live at any street addresses outside of Chile.”) (emphasis supplied).

*Babb v. Wilkie*, 589 U.S. 399, 406, fn.3 (April 6, 2020) (““[S]hall be made” is a form of the verb “to make,” which means “to bring into existence,” “to produce,” “to render,” and “to cause to be or become.” Random House Dictionary of the English Language, at 866. Thus, “shall be made” means “shall be produced,” etc. And the imperative mood, denoting a duty, see Black’s Law Dictionary 1233 (5th ed. 1979), emphasizes the importance of avoiding the taint.”) (*It is entirely natural to regard an employment*

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<sup>16</sup> Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/making>; Collin’s Dictionary, <https://www.collinsdictionary.com/us/dictionary/english/making>; Oxford Learner’s Dictionary, <https://www.oxfordlearnersdictionaries.com/us/definition/english/making>.

<sup>17</sup> Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/make>; Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/make>; Oxford Learner’s Dictionary, [https://www.oxfordlearnersdictionaries.com/definition/english/make\\_1](https://www.oxfordlearnersdictionaries.com/definition/english/make_1)

<sup>18</sup> Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/determining>; Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/determine>

decision as being “made” at the time when the outcome is actually determined and not during events leading up to that decision. See American Heritage Dictionary, at 788 (def. 10) (defining “make” as “[t]o arrive at” a particular conclusion, *i.e.* to “make a decision”). (emphasis supplied).

United States v. Halliburton Company, 954 F.3d 307, 310 (D.C.Cir. March 27, 2020) ( “[M]aking copies” means causing imitations or reproductions of original works to come into being, see Merriam-Webster’s Collegiate Dictionary 702 (10th ed. 1997) (“make”: “to cause to happen”); *id.* at 256 (“copy”: “an imitation, transcript, or reproduction of an original work”), and the parties agree that “any materials,” 28 U.S.C. § 1920(4), includes electronic as well as traditional paper copies. In other words, the phrase “making copies of any materials” still refers to the task of duplication; it does not include the steps leading up to duplication any more than the old version did.”) (emphasis supplied).

Tig Insurance Company (TIG) v. Republic of Argentina, 110 F.4<sup>th</sup> 221, 232 (D.C.Cir. July 30, 2024) (“For example, both TIG and the district court cite the then-current version of Black’s Law Dictionary, which defined to “make a contract” as “[t]o agree upon, and conclude or adopt, a contract.” Make a Contract, Black’s Law Dictionary (5th ed. 1979) (emphasis added). This understanding of to “make”—as TIG urges—encompasses a nonoriginal signatory who later adopts an agreement to arbitrate.”).

EPN agrees with OPM that these statutory terms “have their plain English meaning—confidential positions or those that determine, make, or advocate for policy.”<sup>19</sup> But OPM’s proposal goes far beyond the plain meaning. The proposal brings in large swaths of the federal workforce who do not make or determine policy. They may help to develop policies, and they may act to implement them once they are made or determined. However, these actions do not transform them into persons who make or determine policy. OPM’s proposal is overly broad and fails to limit this new Schedule to persons who reasonably can be considered making or determining policy.

OPM also relies on a faulty interpretation of the statutory provision that authorizes the SES program. This provision states that:

(2) “Senior Executive Service position” means any position in an agency which is classified above GS–15 pursuant to section 5108 or in level IV or V of the Executive Schedule, or an equivalent position, which is not required to be filled by an appointment by the President by and with the advice and consent of the Senate, and in which an employee—

- (A) directs the work of an organizational unit;
- (B) is held accountable for the success of one or more specific programs or projects;
- (C) monitors progress toward organizational goals and periodically evaluates and makes appropriate adjustments to such goals;
- (D) supervises the work of employees other than personal assistants; or

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<sup>19</sup> 90 FR at 17202.



(E) otherwise exercises important policy-making, policy-determining, or other executive functions.<sup>20</sup>

OPM takes the position that the “otherwise” clause (E) means that “SES positions ... are definitionally policy-making or policy-determining.”<sup>21</sup> Likewise, OPM concludes that “[t]he CSRA separately used the terms “policy-making” and “policy-determining” ... to describe all SES positions.”<sup>22</sup>

This misinterprets the SES provision. Under this provision, SES positions are positions that are classified above GS-15 and which either perform any of certain management functions [(A), (B), (C), or (D)] or otherwise exercise either of three functions—“important policy-making, policy-determining, or other executive functions.” The provision uses the word “or” twice in its list of criteria, meaning only one of the various criteria needs to be satisfied, not all of them.<sup>23</sup> Thus, an SES position is authorized for seven categories of positions that:

- (1) direct the work of an organizational unit; or
- (2) are held accountable for the success of one or more specific programs or projects; or
- (3) monitor progress toward organizational goals and periodically evaluate and make appropriate adjustments to such goals; or
- (4) supervise the work of employees other than personal assistants; or
- (5) exercise important policy-making functions; or
- (6) exercise important policy-determining functions; or
- (7) exercise important executive functions.

