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# Thoughts on Civil Service Reform: A Tale of Two Civils

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# Thoughts on Civil Service Reform: A Tale of Two Civils

By Ronald A. Cass

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Executive Summary:
Decisions about how and how much to embrace civil service protections are, for the most part, *political* choices, not constitutional imperatives. The Constitution gives the President control over principal officers in the executive branch and by implication control as well over subordinates, but it doesn't prevent employment restrictions that advance important goals without significantly interfering with that control.

The most trenchant policy questions for potential civil service reform are: whether increasing presidential control over employees will improve government—by making it more democratically responsive—and whether greater executive control of executive branch decisions will increase or decrease legislative commitments of broad policymaking authority to executive officials.

Expanding the ambit of presidential influence over personnel is desirable, to counteract significant impediments that currently undermine the executive's effective constitutional responsibility for government officials, particularly in light of the small number of senior officials now subject to direct presidential control. Significant practical concerns, however, will limit the scope of personnel subject to increased controls. And restricting the scope of executive branch policymaking power—likely to occur on statutory and constitutional grounds—should moderate concerns over expanded presidential authority.

Competition is almost uniformly a hallmark of successful systems. It works in sports to identify, incentivize, and reward the best talent. It works in business in the same manner. But government employment—certainly, employment in the United States Government—functions very largely in insulation from competition. Since enactment of the Pendleton Civil Service Reform Act of 1883,[1] 141 years ago, civil service employees have been shielded against many options for discipline or termination that routinely are used to align workers' incentives with the interests of their bosses. Today, of the roughly 2.2 million full-time civilian employees in the United States Government, all but about 4,500 are covered by civil service protections, generating lower turnover and an older set of workers than in the broader economy.

This system was lauded at its inception, and episodically since, as advancing the competence of government employees and the effectiveness of their service. Yet, the protections associated with the civil service laws also have been derided as limiting the electorate's ability to secure changes in policy consistent with their preferences and

of the President to deliver those changes in implementing the laws. Increasingly, this complaint is associated with charges of a bureaucracy with one-sided policy preferences standing in the way of legally mandated changes.

As argument over the current system has increased in recent years, proposed changes to it—excepting more workers from the Civil Service or, heading in the opposite direction, expanding the scope and durability of Civil Service protections—have been put forward in successive presidential administrations.[2] Looking at the arguments over civil service, the first set of changes seems headed in the right direction while the second set highlights reasons to avoid wholesale replacement of government employees exercising significant authority. Decision on the form and extent of these changes lies largely in the legislature's hands. One further reform, noted briefly at the conclusion of this paper, that should complement the changes (and limits to them) being proposed: restricting the scope of policymaking power lodged in the executive branch should moderate concerns over expanded presidential control. This lies in the hands of both Congress and the courts.

Part I describes first encounters with civil service's virtues and vices. Part II takes up legal issues respecting control of government officers. Part III addresses the efficiency of mechanisms for control of managers and other workers in different organizations and settings, contrasting government with other enterprises. Part IV suggests concerns to be addressed in, and advice for, reform. And Part V summarizes approaches taken by recent U.S. administrations.

## I. Personal Introduction: Pole Positions

### The Starting Pole

I grew up seeing the work my father did, and the way he handled his position, as a civil servant. For him, both words were accurately descriptive.

For roughly half of his 30-year government career, spanning six U.S. presidents, he was the only Deputy Undersecretary in the federal government who was in the Civil Service rather than being a political appointee who formally served at the President's—or the Cabinet member's—will. When the position of Deputy Undersecretary of Labor was created for my father, he insisted that it be a Civil Service position. Having grown up extremely poor, he placed a high value on financial (here, job) security.

Yet, each time political appointees in the Department changed, my father offered to resign so that the new administration could have the benefit of officers whose views on policy aligned more fully with the political appointees'. His offers were routinely rejected. He was kept in his position because his experience and expertise—his knowledge of the programs and processes important to successful navigation of the Department's goals—were valuable to each incoming administration. My father took his job seriously and worked hard under Democrats and Republicans alike. He was the model civil servant, with or without the capital letters that designate government employees who enjoy statutory protections.

His example marks one pole of my view of what Civil Service can be.

### Second Position

My second opportunity to think about this topic—highlighting the opposite pole—came during the Reagan administration. When I

was nominated by President Reagan to serve as a United States International Trade Commissioner, a friend of mine who had served in various White House positions gave me a copy of "Yes, Minister," a book relating travails of a British minister (equivalent of a Department Head). The book's title, used in a BBC television series, lampooned permanent employees of the British civil service dealing with their political bosses.

In this telling, the British civil servants' understanding of job performance was simple: say yes, so the minister will be satisfied that you'll help accomplish his goals; but continue doing what you think is best. Or is least taxing for you. No reason to make changes that don't suit permanent employees' preferences. After all the Minister will be gone soon enough and, in all events, can't really do much to harm you. That was the relationship between civil servants and political "bosses" that my friend wanted me to have in mind as I took my turn in the political appointee's role.

### Inside Looks

My own experience in government wasn't entirely in keeping with this second view of the way civil service protections work. Then again, it wasn't entirely at odds with it, either.

