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Increasing Accountability in the Civil Service

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The reformers who created America's civil service wanted a merit-based federal workforce. They believed this required a simple removal process as well as apolitical hiring. The federal government has strayed far from this vision. Federal agencies report that the federal dismissal process is difficult and time consuming to use. Few federal supervisors believe they could remove problematic employees. Federal employees themselves express frustration that their agencies rarely remove poor performers.

Even more significantly, federal removal protections can prevent Americans from getting the policies they voted for. They can enable career employees to pursue their preferred policies without getting fired. The media documented widespread bureaucratic resistance during the Trump Administration.

Defenders of the current system argue removal protections are necessary to avoid the spoils system. These claims are historically inaccurate; the federal civil service operated with few restraints regarding firing for 6 decades. State governments with at-will employment also demonstrate that a modern civil service does not need removal protections. The federal government could become an at-will employer while maintaining a professional civil service.

IS FIRING FEDERAL EMPLOYEES DIFFICULT?

Federal employees may only be removed for cause. The law presumes federal employees should keep their jobs; agencies must prove performance or conduct merited removal.¹ Employees can appeal these determinations through several administrative bodies. They can appeal to the Merit Systems Protection Board (MSPB), file a grievance before a union arbitrator, or file a complaint alleging discrimination with the Equal Employment Opportunity Commission.² If they lose before the administrative body, they can generally appeal to federal courts ([MSPB, 1995, p.13-15](#)).

¹ In general, agencies must demonstrate that the preponderance of the evidence shows an employee's removal improved the efficiency of the service for actions taken under 5 U.S.C. § 7513 or that substantial evidence supports a performance-based removal taken under 5 U.S.C. § 4303.

² Union grievances are available only to the approximately three-fifths of Federal employees covered by a collective bargaining agreement.

Federal agencies have long documented that this system makes removing federal employees difficult and time consuming. The Government Accountability Office (GAO) estimates that the internal agency process for removing a poor performer takes 6 months to a year—and sometimes more ([GAO, 2015](#)). External appeals to administrative bodies and the courts add even more time to the process. Moreover, proposed removals can be blocked, mitigated, or overturned at several stages of the process ([Katz, n.d.](#)). Perhaps unsurprisingly, MSPB surveys reveal that only a quarter of federal supervisors are confident that they could remove a poor performer who met the legal criteria for removal ([MSPB, 2019, p.15](#)).³

MSPB research finds that “many supervisors believe it is simply not worth the effort to attempt to remove federal employees who cannot or will not perform adequately” ([MSPB, 1995, p. 2](#)). An Office of Personnel Management (OPM) study found that only 8 percent of managers with problem employees attempted to demote or fire those workers. A full 78 percent of these managers said these efforts had no effect ([OPM, 1999, p.11](#)).

Consequently, federal employees are rarely fired once they complete their probationary period. OPM data show that agencies removed less than 4,000 of 1.6 million tenured permanent executive branch employees for performance or misconduct in FY 2020 ([OPM, 2020a](#)).⁴ Half of federal employees report their work unit has poor performers who remain in their jobs without improving ([OPM, 2020b, p. 25](#)). The federal government continues to employ many employees who private employers would likely have quickly terminated. For example:

- A Housing and Urban Development (HUD) employee spent over a third of his working time for more than 5 years conducting private business deals with his official e-mail account. This included arrangements to provide a lap-dancer to a private party. HUD officials did not attempt to fire him ([McElhatton, 2014](#)).
- Two Department of Justice (DOJ) prosecutors intentionally and unconstitutionally withheld exculpatory information from Senator Ted Steven’s defense during his corruption trial. The federal judge who subsequently overturned Senator Steven’s conviction in 2009 said he had “never seen such mishandling or misconduct” ([Thomas, Ryan, & Cook, 2009](#); [Schuelke, 2011](#)). DOJ proposed suspending—not firing—these prosecutors for 55 days. The prosecutors appealed and the MSPB overturned their suspensions on a technicality, ordering DOJ to pay them back wages and \$643,000 in attorney fees in 2016 ([Goeke and Bottini v. Department of Justice, 2016](#)).

³ The survey asked supervisors “If a subordinate employee was deficient in a critical performance element after completion of a PIP [the legal predicate for removing an employee for poor performance under 5 U.S.C. §§ 4301(3), 4302(c)(6), and 4303], are you confident that you would be able to remove that employee?” 26 percent said they were confident, 51 percent said they were not, and 23 percent were unsure.

