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Biden Administration Proposal Insulates the Bureaucracy from Accountability

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Civil service rules make firing career federal employees prohibitively difficult, whether for poor performance or intransigence. President Donald Trump created a new "Schedule F" that would enable agencies to dismiss career employees from policy-influencing positions. That executive order allowed the president to hold key portions of the federal bureaucracy accountable and ensure that policy was made by the American people's elected representatives. However, President Joseph Biden rescinded it shortly after taking office.

The Biden Administration has now proposed regulations that would attempt to prevent a future administration from promptly reissuing Schedule F. A future administration would have to rescind these regulations before reinstating the order. The newly proposed Biden regulations are unlikely to delay Schedule F's reinstatement by more than a few months but could give opponents of Schedule F procedural grounds to challenge a new order in court. Nonetheless, the courts are likely ultimately to uphold the president's authority to issue Schedule F. The Supreme Court has already held that Congress cannot insulate senior policymaking officials from accountability to the president.

Civil Service Rules Make Dismissing Federal Employees Very Difficult

The federal government is primarily run by career employees. The president and his agency heads appoint about 4,000 political appointees out of 2.2 million executive branch civilian employees (U.S. Office of Personnel Management, 2023; U.S. Government Policy and Supporting Positions,

2020, p. 212).[1] The overwhelming majority of federal employees keep their jobs no matter who the American people elect as president.

Dismissing these career federal employees is very difficult. Agencies bear the burden of proving an employee's poor performance or misconduct merits removal. Doing so can take a long time. The Government Accountability Office (GAO) estimates that the internal agency process for removing a poor performer takes six months to a year—and sometimes more (U.S. Government Accountability Office, 2015). If an employee is removed the employee has multiple options to appeal—first administratively, and then to the courts. Unsurprisingly, only a minority of federal supervisors are confident they could remove a subordinate for poor performance or misconduct (Merit Systems Protection Board, 2019, p.15).

Consequently, federal employees are rarely fired once they complete their probationary period. Office of Personnel Management (OPM) data show that agencies removed fewer than 4,000 of 1.6 million tenured permanent executive branch employees for performance or misconduct in FY 2022 (U.S. Office of Personnel Management, 2022b).[2]

Removal Restrictions Hurt Government Performance

Restrictions on removing career federal employees hurt government performance in two ways. First, they make it very difficult for agencies to remove poor performers. Federal employees themselves find this frustrating. Until the Biden Administration removed the question, the Federal Employee Viewpoint Survey used to ask federal employees if their work unit takes steps "to deal with a poor performer who cannot or will not improve." Between 2017 and 2021—the latest years of data available—an average of just 36 percent of federal employees reported that it did (U.S. Office of Personnel Management, 2022a, p. 15).

Entrenched poor performers have been a longstanding problem. In the late 1990s an OPM study found that less than 8 percent of managers with poorly performing subordinates attempted to demote or fire those workers. Over three-quarters of those supervisors said such efforts had no effect (Office of Personnel Management, 1999, p.11).

Second, removal restrictions empower ideological activists in the bureaucracy to pursue their own agendas regardless of who the American people elect to run the government. In theory, career employees are supposed to impartially implement the president's agenda. The reality is much more complicated, as federal employees are human beings who often bring strong personal policy views to the table. So, while many career employees do faithfully implement the president's agenda, a

[1] During the 2021 presidential transition, 3,762 executive branch positions were available for presidential appointees, non-career members of the Senior Executive Service, and Schedule C political appointees. The President can also appoint several hundred political appointees in the Executive Office of the President.

[2] In most agencies the probationary period is one year, but in FY 2022 it was two years at the Department of Defense (which accounts for about one-third of the federal, non-postal workforce). FedScope data cubes, maintained by the Office of Personnel Management, show that agencies removed 3,900 permanent full-time employees with at least two years of service for performance or misconduct in FY 2022. This represents about one-quarter of 1 percent of the 1.6 million permanent full-time federal employees with at least two years of service employed in the executive branch during this period.

significant minority try to stymie policies they oppose. Such rogue bureaucrats undermine the government's integrity and accountability to the American people.

