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June 6, 2025

Mr. Charles Ezell
Acting Director
U.S. Office of Personnel Management
1900 E Street NW
Washington, DC 20415
Submitted via www.regulations.gov

Re: RIN 3206-AO80, “Improving Performance, Accountability and Responsiveness in the Civil Service”

Dear Acting Director Ezell:

The National Women’s Law Center (NWLC) writes in strong opposition to the Office of Personnel Management’s (OPM) proposed rule misleadingly titled, “Improving Performance, Accountability and Responsiveness in the Civil Service.”¹ For over 50 years, NWLC has fought for gender justice—in the courts, in public policy, and in our society—working across issues that are central to the lives of women and girls, with a particular focus on removing systemic barriers to equality and economic security. NWLC has long advocated for policies that will address workplace discrimination, including sexual harassment, raise wages, close racial and gender wage gaps, and improve job quality—and quality of life—for working women across the United States. Similarly, NWLC protects the civil rights of women, LGBTQ people, and families by defending the democratic systems, rooted in the U.S. Constitution and the rule of law, which make those rights possible.

NWLC opposes this Proposed Rule because it would undermine the effectiveness of the federal government and our democracy by subjecting civil servants to presidential loyalty tests rather than federal law, it has a disproportionate negative impact on working women and people of color, and it contravenes federal law and court precedent.

¹ Office of Personnel Management, Improving Performance, Accountability and Responsiveness in the Civil Service, 90 Fed. Reg. 17182 (Apr. 23, 2025), RIN 3206-AO80, Docket No. OPM-2024-0004 (hereinafter, “Proposed Rule”). Available at <https://www.federalregister.gov/documents/2025/04/23/2025-06904/improving-performance-accountability-and-responsiveness-in-the-civil-service>.

The Proposed Rule Would Undermine the Civil Service Protections Established and Expanded by Congress Over Decades

The history of the development of America’s civil service system is one of increasing responsiveness to meet the needs of the American people and an increasingly complex, technologically advanced, and pluralistic society. Before the passage of the Pendleton Act of 1883,² our government largely operated through a spoils system where presidents could freely award and remove federal positions in order to reward political allies. However, through the passage of the Pendleton Act and subsequent protections for federal employees,³ Congress gradually established a civil service that allows agencies to fulfill their purposes defined in law without politicization or bias and with a high degree of expertise. In 1978, Congress passed the Civil Service Reform Act (CSRA), creating the statutory framework for our modern civil service and providing federal workers with due process rights, including notice and the ability to respond to and appeal adverse actions.⁴ More recently, the Biden Administration took steps to reinforce and clarify these civil service protections through the issuance of the “Upholding Civil Service Protections and Merit System Principles” rule.⁵

However, relying on a false and ahistoric “unitary executive” theory,⁶ President Trump seems determined to drag our government back to a spoils system of governance by fiat, in defiance of federal law and constitutional underpinnings, through his executive orders.⁷ This Proposed Rule furthers this illegal purpose by carving significant exceptions into the protections for civil service workers that would thoroughly undermine the system that Congress has established.

² Nat’l Archive, *Milestone Documents: Pendleton Act (1883)*. Available at <https://www.archives.gov/milestone-documents/pendleton-act>.

³ See, e.g., Lloyd-La Follette Act of 1912, 37 Stat. 555 (1912); Veterans’ Preference Act of 1944, 58 Stat. 387 (1944).

⁴ 92 Stat. 1111; Public Law 95-454 (Oct. 13, 1978).

⁵ Office of Personnel Management, *Upholding Civil Service Protections and Merit System Principles*, 89 Fed. Reg. 24982 (Apr. 9, 2024) (hereinafter, “2024 Rule”). Available at <https://www.federalregister.gov/documents/2024/04/09/2024-06815/upholding-civil-service-protections-and-merit-system-principles>.