⁴ In most agencies the probationary period is one year, but it is two years at the Department of Defense (which accounts for over one-third of the Federal, non-postal workforce). FedScope data cubes, maintained by the Office of Personnel Management, show that agencies removed 3,939 permanent full-time employees with at least two years of service for performance or misconduct in FY 2020. This represents approximately one-quarter of one-percent of the 1.6 million permanent full-time Federal employees with at least 2 years of service employed in the executive branch during this period.

DOJ spent 7 years investigating and unsuccessfully attempting to discipline its prosecutors for serious misconduct.

- An Environmental Protection Agency (EPA) public affairs specialist repeatedly pawned thousands of dollars' worth of EPA digital cameras and camcorders at a local pawn store. When the theft was discovered EPA did not attempt to fire her ([Examining Employee Misconduct at EPA, 2016](#)).
- Employees at the Defense Contract Management Agency (DCMA) were frequently observed sleeping on the job, arriving chronically late, and failing to complete their assignments. DCMA made no serious efforts to remove them ([Katz, n.d.](#)).
- A Postal Service employee was arrested on her lunch break outside of her workplace for smoking marijuana and possessing cocaine. She was subsequently convicted, and the Postal Service determined she had illegally brought the cocaine into the postal facility. The Postal Service attempted to fire the employee, but the MSPB mitigated her removal to a 90-day suspension ([Boucher v. U.S. Postal Service, 2012](#)).

This system frustrates federal employees. The Federal Employee Viewpoint Survey (FEVS) asks federal employees if their work unit takes steps “to deal with a poor performer who cannot or will not improve?” Over the past 5 years, an average of only one-third of federal employees said it did ([OPM, 2020b, p. 24](#)).⁵ The MSPB’s Merit Principles Survey shows even greater more frustration, with only a quarter of federal employees believing their organization addresses poor performers effectively ([Buble, 2019](#)). A separate survey by the Government Business Council found that only 11 percent of federal employees say their agency fires poor performers who do not improve after counseling ([Katz, n.d.](#)). Moreover, the FEVS shows that most federal employees do not believe that differences in performance are meaningfully recognized in their work unit ([OPM, 2020b, p. 11](#)).⁶ Almost 80 percent of federal employees say that federal termination procedures “discourage the firing of poor performers” ([Katz, n.d.](#)).

REMOVAL RESTRICTIONS REDUCE PRODUCTIVITY

Making it difficult to remove poor performers affects agency performance. Economists find that removal restrictions reduce the individual productivity of employees ([Ichino and Riphahn, 2005](#); [Martins, 2009](#); [Riphahn, 2004](#); [Scoppa, 2010](#); [Scoppa and Vuri, 2014](#)). Unsurprisingly, some employees do not work as hard when firing them is difficult. Worse, retaining poor performers drags down the rest of the organization. Businesses find that poor performers demotivate and reduce the performance of productive employees ([Hastings and Meyer, 2020, p. 8-10](#)). Economists document that organizations where supervisors can fire

⁵ This figure averages employee responses between 2016 and 2020.

⁶ Between 2016 and 2020 an average of 39.6 percent of Federal employees expressed agreement with the statement “in my work unit, differences in performance are recognized in a meaningful way.” 51 percent of employees expressed agreement with this statement in 2020 alone.

employees are substantially more productive than organizations where supervisors cannot. The mere possibility of firing substantially increases employee productivity ([Corngnet, Hernán-González, and Rassenti, 2015](#)). Removal restrictions make agencies less productive and effective.

UNDERMINE DEMOCRATIC ACCOUNTABILITY

Removal restrictions can also undermine the government's democratic accountability ([Stepman & Stepman, 2017](#)). Approximately 4,000 of the federal government's 2.2 million employees (less than 0.2 percent) are political appointees.⁷ Consequently, the president and his direct reports must rely heavily on career staff. These employees have significant discretion in implementing policy and enforcing the law—the principal ways the government exercises power over the American people.

The government's democratic accountability to the American people makes the exercise of this power legitimate. The people elect the president; the president appoints senior agency officials; those officials carry out the law with the assistance of their subordinates. The Constitution thereby gives the American people a role (albeit indirectly) in choosing the officials who govern them ([Erickson & Berry, 2019, p.2](#)).