Policy resistance is a particular challenge for conservative administrations. Career federal employees are disproportionately liberal—significantly more so than the public at large (Spenkuch, Teso & Xu, 2023, pp. 1184-1187; Feinstein & Wood, 2022, pp. 755-760). As a result, career employees have more incentive to oppose conservative policy initiatives. During the Trump Administration, political appointees reported widespread resistance from career staff. Career officials would often slow-walk policies they opposed, produce unusable work product, or in some cases flatly refuse ideologically disagreeable tasks (Sherk, 2023). Policy resistance was not unique to the Trump Administration. Political scientists have documented how, during the Reagan Administration, Environmental Protection Agency career staff moved policy in the opposite direction agency leadership sought (Wood, 1988).

Empirical research reinforces case studies documenting policy resistance from career staff. Agencies with conservative appointees overseeing liberal career staff systematically engage in fewer rulemakings and take longer to finalize proposed rules (Feinstein & Wood, 2022, pp. 763-769). Agencies with career staff ideologically "misaligned" with agency leadership also experience greater cost overruns and delays in procurement contracts (Spenkuch, Teso & Xu, 2023). Pushing the president's policy agenda through a hostile bureaucracy is challenging.

Restrictions on removing employees permit this policy resistance. If the president's appointees could effectively threaten intransigent bureaucrats with dismissal, these employees would be much less willing to fight the president's agenda. But, because appointees effectively lack this power, career employees feel empowered to advance their own agendas. Removal restrictions undermine the executive branch's accountability to the president and—through him—to the American people.

Schedule F Would Have Held the Bureaucracy Accountable

President Trump addressed this problem in Executive Order 13957 on Creating Schedule F in the Excepted Service (2020). Federal civil service laws allow either the president or OPM to exempt positions of "a confidential, policy-determining, policy-making or policy-advocating character" from civil service rules (5 U.S.C. § 7511(b)(2)). This language is the basis for excepting Schedule C political appointees from the civil service. The Trump Administration recognized that a significant number of career employees also fit this description.

Executive Order 13957 created a new "Schedule F" in the excepted service (the next letter after the already existing schedules A to E). Schedule F was intended for career bureaucrats in policy-influencing positions, such as regulation writers. Employees transferred into Schedule F would serve at will, just like political appointees and most private sector workers do. Dismissing them would no longer take six months to a year.

At the same time, Schedule F maintained the distinction between career employees and political appointees. Section 6 of Executive Order 13957 prohibited agencies from taking "prohibited personnel practices" against Schedule F employees, such as hiring or firing them for their political

beliefs or campaign contributions. The order also expressly stated that Schedule F employees were not expected to step down during a change of presidential administration.

Trump Administration officials estimated Schedule F would apply to between 2 and 4 percent of the overall federal workforce (Weisner, 2023). The order's goal was to empower presidential appointees to meaningfully hold policy-influencing bureaucrats accountable, while retaining the distinction between political appointees hired for loyalty to an administration and career staff hired for their expertise.

Schedule F would help presidents of both parties implement their agendas. It would equally prevent conservative and liberal career staff from disrupting, delaying, or derailing presidential initiatives they personally opposed. And while the federal bureaucracy leans to the left, career employees oppose some Biden Administration policies. For example, Federal Trade Commission career employees have prominently opposed Chair Lina Kahn's aggressive anti-trust enforcement policies and management style (Wayt & Kosman, 2022; Nylen, 2022). Schedule F would enable both Republican and Democratic administrations to advance their policies.