I encountered plenty of smart, thoughtful, and open-minded government officials who were serving before I arrived and would be in place after I left. Many of them had thought hard about aspects of the agency's mission and how to improve the agency's performance in accomplishing it—indeed, many had thought about the important issues a good deal longer and with substantially more insight than I had.

That said, I also encountered plenty of other officials who had fixed views of what the mission of the agency was and should be and how it should be accomplished. In more than a few cases, those officials were less than enthusiastic about reexamining those views to see how they fit the statutory framework governing the agency's authority. These officials, too, were there for the long haul.

### Tethers and Limits

These personal experiences frame the boundaries of what I'm willing to credit as sensible policy for selection and control of government officials. They suggest that discussion of civil service reform is appropriate, because there is room for improvement, for making more civil servants behave more like my father and less like the characters in "Yes, Minister." But these experiences also suggest that wholesale change isn't necessary to align the incentives and behavior of civil servants with reasonable views of public good—that is, to align them as much as is reasonable to expect given the nature and peculiar limitations of government administration.

I start with personal experience because it provides a tether to thinking about policy questions, preventing more abstract argumentation from leaving the realm of reality. But personal experience isn't the same as broader based, less random sources of information. Serious inquiry into what is good or bad about substantial insulation of civil servants from political control requires understanding broader legal and policy considerations.

## II. Law's Order: Presidential Power and Responsibility

### Constitutional Command: First Take

Article II of the U.S. Constitution begins with the declaration that "[t]he executive Power shall be vested in a President of the United States of America."[3] Although some members of the Constitutional Convention

and other participants in the ratification debates favored a plural executive, the strong consensus was that a single chief executive—the President *of the United States* (not *of* a legislative body nor wholly subservient *to* a legislative body)—would provide the energy and strength needed.

To be sure, the Constitution recognized that the President would not act alone or independently of the other branches of government. It did not task him with making most of the critical decisions in governance. In domestic affairs in particular, the document clearly gives primacy to the Congress. Even where the President acts under legislative instruction, he is tasked not with personally implementing the laws—instead, he is to "take Care that the Laws be faithfully executed."[4] The importance of that commitment of authority may be less than often assumed, as it was sandwiched between the directions to "receive Ambassadors and other public Ministers" and to commission all the officers of the United States.

The language of Article II appreciates that those who execute the laws were to be subordinate officers in the Executive branch of the national government. Given the vesting clause of Article II, the obvious reading of this structure is that these officers, being subordinate to the President, also are subject to his command.

But that does not make completely clear the degree to which officials doing the implementing were to be under the President's control. For instance, Article II also states that the President "may require the Opinion, in writing, of the Principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[5] If the vesting clause makes all of the officers performing executive functions fully subject to presidential control, why did the Framers think the President needed express authority to secure an opinion from department heads, the President's most immediate subordinates? And why specify that the request is authorized with respect to subjects "relating to the Duties of their respective Offices"? Does this mean the President cannot ask the Secretary of Treasury about something outside the domain of finance and commerce? More pointedly, doesn't the language of the "require Opinion clause" signal an expectation that duties may be committed by law to other Executive branch officials, rather than assigned by the President?

**Constitutional Command: Second Look**

Of course, separate assignment of responsibility to specific officers does not necessarily imply that the assignments—and the officials exercising them—are free from presidential oversight and control. But the practice does put in issue how much Congress, in making these assignments, constitutionally can circumscribe the processes for carrying them out and the details of personnel selection for the assignments. That is, how much can Congress constrain presidential control over personnel decisions?

Answers to that question have been given with respect to some aspects of presidential control over some officials, not always in ways helpful to the matters at issue here. In *Marbury v. Madison*, for instance, Chief Justice Marshall distinguishes between "an officer [who] is removable at the will of the executive" and officers, like William Marbury, who are not.[6] Marshall states that Marbury was not removable by the President, as "the law creating [his] office gave the officer a right to hold [it] for five years, independent of the executive."[7] This statement often is cited as evidence that Congress can restrict presidential authority

over executive officers however it chooses. But *Marbury* does not say that in nearly so bold a fashion. Mr. Marbury was to receive a commission as a justice of the peace for the District of Columbia, a position comparable to a territorial judge rather than an officer of the United States performing executive functions. That context, together with Marshall's failure to make any clear statement respecting the scope of legislative power to insulate executive officials from presidential control, should give pause to those reading a broad rule into *Marbury*.

Similarly, the Supreme Court's decision in *Kendall v. United States ex rel. Stokes*[8] often—again, wrongly—is referenced as demonstrating that Congress can insulate administrators' decisions from presidential control but not from judicial review. *Kendall* involved disposition of a claim by a firm providing mail carriage service under contract with the United States Post Office. Congress had provided for the firm's payment through legislation in the nature of a private bill directing funds to be drawn from the Treasury, paid from the Post Office's account. The refusal of Postmaster General Kendall to credit the contractor for the amount determined to be owed was not taken pursuant to presidential direction nor would it have been thought to be a matter of executive discretion any more than compliance with a judicial order.

