

# Restoring Accountability to the Executive Branch

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“Democracy runs on accountability.”<sup>1</sup>

– Joe Biden

The federal civil service system is broken. This is not a controversial statement. A 1989 report by the Volcker Commission on civil service found a “quiet crisis” in federal civil service, characterized by “an erosion of performance and morale” and the “inability to recruit and retain a talented work force.”<sup>2</sup> Pride had been replaced by resignation. The Commission found that seven of ten federal employees who witnessed fraud, abuse, or waste did not even bother to report what they saw.<sup>3</sup> The second Volcker Commission in 2003 found deep resentment at “the protections provided to those poor performers among them who impede their own work and drag down the reputation of all government workers.”<sup>4</sup> More recently, the Partnership for Public Service, a federal civil service reform group, describes the system as “a relic of a bygone era.”<sup>5</sup>

The flaws of modern civil service include: 1) a lengthy, bureaucratic recruitment process, taking on average over three months;<sup>6</sup> 2) difficulty in attracting quality personnel; 3) a lethargic and dispiriting office culture; 4) mediocre to poor performance, focused on rote compliance instead of accomplishment; and, most important, 5) the near-impossibility of holding anyone accountable.

I focus in this paper on accountability, which I believe is the lynchpin to overall reform of the civil service system. Giving public officials more responsibility, for example, is essential to attracting energetic and qualified candidates. Affording officials more flexibility also allows them to make common sense tradeoffs when confronting real-world situations, and thereby help relieve the frustrations Americans feel when stymied by bureaucratic rigidities. But few people will support giving officials more responsibility unless they are accountable if they misuse the authority.

Proposed civil service reforms over the past 30 years have gotten nowhere. Moreover, in a futile effort to avoid the ire of public unions, all have avoided the foundational issue of accountability. The failure of Congress to repair federal programs is not confined to civil service, of course, but civil

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<sup>1</sup> Bobby Cuza, “Joe Biden Bashes Trump on Iran at Speech in NYC,” Spectrum News / NY1, January 7, 2020.

<sup>2</sup> The National Commission on the Public Service, “Leadership for America: Rebuilding the Public Service” (1989), ix, 1, 3.

<sup>3</sup> *Id.* at 45.

<sup>4</sup> The National Commission on the Public Service, “Urgent Business for America: Revitalizing the Federal Government for the 21<sup>st</sup> Century” (2003), 12.

<sup>5</sup> Partnership for Public Service, “Building the Enterprise: A New Civil Service Framework” (April 2014), 7.

<sup>6</sup> Nicole Ogrysko, “It Took Agencies an Average of 106 Days to Hire New Employees in 2017,” Federal News Network, March 1, 2018.

service reformers have overlooked a more direct path to change that could be triggered by the executive branch alone—to challenge the constitutionality of the current structure.

Article II of the Constitution provides, in its first sentence, that “the executive Power shall be vested in a President.” For 170 years following ratification of the Constitution, contrary to current misperceptions, the President’s authority to terminate executive branch employees was considered his constitutional prerogative. Congress’s power to curb the President’s discretion was generally limited to public jobs independent of the President, such as quasi-judicial officers. Safeguards against politically-motivated firings were as far as Congress thought it could go.

How federal employees came to enjoy virtual immunity from accountability, beginning in the 1960s, is a classic Washington story of interest group “capture”—specifically by public employee unions who, swimming with the powerful tide of the rights revolution, shifted the focus of public personnel administration from a responsive government to the rights of each employee. The tide was so powerful that almost no one observed the obvious conflict with Article II, as interpreted by a long line of precedent.

I have written about the history of federal civil service, and analyzed the constitutional issues raised by collective bargaining (mandated by the Civil Service Reform Act of 1978) and application of the Due Process clause to employment decisions. As background to the constitutional arguments, this paper will draw on my previous writings.

### *State of Accountability*<sup>7</sup>

Accountability is generally defined as the ability to “hold a person to account” for his actions. In our constitutional framework, elected officials are accountable to voters who can vote them out of office. For the President to have meaningful accountability for decisions within the executive branch, the President must have authority to hold public employees accountable. While “executive Power” within the meaning of Article II includes many powers other than authority over personnel, at a minimum it must include an effective means of terminating officials. As the Supreme Court held in *Free Enterprise Fund v. Public Company Accounting Oversight Board*:

The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else. Such diffusion of authority ‘would greatly diminish the intended and necessary responsibility of the chief magistrate himself.’ The Federalist No. 70, at 478.<sup>8</sup>

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<sup>7</sup> This section draws heavily from Chapter 8 (“Restore Accountability to Public Culture”) of my 2019 book, *Try Common Sense: Replacing the Failed Ideologies of Right and Left* (New York: W. W. Norton).

<sup>8</sup> *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 at 509 (2010).

The absence of accountability in the federal civil service today is the result of layers of civil service protections, union contracts, and judicial rulings. The cumulative protections are considered virtually impregnable.

The process of accountability in the public sector, as I will discuss, basically inverts the management hierarchy—trying to hold a public employee accountable puts the klieg lights on the supervisor. In this legalistic subculture, any negative comment by a supervisor in the personnel file gives rise to a right to file a grievance and demand a legal hearing to put the supervisor to the proof. That’s why, a 2016 GAO report found, over 99 percent of federal civil servants were rated “fully successful” or better.<sup>9</sup> If an accountability proceeding ever gets to the merits of job performance, the ultimate decision turns not on whether an employee does the job well, but whether he’s so much worse than everyone else: “Is this employee so bad that he should lose his job?”

Public union leaders say that protecting public employees is “just a matter of due process.”<sup>10</sup> But the facts say something different. Any pretext of an argument is good enough to avoid dismissal. Regular stories emerge of employees who cannot be terminated despite outrageous behavior—such as the EPA employee who spent the day surfing porn sites.<sup>11</sup> The head of the VA hospital in Phoenix, at the center of a 2014 scandal over falsified waiting times, was found not accountable for “lack of oversight” because, as Steven Brill recounts in *Tailspin*, the government failed to prove specific items of no oversight—overlooking the fact that oversight, by definition, is not limited to specific criteria.<sup>12</sup>

Public unions exist mainly to block any accountability. As one union official admitted, “I’m here to defend even the worst people.”<sup>13</sup> Public unions will spend hundreds of thousands of dollars to defend a bad public employee. Union contracts, often over 300 pages long, require elaborate procedures for almost any negative supervisory decision,<sup>14</sup> as well as supplanting management judgment on numerous details of how to run the department. Instead of inspiring public employees to strive for A’s, the legal standard for keeping your job in federal government is a D-minus, or worse. More federal employees die on the job than are terminated or demoted.<sup>15</sup>

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<sup>9</sup> Robert Goldenkoff, “Federal Workforce: Distribution of Performance Ratings Across the Federal Government, 2013,” GAO- 16- 520R (2016), 5. The figure includes all civil servants except those in the Senior Executive Service.

<sup>10</sup> See, e.g., Randi Weingarten, letter to the editor, *New York Observer*, November 20, 2007; Amita Sharma, “Tenure: A Two-Edged Sword for 80 Years,” [Riverside, CA] *Press-Enterprise*, April 7, 1999.

<sup>11</sup> Colby Itkowitz, “Congressman Seeks Ban to Stop Federal Employees from Watching Porn All Day,” *Washington Post*, September 24, 2014.