SES positions that satisfy any of the criteria in (A) through (D) may or may not exercise important policy-making or policy-determining functions. They may be positions that exercise important executive functions but do not make or determine policy.

It is important to note that the criteria in sub-paragraphs (A) through (D) make no reference to policy making or determining. They refer to executive or management functions. Thus, many if not most SES positions could be higher level executive or management positions that do not make or determine policy and instead perform “important ... executive functions.” OPM’s interpretation—that all SES positions are

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<sup>20</sup> 5 U.S.C. § 3132(a)(2).

<sup>21</sup> 90 FR at 17194.

<sup>22</sup> *Id.*; also see 90 FR at 17202, 17214; OPM 2025 Guidance at fn.5.

<sup>23</sup> *Campos-Chaves v. Garland*, 602 U.S. 447, 457 (June 14, 2024) (“The word “‘or’ ” is “ ‘almost always disjunctive,’ ” *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 87, 138 S.Ct. 1134, 200 L.Ed.2d 433 (2018) (quoting *United States v. Woods*, 571 U.S. 31, 45, 134 S.Ct. 557, 187 L.Ed.2d 472 (2013)), and is generally used “to indicate ... an alternative,” Webster’s Third New International Dictionary 1585 (1993); see also *Woods*, 571 U.S. at 45–46, 134 S.Ct. 557. So here, § 1229a(b)(5)’s ordinary meaning is that either a paragraph (1) notice or a paragraph (2) notice can count as “notice in accordance with paragraph (1) or (2).””)

by definition policy-making or policy-determining—is clearly wrong and provides no basis for the overly broad scope of its proposal.

OPM’s overly expansive interpretation of the statutory terms would fundamentally change the nature of the civil service. The proposed Schedule is an attempt to turn vast swaths of the federal workforce into at-will employees, based on a fallacious claim that large segments of the workforce make and determine policy. This is far beyond what Congress envisioned for this carefully written and narrow provision.

A change of the magnitude countenanced by this proposal is not within the scope of the statute as written. The appropriate recourse is to seek a legislative change, not to distort the statute to force into it the proposal’s view of the desired way to manage the federal workforce.

#### **IV. OPM’s proposal is based on unsubstantiated claims that a substantial number of employees will resist an administration’s policies or are poor performers, causing major interference with implementation of the administration’s policies.**

OPM spends a significant amount of time explaining that there is widespread concern among federal employees that it is hard to take adverse actions against employees with poor performance or other work-related problems. OPM does not, however, assert that actual performance problems are widespread or cover a significant number of employees. Instead, it points to the widespread view that employees with poor performance are not managed properly. In addition, OPM points to various incidents implying some employees resist or claim to resist the policies that have been determined by their leadership, with little evidence of how often and to what degree this occurs.

While the proposed rule cites various studies concerning poor performance within the federal career workforce, the studies provide only limited information concerning the actual prevalence of poor performance.<sup>24</sup> At the same time, OPM’s 2024 rule cites a 2016 GAO report which:

showed “99 percent of all permanent, non-SES employees received a rating at or above ‘fully successful’ in calendar year 2013. Of these, approximately 61 percent were rated as either ‘outstanding’ or ‘exceeds fully successful.’”<sup>25</sup>

This study supports the 2024 rule’s conclusion that OPM had seen no evidence “show[ing] that there are significant numbers of poor performers in government.”<sup>26</sup>

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<sup>24</sup> 90 FR at 17189.

<sup>25</sup> 89 FR at 25039. The proposed rule asserts that these performance ratings cannot “be taken at face value” because employees “have many opportunities to contest or appeal their official performance ratings,” such as by having their bargaining unit file a grievance; and as a result, “supervisors may sadly but rationally rate poor performers as ‘fully successful’ to avoid the time and expense involved in litigating an accurate lower rating.” 90 FR at 17191 & n.124. The proposed rule does not cite any support for these assertions. They amount to unsubstantiated speculation as to the motives of tens of thousands of supervisors across the federal government, and therefore do not undermine the 2024 Rule’s conclusion that there is a low incidence of poor performance among career employees.

<sup>26</sup> *Id.*

In addition, to the extent that performance problems with employees arise, they can be adequately addressed through current mechanisms to address performance issues, including performance management systems, performance improvement plans, and adverse actions such as suspensions, demotions, or removals in chapters 43 and 75, as the 2024 rule explained.<sup>27</sup> While in some cases these mechanisms can be time- and resource-intensive, they are in fact used to address poor performance.<sup>28</sup> Importantly, any problems that have been identified with these mechanisms can be addressed and the mechanisms improved without imposing the proposal's drastic change. Numerous studies have pointed out possible ways to do so.<sup>29</sup> There is no need to eliminate the civil service protections for wide swaths of the federal workforce to solve any such problems. In addition, as discussed in Section VII below, if career staff fail to carry out clear instructions, their insubordination would make them subject to discipline (including potential dismissal) on conduct grounds. In the decades of experience of EPN volunteers, many of whom were managers at EPA, disciplinary actions for misconduct, unlike performance-based disciplinary actions, are easily proven, quickly effectuated, and seldom challenged successfully.<sup>30</sup>