A half-century later, in *United States v. Perkins*, the Court overturned the discharge (not for cause) of a naval cadet engineer, a recent graduate of the Naval Academy whose commission would have issued from the Secretary of the Navy. He had not been given a posting and, two years after graduating, was informed by letter from the Secretary that, there being no position for which his service was needed, he was being honorably discharged. In affirming a judgment for reinstatement with back pay, the Court, without adding any discussion of its own, adopted the language and decision of the Court of Claims. After recounting the law prohibiting discharge of military officers during peacetime except pursuant to court-martial, the Court of Claims (and Supreme Court) declared: "[W]hen Congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest."[9] Like the cheese in "The Farmer in the Dell," this *ipse dixit* stands alone.

Still, *Perkins* remains notable as a rare Supreme Court pronouncement on congressional authority to "limit and restrict the power of removal." It has been variously cited, distinguished, criticized, and ignored in later opinions. But it has not been overruled. Even *Myers v. United States*—Chief Justice Taft's encomium for presidential power over the executive branch—conceded, citing *Perkins*, that "Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal."[10]

Moreover, courts have accepted that, in assigning authority to agencies to implement legislative programs, Congress can craft rules for how those programs will be implemented, including the procedures for decision-making, the individuals authorized to make decisions, and the terms for intra-agency review as well as subsequent judicial review. These controls over decision-making are not easily distinguished from power over personnel decisions. The upshot has been toleration of legislated rules for hiring, firing, disciplining, and compensating inferior officers that restrict presidential control of these employees.

**"In other words, even if *Humphrey's Executor* survives in some measure, the Court now plainly reads the vesting clause of Article II as rejecting the "Yes, Minister" view of executive branch operation."**

### Constitutional Command: A Caveat

Acceptance of the basic framework for civil service rules governing inferior officers, however, has been coupled with increasingly strict restraints on interference with presidential control over principal officers (in the executive branch, officers whose only real boss is the President).

The counterpoint to this is *Humphrey's Executor*, which almost 90 years ago declared that Federal Trade (FTC) Commissioners could be insulated against removal except for good cause because they perform "quasi-judicial and quasi-legislative" duties—emphasizing that these "duties are neither political nor executive."[11] But the Court acknowledged in *Morrison v. Olson* that its more recent decisions would not treat FTC Commissioners' duties as non-executive,[12] a statement joined by all but Justice Scalia, whose dissenting opinion even more strongly supported presidential control of executive officials.[13] This concession undermines the weight *Humphrey's Executor* should carry in considering the limits of permissible personnel rules.

Although, like *Perkins*, *Humphrey's Executor* has not been overruled, the Court's more recent decisions in *Free Enterprise Fund*,[14] *Seila Law*,[15] and *Arthrex*[16] demonstrate the justices' strong concern for presidential capacity to control executive officers' conduct in implementing the law. These decisions reflect the Court's reading of constitutional imperatives for maintaining, first, direct presidential control over principal officers performing executive functions and, secondarily, presidential capacity to control other officers' performance through directions to superior officers removable at will by the President. In other words, even if *Humphrey's Executor* survives in some measure, the Court now plainly reads the vesting clause of Article II as rejecting the "Yes, Minister" view of executive branch operation.

### Speaking of Politics

Before moving on to the "so what" question—what does the Court's view of presidential control over the executive branch mean in practice?—one other set of cases should be noted. A series of decisions from the 1970s to the 1990s addressing state and local government personnel practices asserted that conditioning government employment on political affiliation violates the First Amendment speech and association rights of individuals holding—and even those aspiring to—government positions, at least if the government cannot articulate a convincing justification for its use with respect to specific positions.[17] As with *Perkins* and *Humphrey's Executor*, this line of cases remains technically as good law, but it is far from clear that these decisions could bear much weight today.

## III. Efficiency and Organization: The Government Problem

If the Constitution's text and Supreme Court precedents are at odds with substantial constraints on presidential control but don't make executive officers subject wholly and

only to presidential control, what considerations should inform political choices respecting government personnel rules? One obvious consideration is the cost and efficacy of tools for aligning personnel's interests with broader organizational interests.

### Solving for Shirking

An extensive literature on the economics and management implications of organizational characteristics for different enterprises explains the reasons why managers are generally given extensive control over various decisions within business enterprises, including hiring and firing employees, and why particular organizational structures develop in particular contexts.[18] Every participant in a collaborative venture involving multiple individuals has an incentive to shirk responsibility in some dimension. Yet, teamwork is ubiquitous because mechanisms exist to improve individual incentives, reducing shirking and making team production more efficient.[19]

The mechanisms that succeed in solving problems such as shirking (often referred to generically as "monitoring") are most successful where there is (1) a common goal for the enterprise and (2) a setting that promotes efficiency. The most obvious examples come from business competition.[20] Businesses in private enterprise economies seek to maximize profits, which are returned to the residual owners of the enterprise and, where successful, also tend to correlate with increased rewards to others. The monies earned by the enterprise are easily divisible in ways that facilitate organization features rewarding managers for adopting systems of compensation and production that reduce the combined costs of shirking and monitoring—that is, features that enhance efficiency.