<sup>12</sup> Steven Brill, *Tailspin* (New York: Penguin Random House, 2018), 262– 63.

<sup>13</sup> Allison Pries, “Teacher Union President Suspended After Allegedly Saying ‘I’m Here to Defend Even the Worst People,’” NJ.com, May 2, 2018.

<sup>14</sup> See, e.g., Department of Health and Human Services and National Treasury Employees Union, “Consolidated Collective Bargaining Agreement,” (March 6, 2014), available at <https://www.hrsa.gov/sites/default/files/hr/about/nteu.pdf>.

<sup>15</sup> See, e.g., Dennis Cauchon, “Some Federal Workers More Likely to Die Than Lose Jobs,” *USA Today*, July 19, 2011.

## *History of Executive Power Over Federal Employees*<sup>16</sup>

Until the 1960s, civil servants had no tenure, no union collective bargaining agreements, and no due process protections. Government worked tolerably well, and, while government work was rarely known for excitement, it attracted many of the best and brightest graduates.<sup>17</sup> The history of public service accountability reveals how civil service mutated into an entitlement, and provides powerful evidence for a constitutional challenge.

The issue of executive power over federal personnel came to a head in the very first Congress. In what became known as the “Decision of 1789,” Congress by narrow vote decided that its powers of approval under the Constitution did not include powers related to termination.<sup>18</sup> James Madison carried the day, arguing that “the President should possess alone the power of removal from office,” which would create an unbroken “chain of dependence . . .; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President.”<sup>19</sup> Madison argued that requiring the President to work with “subordinate executive officers” who rendered “inefficient service” or had “lack of loyalty” would “thwart[] the Executive in the exercise . . . of his great responsibility.”<sup>20</sup>

The next development was the spoils system, instituted by Andrew Jackson in 1829.<sup>21</sup> This was intended as a good government reform, bringing populist blood into government by politically accountable leaders. Jackson’s goal of “rotation in office” quickly got out of hand, and was transformed into a sinecure for incompetent political supporters. Allocating spoils jobs to campaign supporters consumed much of politicians’ time, just as campaign fundraising does today.

In the fight with President Andrew Johnson over Reconstruction policy, Congress sought to assert personnel control with the Tenure of Office Act of 1867, requiring congressional approval for terminating high-level appointees. When Johnson defiantly dismissed Secretary of War Edward

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<sup>16</sup> This section draws heavily from my January 2017 *American Interest* essay, “Civil Service Reform: Reassert the President’s Constitutional Authority,” available at <https://www.the-american-interest.com/2017/01/28/civil-service-reform-reassert-the-presidents-constitutional-authority/>, with additional material from Chapter 8 of my 2019 book, *Try Common Sense*.

<sup>17</sup> James K. Conant, “Universities and the Future of the Public Service,” in *Public Service: Callings, Commitments and Contributions*, ed. Marc Holzer (2000, repr. New York: Routledge, 2018).

<sup>18</sup> Gerald E. Frug, “Does the Constitution Prevent the Discharge of Civil Service Employees?,” *U. Pa. L. Rev.*, vol. 124 (1976), 949.

<sup>19</sup> *Annals of Congress*, 1st Cong., 1st sess., 518.

<sup>20</sup> *Myers v. United States*, 272 U.S. 52, 131 (1926). On the role of Congress, Madison argued: “The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the legislative power ceases.” *Annals of Congress*, 1st Cong., 1st sess., 604.

<sup>21</sup> See Arthur M. Schlesinger Jr., *The Age of Jackson* (Boston: Back Bay Books, 1988), 45–46: “While helping to build the party, the spoils system also contributed to the main objective of helping restore faith in the government . . . . The doctrine of rotation-in-office was thus in large part conceived as a sincere measure of reform.”

Stanton (a Lincoln holdover who was a Reconstruction hawk), Congress impeached him. Johnson was acquitted by the Senate. The statute was later repealed and, in 1926, the Supreme Court declared that the Act had been unconstitutional.<sup>22</sup>

By the 1860s, the excesses of the Jacksonian “spoils system” created broad demand for a professional civil service. (“Tell all the office seekers to come at once,” Lincoln is reported to have said when he got smallpox, “for now I have something I can give to all of them.”<sup>23</sup>) Creating a civil service raised again the issue of congressional authority to control hiring. In 1871, the Attorney General concluded that it would be “manifest[ly]” unconstitutional for Congress to require the President or department heads to “appoint the persons named by a civil-service board.”<sup>24</sup> Congress must “leav[e] scope for the judgment and will” of the President or other official who is making the appointment.<sup>25</sup> When the civil service system was created by the Pendleton Act in 1883, following the assassination of President Garfield by a disgruntled office seeker, it provided a mechanism for neutral hiring but allowed the President to “apply the civil service rules where he saw fit.”<sup>26</sup>

The Pendleton Act “did not restrict the President’s general power to remove employees.”<sup>27</sup> This was understood both as a constitutional imperative<sup>28</sup> and also as a clear policy guideline that any “merit system” must include accountability based on performance.

A historical halo hovers over the civil service because it replaced the spoils system in which public jobs were handed out to political hacks. But civil service was a mainly a *hiring* reform—not a form of job protection (other than no obligation to participate in political campaigns). As reform leader George William Curtis said, “if the front door [is] properly tended, the back door [will] take care of itself”<sup>29</sup>:

Having annulled all reason for the improper exercise of the power of dismissal [i.e., jobs were no longer distributed as spoils], 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,

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<sup>22</sup> *Myers*, 272 U.S. at 176.

<sup>23</sup> Adam Bellow, *In Praise of Nepotism* (New York: Doubleday 2003), 356. A different version of the quote appears in David Herbert Donald, *Lincoln* (New York: Simon & Schuster, 1995), 467.

<sup>24</sup> Civil-Service Commission, 13 U.S. Op. Atty. Gen. 516 (August 31, 1871), 523.

<sup>25</sup> *Id.* at 520.

<sup>26</sup> Frug, “Does the Constitution Prevent the Discharge of Civil Service Employees?,” 954. Preserving the President’s right to pick ultimately resulted in the “rule of three,” a protocol in which the executive has discretion to give the job to one of top three test takers. Paul P. Van Riper, *History of the United States Civil Service* (Evanston, IL: Row, Peterson, 1958), 104.

<sup>27</sup> *Id.* at 955.

<sup>28</sup> The Supreme Court had already established that the power of termination was implicit in the power of appointment. *Ex parte Hennen*, 38 U.S. (13 Pet.) 230 (1839).