⁶ Allen Shoenberger, *The Unitary Executive Theory Is Plainly Wrong and Anti-American: “Presidents Are Not Kings,”* 85 Alb. L. Rev. 837 (2021). Available at <https://www.albanylawreview.org/api/v1/articles/38770-the-unitary-executive-theory-is-plainly-wrong-and-anti-american-presidents-are-not-kings.pdf>.

⁷ Executive Order 14171, “Restoring Accountability to Policy-Influencing Positions within the Federal Workforce,” 90 Fed. Reg. 8625 (Jan. 31, 2025). Available at <https://www.federalregister.gov/documents/2025/01/31/2025-02095/restoring-accountability-to-policy-influencing-positions-within-the-federal-workforce>; see also Executive Order 13957, “Creating Schedule F in the Excepted Service,” 85 Fed. Reg. 67631 (Oct. 26, 2020). Available at <https://www.federalregister.gov/documents/2020/10/26/2020-23780/creating-schedule-f-in-the-excepted-service>.

Under this Proposed Rule, a new category of career employees with “policy-influencing” roles would be established, titled “Schedule Policy/Career” (hereinafter, “Schedule P/C”). Although these employees would remain career employees in name and purportedly continue to be hired through the government’s standard merit-based procedures,⁸ the Proposed Rule would allow them to be shifted to this new Schedule without notice or right to appeal. Further, they would be stripped of employment protections and subject to at-will removal. This Proposed Rule would also rescind the protection from reclassification-based removals recognized in the 2024 Rule.

A Functional System of Government that Works for the People Is Critical to Democracy

In our system of constitutional democracy, all civil servants, as well as the President, serve the people of the United States and are sworn to uphold the U.S. Constitution and faithfully execute the laws passed by Congress, not the policies of the elected President. And yet, OPM contends that the Proposed Rule is necessary “to strengthen democracy and promote a nonpartisan civil service,”⁹ concluding that “[d]emocracy depends on a nonpartisan civil service in which career employees effectively and faithfully implement the law and the *policies of the elected President* to the best of their ability.”¹⁰ However, OPM and President Trump have this exactly backward; this Proposed Rule would politicize a nonpartisan federal workforce by eliminating the very employment protections that allow it to operate in a nonpartisan manner.

Our Founders made clear that Congress is the branch of government that represents the will of the American people, which is why it is laid out foremost in the Article 1 of the U.S. Constitution.¹¹ The President, on the other hand, has rather constrained power within our constitutional system, consisting of a few specifically delineated powers (nominations, veto, foreign affairs, and military leadership) and the obligation to “take Care that the Laws be faithfully executed.”¹²

⁸ We note, however, that by requiring essays praising President Trump’s policies as part of the hiring process for federal workers, the Administration has thoroughly politicized hiring and undermined the idea that it is “merit-based.” Kate Plummer, “New Federal Employees Must Now Write Essays Praising Trump’s Policies,” *Newsweek* (Jun. 3, 2025). Available at <https://www.newsweek.com/trump-administration-federal-employees-merit-hiring-plan-2080139>.

⁹ Proposed Rule at 17191.

¹⁰ Proposed Rule at 17218 (emphasis added)

¹¹ *See, e.g.*, Introduction, Constitution of the United States, U.S. Senate. Available at <https://www.senate.gov/about/origins-foundations/senate-and-constitution/constitution.htm>.

The supremacy of the people through their elected representatives is recognized in Article I, which creates a Congress consisting of a Senate and a House of Representatives. The positioning of Congress at the beginning of the Constitution affirms its status as the “First Branch” of the federal government.

See also The Federalist No. 48, at 227-28 (James Madison) (discusses the superiority of legislative branch); The Federalist No. 51, at 238 (James Madison) (“[i]n, republican government, the legislative authority necessarily predominates.”).

¹² U.S. Const., Art. II, Sec. 3.