Notably, the norm in competitive business environments is that employees may be terminated at will. Although large enterprises often develop some form of tenure (through contracts that provide greater payouts for termination or restrictions on the basis for termination), competitive forces also constrain the degree to which this occurs—as shown, for instance, by the movement of facilities from locales with strong legal protections for restrictive union practices to locales with weaker protections.[21]

### Nonprofits' Problem

Understanding differences between more and less efficient enterprises requires consideration of differences in both goals and settings. Nonprofit enterprises—those without residual owners of profits earned by the enterprise—benefit from efficiency, but different institutional goals and different constraints on monitoring their achievement make nonprofit enterprises less attentive to some aspects of efficiency that are critical to success in the profit-seeking world.[22]

Consider, for example, competition among educational institutions, which turns in substantial measure on perceptions of prestige. Unlike money, prestige isn't easily divisible, and it doesn't correlate easily with the excess of income over expenditure. Further, those who donate money to a nonprofit institution often lack ready mechanisms for assessing the effects of their donations. Money generated by nonprofit enterprises—a category that includes some very large and financially successful entities—often is spent on facilities and personnel in greater proportion than entities with residual ownership of funds.[23]

### Government's Special Version

Government enterprises have two additional characteristics that reduce incentives to function efficiently.

The first efficiency-reducing characteristic is that government is less dependent than other enterprises on direct validation of the quality of its performance. After all, governments possess the power to coerce support through imposition of taxes and tax-like burdens of various sorts.

The second characteristic concerns competition. As Charles Tiebout famously explained, competition of a sort exists among governmental units (particularly at the local level),[24] but this competition tends to be muted in comparison to the more visible and more immediately effective competition among businesses. Professor Tiebout's primary contribution was recognizing that individuals' movement among localities imposes *some* competitive constraints on government decision-making and facilitates the correlation of individuals' preferences and decisions respecting each government's basket of services and taxes.

Tiebout also recognized, however, that factors such as the cost of moving from one locale to another impose significant constraints on the *magnitude* of the "voting with the feet" effect. While this effect increases the correlation of residents' preferences with governments' decisions, the correlation weakens as the size of the governmental jurisdiction rises. Thus, Tiebout's competitive effect exists even for national governments (especially for large businesses and some high-wealth individuals), but it does relatively little to match individuals' preferences with nations' policies, much less produce efficient provision of government services.

In the absence of strong pressures to conform government functioning to voters' interests, those who manage and work in government agencies can be expected to pursue goals that are more self-interested. Although there is not a consensus on what these are, three likely candidates have emerged.

First, as Bill Niskanen postulated, those within the agency have incentives to increase the agency's budget.[25] The theory of the budget-maximizing bureaucracy understands increased funds as expanding options for activities that are consistent with the agency's stated goal but in ways that raise the visibility and importance of those overseeing and working at the agency. For example, larger budgets are consistent with expenditures on things that make life better for those at the agency, including larger offices, better office locations, more luxurious appointments (such as wood paneling, more and better furnishings, etc.), increased support staff, and more opportunity to travel.

Second, the agency may pursue ideological interests that are embraced by those guiding and working at the agency. These interests, again, are likely to be broadly compatible with the stated mission of the agency but push the boundaries of agency authority to (or beyond) the legal limits of that authority. Ideologically motivated actions may be observed in any agency, including mainline departments such as the Department of Labor or Commerce or Education as well as stand-alone agencies or bureaus such as the FTC or the Environmental Protection Agency (EPA).[26] Indulgence of ideological preferences is apt to be most visible and most frequent in agencies with narrower, more focused regulatory mandates, such as the EPA or FTC. Although the most obvious examples involve *expansion* of agency authority, ideologically driven actions also can involve efforts to *reduce* the scope of agency authority.[27] In addition to serving agency personnel's ideological interests, these actions may also advance agency officials' interests in career advancement by currying favor with specific legislators.[28]

Third, agency personnel may pursue approaches that increase slack. This could include actions that reduce workload for individual officers, extend time frames for completing tasks, permit pursuit of particular initiatives of personal interest, or advance other personal interests. These actions reduce efficiency and increase the cost of government activity.[29]

### Implications for Personnel Rules

The constraints that clear goals (especially goals correlated with profit-maximizing) and competition's discipline impose on business enterprises are consistent with substantial managerial freedom over personnel decisions and work assignments. The benefits of such freedom for nonprofits and, especially, governments, however, are less clear, at least when viewed strictly in terms of efficiency. As explained above, the absence of efficiency-enhancing incentives means that managerial goals, if more fully enabled, might move the enterprise's operation toward or away from greater efficiency. How much that matters depends on the political value of efficiency and other goals.

## IV. Reform Concerns: Sclerosis, Runaways, Whiplash

Moving from understanding the context to implementing decisions requires identifying problems with the current government personnel system and appropriate steps to address them. What follows is a very short set of important inputs to this analysis.

Two concerns auguring for reform are *sclerosis* and *runaways*. On the other side of the "reform versus don't reform" scale, *whiplash* pulls the other way. Finally, would-be reformers should consider one design rule: *simplicity*.

### Sclerosis

First, sclerosis. Naturally, the start of any enterprise is accompanied by enthusiasm and energy. But over time these qualities fade unless kept alive by some type of pressure.

As already noted, in the business world, that is the pressure to beat the competition and to make more money for the owners, who in turn often tie the managers' and employees' compensation to profit-making success. In government, the sources of enthusiasm and energy tend to be new leadership at the top—almost invariably the product of a change in administration.