<sup>29</sup> Paul P. Van Riper, *History of the United States Civil Service* (Evanston, IL: Row, Peterson, 1958), 102.

by requiring a virtual trial at law before an unfit or incapable clerk can be removed.<sup>30</sup>

In 1897, to guard against politically motivated firings, President McKinley issued an Executive Order requiring “no removal . . . except for just cause and upon written charges.”<sup>31</sup> The Civil Service Commission was concerned that this Order would be interpreted to require a trial and “would give a permanency of tenure in the public service quite inconsistent with the efficiency of the service.”<sup>32</sup> In 1902, President Theodore Roosevelt clarified the Order: “Nothing contained in said rule shall be construed to require the examination of witnesses or any trial or hearing.”<sup>33</sup> These Executive Orders were codified in the Lloyd-LaFollette Act of 1912—requiring notice in writing, a chance to respond in writing, but no “examination of witnesses, trial, or hearing.”<sup>34</sup> The upshot of these changes, in the words of civil service scholar Gerald Frug, was “merely that the executive had to have a legitimate, non-political reason for removal.”<sup>35</sup>

Other than the Tenure of Office Act, the main constitutional gray area concerned the President’s power to terminate appointees before the end of a term fixed by Congress. In *Marbury v. Madison*,<sup>36</sup> Chief Justice Marshall held that the President could not dismiss a justice of the peace before the end of the term. But a series of later decisions, culminating in *Myers v. United States* in 1926,<sup>37</sup> gave the President authority to terminate appointees before the end of a fixed tenure. *Myers*’ conclusions on executive power have been explicitly quoted with approval by the Supreme Court in a number of more recent decisions, including in *Free Enterprise Fund*:

The landmark case of *Myers v. United States* reaffirmed the principle that Article II confers on the President ‘the general administrative control of those executing the laws.’ It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman’s famous phrase. As we explained in *Myers*, the President therefore must have some ‘power of removing those for whom he can not continue to be responsible.’<sup>38</sup>

During the New Deal, a crisis erupted when FDR terminated a commissioner of the FTC before the end of his term. In *Humphrey’s Executor* (1935), the Supreme Court reaffirmed the ruling in *Myers* that “an officer . . . in the executive department . . . [is] inherently subject to the exclusive and illimitable power of removal by the Chief Executive,” but ruled that the President lacked the authority to override Congress with “quasi-legislative or quasi-judicial” officers whose job requires them to act

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<sup>30</sup> National Civil Service Reform League, “Proceedings at the Annual Meeting of the National Civil Service Reform League” (August 1, 1883), 24–25.

<sup>31</sup> Executive Order 101 (July 27, 1897).

<sup>32</sup> U.S. Civil Service Commission, “Annual Report of the United States Civil Service Commission,” vol. 19, 18.

<sup>33</sup> Executive Order 173 (May 29, 1902).

<sup>34</sup> *Arnett v. Kennedy*, 416 U.S. 134, 140 (1974), quoting the Lloyd-LaFollette Act of 1912.

<sup>35</sup> Frug, “Does the Constitution Prevent the Discharge of Civil Service Employees?,” 956.

<sup>36</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>37</sup> *Myers*, 272 U.S. 52.

<sup>38</sup> *Free Enterprise Fund*, 561 U.S. at 487 (citations omitted).

“independently of executive control.”<sup>39</sup> The Court held that “whether the power of the President to remove an officer shall prevail over the authority of Congress . . . will depend upon the character of the office.”<sup>40</sup> Recent Supreme Court decisions have reaffirmed the distinction between “purely executive” officers subject to the “illimitable power of removal” and officers who are “independent” or “quasi-judicial,” for which Congress can provide “good cause tenure.”<sup>41</sup>

Public unions had been created during the progressive era, but they had no collective bargaining power. FDR was adamant that public collective bargaining would be manifestly contrary to the public interest, writing in 1937: “The process of collective bargaining, as usually understood, cannot be transplanted into the public service.”<sup>42</sup>

During the “red scare” of the McCarthy years, executive authority over public employees was reaffirmed but reached a low point. Executive Orders by both Presidents Truman and Eisenhower required loyalty oaths, and virtually every public employee and applicant was reviewed to see if “reasonable grounds exist for the belief that the person involved is disloyal.”<sup>43</sup> Because of the nature of the charges, employees were given the right to a hearing and an appeal to a “loyalty review board,” but had no right to confront accusers, and the final decision was still vested in the discretion of the reviewing boards. A federal court held there was no right to more process: “Never in our history, even under the terms of the Lloyd-LaFollette Act . . . , has a Government employee been entitled as of right

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<sup>39</sup> *Humphrey’s Executor v. United States*, 295 U.S. 602, 627, 629 (1935). *Humphrey’s Executor* and *Myers* were reaffirmed in *Bowsher v. Synar*, 478 U.S. 714 (1986) (Congress lacks power to terminate Comptroller General). The Supreme Court in 1988 modified the test of *Humphrey’s Executor* when upholding the independent counsel statute, holding that Congress’s ability to impose a “good cause” requirement on termination hinged on whether the limitation unduly interferes with officers acting under the executive authority of Article II: Congress may “not interfere with the President’s exercise of the ‘executive power’ and his constitutionally appointed duty to ‘take care that the laws be faithfully executed’ under Article II.” *Morrison v. Olson*, 487 U.S. 654, 690 (1988) (upholding Congress’s power to create an independent counsel).

<sup>40</sup> *Id.* at 631. The Court also stated: “The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others has often been stressed, and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution, and in the rule that recognizes their essential coequality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.” *Id.* at 629–30.

<sup>41</sup> See generally, *Free Enterprise Fund*, 561 U.S. 477. Nearly a decade after *Myers*, the Court in *Humphrey’s Executor* held that *Myers* did not prevent Congress from conferring good-cause tenure on the principal officers of certain independent agencies. The Court distinguished *Myers* on the ground that *Myers* concerned “an officer [who] is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is.” 295 U.S. at 627. By contrast, the Court characterized the FTC as “quasi-legislative and quasi-judicial” rather than “purely executive,” and held that Congress could require it “to act . . . independently of executive control.” *Id.* at 627–29.

<sup>42</sup> Franklin D. Roosevelt, “Letter on the Resolution of Federation of Federal Employees Against Strikes in Federal Service,” The American Presidency Project, August 16, 1937.

<sup>43</sup> Executive Order 9835 (March 21, 1947).

to the sort of hearing [the plaintiff] demands in respect to dismissal from office.”<sup>44</sup> The case was affirmed when the Supreme Court equally divided. At the end, after the Civil Service Commission and FBI reviewed the files of some two million employees, about 375 lost their jobs.<sup>45</sup>

Beginning in the 1960s, however, an amazing shift occurred. As if suffering from constitutional amnesia, all three branches of government forgot about the President’s constitutional authority over executive branch employees. The “rights revolution” started with civil rights, expanded to environmental protection, shut down colleges over Vietnam, and eviscerated any remaining respect for authority with Watergate. No one took to the streets over civil service rights, but all authority was suspect. Without any discussion of almost two centuries of jurisprudence, each branch changed its personnel frameworks to effectively remove the President’s constitutional authority over executive branch employees. No one dissented. Almost no one noticed. The singular focus on individual rights supplanted the capacity even to consider the constitutional or managerial implications of this sweeping change.

The first shoe to drop was JFK’s Executive Order 10988 in 1962,<sup>46</sup> which allowed public unions to engage in collective bargaining—effectively severing presidential authority over personnel except as unions would prescribe in the collective bargaining contracts. The Order also extended to all public employees a World War II veterans’ preference that allowed veterans to appeal termination to the Civil Service Commission. The task force that recommended these changes, chaired by Arthur Goldberg, saw them as overdue improvements to give unions the power to help make government work better. It did not discuss any effects on executive authority.

Next, the Supreme Court invented a new jurisprudence for public employees; it viewed personnel decisions as a matter of due process under the Fifth Amendment instead of executive power under Article II. A 1964 law review article by Yale Law Professor Charles Reich, “The New Property,” argued that government benefits should have the same legal status as private property.<sup>47</sup> In a series of opinions, the Supreme Court ruled that if public employees enjoyed any legislative protection—including the Lloyd-LaFollette Act’s requirement of notice and writings—then the public job constituted “property” and could not be constitutionally terminated without due process.<sup>48</sup> Even though Lloyd-LaFollette itself explicitly stated that there was no requirement of examination, witnesses, or hearing, the Supreme Court held that it, not Congress, would be the judge of what due process required.<sup>49</sup> If Congress provided any protections, under the Court’s reasoning, then the President had no authority over the employment status of executive branch employees unless the President (or

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<sup>44</sup> *Bailey v. Richardson*, 182 F.2d 46, 51 (DC Cir. 1950).

