IndependentWomen®

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

RE: Improving Performance, Accountability, and Responsiveness in the Civil Service (RIN: 3206-AO80)
Docket ID: OPM-2025-0004
Document Number: 2025-09356

Dear Acting Director Charles Ezell,

The **proposed rule**, "Improving Performance, Accountability, and Responsiveness in the Civil Service," represents an important step towards restoring constitutional governance, enhancing democratic accountability, and ensuring that the executive branch is actually responsive to the wishes of the American people and executes those wishes in an efficient and professional manner.

The Independent Women's Law Center strongly supports the proposed rule and submits these comments to highlight why it is so critical for the American voter and confidence in our constitutional system to create more direct accountability for those high-ranking civil servants who have the privilege of executing policy for the United States.

An Executive Branch Accountable to No One

Lost in lamentations about more accountability for federal workers "threatening democracy" is that the status quo, which leaves so much of American governance to unelected bureaucrats, is flatly unconstitutional and anti-democratic. For more than 50 years, Congress has written vague legislative language that delegates the bulk of governing decisions to unelected bureaucrats in the executive branch, who in turn operate under such a dense web of civil service protections that they have free rein to defy the policy agenda of the elected president. The balance between pages of actual legislation from the legislative branch to pages of regulations issued by unelected bureaucrats is now about **one to twenty**, highlighting just how much of the business of the American people is done through executive agencies rather than elected representatives (and this number fails to account for the extensive adjudication and investigatory functions of the executive, nor does it account for

end-runs around the Administrative Procedure Act rulemaking process like Dear Colleague letters).

In practice, for at least the past half-century, two million "civil servants," who functionally cannot be fired and who feel no need to substitute the vision of the elected branches for their own, do the day-to-day governance of the United States.

Reclassifying at least the top 2% of the civilian workforce with direct influence on policymaking is a necessary reassertion of presidential (and thus democratic) supervision over agencies that otherwise exploit vague statutory mandates to use policymaking powers to which they have no legitimate right. The proposed rule will both make the government more responsive and make the federal workforce more efficient.

Reforms Will Improve Efficiency and Merit in the Civil Service

The proposed regulation will have other positive effects beyond restoring some measure of democratic control to the executive branch. The same litany of job protections, even for powerful career positions, also prevents more mundane forms of employee accountability in a way that would likely be viewed as a scandal to the average American worker, three-quarters of whom work at-will.

A **strong majority of Americans** know that our current federal bureaucracy is "almost always wasteful and inefficient," and to be even blunter, most have long since given up on even the idea of quick and competent service from their "civil servants"; government efficiency is considered by most voters to be little more than a joke. And looking at how difficult it is to fire an employee for the most basic offenses, like completely failing to do his or her job, it's easy to see why.

On average, it takes **170 to 370 days** for the federal bureaucracy's dismissal process to spin itself out. Removing—or even failing to promote—a clearly unproductive or poor-performing worker is such a Sisyphean task that managers report in surveys that they rarely even bother to begin it, and it's therefore unsurprising that the dismissal rate among government workers is a **mere 0.2%**, **three times lower** than the comparable private sector rate. Half of federal employees themselves **report in surveys** that their agencies have poor performers who are shuffled along for years without any evidence of improvement.

If an employee's performance is so bad that a manager actually takes the initiative to do the extensive documentation necessary to start the removal process, the whole matter ends up in appeals before an administrative law judge, with both sides submitting evidence for a hearing on the order of a civil trial, with all attendant protections for the "accused." And if that appeal fails, a worker can further take his

case to the Article III courts, and continue the charade, which is why there are **cases** of federal employees convicted of crimes while on the job but still receiving federal paychecks in jail.

To add insult to injury, until this administration came into office, many federal workers were also working from home with a total lack of accountability to their managers. There is nothing wrong with flexible work from home arrangements, which provide the opportunity for women, in particular, to balance their obligations of work and family life, but they rely even more than office arrangements on the ability of managers to evaluate work product and provide accountability, functions that have been ***de facto* eradicated** in much of federal employment by civil service protections.

Nor is this extensive system of protections remotely similar to the initial guardrails against a pure patronage system put in place by the Pendleton Act more than a century ago. Neither the originating **Pendleton Act** in the late 19th century, nor its follow-up, the Lloyd-La Follette Act in 1912, imagined they were setting the stage for a system that would one day take 170 to 270 days to dismiss an obviously poor performer or outright defiant employee from federal service.

The Trump administration here is acting on eminently reasonable bipartisan complaints about civil service protections that go back decades. In recent years, protections have only gotten stronger and more difficult for managers to navigate; for example, it wasn't until the late date of 1978 that there was even any outside-agency review over firing an employee, something now taken for granted. And even before those outside-agency lengthy additions to the removal process were instituted, the system was already **described** by Jimmy Carter as "a bureaucratic maze which neglects merit, tolerates poor performance, permits abuse of legitimate employee rights, and mires every personnel action in red tape, delay, and confusion."

