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*Via online portal*

Re: Comment of Citizens for Responsibility and Ethics in Washington in response to Notice of Proposed Rule: Upholding Civil Service Protections and Merit System Principles, RIN 3206–AO56, 88 Fed. Reg. 63862 (September 18, 2023).

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully submits this comment in response to the notice of proposed rulemaking (“NPRM”) that the U.S. Office of Personnel Management (“OPM”) issued on September 18, 2023 regarding its proposal to bolster the federal civil service and protect the merit system. CREW is a nonpartisan nonprofit organization focused on ethics, transparency, and accountability, including anti-corruption work, and appreciates this opportunity to work with OPM to protect the merit system and the integrity of the federal government.

As we describe in more detail below, CREW strongly supports OPM’s proposal. If implemented correctly, OPM’s rule would help ensure that protections afforded to federal employees can’t be arbitrarily withdrawn to suit the political desires of any given presidential administration. We submit this comment to convey our support for the rule, to briefly discuss the importance of OPM’s project, and to encourage OPM to move forward with the rulemaking process without delay.

## **1. The importance of a merit-based civil service.**

This is a perilous time for the federal civil service. In the past few years, conservative activists<sup>1</sup> and political candidates<sup>2</sup> have called for reforms that would undermine the integrity of all federal agencies by effectively ending the merit system that ensures that only qualified candidates are chosen for employment in the federal civil service.

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<sup>1</sup> The Heritage Foundation has launched “Project 2025,” a major effort to reshape the federal government. See <https://www.project2025.org/>.

<sup>2</sup> See, e.g., Erich Wagner, “DeSantis Endorses Schedule F Ahead of Possible Presidential Run,” *Government Executive*, Mar. 1, 2023, <https://www.govexec.com/workforce/2023/03/desantis-endorses-schedule-f-ahead-possible-presidential-run/383504/>.

Specifically, these projects, like the Heritage Foundation's Project 2025<sup>3</sup> build on President Trump's short-lived Executive Order 13957 to create a new category of the excepted service, Schedule F, that would have allowed thousands of civil servant positions to be converted into political appointments.<sup>4</sup> While Trump's Executive Order never fully went into effect,<sup>5</sup> the goal was to increase presidential control over the federal career public service by returning federal agencies to the spoils system, under which federal employment was based on party loyalty and patronage rather than merit and expertise -- a system that was so corrupt and anti-democratic that Congress abolished it in 1883 with the passage of the Pendleton Act.<sup>6</sup>

The spoils system, which flourished under Presidents Andrew Jackson and Martin Van Buren, is a government structure that allows the president and party leaders to buy and reward people's loyalty through employment in the federal government.<sup>7</sup> This structure helped foster a political system based on patronage and kickbacks rather than popular sovereignty: in order to be elected, aspiring politicians would buy endorsements and reward loyalty with promises to put important party bosses' political cronies in positions of power in their administration.<sup>8</sup> Rather than qualified employees, who are required to do their jobs without regard to political affiliation, the spoils system allowed the president to hire political servants with an overriding loyalty to the party but often without knowledge or expertise in the jobs they were filling. It is not surprising that the spoils system was directly linked to a rise in corruption and inefficiency within the government.<sup>9</sup>

But the spoils system didn't just create a government littered with inadequate employees--it also resulted in distorted policy making. After all, "party loyalists are also more likely to be insensitive to the limitations and potential harmful effects of their party's policies" while "partisan bureaucrats are likely to sabotage established

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<sup>3</sup> Project 2025 includes recommendations that would undermine the career civil service and effectively reinstate the spoils system. See Project 2025, "Mandate for Leadership: the Conservative Promise" at 69 (Chapter 3: Central Personnel Agencies: Managing the Bureaucracy, by Donald Devine, Dennis Dean Kirk, and Paul Dans), [https://thf\\_media.s3.amazonaws.com/project2025/2025\\_MandateForLeadership\\_FULL.pdf](https://thf_media.s3.amazonaws.com/project2025/2025_MandateForLeadership_FULL.pdf).

<sup>4</sup> See Exec. Order No. 13957, 85 Fed. Reg. 67631 (2020).

<sup>5</sup> U.S. Gov't Accountability Off., GAO-22-105504, *Civil Service: Agency Responses and Perspectives on Former Executive Order to Create a New Schedule F Category of Federal Positions* at 10 (Sep. 2022) ("GAO Schedule F Report"), <https://www.gao.gov/assets/gao-22-105504.pdf>.

<sup>6</sup> Pendleton Civil Service Reform Act, 22 Stat. 403 (1883),

<https://govtrack.us.s3.amazonaws.com/legislink/pdf/stat/22/STATUTE-22-Pg403a.pdf>.

<sup>7</sup> See "Spoils System," Encyclopedia Britannica, <https://www.britannica.com/topic/spoils-system>. See also, "Spoils System," Encyclopedia.com,

<https://www.encyclopedia.com/history/united-states-and-canada/us-history/spoils-system>; and Jonathan Rauch,

"How American Politics Went Insane," *The Atlantic*, Jul/Aug 2016,

<https://www.theatlantic.com/magazine/archive/2016/07/how-american-politics-went-insane/485570/>.

<sup>8</sup> See "William 'Boss' Tweed and Political Machines," *Bill of Rights Institute*,

<https://billofrightsinstitute.org/essays/william-boss-tweed-and-political-machines>.

