Subcommittee on Government Operations, Committee on Oversight and Reform, U.S. House of Representatives

Revitalizing the Federal Workforce

Testimony of James Sherk

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Chairman Connolly, Ranking Member Hice, and Members of the Subcommittee on Government Operations, thank you for inviting me to testify this morning. My name is James Sherk. I am a former Special Assistant to the President for Domestic Policy in the Trump administration. Prior to my service in the White House I was a research fellow at the Heritage Foundation. I am speaking this morning only in my personal capacity and not on behalf of the Trump administration. As such, while I can discuss the problems the administration addressed, how it addressed them, and my personal views, I am not authorized to speak on behalf of others who served in the administration or to reveal internal administration deliberations.

The Trump administration sought to make the government operate more efficiently while making the Federal government a better place to work. These efforts were successful. Federal employee' job satisfaction rose every year that President Trump held office.

Federal employees widely believe that their agencies do not effectively address poor performance. Excessive removal restrictions undermine the original vision of the Pendleton Act. Civil service reformers wanted a merit system that prohibited patronage hiring while enabling agencies to swiftly remove poor performers. Federal employees themselves express frustration that their agencies rarely remove poor performers. President Trump signed several Executive Orders designed to make it easier for agencies to do so. Polling shows that Federal employees approved of these efforts by a 2-to-1 margin.

President Trump also signed Executive orders making the Federal workforce operate more efficiently. Congress directed the Executive Branch to implement the Federal Service Labor-Management Relations Statute (FSLMRS) in a manner "consistent with the requirement of an effective and efficient government."[1] The actual implementation of the Statute has fallen short of that goal. The Trump administration sought to rectify that.

Finally, Federal employees enjoy, on average, greater pay and benefits than similarly skilled workers in the private sector. The Trump administration sought to keep the Federal government a first-class employer while promoting equity between the Federal and private sector workforces. To that end President Trump signed legislation providing Federal employees with paid parental leave benefits for the first time, while proposing benefit reforms that would bring Federal employee benefits closer in line with private sector standards.

President Biden has rescinded many of these Executive Orders, and members of the Committee have proposed legislation to prevent a future administration from bringing these reforms back. These proposals will hurt the Federal workforce. Most Federal employees work hard and care about their agency's mission. They do not want to carry poor performers' slack.

Federal Performance Management Problematic

[1] 5 U.S.C. §7101(b)

It is prohibitively difficult to fire a Federal employee for poor performance. The Government Accountability Office (GAO) estimates that it takes between 6 months and a year – and often longer – for a supervisor to fire a poor performer.[2] The most recent Merit Principles Survey reveals that only a quarter of Federal supervisors are confident that they could remove a poor performer who met the statutory criteria for removal.[3]

Merit Systems Protection Board (MSPB) research finds that "many supervisors believe it is simply not worth the effort to attempt to remove Federal employees who cannot or will not perform adequately."[4] An Office of Personnel Management (OPM) study found that only 8 percent of managers with problem employees attempted to demote or fire those workers. Fully 78 percent of these managers said these efforts had no effect.[5]

Consequently, Federal employees are rarely removed for poor performance once they complete their probationary period. OPM data show that agencies removed just 3,939 of 1.6 million tenured permanent executive branch employees for performance or misconduct in FY 2020.[6] The Federal government continues to employ many employees who private employers would have quickly terminated. For example:

- A Housing and Urban Development (HUD) employee spent over a third of his working time for over five years conducting private business deals with his official e-mail account. This included arrangements to provide a lap-dancer to a private party. HUD officials did not attempt to fire him.[7]
- A GS-12 Environmental Protection Agency (EPA) public affairs specialist repeatedly pawned thousands of dollars' worth of EPA digital cameras and camcorders at a local pawn store. When the theft was discovered EPA did not attempt to fire her.[8]

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[2] Government Accountability Office, "Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance," Report Number GAO-15-191, February 6, 2015. Available at https://www.gao.gov/products/GAO-15-191

[3] The survey asked supervisors "If a subordinate employee was deficient in a critical performance element after completion of a PIP, are you confident that you would be able to remove that employee?" 26 percent said they were confident, 51 percent said they were not, and 23 percent were unsure. U.S. Merit Systems Protections Board, Office of Policy and Evaluation, "Remedying Unacceptable Employee Performance in the Federal Civil Service," Research Brief, June 18, 2019, page 15. Available at https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1627610&version=1633458&application=ACROBAT

[4] U.S. Merit Systems Protection Board, Office of Policy and Evaluation, "Removing Poor Performers in the Federal Service," Issue Paper, September 1995, page 2, http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253662&version=253949&application=ACROBAT

[5] U.S. Office of Personnel Management, Office of Merit Systems Oversight and Effectiveness, "Poor Performers in Government: A Quest for the True Story," January 1999, p. 11, http://archive.opm.gov/studies/perform.pdf

[6] In most agencies the probationary period is one year, but it is two years at the Department of Defense (which accounts for over one-third of the Federal, non-postal workforce). FedScope data cubes, maintained by the Office of Personnel Management, show that agencies removed 3,939 permanent full-time employees with at least two years of service for performance or misconduct in FY 2020. This represents approximately one-quarter of one-percent of the 1.6 million permanent full-time Federal employees with at least 2 years of service employed in the executive branch during this period. See https://www.fedscope.opm.gov/

[7] Jim McElhatton "Nice Work If You Can Get It: Federal Workers Keep Jobs Despite Misconduct," The Washington Times, May 13, 2014, http://www.washingtontimes.com/news/2014/may/13/federal-workers-hold-on-to-jobs-despite-blatant-mi

[8] U.S. Environmental Protection Agency, Office of Inspector General, "OIG Investigations of Employee Misconduct

- A Postal Service employee was arrested on her lunch break outside of her workplace for smoking marijuana and possessing cocaine. She was subsequently convicted, and the Postal Service determined she had brought the cocaine into the postal facility. The Postal Service attempted to fire the employee, but the MSPB mitigated the penalty to a 90-day suspension.[9]

