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Quick Actions to Improve Recruitment, Hiring, and Accountability in the Federal Workforce

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Quick Actions to Improve Recruitment, Hiring, and Accountability in the Federal Workforce

By Jeffrey Salmon

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Executive Summary: Over the last many years, prestigious commissions have concluded that the Federal civil service needs fundamental reform. However, their proposals confront massive barriers—union obstinance and a requirement for legislative, executive, or judicial branch concurrence. But reform need not pause until these barriers are overcome. This essay explores the potential benefits of a far more aggressive use of term appointments, Schedule A hiring authority, and enhancing agency control over its executive core by empowering Executive Resources Boards. Each measure is within federal agencies' prerogative, no asking mother-may-I, and if implemented aggressively, can have a positive impact on the federal workforce.

Introduction¹

The goal of this paper is to examine ways to achieve modest, but meaningful, civil service reform, especially in hiring and accountability, through actions open to all agencies and without the involvement of the Office of Personal Management, the Office of Management and Budget, Congress, the public employee unions, or an appeal to special authorities granted to select agencies. It is reform without asking, "Mother-may-I." Such reform is not revolutionary, but it need not be nibbling-on-the-edges either. If the suggestions put forward here are taken seriously and implemented aggressively, they can address hiring roadblocks endlessly detailed by countless reform commissions, alleviate, and in some cases solve, day-to-day personnel accountability problems, stimulate government human resource professionals to think and act creatively, and perhaps force reluctant parties to the table for serious discussions of transformation.

Before detailing these actions, however, we need to set the context, the context of some his-

tory and the context of ongoing serious efforts to bring hiring reform and accountability to the federal civil service through modernization of the administrative state.

The Bureaucracy in the City Plan of Washington, D.C.

Numerous historical studies of the rise of the civil service unfold a story that can help us understand current struggles over the administrative state and calls for its reform.² But a different and important angle is presented in a study of the development of the Washington community itself in the Jeffersonian Era.

In his influential study of "people and power" in early Washington politics, James Sterling Young reviews the creation of a governing center of power from scratch that reflected as much as possible the "principles of organization to be followed by the rulers of the nation."³ In reviewing Pierre L'Enfant's community plan for a new capital city and drawing a connection from that to the Constitution, Young observes that "[t]here is no single center in the ground plan of the governmental community, no one

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focus of activity, no central place for assembly of all its members. What catches the eye instead is a system of larger and lesser centers widely dispersed over the terrain.... And [a]mong these units, three major centers vie for dominance. They are separated by a considerable distance, and situated so as to command different aspects, avoiding mutual confrontation. One is assigned to the Congress; one to the President; and one to the Court.”⁴ Thus, “the physical arrangement of Washington was the structure of the government expressed in space.”⁵

The L’Enfant plan is a rendering, “in a different language, of the constitutional prescriptions for the structure and functions of the national government. The plan for government, like the plan for the governmental community, intends a tripartite segmentation of governing personnel, with legislative, executive, and judicial functions assigned to differently composed and differently organized groups with the government. The failure of the community plan clearly to define a place for the administrative units of the executive branch finds its parallel in the ambiguity of the Constitution itself regarding the place of these units in the scheme of ‘separation of powers.’”⁶

Of course, the administrative structure in the years covered by Young, 1800-1828, was vanishingly small compared to today. By 1829, the total executive branch employment stood at 318.⁷ At that time, the entire civil service barely outnumbered the number of members of Congress; the administrative state, unlike the constitutionally designated branches, had no home.

As Michael Nelson points out in a reexamination of Young’s work, “L’Enfant, trying his best to design a city plan for the capital that would reflect constitutional principles, fretted over where to place the departments, which seemed equally the charge of both Congress and the president. Today that problem has been ‘solved’ after a fashion. The buildings that house the departments (not to mention the regulatory agencies, independent agencies, and other species of bureaucratic organization) sprawl all over town and far out into the Maryland and Virginia suburbs. Bureaucracy is not anywhere on the city plan of modern Washington, but only because it is everywhere.”⁸

Perhaps its growth and influence, which was inevitable as the power of government itself expanded, were actually accelerated by the community plan’s adherence to constitutional principles, as it “seemed equally the charge of both Congress and the president,”⁹ as Nelson notes. Indeed, the bureaucracy is “today’s manifestation of the original decision for big government...It will not melt under the heat of fulmination or blow away on the wind of wish.”¹⁰ In a sense, everyone can take some ownership of the administrative structure, and everyone has a shot at fulmination, which is certainly what we see today as we examine issues surrounding civil service reform, and it’s a complexity born of the constitution and reflected in the very city plan of Washington, D.C.

Reform of a System in Crisis

Denunciation of the federal civil service system is commonplace. And it would be easy to dismiss (and to refute) these denunciations if they

were simplistic attacks on lazy bureaucrats and government inefficiency. There are lazy bureaucrats and government is inefficient, but that is nothing new and hardly in itself justifies the array of thoughtful, detailed, harshly worded, and sophisticated critical analysis of the government's human capital system that have been issued over just the last few years. Management of human capital in the federal government is clearly in crisis.