<sup>45</sup> Van Riper, *History of the United States Civil Service*, 445–52.

<sup>46</sup> Executive Order 10988, 27 Fed. Reg. 551 (January 19, 1962).

<sup>47</sup> Charles A. Reich, “The New Property,” *Yale L.J.*, vol. 73, no. 5 (April 1964).

<sup>48</sup> Frug, “Does the Constitution Prevent the Discharge of Civil Service Employees?,” 977–84.

<sup>49</sup> *Arnett*, 416 U.S. 134.

executive branch manager) sustained its burden in a due process proceeding.<sup>50</sup> At no point in these decisions did the Court address the Article II implications of its rulings.

The Supreme Court bent over backwards to say that the process that was “due” would depend on the circumstances.<sup>51</sup> But the Court provided no mechanism or guidelines to figure out how to determine the correct process, and disagreements among the justices case by case hardly inspired confidence. Unlike Lloyd-LaFollette, which was intended to be a safeguard against politically motivated terminations, the Court was now imposing a broader fairness standard, focusing on the predicament of the individual employee. As it said in one case:

The significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. While a fired worker may find employment elsewhere, doing so will take some time, and is likely to be burdened by the questionable circumstances under which he left his previous job.”<sup>52</sup>

The third shoe to drop was the Civil Service Reform Act of 1978 (CSRA).<sup>53</sup> In addition to innovations such as a new Senior Executive Service (SES), Congress here stated that its goal was to clarify authority. But the clarification represented a legislative enshrinement of the Executive Order permitting collective bargaining and the Supreme Court rulings which assumed that trial-type hearings were a neutral guarantee of fairness. The legislative history discussed accountability in general terms but not the President’s constitutional authority under Article II. Representative Patricia Schroeder of Colorado warned that, “in years to come [civil servants] will have to put up with colleagues who do not pull the load.”<sup>54</sup>

The President’s authority over executive branch personnel had not completely disappeared. In 1981, President Reagan fired almost 12,000 air traffic controllers after they refused to return to work from an illegal strike. But the President’s ability to hold particular individuals accountable for job

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<sup>50</sup> One opinion, by Justice Powell, emphasized the interest of the government in operational efficiency: “In the present case, the Government’s interest, and hence the public’s interest, is the maintenance of employee efficiency and discipline. Such factors are essential if the Government is to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government’s interest in being able to act expeditiously to remove an unsatisfactory employee is substantial.” *Id.* at 168.

<sup>51</sup> E.g., *id.* at 154–55; *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545–46 (1985).

<sup>52</sup> *Loudermill*, 470 U.S. at 543 (citations omitted).

<sup>53</sup> 5 U.S.C. §§ 1101 *et seq.*

<sup>54</sup> Committee on Post Office and Civil Service, “Legislative History of the Civil Service Reform Act of 1978,” vol. I (1979), 835.

performance—the basic precondition to managing any department—had been rendered null and void.

In hindsight, this inversion of authority was motivated not by practical problems with the prior framework, but by union political power and by the ideological power of the rights revolution. There was no rash of unfairness that could be laid at the door of public managers. To the contrary, getting public managers to make unpleasant personnel decisions was the challenge, not the norm. Doing nothing is the sure-fire way to avoid trouble in the public sector, so that's what bureaucrats tend to do. Executive power just got washed away by the "rights revolution," which assumed that the Constitution was supposed to protect civil servants—not, as Madison had argued, to empower the President to fulfill his "great responsibility."

Fast forward to today. The President has practical authority over a grand total of two percent of the federal workforce.<sup>55</sup> The slow dissipation of presidential power is a story rich with irony—designed to avoid interest group capture, the civil service became its own special interest.

Civil service has come full circle: Instead of avoiding public jobs as property of political spoils, the civil service has become a property right of the public employees themselves. The layers of legal protection put the President in the position of a legal supplicant, facing union and constitutional hurdles that effectively eliminate accountability as a meaningful concept. Public employees answer to no one.

In 1989, only a decade after Congress had encased civil service accountability in impenetrable red tape, the first Volcker Commission reported on the "quiet crisis" of "frustration inside government and a lack of public trust outside."<sup>56</sup> The gray powerlessness within agencies would not have surprised the Framers, the progressives who created civil service, or constitutional experts before 1960. Of course the executive branch is an exercise in futility—the links in the Constitution's chain of authority have been broken.

### *Framing the Constitutional Argument*<sup>57</sup>

"Any government," Paul Volcker observed, "is only as good as its workers."<sup>58</sup> Giving permits on a timely basis, for example, requires officials who make numerous judgment calls needed to meet deadlines. The challenges facing modern democracy are almost impossible to fix without a manageable federal workforce. Take regulatory reform. What replaces red tape? People taking responsibility. Scrapping mindless rules requires empowering humans to take responsibility for results. Only then can daily choices be practical again. Thick rulebooks can be replaced by pamphlets.

But they must be accountable. Without accountability, responsibility will never be given, and

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<sup>55</sup> There are about 4,000 presidential appointments out of 2.1 million federal civil employees.

<sup>56</sup> National Commission on the Public Service, "Leadership for America," ix, 2.

<sup>57</sup> This section draws significantly from Chapter 8 of my 2019 book, *Try Common Sense*, and my January 2017 *American Interest* essay, "Civil Service Reform."

<sup>58</sup> Paul Volcker, "The Endangered Civil Service," *New York Times*, August 5, 1990.

will revert immediately to thick rulebooks. Few of us will give power to another without assurance that the person will be accountable if they abuse it. “When men are allowed to act as they see fit,” Friedrich Hayek noted, “they must also be held responsible for the results of their efforts.”<sup>59</sup>

Public employee accountability is commonly argued as either an act of vindication against an unworthy official—throw the bum out!—or as a matter of fairness to the individual. Donald Trump’s view of accountability tends towards the vindictive; he starred for 14 years in a TV series in which the climactic moment was Trump announcing to his next victim, “You’re fired!” The Supreme Court’s due process rulings focused on the consequences to the individual, and called for balancing the interests of the employee versus the state. “The significance of the private interest in retaining employment cannot be gainsaid,” as the Court wrote in *Loudermill*.<sup>60</sup> Each perspective is the opposite side of the same coin: focusing on accountability as a decision about an individual.

But focusing accountability on the individual is a mistake, and diverts attention from the importance of accountability to any healthy organization, and, indeed, to the fabric of freedom. What’s at stake with accountability is a functioning, responsive democracy—not the job status of particular individuals. If public employees can’t be accountable for inadequate performance, pretty soon their ability to make sensible decisions will be replaced by bureaucratic shackles. That’s the work life of most public employees in America.

There are two vital public goals that are undermined by preventing public managers from holding public employees accountable:

First, the integrity of democracy depends, as James Madison suggested, on an unbroken “chain of dependence . . . ; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President.” Whom we elect will make a difference only if their values and judgments are implemented. To use a local example, if the school principal can’t make basic management decisions, such as deciding which teachers are effective, then it doesn’t matter much whom the local officials appoint as principal. Americans keep electing Presidents who promise change . . . and nothing much happens. Part of the problem is dense bureaucracy, and part is unmanageable personnel.

