

Comment by

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on

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“Improving Performance, Accountability and Responsiveness in the Civil Service”

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This comment is in opposition to OPM’s proposed new rule, which would permit the movement of “policy-influencing positions” in the federal government from the competitive service into a new Schedule Policy/Career (P/C). Under the new rule, persons reclassified as P/C would no longer be entitled to the procedural protections of Chapter 75 of Title 5, United States Code, which are applicable to such adverse employment actions as an agency may initiate “for such cause as will promote the efficiency of the service.” Any career professional doing policy-relevant work would now be susceptible to a reclassification making them dischargeable at will.

For reasons well explained in detail by other commenters, the proposed new rule goes beyond the President’s statutory authority to provide exceptions from the competitive service. The soundest reading of the relevant portions of Title 5 precludes so radical a change, and if a statutory interpretation “is not the best, it is not permissible.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400, 144 S. Ct. 2244, 2266 (2024). OPM’s new interpretation of “positions of a confidential, policy-determining, policy-making, or policy-advocating character” to include career professionals, as well as political appointees, is unpersuasive. Nor can removing tenure protections for career professionals be justified under the President’s statutory obligation “to ensure that personnel management is based on and embodies the merit system principles,” 5 U.S.C. § 2301(c). Among those principles is Congress’s determination that federal “[e]mployees should be—protected against arbitrary action, personal favoritism, or coercion for partisan political purposes.” 5 U.S.C. § 2301(b)(8)(A). OPM’s P/C proposal would facilitate, rather than prevent arbitrary adverse employment actions. Moreover, the statutory invalidity of OPM’s P/C proposal is all the more evident because OPM relies on a very general statutory provision to authorize a transformative and largely unprecedented exercise of regulatory authority on a matter of exceptional economic and political significance. *W. Virginia v. Env’t Prot. Agency*, 597 U.S. 697, 716 (2022). Neither OPM nor the President has statutory authority to implement Schedule P/C.

The focus of this comment, however, is on OPM’s misplaced use of the constitutional avoidance canon as a makeweight in support of its unsound reading of the Civil Service Reform Act (CSRA). 77 Fed. Reg. at 17211-17215. In protecting the tenure of career federal professionals, Congress is acting well within its constitutional authority over the structure of the

¹ Institutional affiliations are provided solely for purposes of identification. The views expressed in this comment are solely those of the author and do not purport to represent the views of any organization with which he may be associated.

federal workforce. Both the proposed rule and the executive order on which it is based, Exec. Order No. 14171, 90 Fed. Reg. 8625 (2025), rest on a profound misunderstanding—and explicit mischaracterization—of the President’s constitutional relationship with “inferior officers” and other federal employees. Protecting career federal “policy-influencing” professionals from arbitrary dismissal poses no conflict whatever with Article II of the Constitution. There is no significant constitutional issue to avoid.

Of course, Article II vests executive power in a President of the United States. And among those powers is the authority to “require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices.” U.S. Const., Art. II, § 2. The reference to “executive departments,” however, refutes the notion that the President is a one-person branch of government.² The “duties” to which the President’s opinion-seeking authority refers are duties assigned not by the President, but by Congress.³ (It would have been absurd to provide that the President could demand from department heads their opinions in writing about the duties the President assigns.) In this respect, the agencies are first and foremost the agents not of the President, but of Congress, which created them. In implementing legislation adopted by the elected legislative branch, they are fulfilling their fundamental democratic role. The President’s relationship to the agencies is one of supervision; he is to “take care that the laws be faithfully executed,” but not to perform those duties personally. As Attorney General William Wirt wrote in 1823: “If the laws . . . require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would . . . be violating [the law] himself.” *The President and Accounting Officers*, 1 U.S. Op. Atty. Gen. 624, 625 (1823).