The "Yes, Minister" side of government—civil servants who are reluctant to alter what they do and have been doing—however, often produces a sort of institutional hardening of the arteries. The unarticulated mantra is: "We know better. We've been at this a long time. Don't tell us we need to change."

Of course, the bureaucrats may be right. They may be acting in ways more consistent with—or using more efficient means of implementing—the law than the directions new leadership brings. Almost certainly, the bureaucrats know more about some of the problems the agency faces.

But to the extent that statutory authority gives scope for discretion, those appointed by a new administration (linked to recent

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electoral choices) are better positioned to align the bureaucracy's functioning with larger goals and to inject energy into its work.

Unlike the judiciary, which is purposely insulated against popular pressures—because it makes retrospective decisions rewarding or punishing prior private conduct—the President's control over executive decision-making and personnel is broadly consistent with constitutional design. Faster, more consistent, and even more legally appropriate decisions often will follow from tying worker's interests to presidential energies. This makes the sclerosis concern important to personnel rules.

**Runaways**

My second focus would be runaways. The fact that implementation of the laws frequently provides scope for judgment does not make all judgments on how to implement the laws *lawful*. People drawn to work at an agency often are true believers in a conception of the agency's mission. This can produce pressure toward a mission the agency is not given unbridled authority to pursue.

Hence, for example, those who advocate almost any goal—government regulations in pursuit of lower emissions of pollutants or of greenhouse gases; greater dispersion of communications technologies to geographically dispersed, more rural, or less affluent potential users; greater safeguards against misleading investors—often slight competing concerns. That will affect their analysis of the agency's legal mandate and how to exercise whatever discretion has been given to implement the mandate.

The bottom line here is that reform of government personnel rules should help reduce risks that agency decisions ignore or undervalue concerns more obvious to or more heavily weighted by politically responsive managers.

**Whiplash**

Another thing to keep in mind is the danger of whiplash—making it too easy to change institutional course without considering the costs of frequent changes. The interests at stake here are those of individuals and entities who deal with the government, whose businesses or personal lives are affected by what government does and how it does it, and who make plans based on predictions about what rules they'll have to live by.

Adjusting agency behavior to changed political mandates is beneficial, but adjusting too often and too fast imposes costs on a range of people who value predictability. This is the other side of sclerosis, its offsetting problem.

Just as it's natural for people who have been at a task for a long time to overvalue the benefits of continuity (both personal and public), it's also natural for those who are new to a task to overvalue the benefits of change. Of course, where the broader public has sharply divided views of what to do with respect to a given set of issues, any change in presidential administration may give impetus to an about-face on matters subject to significant regulatory discretion.

This problem is best addressed by insisting on statutory instructions that give less scope for administrators to exercise expansive power in shaping legal rules. The real focus for this concern should be on statutory design and on judicial rules on delegations of authority. But anyone crafting personnel rules should keep this concern in mind as well.

### Simplicity

Finally, in looking at potential reforms it's important not to shoot for perfect decisions on each person or group of people working for the government. Perfection is costly, data-dependent, and requires consideration of too many variables to be likely to produce the outcomes desired. Simple solutions tend to be better.[30]

The right question generally is not how to achieve the perfect amount of something—here, of control by principal officers or other politically-sensitive executive officials. Instead, it is how to achieve the optimal trade-off between different goals, each of which entails different costs.

Professors Mathew McCubbins and Thomas Schwartz captured a version of this thought in the context of congressional oversight of agency operation, contrasting police patrols with fire alarms as means of identifying and responding to problems.[31] Police patrols try to prevent problems or to identify them before they become especially problematic. Fire alarms signal that a problem is already occurring. In some settings one approach—ex ante monitoring in hopes of prevention or ex post reacting in hopes of a quick cure—is better than the other.

In the personnel realm, reliance on patronage—or at least some version of appointment and removal authority that can account for likely sympathy to an administration's priorities—is apt to increase responsiveness to the current administration. In contrast, civil service systems tend to increase expert skills with respect to current procedures, understanding of the array of problems that exist in specific areas (though not necessarily the best way to address them), and some types of analysis. Whatever the right balance between patronage and civil service approaches, the current allocation of roughly two-tenths of a percent of government employees not subject to civil service protections almost certainly is too low.

## V. Dueling Plans: Schedule F and "F That!" Response

### Schedule F: The Plan

The first shot in the current battle over potential changes to government personnel rules was President Trump's proposal to create a new Schedule F for specified federal civilian employees. That proposal did not, in itself, create any new positions or shift positions from civil service protected status to unprotected status. Instead, it directed heads of executive branch agencies to review positions within each agency and identify "positions ... of a confidential, policy-determining, policy-making, or policy-advocating character" but "are not normally subject to change as a result of a Presidential transition."[32] For any of those positions, the agency head is then instructed to apply to the Director of the Office of Personnel Management (OPM) to classify those as positions as being part of a newly created Schedule F.[33]

These reclassifications would increase the freedom of agency heads and their immediate subordinates—who tend to be hired through political processes and whose appointments generally terminate with the end of an administration—to use political considerations to hire the next tier of high-ranking policy-making and policy-advising officials (and others who have privileged access to the higher-ranking political appointees' confidential information). At the same time, the people on Schedule F would be safeguarded against a large array of potentially adverse decisions on the basis of considerations that might be deemed improperly discriminatory, among other

things.[34]

President Trump's order did not specify the number of positions that would become Schedule F positions. Some critics claimed tens of thousands of jobs would be changed from civil service to political appointments, even if not required as a matter of law. No doubt, some agencies closely tied to the President—the Office of Management and Budget (OMB), for example, a relatively small entity within the Executive Office of the President—would want to make a significant proportion of agency positions essentially shadow political ones. But given the difficulty of screening and hiring large numbers of people to relatively high-level government positions, it's likely the numerical impact across the government wouldn't be nearly so great as feared—or hoped. Instead, the effect of the Trump initiative would be qualitative more than quantitative. In all events, the quick demise of the Schedule F executive order means that, for now, there isn't a definite answer to "how far does it go?"