Debates about accountability usually get sidetracked towards Manichaeian perceptions of how accountability decisions are made: either the supervisor has unfettered discretion to wield the management sword, or the employee has invulnerable legal armor. But most large organizations offer a middle ground, with safeguards against arbitrary dismissals that are based on the judgment of co-workers or others, not anything goes vs. legal irons. For example, at its assembly plants in the U.S., Toyota enlists co-workers in reviewing termination decisions.<sup>61</sup> Similarly, the protections against politically-motivated firings in the Lloyd-Lafollette Act were implemented by independent review by the Civil Service Commission, based on written submissions, not legal proceedings.

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<sup>59</sup> Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago, 1960), 76.

<sup>60</sup> *Loudermill*, 470 U.S. at 543.

<sup>61</sup> Jeffrey Liker and Michael Hoseus, *Toyota Culture* (New York: McGraw Hill, 2008), 414–18.

Second, a vigorous, respected public service is almost impossible without the backdrop of accountability. Just as a functioning democracy requires a hierarchy of accountability, so too does a healthy public workplace. Accountability is vital to an organization not to fire lots of people—that would be discouraging—but to imbue the organization with trust that everyone is doing their part. What accountability does is make people trustworthy. There’s an expectation that co-workers will pull their share. Against that baseline, cooperative cultures can be nurtured. “A social organism of any sort whatever, large or small, is what it is because each member proceeds to his own duty,” William James noted, “with a trust that the other members will simultaneously do theirs.”<sup>62</sup>

By contrast, the leverage of trustworthiness turns negative when everyone knows it doesn’t matter what you do. That’s why the absence of accountability usually kills a culture. Distrust is reinforced when people expect that others will not try hard. When bad performance has no consequences, it discourages good behavior. It’s organizational psychology 101: “When a single individual free rides,” as one study found, there is a “precipitous decline in teammate contributions.”<sup>63</sup> One “bad apple,” another study concluded, “can spoil the barrel.”<sup>64</sup>

Another flawed assumption of civil service, embraced fully by the Supreme Court in its due process rulings, is that personnel judgments can be proved in a legal proceeding. But whether a person is not trying hard, or has bad judgment, or doesn’t work well with others, or is less capable, are matters of perception not readily “proved” in a legal trial. Accountability, like responsibility, hinges on judgment. Just as people taking responsibility must be able to draw on their instincts and experience to get the job done, so too supervisors and co-workers must be able to draw on their instincts about who’s doing a good job. It’s not difficult to protect against arbitrary choices by allowing another person or committee to review a termination, but these too must be matters of judgment, not legal proof.<sup>65</sup> Due

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<sup>62</sup> William James, “The Will to Believe,” in *Pragmatism and Other Writings* (New York: Penguin Classics, 2000), 214.

<sup>63</sup> Xiao-Ping Chen and Daniel G. Bachrach, “Tolerance of Free-Riding: The Effects of Defection Size, Defection Pattern, and Social Orientation in a Repeated Public Goods Dilemma,” *Organizational Behavior and Human Decision Processes*, vol. 90, no. 1 (2003), 139–47, as described in Will Felps, Terrence R. Mitchell, and Eliza Byington, “How, When, and Why Bad Apples Spoil the Barrel: Negative Group Members and Dysfunctional Groups,” *Research in Organizational Behavior*, vol. 27: *An Annual Series of Analytical Essays and Critical Reviews*, ed. Barry Staw (Oxford: Elsevier, 2006), 194.

<sup>64</sup> Felps, Mitchell, and Byington, “How, When, and Why,” 190.

<sup>65</sup> Intangible attitudes are critical to success. In one study of workers with the same job responsibility, researchers found a dramatic difference in employee effectiveness depending upon whether the employee considered the work as a “calling” or, alternatively, as a “job.” Those who saw their work as a calling went out of their way to be helpful. They thought about the ultimate purpose of the enterprise, not just their job description. They raised the morale of co-workers. (Amy Wrzesniewski, “Finding Positive Meaning in Work,” in *Positive Organizational Scholarship: Foundations of a New Discipline*, eds. Kim S. Cameron, Jane E. Dutton, and Robert E. Quinn (San Francisco: Berrett-Koehler, 2003).) Shared values and ways of doing things are important also. “The question of personal compatibility or incompatibility is much more far-reaching in limiting cooperative effort than is recognized,” Chester Barnard observed. (Chester Irving Barnard, *The Functions of the*

process, experience now shows, operates as a locked door to accountability. It's just too difficult, and unpleasant, to fight a legal holy war with a public employee over his competence and character. The proof is in the pudding: That's why there's virtually zero accountability in federal civil service.

Public service can be stimulating. This is demonstrated by pockets of excellence that exist throughout government. In almost all these cases, the vacuum of accountability in the federal service is overcome by a culture of professionalism. The Centers for Disease Control (CDC) in Atlanta has an exemplary record of confronting contagious diseases worldwide. Its culture, by no coincidence, is mission-driven and famously cooperative. When Dr. James Curran was charged in the early 1980s with spearheading AIDS research, there was a federal hiring freeze, so he asked for volunteers. Eight hundred CDC employees answered the bell.<sup>66</sup> When the contagious, life-threatening Ebola virus began to endanger entire populations, CDC asked for volunteers to go to West Africa to help contain the disease. Two thousand CDC employees volunteered. This is public service at its most noble, comparable to soldiers volunteering for dangerous missions. The State Department, United States Attorneys, National Weather Service, and Securities and Exchange Commission enjoy reputations for

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*Executive* (Cambridge, MA: Harvard University Press, 1968), 146.) If people don't row together, for any reason, the institution will suffer.

There are countless reasons why some people work out in a job and others do not, relating to personalities, skills, work habits, and office culture. Those that don't fit in should probably work elsewhere. These perceptions about the attitude and fit of particular people will be clear to supervisors and co-workers, but cannot readily be proved by objective criteria. "Laying aside all exceptions to the rule," Professor Philip Jackson found, "there is typically a lot of truth in the judgments we make of others." (Philip Jackson, Robert E. Boorstrom, and David T. Hansen, *The Moral Life of Schools* (San Francisco: Jossey-Bass, 1998), 34.) For an institution to work, people must be free to make these decisions based on their perceptions rather than objective proof. There's nothing sinister about this. Americans on average change jobs ten times between the ages of 20 and 40. (Remarks by U.S. Secretary of Labor Elaine L. Chao, National Summit on Retirement Savings, Washington, DC, March 1, 2006.) This job mobility, propelled in part by people deciding about each other, increases the odds that people will find a workplace they enjoy.

The modern mind is conditioned to believe that losing a job is a cataclysmic event. Whatever sliver of truth there might be in particular cases, it's not true for most people, particularly those who are good workers and readily land on their feet. What's far more dangerous, and unfair, is to tolerate workers who are not doing the job. The cumulative injustice to co-workers and to the enterprise of retaining inadequate workers is far greater than the odd cases where an exemplary employee is let go.