Over decades, Congress, at the behest of the people, has structured our civil service to achieve multiple concurrent purposes, including faithful execution of laws and funded programs, retention and effective use of expertise and talent within government, continuance of government operations and services without undue disruption, stability during presidential transitions, prevention of fraud and abuse, and assurance of routine operation of government without partisan or political bias.¹³ From the enforcement of civil rights and labor protections to Medicare, from forecasts provided by the National Weather Service to food and medication safety assessments provided by the Food and Drug Administration, Americans depend on our government to perform basic services necessary for the day-to-day functioning of our society. And with their votes, they have elected congressional representatives and senators who have turned those preferences—as well as the civil service as a means of accomplishing them—into law through democratic processes.

It would hardly be “democratic” for this Administration to throw out decades of civil service rules and employment protections carefully established by our elected leaders on the basis of one presidential election and a legally dubious “unitary executive” theory. This President seems to believe that “democracy” allows him to assert his unconstitutional policy preferences¹⁴ and unsupported legal theories¹⁵ as federal law without going through legislative or even rulemaking processes. In fact, the structure of our civil service is, at least in part, a check by Congress on the power of the President, as it requires him to act through legal processes before he can turn his policy agenda into law. For example, Congress has established protections for whistleblowers within the civil service to call out waste, fraud, abuse, and illegal activities.¹⁶ Unfortunately, the Proposed Rule would greatly undermine these protections.¹⁷

Ultimately, the civil service adheres to the laws set in place by Congress and serves the American people. The “policies of the elected President” are not laws, no matter how much

¹³ See 2024 Rule at 25004 (“By ensuring that the civil service is staffed by individuals chosen for their merit and ‘protected from political winds, we ensure a more stable, effective, and reliable government.’”).

¹⁴ See, e.g., Executive Order 14151, “Ending Radical and Wasteful Government DEI Programs and Preferencing,” 90 Fed. Reg. 8339 (Jan. 20, 2025).

¹⁵ See, e.g., Executive Order 14160, “Protecting the Meaning and Value of American Citizenship,” 90 Fed. Reg. 8449 (Jan. 20, 2025); Executive Order 14190, “Ending Radical Indoctrination in K-12 Schooling,” 90 Fed. Reg. 8853 (Jan. 29, 2025).

¹⁶ Whistleblower Protection Act of 1989, 103 Stat. 16 (1989).

¹⁷ Sections 5 CFR §§ 752.401 and 752.405 of the Proposed Rule provide that a Schedule P/C employee would not be able to appeal an adverse action such as removal, suspension, reduction in pay or grade, or furlough to the MSPB. Such appeals allow for consideration of allegations of retaliation for whistleblowing in the typical appellate process. 5 CFR § 1209.2(b)(2). Since that process is foreclosed to Schedule P/C employees, they will need to bring whistleblower complaints as an individual right of action, which limits the types of complaints that may be brought as well as inclusion of compounding factors such as discrimination and procedural flaws. 5 CFR § 1209.2(c).

President Trump may wish that were so, and civil servants are obligated to follow the law, not be faithful or loyal to him. However, this Proposed Rule threatens to upend our well-established and democratically approved system by giving the President a level of control over career civil servants that is unprecedented in modern times.

OPM contends that the harm to staff from Schedule P/C is insignificant because they would still be hired through a merit process, and “[e]mployees who faithfully perform their jobs to the best of their ability have little to fear from Schedule Policy/Career.”¹⁸ But the reality of how the Trump Administration has already treated civil servants paints a very different picture. This Administration has fired nonpartisan employees for performing investigative work as ordered,¹⁹ fired employees for working on diversity matters as part of their job,²⁰ and fired nearly all of the government watchdogs who oversee ethics issues and investigate fraud.²¹ Using calls for voluntary resignation, spending freezes, termination of probationary workers (new or recently transferred or promoted workers), and mass layoffs through “reductions in force” (RIFs), this Administration has engineered chaos in the federal workforce, depriving thousands of workers of the benefits and protections they are entitled under law.²² These illegal actions have resulted in irreparable harm to both federal workers and essential programs that Americans depend upon, from Social Security;²³ to health data systems;²⁴ to the enforcement of civil rights protections in

¹⁸ Proposed Rule at 17218.