This democratic accountability, however, exists only if career staff are meaningfully accountable to presidential appointees. In practice, removal restrictions significantly weaken this accountability. Presidential appointees have little ability to remove the career staff to whom they must delegate authority. This gives unelected career staff significant discretion to advance their own policy preferences ([Wood, 1988](#)).

Scholars have long documented the ability of career bureaucrats to advance their preferred policies and to stymie initiatives they oppose ([Johnson & Libecap, 1994, pp. 156-171](#)). Career staff can withhold information, leak, slow-walk, or deliberately underperform. In some cases, they simply ignore directives they dislike. During the Trump Administration, bureaucratic resistance to President Trump's policies became so widespread that it made national news. The Washington Post quoted one federal employee boasting how “[y]ou’re going to see the bureaucrats using time to their advantage” to block Trump policies ([Eilperin, Rein, & Fisher, 2017](#)). Bloomberg News documented how “career staff have found ways to obstruct, slow down or simply ignore their new leader, the president” ([Flavelle & Bain, 2017](#)). At the National Labor Relations Board, career staff celebrated how their self-described “resistance” stopped President Trump's General Counsel from fully implementing his agenda ([Nelson, 2021](#)).

Restrictions on firing federal employees can undermine the government's democratic accountability. The American people elect the president. They do not elect career

⁷ During the 2021 Presidential transition there were 3,762 executive branch positions available for Presidential appointees, non-career members of the Senior Executive Service, and Schedule C political appointees ([U.S. Government Policy and Supporting Positions, 2020, p.212](#)).

bureaucrats. When removal protections enable bureaucrats to resist a president's agenda, they deny the American people a say over the policies that govern them.

PROTECTING AGAINST THE SPOILS SYSTEM?

It is well documented that federal job protections shelter poor performers and empower unelected bureaucrats. Nonetheless many policymakers strongly support them. They believe these protections are necessary to avoid the “patronage” or “spoils” system.

During the mid-19th century presidents used federal jobs to reward party loyalists. New presidents would promptly replace their predecessors' appointees with their own supporters ([Johnson & Libecap, 1994, pp. 14-17](#)). Consequently, many federal jobs were filled based on political connections, rather than merit. Prioritizing political loyalty over competence undermined agency performance. And rotating employees *en masse* with each new president prevented agency workforces from building up institutional expertise. Americans came to see the spoils system as impeding dependable government services ([Johnson & Libecap, 1994, pp. 17-25](#)).

The Pendleton Act of 1883 replaced the patronage system with a professional civil service. The Act required competitive examinations and merit-based hiring for certain federal positions. The Act also prohibited agencies from firing employees because of their political activities ([Johnson & Libecap, 1994, pp. 31-33](#)).

Many Americans believe federal job protections are necessary to prevent the president from filling the federal workforce with incompetent cronies. These protections may make it difficult to fire poor performers and empower the bureaucracy, but many policymakers consider these costs small compared to the benefits of maintaining a professional federal workforce ([Connolly, 2021](#); [Mitnick, 2021](#); [Neal, 2020](#)).

REMOVAL PROTECTIONS CONTRAVENE ORIGINAL CIVIL SERVICE VISION

These arguments are based on historical ignorance. Tenure and job protections undermine the original vision for the federal merit service. The Pendleton Act made minimal changes to the dismissal process. While it prohibited removing employees because they made—or failed to make—political contributions, the Pendleton Act did not otherwise interfere with the president's general authority to remove employees ([Frug, 1976, p. 955](#)).

Civil service reformers expressly avoided obstructing the removal process. They wanted to eliminate patronage by regulating hiring while leaving the government free to remove problematic employees. George William Curtis was the president of the National Civil Service Reform League. He helped draft, and played a major role in passing, the Pendleton Act (White, 2003, p.20). Curtis explained his belief that:

Having annulled all reason for the improper exercise of the power of dismissal, we hold that it is better to take the risk of occasional injustice from passion and prejudice, which no law or regulation can control, than to seal up incompetency, negligence, insubordination, insolence, and every other mischief in the service, by requiring a virtual trial at law before an unfit or incapable clerk can be removed ([Frug, 1976, p. 955](#)).

One historian of the civil service summarized the view of the reformers as “if the front door were properly tended, the back door would take care of itself” (Van Riper, 1958, p. 102). The Pendleton Act implemented their vision.