There's no alternative to a hierarchy of accountability. You are free to take responsibility, then your supervisor is free to take responsibility to judge you, and then his supervisor is free . . . and on up the line. Whether these supervisors are wise or fair will be reflected in the workplace culture, for which they should be accountable. "There have to be people who make decisions or nothing will ever get done," Peter Drucker observed. "There have to be people who are accountable for the organization's mission, its spirit, its performance, its results." (Peter Drucker, *A Functioning Society: Community, Society, and Polity in the Twentieth Century* (New Brunswick: Transaction, 2003), 122.)

<sup>66</sup> Interview by Philip Howard with Dr. James Curran, 2018.

professionalism.

But the absence of accountability is more commonly reflected, as both Volcker Commissions found, in a listless public culture.<sup>67</sup> Many government departments are awful places to work. Stories of public departments often share a theme of gray futility, with public employees trudging through mindless bureaucracy.<sup>68</sup> Show up at this time; do the appointed work, as slowly as you'd like; talk on the phone with family and friends; leave at five o'clock.

This is the common "institutional neurosis" of bureaucratic offices, as James Scott describes in *Seeing Like a State*, "marked by apathy, withdrawal, lack of initiative."<sup>69</sup> An appointed official in the Pentagon working in humanitarian relief was surprised when, just as a crisis broke in the Balkans, most of her office just got up and went home. It was five o'clock.<sup>70</sup> A regional head of FEMA went on holiday the day following the 1989 California earthquake because, as he explained, he had nonrefundable plane tickets.<sup>71</sup>

Today, there's a broad sense that public service is a dead end. Some conservatives believe that the public sector is condemned to being sluggish because there are no market forces pushing people to perform. But studies by Professor Edward Deci and others demonstrate that humans are motivated more by challenge, and the ability to solve problems, than by money.<sup>72</sup>

Rebuilding a healthy public culture is not a utopian dream. As recently as the 1950s, federal officials could make practical and timely public choices, and three-quarters of Americans trusted government.<sup>73</sup> Forest rangers had autonomy to manage million-acre parcels of public land, balancing different interests. They were guided by a pamphlet of legal goals and principles, and overseen by

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<sup>67</sup> See, e.g., Howard Risher, "Why Is Public-Employee Morale So Bad?," *Governing*, August 23, 2016; Apolitical, "Government Jobs Aren't Working for Millennials. Here's How That Could Change," October 5, 2018. See also, David Fahrenthold's 2014 "Breaking Points" series in the *Washington Post* (e.g., "Sinkhole of Bureaucracy," March 22, 2014); Brill, *Tailspin*.

<sup>68</sup> See Marshall Dimock, "Bureaucracy Self-Examined," in *Reader in Bureaucracy*, ed. Robert K. Merton (New York: Macmillan, 1952), 400: "When an individual in an organization feels utterly secure, the sense of struggle which produces much of the world's best effort is lost. Lassitude results. Laziness gradually translates itself into managerial slothfulness, one of bureaucracy's worst faults."

<sup>69</sup> James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1999), 349: "We have learned enough of such settings to know that over time they can produce among their inmates a characteristic institutional neurosis marked by apathy, withdrawal, lack of initiative and spontaneity, uncommunicativeness, and intractability. The neurosis is an accommodation to a deprived, bland, monotonous, controlled environment that is ultimately stupefying."

<sup>70</sup> Interview by Philip Howard with former Pentagon official, 2008.

<sup>71</sup> Charles Peters, *How Washington Really Works* (New York: Basic Books, 1992), 59.

<sup>72</sup> See Edward Deci, *Why We Do What We Do: Understanding Self-Motivation* (New York: Penguin, 1995).

<sup>73</sup> Pew Research Center, "Beyond Distrust: How Americans View Their Government" (November 2015), 18.

supervisors who intervened only when needed.<sup>74</sup> This was a period when the Interstate Highway System was authorized in a 29-page statute<sup>75</sup> and substantially completed a little more than a decade later.<sup>76</sup> Running government this way didn't require heroics—nothing special compared with the massive public works programs of the New Deal or the even more massive mobilization of World War II. What was required was the same as for any well-functioning organization: employees who were willing to take responsibility and could count on their colleagues to do the same.

What's needed is not reforms around the edges, but a complete refocusing of the public employment structure, away from entitlements and towards what it takes to build a responsive, vigorous public culture.

I present two approaches to approaching civil service reform. The first is to assert executive authority over “Officers of the United States.” The second approach is to challenge provisions of the CSRA, as amended, as conflicting with Article II's mandate that “the executive Power shall be vested in a President.”

#### *Restore Accountability Over “Officers of the United States”*

In addition to vesting “executive Power ... in a President,” Article II provides in its Appointments clause for the President to nominate certain high level officials, subject to Senate approval. The Appointments clause also provides for Congress to authorize the appointment of “inferior officers”:

He shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>77</sup>

The President under Article II thus explicitly has power of appointment of “Officers of the United States,” unless Congress has specifically designated appointment power “in the Courts of Law, or in the Heads of Departments.” In *Free Enterprise Fund*, the Supreme Court held that the President and heads of departments may not delegate this power. Such a diffusion of power “carries with it a diffusion of accountability.”<sup>78</sup>

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<sup>74</sup> See Philip K. Howard, Foreword, in Herbert Kaufman, *Red Tape: Its Origins, Uses, and Abuses* (Washington, DC: Brookings, 2015).

<sup>75</sup> Federal-Aid Highway Act of 1956, Pub. L. No. 84-627.

<sup>76</sup> U.S. Department of Transportation, Federal Highway Administration, “Highway History: The Greatest Decade 1956-1966.”

<sup>77</sup> U.S. Const. art. II § 2.

<sup>78</sup> *Free Enterprise Fund*, 561 U.S. at 492.

The power of appointment carries with it the power of removal.<sup>79</sup> In *Free Enterprise Fund*, the Supreme Court reaffirmed that “That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties.” *Free Enterprise Fund*, as noted above, explicitly reaffirmed the holding of *Myers* about the “exclusive and illimitable power of removal” by the President. The constitutional power to remove “Officers of the United States” is generally at will, as with cabinet appointees and ambassadors. As *Free Enterprise Fund* goes on to say:

We held in *Edmond v. United States*, 520 U.S. 651, 662–663 (1997), that ...“inferior officers’ are officers whose work is directed and supervised at some level” by other officers appointed by the President with the Senate’s consent. In particular, we noted that “[t]he power to remove officers” at will and without cause “is a powerful tool for control” of an inferior. *Id.*, at 664. As explained above, the statutory restrictions on the Commission’s power to remove Board members are unconstitutional and void.<sup>80</sup>

Congress may require “cause” to be shown for certain categories of officials whose responsibilities are “quasi-judicial”<sup>81</sup> or designed to be independent.<sup>82</sup> Even where “cause” is required, the hurdles to removal must not be insurmountable. In striking down “cause” requirements for removing members of the Public Company Accounting Oversight Board (PCAOB), the Supreme Court in *Free Enterprise Fund* held that two layers of “cause” were unconstitutional because they removed any practical route of holding officials accountable:

While we have sustained in certain cases limits on the President’s removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President’s authority in this way.<sup>83</sup>

The authority in Article II to terminate “Officers of the United States” may be exercised by the President, or, in particular situations, by the department head. A remaining question is how many federal employees qualify as “Officers of the United States” under Article II. The Supreme Court in *Buckley v. Valeo* suggested that “officers” were officials which had “significant authority.”<sup>84</sup> Recent research by Jennifer Mascott suggests that “officers” is much broader: The “evidence indicates that the most likely original public meaning of ‘officer’ is one whom the government entrusts with ongoing

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<sup>79</sup> *Id.* at 504. (“Under the traditional default rule, removal is incident to the power of appointment.”) See also, *Sampson v. Murray*, 415 U.S. 61, 70, n. 17 (1974); *Myers*, 272 U.S. at 119; *Ex parte Hennen*, 13 Pet. at 259–60.