The Supreme Court has recently decided that the President’s power of supervision entails an at-will removal power over the principal officer of any federal agency wielding “significant executive power” that is directed by a single individual. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 220 (2020). Following the recent discharges of the principal officers of several multi-member independent agencies—including the National Labor Relations Board, the Federal Trade Commission, and the Consumer Product Safety Commission—the Administration plainly hopes to persuade the Supreme Court to extend the principle of at-will removability to the principal officers of all federal agencies. Such a doctrinal development would necessitate overruling the Court’s unanimous opinion in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), which upheld Congress’s authority to limit presidential removals of FTC Commissioners to cases of “inefficiency, neglect of duty, or malfeasance in office.” Notwithstanding *Seila Law*, however, and regardless of the Court’s eventual resolution of the challenge to multi-member independent agencies, such cases concern only the President’s

² In dicta, the Supreme Court has referred to the President as “the only person who alone composes a branch of government,” *Trump v. Mazars USA, LLP*, 591 U.S. 848, 868 (2020), quoted in *Trump v. United States*, 603 U.S. 593, 610 (2024), but the constitutional text reveals that this is not literally so. What the Court seems to mean is that, insofar as the Constitution is the direct source of any branch’s authority, it is only within the executive branch that such authority is vested in a single person. The “executive departments” acquire whatever authority they exercise not from the Constitution, but from legislation and from such responsibilities as the president may delegate to them consistent with law.

³ The statement in Exec. Order 14,171 that “[a]ny power” possessed by policy-influencing personnel “is delegated by the President,” is flat-out wrong. 90 Fed. Reg., at 8625.

relationship with *principal* officers. The President’s relationship to so-called inferior officers and to non-officer government employees poses entirely different issues.

The more attenuated nature of the President’s control over inferior officers and employees is manifest in the constitutional text. Article II explicitly provides: “Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.” U.S. CONST., Art. II, § 2. The fact that Congress need not involve the president in the appointment of inferior officers directly implies a more attenuated relationship. The Court has recognized as much, even holding that Congress has authority, if it chooses, to permit the judicial appointment of inferior officers performing executive duties. *Morrison v. Olson*, 487 U.S. 654, 673 (1988); *Ex parte Siebold*, 100 U.S. (10 Otto) 371 (1880). Congress has exercised this power, for example, in authorizing district courts, in certain cases of vacancy, to appoint acting United States Attorneys. 28 U.S.C. § 246.⁴ As to government employees, there is no limit, express or implied, to Congress’s authority to condition their employment on whatever terms Congress reasonably determines are “necessary and proper.” U.S. CONST., Art. I, § 8.

At this time, it is not clear what specific positions Schedule P/C will comprise. It is likely, however, that the vast majority of covered individuals will have the status of government “employee,” not “inferior officer.” As the NPRM correctly notes: “Subordinate officials who act as the agents of superior officers directly vested with statutory or regulatory responsibilities generally are not officers.” 90 Fed. Reg. at 17212. This would plainly be true of the scientists, engineers, economists, statisticians, and other kinds of analysts who are “policy-influencing” only in the sense that their research and analysis informs actual decision makers of the likely costs and benefits of pursuing one or another avenue of policy implementation. For such professionals, successful performance depends on expertise and impartiality. Before embarking on a regulatory or deregulatory initiative, the actual decision-making officer will want the soundest possible advice on the conceivable economic and social consequences of alternative approaches. Weighing the advantages and disadvantages—and determining the tradeoffs most attractive in light of an agency’s statutory obligations and the President’s agenda—is the business of the decision maker, not the analyst. The only authority such professionals have is the authority to report to the decision makers for whom they work.