The National Academy of Public Administration,¹¹ the Partnership for Public Service,¹² and more recently the Senior Executive Association,¹³ and the Final Report on the National Commission for Military, National, and Public Service,¹⁴ among many others, have weighed in on the compelling necessity for reform of the federal human capital system. There are even calls for starting over through executive order by the President challenging the existence of public employee unions and revamping entirely the existing civil service system, allowing the executive to assert authority over the bureaucracy by, among other things, enforcing accountability.¹⁵

Most of these impressive efforts walk the same road with varying degrees of specificity and focus. None of them lack for overarching condemnations of the federal civil service system itself: “A relic of a bygone era,”¹⁶ “badly out of sync with the needs of an efficient 21st Century government,”¹⁷ the system is “fundamentally broken.”¹⁸ The classification system, which provides means to compare public and private sectors jobs, “describes a workplace from the last century”¹⁹ and “[D]espite being the world's largest employer, federal [human capital management] is inefficient, lacks credibility, is not

investment or future oriented, and lacks government-wide perspective.”²⁰ “[T]he civil service, once the elixir to ensure good government, has become a cancer killing good government,” one observer concludes.²¹

Harsher condemnations of the system can be heard from those actually attempting to be successful civil servants. My personal experience as a civil servant, both as a career member of the Senior Executive Service (SES) and as a political appointee, extends more than 25 years, some 17 of which were intimately involved in human capital matters. One example of the dysfunction of the system that I encountered—one example among many—was a failure of political leadership grounded on a fear of endless formal grievances.

As a manager, holding employees accountable by issuing poor performance reports or even rating an employee “meets expectations,” especially a member of the SES, that is, those who are supposed to set the standard for all employees in terms of integrity, responsibility, professionalism, and overall performance, is opening the door to disappointment and frustration as one discovers that senior levels in your department will seldom support a serious effort to hold employees accountable. I served for over 10 years on the Department of Energy's Executive Review Board (ERB), which is variously responsible for all aspect of SES hiring, performance, training, and promotion (more on the ERB system below). One year, the Deputy Secretary declared his intention to demand serious performance ratings for all SES members, that “outstanding” ratings would be challenged, and that a cap would be placed on the number of SES members who could receive this highest

“One example of the dysfunction of the system that I encountered—one example among many—was a failure of political leadership grounded on a fear of endless formal grievances.”

rating. The cap held, more or less. What did not hold was the “serious performance ratings” part. At least a dozen members of the SES challenged their ratings, a challenge that had to first go through the ERB on which I sat. The ERB supported the lower ratings, some of which were just “meets expectations,” and yet regarded by SES members as a career disaster given the ease with which one was normally rated “exceeds” or “outstanding.”²² A number of these challenges went to the Deputy on appeal and arguing the case for the unjustly rated SES members were a set of Assistant Secretaries, all political appointees. The Deputy overturned every negative rating including the “meets expectations.” The ERB was left out to dry. Message sent; message received. Similar circumstances, and much worse, take place every year in many agencies.

Indeed, survey data from government employees themselves support both professional analysis by esteemed commissions and personal experience. The Office of Personnel Management’s Federal Employee Viewpoint Survey (FEVS) (2019) “provides a snapshot in time of the self-reported perceptions of employees in the Federal government regarding their work experience, work unit, agency, supervisor, organizational leadership, and satisfaction with a variety of work-related components such as pay and recognition.”²³ Here are some results that speak to performance and recruitment. Percentages are those agreeing with the statement.

- Pay raises depend on how well employees perform their jobs (28%)
- In my work unit, steps are taken to deal with a poor performer who cannot or will not improve (34%)
- Promotions in my work unit are based on merit (39%)
- My work unit is able to recruit people with the right skills (44%)
- Creativity and innovation are rewarded (44%)

On the other hand, individual respondents believe they are held to standards.

- I am held accountable for achieving results (83%)
- My performance appraisal is fair reflection of my performance (71%)

The low scores on perceptions of performance of employees in general may speak to the higher scores on self-perceptions of accountability. If there were more ratings of “meets expectations” or “needs improvement,” it is possible to imagine that the survey data would register a higher level of dissatisfaction with self-perceptions of individual ratings. In any case, between the host of commission reports and independent assessment of the federal government’s management of human resources, OPM survey data on employee perceptions of the system, and the horror stories one can elicit with ease from civil servants themselves, you have a compelling case for overall dysfunction.

What are the prescriptions for repairing, reforming, and modernizing the civil service?

Recruitment, the hiring process, and accountability make up a large segment of the reformer’s attention. The federal government is not generally seen as an attractive employer, owing in large part to its onerous hiring process.

Below, a sample of the degree of change called for.

- The antiquated classification system must be modernized. Proposals include replacing the “General Schedule ... grade levels (GS-5 through 15) into five work levels that most closely align with the knowledge work that most employees currently perform, and that enable them to progress based on their technical expertise, not just the number of people they supervise.”²⁴ The system does not allow a ready comparison of federal and private sector work, it is not connected to the kinds of knowledge-based work now done in the government, and it is subject to the most egregious distortions because

the rules governing how to classify a job are so byzantine that very few human resource specialists understand them. To accomplish goals such as this will require cooperation from Congress and the executive branch, and would likely be opposed by the unions.