The Federal Employee Viewpoint Survey (FEVS) shows that Federal employees themselves are frustrated with the government's failure to address poor performance. Each year FEVS asks Federal employees if they believe that in their work unit "steps are taken to deal with a poor performer who cannot or will not improve?" Federal employees consistently give this question some of the most negative responses of the entire survey. In 2019 only 34 percent of Federal employees agreed with this statement.[10] Similarly, most Federal employees tell the FEVS that poor performers remain in their work unit and continue to underperform.[11]

Removal Restrictions Undermine the Federal Service

Extensive removal restrictions undermine the Federal services. An extensive line of research finds that stringent employment protections reduce employee productivity: some workers do not work as hard when they know they cannot be fired.[12] Making it prohibitively difficult for agencies to remove all but the worst offenders both prevents agencies from removing poor performers and encourages shirking. This makes it harder for agencies to serve the American people. Strong removal protections also reduce the government's democratic accountability. Voters may not get the policies they voted for if poorly performing bureaucrats fail to implement them effectively.

Congress has recognized that the merit system needs performance accountability. Merit System Principle 6 provides that "employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards."[13] Unfortunately the Federal government does not uphold this principle.

Removal Protections Contravene Original Civil Service Vision

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at the U.S. Environmental Protection Agency," Statement of Patrick Sullivan, Assistant Inspector General for Investigations before the Committee on Oversight and Government Reform, U.S. House of Representatives, May 18, 2016, Page 4. Available online at https://www.epa.gov/sites/production/files/2016-05/documents/_epaoig_statement_of_sullivan_hogr_hearing_5-18-16.pdf

[9] *Maria Theresa Boucher v. United States Postal Service*, 118 M.S.P.R. 640 (2012). Available online at https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=773207&version=776110&application=ACROBAT

[10] Office of Personnel Management, "Federal Employee Viewpoint Survey: 2019," page 3. Available online at https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-management-report/governmentwide-report/2019/2019-governmentwide-management-report.pdf

[11] *Ibid*, Appendix D, page 32.

[12] Pedro S. Martins, "Dismissals for Cause: The Difference That Just Eight Paragraphs Can Make," *Journal of Labor Economics*, Volume 27, Number 2. April 2009; Vincenzo Scoppa, "Shirking and employment protection legislation: Evidence from a natural experiment," *Economic Letters*, Volume 107, Issue 2. May 2010. Pages 276-280; Vincenzo Scoppa & Daniela Vuri, "Absenteeism, unemployment and employment protection legislation: evidence from Italy," *IZA Journal of Labor Economics*, Vol. 3, No. 3 (2014); Regina T. Riphahn, "Employment protection and effort among German employees," *Economics Letters*, Volume 85, Issue 3 (2004). Pages 353-357; Andrea Ichino and Regina T. Riphahn, "The Effect of Employment Protection on Worker Effort: Absenteeism during and after Probation," *Journal of the European Economic Association*, Vol. 3, Issue 1 (2005).

[13] 5 U.S.C. §2301(b)(6)

Extensive removal protections contravene the original vision for the merit service. The Pendleton Act of 1883 replaced the patronage or "spoils" system with a professional civil service. The act provided for competitive examinations and merit-based hiring for certain Federal positions.[14] However, the Pendleton Act did not interfere with the President's authority to fire Federal employees. While the Act prohibited removing employees because they made – or failed to make – political contributions, it did not otherwise interfere with the President's general authority to remove employees.[15]

Civil service reformers intentionally avoided impeding the removal process. They wanted to eliminate patronage by regulating hiring, while leaving the government free to remove poor performers. George William Curtis was the President of the National Civil Service Reform League and the Chair of President Grant's Civil Service Commission. He explained that:

> "Having annulled all reason for the improper exercise of the power of dismissal, 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, by requiring a virtual trial at law before an unfit or incapable clerk can be removed."[16]

More succinctly, Curtis observed that "if the front door [is] properly tended, the back door [will] take care of itself."[17] The Pendleton Act effectuated this vision.

The Civil Service Commission subsequently requested a Presidential order requiring agencies to explain their reasons for removing employees, as a safeguard against politically-motivated removals. In 1897 President McKinley issued an Executive Order providing that civil servants could only be removed "for just cause, upon written charges … of which the accused … shall have an opportunity to make defense."[18] The Civil Service Commission became concerned that McKinley's order could be interpreted as requiring a trial to determine if "just cause" existed. The Civil Service Commission feared that "to require this [a trial] would not only involve enormous labor, but would give a permanence of tenure in the public service quite inconsistent with the efficiency of that service." Consequently, and upon the Civil Service Commission's recommendation, President Theodore Roosevelt issued a follow-up executive order in 1902 clarifying that "just cause" means any cause that promotes the efficiency of the service and that trials or examination of evidence were unnecessary to remove an employee.[19]

In 1912 President Taft issued an executive order reaffirming the McKinley and Roosevelt orders. The Civil Service Commission explained that the Taft order required only a notice and right to reply – not any sort of trial – before removing an employee, and this was necessary for efficient government:

> "The rules are not framed on a theory of life tenure, fixed permanence, nor vested right in office. It is recognized that subordination and discipline are essential, and that therefore dismissal for just cause shall be not unduly hampered ... Appointing officers, therefore, are entirely free to

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[14] The Pendleton Act initially covered about 10 percent of the executive branch workforce, but its coverage was rapidly extended to encompass more positions. By the mid-1890s it covered approximately half of executive branch employees.

[1515] Gerald E. Frug, "Does the Constitution Prevent the Discharge of Civil Service Employees?," University of Pennsylvania Law Review, vol. 124 (1976), page 955. Online at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4997&context=penn_law_review

[16] *Ibid*.

[17] Paul P. Van Riper, History of the United States Civil Service (Evanston, IL: Row, Peterson, 1958), page 102.