Biden Administration Reinforces Removal Restrictions

President Biden rescinded Executive Order 13957 and Schedule F within days of taking office (Exec. Order 14003). The Biden Administration's OPM has now proposed new regulations designed to prevent a future administration from reissuing Schedule F (Upholding Civil Service Protections and Merit System Principles, 2023). The proposed regulations make three main changes to OPM regulations. They:

1. Define positions of a "confidential, policy-determining, policy-making or policy-advocating character" to refer exclusively to political appointments and not to career officials, irrespective of a career official's policymaking responsibilities;

2. Provide that if a career employee is nonetheless transferred to an excepted service schedule without competitive status or removal protections (such as reclassifying the employee as a Schedule C political appointee), the employee will nonetheless retain competitive status and removal protections unless the employee voluntarily relinquishes them; and

3. Allow career employees to appeal to the Merit Systems Protection Board (MSPB) if their position is moved to an excepted service schedule without removal protections.

These regulatory changes would effectively block the immediate reissuance of Schedule F. While the president could issue such an order, any career employees transferred to Schedule F would retain their removal protections—making the change pointless.

The Biden Administration is trying to protect the bureaucracy from accountability to the president. Because federal employees are broadly aligned with the Biden Administration's policies, this will have little impact on the current administration's ability to advance their agenda. But this unaccountability would make it much harder for a future administration to move policy in directions the bureaucracy opposes.

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However, what is done through executive action can be undone through executive action. A future administration can go through notice-and-comment rulemaking procedures and rescind these regulations. Once that is done, Schedule F could be reissued with full force and effect. The Biden Administration's regulations can slow down—but not block—Schedule F.

Procedural Challenges

Although they can be quickly revoked, the Biden Administration's proposed regulations serve another purpose: they permit procedural challenges to Schedule F. If Schedule F were reissued today, opponents would have virtually no legal basis to challenge it. The president has authority to directly issue rules and regulations governing the civil service (5 U.S.C. §§ 3301, 3302). Precedent from the Ninth and Federal Circuit Courts of Appeals also holds that executive branch determinations that a position is of a "confidential, policy-determining, policy-making or policy-advocating character" cannot be reviewed in court (*Stanley v. Department of Justice*, 2005; *Stanley v. Gonzales*, 2007). The Ninth and Federal Circuits are among the most liberal appeals courts in America. Less liberal courts are unlikely to come to a different conclusion. Opponents have almost no legal grounds to object to Schedule F.

The Biden Administration's proposed regulations—and the regulations that would be necessary to undo them—give opponents of Schedule F grounds for procedural challenges. Under the Administrative Procedures Act (APA) agencies must give the public an opportunity to comment on proposed regulations. The agency must then give a reasoned explanation for regulatory changes, as well as for why they are not adopting any suggested modifications. Agencies cannot act in an "arbitrary or capricious" manner (Congressional Research Service, 2016).

In theory, this "arbitrary and capricious" standard is a low bar for agencies to clear. In practice, agencies lose about 30 percent of APA cases (Barbash & Paul, 2019). Since whether a policy is arbitrary and capricious is largely situation specific, judges can have a lot of discretion to overturn on procedural grounds policies they personally dislike. During the Trump Administration, plaintiffs frequently filed suits in jurisdictions like California and the District of Columbia with predominantly liberal lower-court judges. Those judges routinely blocked Trump Administration policies on APA grounds (Barbash & Paul, 2019). This prevented agencies from acting until an appeals court or the Supreme Court overturned the injunction.

Opponents are certain to file suit against future regulations that undo the Biden OPM regulations. While the courts have little legal basis to rule against Schedule F, activist judges could decide that OPM has committed procedural errors by not presenting a sufficiently reasoned explanation for the policy change. Opponents of Schedule F have already telegraphed the likelihood of APA lawsuits if this rule is rescinded (Wagner, 2023).

The Constitution Gives the President Control of the Executive Branch

Nonetheless, the Supreme Court is unlikely to allow lower courts to permanently block Schedule F. The Constitution puts the president in charge of the executive branch. Rulings that would permanently prevent the president from dismissing senior policymaking officials would be unconstitutional under existing doctrine.