- The mechanics of the hiring process will need top to bottom change. The most impressive recent look at this issue with associated solutions comes from the National Commission on Military, National, and Public Service, although all serious commissions and studies offer useful suggestions for reform. In addition to specific actions to fix the federal human capital system, it also provides a fine primer on the system itself in all its mind-numbing bureaucratic detail. The Commission recommends, for example, reasonable and needed limits on eligibility to Veterans Preferences, changes to the way resumes are evaluated in the hiring process, abandonment of the category rating of candidates “which can result in a large, unwieldy and less-qualified pool of [candidates], expanding direct-hire authority,” and greater use of term appointments (more on this below).²⁵ Most of its recommendations are shared in one way or another with previous studies; what stands out is the level of detail on each action, which makes it a more actionable agenda. Still, its proposals, along with most others having to do with overhauling the sclerotic hiring process, require intervention by the executive and legislative branches and will confront the full-scale displeasure of the unions.
- Perhaps even more vexing than the hiring process is that associated with the performance management system. Philip Howard notes that “good government” reports tend to “[treat] accountability with kid gloves” although accountability is the key to “designing a new civil service system.”²⁶ He is correct. The performance management system crosscuts so many of the mechanisms

connecting civil service reform—attracting good candidates, hiring, classification, promotion—that isolated reforms would be ineffective. Still, “individual accountability,” as Howard notes, “is the only way to rebuild a healthy civil service.”²⁷ The Partnership for Public Service gets at this through various mechanisms tying pay to performance and not to tenure. They would eliminate tenure-based pay increases, making “pay progression within a particular salary band based strictly on performance.”²⁸ They also call for more serious attempts within agencies to hold managers accountable for credible performance plans, for themselves and their employees. This is all well and good, although any attack on the performance management system will, as noted, require a comprehensive approach, outside agreement from OPM, et.al. and generate the ire of the unions.

Just this brief overview demonstrates the uphill battle ahead for any civil service modernization effort. Not only are such efforts replete with the minutia of the HR world and government regulations, but more fundamentally the interconnectedness calls for a level of comprehensive reform that is hard to imagine finding much traction in the American political system. In virtually every case, modernization calls upon the need for the agreement and good will of the OPM, OMB, White House, Congress, a host of committees and subcommittees, and of course the unions. It is hard to envision a critical political mass of these entities forming around the need to eliminate category rating or overhauling the General Schedule.

One is left, on the one hand, with what might be called the Howard Solution—an Executive Order “to remake the civil service system, but also challenge Congress’s authority to impose unions on the Executive Branch”²⁹—or on the other, finding some meaningful reforms already available without asking Mother-may-I. One can hope that the President will heed Howard’s

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advice, and that we could fight a battle for reform that holds some prospects for truly revolutionary change. Until that time, we must seek auxiliary methods of reform.

Reform without asking Mother-may-I

Agencies should stop complaining about restraints on sound management imposed by the “relic of a bygone era” aka, our civil service system, and take actions available to them today to force change while at the same time exercising responsible management. The germ of this notion came from witnessing first-hand how a “helping people competency” contrasted with a “compliance driven mentality” by HR professionals at the Department of Energy.³⁰ What has come of that are these preliminary suggestions for doing what can be done to recruit, hire, and rate in ways that by-pass arthritic processes that make day-to-day operations so difficult and dispiriting. The criteria for selection were: 1) they must be available to virtually all agencies without going to outside entities for approval including the unions, 2) they must not undermine merit principles,³¹ and 3) they must accelerate the hiring process dramatically and enhance accountability. This was not simple. Over the years, the piling on of hiring processes aimed at insuring fairness, and overall federal employee protections, have shut the door firmly against many reform and modernization plans. But as the proverbial thief will try hundreds of doors in a hotel complex to find just one that is unlocked, a few doors to action at improving the process have been left ajar. Let’s walk through and see what we can accomplish.

Three practices are suggested here: employing, to the maximum extent possible, term

appointments instead of permanent civil service positions; employing to the maximum extent possible Schedule A appointment authority; and fully empowering agency Executive Review Boards to address hiring and performance management in the executive corps. As noted at the beginning of this paper, none are revolutionary, but they can all make a real difference.

It should be noted that there are a host of special direct-hire and other authorities granted some agencies and not to others. In 2018, OPM found that “[A]gencies are missing an opportunity to implement more strategic, innovative, and targeted recruitment activities to reach highly qualified applicants.”³² In part, this means that agency-specific grants of special authority to hire without competition and the complex set of actions surrounding the traditional hiring process were not fully utilized. The Commission on Military, National, and Public Service had a cogent explanation for this: “Too often, agency culture encourages a compliance-driven, siloed, ‘someone else’s responsibility’ attitude rather than a talent-driven, whole-of-agency, forward-looking workforce strategy. Despite being granted additional authority by Congress and OPM, some agencies—due to habit, fear of being out of compliance with the law, insufficient capability with the human resources departments, and lack of interest and support from agency leadership—restrict the use of such authorities by HR staff and hiring managers.”³³ Seldom have truer words been written. It therefore must be acknowledged that ossified, risk-averse behavior is going to be difficult to overcome. And yet, the suggestions offered here have the advantage of universal application to agencies leaving open the possibility that

creative HR professionals and political leaders in any agency can make a difference without asking permission from anyone.

No matter how swift the change as a result of the three techniques discussed here could be, it will take a move away from compliance-driven HR thinking and, just as important, political will from executive leadership in agencies to execute all these with vigor. We will return to these issues at the end of this paper.