OPM asserts that its proposal is an attempt to address the breadth and scope of these problems, with a focus on the areas in which policy is impacted. OPM states that:

Upon further review, OPM has concluded policy resistance is a serious concern—indeed, a serious threat to democratic self-government. OPM now believes these proposed regulations implementing Schedule Policy/Career are necessary to reduce bureaucratic autonomy and strengthen the Government's democratic accountability to the American people. ... Unfortunately, considerable evidence shows that a significant number of career employees instead inject their personal politics into their official duties.<sup>31</sup>

The evidence OPM provides includes theoretical models used to analyze federal employment.<sup>32</sup> Otherwise, its factual assertions are anecdotal. OPM discusses a few specific examples such as enforcement actions taken over 40 years ago contrary to the policy of EPA's then administrator. OPM cites various news reports of "widespread career employee policy resistance." Examples in the news reports discuss slow-walking actions the employee disagrees with, and advice to "[o]nly provide minimal information requested", "[f]ail to find information", "[m]iss deadlines while 'doing your best'", or "pretend to work really hard on something when they're not."<sup>33</sup> OPM also points to a regional director's refusal to decertify a bargaining unit, to Department of Energy employees refusing to help draft regulations, and government lawyers refusing to assist in litigation.<sup>34</sup> OPM also points to political appointees in the former Trump administration reporting they "experience[d] strong policy resistance."<sup>35</sup>

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<sup>27</sup> Id.

<sup>28</sup> Id.

<sup>29</sup> For example, see "The Partnership for Public Service's Vision for a Better Government" (August 15, 2024) 5-6, <https://ourpublicservice.org/publications/vision-for-a-better-government/>.

<sup>30</sup> The important role of SES positions in managing the career workforce is discussed below in section VII.

<sup>31</sup> 90 FR at 17191.

<sup>32</sup> Id. at 17191-192.

<sup>33</sup> Id. at 17192.

<sup>34</sup> Id. at 17193.

<sup>35</sup> Id. at 17192.

EPN does not support or condone actions like those alleged in the preamble. However, it is important to note several points.

The so-called evidence of staff resistance is astoundingly weak. Most of the cited news accounts describe future actions that might or might not be taken by the employees. The news accounts do not refer to or substantiate actual past conduct, but rather to assertions of possible future conduct. While such conduct would not be appropriate, OPM does not show that actual resistance of this nature has occurred or to what extent it has occurred. There can be a far cry between what an employee anonymously tells a reporter about what they might do and what action they do take, if any. Likewise, the reference to theoretical models is unpersuasive because it fails to show that any staff have actually interfered with the development of policies. The allegations of “strong policy resistance” lack supporting detail and evidence, and to the extent the preamble offers concrete instances of so-called resistance, they are limited in number and scope, and some happened over 40 years ago.<sup>36</sup>

It appears that OPM’s evidence of resistance is drawn in large part from James Shrek’s paper, “Tales from the Swamp: How Federal Bureaucrats Resisted President Trump”<sup>37</sup> (hereafter “Tales”). “Tales” specifically alleges misconduct by lawyers in EPA’s Office of General Counsel (OGC) during the first Trump administration. The paper does not cite any sources or provide any documentation for this claim, and it takes no more than a close look to show the allegations are wrong. **Appendix B** explains why this allegation is not credible and is inconsistent with public statements of political appointees in OGC from this period. Their words speak for themselves. The allegation against OGC is not credible, and it casts doubt on the other allegations in the paper.

There is also academic research that conflicts with OPM’s conclusion. A study of four regulatory agencies during the Ronald Reagan administration found that career civil servants generally do follow the president’s agenda, and employees who do not are marginalized.<sup>38</sup> This indicates that what a political appointee may subjectively see as “resistance” is likely to be no more than good-faith efforts on the part of knowledgeable career staff to ensure that an appointee is aware of relevant information about the potential impacts or risks from a certain policy option, information they might not otherwise be aware of.

Critical analysis of proposed policies is part of the standard policy development process. It is the job of career staff to analyze and compare policy options, identifying the pros and cons of each, to help policymakers arrive at sound decisions. An uncritical assessment of an administration’s policy proposals would be a disservice to the senior officials making final decisions. Some of the information may not be what they want to hear and may be interpreted as an attempt to interfere with the administration’s agenda. However, providing this kind of relevant information is not “resistance.” As discussed below in Section V, it is an essential function of career staff. Senior officials always retain the authority to make the final decision, and providing this kind of information ultimately serves the administration by helping it make the most informed decision.

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<sup>36</sup> OPM’s assertion of an improper increase in enforcement stringency from over 40 years ago is mistaken, as discussed in **Appendix A**.

<sup>37</sup> James Shrek, “Tales from the Swamp: How Federal Bureaucrats Resisted President Trump,” Am. First Pol. Inst., (Jan. 8, 2025), <https://www.americafirstpolicy.com/issues/20222702-federal-bureaucrats-resisted-president-trump>. See 90 FR at 17192, fn. 138, 139, 140, and 141, and Tales at pp. 6-7, 11.