[18] Frug, "Does the Constitution Prevent the Discharge of Civil Service Employees?," page 956.

[19] *Ibid*, page 957 quoting 19 U.S. Civil Service Commission Annual Report 76 (1902).

> make removals for any reasons relating to the interests of good administration, and they are made the final judges of the sufficiency of the reasons ... The rule is merely intended to prevent removals upon secret charges and to stop political pressure for removals .... No tenure of office is created except that based upon efficiency and good behavior."[20]

Congress quickly enacted legislation that mirrored President Taft's executive order almost verbatim. This law, which became known as the Lloyd-LaFollette Act, required agencies to provide employees with a notice and an opportunity to respond before removal, while expressly providing that "no examination of witnesses nor any trial or hearing shall be required."[21] Lloyd-LaFollette statutorily codified the existing civil service policy that prohibited removals for narrowly defined purposes (i.e. political activities) while otherwise giving agencies free rein to define and assess when cause for removal existed.[22]

Strict removal restrictions arose in the modern era. Section 14 of the Veterans Preference Act of 1944 gave veterans the right to an in-person hearing over proposed removals, as well as the right to appeal adverse decisions to the Civil Service Commission. In January 1962 President Kennedy issued an Executive Order giving all Federal employees in-person hearings and allowing them to appeal adverse decisions within their agency.[23] In 1974 President Nixon shifted the appeals venue to the Civil Service Commission, giving all Federal employees the same appeals rights that Congress previously gave veterans.[24] The Civil Service Reform Act of 1978 codified external agency appeals in statute, creating the system that largely exists today. Extensive removal restrictions thus arose well after the United States transitioned from a patronage to a merit system. The original civil service reformers believed that expeditious removals were essential to maintaining a merit system.

State Civil Service Reforms Have Removed Employment Protections

Many state civil service systems also make removing state employees prohibitively difficult. Several states have addressed the problems these systems create by eliminating removal protections for their state workforces. For example:

- Arizona enacted legislation in 2012 making most state government employees at-will;
- Florida removed employment protections for their state equivalent of the Senior Executive Service in 2001
- Georgia's Democratic Governor and legislature enacted legislation that put state employees hired after July 1, 1996 into a new civil service system without employment protections;
- Missouri enacted legislation in 2018 making the vast majority of state government employees functionally at-will; and
- Texas abolished its centralized civil service system in 1985.

These reforms have not brought the spoils system back to state government. Evaluations of these reforms report mixed-to-positive effects, with managers reporting particularly positive impacts on state employee responsiveness to the goals and priorities of state administrators.[25] Arizona, Florida, Georgia, Missouri,

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[20] *Ibid*, page 957, quoting 29 U.S. Civil Service Commission Annual Report 21-22 (1913).
[21] Act of Aug. 24, 1912, ch. 389, § 6, 37 Stat. 555.
[22] Frug, "Does the Constitution Prevent the Discharge of Civil Service Employees?," page 958.
[23] Executive Order 10987 of January 17, 2962.
[24] Executive Order 11787 of June 11, 1974.
[25] Jerrell Coggburn, "At-Will Employment in Government: Insights from the State of Texas," *Review of Public Personnel Administration*, Vol. 26, No. 2 (June 2006). Pages 158-177; Charles Gossett, "The Changing Face of Georgia's Merit System: Results from an Employee Attitude Survey in the Georgia Department of Juvenile Justice," *Public Personnel Management*, Vol. 32, No. 2 (June 2003). Pages 267-278; Edward French and Doug Goodman,

and Texas continue to operate highly effective, professional state workforces without extensive removal protections.

Executive Order 13839 - Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles

The Trump administration set out to address the longstanding problem of inadequate performance accountability in the Federal government. On May 25, 2018 President Trump signed Executive Order 13839 on Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles (E.O. 13839).

The executive order was designed to streamline the typically cumbersome process for removing employees for poor performance or misconduct. Regulations and agency practices implementing the civil service laws have made the removal process even harder than Congress intended. For example, the Civil Service Reform Act of 1978 (CSRA) added Chapter 43 to title 5, United States Code. Chapter 43 was expressly intended to make firing poor performers easier. However, agencies remove only a few hundred employees annually under Chapter 43.[26] Managers report that Chapter 43 is harder to use than the previously existing Chapter 75 procedures, and most performance-based removals continue to occur under Chapter 75.[27] CSRA implementation has fallen well short of what Congress intended.

E.O. 13839 was designed to remove unnecessary regulatory or procedural accretions that prevent agencies from removing problematic employees expeditiously. For example:

- *30 Day PIPs*. Chapter 43 allows agencies to remove employees for poor performance after providing them with an "opportunity to demonstrate acceptable performance." During these opportunity periods, colloquially known as "performance improvement periods" or "PIPs", managers must extensively document employee performance and work with the employee. PIPs typically last 60 to 120 days. However, longer PIPs do not facilitate removals. Under Chapter 43, if an employee's performance relapses within 12 months of the start of the PIP the agency can remove them, even if the PIP has concluded. Longer PIPs merely increase the administrative burden on supervisors. So section 4(c) of E.O. 13839 standardized PIPs at 30 days, cutting approximately two months off the time required to use Chapter 43 procedures.

- *Discretion in Applying Penalties*. A series of Merit System Protection Board (MSPB) cases required uniform-discipline standards agency wide.[28] The MSPB held that if an agency did not remove one employee for an infraction, then the agency could not remove any other employee anywhere else in the agency for a similar infraction. This doctrine is why the MSPB ordered the Postal Service to reinstate the employee who brought cocaine into her workplace. Agency-wide

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"Assessing the Temporary Use of At-will Employment for Reorganization and Workforce Reduction in Mississippi State Government," *Review of Public Personnel Administration*, Vol. 31, No. 3 (2011). Pages 270-290; Juggin Kim and J. Edward Kellough, "At-Will Employment in the States: Examining the Perceptions of Agency Personnel Directors," *Review of Public Personnel Administration*. Vol. 34, No. 3 (2014). Pages 218-236.