Let us now summarize some non-Mother-may-I actions that can improve HR operations, hiring, and make performance management more credible.

Term Appointments

Agencies may make appointments with or without competition for a period of one to four years and may renew the appointment for an additional four years. “Reasons for making a term appointment include, but are not limited to: project work, extraordinary workload, scheduled abolishment, reorganization, contracting out of the function, uncertainty of future funding....”³⁴ The language “not limited to” is important. If hiring managers wish to hire term employees for reasons other than those listed, they need only get approval from the agency Chief Human Capital Officer.

The modern use of term appointments goes back to the enactment of Title 5 itself and the regulations governing their use to 1968. The regulation was modified several times including in 1998 when among other changes, OPM was permitted to extend the length of the term appointment when justified and veteran’s preference were clarified.³⁵

The advantages of a term appointment are considerable. Although the term employee has some appeal rights if he or she is terminated after a one-year probationary period, they are limited compared to those afforded an individual with a permanent appointment. By definition, the employee is let go after the specified term in any case, unless an extension is desired. You can appoint term employees without

competition so long as they qualify for the position. If the selection goes through the competitive process, the employee can be converted without competition to permanent status at any time during the term. What is more, the reasons for making a term appointment are so broad as to encompass most any position. What job in government is not somehow connected to “future funding?” And since the list of reasons noted above is not comprehensive, the creative HR professional with a customer-service mentality should be able to find other rationales if none in the regulations seem to fit. Finally, term appointments directly challenge the idea of tenure in federal employment. As the Partnership for Public Service argues, “[R]igid policies that were designed to encourage long-term tenure and internal equity, for example, are now a burden on a government that needs to encourage flexibility and innovation to meet rapidly changing and difficult challenges.”³⁶ The issue of virtual permanent tenure for federal employees, of course, goes to the root of issues surrounding accountability, which is discussed below. The value of tenure, and there are good arguments in its favor, is worthy of its own study but is beyond the scope of this paper.

Indeed, because of tenure, federal managers know there is little more dispiriting than having made a bad hire. Sometimes it takes longer than a probationary period to discover the error. Since you can set the term appointment on your own to anywhere from one to four years, you can protect yourself from a bad decision and avoid the nightmarish removal process. And if the selection is a good one and you competed the position, you are able to convert the employee to permanent status if you wish.

In the office I worked in at DOE, program managers who handled grant-making decisions for fundamental scientific research, and there were over 200 of them, could all have been hired as term employees given the fluctuation in project funding. In not a few cases that I witnessed, a term appointment would have spared the office enormous pain as we either

carried deadheads on the roles, or worked to have under-performers removed. And the term system would have brought fresh ideas into the grant-making process through rotation, a special advantage when it comes to funding cutting edge scientific research.³⁷

Given these benefits and given the chorus of criticism within and outside government of its convoluted recruitment, hiring, and removal process, term appointments should be the default position. In other words, agency leads should insist that hiring managers announce all open positions as term appointments unless they can provide overwhelming evidence that doing so would be illegal or impractical. Direct appointment without competition is often a good option when turnover is seen as a long-term advantage to the program and when the hiring manager has good candidates readily available. But if managers prefer otherwise, term appointments through the competitive process provide up to a four-year window and even longer to assess performance. That should be sufficient time to tackle most performance management issues. If the supervisor wishes, in the fullness of time, he or she can convert the outstanding employee to permanent status.

As noted, this would be seen by unions and others in any agency as a challenge to the very idea of permanent civil service status. That would certainly be a discussion worth having. An aggressive move to term appointments could generate such a conversation, and it is one that needs to take place.

Hiring Under Schedule A Authorities

Just as federal hiring managers should be required to consider term appointments as the default for filling open positions, they should

be required to give serious consideration to hiring using Schedule A authorities. Schedule A allows hiring of “qualified individuals with disabilities into positions non-competitively without going through the often lengthy traditional hiring process.”³⁸ It can be used “to hire people in all professions from clerical to attorneys.”³⁹ The appointment may be permanent or time-limited and “[a]n agency may noncompetitively convert to the competitive service an employee who has completed 2 years of satisfactory service...”⁴⁰ Note that all of this is within the agencies’ discretion. Is this taking advantage of a protected class? Not at all. As noted below, it is the applicate not the hiring manager who asserts the designation.

Schedule A authorities have a long history. The Civil Service Reform Act of 1883, better known as the Pendleton Act, created the Civil Service Commission, replaced the “spoils system” with a merit-based hiring system, and created the competitive service including competitive examinations.⁴¹ It also provided for two exceptions to competitive service: hiring under Schedule A and Schedule B.⁴² As a practical matter, however, the distinctions between competitive service and excepted service appointments became blurred over time and the Eisenhower Administration responded with a new category, Schedule C (political appointments) and redefined Schedule A and B, which are still in use today in the Code of Federal Regulation.⁴³ Specially, Schedule A allows appointment without competition and was defined to include attorneys, chaplains, and employees with disabilities.⁴⁴ Our concern in this paper is the flexibilities permitted in hiring employees with disabilities.