<sup>38</sup> “What Motivates Bureaucrats,” Marissa Martino Golden, New York: Columbia University Press, 2000, at 2, 13, 136, 168.

In addition, the preamble provides no evidence of whether the alleged problem of resistance is sufficiently common to justify the extraordinarily broad change being proposed. It provides no evidence of any nature as to how many employees were involved in past instances of resistance, what form the resistance took, how serious the resistance was, and even whether the resistance had any impact on policy determination or implementation. The preamble provides no evidence of whether currently available mechanisms to discipline misconduct were used and what effect this had. The evidence provided by OPM fails to provide any concrete basis for OPM's conclusions.

The collective experience of EPN volunteers who served as managers at EPA and other federal agencies is that conduct that interferes with or resists implementation of a decision-maker's policy is extremely rare and limited in nature. The evidence OPM cites fails to provide credible support for its conclusion that "a significant number" of federal employees resist or interfere with the policy decisions they are called upon to help implement.

To the contrary, there is compelling evidence that career employees faithfully execute their duties to support their agencies' policies and programs, over any number of administrations. Taking EPA as an example, the administrations of Presidents Clinton, Bush, Obama, Trump, and Biden were all very successful in adopting and implementing numerous policies that each administration desired. Whether or not one agrees with the wisdom of their policies, it can't be doubted that each administration made significant changes and vigorously moved the agency in the direction in which that administration wanted to go. Behind this success was the high level of expertise and professionalism exhibited by EPA's career staff. As OPM's 2024 rule states, "Republican and Democratic administrations have achieved important policy goals with a nonpartisan career civil service whose members undoubtedly encompass a wide variety of personal political perspectives."<sup>39</sup>

For example, the first Trump administration issued a large number of regulatory rollbacks and claimed to lower regulatory costs to industry by hundreds of billions of dollars.<sup>40</sup> These actions were possible only because career employees performed their jobs with professionalism and implemented the policies adopted by that administration. The actions taken by EPA during the first Trump administration highlight that EPA career employees have performed and continue to perform their jobs with professionalism, implementing policy direction irrespective of the political leadership of the agency. This real-world evidence stands in sharp contrast with the vague, unsubstantiated allegations concerning an unknown number of career employees that the proposed rule relies on. The proposed rule does not provide evidence of a single EPA rule or policy that was delayed, undercut, or changed because of policy resistance from career employees.

An equally important point is that none of the alleged evidence cited by OPM indicates that the persons involved were making or determining policy. All the evidence cited points to actions related to implementing a policy. "Slow walking" a work product, delaying the completion of a work product, or providing some but not all appropriate information are clearly inappropriate. But these actions are not "making" a policy or "determining" what a policy will be. A new policy will not fail to be made just because an employee fails to

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<sup>39</sup> 89 FR at 25000.

<sup>40</sup> E.g., C. Crews, Jr. et al., "2021 Status Report: What Regulations Did The Trump Administration Eliminate In 2020," *Forbes* (January 19, 2021) <https://www.forbes.com/sites/waynecrews/2021/01/19/status-report-what-regulations-did-the-trump-administration-eliminate-in-2020/>

meet a deadline, whether the delay is intentional, accidental, or entirely reasonable. It may or may not be poor or inappropriate performance, but it certainly is not making or determining a policy.

**V. The proposed Schedule would fundamentally undermine the critical role the career civil service plays as a central pillar of the executive branch of government in a free society.**

**A. Nonpolitical expertise is one of the foundations of an effective democratic government.**

The civil service system, centered on a career staff characterized by nonpolitical expertise, is an essential underpinning of modern government in a democracy. Effective government depends on career staff who can candidly provide expert advice and information, based on experience and expertise, to senior managers and political appointees. To successfully make and implement decisions that are responsive to presidential policy aims, a president's appointees must have good information and carefully thought-out advice from career staff. Receiving knowledgeable analyses and critical reviews of policy options, based on the independent professional judgment and experience of career staff, is key to making decisions that have the soundest factual, legal, and scientific basis. This also maximizes the defensibility of a decision from subsequent legal challenges. Understanding the programmatic and historic context for a decision is critical for decision-makers, and this kind of context can be provided by experienced career staff. This process is part of the foundation of modern, democratic government, and for it to work effectively, career employees must be able to provide information and candid advice without fear of political reprisal.

A critical function of the civil service system is to have a body of professionals and other persons who are knowledgeable and skilled in their field ("experts") who can help ensure that the work of the agency—carried out at the direction of its leadership—is done properly and effectively. In many cases, this expertise is developed over years of experience, across multiple administrations. Expertise of this kind is difficult to establish and almost impossible to replace if lost.

The ready availability of this kind of neutral competence is particularly important for decision-makers. Decisions must be made considering an often complex mix of scientific, legal, and other considerations. Whether the information or advice is coming from senior career officials or staff below them, it is a critical resource for political appointees. A blanket removal of civil service protections for broad groups of employees who provide this kind of information and advice would seriously chill this process and deprive appointees of the benefits of this resource.