<sup>80</sup> *Id.* at 506.

<sup>81</sup> See, e.g., *Humphrey’s Executor*, 295 U.S. at 629.

<sup>82</sup> *Morrison v. Olson*, 487 U.S. 654, 690 (1988). See also, *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018) (discussing the President’s power to remove SEC commissioners).

<sup>83</sup> *Free Enterprise Fund*, 561 U.S. at 499.

<sup>84</sup> *Buckley v. Valeo*, 424 U.S. 1 at 126 (1976).

responsibility to perform a statutory duty of any level of importance.”<sup>85</sup> Professor Mascott’s research, cited by the Supreme Court in *Lucia v. Securities and Exchange Commission*,<sup>86</sup> suggests that the executive has far greater appointment and termination authority over most senior and mid-level civil servants than is commonly assumed.<sup>87</sup>

### *How Statutory Protections Prevent Constitutional Accountability*

Now let’s contrast the procedures for accountability under the CSRA, as amended. The CSRA in practice generally requires trial-type hearings in termination cases, which has the effect of putting the burden of proof on the supervisor.

The statute contains two separate avenues for any “major adverse action” affecting public employees in civil service, which includes high-level public employees in civil service who likely are “officers” within the meaning of Article II:

- i) Part 432<sup>88</sup> permits adverse actions including termination for “unacceptable performance.” The supervisor must provide “substantial evidence” of unacceptable performance, all of which must have taken place within the previous 12 months (earlier underperformance is irrelevant). Moreover, no adverse action is allowed unless the employee’s performance has been documented and the employee has previously been given a “performance improvement plan” (PIP) and a chance to demonstrate the ability to do the job. If the supervisors meet these requirements but an employee still merits removal, then they are required to provide 30 days’ advance notice to the employee, detailing specific instances of underperformance that specifically relate to a “critical element” of the employee’s duties. They also need a higher-level supervisor within the agency to sign off on the firing. The employee has a right to representation, and can answer orally and in writing, and under many collective bargaining agreements can demand access to any evidence used by supervisors to make their case. Once a decision has been rendered, employees are then free to appeal to an administrative judge working for the Merit Systems Protection Board (MSPB), then appeal *that* decision to the Board itself, then appeal the Board’s final determination to a federal appellate court.<sup>89</sup>

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<sup>85</sup> Jennifer L. Mascott, “Who Are ‘Officers of the United States?’”, 70 *Stan. L. Rev.* 443 at 454 (2018).

<sup>86</sup> *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018) (Thomas, C., concurring).

<sup>87</sup> Professor Mascott suggests (quoting *Free Enterprise Fund*, 561 U.S. 477) that a presidentially-appointed board like the Merit Systems Protection Board (MSPB) could serve as a “department head” and thus potentially exercise inter-departmental authority over a broad array of inferior officers, consistent with Article II. See Mascott, “Who Are ‘Officers of the United States?’” at 555-59 and *infra*.

<sup>88</sup> 5 U.S.C. § 4303.

<sup>89</sup> Between informal performance meetings, pre-termination conferences, post-termination hearings before an MSPB judge (or a mediator if the employee files a union grievance), appeal to the full MSPB (or arbitration, under collective bargaining agreements), and finally, appeal to a court, a fired civil servant may have had at least five opportunities to plead their case before their removal becomes final.

ii) Part 752<sup>90</sup> permits adverse actions, including termination, “to promote the efficiency of the service.” The supervisor must show cause with “a preponderance of the evidence.” No PIP is required, but employees enjoy the same bevy of rights as under Part 432. Unlike under Part 432, where firing decisions are either upheld or overturned, MSPB judges hearing Part 752 cases are free to mitigate the action, meaning after months of process and argument, an underperforming employee could potentially be put right back to work again with a slap on the wrist and a requirement for more training.

But those are not the only constraints on accountability Congress has imposed on the executive branch. The CSRA also mandates collective bargaining for federal employees, finding that “labor organizations and collective bargaining in the civil service are in the public interest.”<sup>91</sup> The statute explicitly authorizes collective bargaining relating to “the conditions of employment.”<sup>92</sup> Collective bargaining agreements vary from agency to agency, but they significantly impair managerial choices and accountability. Common collective bargaining requirements include the following:

i) Public employees have a right to file a grievance if any negative comments are put in their evaluation report. The grievance procedures usually require weeks of back and forth paper negotiations, unilateral rights to demand mediation, and if no settlement can be reached between the parties, arbitration (followed by appeals or review by the Federal Labor Relations Authority).<sup>93</sup> The reluctance to endure this legal gauntlet is why more than 99 percent of federal employees receive a “fully successful” rating each year.

ii) Most contracts specify rights for union representatives to be in the room if an employee is interviewed about a specific work incident or about general performance issues.<sup>94</sup> Many even lay out elaborate notice and response procedures for simply taking disciplinary actions against underperforming employees. A contract for workers in the Bureau of Indian Affairs,<sup>95</sup> for example, requires that employees receive 30 days notice of possible discipline and eight hours of work time to review evidence and respond.<sup>96</sup>

Combining collective bargaining rights with statutory procedures and burdens creates the interlocking mesh of protections that are virtually bulletproof. Once a federal employee has for years received a “fully successful” rating, for example, it is almost impossible for a supervisor to meet the burden of proof mandated by statute.

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<sup>90</sup> 5 U.S.C. § 7513.

<sup>91</sup> 5 U.S.C. § 7101.

<sup>92</sup> 5 U.S.C. § 7102.

<sup>93</sup> See, e.g., Collective Bargaining Agreement between the Bureau of Indian Affairs and the AFL-CIO (2011), available at: <https://seba.bie.edu/PolicyAndProcedures-BIE/CollectiveBargainingAgreement.pdf>

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

As noted above, the CSRA also created the SES, designed to be high-level officials with greater responsibility and accountability. This innovation has proved by most accounts to be a success. But the greater “accountability” only relates to status within the SES. A department head has authority to remove an official from SES “at any time for less than fully successful executive performance”<sup>97</sup> but the official then reverts to regular civil service, with all the protections against accountability described above.

It seems impossible to square the circle of Article II jurisprudence regarding accountability of “Officers of the United States” with the CSRA, which requires department heads and the President to demonstrate cause, imposes other substantial evidentiary and procedural burdens on any personnel action, and, on top of explicit statutory requirements, imposes hundreds of pages of supervisory restrictions through collective bargaining.

### *Reassert “Executive Power” to Remake Civil Service*<sup>98</sup>

The executive branch must operate within goals and framework set by Congress. Congress sets public priorities, creates programs and offices, decides what compensation should be, and allocates funding for it. Congress can also create a civil service system to regularize employment and, although not free from doubt, can also provide some mechanisms to safeguard against arbitrary or political dismissal. But the President must have authority to manage how the work gets done. As the Supreme Court said in *Free Enterprise Fund*:

No one doubts Congress’s power to create a vast and varied federal bureaucracy. But where, in all this, is the role for oversight by an elected President? The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws.<sup>99</sup>

The personnel quagmire just described creates a political and practical dilemma as well as a constitutional one. Collective bargaining also restricts basic management choices.