How does one qualify for this flexibility? The targeted disabilities and serious health

conditions listed in the government’s “self-identify” form and the overarching definition—“An individual with a disability [is a] a person who (1) has a physical or mental impairment which substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment”⁴⁵— all appear to require an individual to indeed have some sort of serious physical or mental impairment. However, in its fact sheet for youth and young adults, OPM notes that you may qualify for Schedule A if you meet any of these broad criteria:

- Received Supplemental Security Income (SSI) benefits
- Identified as needing services through the Individuals with Disabilities Education Act (IDEA)
- Received services in elementary or high school through an Individualized Education Program (IEP) or a 504 plan in school
- Used Disabled Student Services on your college campus
- Needed a special accommodation
- Received vocational rehabilitation services
- Fits under the Americans with Disabilities Act’s (ADA) definition of an individual with a disability⁴⁶

It would be up to a health official—e.g. family physician, nurse practitioner, physician, psychologist, psychiatrist, audiologist, licensed rehabilitation professional—to provide Schedule A documentation. It would be their judgement if the individual fit into one of the many physical or mental disability categories listed in OPM’s standard documentation form and the items appearing in the Fact Sheet. Neither the HR professional, hiring manager, indeed no one,

would be permitted to know the specific reason for the health official’s determination. And people take that prohibition seriously. One of the few times I saw the union representative in our office come down on someone in the bargaining unit was when that person persisted in questioning a Schedule A hire because he could see no visible disability.

If a hiring manager has identified a qualified person, he or she should simply make the Schedule A authority, and its associated criteria, known to the individual and that person can determine if he or she might fit any of the categories and then have that documented by a health official. And it is “generally recommended that the documentation should not include: Specific information about [the] disability (beyond the broad categories listed [in the fact sheet]...”⁴⁷

If this qualified individual can produce such documentation, hiring managers have many routes open to them. They can appoint without competition to a time-limited or permanent position, whichever is determined by the agency to best serve its interests. And it “may noncompetitively convert to the competitive service any employee who has completed 2 years of satisfactory service...”⁴⁸ In other words, under this authority the employee has a 2-year instead of a 1-year probationary period—a significant benefit to the agency in addition to having avoided the onerous government hiring process.

The government strongly encourages the use of this authority. In a 2016 Report to Congressional Committees on federal hiring, the General Accounting Office highlighted Schedule A as a way for agencies to meet hiring needs “that [have] not been remedied by using competitive hiring.”⁴⁹ EEOC guidelines for hiring managers was more pointed. “Managers should consider using the Schedule A hiring authority as soon

as you have a hiring need. As a best practice, Managers should contact both the Human Resource professional and the Disability Program Manager (DPM) or Special Placement Program Coordinator (SPPC) about the opening before taking steps to formalizing the job announcement. Explain what competencies the ideal candidate should possess and what functions are essential versus non-essential. The DPM or SPPC then has an opportunity to search their candidate database and send you several resumes of qualified Schedule A eligible candidates who have the requisite skills and are actively seeking employment opportunities.”⁵⁰

Now clearly this “best practice,” as the EEOC calls it, could be abused, but that is the case with virtually any HR authority. In the end, the onus is where it should be, on the hiring manager guided by an HR professional with a helping-people competency, who in the capacity of facilitating the use of Schedule A, is following government guidelines. If they have identified a qualified candidate, they need to provide that candidate with the legal means to enter service non-competitively, explain the mode of appointment (temporary, or permanent) and let the individual, working with a health professional, determine their qualifications for this flexibility. And they should do this “before taking steps to formalize the job announcement.”⁵¹

Finally, without undermining access to federal jobs by people with disabilities, the flexibilities afforded by Schedule A and indeed term appointments might provide models for legislative reform of the widely denounced federal human capital management system. They are, at the very least, one of the first stops reformers should make along the way as they seek to reshape, modernize, and institute best practices in the civil service HR world. In the meantime, to ignore this flexibility by not

making the option open to a qualified candidate is simply HR malpractice.

Empower Executive Resources Boards

“The head of each agency is responsible for executive resources management [essentially the Senior Executive Service], controlling the decisions to hire, develop, assign work, evaluate performance, and compensate the agency’s executives. In addition, the head of each agency controls the extent to which the ERB [Executive Resources Board] is involved in these decisions through appropriate delegation of authority.”⁵² Created in the Civil Service Reform Act of 1978, members of the SES “serve in the key positions just below the top Presidential appointees. SES members are the major link between these appointees and the rest of the Federal workforce. They operate and oversee nearly every government activity in approximately 75 Federal agencies.”⁵³ Additionally, the CSRA states that “[e]ach agency shall establish one or more executive resources boards, as appropriate, the members of which shall be appointed by the head of the agency from among employees of the agency. The boards shall, in accordance with merit staffing requirements established by the Office, conduct the merit staffing process for career appointees....”⁵⁴ Selection, compensation, performance management, and other human resource factors are handled differently in the SES than in positions under the General Schedule and as noted are the direct responsibility of agency heads who manage that responsibility through an ERB.

Agencies meet that responsibility in a variety of ways, and even within agencies the way ERBs operate changes with changes in leadership. In the Department of Energy, I have seen ERB responsibilities controlled by a single political appointee reporting to the Secretary’s Chief of Staff (a less than optimal solution), later solely the Deputy Secretary (a formula

for consistent delay), then by a group of senior executives headed by the Chief Human Capital Officer (CHCO) reporting to the Deputy Secretary, (a first move toward a clear and regularized process), and finally by an ERB with political appointees and career SES as members, chaired by the CHCO who had been formally delegated virtually all of the Secretary's authorities over executive resource management.