**B. The proposed rule will chill agency experts and thereby weaken decision-making.**

OPM's proposal threatens to undermine this foundation of knowledge and expertise that makes federal agencies effective, by removing the job security of knowledgeable and skilled career employees. This will fundamentally weaken the federal government by discouraging career staff from providing honest professional advice and information. Instead, it will pressure them to avoid anything other than uncritical support of the apparent desires of the agency's political leadership.

Experts can only be effective if they have confidence that their information and advice can be given freely and in good faith without fear of retribution, even when it may not be what superiors want to hear. Knowing that your job is at risk if a political appointee decides they no longer have confidence in your ability to faithfully promote their preferred policy will assuredly undermine that confidence. Honest

information and advice will inevitably be chilled, and experts will have an incentive to tailor their input to support what they perceive to be the desired result. The outcome will be less-well informed decisions that also may be less effective at achieving the goals of political appointees.

OPM contends the proposed rule would not have this chilling effect because positions under the new Schedule would remain career positions, selected and retained on their merits and not for political reasons. OPM claims that its proposal does no more than facilitate the removal of persons who interfere with an administration's policies, whether through active resistance or poor performance.<sup>41</sup> OPM states that it recognizes "the value in having many perspectives present in an agency, and in career civil servants who disagree or see problems with a policy presenting their objections. Diverse perspectives frequently improve decision making." OPM states that its only concern is "when a career employee goes from voicing disagreement to resisting policy decisions."<sup>42</sup>

It is hard to see how the rule would not weaken and chill the ability of career staff to exercise and voice their independent professional judgment in advising decisionmakers. It is hard to see another purpose for the proposal as that is the obvious and expected result.

While presidential administrations in the past have at times attempted to inject political considerations into the management and activity of the federal bureaucracy, this proposal goes far beyond previous efforts and career staff will clearly see it as such. The kind of politicization that would result from the proposed Schedule in turn would result in great distrust between political appointees and career staff, and fear of reprisal for providing what an employee believes is the best information and advice. This inevitably will lead to weaker information exchange, less robust policy advice, and poorer management outcomes. "By politicizing bureaucratic ranks with lower-level appointees and centralizing decision-making through decidedly top-down arrangements, presidents foster further distrust of political appointees among careerists. This reciprocated distrust, in turn, inhibits a president's (and . . . appointees') capacity to develop the institutional competence necessary to successfully implement his policy agenda."<sup>43</sup>

The proposal sends a clear message to agency staff that their ability to keep their jobs depends on their demonstration of loyalty to the president's policies and avoiding any hint that they might advise a different approach. Loss of job security is the heart of the new Schedule. This is emphasized in the text of the proposal—dismissal can be based on the subjective view that the agency has "los[t] confidence" in the employee's ability to faithfully implement administration policies. This explicit threat of termination, based solely on the subjective view of a political appointee, can do nothing but create fear and insecurity.

The likelihood that the new Schedule will be managed to create a climate of fear and insecurity is only highlighted by the statements from the highest levels of this administration that the administration has little if any respect or concern for career employees. According to Russell Vought, head of OMB, "[w]e want the bureaucrats to be traumatically affected . . . When they wake up in the morning, we want them to not want to go to work because they are increasingly viewed as the villains. We want their funding to be shut down

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<sup>41</sup> 90 FR at 17182, 17183.

<sup>42</sup> Id. at 17194.

<sup>43</sup> Resh, William G., *Rethinking the Administrative Presidency: Trust, Intellectual Capital, and Appointee-Careerist Relations in the George W. Bush Administration*, Johns Hopkins University Press, 2015, p. 144.

.... We want to put them in trauma.”<sup>44</sup> OPM may claim career federal employees have nothing to fear from the proposed Schedule, but this administration’s words and actions speak for themselves.

Another serious impact of losing coverage of civil service protections is to strip the covered employees of the whistleblower and follow-the-law/follow-the-rule protections for adverse actions provided by Title 5, Section 2302(b)(8) and (b)(9). Losing whistleblower and related protections will add to the chilling effect on providing unvarnished policy advice and is likely to reduce the likelihood federal employees will report waste, fraud, abuse, and illegality. This will also adversely impact recruitment and retention of highly motivated employees.

By fundamentally undermining the critical role the career civil service plays, the proposal strikes a blow at one of the foundations of an effective democratic government.

## **VI. OPM’s overly broad proposal invites subjective, arbitrary, and politicized personnel actions against career employees.**

Loss of job security is at the center of the proposed schedule. The large percentage of federal employees who could be covered by the proposed Schedule would become at-will employees, subject to adverse action including dismissal with little if any ability to contest the actions. OPM’s clear goal is to put large numbers of federal employees back into the situation career employees faced prior to the 1960’s, when the Civil Service Reform Act and related laws were passed. This ignores the longstanding view that such an at-will employment structure was not optimal for development of a strong, effective, and long-term federal workforce.