Congress exercised its authority to limit the removability of government employees in enacting the Pendleton Civil Service Act of 1883. As the NPRM notes, the Pendleton Act’s central reform strategy in beginning to eliminate the spoils system for federal employment was to establish a merit hiring system, which initially covered about 10 percent of all federal employees. It contained no across-the-board prohibition regarding arbitrary dismissals. The Act nonetheless contained an important limit on removal power. Under Section 13 of the Act:

No officer or employee of the United States mentioned in this act shall discharge, or promote, or degrade, or in manner change the official rank or compensation of any other

⁴ As early as 1897, Congress had enacted a statute “To remove doubts as to the power of the supreme court of the District of Columbia to provide for a vacancy in the office of attorney of the United States for the District of Columbia.” 29 Stat. 600 (1897). Congress’s formulation of its statutory purpose demonstrates its view that the authority of federal courts to fill vacancies in the office of U.S. Attorney preexisted the actual statute.

officer or employee, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose.

The NPRM accurately states that the Civil Service Commission under President Harrison disclaimed the authority to investigate removals as potentially unlawful except on Section 13 grounds. But contrary to the NPRM and to the characterization of Professors Calabresi and Yoo on which the NPRM relies, 90 Fed. Reg., at 17184 and n. 26, the CSC made no statement regarding the relationship of its limited authority to the President's removal power; its report essentially stated the obvious: the CSC would not investigate acts as potentially unlawful if the Pendleton Act did not prohibit those acts. 9 U.S. Civ. Serv. Comm'n Ann. Rep. 77 (1892), available at <https://babel.hathitrust.org/cgi/pt?id=uiug.30112113390287&seq=89>.

It has long been understood that Congress has the same power with regard to deciding on tenure protections for inferior officers not appointed by the President as it does for employees. In *United States v. Perkins*, 116 U.S. 483 (1886), a decision oddly ignored in the 2025 NPRM, the Supreme Court unanimously upheld the protection against at-will removal conferred upon a naval cadet engineer, who was an appointee of the Secretary of the Navy. The Court held: "We have no doubt that when congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as congress may enact in relation to the officers so appointed." *Id.* at 485.

Myers v. United States, 272 U.S. 52 (1926), the Supreme Court precedent going furthest in asserting (at least in dicta) the importance of presidential removal power over principal officers, expressly approved the holding of *Perkins*:

The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power. The authority of Congress given by the excepting clause to vest the appointment of such inferior officers in the heads of departments carries with it authority incidentally to invest the heads of departments with power to remove. It has been the practice of Congress to do so and this court has recognized that power. The court also has recognized in the *Perkins* case that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal.

Id. at 161.⁵ The NPRM ignores *Myers*, just as it ignores *Perkins*. Because it is doubtful that any of the professionals proposed for reclassification under Schedule P/C will be presidential

⁵ Congress, it should be remembered, has discretion under Article II to provide for inferior officers to be appointed by the President with the Senate's advice and consent. The *Myers* Court concluded (again, in dicta) that, for such inferior officers, the President be entitled to removal authority. As explained by Chief Justice (and former President) Taft: "Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent." 272 U.S. at 164. Should Congress "deem[] appointment [of an inferior officer] by the President with the consent of the Senate essential to the public welfare, . . . they will be subject to removal by the President alone." *Id.* at 163.

appointees, there is no constitutional impediment to Congress determining the conditions of their tenure.

In ignoring such well-established constitutional principles, the NPRM relies on dicta from *Seila Law* and from *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). As accurately described in the NPRM, the Court, in *Free Enterprise Fund* held that “if Congress protects the heads of a multimember independent agency from removal, subordinate inferior officers cannot also possess binding removal restrictions.” That holding, however, directly implies the point of this comment, namely, that the President has no constitutional authority to dismiss inferior officers directly. If such a power existed, the Court would not have had to worry about whether the President could effect the discharge of PCAOB members through the Securities and Exchange Commission as an intermediary.⁶ Moreover, as OPM noted in the preamble to its 2024 final rule, the overwhelming number of federal career professionals doing policy-relevant work are employed by agencies, the heads of which are removable at will—thus posing no “multiple layers” problem.