¹⁹ *See, e.g.*, Eric Tucker and Alanna Durkin Richer, “Trump administration fires prosecutors involved in Jan. 6 cases and moves toward ousting FBI agents,” AP (Jan. 31, 2025). Available at <https://apnews.com/article/trump-fbi-firing-a7b19a5f414ce82c6f6b5f6656000d23>.

²⁰ *See, e.g.*, Andrea Hsu, “They had left their DEI roles. Trump still fired them,” NPR (Apr. 7, 2025). Available at <https://www.npr.org/2025/04/07/nx-s1-5348922/trump-dei-federal-employees-firing>.

²¹ *See, e.g.*, The Associated Press, “The fired head of a federal watchdog agency says he’s ending his legal fight,” NPR (Mar. 6, 2025). Available at <https://www.npr.org/2025/03/05/nx-s1-5319326/trump-hampton-dellinger-watchdog-appeals-court>; Sean Michael Newhouse, “Trump fired multiple agency inspectors general,” Government Executive (Jan. 25, 2025). Available at <https://www.govexec.com/oversight/2025/01/trump-fires-multiple-agency-inspectors-general/402504/>.

²² Sam Berger and Jacob Leibenluft, Trump Administration’s Mass Layoffs of Federal Workers Are Illegal, Center on Budget and Policy Priorities (May 2, 2025). Available at <https://www.cbpp.org/research/federal-budget/trump-administrations-mass-layoffs-of-federal-workers-are-illegal>.

²³ Emily Paulin, “With Social Security Customer Service in Crisis, AARP Urges Fixes,” AARP (April 8, 2025). Available at <https://www.aarp.org/politics-society/advocacy/info-2025/social-security-customer-service-in-crisis.html>.

²⁴ David Gilbert, “HHS Systems Are in Danger of Collapsing, Workers Say,” WIRED (April 14, 2025). Available at <https://www.wired.com/story/department-health-human-services-possible-collapse/>.

federal contracting, schools, and the workplace;²⁵ to lead paint remediation;²⁶ to air travel;²⁷ and many, many others. And in some cases, this has left agencies unable to fulfill the roles and programs that Congress created.²⁸

By stripping away protections, the Proposed Rule would allow the President to implicitly coerce Schedule P/C staff, indirectly establishing partisan control and biasing decision making. The Proposed Rule would fundamentally change the nature of these positions in ways that conflict with Congress's intentions. Ultimately, Congress gets to decide what a "competent, ethical, and democratically accountable government"²⁹ looks like, not a self-interested President.

Attacks on the Civil Service Have a Disproportionate Impact on Working Women and People of Color

The Trump Administration's pattern of attacks on the federal workforce has made clear its intent to target women and people of color.³⁰ And this Proposed Rule would empower the Administration to bypass civil service protections and leave these workers with few protections except for nondiscrimination laws – which the Trump Administration is no longer enforcing³¹ and actively seeks to undermine.³² OPM anticipates that this Proposed Rule will result in more filings of civil rights complaints,³³ all but confirming its discriminatory intent.

²⁵ Alanna Durkin Richer, "Trump's new Justice Department leadership orders a freeze on civil rights cases," AP (Jan. 22, 2025). Available at <https://apnews.com/article/civil-rights-division-justice-department-trump-2dcb45cca7c9c9cdaea78282d4279c35>.

²⁶ Alexander Tin, "CDC denies help for lead poisoning in Milwaukee schools due to layoffs," CBS News (April 11, 2025). Available at <https://www.cbsnews.com/news/milwaukee-schools-lead-poisoning-cdc-denies-help/>.