[26] Government Accountability Office, "Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance," page 25.

[27] U.S. Merit Systems Protection Board, *Issues of Merit*, "Why is the CSRA's Provision for Removing Poor Performers Not Used More Often," August 2018, page 4. Available online at https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1540524&version=1546183&application=ACROBAT

[28] See *Woebcke v. DHS*, 114 M.S.P.R. 100 (2010), *Lewis v. DVA*, 113 M.S.P.R. 657 (2010), and *Villada v. USPS*, 115 M.S.P.R. 268 (2010)

discipline standards both made it hard for agencies to remove bad employees and discouraged agencies from ever showing lenience, for fear of handicapping their ability to remove future problematic employees. Section 2(c) of E.O. 13839 directed OPM to issue regulations clarifying that discipline should be tailored to the facts and circumstances of the case, and agencies are not required to apply uniform penalties agency-wide.

- *Grievance Arbitration*. The CSRA allows union-represented employees to appeal removals through either the MSPB or a collectively bargained grievance procedure.[29] Federal unions and agencies jointly select grievance arbitrators. The joint selection process gives arbitrators a strong incentive to "split the baby" and give both sides a partial win to remain acceptable to both parties for future cases. In removal cases, these incentives encourage arbitrators to agree the employee merited discipline, but downgrade the penalty from removal to something less severe. This make grievance arbitration a hostile forum for agencies seeking to remove poor performers. MSPB administrative judges overturn agency decisions less than 10 percent of the time.[30] However, grievance arbitrators require agencies to reinstate terminated employees 60 percent of the time.[31] Arbitral hostility to removals is especially problematic because it is very difficult for agencies to appeal arbitral awards concerning adverse actions. The grievance arbitration process significantly impedes performance accountability. So section 3 of E.O. 13839 directed agencies to seek to exclude removal cases from the grievance process when they renegotiate their collective bargaining agreements.

Executive Order 13957 – Creating Schedule F in the Excepted Service

Poor performance is problematic wherever it occurs. But poor performance by employees who influence agency policy is especially problematic. The effects of poor performance by a "line" employee is generally limited and localized; poor performance by a policy-influencing employee impairs the effectiveness of the entire agency. For example, a poorly performing IRS agent may cost the Federal government revenue in the tax audits that he or she conducts. But a poorly performing IRS regulation-writer could cost the government revenue across every audit the IRS conducts. Consequently, it is especially important for agencies to be able to hold employees in policy-influencing positions accountable for their performance.

Executive Order 13957 on Creating Schedule F in the Excepted Service (E.O. 13957) addressed this problem. The Executive Order created a new Schedule F in the excepted service for career employees in confidential, policy-making, policy-determining, or policy-advocating positions. Under title 5 employees hired into or transferred to schedule F could not appeal their removal.[32] E.O. 13957 would thus allow agencies to quickly remove policy-influencing employees, such as regulation writers for poor performance.

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[29] 5 U.S.C. §7121(e)(1)
[30] U.S. Merit Systems Protection Board, "Annual Report for FY 2016," January 18, 2017, Table 5. Available online at https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1374269&version=1379643&application=ACROBAT
[31] Author's calculations based on a sample of arbitral awards submitted to the Office of Personnel Management pursuant to E.O. 13836.
[32] 5 U.S.C. §7511(b)(2)

Schedule F paralleled the successful civil service reforms in Georgia, Florida, and other states, but applied only to a small minority of Federal employees in positions of heightened responsibility. I estimate that Schedule F would have covered between 1 and 3 percent of the Federal workforce.

Schedule F was designed to enable to agencies to hold policy-influencing career employees accountable while maintaining the important distinction between career and political appointees. Under the order Schedule F employees maintain their positions between administrations. Section 6 of E.O. 13957 required agencies to ensure they did not base Schedule F hiring or firing on politics or other impermissible factors such as race, sex, or marital status.

E.O. 13957 thus restored the original policy of the Pendleton Act: it gave agencies broad discretion to remove poorly performing employees from policy-influencing positions, while keeping political considerations out of the equation. The Civil Service reformers wanted to stop patronage-based Federal hiring, not insulate career employees in policy-influencing jobs from accountability for their actions.

Proposed Legislation Raises Constitutional Concerns

President Biden rescinded E.O. 13957 shortly after taking office, eliminating Schedule F. Members of this committee have introduced legislation to prevent a future administration from reintroducing Schedule F. The Preventing a Patronage System Act (PAPSA) would prevent the executive branch from creating new excepted service schedules or modifying the scope of currently existing ones. This would prevent a future administration from eliminating removal protections for policy-influencing career employees.

PAPSA's title is historically inapposite: the civil service reformers believed a merit system required a straightforward dismissal process. Setting that aside, PAPSA also raises constitutional concerns that the committee should carefully evaluate. It may unconstitutionally constrain the President's authority to supervise the executive branch.

The Supreme Court has explained that:

> "Under [the] Constitution, the executive Power—all of it—is vested in a President who must take Care that the Laws be faithfully executed. Because no single person could fulfill that responsibility alone, the Framers expected that the President would rely on subordinate officers for assistance … as a general matter the Constitution gives the President 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."[33]

The Supreme Court recently explained that it has recognized only two narrow exceptions to the President's general authority to fire executive branch officers -- "one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority -- [these exceptions] represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power."[34]

PAPSA would require the President to maintain civil service protections for career employees in policy-influencing positions. However, these positions do not appear to fall under either exception. They are obviously not heads of multimember expert agencies. And these positions are deeply involved in policymaking. Schedule F applied to the small minority of Federal positions whose duties include

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[33] *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. ___ (2020) (cleaned up)
[34] *Ibid.*

substantive work in agency policy development.[35] It is not clear that the Supreme Court would uphold legislation shielding officials with substantive policy-related duties from Presidential control.