The Civil Service Commission subsequently requested a presidential order requiring agencies to explain their reasons for removing employees as a safeguard against politically motivated removals. In 1897 President William McKinley issued an executive order providing that civil servants could only be removed “for just cause, upon written charges ... of which the accused ... shall have an opportunity to make defense” ([Frug, 1976, p. 956](#)). The Civil Service Commission became concerned that McKinley’s order could be interpreted to require a trial to determine if “just cause” existed. The Civil Service Commission feared that “to require [a trial] would not only involve enormous labor, but would give a permanence of tenure in the public service quite inconsistent with the efficiency of that service.” Consequently, and upon the Civil Service Commission’s recommendation, President Theodore Roosevelt issued a follow-up executive order in 1902 clarifying that “just cause” means any cause that promotes the efficiency of the service and that trials or examination of evidence were unnecessary to remove an employee ([Frug, 1976, p. 957](#)).

In 1912 President William Howard Taft issued an executive order reaffirming the McKinley and Roosevelt orders. The Civil Service Commission explained that the Taft order required only a notice and right to reply, not any sort of trial, before removing an employee, and this was necessary for efficient government:

The rules are not framed on a theory of life tenure, fixed permanence, nor vested right in office. It is recognized that subordination and discipline are essential, and that therefore dismissal for just cause shall be not unduly hampered. The rules have at all times left the power of removal as free as possible, providing restraints only to ensure its proper exercise ... the public service is governed by the same theory as private service, in which tenure of place depends upon good behavior and efficiency ... The only restriction that has been imposed is that employees should not be removed for political or religious reasons or upon secret charges ...

Appointing officers, therefore, are entirely free to make removals for any reasons relating to the interests of good administration, and they are made the final judges of the sufficiency of the reasons. No examination of witnesses or any trial or hearing is required ... The rule is merely intended to prevent removals upon secret charges

and to stop political pressure for removals No tenure of office is created except that based upon efficiency and good behavior ([U.S. Civil Service Commission, 1913, p.21-22](#)).

Soon afterward, Congress enacted legislation that mirrored President Taft's executive order almost verbatim. This law, which became known as the Lloyd-LaFollette Act ([1912](#)), required agencies to provide employees with a notice and an opportunity to respond before removal while expressly providing that "no examination of witnesses nor any trial or hearing shall be required." Lloyd-LaFollette statutorily codified the existing civil service policy that prohibited removals for narrowly defined purposes (i.e., political activities or religious belief) while otherwise giving agencies free rein to determine when employees should be removed ([Frug, 1976, p. 958](#)).

Removal protections arose in the modern era. Section 14 of the Veterans' Preference Act ([1944](#)) gave veterans an in-person hearing over proposed removals and allowed them to appeal removals to the Civil Service Commission. The Classification Act of 1949 also allowed employees to appeal poor performance ratings before a review board. By the 1960s, veterans made up a large portion of the postwar federal workforce. Excluding non-veterans from general civil service appeals came to seem arbitrary and inconsistent ([Frug, 1976, p. 960-61](#)). In January 1962 President John F. Kennedy issued an executive order giving all federal employees in-person hearings and allowing them to appeal adverse decisions within their agency ([Exec. Order 10987](#)). In 1974, President Richard Nixon shifted appeals to the Civil Service Commission, giving all federal employees the same appeals rights that Congress previously gave veterans ([Exec. Order 11787](#)).⁸ The Civil Service Reform Act ([1978](#)) codified external agency appeals in statute, creating the system that largely exists today.

History shows that removal protections are not necessary to prevent a patronage system. The federal civil service operated with few such protections for 6 decades after the spoils system ended. Nonetheless, federal unions consistently promote the myth that job protections are an essential part of the civil service. This myth helps them combat reforms that could weaken their members' job security ([Johnson & Libecap, 1994, pp. 171, 181-82](#)).

TRUMP ADMINISTRATION REFORMS PROMOTED ACCOUNTABILITY

The Trump Administration rejected these myths and undertook several initiatives to make removing federal employees easier. In 2018 President Trump signed Executive Order (EO) 13839 on Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles ([Exec. Order 13839](#)).