And those authorities are considerable. Some are mandatory, for example, conducting "the merit staffing process⁵⁵ for career appointments in the SES, including reviewing the executive qualifications of candidates ... and making written recommendations thereon to the appointing authority."⁵⁶ In other words, ERBs must approve all new SES appointments to include the process by which the individual was considered. "Agency heads may delegate additional functions and authorities" to an ERB to include allocation decisions, compensation and retention strategies, performance management, approving qualification standards, approving vacancy announcements and "recommending how positions are to be filled (e.g. career, noncareer, limited appointments...)." ⁵⁷ The responsibilities can also encompass interviewing candidates or determining who will interview candidates.

In short, agency heads are empowered to manage all aspects of their executive-level employees, and OPM argues that "the ERB

should have a much broader charter than just merit staffing."⁵⁸ Let us focus on one aspect of those authorities, performance management and accountability.

Agencies set up Performance Review Boards (PRB) to examine, and in most cases approve, the summary ratings of an executive's performance. OPM suggests a close connection be established between the PRB and the ERB, to include appointment to the PRB made by the ERB and, most important, having the PRB's findings reported through the ERB for approval. There is both a process and political issue involved here.

No matter the specific composition of the two boards or method of appointment, it is necessary that one set of senior executives, preferably the ERB, which is permitted the broadest authorities, review and approve performance ratings. That review, especially in agencies with more than a handful of senior executives, will inevitably find abuses in the performance management system within the agency. As a member of both PRBs and the agency ERB, every year I witnessed scores of inflated ratings supported by gobbledygook. The bogus rating was often granted simply to avoid a grievance. Punitive ratings to tame some ornery executive were not uncommon, nor were ratings pulled from thin air because, frankly, the rater felt he or she was too busy to do a thorough job. There was a clear and

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well understood process to deal with such things, involving written reports from the review boards up to the agency head. Once these written reports entered the black box of “the front office,” there could be a variety of actions—meetings with various interested parties, summary judgments, etc.

In all this, the responsibility for the integrity of the process, which was well understood, rested squarely at the political level. If that level made clear to the ERB/PRB that it demanded serious accountability of its senior executives and objected, for example, to seeing an overwhelming number of “outstanding” ratings, and then supported the boards when they pushed back against flawed ratings, the performance management system itself would gain credibility. Further action from the political level would inevitably include backing managers battling grievances from low-rated executives. A fully empowered and politically supported ERB can make reform in many areas a reality.

This is not too much to ask of political appointees. And yet, as is obvious from the FEVS, civil servants do not believe the system deals with poor performers.

What is clear, nevertheless, is that there is nothing standing in the way of political appointees fixing or at least addressing that issue in very meaningful ways. Empowering the ERB with delegated authorities, assuring that the CHCO staffs it properly, making

expectations clear with respect to maintaining the integrity of each of those authorities, can all be powerful tools to make incremental reform by political appointees simply doing the job assigned to them. And as noted above, this includes the full range of human capital management of the executive core. Not happy with the way senior executives are recruited and hired? ERBs have wide authority to intervene. Not happy with the way senior executives are trained? ERBs can manage that. Not happy with the senior executive rating system? ERBs can manage that as well. Granted, the grievance process itself will continue to be overly complex, disciplinary procedures will continue to be something only the most strong-willed manager dare engage, and the recruitment and hiring process will continue to be resistant to best practices from the private sector—those are problems one must ask forces outside the agency to help solve. Political appointees need to get used to that at the same time they attempt to push comprehensive civil service reform. That one cannot do everything is no excuse for not doing what one can.

Conclusion

In 2020, Federal News Network “questioned whether Congress would take on any big federal workforce modernization efforts—with recommendations from good government groups, chartered commissions and others in no short supply.”⁵⁹

That questioning mainly revolved around the National Commission on Military, National and Public Service report and its detailed set of recommendations. Would Congress take them up in any serious fashion? We now know the answer is no.⁶⁰ Good government and other reform-minded parties must come to grips with reality. Even modest civil service modernization let alone comprehensive reform is not going to happen. Employee union priorities dominate the Biden Administration.⁶¹ And a potential stalwart of change, the Senior Executive Association, avoided entirely questions of hiring reform, performance management, and fundamental modernization issues in its Policy Priorities for the New Administration, instead focusing on a narrow list of near-term process fixes and steps they knew the Administration was going to take anyway, such as repealing President Trump's executive order on the creation of Schedule F.⁶² We are left, as noted above, with the Howard Solution or smallball: pushing the system toward reform through the vigorous exercise of HR flexibilities, that are open to all agencies without asking permission, can actually ease performance management challenges, and improve the miserable hiring process.

But can the flexibilities discussed—more term appointments, speedy hiring through Schedule A, empowering agency Executive Resource Boards—really make a difference?

As argued, a strong bias toward term appointments challenges the very concept of tenure, a foundational issue that critics all discuss, but for which they have no real answer. But so long as merit principles are maintained, and there are few who challenge them, term hiring opens the door to much greater flexibility in managing the

workforce. Tenure should no longer be the default position in hiring.

