



November 17, 2023

U.S. Office of Personnel Management
1900 E. St. NW.
Washington, D.C. 20415

**RE: Comments on Upholding Civil Service Protections and Merit System
Principles (RIN: 3206-AO56)
Docket ID: OPM-2023-0013
Document Number: 2023-19806**

To The Office of Personnel Management and to whom it may concern,

Independent Women's Forum appreciates the opportunity to comment on the Office of Personnel Management's (OPM) proposed rule to insulate unelected bureaucrats from future reforms intended to introduce democratic accountability to the policymaking federal workforce.

IWF is the leading national women's organization dedicated to developing and advancing policies that are more than just well-intended, and that actually enhance women's and men's freedom, opportunities, and well-being.

Background

1. The federal bureaucracy is not currently adequately or constitutionally accountable to the elected president.

We hold federal elections every two, four, and six years, respectively. But a large and increasing part of our governance is permanent. Just over two million civil servants, with more than a century of special job protections, stick around in Washington no matter who wins elections, and a substantial number of them are wielding policymaking power without any input or oversight from We the People or the elected officials who ostensibly represent us.

Unelected agencies are making decisions daily that concretely affect the rights and lives of American citizens, and they do so with virtually no democratic oversight. From the IRS seizing private financial information without judicial process (*James Harper v. Daniel Werfel, et al.*), to imposing industry-devastating fees with no basis in law (*Relentless, Inc. v. the U.S. Department of Commerce*), to making Americans criminally liable overnight without legislative change from their elected

representatives (*Gargill v. Garland*), unelected bureaucrats functionally wield policymaking power without ever having to stand for election.

This is not how our constitutional republic is supposed to work. We are supposed to vote for our representatives in Congress to write the law, and the president to execute it. When the federal bureaucracy becomes divorced from the political decisions of the president, the American voter loses his only way to hold policymakers accountable for the decisions that affect him and his life.

2. The federal bureaucracy is not politically neutral.

Progressives at the turn of the 20th century, such as President Woodrow Wilson, argued that governance in the modern age was too complex and technical for a simple constitutional separation of powers. In his famous article, “**The Study of Administration**,” Wilson wrote, “Public administration is detailed and systematic execution of public law... The broad plans of governmental action are not administrative; the detailed execution of such plans is administrative.” He saw a clear distinction between the political and democratic act of *directing* the ship of state and the function of executing the plan’s details; even Wilson preserved a role for the voting citizen as the “authoritative critic,” setting the general direction of policy and politics while the details of administration were left to an apolitical and technocratic bureaucracy. If this Wilsonian ideal of a division between politics and administration has ever been true, it is most assuredly not true now.

Our federal employees today are not neutral sailors, trimming the sails of the ship of state; they’re active in directing its rudder. They have strong political opinions, and those opinions make themselves felt in the policy outcomes of executive agencies regardless of the preferences of the elected president and his cadre of political appointees.

To start with, federal employees lean overwhelmingly to the left. In the 2016 presidential election, for example, federal employee donations—as recorded by the FEC—went **95 percent** to the Democratic nominee for president. And these political leanings have an empirically demonstrable effect on policy. Agencies with a greater distance between the political views of civil servants and the views of their political appointee leadership take longer to finalize proposed rules and engage in fewer instances of rulemaking—a fancy way to say the civil service slow-walks the wheels of bureaucracy based on their own **political objections** to the rule. Presidents have complained about the problem of pushing through policies contrary to the political preferences of the bureaucracy for quite some time—from Presidents Jimmy Carter (who proposed and shepherded into passage the last serious legislative civil service reform in 1978) and Ronald Reagan, up through the Clinton years and to the present day.

Schedule F reforms, against which the proposed rule seeks to raise further bureaucratic hurdles, are well within the bounds of what has been a decades-long attempt by presidents of both parties to gain control over an administrative state that has insulated itself from political, and therefore democratic, direction.

3. The current state of civil service protections makes the federal bureaucracy unable to competently carry out its duties.

There is, of course, a less constitutional and more practical problem with today's federal workforce: the problem of competency. Complaints about the speed and efficiency of the federal government are hardly confined to one side of the political spectrum. And at least one root of the government's famous inefficiency is that it is so difficult to fire employees for even the most blatant failures to do their jobs.