Under the Constitution's Appointments Clause, the president, with Senate consent, alone appoints "principal officers"—officials authorized to make final executive branch decisions (*U.S. v. Arthrex*, 2021). The president and agency heads can both appoint "inferior officers"—officials who exercise significant but not final federal authority. While employees not subject to the Appointments Clause make up most of the federal workforce, constitutional officers fill the most senior roles in the executive branch.

The president and agency heads can generally dismiss appointed officers at will. To this rule, the Supreme Court has recognized only "two exceptions—one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority." The Court has also been clear that these exceptions "represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power" (*Selia Law v. Consumer Finance Protection Bureau*, 2020).

In *Free Enterprise Fund v. Public Company Accounting Oversight Board* (2010), the Court considered whether Congress could combine these two exceptions, giving removal protections to inferior officers who work in an independent agency whose heads also have removal protections. The Court concluded Congress could not; this would unconstitutionally insulate those inferior officers from presidential control.

In dissent, Justice Breyer argued that the decision threatened civil service protections in every independent agency. He noted that "efforts to define [inferior officers] inevitably conclude that the term's sweep is unusually broad." Justice Breyer explained that even under a stringent definition of inferior officer, there was "no way to avoid sweeping hundreds, perhaps thousands of high-level [career] Government officials within the scope of the Court's holding" and thereby invalidating their civil service protections (*Free Enterprise Fund v. PCAOB*, 2010).

Chief Justice Roberts' majority opinion dismissed those concerns for a simple reason: the president already had statutory authority to remove those employees' civil service protections—and had chosen not to use it. So Congress was not forcing the president to retain any officers of whose performance he disapproved. Pointing to the exact statutory provisions President Trump used to create Schedule F, Chief Justice Roberts wrote:

Senior or policymaking positions in government may be excepted from the competitive service to ensure Presidential control, see 5 U.S.C. §§ 2302(a)(2)(B), 3302, 7511(b)(2) … The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own (*Free Enterprise Fund v. PCAOB*, 2010).

The Court has held that restrictions on dismissing senior and policymaking officers raise no constitutional concerns precisely because the president can dispense with them. Construing civil service laws to force the president to retain senior policymaking officers against his will would be unconstitutional.

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Conclusion

The federal bureaucracy is, to a large extent, largely unaccountable to the president. Dismissing a federal employee for poor performance or misconduct is prohibitively difficult. President Trump addressed this problem with his executive order creating Schedule F. This order maintained the distinction between career and political appointees, while enabling the president to dismiss policy-influencing officials if he disapproved of their performance. President Biden rescinded Schedule F. His administration is now proposing new regulations designed to prevent a future administration from reinstating the order. However, the Biden Administration's efforts can only delay Schedule F's return. The Supreme Court has long recognized the president's authority over the executive branch—especially over policymaking officials. President Biden may "restrain himself in his dealings with his subordinates" as he chooses. But he cannot "bind his successors by diminishing their powers."

WORKS CITED

Barbash, F. & Paul, D. (2019, Mar. 19). The real reason the Trump administration is constantly losing in court. *The Washington Post*. https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html

Congressional Research Service. (2016, Dec. 7). *An introduction to judicial review of federal agency action*. https://www.everycrsreport.com/files/20161207_R44699_26ff11bc6f4444ce8d3f184b71e9a70ebcf5c852.pdf

Executive Order 14003, 86 FR 7231 (January 27, 2021). https://www.federalregister.gov/documents/2021/01/27/2021-01924/protecting-the-federal-workforce

Executive Order 13957, 85 FR 67631 (Oct. 26, 2020). https://www.federalregister.gov/documents/2020/10/26/2020-23780/creating-schedule-f-in-the-excepted-service

Feinstein, B. & Wood, A. (2022). Divided agencies. *Southern California Law Review*, 95(4), 731-784. https://southerncalifornialawreview.com/wp-content/uploads/2022/12/WoodFeinstein_Final.pdf

Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477 (2010). https://scholar.google.com/scholar_case?case=6019616206791654633