Once an employee is covered by the proposed Schedule “[t]hey are required to faithfully implement administration policies to the best of their ability, consistent with their constitutional oath and the vesting of executive authority solely in the President. Failure to do so is grounds for dismissal.”<sup>45</sup> The grounds for dismissal would include the subjective view that the agency has “los[t] confidence” in the employee’s ability to satisfy this requirement.<sup>46</sup>

This means dismissal or other adverse action would be based largely on a subjective view of the employee’s performance. Failure to “faithfully implement” administration policies “to the best of their ability” is a subjective evaluation, clearly subject to arbitrary and partisan decision-making. “Loss of confidence” invites the same subjective evaluation. EPN’s comments do not attempt to catalogue all the myriad ways this can be an inappropriate way to manage the federal workforce. But the potential for abuse is not hypothetical—one need only look to recent events to see the serious risk of politicization of this process.

Under the prior administration, the Department of Justice (DOJ) implemented long-standing policies on the prosecution of federal crimes—follow the evidence where it takes you and apply the law neutrally to whoever is involved—in its prosecution of a variety of different kinds and degrees of crimes stemming from the events at the U.S. Capitol on January 6, 2021. The personnel at DOJ who staffed and managed these

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<sup>44</sup> Pro Publica, October 28, 2024, <https://www.propublica.org/article/video-donald-trump-russ-vought-center-renewing-america-maga>

<sup>45</sup> Proposed § 213.3501, “Career positions of a confidential, policy-determining, policymaking, or policy-advocating character.”

<sup>46</sup> 90 FR at 17185, 17190.



prosecutions appear to have faithfully implemented, to the best of their abilities, the policy choices of the prior administration.

Immediately upon installment of the current administration, the political leadership at DOJ reassigned and otherwise punished many senior lawyers involved in these prosecutions. This was based on the new administration's different view of the proper policy to address the serious events that occurred on that day. EPN's point is not about which administration's policy was the right or wrong policy. Our point is that employees who faithfully implemented the policy of their current administration were later punished by the next administration for doing exactly what OPM says employees should do—faithfully implement the policies of the administration that employs you.

This is perhaps the clearest example that the criteria in proposed § 213.3501—"faithfully implement" administration policies "to the best of their ability"—can mean whatever the person in authority wants them to mean, and "loss of confidence" is by definition an entirely personal perspective not subject to objective evaluation. OPM's proposal inappropriately attempts to place a large percentage of the federal workforce under this kind of subjective criteria. It is an invitation to arbitrary and politicized personnel decisions. The purpose of federal workforce legislation since the 1960s has been the avoidance of this kind of management framework. OPM should not be allowed to turn the clock back almost 60 years, as it has proposed.

## **VII. The proposed rule is unnecessary to address insubordination based on resistance because adequate administrative controls already exist.**

The proposed rule claims that the political leadership of federal agencies need the new, stronger authority to remove career civil servants from "policy-influencing" positions when those career staff refuse or interfere with directions from the political leadership—the so-called "resistance" or "deep state." Existing personnel rules, however, already provide the political leadership ample authority to address such insubordination. The proposed rule is entirely unneeded, has significant potential for abuse, and should be abandoned.

There are three ways in which the political leadership can ensure that their policy choices are implemented by the career staff in their federal agencies. First, the political leaders of an agency can work with the senior career leadership—the members of the SES—to ensure that the leadership's policy choices are clearly and effectively communicated to the career staff. To the extent that political leaders determine that an SES official is not performing as required, the political leadership may take disciplinary action, including reassignment, quickly and efficiently. Second, the political leadership of federal agencies should determine how much (or how little) and to what level to delegate the authorities their agencies administer. Finally, Presidentially appointed, Senate-confirmed (PASC) leaders in federal agencies always have the ability to hire Schedule C employees who can assist the PASC leaders in the formulation and communication of policy positions, and who can oversee the execution of those policies.

The members of the SES are some of the most outstanding individuals in the federal career service. In the organizational structure of federal agencies, the SES is the highest level of career employees. As such, SES members directly or indirectly supervise all of the subordinate career staff within their organizations. Further, the political leadership of their agencies are their superiors and, thus, have the authority to direct the work of SES members. Consequently, as a practical matter, the SES plays a crucial role in understanding and transmitting instructions from the agency's political leadership to the career employees who have to

carry out the instructions. Often, there is an essential policy foundation for the political leadership's instructions and it is incumbent on the SES to make sure that the specific directions that the career staff receive are consistent with that foundation. To the extent the implications of a policy are unclear, the SES member is responsible for seeking clarification so that the political leadership's intentions are achieved. In essence, therefore, the SES—and only the SES—should be held responsible for making sure that the policy agenda of political leadership is implemented through the work of career staff.

