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U.S. Office of Personnel Management
1900 E Street, NW
Washington, DC 20415-1000

Re: Comments on Notice of Proposed Rulemaking, *Improving Performance, Accountability and Responsiveness in the Civil Service*, 90 Fed. Reg. 17182 (Apr. 23, 2025), RIN 3206-AO80.

We write on behalf of Americans for Prosperity Foundation.¹ We appreciate this opportunity to comment on the Notice of Proposed Rulemaking regarding Improving Performance, Accountability and Responsiveness in the Civil Service (RIN 3206-AO80), as published at 90 Fed. Reg. 17,182 (Apr. 23, 2025) (the “NPRM”).

I. Introduction

The NPRM proposes “to increase career employee accountability” by allowing “policy-influencing positions be moved into Schedule Policy/Career. These positions will remain career jobs filled on a nonpartisan basis. Yet they will be at-will positions excepted from adverse action procedures or appeals.” *Id.* at 17,182. The key effect of the proposed changes, which will amend relevant sections of Title 5 of the Code of Federal Regulations, is that agencies acting under the direction and authority of the president will be allowed “to quickly remove employees from critical positions who engage in misconduct, perform poorly, or undermine the democratic process by intentionally subverting Presidential directives.” *Id.*

As a general matter, AFPF consistently advocates against executive overreach and for restraining the scope of federal power to uphold proper Constitutional checks and balances across the three branches of government. In this instance, AFPF supports the NPRM because the proposed changes do not expand executive power beyond constitutional bounds. To the contrary, the proposed changes are a correct exercise of the unified executive authority that the Constitution grants to the president. The rule changes will properly limit privileges that should never have been granted to an extraconstitutional “Fourth Branch” of government and help locate accountability and oversight of the federal workforce in its proper place.

¹ See AMERICANS FOR PROSPERITY FOUNDATION, <https://americansforprosperityfoundation.org/>.

All Executive Branch employees should answer to the president and through him to We the People, but accountability for individuals in policy-making positions, who are instrumental in implementing the president's agenda, is of special importance. By creating Schedule Policy/Career as a new federal job category and making those so categorized at-will employees, the proposed changes will help return the federal workforce to its proper position in our constitutional order.

II. The NPRM's proposed changes are needed for the proper constitutional oversight and function of the federal workforce.

In October 2020, during President Trump's first term, the president signed a "Schedule F" executive order that garnered much attention. But that Order (E.O. 13597) was never implemented before President Biden took office; he promptly signed an executive order rescinding the Schedule F Order. The original policy aimed to redefine a range of federal jobs with "confidential, policy-determining, policy-making, or policy-advocating positions" as roles to be filled by the president rather than through the traditional "competitive" civil service hiring process. One estimate was that 2–4 percent of the federal workforce would have been affected, although the Office of Personnel Management (OPM) was given authority to make final determinations on which roles would be reassigned to the new classification.

The purpose of Schedule F was to better ensure that employees in significant policy-influencing positions were responsive to the policies and priorities of the president, as the Constitution requires. Employees who are ineffective, and at times even hostile to shifting priorities of an administration, are particularly troubling when they are in decision-making positions that steer agencies towards policy objectives contrary to those of president and yet remain immune from presidential oversight. As the NPRM itself notes, research from the Merits System Protection Board (MSPB) shows that only "41 percent of supervisors are confident they could remove a subordinate for serious misconduct, and just 26 percent are confident they could remove one for poor performance." 90 Fed. Reg. at 17,188.

In April 2024, President Biden's administration published a final OPM rule to establish significant roadblocks to implementing Schedule F or anything like it in the future. Upon his return to office in January 2025, President Trump signed Executive Order 14171 to implement an updated version of the original Schedule F Order and to direct OPM to issue a new rulemaking to implement his policy and overturn the previous administration's final rule. The current NPRM is the result of that directive.