Even if the courts find Schedule F employees fall within the second exception, PAPSA raises an additional constitutional concern at independent agencies. The Supreme Court held in *Free Enterprise Fund v. Public Company Accounting Oversight Board* that Congress cannot interpose multiple layers of for-cause removal protections between inferior officers and the President.[36]

In that case the Court considered the Public Company Accounting Oversight Board (PCAOB), an entity the Sarbanes-Oxley Act created within the Securities and Exchange Commission (SEC). The President may only remove SEC Commissioners for good cause. Under Sarbanes-Oxley, SEC Commissioners could in turn only remove PCAOB Members for good cause. The Supreme Court held that multiple layers of removal protections unconstitutionally insulated PCAOB members from Presidential oversight.

In his dissenting opinion, Justice Breyer observed that many civil servants in independent agencies are inferior officers as the definition of inferior officer is "unusually broad." Justice Breyer worried that the *Free Enterprise* holding would undermine the validity of their official actions because these officials also enjoy multiple layers of for-cause removal protections.[37] The majority opinion, authored by Chief Justice Roberts, explained that these fears were misplaced because:

> "Senior or policymaking positions in government may be excepted from the competitive service to ensure Presidential control, see 5 U. S. C. §§2302(a)(2)(B), 3302, 7511(b)(2) … Nothing in our opinion, therefore, should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies."[38]

Under *Free Enterprise* the civil service system raises no constitutional concerns at independent agencies precisely because the President can collapse the multiple layers of removal protections to the one level granted to agency heads. PAPSA would amend title 5 to prevent the President from doing so. As a result the civil service laws would appear to effectively – and unconstitutionally – shield many inferior officers at independent agencies from Presidential control. Enacting PAPSA could thus vitiate civil service protections for far more officials at independent agencies than would have lost them under Schedule F.

Executive Order 13932 - Modernizing and Reforming the Assessment and Hiring of Federal Job Candidates

President Trump signed Executive Order 13932 (E.O. 13932) to modernize Federal hiring by requiring agencies to use competency-based skills assessments. Currently most agencies use subjective self-assessments. These subjective self-assessments do little to help agencies identify skilled applicants. E.O. 13932 will reduce subjectivity in the hiring process and promote hiring based on skill and merit.

E.O. 13932 further prohibits agencies from using educational attainment as a proxy for an applicant's skills unless that education is directly relevant to their prospective job. This will ensure the Federal government does not overlook qualified applicants simply because they do not possess a college diploma.

Objective skills assessments were one of the tools most often - and most effectively - employed by civil service reformers to dismantle the spoils system at the end of the 19th Century. By returning to a more

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[35] Executive Order 13957, §5(c)(1)
[36] *Free Enterprise Fund v. Public Company Accounting Oversight Bd* ., 561 U.S. 477 (2010)
[37] To illustrate, the agency heads at such independent agencies enjoy for-cause removal protections, while civil servants beneath them also enjoy statutory for-cause removal protections.
[38] *Free Enterprise Fund v. Public Company Accounting Oversight Bd* ., 561 U.S. 477 (2010)

quantifiable and less subjective method of hiring, the Trump Administration followed in the footsteps of those who ended the patronage system.

Executive Order 13836 -- Developing Efficient, Effective, and Cost-Resducing Approaches To Federal Sector Collective Bargaining

The Federal Service Labor-Management Relations Statute governs most collective bargaining in the Federal sector.[39] The Statute expressly provides that Federal collective bargaining should occur in a manner consistent with "effective and efficient government."[40] Unfortunately that does not always happen. Union contracts can create needless inefficiency. For example:

- Some lawmakers have criticized the Department of Veterans Affairs (VA) for not filing vacant positions quickly enough. VA's collective bargaining agreement with the American Federation of Government Employees (AFGE) unnecessarily prolongs the hiring process. The Office of Personnel Management recommends that agencies post vacancy announcements for 5 calendar days, and a maximum of 10 calendar days.[41] VA's collective bargaining agreement nonetheless requires the Department to post vacancies for at least 15 *workdays* (three weeks).[42]

- During the coronavirus pandemic VA implemented a COVID-19 screening tool for employees to use prior to starting work. The tool was designed to help minimize the spread of COVID-19 in VA facilities. AFGE filed a grievance over VA's deploying the tool without collectively bargaining over it. AFGE alleged that using the screening tool before negotiations concluded violated multiple provisions of their contract. AFGE demanded VA suspend the screening tool until negotiations concluded.[43]

Furthermore, the Federal collective bargaining process itself is protracted and expensive. The FSLMRS requires agencies to pay the salaries of both their own and the union's negotiations. This gives unions little incentive to bargain efficiently. As a result renegotiating Federal collective bargaining agreements typically takes years. For example, VA spent eight years negotiating their current master agreement with AFGE (between 2003 and 2011). The Environmental Protection Agency began renegotiating its contract with its largest local in May 2010. Negotiations over that contract have yet to conclude.[44] The Social Security Administration (SSA) took two years to negotiate its current master contract with AFGE.[45] Federal filings show that both VA and SSA spent approximately $2 million on negotiating their current

[39] There are a few exceptions. For example, employees of the Postal Service are covered by a separate statute, and Transportation Security Administration employees are covered by an administrators' determination.
[40] 5 U.S.C. §7101(b)
[41] U.S. Office of Personnel Management, "Hiring Elements End-to-End Hiring Roadmap." Available online at https://www.opm.gov/policy-data-oversight/human-capital-management/hiring-reform/hiringelements.pdf
[42] Master Agreement between the Department of Veterans Affairs and the American Federation of Government Employees, 2011. Article 23, Section 8(H)(1). Online at https://www.va.gov/LMR/docs/Agreements/AFGE/Master_Agreement_between_DVA_and_AFGE-fin_March_2011.pdf
[43] National Grievance NG-08/07/20 filed by the National Veterans Affairs Council, American Federation of Government Employees against the Department of Veterans Affairs on August 7, 2020.
[44] See *Environmental Protection Agency and American Federation of Government Employees*, 2020 FSIP 051 (2020) for the bargaining history of this unit. Available online at https://www.flra.gov/node/78975
[45] See *Social Security Administration and AFGE*, 2019 FSIP 019 (2019), at https://www.flra.gov/node/78699 .