²⁷ Eric Katz, "The Trump administration is staffing up parts of FAA, it's also incentivizing thousands of departures and threatening layoffs," Government Executive (May 15, 2025). Available at <https://www.govexec.com/management/2025/05/trump-administration-staffing-parts-faa-its-also-incentivizing-thousands-departures-and-threatening-layoffs/405347/>.

²⁸ See, e.g., *U.S. Inst. of Peace v. Jackson*, 1:25-cv-00804-BAH (D.D.C. May 19, 2025). Available at <https://www.documentcloud.org/documents/25948144-howell-usip-ruling/>; *State of New York v. McMahon*, 1:25-cv-10677-MJJ (D. Mass. May 22, 2025). Available at <https://democracyforward.org/wp-content/uploads/2025/05/Somerville-PI-opinion.pdf>.

²⁹ Proposed Rule at 17218.

³⁰ Sarah Javaid, Attacks on the Federal Workforce Target Women and People of Color, National Women's Law Center (2025). Available at <https://nwlc.org/wp-content/uploads/2025/05/Federal-Workforce-FS-5.5.25v2.pdf>.

³¹ Alanna Durkin Richer, "Trump's new Justice Department leadership orders a freeze on civil rights cases," AP (Jan. 22, 2025). Available at <https://apnews.com/article/civil-rights-division-justice-department-trump-2dcb45cca7c9c9cdaea78282d4279c35>.

³² Executive Order 14281, "Restoring Equality of Opportunity and Meritocracy," 90 Fed. Reg. 17537 (Apr. 23, 2025). Available at <https://www.federalregister.gov/documents/2025/04/28/2025-07378/restoring-equality-of-opportunity-and-meritocracy>.

³³ Proposed Rule at 17217.

Under the guise of protecting federal workers from diversity, equity, and inclusion (DEI) policies and programs,³⁴ this Administration purged workers who had ever had any involvement with a diversity initiative,³⁵ slashed civil rights enforcement,³⁶ and called upon workers to turn in coworkers who were secretly working on DEI.³⁷ Not only did this have the effect of rolling back decades of progress in combating sex- and race-based workplace discrimination, it was a fine-tuned approach to identify and terminate federal workers who are women and people of color, who are more likely to hold positions relating to these issues.³⁸ Further, it left women (who make up 46% of the federal workforce) and people of color (who make up 41% of the federal workforce) with few options to turn to if they experience discrimination or have concerns about their working environment.³⁹

Moreover, several agencies that have a larger proportion of women and/or people of color employees were especially impacted by cuts, termination of probationary workers, and mass layoffs, including the Department of Education, the Department of Veterans Affairs, the Department of Health and Human Services, the Department of Housing and Urban Development, and the Department of the Treasury.⁴⁰

Given the actions he has already taken, there is every reason to believe that President Trump would use the new authority granted by this Proposed Rule to further assault the federal workforce in ways that target women and people of color. OPM estimates that 50,000 incumbent

³⁴ See, e.g., Economic Policy Institute, “EO Ending Radical and Wasteful Government DEI Programs and Preferencing,” (January 30, 2025). Available at <http://policywatch/eo-ending-radical-and-wasteful-government-dei-programs-and-preferencing/>; Economic Policy Institute, “Trump rescinds executive order preventing discrimination based on gender identity and sexual orientation,” (January 22, 2025). Available at <https://www.epi.org/policywatch/trump-rescinds-executive-order-preventing-discrimination-based-on-gender-identity-and-sexual-orientation/>; Economic Policy Institute, “Rescission of Biden-era EOs on Racial Equity and Racial Justice for AANHPI, Black, Hispanic and Native Americans,” (January 24, 2025). Available at <https://www.epi.org/policywatch/rescission-of-biden-era-eos-on-racial-equity-and-racial-justice-for-aanhpi-black-hispanic-and-native-americans/>.