<sup>9</sup> See "Spoils System," Encyclopedia.com; see also "Machine Politics," PBS,

<https://www.pbs.org/wgbh/americanexperience/features/presidents-unity-garfield/>.

federal policies and legal statutes to please political leaders.”<sup>10</sup> This quid pro quo system of politics and federal employment undermined Americans’ constitutional right to equal protection of the laws by deploying the federal government to reward those who agreed with the party and punish those who disagreed.<sup>11</sup> In sum: not only did the spoils system fill the government with corruption and inefficiency, it undermined American democracy itself.

A return to the spoils system would be catastrophic for our democracy. Thankfully, OPM has developed a proposed rule that, if implemented correctly, would create new defenses against attacks on the merit system and the career civil service. We discuss the rulemaking briefly below.

## **2. OPM should adopt the rule as written with one minor clarification.**

OPM has written a strong, well-designed rule that would help protect the merit-based civil service from attack from within the executive branch. By clarifying the protections afforded to career federal employees and ensuring that those protections can’t be arbitrarily withdrawn to suit the political desires of any given presidential administration, the proposed rule offers a concrete policy solution and meets the pressing requirements of this perilous moment.

All executive agencies exist because Congress has delegated elements of its lawmaking authority to the executive. Congress “create[s] agencies,” “detail[s] agency] authority and set[s] policy goals for the agency to accomplish in the exercise of that authority,” and “may choose to grant an agency the authority to issue legislative rules, enforce provisions of law, or adjudicate claims.”<sup>12</sup> While the President can direct agencies to make policy consistent with the President’s political aims, agencies--and their staff--can only implement that policy if it is consistent with Congress’s description of the agencies’ authority and purpose.

Protecting the career civil service and guaranteeing that it is staffed by people with relevant expertise ensures that agencies can fulfill their role as stewards of Congress’s mission rather than the whims of a political appointee who is looking to act beyond Congress’s mandate. The executive branch has many complex and longstanding federal programs. Carrying out these programs effectively, efficiently, and consistent with Congress’s intent requires them to be staffed by individuals with a thorough understanding of the particular statutory and regulatory schemes, institutional knowledge of the history of the programs, familiarity with relevant

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<sup>10</sup> See, Jack K. Knott, “A Return to Spoils: The Wrong Solution for the Right Problem,” 29 *J. of Admin. & Society*, 6 (1998), <https://rb.gy/c0w1dm>.

<sup>11</sup> For instance, William Tweed, the infamous “boss” of Tammany Hall in New York City, would dole out thousands of jobs to friends who had little to no experience with the expectation that he would receive kickbacks--he would, for example, distribute money to judges in exchange for favorable rulings. See <https://billofrightsintstitute.org/essays/william-boss-tweed-and-political-machines>.

<sup>12</sup> Todd Garvey & Sean M. Stiff, Cong. Rsch. Serv., R45442, *Congress’s Authority to Influence and Control Executive Branch Agencies*, at 10 (Mar. 2023), <https://crsreports.congress.gov/product/pdf/R/R45442>.

stakeholders inside and outside government, and substantial technical expertise. That is what the career civil service provides--and what a return to the spoils system would completely destroy. Adopting a rule that protects career employees from being fired *en masse* and ensuring that a presidential election doesn't automatically lead to massive staffing shifts is therefore critical to the government's ability to continue operating these programs and protecting the health, safety, and welfare of Americans.

That is why this proposed rule is so important.

We do, however, encourage OPM in the final rule to explicitly clarify that the protections afforded to civil servants which OPM reinforces throughout the proposed rule also reach career employees in the Senior Executive Service ("SES") wherever applicable. The SES "operate and oversee nearly every government activity in approximately 75 Federal agencies," and are the "major link between [Presidential appointees] and the rest of the Federal workforce."<sup>13</sup> As noted on OPM's website, the SES is the "keystone of the Civil Service Reform Act of 1978."<sup>14</sup> While OPM's proposed rule does not harm the SES, it is important that in the final rule OPM clarifies that all the protections they've added or enhanced apply equally to the SES.

## **Conclusion**

The development of the federal merit system--and the end of the spoils system--was one of the most important improvements to our government in the country's history. By requiring that federal agencies hire candidates based on their expertise, experience, and ability to do their job--as opposed to the amount of money they or their friends contributed to a campaign--Congress slashed corruption and mismanagement in all federal agencies. This merit-based system has only grown in importance in the 20th and 21st centuries. With Congress increasingly unable to pass even minor legislation, federal agencies have been forced to pick up the slack. Rulemakings, by administrations of both parties, have become the main way our government regulates industries and industry practices--and ensures that our water and air are clean, and that the medicines we take are safe. Without career civil servants who are experts in their fields and who understand their responsibilities under the law, these functions would collapse. And a government hamstrung by federal agencies filled with unqualified party loyalists would harm almost every part of everyday Americans' lives.

That is precisely why we support OPM's strong and important rule so vigorously. The rule bolsters the merit system at a perilous time. And while we encourage OPM to clarify that the protections afforded to other career employees also apply to the Senior Executive Service, we also call on OPM to adopt the rest of the rule as drafted.

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<sup>13</sup> <https://www.opm.gov/policy-data-oversight/senior-executive-service/>

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We look forward to working with OPM as you move this crucial rule through the notice and comment process.

Kind regards,

A handwritten signature in black ink that reads "Debra Perlin". The signature is written in a cursive, flowing style.

Debra Perlin  
Policy Director