contracts.[46] Private sector collective bargaining is much more efficient. For example, General Motors and the United Auto Workers spent only 3 months negotiating their latest contract.[47]

Executive Order 13836 on Developing Efficient, Effective, and Cost-Reducing Approaches To Federal Sector Collective Bargaining (E.O. 13836) sought to reform the Federal collective bargaining process to address these problems. The order directed agencies to identify CBA provisions that wasted funds or interfered with their missions, then renegotiate their contracts to eliminate or improve them. The order also directed agencies to negotiate expeditiously, setting a target for 6 months of negotiations instead of the years that negotiations typically take.

E.O. 13836 helped agencies accomplish these goals by establishing an inter-agency working group to share best practices and model contract language between agencies. Federal sector unions coordinate bargaining activities between locals extensively; prior to E.O. 13836 agencies did not. By sharing information the labor relations working group leveled the playing field and helped agencies get better deals.

E.O. 13836 also required agencies to submit CBAs to OPM for publication in a centralized online database. This reform promoted transparency and enabled the public to see what agencies were agreeing to.

Executive Order 13837 -- Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use

Taxpayer-funded union time is a particularly egregious waste of tax dollars. Federal law allows Federal employees to spend part or all of their duty time working for their union instead of for their agency.[48] The Congressional Budget Office estimates that 1,600 Federal employees spend a majority of their duty hours working for a union while collecting their full agency salary.[49] Many of these employees work for a union full-time, performing no agency business. For example, over 470 VA employees – including doctors and nurses – spent 100 percent of their duty hours on union time in 2018.[50] While VA paid these medical professionals to treat veterans, they spent all their working hours on union business.

The Office of Personnel Management estimated that agencies paid Federal employees $177 million to perform union business in FY 2016.[51] Worse, employees who spend years performing only union business lose the ability to work for their agency as their skills and experience atrophy. This is a particularly serious concern for medical personnel, whose competencies will lapse if they go too long without treating patients.

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[46] See *U.S. Department of Veterans Affairs and AFGE*, 2020 FSIP 022 (2020) and *ibid*.
[47] Negotiations began in July, 16 2019 and concluded with a ratified contract on October 25, 2019.
[48] 5 U.S.C. §7131
[49]Congressional Budget Office, "Cost Estimate: H.R. 1364 - the Official Time Reform Act of 2017," November 29, 2018. Available online at https://www.cbo.gov/system/files?file=2018-11/hr1364.pdf
[50] U.S. Department of Veterans Affairs, News Release, "U.S. Department of Veterans Affairs Secretary Clarifies Collective Bargaining Authority Related to Professional Conduct, Patient Care," August 17, 2018. Available online at https://forum.ltgof.net/articles/government/1582-u-s-department-of-veterans-affairs-secretary-clarifies-collective-bargaining-authority-related-to-professional-conduct-patient-care
[51] U.S. Office of Personnel Management, "Official Time Usage in the Federal Government: Fiscal Year 2016," May 2018. Available at https://www.opm.gov/policy-data-oversight/labor-management-relations/reports-on-taxpayer-funded-union-time/reports/2016-official-time-usage-in-the-federal-government.pdf

E.O. 13837 on Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use (E.O. 13837) made several reforms to rectify these abuses and reduce excessive union time expenditures.

First, the order required Federal employees to spend at least three-quarters of their working hours performing agency business, with no more than one-quarter of their time spent on union work. This reform ensured Federal employees would maintain the skills necessary to perform their jobs. The importance of this requirement was unfortunately demonstrated at the Social Security Administration. After President Trump signed E.O. 13837 the President of AFGE Council 220 retired from his 100 percent union time position at SSA. He told reporters that he no longer remembered how to work for his agency:

> "[I]f today I had to go back to my desk, I haven't done my job in years. I don't have any clue about how to do my claims work job at this moment, because my job has been representing Social Security employees. I'd have to be retrained."[52]

Second, E.O. 13837 directed agency negotiators to adopt government-wide best practices for efficient union time use. OPM data shows that unions at the Departments of Defense, State, and Interior used less than one hour of taxpayer-funded union time per bargaining unit employee in 2016.[53] The order directed all agencies to target union time rates of one hour per bargaining unit employee, utilizing union time as efficiently as these agencies.

Third, the order required agencies to track and approve all union time use. Many agencies grant union representatives blanket allocations of union time (e.g. 75 percent of their duty hours) without monitoring how this time is used. Indeed, some agencies do not even track how much union time their employees claim.[54] The lack of oversight encourages abuses. For example, a union whistleblower at the Social Security Administration testified that the leadership of his AFGE Local offered him a 100 percent union time position with no duties required, in exchange for not challenging the local's leadership in an upcoming union election and remaining silent about union abuses.[55] Requiring employees to seek pre-approval for union time use prevents such abuses.

Fourth, E.O. 13837 prohibited particularly wasteful uses of union time. In particular, it prevented Federal employees from lobbying Congress or pursuing grievances on union time. Taxpayers should not subsidize union political activism. And paying unions to file grievances encourages filing meritless or nuisance complaints. Requiring unions to internalize the cost of bringing grievances encourages them to grieve only substantive issues.

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[52] Nicole Ogrysko, "SSA tells union to leave by month's end, details new official time cut," Federal News Network, July 10, 2018. Available online at https://federalnewsnetwork.com/unions/2018/07/ssa-tells-union-to-leave-by-months-end-details-new-official-time-cuts/

[53] U.S. Office of Personnel Management, "Official Time Usage in the Federal Government: Fiscal Year 2016," Appendix B.