The current personnel rules give political leadership the ability to discipline SES members who do not perform their roles in ways that the political leaders find satisfactory. SES members can be reassigned with written 15-day advance notice.<sup>47</sup> Although SES members retain certain limited rights with respect to final disciplinary actions, as detailed in 5 CFR 359.502, the procedures for removal from SES positions are already consistent with what OPM seeks to achieve—better alignment of career staff and management performance with presidential policy goals. There is no need for the much greater disruptive impacts OPM's proposal would bring. As OPM states:

However, this reasoning ignored statutory SES management flexibilities. Agency heads can reassign SES members at-will or unilaterally demote them from the SES for poor performance.[fn] The President and OPM can also take agencies out of the SES and create alternative senior executive management systems.[fn]<sup>48</sup>

To the extent that political leadership has concerns that career staff will take actions inconsistent with the leadership's announced policies or will act inappropriately in the absence of clear direction from the leadership, the solution is for the political leadership to assign decision-making authority only to those in whom they have confidence. Many EPN volunteers have served in the SES and keenly appreciate the challenges of communicating new policy directions throughout a large organization. Rather than reclassifying positions as “policy-influencing” to make staff subject to summary dismissal, the more straightforward approach is to revisit the agency's delegations of authority. If the political leadership thinks that career staff may not properly implement critical new policies, they should withdraw the existing delegations of authority to make decisions that might turn on the new policies. The political leadership can entrust key decision-making to people (or organizational levels) whom they trust to act as the leadership would expect. More importantly, that would leave the career staff performing the essential roles necessary to execute the decisions. If career staff failed to carry out clear instructions, supervisors have the ability to reassign work. In addition, their insubordination would make them subject to discipline (including potential dismissal) on conduct grounds. In the decades of experience of EPN volunteers as managers in EPA, disciplinary actions for misconduct, unlike performance-based disciplinary actions, are easily proven, quickly effectuated, and seldom challenged successfully. Thus, a thoughtfully designed delegation scheme would address all concerns about improper “resistance” by career staff.

Finally, political leadership can and should turn to Schedule C appointees for help in effectively implementing their new policies. Many EPN volunteers have experience as SES members working directly with new political leadership in an agency. We appreciate that the political leadership takes on a very large number of responsibilities at their new agencies, and that the positions are challenging. Congress and OMB

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<sup>47</sup> “Senior Executive Service (SES) Addressing Conduct,”

<https://www.opm.gov/policy-data-oversight/senior-executive-service/adverse-actions/ses-addressing-conduct-fact-sheet/>

<sup>48</sup> 90 FR at 17195.

have authorized agencies to hire a modest number of staff non-competitively using the authority in Schedule C. Typically, Schedule C employees have connections with the then-current administration's political party and, thus, are dependably aligned with the policy preferences of the agency's political leadership. Although some Schedule C appointees serve in relatively junior positions, a new administration could use the Schedule C appointment authority to give political leaders of an agency additional help in overseeing the agency's operations. Schedule C staff can prove very valuable in extending the effective management of the political leaders of a government entity and ensuring that new policies are effectively communicated and implemented.

In sum, if political leaders in federal agencies employ good management practices that use all of the available tools—working with members of the SES, allotting delegated authority to trusted levels of their organizations, and making effective use of Schedule C appointees—they can ensure that career civil servants will effectively implement their policies. There is no need to reclassify broad swaths of the federal workforce to the new Schedule as proposed.

### **VIII. OPM's proposal will significantly hurt recruitment and retention of skilled and knowledgeable staff.**

OPM relies on three arguments to support its claim that the proposed Schedule does not raise serious concerns about recruitment and retention.

OPM points to the fact that recruitment would still be under the merit system applicable to career employees. The current merit-based hiring process would remain intact and “[e]mployees considering whether to apply for a Policy/Career position would know that they will be valued for their knowledge, skills, and abilities and evaluated based on merit. They would also be filling long-term positions that would not typically disappear upon a change in administration.”<sup>49</sup>

With respect to the benefits of job security, OPM paints a superficially rosy picture.

[E]mployees who perform well and faithfully implement the President's agenda to the best of their ability have little reason to fear dismissal based on non-merit factors. Firing experienced policy-influencing employees who are helping advance his policy agenda would undermine the President's ability to implement that agenda. The President has unsurprisingly forbidden agencies from doing so. Dismissals of policy-influencing career employees, to the extent they occur, would instead be concentrated among poor performers, corrupt employees, or those who injected partisanship into the performance of their duties. While dismissing such employees may create some disruption, over the long-term the government benefits from employing a high-performing and ethical workforce that understands that democracy requires subordinating their personal policy preferences to those of the voters. Consequently, OPM expects Schedule Policy/Career would not bring about the destabilizing separations commenters and OPM previously feared would occur under the proposed Schedule F, nor would it necessarily lead to losses of institutional knowledge or reduced employee investment in skills within agencies.<sup>50</sup>

While recognizing that job security is a significant advantage for the federal government in terms of hiring, OPM points to other advantages that will alleviate any loss of security that at-will employment brings. In

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<sup>49</sup> 90 FR at 17216.