From a policy perspective, the changes proposed by the current NPRM are welcome. The effort to reclassify a range of agency positions into roles that are filled at the behest of the president and to make those individuals at-will employees provide positive reform for the civil service system. The federal Executive Branch must be limited to its proper scope as set forth in the U.S. Constitution and accountable to American voters through the president whom they elect. At a minimum, this means

presidents must be able to make workforce and policy decisions that allow them to effectively run the Executive Branch. That cannot be accomplished without the power and authority to remove specific employees who fail to perform or actively work against the president's vision.

Currently, the civil service employment system—strongly influenced by government union bargaining and the MSPB—is defined by difficult hiring, discipline, and termination procedures. The result is a bureaucracy that is insufficiently responsive to either the president or Congress. This has contributed to the rise of the “administrative state,” an extraconstitutional “Fourth Branch” of government where agencies and their entrenched employees exert too much power and influence, on the one hand, and yet also are crippled by inefficiency and negligence, on the other hand.

To function properly and in accordance with the Constitution, federal workers must be responsive to and controlled by the president. Proper accountability and function were never intended to be hindered by civil service red tape or a federal workforce that can defy the president by carrying out its own agenda. The proposed changes outlined in the NPRM will help move the federal workforce toward a proper constitutional structure.

III. The NPRM's proposed changes are constitutional.

For too long the federal bureaucracy has flouted constitutional norms. In this country, all governmental power must flow from its proper source: We the People. Our system of government relies on the consent of the governed, memorialized in the Constitution. In that Supreme Law of the Land, the People agreed that three branches of government—legislative, executive, and judicial—would exercise different forms of power that must be kept separate. Pursuant to the Constitution, “[t]he entire ‘executive Power’ belongs to the President alone,” *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 213 (2020); U.S. Const. art. II, § 1, cl. 1, who “shall take Care that the Laws be faithfully executed,” U.S. Const. art. II, § 3. This means that “[t]he President is the only person who alone composes a branch of government.” *Trump v. Mazars USA, LLP*, 591 U.S. 848, 868 (2020);

Article II contemplates that the president will be assisted by subordinate officers in carrying out his broad constitutionally charged responsibilities, U.S. Const. art. II, § 2, cl. 2, including enforcing federal law. But to protect liberty and ensure accountability, the Constitution also grants the president plenary power to remove at will those officers. U.S. Const. art. II, § 1, cl. 1; *id.* art. II § 3; *see Trump v. Wilcox*, No. 24A966, 2025 WL 1464804, at *1 (S. Ct. May 22, 2025) (“Because the Constitution vests the executive power in the President, *see* Art. II, §1, cl. 1, he may remove without cause executive officers who exercise that power on his behalf, subject to narrow exceptions recognized by our precedents.”) (citing *Seila Law*, 591 U. S. at 215–218). And “no statute can take that Presidential power away.” *Collins v. Yellen*, 594 U.S.

220, 267 (2021) (Thomas, J., concurring). The rise of “independent” agencies with vast law enforcement powers and a federal workforce effectively shielded from presidential oversight has undermined the Constitution’s separation of powers, allowed parts of the Executive Branch to escape accountability, and threatened individual liberty.

A. The Constitution does not authorize a fourth branch of government.

“Our Constitution was adopted to enable the people to govern themselves, through their elected leaders.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). To protect liberty, the Constitution “sets out three branches and vests a different form of power in each—legislative, executive, and judicial.” *Seila Law*, 591 U.S. at 239 (Thomas, J., concurring). “These grants are exclusive.” *Dep’t of Transp. v. Ass’n of Am. R.R.*, 575 U.S. 43, 67 (2015) (Thomas, J., concurring in the judgment). “The Constitution establishes three branches of government, not four[,]” and thus “there can be no fourth branch, headless or otherwise.” *Ameron, Inc. v. U.S. Army Corps of Eng’rs*, 787 F.2d 875, 892 (3d Cir. 1986) (Becker, J., concurring in part).