EO 13839 streamlined federal removal procedures. Regulations and agency practices have made these procedures more cumbersome than Congress intended. For example, the Civil Service Reform Act ([1978](#)) created Chapter 43 of title 5, United States Code, with a lower

⁸ Executive Order 11787 of June 11, 1974.

burden of proof to make firing poor performers easier. Supervisors have found Chapter 43 harder to use, however, than the previously existing Chapter 75 procedures ([MSPB, 2018, p.4](#)). Agencies remove only a few hundred employees annually using Chapter 43 ([GAO, 2015, p.25](#)). EO 13839 was designed to remove regulatory and procedural impediments that make removals harder than the law requires. For example:

- *30 Day PIPs*. Chapter 43 allows agencies to remove employees for poor performance after providing them with an “opportunity to demonstrate acceptable performance” ([5 U.S.C. §4302\(c\)\(6\)](#)). During these opportunity periods, colloquially known as “performance improvement periods” or “PIPs,” managers must extensively document employee performance and work with the employee. PIPs typically last 60 to 120 days. Longer PIPs, however, do not facilitate removals. Under Chapter 43, if an employee’s performance relapses within 12 months of the start of the PIP, the agency can remove them, even if the PIP has concluded. But longer PIPs significantly increase the administrative burden on supervisors. So EO 13839 generally standardized PIPs at 30 days, cutting approximately 2 months off the time required to use Chapter 43 procedures.
- *Eliminating Performance Assistance Periods (PAPs)*. Many federal union contracts required agencies to give poor performers a PAP before putting them on a PIP. PAPs made Chapter 43 procedures even more time-consuming. So EO 13839 prohibited PAPs.
- *Discretion in Applying Penalties*. During the Obama Administration, the MSPB began requiring uniform discipline standards agency wide. The MSPB ruled that if an agency did not remove one employee for an infraction, then the agency could not remove anyone else for similar infractions agency-wide ([Woebcke v. DHS, 2010](#); [Lewis v. DVA, 2010](#); [Villada v. USPS, 2010](#)). This doctrine explains why the MSPB ordered the Postal Service to reinstate the employee who brought cocaine onto federal property. Agency-wide discipline standards made it hard for agencies to remove bad employees and discouraged them from ever showing leniency for fear of handicapping their ability to remove future problematic employees. EO 13839 directed OPM to issue regulations clarifying that discipline should be tailored to the facts and circumstances of the case and agencies are not required to apply uniform penalties agency-wide.

In addition to streamlining the overall dismissal process, the Trump Administration particularly expedited removals for two types of positions: policy-influencing positions and positions at the Department of Veterans Affairs (VA).

VA Accountability Act

Malfeasance at the VA during the Obama Administration caused veterans to die while waiting to receive medical care ([Daly & Tang, 2014](#)). In response, Congress passed and President Trump signed the Department of Veterans Affairs Accountability and

Whistleblower Protection Act ([2017](#)). The Accountability Act created an expedited “section 714” process for removing VA employees ([38 U.S.C. § 714](#)). This process combined some of the most efficient features of Chapter 43 and Chapter 75. Under section 714 supervisors can remove employees without going through a PIP but need only meet the lower Chapter 43 burden of proof.⁹ ¹⁰Additionally, the MSPB cannot mitigate penalties imposed under section 714. So if, for example, VA removed an employee for misconduct using section 714, and the MSPB determined the agency demonstrated that misconduct occurred, the MSPB could not downgrade the removal to a suspension. Removals of VA employees for performance or misconduct increased by 40 percent after Congress passed the Accountability Act.¹¹

Schedule F

President Trump stated that he considered poor performance by employees in policy-influencing positions especially problematic. He contended poor performance by such employees impairs the effectiveness of the entire agency ([Exec. Order 13957, §1](#)). Resistance by such employees can also undermine policy initiatives and prevent the American people from getting the policies they voted for ([Stepman & Stepman, 2017](#)).

President Trump’s EO 13957 addressed these problems. EO 13957 created a new schedule F in the excepted service for career employees in confidential, policy-making, policy-determining, or policy-advocating positions (e.g. regulation writers, or policy planning staff). Any employees hired or transferred into schedule F could not appeal their dismissal.¹² EO 13957 empowered agencies to quickly remove policy-influencing employees for poor performance or intransigence.

EO 13957 increased the accountability of policy-influencing employees while maintaining the important distinction between career staff and political appointees. EO 13957 expressly required agencies to ensure they did not hire or fire Schedule F employees because of their politics or other protected characteristics such as race, sex, or religion.