Schedule A, when used properly, but aggressively, gives hiring managers an avenue to avoid the cumbersome hiring process, and puts a premium on recruiting good employees and then seeing if they qualify for a Schedule A hire under the board criteria. What is more, the authority itself provides managers with much greater leeway in dealing with performance problems than the standard process, with its limited probationary period and limited timeframe of employment, e.g. temporary, term, or permanent. No hiring manager or HR professional should complain about the process if they have not given serious thought to Schedule A hiring.

OPM begs agency heads to use their authorities to manage the SES. Through the Executive Resource Board, they have a powerful tool to structure and influence all aspects of executive leadership from recruitment to accountability. Senior executives are not members of the bargaining unit, and while their protections are indeed impressive when compared to the private sector, their job security is far less than those on the General Schedule. There is simply no excuse for agency heads not to exercise every power given to them to create the kind of executive corps they need to execute their mission and to hold SES accountable.

Still, one must acknowledge that none of this, while it avoids asking for outside help, is self-generating. Two things are required, one technical, one more fundamental. First, agencies need HR professionals with helping-people competencies. Creating a core of HR professionals focused on accomplishing the mission rather than process-obsessed box-checkers, is a topic for a different paper.

It is enough to say here that agency leadership needs to understand the difference and demand the former.

Second, the bureaucracy itself must, though administrative statesmanship, instruct the political leadership on the ways and means of accomplishing the mission, especially at the granular level we are now discussing. As Herbert Storing noted: “random carping or wholesale condemnation of the bureaucracy has only the effect (when it has any effect) of diverting attention from the need to nurture and strengthen its capacity for administrative statesmanship and of weakening what is a prime source of intelligence....”⁶³ Elsewhere, Storing highlights the civil servant’s “distinctive competence in the art of government and a unique knowledge of the problems of government, without which stable and intelligent government under modern conditions would be literally impossible.”⁶⁴ Even in the current heated environment where condemnations of the administrative state are familiar, political appointees need to take seriously Storing’s perspective on the value of the bureaucracy’s “unique knowledge of the problems of government.”

The civil servant’s technical knowledge is the grounds for it exercising administrative statesmanship by informing the political leadership of every means at its disposal to manage properly the government it is elected to oversee. Given what Storing calls its “institutional qualities” the civil servant has, he argues, a legitimate claim to “share with elected officials in rule.”⁶⁵ If this is the case, it may well be that the political will for reform of the civil service along the lines noted in this paper could come largely from the civil service itself in its capacity to advise the political level on fixing the archaic system the civil servants themselves must live under.

James Sterling Young showed us that within the constitutional order, and indeed the city plan of the Washington community itself, the bureaucracy and civil service had no fixed status as did the major branches of government. Its openness, therefore, to influences by Congress and the courts, as well as the branch granted “the executive power,” is a given. And outside the Howard Solution, the generally recognized need for modernization and reform of the civil service cannot be within exclusive authority of the executive. Consequently, reform within the normal political process is unlikely. This paper suggests, however, that incremental, but still meaningful reform of the civil service, is within the grasp of every agency.

Apprised of the details of the legal authorities that can help fix or alleviate a set of personnel nightmares, the civil service and its political leadership can move us to the kind of reform it knows is necessary while we await more fundamental modernization.

Endnotes

1. I would like to acknowledge the assistance of Ms. Cyndi Mays, Director, Talent Services, U.S. Department of State and Carly Hviding, J.D. Candidate, 2022, George Mason University Antonin Scalia Law School, in preparing this article.
2. See, e.g. Joseph Postell, *From Merit to Expertise and Back: The Evolution of the U.S. Civil Service System*, The C. Boyden Gray Center for the Study of the Administrative State, George Mason University (February 2020). This is a recent example of an excellent study of the development of the civil service. See, <https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2020/02/Postell-From-Merit-to-Expertise-and-Back.pdf>.
3. James Sterling Young, *The Washington Community 1800-1828*, (1966), vii, 2.