The process of firing a civil servant for poor performance is so onerous that it often stretches out from six months to well over a year, according to the **U.S. Government Accountability Office**, and includes proceedings that almost rise to the kind of protections provided to the defendant in a civil trial. As a result, only about a quarter of a single percent of employees are fired in the federal bureaucracy per year, and poor performers retain enormous power over their ostensible bosses, for whom it's usually not worth it to initiate the process. An OPM study back in 1999 found that less than 8 percent of federal supervisors had even bothered to try to fire poor performers in their offices, perhaps because of those who tried, three-quarters reported that the attempts were unsuccessful.

Even conviction in a criminal court is not enough to short-circuit the process. For example, DeWayne Hamlin, a manager at Veterans' Affairs, was convicted of a felony (involving using his position for corrupt purposes, no less), and yet Hamlin was still allowed to continue working and drawing a paycheck for months on end after his conviction, while his civil service protection appeals played out. Perhaps even more revealingly, Congress itself was forced to pass an entire piece of legislation providing a quicker route to firing federal employees for watching pornography on the job and using government computers; the protections in place are such that previously, this had been a near-impossible task for managers.

Schedule F and Proposed Rule

Against this backdrop, the Trump administration, towards the end of its tenure in office, created a new category of employees, Schedule F, to describe career bureaucrats who were not political appointees, but who nevertheless held policymaking power (about two to four percent of the workforce). These top bureaucrats, who hold direct policymaking power that affects the lives of ordinary Americans, would serve at the will of the elected President.

Noting the special due process concerns of federal employment, however, the Schedule F reform still made sure to protect these policymaking employees from discriminatory firing based on political beliefs or party allegiance. Unlike during President Andrew Jackson's "rotation in office," these employees were not expected to submit their resignations at the turnover of a new administration; they would presumptively keep their jobs unless they performed poorly or contravened the policy decisions of the elected president and his political appointees. In other words, the Schedule F reforms were intended to make the bureaucracy democratically accountable and to prevent the illegitimate exercise of political power by unelected federal employees; not to obliterate the Wilsonian distinction between politics and administration, but to restore it.

President Biden and his administration rescinded the Executive Order that created Schedule F just days after assuming the White House, as is their right. But now, OPM has proposed these new regulations intended to prevent or slow down future administrations from restoring the presidential control Schedule F or similar reforms would bring to the federal bureaucracy. In essence, the proposed rule is an unelected bureaucracy attempting to protect itself from democratic accountability in the future.

The proposed rule makes three changes, all contrary to the goal of a tighter connection between the American voter and his government.

First, it constrains the definition of policymaking authority to political appointees, in contradiction to the observed and measurable performance of the current bureaucracy, as laid out above.

Second, it allows a current career employee to "carry over" the myriad of protections if he is rescheduled into a different status, as Schedule F attempted to do.

Third, similarly, it allows career employees to maintain their ability to appeal to the Merit Systems Protection Board if the employee loses certain removal protections in being moved to a different service schedule, again making reforms like Schedule F, which are intended to increase accountability, all but pointless.

Effectively, the proposed rule is an attempt to protect the federal bureaucracy and its unelected policymakers from any decisions the American people might make in the future to elect presidents with different ideas than federal employees about the policy direction of the ship of state. It's an attempt to constrain the voter in service of the permanent class of Washington.

Conclusion

We believe this proposed rule, if finalized, would bolster unconstitutional and undemocratic power currently wielded by unelected bureaucrats, and provide the American voter with less control over his government and its policies in the future.

As the executive branch and its ever-expanding list of agencies have taken on more and more of the actual policymaking power of government, it is absolutely crucial that the elected president at least maintain his constitutional power over the 2.2 million-man civilian bureaucracy. The idea that the only people making policy decisions are the around 4,000 political appointees who serve at the president's will, as the proposed rule states, is an obvious fiction. This fiction is made all the more obviously false by the fact that only a minority of **bureaucratic** supervisors are confident that they can fire their subordinates for poor performance or misconduct.

One does not need to agree with the accountability brought by Schedule F reforms, but surely the next president—regardless of party affiliation—should have the opportunity to decide for himself how to manage the federal bureaucracy without the additional hurdles created by the proposed rule.

A strange transformation is happening around the words “protecting democracy.” The proposed rule does the opposite of protecting democracy; it makes more attenuated the connection between the American voter filling in the bubble for the candidate of his choice, whomever that person is, and actually seeing policy change effected in Washington.

Independent Women's Forum therefore opposes the proposed rule on the grounds above.

Respectfully,



Inez Feltscher Stepman
Senior Policy Analyst
Independent Women's Forum