As for career professionals employed by independent regulatory agencies, the *Free Enterprise Fund* Court wrote: “Nothing in our opinion . . . should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies.” *Id.* at 507. The preamble to the final 2024 OPM rule that the current NPRM seeks to repeal elaborates on this point:

[E]ven in most independent agencies, the removal restrictions at issue in *Free Enterprise Fund* are of limited relevance. There, the Supreme Court focused specifically on the removal protections of Board members, whom the Court held were executive officers “as the term is used in the Constitution” and who exercise “significant authority.” It clarified that “many civil servants within independent agencies would not qualify” as executive officers and none of the civil servants or corresponding protections addressed by the dissenting opinion introduce the same constitutional problems as those of the Board. One group the dissent specifically mentions are employees in the Senior Executive Service. Even though SES employees work on policy and have significant leadership responsibilities, they also have civil service protections. The majority states that “none of the positions [the dissent] identifies,” which would include SES positions, “are similarly situated to the Board.”

OPM, “Upholding Civil Service Protections and Merit System Principles,” RIN 3206–AO56, 89 Fed. Reg. 24982, 24992 (2024), citing *Free Enterprise Fund*, 561 U.S., at 506, 541. It is not relevant to the current rulemaking that *Free Enterprise Fund* mentions that “[s]enior or policymaking positions in government may be excepted from the competitive service to ensure Presidential control,” citing 5 U.S.C. § 7511(b)(2). The President’s entitlement to deny Section 75 protections under 5 U.S.C. § 7511(b)(2) extends only to persons in positions that are “confidential, policy-determining, policy-making or policy-advocating character,” i.e., political,

⁶ Anne Joseph O’Connell, *Can the President Appoint Principal Officers Without the Senate?* LAWFARE (Apr. 14, 2025) (“If the president could fire the PCAOB members directly as inferior officers, there would have been no need for the Court to determine that double for cause removal protections violated the separation of powers.”)

rather than career appointees. The extension of § 7511(b)(2) to career professionals doing any sort of policy-relevant work goes beyond what the statute permits.

Seila Law likewise reveals no constitutional problem with Congress extending tenure protection to career professionals doing policy-relevant work, but who are not actually making, determining, or advocating policy. The Court quotes approvingly then-Judge Kavanaugh’s description while on the D.C. Circuit of the exception from at-will removability that the Constitution permits for heads of multi-member agencies and “inferior officers with limited duties and no policymaking or administrative authority.” These exceptions, according to the Court, “represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President’s removal power.” *Seila Law*, 591 U.S., at 218. Yet the career professionals most likely to be affected by Schedule P/C are precisely those who fall within the categories *Seila Law* has identified. Even career professionals doing policy-relevant work are likely to have no power to make significant binding decisions on behalf of the agencies that employ them. They may exercise enough discretion in the performance of their duties to warrant their classification as an “officer.” But they still have “limited duties and no policymaking or administrative authority” in the sense contemplated by *Seila Law*.⁷

In short, nothing in *Free Enterprise Fund* or in *Seila Law* casts doubt on the vitality of the rule in *Perkins*, which was explicitly reaffirmed in *Myers*. When Congress authorizes agencies to hire employees or vests in the heads of departments the authority to appoint inferior officers, Congress is exercising its well-established and repeatedly affirmed authority to determine the tenure conditions for those thus hired or appointed. Because the civil service laws properly interpreted fall squarely within that authority, an interpretation of the Civil Service Reform Act to preclude the Schedule P/C poses no constitutional problem, significant or otherwise. The real constitutional question is whether the Administration’s effort without clear congressional authority to convert so much of government employment into positions owing political loyalty only to the President threatens to subvert checks and balances, substituting executive rule for republican democracy.

⁷ The Court’s reference to inferior officers with “no . . . administrative authority” is puzzling if understood literally because the Court generally ascribes constitutional “officer” status only to persons “exercising significant authority pursuant to the laws of the United States.” *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). But the formulation in *Seila Law* makes sense if understood to refer more precisely, as the Court did in *Morrison v. Olson*, 487 U.S. 654, 691 (1988), to an inferior officer “lacking policymaking or significant administrative authority,” even if they have important discretionary functions.