[54] See for example U.S. Government Accountability Office, "VA Could Better Track the Amount of Official Time Used by Employees," Report GAO-17-105, January 24, 2017, available online at https://www.gao.gov/products/GAO-17-105 and National Labor Relations Board, Office fo Inspector General, "Official Time for Union Activities," Report No. OIG-AMR-62-10-01, December 2009. Available online at https://www.nlrb.gov/sites/default/files/attachments/pages/node-151/oig-amr-62-10-010.pdf

[55] Statement of John Reusing, Claims Authorizer, Division of International Operations, and Third Vice-President, American Federation of Government Employees Local 1923, Baltimore, Maryland, in *Hearing on Labor-Management Relations at the Social Security Administration*, Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, July 23, 1998.

Fifth, the order required agencies to charge unions rent for their use of Federal office space and prohibited agencies from reimbursing expenses incurred performing non-agency business. Previously agencies would give Federal unions office space free of charge, and would often cover their travel expenses. The order eliminated these subsidies to give taxpayers a better deal.

The White House estimated these reforms would save taxpayers over $100 million annually when fully implemented.[56] Savings quickly materialized. The Office of Personnel Management found that overall union time expenses dropped from $177 million in 2016 to $135 million in 2019 – savings of approximately $42 million.[57]

Litigation Background

Federal unions filed suit shortly after President Trump issued E.O.'s 13836, 13837, and 13839. On August 25, 2018 Judge Ketanji Brown Jackson, an Obama appointee on the D.C. District Court, issued a ruling enjoining the administration from enforcing central provisions of the executive orders.[58] Judge Jackson held that she had jurisdiction to hear the case and that provisions of the orders violated the unions' FSLMRS collective bargaining rights.

The Trump administration appealed, and on July 16, 2019 a unanimous D.C. Circuit panel reversed and vacated Judge Jackson's decision.[59] The panel unanimously held that the district court lacked jurisdiction to hear the case. Under Supreme Court's *Thunder Basin* framework, litigants must generally exhaust administrative procedures before going to Federal court.[60] The D.C. Circuit ruled that unions had to pursue their complaints before the Federal Labor Relations Authority (FLRA), and could appeal an adverse ruling to the D.C. Circuit, but they could not proceed directly to district court. The D.C. circuit did not reach the merits of the case. The unions requested en banc reconsideration, but no D.C. Circuit judge supported that request. The D.C. Circuit issued the mandate formally dissolving Judge Jackson's injunction in early October 2019.

Federal unions sought injunctions from other district courts. However, all of these judges followed the reasoning of the D.C. Circuit and held that they lacked subject matter jurisdiction.[61] In December 2020 the FLRA issued its first decision on union challenges to the merits of E.O.'s 13836 and 13837, rejecting union arguments that the orders violated the FSLMRS.[62]

In general, executive orders supersede agency collective bargaining obligations.[63] However, E.O.s 13836, 13837, and 13839 did not abrogate contracts negotiated before they took effect. Several agencies negotiated new collective bargaining agreements with their unions between August 2018 and October 2019, while the executive orders remained enjoined. On October 11, 2019 President Trump issued a

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[56] White House Fact Sheet, "Reforming the Civil Service to Work for the American People," May 25, 2018. Available online at https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-reforming-civil-service-work-american-people/

[57] U.S. Office of Personnel Management, "Taxpayer-Funded Union Time Usage in the Federal Government: Fiscal Year 2019," October 2020. Appendix B. Available online at https://www.opm.gov/policy-data-oversight/labor-management-relations/reports-on-taxpayer-funded-union-time/reports/taxpayer-funded-union-time-fy-2019.pdf

[58] *AFGE, AFL-CIO v. Trump*, 318 F.Supp.3d 370 (D.D.C. 2018)

[59] *AFGE, AFL-CIO v. Trump*, 929 F.3d 748 (D.C. Cir. 2019)

[60] *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994)

[61] See for example *Serv. Emps. Int'l Union Local 200United v. Trump*, 1:19-CV-01073 EAW (W.D.N.Y. Oct. 3, 2019)

[62] *Patent Office Professional Association and U.S. Patent and Trademark Office*, 71 FLRA 1223, December 23, 2020.

[63] 5 U.S.C. §7117(a)(1)

Presidential Memorandum clarifying that agencies could give full effect to contracts negotiated during this period.

Biden Actions

On January 22nd President Biden rescinded E.O.'s 13836, 13837, 13839, and 13957, as well as the October 11, 2019 Presidential Memorandum.[64] As a result the inter-agency labor relations working group was disbanded, Federal employees may now spend more than 25 percent of their time performing union business. President Biden expressly directed agencies to suspend their systems for monitoring official time use and directed OPM to rescind their regulations streamlining the dismissal process. President Biden further directed agencies to renegotiate union contracts to undo the efficiencies negotiated by the Trump administration.[65] These directives will create a less efficient, more bureaucratic workforce that wastes taxpayer dollars. They will also aggravate Federal employee frustrations with inadequate performance accountability in the Federal workforce.

Federal Pay and Benefits

Most Federal employees earn more than they would in the private sector. Alan Krueger, the former Chairman of President Barack Obama's Council of Economic Advisers, documented this pay premium in the 1980s.[66] Academic researchers have repeatedly found similar results since.[67] Most recently, the Congressional Budget Office (CBO) found that Federal employees receive on average 17 percent greater total compensation than they would earn in the private sector.[68]

CBO concluded that both Federal wages and benefits are inflated, but that most of the compensation premium comes from the Federal benefits package. While Federal employees receive 3 percent higher average wages than comparable private sector workers, their benefits package is 47 percent greater. Federal benefits include:

- The Thrift Savings Plan, a defined-contribution style retirement benefit with a 5 percent Federal match for employee contributions;
- The Federal Employees Retirement System (FERS) annuity, a defined-benefit style retirement benefit;
- Paid leave benefits that include, for an employee with 5 years of service, 20 paid vacation days, 13 paid sick leave days, and all 10 Federal holidays; and
- Retiree health benefits.