³⁵ See, e.g., “Judge blocks firing of intelligence agency employees who worked on DEI programs,” AP (Apr. 1, 2025). Available at <https://apnews.com/article/intelligence-agencies-trump-musk-dei-firings-ee65192074e63e2231c15f3e1b4b6605>; Andrea Hsu, “They had left their DEI roles. Trump still fired them,” NPR (Apr. 7, 2025). Available at <https://www.npr.org/2025/04/07/nx-s1-5348922/trump-dei-federal-employees-firing>.

³⁶ Ryan Lucas, “70% of the DOJ’s Civil Rights Division lawyers are leaving because of Trump’s reshaping,” NPR (May 19, 2025). Available at <https://www.npr.org/2025/05/19/g-s1-66906/trump-civil-rights-justice-exodus>.

³⁷ Rebecca Heilweil and Caroline Nihill, “OPM creates email account to report suspected diversity and inclusion initiatives,” Fedscopeop (Jan. 22, 2025). Available at <https://fedscoop.com/opm-email-report-diversity-and-inclusion-initiatives/>.

³⁸ Sarah Javaid, Attacks on the Federal Workforce Target Women and People of Color, National Women’s Law Center (2025). Available at <https://nwlc.org/wp-content/uploads/2025/05/Federal-Workforce-FS-5.5.25v2.pdf>.

³⁹ *Id.*

⁴⁰ *Id.*

employees would be moved into Schedule P/C. But this is a gross underestimate, as there is nothing limiting the number of reclassified employees. After all, federal workers will have little ability to contest this designation, and agencies would be incentivized to redesignate employees in order to circumvent civil service protections. But even if we take the Administration’s claims that Schedule P/C would only apply to “policy-influencing” roles at face value, then this designation would have a disproportionate impact on:

- Agencies that with public policy responsibilities, such as the Department of Justice and the Department of Education;⁴¹
- Agencies with grantmaking functions, such as the Department of Health and Human Services;⁴² and
- Agencies that collect and analyze federal statistics, such as the Census Bureau and the Bureau of Labor Statistics.⁴³

Several of these agencies, such as the Department of Education and the Department of Health and Human Services, have a larger than average proportion of federal workers who are women and/or people of color. The discriminatory intent and impact of this Proposed Rule is self-evident.

The Proposed Rule Contravenes Federal Law and Court Precedent

At the heart of this Proposed Rule is the premise that CSRA’s exemption for political appointees may be extended to all federal workers in “policy-influencing” roles. But basic statutory analysis shows that this approach is flawed, and OPM has pointed to no court precedent—none—that allows for this sleight of hand.

In relevant part, CSRA § 7511(b)(2) provides that the civil service protections do not apply to an employee, “whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character...,”⁴⁴ which this Proposed Rule has defined as “policy-influencing positions.”⁴⁵ The misalignment is evident from the beginning. Even if courts find that this provision, which has always referred to political appointees, can be applied to some career positions, the fact that a position *influences* policy is far broader than one that *determines*, *makes*, or *advocates* for policy. The ways in which federal workers might influence policy are nearly infinite, whereas making or determining policy conveys a level of ownership or authority

⁴¹ Proposed Rule at 17188.

⁴² *Id.*

⁴³ Erica Groshen, “Is Schedule Policy/Career a Risk for Federal Statistical Agencies,” Center for Applied Research on Work (May 5, 2025). Available at <https://www.ilr.cornell.edu/carow/carow-policy/schedule-policycareer-risk-federal-statistical-agencies>.

⁴⁴ 5 U.S.C. § 7511(b)(2).

⁴⁵ Proposed Rule at 17182.

over the policy-making process. For example, a federal employee might *influence* policy by gathering or analyzing statistics that help inform policy decisions; informing policy-making staff about how various policy decisions may impact them or their families personally; performing merit-based hiring of federal workers in policy-influencing positions; reviewing, contracting, or interacting with consultants who may impact the policy-making process; and through numerous other avenues.