**Anti-Schedule F Initiative**

The Biden administration reversed President Trump's Schedule F plan, which it characterized as "designed to be broad and numerically unlimited" and suggested that it was also intended to permit politically committed officials to be hired without demonstrating competence at the assigned tasks and then to "burrow" into their positions in the agency for the long term.[35] President Biden's Executive Order and OPM rulemaking criticized the Schedule F plan as contrary to statutes respecting government personnel, less likely to result in having employees with "the appropriate temperament, acumen, impartiality, and sound judgment," and potentially "discriminatory in application."[36]

The OPM rulemaking went on to announce steps to enhance limitations on political officials' control of federal workers. These include new limitations on reclassifying positions as belonging to a different service classification. In addition, the rulemaking declares that "employees who are moved from the competitive to the excepted service, or from one excepted service schedule to another, retain the status and civil service protections they had already accrued."[37] In short, the Biden plan, so far as limiting presidential authority over federal workers goes, is "*status quo* plus."

**Hitting the Target?**

The contrasting inclinations of the Trump and Biden approaches say more about the sense each President, and each presidential administration, has respecting the fit between current officials' compatibility with particular approaches to government. The Biden approach accepts present officials as sympathetic and well-suited to the administration's priorities—likely to agree with the President's policy preferences and diligently to advance them. It aims to reinforce the current system and "Trump-proof" it, increasing the difficulty of future efforts to diminish restrictions on presidential control. This approach doesn't suit political administrations that are committed to changing priorities in government so far as legally committed discretionary authority permits. It isn't concerned with sclerosis or runaways, though it is consistent with concerns over whiplash—that is, when someone else is holding the whip.

The Trump approach, in sharp contrast, seeks a way around current limitations on presidential control of government officials, reflecting frustration at efforts to change course in much of the administration of the laws. This suits the views of many

political appointees who try to move agency decisions in a different direction, addressing both sclerosis and runaway concerns. But the Trump approach associated with Schedule F doesn't present clear boundaries to political appointees' power. Its limitations are more practical than legal. Those limitations are still significant, and the time frame within which presidential administrations function will act as a significant impediment to change even with the most congenial legal framework.

It is worth noting that much of our framework of government is designed to slow and temper change. Current legal rules and administrative implementation of them, however, don't necessarily slow change in ways consistent with constitutionally prescribed mechanisms. That's the point of the concerns sketched in Part IV. A path for needed reform can and should fit constitutional priorities as well as presidential preferences while tempering the concerns articulated here.

## VI. Conclusion

Lord Salisbury—the on-again, off-again U.K. Prime Minister at the end of the nineteenth and beginning of the twentieth centuries—reportedly declared, in response to a demand for reform: "Don't speak to me of reform. Things are bad enough as they are." That may be the right attitude to bring to most efforts to change American government.

When it comes to the civil service, however, it is hard to say that there is no room for improvement or that making top-level policymakers and advisers more susceptible to presidential control is generally ill-advised. Consider Justice Scalia's dissent from the Court's 1990 decision in *Rutan v. Republican Party of Illinois*, the last notable case asserting a constitutional inhibition to basing government employment decisions on party affiliation. Joined by Chief Justice Rehnquist, Justice Kennedy, and (in the major analytical parts of the dissent) Justice O'Connor, Scalia attacked the entire edifice on which the earlier decisions rest. His opening lines give the flavor of his position:

> Today the Court establishes the constitutional principle that party membership is not a permissible factor in the dispensation of government jobs, except those jobs for the performance of which party affiliation is an "appropriate requirement." It is hard to say precisely (or even generally) what that exception means, but if there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where partisanship is not only unneeded but positively undesirable. It is, however, rare that a federal administration of one party will appoint a judge from another party. And it has always been rare. Thus, the new principle that the Court today announces will be enforced by a corps of judges (the Members of this Court included) who overwhelmingly owe their office to its violation. Something must be wrong here, and I suggest it is the Court.[38]

Scalia goes on to note that as the use of patronage instead of a merit-oriented system of staffing government at all levels declined, complaints about the inability of government to accomplish its assigned tasks have grown.[39]

Scalia's *Rutan* dissent should give pause not only to creating a legal *right* requiring the abandonment of historically accepted approaches to governance, but also to policy-based frameworks built on similar instincts. The use of patronage to some degree, small or large, has historical pedigree

and arguable advantages over a civil service system (or as an adjunct to it), encouraging political participation and supporting political competition.