EO 13957 thus returned to the original policy of the Pendleton Act. It gave agencies broad discretion to remove poorly performing or intransigent employees from policy-influencing positions, while keeping political activities out of consideration. The founders of the civil

⁹ Under Chapter 43 and section 714, agencies must prove that “substantial evidence” supports a proposed removal. Under that standard there must be sufficient evidence for a reasonable person to conclude removal was appropriate, though another reasonable person might disagree. Under Chapter 75 agencies must prove that a “preponderance of evidence” supports removal, that is the evidence must be enough to conclude that it is more likely than not removal is warranted.

¹⁰ While section 714 does not require a PIP, an arbitrator ruled that VA’s collective bargaining agreement separately required the agency to provide poorly performing employees with a 90 day PIP before removing them. The arbitrator required VA to reinstate with backpay all employees fired for poor performance without going through a PIP. The Federal Labor Relations Authority upheld this ruling upon appeal ([Alms, 2020](#)).

¹¹ Author’s calculations based on data from the Office of Personnel Management ([OPM 2020a](#)). The calculation compares average removals or dismissals for performance or misconduct at the Department of Veterans Affairs between FY 2018 – 2020, the three years following the Accountability Act’s passage, and FY 2014 – 2016, the three years preceding its passage. The Accountability Act was passed in the middle of FY 2017, so that year was omitted from the analysis.

¹² Under 5 U.S.C. § 7511(b)(2) adverse action appeals do not extend to employees in the excepted service “whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character” by the President or the Office of Personnel Management.

service wanted to stop patronage-based federal hiring. They did not want to shield policy-influencing employees from accountability.

FEDERAL EMPLOYEES SUPPORTIVE

Failing to address poor performance frustrates federal employees themselves. Many of the Trump Administration's initiatives were popular in the federal workforce. Shortly after EO 13839 was issued Government Executive Magazine surveyed federal employees on the Trump Administration's initiatives making it easier to fire poor performers. They found that federal employees supported these initiatives by a more than 2-to-1 margin ([Wagner, 2018](#)).¹³

Federal union leaders derided these initiatives as an attack on federal workers ([Revitalizing the federal workforce, 2021](#)). But there is no evidence the broader federal workforce agreed. Federal employee job satisfaction hit a record high under President Trump. In 2016 the FEVS showed 66.2 percent federal employee job satisfaction.¹⁴ That figure rose every year of the Trump Administration. By 2020 federal employee job satisfaction rose to 71.6 percent—an all-time high ([OPM, 2021](#)). Every measure of working conditions FEVS tracks showed higher approval in 2020 than in 2016, and 32 of 37 measures reached all-time highs ([OPM, 2020b](#)).¹⁵

And while most federal employees are not satisfied with their agency's handling of poor performers, their dissatisfaction subsided during the Trump Administration. The proportion of federal employees believing that their agency effectively addresses poor performers rose from 29 percent in 2016 to 42 percent in 2020—the highest the FEVS has ever recorded ([OPM, 2020b](#)).¹⁶ While much work remains, federal employees approved of President Trump's initiatives making it easier to fire poor performers.

BIDEN ADMINISTRATION REVERSES COURSE

The Biden Administration quickly reversed course. President Biden signed an order revoking EO 13839 and EO 13957 shortly after taking office ([Exec. Order 14003](#)). That order also instructed OPM to undo the Trump-era OPM regulations streamlining the dismissal process. Biden also required agencies to renegotiate their union contracts to reinstate provisions that make it harder to fire federal employees ([McGettigan, 2021](#)). These actions undo initiatives that made it easier to hold federal employees accountable.

¹³ More specifically 51 percent of Federal employees supported "the administration's efforts to make it easier to fire poorly performing employees" while 24 percent opposed those efforts, and another 24 percent either hadn't heard about the changes or were neutral.

¹⁴ This metric is the percent of employees responding that they are "very satisfied" or "satisfied" to the question: considering everything, how satisfied are you with your job?

¹⁵ Author's analysis of 2002 – 2020 data from the Federal Employee Viewpoint Survey and its predecessor survey, the Federal Human Capital Survey. Full results available from the author upon request.

¹⁶ *Ibid.*

MOVING THE FEDERAL WORKFORCE TO AT-WILL EMPLOYMENT

The law currently requires agencies to prove that an employee deserves to be fired, followed by lengthy appeals before administrative bodies and the courts ([MSPB, 1995, p.13-15](#)). As discussed above, this system prevents agencies from effectively addressing poor performers or bureaucratic resistance. The civil service reformers fear that removal protections would “seal up incompetency, negligence, [and] insubordination ... by requiring a virtual trial at law before an unfit or incapable [employee] can be removed” have been realized ([Frug, 1976, p. 955](#)).

