

May 21, 2025

Competitive Enterprise Institute Letter in Support of OPM proposed rule “Improving Performance, Accountability and Responsiveness in the Civil Service”

On behalf of the Competitive Enterprise Institute (CEI), I respectfully submit the following comments in response to the Office of Personnel Management’s (OPM) proposed rule, “Improving Performance, Accountability and Responsiveness in the Civil Service,” published in the Federal Register on April 23, 2025, regulatory information number (RIN) 3206-AO80.

Founded in 1984, the Competitive Enterprise Institute is a non-profit research and advocacy organization that focuses on regulatory policy from a pro-market perspective.

The OPM proposed the creation of a “Schedule Policy/Career” category to be added to civil service employment. The category will encompass policy-influencing career positions, filled on a nonpartisan basis that will be at-will employment. The administration states that the category is necessary to ensure that it can dismiss federal employees who do not “faithfully implement administration policies to the best of their ability.”

CEI endorses the creation of this category to ensure that federal regulatory agencies are properly responsive to the executive branch and, through that, responsive to the broader American public. Too many federal agencies effectively exist outside the oversight of the executive, legislative or judicial branches, allowing them to wield power autonomously. The creation of this new category will bring a measure of accountability to the agencies, putting them more firmly under the executive branch authority while leaving important civil service protections in place.

Agencies that exercise executive power must be answerable to the president

To protect individual liberty, the Constitution mandates a separation of powers that imposes checks, balances, and accountability on the exercise of governmental authority. Article II of the Constitution vests its executive power in the president of the United States. Any federal office exercising that power should be accountable to the branch of government in which that power is constitutionally vested.

Granting federal workers an effectively tenured position that enables them to undermine the efforts of prospective future presidential administrations is, in its own way, as corrupt as the 19th century spoils system that the modern civil service system was intended to replace.

The OPM’s proposed “Schedule Policy/Career” category would help address this issue. The proposal states the category would cover employees with “substantial discretion to determine the

manner in which the agency exercises functions committed to the agency by law,” as well as the authority to “bind an agency to position, policy or course of action without higher lever review or with only limited higher lever review” and “positions statutorily described as exercising important policy-determining or policy-making functions.” Federal employees with such authority are properly overseen directly by presidential appointees. Therefore, the executive branch must have the authority to dismiss such employees if they act improperly or in direct contradiction to administration policy.

There are an estimated three million federal employees, not counting active-duty military, according to the Pew Research Center. Of that number, an estimated 4,000 are positions that serve at the pleasure of the president.¹ The administration’s proposed “Schedule Policy/Career” category is a successor to the first Trump Administration’s proposal to create a “Schedule F” federal worker category. “OPM estimates 50,000 positions will ultimately be moved into Schedule Policy/Career, approximately 2% of the Federal workforce.”² The overwhelming majority of federal workers would be unaffected and retain their previous protections.

In practical terms, it is unlikely that the present administration could replace all of the estimated 50,000 employees even if it wished to because it would also have to find the necessary replacement workers. The first Trump administration never filled all existing 4,000 at-will positions in the federal workforce. Thus, a wholesale changeover is unlikely. However, OPM’s “Schedule Policy/Career” category would grant the administration the ability to dismiss individual bad actors for not performing their duties properly.

At-will employment is necessary to manage the federal workforce

Presidents have long expressed frustration that the federal bureaucracy is slow and sclerotic, making it difficult for them to enact their agendas and/or fulfill the government’s necessary duties. President Franklin Roosevelt in 1938 decentralized much of the work of the Civil Service Commission and required federal departments to set up professional personnel offices. Roosevelt was reacting to the perceived slowness of the government in executing his New Deal policies.

The Civil Service Reform Act of 1978 was intended in part to give federal managers more flexibility and to allow merit pay that would provide performance-based incentives. “Even the best organized government will only be as effective as the people who carry out its policies,”

¹ GAO Government-wide Political Appointee Data and Some Ethics Oversight Procedures at Interior and SBA Could Be Improved, GAO-19-249, 8 (March 2019).

² The White House, Fact Sheet: President Donald J. Trump Creates New Federal Employee Category to Enhance Accountability (April 18, 2025), <https://www.whitehouse.gov/fact-sheets/2025/04/fact-sheet-president-donald-j-trump-creates-new-federal-employee-category-to-enhance-accountability/>.

President Jimmy Carter said in his 1978 State of the Union address.³ The law also granted federal workers collective bargaining rights under the mistaken notion that this too would boost efficiency by increasing job satisfaction. Still, the intention of the reform was to make the federal workforce more, not less, responsive to the goals of the executive branch.

President George W. Bush signed the Homeland Security Act in 2002, consolidating 22 existing government agencies under a single department. A key goal of that reorganization was to ensure accountability for the newly-created Department of Homeland Security's workers. The 2002 proposal to create the department stated, "When a job needs to be done the Department should be able to fill it promptly, at a fair compensation level, and with the right person. Likewise, employees should receive recognition for their achievements, but in cases where performance falls short, should be held accountable."⁴

There is, in short, a long-standing bipartisan awareness that executive branch agencies need periodic reform and restructuring to ensure that the workers are fully aligned with executive branch policies and can be held accountable for not fulfilling them. The current OPM proposal is merely the latest iteration of this.

About 20 states have experimented with reforms similar to OPM's proposed "Schedule Policy/Career" category, and the results have been fruitful. "States that have created at-will employment and kept employee grievances inside departments have seen improved management and limited evidence of politicization or patronage," noted Manhattan Institute scholars Judge Glock and Renu Mukherjee.⁵

The proposed new at-will employment category is itself non-partisan and not specific to any particular policy. It is therefore not likely to be rescinded by any hypothetical future administration, even one with different priorities than the current administration. One thing that presidential administrations of both parties are likely to agree on is the need to have subordinate officers that effectively carry out their policies.

The OPM proposal does not trample on workers' First Amendment rights

The OPM's proposed "Schedule Policy/Career" category includes a clarification that covered employees are "not required to personally or politically support the current President or the

³ President Carter, The State of the Union Address (January 19, 1978), <https://www.presidency.ucsb.edu/documents/the-state-the-union-address-delivered-before-joint-session-the-congress-1>.

⁴ The White House, The Department of Homeland Security (2002), <https://georgewbush-whitehouse.archives.gov/deptofhomeland/text/sect7.html>.

⁵ Judge Glock and Renu Mukherjee, "Radical Civil Service Reform Is Not Radical: Lessons for the Federal Government from the States." Manhattan Institute (March 4, 2025), <https://manhattan.institute/article/radical-civil-service-reform-is-not-radical-lessons-for-the-federal-government-from-the-states>

policies of the current administration,” though they do have to enact said policies. The clarification was presumably introduced to counter complaints that the First Trump administration’s similar proposed “Schedule F” category amounted to an unconstitutional loyalty oath.

Federal employees are therefore free to voice their opinions on the policies, but if they applied for and accepted a position that requires them carry out the policies it is their responsibility to do so and properly grounds for dismissal if they refuse.

Conclusion

The OPM’s proposal to create a new at-will employment category will create a federal bureaucracy that is more accountable to the executive branch as they should be under the Constitution but is limited enough in scope to preserve civil service protections and without violating the First Amendment rights of the federal workers that will be under the new category. The Competitive Enterprise Institute supports this rulemaking.

Sean Higgins

Research Fellow, labor and employment policy

Competitive Enterprise Institute