In the main, how and how much to embrace civil service protections are, at best, *political* choices, not legal imperatives. The most trenchant questions are: whether steps that increase presidential control over civilian employees will improve government—especially making it more democratically responsive at the broad policy level—and whether greater executive control of executive branch decisions will increase or decrease legislative commitments of broad policymaking authority to executive officials.

Recent legal developments don't answer these questions, but developments in two arenas may tilt the practical-political calculus toward change. Judicial decisions are increasingly skeptical of untethered statutory grants of policymaking authority and of judicial review rules that bolster such authority, as evidenced by recent decisions on "major questions"[40] and pending cases respecting deference.[41] The Supreme Court also has offered hints that it may be more willing to hold delegations of broad decisional authority contrary to constitutional command.[42]

These developments, and what they might portend for future actions by Congress as well as the courts, should give solace to reformers worried about expanding presidential power. While there are incentives for Congress to delegate difficult decisions to others, political changes as well as judicial ones may provide counterweights, increasing resistance to broad delegations of discretionary authority. At least from the standpoint of concerns over a too-powerful executive branch under too-strong presidential control, this might be the ideal time for civil service reform.

## Endnotes

1. Pub. L. 47-27, 22 Stat. 403, Jan. 16, 1883.

2. *See, e.g.*, Executive Office of the Pres., *Creating Schedule F in the Excepted Service*, Exec. Order No. 13957, 85 FED. REG. 67631, Oct. 21, 2020, https://www.federalregister.gov/documents/2020/10/26/2020-23780/creating-schedule-f-in-the-excepted-service (*Trump Schedule F Order*); Office of Personnel Mgt., *Upholding Civil Service Protections and Merit Systems Principles*, 88 FED. REG. 63862, Sep. 18, 2023, https://www.federalregister.gov/documents/2023/09/18/2023-19806/upholding-civil-service-protections-and-merit-system-principles (*Biden OPM Rulemaking*).

3. U.S. CONST., Art. II, § 1.

4. U.S. CONST., Art. II, § 3.

5. U.S. CONST., Art. II, § 2.

6. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803) *(Marbury)*.

7. *Id.*

8. 37 U.S. (12 Pet.) 524 (1838) *(Kendall)*.

9. 116 U.S. 483, 485 (1886) (*Perkins*). The Court of Claims also declared that Perkins was an officer of the United States, not an employee, and thus covered by the law. *Id.*, at 484.

10. *See* Myers v. United States, 272 U.S. 52, 161 (1927) (*Myers*).

11. Humphrey's Executor v. United States, 295 U.S. 602, 624 (1935) (*Humphrey's Executor*). See also Wiener v. United States, 357 U.S. 349 (1958) (following *Humphrey's Executor* with respect to members of the War Claims Commission, which was "established as an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof," *id.* at 354–55).

12. Morrison v. Olson, 487 U.S. 654, 690 n.28 (1988).

13. Justice Scalia often noted that his confirmation vote was 98-0 but, given that the two senators not voting that day—conservative Republicans Jake Garn of Utah and Barry Goldwater of Arizona—were both Scalia supporters, the "effective" vote was really 100-0. Using that logic, given Scalia's views

on how to categorize government functions, the real vote on this statement would be 9-0.

14. Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477 (2010).

15. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

16. United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021).

17. *See* Elrod v. Burns, 427 U.S. 347, 367, 372–73 (1976) (plurality op.) (*Elrod*); id., at 375 (Stewart, J., concurring); Branti v. Finkel, 445 U.S. 507, 518–19 (1980) (*Branti*); Rutan v. Repub. Pty. of Illinois, 497 U.S. 62,74–75, 78–79 (1990) (*Rutan*). These cases bear a distant relationship to the issue addressed more recently in Janus v. Am. Fed. of State, Cnty. & Mun. Employees, Coun. 31, 138 S. Ct. 2448 (2018) (*Janus*). *Janus* did not present a question of hiring or firing based on *party* affiliation, but it did address government employees' mandated financial support for a specified union that was associated with one type of speech on politically salient issues (speech that aligned with the positions of one political party). Unlike the claims advanced in *Elrod*, *Branti*, and *Rutan*, the practice challenged in *Janus*—of payments to a specific union used to support politically salient speech—was not defended as instrumental to promote government employees' fidelity to elected officials' policy inclinations. The *Janus* concern with compelled speech that was not linked to any instrumental value of government is more solidly based on standard First Amendment doctrine. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977); Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Inter-pretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405 (1987); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981).

18. *See*, *e.g.*, Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301 (1983).

19. *See*, *e.g.*, Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972).

20. *See*, *e.g.*, Douglas A. Hay & Gary S. Liu, *The Efficiency of Firms: What Difference Does Competition Make?*, 107 ECON. J. 597 (1997).

21. *See*, *e.g.*, Kevin Bessler, *Data: Jobs Continue to Flow from Pro-Union States like Illinois to Right-to-Work States*, MADISON-ST. CLAIR RECORD, Sep. 14, 2022, available at https://madisonrecord.com/stories/631631327-data-jobs-continue-to-flow-from-pro-union-states-like-illinois-to-right-to-work-states.

22. *See*, *e.g.*, Henry Hansmann, *The Role of the Nonprofit Enterprise*, 89 YALE L.J. 835 (1980).