Nor is this merely a theoretical defect. The Proposed Rule itself,⁴⁶ as well as relevant OPM guidance,⁴⁷ describes the types of positions that should be redesignated as Schedule P/C far more broadly than merely positions of “a confidential, policy-determining, policy-making or policy-advocating character.” For example, the new Schedule P/C would include, among other positions:

- Staff involved with drafting funding opportunities, grantmaking, grant evaluation, and recommendations regarding the selection of grantees, based on a novel conception that “grantmaking is an important form of policymaking;”⁴⁸
- Staff who inform the public about the policies of the agency on social media;
- Positions that supervise attorneys;
- Positions involved with collective bargaining;
- Positions that view, circulate, or otherwise have some contact with proposed regulations or guidance;
- Program officers and others accountable for the success of programs or who monitor progress towards agency goals or evaluate programs; and
- Any position with a description that says the position is “policy-making, policy-determining, or policy-advocating duties,” regardless of the reality of such position.

The Proposed Rule appears to contemplate that any federal position that might have some conceivable connection to the President’s agenda is somehow “policy-influencing” and therefore subject to the § 7511(b)(2) exception.⁴⁹ But this conception sweeps in far too many positions and is clearly at odds with Congress’s intent to provide broad civil service protections for

⁴⁶ Proposed Rule at 17188.

⁴⁷ OPM, Guidance on Implementing President Trump's Executive Order titled, “Restoring Accountability to Policy-Influencing Positions Within the Federal Workforce,” (January 27, 2025). Available at <https://www.chcoc.gov/content/guidance-implementing-president-trump%E2%80%99s-executive-order-titled-restoring-accountability>.

⁴⁸ Proposed Rule at 17188.

⁴⁹ See Proposed Rule at 17191-17194 (justifying the Proposed Rule because of resistance in terms of grantmaking, career lawyer concerns about taking frivolous legal positions, and disagreement regarding the lawfulness of presidential actions).

positions where there is an “expectation of continuing employment with the Federal Government.”⁵⁰

OPM admits that since CSRA’s passage in 1978, every administration has applied § 7511(b)(2) as a narrow exception for political appointees.⁵¹ However, OPM argues that positions of a “confidential, policy-determining, policy-making or policy-advocating character” should not be considered a term of art for political appointees because the language is also used in the definition of “Senior Executive Service position,”⁵² (SES) and there are nonpolitical, career SES positions (as well as SES political appointees).

However, this analysis ignores the fact that the SES definition is inclusionary, in relevant part covering an employee that:

- (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**
- (E) otherwise exercises important policy-making, policy-determining, or other executive functions....⁵³

There is no inherent conflict—the SES definition includes both political appointees (covered by subparagraph E) and other SES positions (subparagraphs A through D). In fact, the statute further supports this construction by showing a distinction between career SES positions and SES positions that involve policymaking responsibilities.⁵⁴ The fact the Congress distinguishes between SES positions that can be filled by political or career staff and those reserved for career staff to “ensure impartiality, or the public’s confidence in the impartiality, of the Government,”⁵⁵ shows that it does not believe that SES positions are “definitionally policy-making or policy-determining,”⁵⁶ as OPM claims.

In addition to its faulty statutory analysis, OPM makes several other legally questionable claims in support of the Proposed Rule.

⁵⁰ H.R. Rep. No. 101-328, at 4–5 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 695, 698–99.

⁵¹ Proposed Rule at 17186.

⁵² 5 U.S.C. § 3132(a)(2).

⁵³ *Id.* (emphasis added).

⁵⁴ 5 U.S.C. § 3133(e)(2).

⁵⁵ 5 U.S.C. § 3132(b)(1).

⁵⁶ Proposed Rule at 17194.