Indeed, bipartisan majorities in Congress have repeatedly recognized that the civil service protections are out of control when they seek to exempt particularly important agencies or processes from them, as they did in 2017 when they **streamlined accountability** for employees at Veterans Affairs after long-term complaints from veterans' groups. Those accountability reforms, tellingly, went intentionally **unenforced** by the previous administration. Most hilariously, they provided a **special carve-out process** for dismissing federal workers who were caught watching pornography on government computers and on government time. Yes, even that could not get you fired in the federal government!

The process has only gotten worse since. The outrageous extent of the job protections currently in place, with overlapping systems controlled by the Merit

Service Protection Board and collective bargaining agreements, respectively, is a recent phenomenon, which the vast majority of presidential administrations in American history have managed without. Yet opponents of this proposed rule somehow now consider the current **eye-crossing flowchart for dismissal** to be an untouchable and essential ingredient of liberal democracy.

One aspect of the proposed rule intentionally overlooked by opponents is that it is focused on being able to *remove* poor performers and those illegitimately usurping the policymaking role from democratically accountable actors, *not* on the hiring process. Opponents simply skip over the fact that this rule maintains, and other Trump administration actions will likely enhance, the merit-based hiring process. Employees reclassified by the proposed rule will have more accountability in doing their jobs, but the hiring process remains totally separate from the hiring process for political appointees.

Indeed, part of the decades-long collapse of accountability in federal employment includes moving away from the very merit-based, professional hiring procedures that opponents of the proposed rule claim they are trying to preserve. There hasn't been a serious generalized merit examination to enter the civil service since 1981, when the traditional exam was scrapped over concerns about it negatively impacting black and Hispanic applicants (despite black employees being substantially **overrepresented** in the federal workforce by comparison to the general population). Instead, federal employees today are given a test that essentially asks them to rate their own fitness on various skills, a laughable substitute for a real merit-based service.

Similarly, claims that the proposed reform—again affecting about 2% of federal positions engaged in policymaking—will make it "impossible" for the federal government to recruit and hire capable professionals. As mentioned above, three-quarters of the American workforce, along with the state employees of many states, work at-will without devastating their applicant pools.

Furthermore, the oft-repeated canard that the federal government undercompensates vis-à-vis private sector employment is no longer true, if it ever was. Studies in the past 20 years have found that federal employment offers significantly higher compensation—between **30% and 60% higher**—than comparable private sector jobs when considering both salary and benefits.

Opponents of reform are fighting to preserve a system that has little merit-based gatekeeping on the front end of hiring, and a near-impassible web of job protections against removal once hired. It's little wonder that even federal employees themselves say in surveys that lack of accountability is a consistent problem in the federal workforce, with poor performers and people who don't do their jobs heaping extra

work on those who are trying hard to serve the American people and causing damaging delays of important business for citizens.

This web of restrictions is so dense, it functionally prevents the sitting president from controlling the policy of his own executive branch and unconstitutionally interferes with the president's Article II responsibility to faithfully execute the laws.

Reform Provides Accountability Without Leading to Widespread "Politicization"

"Politicization" is a slippery word.

Government employees have no independent legitimacy to direct policy or politics, and control over the executive branch and its decisions is inherently a political enterprise, so in that sense it is not only not worrying but necessary for there to be some ultimate form of political control over foreign policy, regulation, and agency actions more broadly. At the same time, it is reasonable to assume that pure political patronage can be at odds with meritocracy, even though some of America's best-run administrations (for example, Abraham Lincoln's) were run with "rotation in office." Fortunately, there's no reason to believe the proposed regulation will lead to full-blown patronage or "politicization" in the negative sense.

The risk of a full-blown spoils system is almost nil, even if the entire federal workforce were at-will, let alone the 2% of top policymakers that this regulation proposes to reclassify. First and foremost, most of the concerns related to "spoils" have to do with the hiring process, and this rule maintains a merit-based hiring process for those who qualify as policymakers; rather, it addresses accountability for those who fail to either perform or professionally respect the policy direction of the elected administration once hired.

But in any case, the risk of a government operating like it did under Presidents Jackson or Lincoln is very small, for three structural reasons. First the government is so much larger than it was in the day of the spoils system; second, courts have placed limits on requirements for party affiliation in order to be eligible for government employment that are respected by this and other Trump administration actions; and third, multiple states have at-will state workforces and show no evidence of the kind of "politicization" that opponents of this regulation scaremonger about.

First, very simply, the federal government today is so large and complex, comprising over two million civilian employees, that the kind of patronage that was commonplace in the 19th century—when office seekers would physically line up to plead their partisan bona fides to key administration officials—would be operationally laughable even if the proposed rule did not keep in place a totally apolitical hiring system. Then there is the intervening century of limitations placed

around the actions of the federal government towards its employees between us and the circumstances that spurred reform through the Pendleton Act in 1883. Most importantly, in 1976, the Supreme Court ruled that party affiliation could not be considered under civil service hiring and firing decisions unless the personnel are in policymaking positions of power, so the most obvious form of widespread patronage has been declared unconstitutional (***Elrod v. Burns***).