The Constitution provides in no uncertain terms that “[t]he executive Power shall be vested in a President,” U.S. Const. Art. II, § 1, cl. 1, who “shall take Care that the Laws be faithfully executed,” U.S. Const. Art. II, § 3, thereby “creat[ing] a strongly unitary executive.” Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1213 (2014). “As the Supreme Court has long recognized, these provisions confer upon the president the power to remove executive officers at will.” *Dellinger v. Bessent*, No. 25-5028, 2025 WL 559669, at *15 (D.C. Cir. Feb. 15, 2025) (Katsas, J., dissenting) (citing *Collins*, 594 U.S. at 250–51; *Seila Law*, 591 U.S. at 213–15; *Free Enter. Fund*, 561 U.S. at 492–93; *Myers*, 272 U.S. at 108–17); see *Trump v. Wilcox*, 2025 WL 1464804, at *1.

The President’s at-will removal power flows directly from the Constitution, not from Congress. See *Seila Law*, 591 U.S. at 204 (“The President’s power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II[.]”); *Myers*, 272 U.S. at 163–64. “The President’s removal power has long been confirmed by history and precedent. It was discussed extensively in Congress when the first executive departments were created in 1789.” *Seila Law*, 591 U.S. at 214 (cleaned up). “Most members of [the First] Congress recognized that forbidding removal effectively would preclude presidential control of law execution and destroy presidential accountability for that task.” Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 796 n.556 (2003). “Debates in the First Congress, the so-called Decision of 1789, made clear that the President is vested with plenary removal power.” *Fleming v. U.S. Dep’t of Agric.*, 987 F.3d 1093, 1114 (D.C. Cir. 2021) (Rao, J., concurring in part and dissenting in part).

The First Congress thus “confirmed that Presidents may remove executive officers at will.” *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 168 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting). Nor may Congress limit the core at-will removal power Article II exclusively vests in the President. “[B]ecause the Constitution nowhere grants Congress the authority to strip that power from the President, the President’s removal power was originally understood to be nondefeasible.” *Consumers’ Rsch. v. Consumer Prod. Safety Comm’n*, 98 F.4th 646, 651 (5th Cir. 2024) (Oldham, J., dissenting from denial of rehearing en banc) (citing Aditya Bamzai & Saikrishna Prakash, *The Executive Power of Removal*, 136 Harv. L. Rev. 1756, 1789 (2023)). Indeed, the Supreme Court has “held that Congress lacks authority to control the President’s ‘unrestricted power of removal’ with respect to ‘executive officers of the United States whom he has appointed.’” *Trump*, 603 U.S. at 608–09 (quoting *Myers*, 272 U.S. at 106, 176).

Recently, the Supreme Court reiterated this understanding in *Trump v. Wilcox*, explaining that “Because the Constitution vests the executive power in the President, see Art. II, §1, cl. 1, he may remove without cause executive officers who exercise that power on his behalf[.]” 2025 WL 1464804, at *1.

B. At-will removal power is a key accountability checkpoint.

“As Madison stated on the floor of the First Congress, ‘if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.’” *Free Enter. Fund*, 561 U.S. at 492 (quoting 1 Annals of Cong. 463 (1789)). Given that the President’s “selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.” *Myers*, 272 U.S. at 117. “[B]ecause the President, unlike agency officials, is elected,” the removal power “is essential to subject Executive Branch actions to a degree of electoral accountability.” *Collins*, 594 U.S. at 252. For “[w]ithout presidential responsibility there can be no democratic accountability for executive action.” *United States v. Arthrex, Inc.*, 594 U.S. 1, 28 (2021) (Gorsuch, J., concurring in part, dissenting in part).