<sup>50</sup> Id.

particular, OPM cites the government's more generous benefits package compared to most comparable private-sector employers.<sup>51</sup>

OPM's arguments are unfounded. EPN fully supports the position OPM expressed in the 2024 rule, which preserved civil service protections to:

[support] the retention of Federal career professionals who provide the continuity of institutional knowledge and subject-matter expertise necessary for the critical functioning of the Federal Government.<sup>52</sup> "A vast body of research" shows "public service motivation as a central factor in public employment" and that civil servants "invest effort and develop expertise precisely because a stable public job provides an environment where they can pursue their motivation to make a difference."<sup>53</sup> The rights and protections afforded to career Federal employees offer a more stable alternative to comparable private and non-government sector positions.<sup>54</sup> These professionals play an integral role in transferring knowledge, not just as part of their official duties, but also by training and mentoring newer and less experienced Federal employees, interns, contractors, etc.<sup>55</sup>

In 2024, OPM stated that:

[Civil service protections are] critical to the Federal Government's ability to recruit and retain the talent that agencies need to deliver on their complex missions. Individuals considering whether to accept a career civil service position need to know that they will be valued for their knowledge, skills, and abilities; evaluated based on merit; and not only protected from retribution for offering their candid opinions but encouraged to do so. Policies that cast doubt on these fundamental characteristics of a career civil service job<sup>56</sup> ... [would] instill[] fear of reprisal and loss of employment, [which] would damage retention and recruitment efforts.<sup>57</sup>

Successful recruitment and retention of federal employees hinges on preserving the benefits people see in federal employment—the ability to serve an important public mission and the job security to do this for long periods of time. Preserving merit-based hiring is only part of achieving this goal. The ability to fire an employee on grounds as amorphous, vague, and susceptible to partisan abuse as "loss in confidence" that an employee will "faithfully implement administration policies to the best of their ability" significantly undercuts the ability of prospective or current employees to believe they have any degree of job security. The loss of civil service protections makes a mockery of the idea that federal government employment offers job security to persons who are motivated by public service to seek or keep federal employment.

OPM's argument on the value of government benefits packages in the hiring process is likewise faulty. An employee subject to this new Schedule could lose all these benefits if they are not viewed as politically faithful, which significantly undercuts the value these benefits provide for hiring. In addition, OPM has cherry-picked Congressional Budget Office (CBO) data to support its claim. While the federal government's

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<sup>51</sup> Id.

<sup>52</sup> Donald P. Moynihan, "Public Management for Populists: Trump's Schedule F Executive Order and the Future of the Civil Service," Pub. Admin. Rev., p. 174, 177 (Jan.–Feb. 2022).

<sup>53</sup> Id.

<sup>54</sup> Id.

<sup>55</sup> 89 FR at 25043-054.

<sup>56</sup> Id. at 24983.

<sup>57</sup> Id. at 25037.

non-wage benefits are more generous than the private sector for employees with a bachelor's degree or higher, the CBO study shows that for employees with a bachelor's degree, the total compensation package (wages and benefits) is only slightly higher than the private sector, and for employees with higher degrees the federal government provides lower total compensation than the private sector.<sup>58</sup>

The federal government has long struggled to attract the best people for higher level jobs because its salary and benefits are not deemed competitive. Most of the positions likely to be covered in this rule are higher level workers, many at or above the bachelor's level. These people have historically joined the government because of commitment to an agency's mission and accompanying job security. Eliminating these incentives would significantly change the quality of the hiring pool for EPA and many other agencies. The loss of civil service protections would compound the competitive disadvantage that the federal government already faces in recruitment and retention.

EPN believes the proposed Schedule seriously undermines the major reasons to become or stay a career civil servant.

## **IX. Conclusion.**

A government workforce based on principles of expertise, professionalism, and independence from political retribution is part of what defines modern democratic governments. The current framework for the civil service embodies this approach and has served this country well. OPM's proposed Schedule is a thinly disguised effort to remove the job security that is at its core. It is an extreme reordering of the longstanding framework for the civil service, which is unlawful and threatens a core institution of our federal government.

OPM's proposal would dramatically expand the excepted service by inappropriately covering a very large percentage of the federal workforce. It relies upon an unsupportable interpretation of the statute that is vastly broader than it authorizes. The proposal relies upon unsubstantiated claims that employee resistance to an administration's policies and poor performance are widespread problems that cause major interference with the implementation of administration policies.

The proposed Schedule would undermine a critical function of the career civil service—candidly providing expert advice and information, based on experience, to senior managers and political appointees. This undercuts a long-standing foundation of the executive branch of government in a free society. The proposal invites subjective, arbitrary, and politicized personnel actions against career employees. It is not needed as adequate administrative controls already exist to address insubordination based on resistance to an administration's policies. The proposed Schedule will seriously hinder federal recruitment and retention.

For all the above reasons, OPM's proposal is fatally flawed and should not be adopted.

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<sup>58</sup> "Comparing the Compensation of Federal and Private-Sector Employees in 2022," Congressional Budget Office, April 2024, at 2, Fig. S-1.

## **Appendices**

**Appendix A: Examining Claims of EPA Bureaucratic Resistance During the Reagan Administration**

**Appendix B: Examining Claims of EPA Office of General Counsel Misconduct During the First Trump Administration**

**Appendix C: A 50-Year History of the Environmental Protection Agency Office of General Counsel, 1970-2020**