OPM is dismissive of the body of law, including Merit System Protection Board (MSPB) and Federal Circuit cases,⁵⁷ holding that a determination that a position is of a policy-determining, policy-making, or policy-advocating character does not remove civil service protections unless it occurs before the employee is appointed.⁵⁸ OPM says that *Briggs v. National Council on Disability*,⁵⁹ cited by the 2024 Rule as a source for this proposition, does not, in the department’s opinion, stand for this proposition. However, this central holding has been confirmed as binding precedent numerous times by the Federal Circuit, and OPM points to no contravening authority for the idea that positions may be retroactively declared policy-determining, policy-making, or policy-advocating and stripped of civil service protections, nor for its own novel and ahistorical view of § 7511(b)(2). Further, OPM admits that *Briggs* (and its progeny) holds that there is a due process interest at stake in this line of cases: “fairness and due process considerations require that any determination as to the character of the position... [be] made in such a manner as to put the appellant on notice of the nature of the position she was considering accepting.”⁶⁰ OPM may not substitute its own judgment and disregard this relevant precedent simply because there is some ambiguity in the law.⁶¹

Moreover, while OPM justifies this Proposed Rule by pointing to outdated studies and instances of poor performance,⁶² it fails to show: 1) that these reports apply to staff that would be moved into Schedule P/C, and 2) any relationship between its purposed goal (improving work outcomes) and its means (establishing a special classification for policy-influencing positions). Similarly, most of the instances of “policy resistance” that OPM points to involve employees who would not be subject to this Proposed Rule even if adopted (an EEOC administrative law judge, an FLRA regional director, and a survey of SES employees).⁶³ Lastly, refusal of career lawyers—who have an independent duty to the bar to uphold ethical standards and rules of professional conduct—to sign on to unprecedented and frivolous legal positions is not an indicator of “policy resistance,” but of appropriate legal judgment. DOJ lawyers have a duty of zealous advocacy on behalf of the United States (not President Trump), and if the President hopes to use Schedule P/C to rid the government of lawyers who can shine the light of reality on his illegal policy pronouncements, he will soon find the government without competent representation.

⁵⁷ See *Briggs v. Nat'l Council on Disability*, No. DC-0432930150-I-1 (M.S.P.B. Jan. 7, 1994), *aff'd King v. Briggs*, 83 F.3d 1384, 1389 (Fed. Cir. 1996). See also *Lal v. M.S.P.B.*, 821 F.3d 1376 (Fed. Cir. 2016); *Todd v. M.S.P.B.*, 55 F.3d 1574 (Fed. Cir. 1995). Cf., e.g., *Bennett v. M.S.P.B.*, 635 F.3d 1215 (Fed. Cir. 2011); *Jackson v. M.S.P.B.*, 251 F.3d 169 (Fed. Cir. 2000).

⁵⁸ Proposed Rule at 17199-200.

⁵⁹ *Briggs v. Nat'l Council on Disability*, No. DC-0432930150-I-1 (M.S.P.B. Jan. 7, 1994), *aff'd King v. Briggs*, 83 F.3d 1384, 1389 (Fed. Cir. 1996).

⁶⁰ Proposed Rule at 17200.

⁶¹ See *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

⁶² Proposed Rule at 17189-91.

⁶³ Proposed Rule at 17191-93.

Conclusion

Women and working families rely upon the critical programs provided by our effective, expert, and nonpartisan civil service. Schedule P/C would undermine essential employment protections established by Congress to allow the civil service to function without political interference. Civil servants are sworn to serve the people and to follow the law and the U.S. Constitution, not the policy preferences of the President. OPM has misdiagnosed the problem it is seeking to rectify through this Proposed Rule. The problem is not “policy resistance” among civil servants, it is an Administration that is unwilling or unable to advance its policy preferences through lawful processes. National Women’s Law Center strongly opposes this Proposed Rule. We urge you to reject this Rule in its entirety and reinstate the 2024 Rule. If you have any questions about NWLC’s comments, you may contact me at agill@nwlc.org.

Very truly yours,

A handwritten signature in black ink, appearing to read 'AGill', is positioned above the typed name.

Alison Gill, Esq.
Director of Nominations & Democracy