23. A similar phenomenon is observed with regulated utilities, where returns to the organization are limited based on investments or expenditures in certain categories. *See*, *e.g.*, Harvey Averch & Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 AM. ECON. REV. 1052 (1962); Steve Cicala, *When Does Regulation Distort Costs? Lessons from Fuel Procurement in US Electricity Generation*, 105 AM. ECON. REV. 411 (2015).

24. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

25. William A. Niskanen, Jr., *Bureaucracy and Representative Government* 36–42 (Aldine-Atherton 1971).

26. *See*, *e.g.*, Dept. of Commerce v. New York, 139 S. Ct. 2551 (2019); Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation Under the Obama Administration*, 34 HARV. J.L. & PUB. POL'Y 421 (2011). This observation does not in any way endorse judicial inquiry into the motivation for agency actions. *See* Ronald A. Cass, *Motive and Opportunity: Courts' Intrusions into Discretionary Decisions of Other Branches—A Comment on* Department of Commerce v. New York, 27 GEO. MASON L. REV. 399 (2020).

27. *See*, *e.g.*, MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994).

28. *See*, *e.g.*, Dennis C. Mueller, *Public Choice II* 258–59 (Cambridge Univ. Press 1989) (citing, among other things, Albert Breton & Ronald Wintrobe, *The Logic of Bureaucratic Conduct* 96–97 (Cambridge Univ. Press 1982)). For more general discussion of the interrelation of interests between legislators, politically appointed agency officials, and longer-term agency officials, *see*, *e.g.*, Glen O. Robinson, *American Bureaucracy: Public Choice and Public Law* (Univ. of Michigan Press 1991); Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982).

29. *See*, *e.g.*, Mueller, *supra note* 28, at 261–66.

30. See, e.g., Richard A. Epstein, *Simple Rules for a Complex World* (Harv. Univ. Press 1997).

31. *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

32. *Trump Schedule F Order*, *supra* note 2, at §§ 4–5. The mandated review to identify potential Schedule F positions was to be accomplished within 210 days of the Executive Order and, subsequently, reviewed each year or less.

33. A separate provision addressed positions that fit the description of appropriate Schedule F jobs but already were excepted from the "competitive service" (meaning that these positions did not require the hiring processes normally used for federal government employment; for example, attorney hiring often takes place outside the usual competitive service rules to gain access to employees with the appropriate skill set). See Admin. Conf. of the U.S., Recommendation 2019-9, *Recruiting and Hiring Agency Attorneys*, 84 Fed. Reg. 71,355 (Dec. 27, 2019). Under President Trump's Executive Order, those positions would be considered as Schedule F positions for relevant purposes. *Trump Schedule F Order*, *supra* note 2, at § 5(a)(ii).

34. *See* 5 U.S.C. 2302(b); *Trump Schedule F Order*, *supra* note 2, at § 6.

35. *See Biden OPM Rulemaking*, *supra* note 2, at § I.D.

36. *See id.*

37. *See id.* at § II.A.

38. *Rutan*, 497 U.S. at 92–93 (Scalia, J., dissenting) (internal citations omitted).

39. *Id.* at 93–94, 105–08 (Scalia, J., dissenting). He observes as well that the tests adopted by the Court—that government personnel practices giving scope to party affiliation must serve compelling interests and be narrowly tailored to that end—are, in the great sweep of government in America, new requirements at odds with long-accepted practices. And, additionally, requirements not easily administered. *Id.* at 111–14 (Scalia, J., dissenting).

40. *See*, *e.g.*, West Virginia v. EPA, 142 S. Ct. 2587 (2022). Although contentious in legal and academic circles, this has both a substantial pedigree and salutary reform prospects. *See*, *e.g.*, Beau J. Baumann, *The Major Questions Doctrine Reading List*, YALE J. ON REG: NOTICE & COMMENT [https://perma.cc/J2ZE-4VZH] Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L. REV. 191 (2023); Ronald A. Cass, *Delegation and the Administrative State: First Steps toward Fixing our Rule of Law Paradox*, 16 N.Y.U. J. L. & LIB. REV. 451 (2023).

41. *See*, *e.g.*, Loper Bright Enterprises v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (May 1, 2023) (No. 22-451), and Relentless, Inc. v. Dept. of Commerce, 62 F.4th 621 (1st Cir. 2023), *cert. granted*, Supreme Court Order List, https://www.supremecourt.gov/orders/courtorders/101323zr1_n6io.pdf (Oct. 13, 2023) (No. 22-1219) (both presenting question whether the Supreme Court should amend or revoke the review rule associated with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

42. Although the Court rebuffed a nondelegation challenge in Gundy v. United States, 139 S. Ct. 2116 (2019) (*Gundy*), the dissent in *Gundy* by Justice Gorsuch for three justices, and statements by Justices Alito, Kavanaugh, and Thomas in other cases bolster prospects that the Court may reinvigorate the nondelegation doctrine. *See*, *e.g.*, Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in denial of cert.); *Gundy*, 139 S. Ct. at 2131, 2133–42 (2019) (Gorsuch, J., dissenting); U.S. Dept. of Transp. v. Ass'n of Am. Railroads, 575 U.S. 43, 61 (2015) (Alito, J., concurring); *id.* at 66, 69–91 (Thomas, J., concurring in judgment).