Much more radical civil service reforms—including moving to an entirely at-will system for all new hires—have been implemented in the states, with no evidence of either efficiency or recruitment harms, or the "politicization" warned about by opponents. Since the 1990s, a number of states have made changes to worker protections in order to modernize their state workforces, **providing a litany of living counterexamples** to the parade of horribles threatened by opponents of the proposed rule.

In 1996, Georgia became the first state to make new hires at-will, citing many of the same concerns federal workers themselves admit are rampant in the federal service: that thick protections and endless appeals before removal protect consistently poor performers at the expense of hardworking employees and frustrate efficient management. In the following decades, states like Florida, Utah, Indiana, Arizona, Tennessee, and Kansas have also **implemented various forms of civil service reform** focused on eliminating red tape around removal. These reforms have generally been met with moderately positive reviews, even from managers and personnel themselves, with some **citing** improved agency performance and customer service for citizens. What **there is little evidence** of in any of these states, with far more private-sector style removal systems for state employees, is rampant politicization, or improper firings related only to the political posture of civil servants.

The moderate and sensible reforms in the proposed rule do not touch hiring practices. They will not lead to "politicization" of the federal workforce in the negative sense implied by critics, who imagine that unqualified individuals will be hired for powerful and important positions. This reform, and others proposed by the Trump administration, do not place a target on the back of any federal employee who carries out the duties of his position efficiently and professionally, regardless of how he votes or what his personal political beliefs are.

Instead, the focus of this proposed rule is the ability to set a voter-chosen political course from the top and have federal employees professionally, meritoriously, and efficiently carry it out. Opponents try to conflate legitimate democratic accountability, which includes the power to change policy course, with "politicization," but there is no relationship between that fiction and the rule as actually proposed. The proposed rule only seeks to ensure that poor performers and those who illegitimately substitute their own political judgments for the will of the

voters can be removed from important policymaking positions without years of endless appeals.

The President's Power of Removal

Federal courts have long recognized that the president's ability to choose who works under him to execute his agenda is a critical part of his Article II powers and his constitutional duty to faithfully execute the laws, and that when Congress attempts to too-tightly constrain that power, it oversteps its boundaries in the separation of powers.

Both before (see ***Myers v. United States***) and after the New Deal (***Selia Law LLC v. CFPB; Collins v. Yellen***), Courts have come down on the side of granting the president broad latitude to choose those who serve under him, particularly in policymaking roles. Opponents of this rule and other attempts to reform the unconstitutional bureaucracy, therefore, tend to hang their hats on a single New Deal era case, ***Humphrey's Executor***, that has been substantially narrowed by *Selia Law*, in which Justices Thomas and Gorsuch explicitly called for its overturning.

In late May, the Supreme Court issued a 6-3 unsigned stay in ***Wilcox v. Trump***, rebuking a lower court's outrageous remedy of forcing the Trump administration to *rehire* dismissed high-ranking officials in both the National Labor Relations Board (NLRB) and, relevantly, the Merit Service Protection Board. While the order doesn't go into great detail on the merits, it suggests the current Court will interpret the presidential power of removal more broadly than *Humphrey's Executor* does, writing that the president may remove officials exercising significant executive power without cause unless they fall into a set of "narrow exceptions," such as at the Federal Reserve. This case or others spun up from Trump administration dismissals may provide the Court with a vehicle to restore the unitary executive model, and even looser legislative civil service protections may well find themselves on the wrong side of the president's constitutional removal power and fundamental duty to control the executive branch.

The president's power of removal has become more, not less, critical in the last half century in the face of Congress' total retreat from taking on tough legislative challenges. Too often, bills in Congress today amount to little more than imprecise delegations of power to various executive agencies in practice. Congress' trend towards vague or broad delegation highlights the problem with constraining the president's removal power: In essence, the legislative branch leaves it to policymakers in the executive branch to legislate, but the elected president has very little ability to steer the direction of his own top policymakers without the ability to remove them. With accountability lines cut both to Congress and to the Chief

Executive, that correspondingly leaves voters with a much weakened ability to actually direct the policies of their supposedly elected government.

This structural problem of governance is an underrated cause for the political malaise of the last few decades, in which voters often register that they feel their vote "does nothing" or "changes little." This attitude doesn't reflect indifference or a deficit of self-government, but instead a realistic depiction of voting in a system where the vast majority of day-to-day policies are set by actors with no accountability to voters or the people they elect.

Conclusion

Contra opponents' claims, this rule does not sacrifice merit in favor of "politicization" in any way. Instead, it and other reforms to civil service protections will enhance both merit and democratic accountability. It is the status quo that frustrates the will of American voters and anyone, inside or outside of government employment, who wants to see the federal government work in a responsible, responsive, and efficient manner for citizens. And most importantly, reforms like the proposed rule will bring us closer to the vision of a constitutional government of, by, and for the people that our founders envisioned.