At-will removal allows the president to ensure unelected administrative officials “serve the people effectively and in accordance with the policies that the people presumably elected the President to promote.” *Collins*, 594 U.S. at 252. “It is the power to supervise—and, if need be, remove—subordinate officials that allows a new president to shape his administration and respond to the electoral will that propelled him to office.” *Id.* at 278 (Gorsuch, J., concurring in part). “At-will removal ensures that the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.” *Id.* at 252 (majority op.) (cleaned up). After all, “[o]nce an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he

must fear and, in the performance of his functions, obey.” *Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

The president’s at-will removal power also protects liberty. “Few things could be more perilous to liberty than some ‘fourth branch’ that does not answer even to the one executive official who *is* accountable to the body politic.” *Collins*, 594 U.S. at 278–79 (Gorsuch, J., concurring in part) (emphasis in original). The President’s Article II at-will removal power guards against that threat. Limits on that core executive power allow “wholly unaccountable government agent[s to] assert the power to make decisions affecting individual lives, liberty, and property. The chain of dependence between those who govern and those who endow them with power is broken.” *Id.* at 278 (Gorsuch, J., concurring in part); see *Dellinger*, 2025 WL 559669, at *17 (Katsas, J., dissenting) (“Allowing another branch of government to insulate executive officers from presidential control—whether by congressional statute or judicial injunction— would sever a key constitutional link between the People and their government.”). Thus, “[i]f anything, removal restrictions may be a greater constitutional evil than appointment defects.” *Collins*, 594 U.S. at 277 (Gorsuch, J., concurring in part).

C. For-cause removal protections for officers wielding substantial executive power empower a fourth branch.

The Executive Branch “now wields vast power and touches almost every aspect of daily life, [which] heightens the concern that it may slip from the Executive’s control, and thus from that of the people.” *Free Enter. Fund*, 561 U.S. at 499. “President Truman colorfully described his power over the administrative state by complaining, ‘I thought I was the president, but when it comes to these bureaucrats, I can’t do a damn thing.’ President Kennedy once told a constituent, ‘I agree with you, but I don’t know if the government will.’” *City of Arlington v. FCC*, 569 U.S. 290, 313–14 (2013) (Roberts, C.J., dissenting) (citation omitted). That holds true today. As it stands now, “the President actually controls surprisingly little of the Executive Branch. Only a tiny percentage of Executive Branch employees are subject to Presidential removal.” *Feds for Med. Freedom v. Biden*, 63 F.4th 366, 390 (5th Cir. 2023) (en banc) (Ho, J., concurring). The bulk of the federal bureaucracy is shielded from presidential removal—and thus from accountability to the People through the elected president—by civil service laws. *See id.* (Ho, J., concurring). This means that “a modern president is more or less stuck with thousands of civil servants whom he did not appoint and have little loyalty toward him.” Jason Marisam, *The President’s Agency Selection Powers*, 65 Admin. L. Rev. 821, 863 (2013). This “make[s] it virtually impossible for a President to implement his vision without the active consent and cooperation of an army of unaccountable federal employees.” *Feds for Med. Freedom*, 63 F.4th at 390 (Ho, J., concurring). “Even if a president has the perfect ally running an agency, that ally may still fail to produce the desired results if the ally runs into resistance from his civil servants.” Marisam, 65 Admin. L. Rev. at 863. And, as it

stands now, those unelected bureaucrats are almost impossible to fire because “they enjoy a *de facto* form of life tenure, akin to that of Article III judges.” *Feds for Med. Freedom*, 63 F.4th at 391 (Ho, J., concurring). These tenure-like protections embolden some federal employees to view themselves “as a free-standing interest group entitled to make demands on their superiors.” *Id.* (Ho, J., concurring). And they do.

Reform of the removal protections currently in place, accordingly, is long overdue. The NPRM is a step in the right direction toward a proper constitutional structure.

IV. Conclusion.

We support the proposed changes to the federal workforce as set forth in the NPRM. The changes enact needed policy changes and are supported by both the text of the Constitution and relevant federal case law construing the powers vested in the president under Article II of the Constitution.

Respectfully submitted,

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