4. id. 3.
5. id. xii.
6. id, 8.
7. id, 31.
8. Michael Nelson, “The Washington Community Revisited.” QRV Online (1985) <https://www.vqronline.org/essay/washington-community-revisited>.
9. id.
10. Herbert Storing, “The Problem of Big Government,” in *Toward a More Perfect Union*, (1995) p. 304.
11. National Academy of Public Administration. *No Time to Wait: Building a Public Service for the 21st Century*. (July 2017).
12. Partnership for Public Service. *A New Civil Service Framework*. (April 2014).
13. Senior Executive Association, *Ten Considerations for Civil Service Modernization*. See, <https://seniorexecs.org/page/www-seniorexecs-org-10considerations>.
14. *The Final Report of the National Commission on Military, National and Public Service*. (March, 2020).
15. Philip Howard, *Civil Service Reform: Reassert the President’s Constitutional Authority*. *The National Interest*, January 2017.
16. Partnership for Public Service, p. 7.
17. National Academy of Public Administration, p. 3.
18. Quoted in *The Final Report of the National Commission*, p. 61.
19. Partnership for Public Service.
20. SES Study *Transforming the Governance of Federal Human Capital Management*, p. ix.
21. Howard, p 2 (<https://www.the-amernter-est.com/2017/01/28/civil-service-reform-reassert-the-presidents-constitutional-authority/>).
22. The rating terms changed several times over the years I was at DOE.
23. Office of Personnel Management *Federal Employee Viewpoint Survey* (2019) <https://www.opm.gov/fevs/reports/data-reports/data-reports/report-by-agency/2019/2019-agency-report/>. It has a 42.6% response rate, considered very good for a survey of this kind.
24. Partnership for Public Service, p.10.
25. Category rating is the overly complex process by which individual candidates for a federal position are placed in minimally, well, and best qualified categories. See, <https://www.opm.gov/policy-data-oversight/human-capital-management/hiring-reform/reference/categoryratingpolicy-template.pdf>.
26. Howard, p. 3.
27. Id.
28. Partnership for Public Service p. 25.
29. Howard, p.8.
30. This distinction was defined most clearly to me by the then-HR director in my office at DOE, Cyndi Mays
31. See, Partnership for Public Service p.9. The merit principles are codified in law and set out the broad standards for personnel practices, see 5 U.S. Code S 2302.
32. See, Office of Personnel Management, *Excepted Service Hiring Authorities: Their Use and Effectiveness in the Executive Branch* (2018).
33. *The Final Report of the National Commission*, p. 64.
34. 5 U.S.C. 316.301. The language “not lim-

ited to” is important. If hiring managers wish to hire term employees for reasons other than those listed, they need only get approval from the agency Chief Human Capital Officer.

35. 63 Fed. Reg. No. 221, 63781 (Nov. 17, 1998).

36. Partnership for Public Service, p. 8.

37. This of course begs the question, why did we not make term appointments for these positions? Several reasons: Hiring managers are risk averse and this was something new. Some thought it would discourage good candidates from applying. In an office that looked to long-term funding commitments, longevity of program managers was seen as a benefit. And there was no push from upper management or the political level.

38. Workforce Recruitment Program “Schedule A Checklist: What is Schedule A and How Does it Work?” <https://www.dol.gov/sites/dolgov/files/odep/wrp/scheduleachecklist.pdf>.

39. Federal Schedule A Hiring Authority Fact Sheet. <https://youth.gov/feature-article/federal-schedule-hiring-authority-fact-sheet-tips-youth-and-young-adults>.

40. 5 U.S.C. 213.3102 (u).

41. Our Documents.Gov, Pendleton Act (1883), <https://www.ourdocuments.gov/doc.php?flash=false&doc=48>.

42. U.S. OFF. OF PERS. MGMT., SPECIAL STUDY, EXCEPTED SERVICE HIRING AUTHORITIES: THEIR USE AND EFFECTIVENESS IN THE EXECUTIVE BRANCH I (2018).

43. Id.

44. See 5 C.F.R. § 213.3102 (2020).

45. United States Office of Personnel Management form SF 256. https://www.opm.gov/forms/pdf_fill/sf256.pdf.

46. OPM Fact Sheet [https://youth.gov/feature-article/federal-schedule-hiring-authority-](https://youth.gov/feature-article/federal-schedule-hiring-authority-fact-sheet-tips-youth-and-young-adults)

[fact-sheet-tips-youth-and-young-adults](https://youth.gov/feature-article/federal-schedule-hiring-authority-fact-sheet-tips-youth-and-young-adults).

47. Schedule A Checklist. Emphasis in original. <https://www.dol.gov/sites/dolgov/files/odep/wrp/scheduleachecklist.pdf>.

48. 5 U.S.C. 213.3102 (u). 6.

49. U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-521, FEDERAL HIRING: OPM NEEDS TO IMPROVE MANAGEMENT AND OVERSIGHT OF HIRING AUTHORITIES 10 (2016).

50. E.E.O.C., *The ABC’s of Schedule A: Tips for Hiring Managers on Using the Schedule A Appointing Authority* (2020), <https://www.eeoc.gov/publications/abcs-schedule-atips-hiring-managers-using-schedule-appointing-authority>. Emphasis added.

51. id

52. United States Office of Personnel Management, Memo from John Berry, Director. September 9, 2009. <https://www.chcoc.gov/content/executive-resources-boards>.

53. OPM, Senior Executive Service: Leading America’s Workforce. <https://www.opm.gov/policy-data-oversight/senior-executive-service/>.

54. CSRA 1978

55. Essentially the hiring process.

56. Berry Memo

57. Berry Memo

58. Berry Memo

59. Federal News Network, “Slim pickings on big federal workforce changes in 2021 legislation” July 27, 2020 <https://federalnewsnetwork.com/mike-causey-federal-report/2020/07/slim-pickings-on-big-federal-workforce-changes-in-2021-legislation/>.

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[port/2020/05/will-congress-tackle-the-federal-workforce-elephants-in-the-room/](https://www.federalworkforce.com/2020/05/will-congress-tackle-the-federal-workforce-elephants-in-the-room/).

61. National Treasury Employees Union, Biden Administration Restores Respect for Career Civil Service (Jan. 22, 2021), <https://www.nteu.org/media-center/news-releases/2021/01/22/bidenrevokeseos>.

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63. Storing, "The Problem of Big Government" p. 304.

64. Storing, "Political Parties and the Bureaucracy," in *Toward a More Perfect Union* (1995), p. 324.

65. Id.