How do we fix it? Congress is unlikely to take on the public unions unless its hand is forced.

### Creating a new accountability framework.

As a first step, the President could assert “executive Power” and terminate one or more officers, without following any process except review by the MSPB to guard against politically-motivated terminations (as had been provided by the Lloyd-LaFollette Act). The employees or union would presumably challenge the termination, including on the basis that the termination violates the collective

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<sup>97</sup> 5 U.S.C. § 3592.

<sup>98</sup> This section draws from Chapter 8 of my 2019 book, *Try Common Sense*, and my January 2017 *American Interest* essay, “Civil Service Reform.”

<sup>99</sup> *Free Enterprise Fund*, 561 U.S. at 494.

bargaining agreement. The case would turn on the constitutionality of the removal provisions of CSRA. The case would likely be decided by the Supreme Court.

If CSRA accountability provisions are invalidated, then Congress will be forced to the drawing board. What accountability framework will support a healthy public service?

To pass constitutional muster, accountability of officials must be a practical possibility within a chain of authority that is ultimately linked to voters. The clear import of Article II Supreme Court rulings is that the ability to hold federal officers accountable is a matter of supervisory judgment, and except for independent or quasi-judicial officers, Congress must not impose legal proceedings to prove “cause.”

To build public support and credibility, I believe there should be some safeguards against vindictive personnel choices. We live in an age of distrust of authority, and there will be broad demand for protection against arbitrary personnel decisions. I recommend two changes:

- i) All terminations should be approved by department heads or other official reporting to the President. Then there will be a chain of accountability ultimately back to voters. This may well be a constitutional imperative.<sup>100</sup>
- ii) To safeguard against political retribution or arbitrary choices, provide for independent review by MSPB or other independent body, with written submissions. This independent review will confirm that there are legitimate reasons for the action, without subjecting supervisors to a trial or the requirement to “prove” by objective evidence what is a judgment call. The requirement of supervisors to show “cause” will be limited to independent or quasi-judicial officers.<sup>101</sup>

### Re-empowering other executive decisions.

The authority of Congress to restrict executive decisions other than termination is also constrained by Article II’s mandate that “the executive Power shall be vested in a President.” The debate over accountability will also provide an impetus to address the constitutionality of other

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<sup>100</sup> See, e.g., Memorandum from Department of Justice Office of Legal Counsel on President’s Authority to Delegate Functions 5 (January 24, 1980) (citing *Runkle v. United States*, 122 U.S. 543 (1887) (holding that the President’s dismissal power could not be delegated to the Vice President)). See generally, Dina Mishra, “An Executive-Power Non-Delegation Doctrine for the Private Administration of Federal Law,” 68 *Vanderbilt L. Rev.* 1509, 1566-71 (2015).

<sup>101</sup> The Supreme Court’s jurisprudence in *Loudermill* suggests the possibility that, by weakening the MSPB appeal process, civil servants facing removal might instead gain the right to a more formal pre-termination hearing, which would hardly advance the ball on accountability. However, this jurisprudence rests on the conception of a civil service position as a property right, a conception that I urge the Court to reject later in this piece.

statutory restrictions, and permit more adaptable and practical mechanisms to manage the executive branch. These changes include:

- *Expeditious and flexible hiring.* Sluggish hiring protocols mandated by Congress and by regulation have been broadly criticized by the Volcker Commissions and by the Partnership for Public Service, among other nonpartisan expert groups. While Congress has some role in protecting the qualifications of new hires, it cannot limit choices to a range that prevents the President and department heads from hiring qualified public employees.<sup>102</sup> One innovation would be to create a second hiring track which permits hires outside of the competitive service procedures provided the hires are approved as qualified by MSPB or other independent board.
- *Collective bargaining restrictions.* Any restrictions which make it difficult to manage the executive branch effectively would likely not pass constitutional muster. Chief among these, in addition to accountability, is subjecting the President to other management restrictions in collective bargaining. Multi-hundred page collective bargaining agreements are designed to prevent executive branch officials from making choices. The President should repudiate the agreements, and have the constitutionality of collective bargaining resolved by the Supreme Court.
- *No property right or presumption of lifetime service.* Just as Congress cannot eliminate accountability, it also cannot constitutionally transform public job into a “property right,” which under the line of Supreme Court rulings discussed earlier effectively shifts the burden of accountability onto supervisors. While it is likely permissible for Congress to structure public employment to incentivize lifetime service without granting tenure, the Partnership for Public Service has concluded that civil service would be healthier if it eliminated the expectation of lifetime service. One way to do this is to adjust income and pension schedules to make shorter terms of public service attractive.
- *Accountability for public employees who are not “Officers of the United States.”* In *Free Enterprise Fund*, the Supreme Court explicitly left open the President’s constitutional authority over federal employees who are not “officers” under the Appointments clause:

Many civil servants within independent agencies would not qualify as ‘Officers of the United States,’ who ‘exercis[e] significant authority pursuant to the laws of the United States’.... We do not decide the status of other Government employees, nor do we decide whether ‘lesser functionaries subordinate to officers of the United States’ must be subject to the same sort of control as those who exercise ‘significant authority pursuant to the laws.’<sup>103</sup>

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<sup>102</sup> See, e.g., Civil-Service Commission opinion, *supra* note 24.

<sup>103</sup> *Free Enterprise Fund*, 561 U.S. at 501 (citations omitted).

Presumably, however, the grant of “executive authority” includes the ability of the President, his appointees, and civil service supervisors to exercise their judgment in holding non-officers accountable. This is certainly the import of Madison’s statement on “the chain of dependence.” In her historical study of the breadth of the meaning of “Officers of the United States,” Professor Mascott finds that “officers” included public employees who had jobs with little or no discretionary authority, such as employees copying manuscripts. While the supervisors authorized to make accountability judgments should be different, and perhaps broader, for lower level employees, I see no reason why these decisions too shouldn’t include some judgment-based review to safeguard against political or arbitrary choices, just as large private employers have site-based committees to review terminations.

### *Conclusion*

Article II’s grant of “executive Power” to the President cannot be reconciled with the personnel and management controls imposed by Congress. Executive power is toothless, as James Madison observed, if the President has no practical authority over personnel: “If any power whatsoever is in its nature executive it is the power of appointing, overseeing, and controlling those who execute the laws.”<sup>104</sup> Those employees exist only as the President’s surrogates because, as George Washington noted, of “the impossibility that one man should be able to perform all the great business of the state.”<sup>105</sup>

A healthy democracy is impossible with an unaccountable, semi-unmanageable public culture at the heart of it. To fix American democracy, the sick culture within our governing institutions must be completely rebuilt. Civil service must be reconceived as a genuine “merit system” within a framework of democratic accountability, not a system of tenure disconnected from democracy. Accountability, as the Framers intended, is a key component of good government. Every virtue we seek in public institutions—public purpose, responsiveness, energy, effectiveness, adaptability, fairness, to name a few—hinges on accountability. Public service must become important again, not a sinecure without opportunity or honor. For Democracy to function effectively, the links in the chain of human responsibility and accountability must be reconnected.

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<sup>104</sup> James Madison, “Speech in Congress on Presidential Removal Power,” June 16, 1789.

<sup>105</sup> George Washington, “Letter to Count de Moustier,” May 25, 1789, Gilder Lehrman Collection Documents.