Making federal employment statutorily at-will would eliminate these problems. Doing so would also return to the original vision for the merit service. As the Civil Service Commission explained, the policies underlying the Pendleton and Lloyd-La Follette Acts “at all times left the power of removal as free as possible, providing restraints only to ensure its proper exercise” ([U.S. Civil Service Commission, 1913, p.21](#)).

At-will employment in the federal government can coexist with merit-service prohibitions on politically-motivated firings. This would involve allowing agencies to remove employees for any reason not prohibited by law (e.g. political favoritism or discrimination). This is how removals currently operate in the private sector ([Swerdzewski, 2020](#)).

Requiring agencies to adjudicate allegations of illegal removals internally, rather than external administrative or judicial appeals, would prevent prohibitions on discrimination from becoming alternative employment protections. This is very similar to how agencies examine allegations of misconduct by national security employees.¹⁷ Such a system would also be comparable to how the civil service operated for 6 decades under the Pendleton and Lloyd-La Follette Acts.¹⁸

At-will employment would eliminate the lengthy appeals that make removals difficult. For example, under at-will employment DOJ could have immediately fired the prosecutors who intentionally violated Senator Stevens’ constitutional rights. They would not have had to spend 7 years unsuccessfully attempting to discipline them.

STATES HAVE MOVED TO AT-WILL EMPLOYMENT

¹⁷ Many federal jobs – especially those within the Department of Defense – require employees to hold a security clearance or otherwise maintain eligibility to hold a national security sensitive position. These clearances and/or eligibility require avoiding conduct that calls an employee’s judgment into question. An employee whose security clearance or eligibility is revoked must usually also be fired, as they can no longer legally perform their job. However, agencies have sole authority to determine whether particular instances of misconduct warrant revoking an employee’s security clearance or eligibility. Neither the MSPB nor courts may typically review this decision. See *Kaplan v. Conyers* (2013). Thus, hundreds of thousands of national security employees currently work under a system of purely internal agency adjudication of misconduct-related removals.

¹⁸ Under the Pendleton Act Federal employees remained at will, provided the removal was not motivated by political or religious discrimination. The Lloyd-La Follette Act added the requirement that the removal would advance the efficiency of the Federal service, but left adjudicating this determination wholly to the discretion of Federal agencies.

State-level reforms show that the government can operate a professional civil service with at-will employment. Many state civil service systems have similar procedures for removing state employees as the federal government, with for-cause removal protections and appeals to an external administrative agency. These procedures have also made removing state government employees difficult. Some states have addressed this problem by ending removal restrictions and moving to at-will employment. For example:

- Arizona enacted legislation in 2012 making most state government employees at-will;
- Florida removed employment protections for senior state executives in 2001;
- Georgia placed state employees hired after July 1, 1996, in a new civil service system without employment protections; that system now covers almost all Georgia state government employees;
- Indiana increased the number of at-will employees in state government in 2011, while reducing the importance of seniority for those retaining employment protections;
- Missouri enacted legislation in 2018 making the vast majority of state government employees functionally at-will; and
- Texas abolished its centralized civil service system in 1985.

These reforms have been generally successful. Evaluations show mixed-to-positive effects, with managers reporting particularly positive impacts on state employee responsiveness to the goals and priorities of state administrators ([Coggburn, 2007](#); [Condrey & Battaglio, 2007](#); [Cournoyer, 2012](#); [Gossett, 2003](#); [French & Goodman, 2011](#); [Kim & Kellough, 2014](#)). The reforms have certainly not come close to bringing back the spoils system. These states continue to operate highly effective, professional state governments under at-will employment. The federal government can do the same.

CONCLUSION

Federal job protections are not necessary to run a professional, apolitical civil service. The federal civil service system operated for six decades with minimal restrictions on firing. More recently, several states have adopted at-will employment. These states continue to operate effective and professional civil services at-will. Their experience shows the federal government can do the same. The federal government can eschew the spoils system without protecting poor performers or empowering bureaucratic resistance.

Moving to at-will employment would restore the Pendleton Act's vision for the merit service. America's civil service system need not "seal up incompetency, negligence, [and] insubordination."

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