Nylen, L. (2022, July 29). *FTC's Khan overruled staff to sue Meta over VR app deal*. Bloomberg. https://www.bloomberg.com/news/articles/2022-07-29/ftc-s-khan-overruled-staff-to-sue-meta-over-virtual-reality-deal#xj4y7vzkg

Selia Law v. Consumer Finance Protection Bureau, 140 S. Ct. 2183 (2020). https://scholar.google.com/scholar_case?case=14557349188638541514

Sherk, J. (2023, Sept. 10). *Tales from the swamp: How federal bureaucrats resisted President Trump*. America First Policy Institute. https://americafirstpolicy.com/latest/20222702-federal-bureaucrats-resisted-president-trump

Spenkuch, J. L., Teso, E., & Xu, G. (2023). Ideology and performance in public organizations. *Econometrica*, 91(4), 1171-1203. https://www.econometricsociety.org/publications/econometrica/2023/07/01/Ideology-and-Performance-in-Public-Organizations

Stanley v. Department of Justice, 423 F. 3d 1271 (Fed. Cir. 2005). https://scholar.google.com/scholar_case?case=2937348933228033312

Stanley v. Gonzales, 476 F.3d 653 (Ninth Cir. 2007). https://scholar.google.com/scholar_case?case=16061681668329786330

United States v. Arthrex, 141 S. Ct. 1970 (2021). https://www.supremecourt.gov/opinions/20pdf/19-1434_ancf.pdf

Upholding Civil Service Protections and Merit System Principles, 88 FR 63862 (Sept. 18, 2023). https://www.federalregister.gov/documents/2023/09/18/2023-19806/upholding-civil-service-protections-and-merit-system-principles

U.S. Government Accountability Office. (2015). *Improved supervision and better use of probationary periods are needed to address substandard employee performance*. (GAO Report No. GAO-15-191). https://www.gao.gov/products/GAO-15-191

U.S. Government Policy and Supporting Positions (Plum Book). (2020). *Senate Committee on Homeland Security and Governmental Affairs and House Committee on Government Reform*. https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2020/pdf/GPO-PLUMBOOK-2020.pdf

U.S. Office of Personnel Management. (1999). *Poor performers in government: a quest for the true story*. Office of Merit Systems Oversight and Effectiveness. https://web.archive.org/web/20201120115314/http:/archive.opm.gov/studies/perform.pdf

U.S. Merit Systems Protections Board. (2019). *Remedying unacceptable employee performance in the federal civil service*. Office of Policy and Evaluation. https://www.mspb.gov/studies/researchbriefs/Remedying_Unacceptable_Employee_Performance_in_the_Federal_Civil_Service_1627610.pdf

U.S. Office of Personnel Management. (2022a). *Federal employee viewpoint survey: government-wide management report*. https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2021/2021-governmentwide-management-report.pdf

U.S. Office of Personnel Management. (2022b). *Federal workforce data*. https://www.fedscope.opm.gov/

U.S. Office of Personnel Management. (2023). *Federal workforce data*. https://www.fedscope.opm.gov/employment.aspx

Wagner, E. (2023, Sept. 15). Regulations aimed at derailing a Schedule F revival proposed by OPM. *Government Executive*. https://www.govexec.com/workforce/2023/09/regulations-aimed-derailing-schedule-f-revival-proposed-opm/390346/

Wayt, T. & Kosman, J. (2022, June 12). FTC faces staff exodus, anger over Biden-appointed Big Tech foe's leadership. *The New York Post*. https://nypost.com/2022/06/12/ftc-faces-staff-exodus-anger-over-biden-appointed-big-tech-foes-leadership/

Weisner, M. (2023, June 30). Schedule F is about accountability, not spoils system, ex-officials say. *Federal Times*. https://www.federaltimes.com/management/career/2023/06/30/schedule-f-is-about-accountability-not-spoils-system-ex-officials-say/

Wood, D. B. (1988). Principals, bureaucrats, and responsiveness in clean air enforcements. *The American Political Science Review*, 82(1). 213-234. https://www.jstor.org/stable/1958066