These benefits are more generous than large private sector employers offer. Virtually no private employers offer both a defined-benefit and a defined-contribution retirement plan, and very few offer retiree health benefits. Federal employees also receive approximately two weeks more paid leave a year

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[64] Executive Order 14003 of January 22, 2021.
[65] *Ibid*, sections 3(e) and 3(f).
[66] Alan B. Krueger, "Are Public Sector Workers Paid More than Their Alternative Wage? Evidence from Longitudinal Data and Job Queues," in Richard B. Freeman and Casey Ichniowski, eds., When Public Sector Workers Unionize (Cambridge, MA: National Bureau of Economic Research, 1988), http://www.nber.org/chapters/c7910.pdf
[67] For an overview of this literature, see Robert Gregory and Jeff Borland, "Public Sector Labor Markets," in Orley C. Ashenfelter and David Card, eds., Handbook of Labor Economics (Amsterdam: Elsevier, 1999), Vol. 3A, Chap. 31.
[68] Congressional Budget Office, "Comparing the Compensation of Federal and Private Sector Employees, 2011 to 2015," April 2017, at https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/52637-federalprivatepay.pdf

than similarly situated private sector workers.[69] The Federal compensation premium costs taxpayers approximately $44 billion a year.[70]

CBO also found that these average figures mask considerable variation within the Federal workforce. Some Federal employees, particularly the most skilled workers, acceot lower compensation than their skills would command in the private sector. Other Federal workers enjoy a compensation premium of 50 percent or more.[71]

Promoting Equitable Federal Compensation

The Trump administration's budgets proposed reforms that would promote equitable Federal compensation for Federal employees, while following leading practices in the private sector and keeping the Federal government a first class employer. The Trump administration also recognized that some high performing Federal employees are underpaid. Trump administration proposals to modernize Federal compensation included:

- Suspending or limiting the annual COLA-type across-the-board pay Federal pay increase (while this proposal is often termed a pay-freeze, that terminology is inaccurate as most Federal employees would continue to receive seniority-based pay increases);
- Increasing funds available for on-the-spot and ratings-based performance awards.
- Having employees and their employing agency pay an equal share of the employee's FERS annuity cost;
- Basing annuity calculations on employees' "High–5" salary years instead of "High–3" – a common private sector practice; and
- Transitioning the Federal workforce to a system of consolidated Paid Time Off, instead of separate vacation and sick leave allowances – following an increasingly common and popular practice in the private sector.

Additionally, the President signed legislation giving Federal employees paid parental leave benefits for the first time.

Some members of Congress have proposed legislation that would further enhance Federal benefits relative to the private sector. Such legislation seems inappropriate during the COVID-19 pandemic. Over the past year millions of private sector workers lost their jobs or saw steep cuts in their hours. Many of these workers have not yet found new work or had their hours restored. Scarce funds would be better used helping private sector workers recover from the pandemic than increasing benefits for Federal employees who kept their jobs. If Congress believes that the Federal government should add new benefits to remain a first class employer, Congress should at least offset its cost through offsetting reforms to other Federal benefits.

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[69] James Sherk and Rachel Greszler, "Why it is Time to Reform Compensation for Federal Employees," Heritage Foundation Backgrounder No. 3139, July 27, 2016 at https://www.heritage.org/jobs-and-labor/report/why-it-time-reform-compensation-federal-employees

[70] Author's calculations based on the CBO's estimated 17 percent total compensation premium and Office of Management and Budget data estimating the government will spend $312.8 billion in FY 2021 on the total compensation of the non-Postal executive branch workforce. See Office of Management and Budget, Budget of the United States Government: FY 2021, Analytical Perspectives, Table 5-4., Personnel Pay and Benefits, at https://www.govinfo.gov/content/pkg/BUDGET-2021-PER/pdf/BUDGET-2021-PER.pdf

[71] *Ibid*, page 3.

Conclusion: Trump Reforms Popular in the Federal Workforce

Most Federal employees are frustrated with their agencies' failure to adequately address poor performance. The Trump administration's efforts to address poor performance were consequently quite popular in the Federal workforce. Shortly President Trump signed E.O. 13839 Government Executive Magazine surveyed Federal employees' views on the order. They found that Federal employees supported the administration's efforts to make it easier to fire poor performers by a better than 2-to-1 margin.[72]

FEVS survey data also showed Federal employee job satisfaction rose every year of the Trump administration. In 2016 FEVS showed 66.2 percent job satisfaction. By 2020 Federal employee job satisfaction rose to 71.6 percent.[73] Of the 71 FEVS questions asked in both 2015 and 2019 (the last year of complete survey data), Federal employees reported greater satisfaction on 64 measures and no decrease on the remaining 7 measures.[74] And while Federal employees remain dissatisfied with agency handling of poor performers, their dissatisfaction subsided during the Trump administration. The proportion of Federal employees believing that their agency effectively addresses poor performers rose every year of the Trump administration, going from 29 percent in 2016 to 34 percent in 2019.[75]

President Trump's reforms were popular in the Federal workforce.

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[72] More specifically 51 percent of Federal employees supported "the administration's efforts to make it easier to fire poorly performing employees" while 24 percent opposed those efforts, and another 24 percent were neutral or didn't know about the changes. See Erich Wagner, "Survey: Half of Feds Support White House Attempts to Ease Firing Process," *Government Executive*, June 18, 2018. Online at https://www.govexec.com/management/2018/06/survey-half-feds-support-trump-efforts-firing/148818/

[73] U.S. Office of Personnel Management, Press Release, "OPM Federal Employee Viewpoint Survey: Preview Highlights of Governmentwide 2020 Results," January 19, 2021. Available online at https://www.opm.gov/news/releases/2021/01/opm-federal-employee-viewpoint-survey-preview-highlights-of-governmentwide-2020-results/

[74] Michael Rigas, "Surveys show that civil servants were happy under Mr. Trump," the Washington Post, Letters to the Editor, February 12, 2021.

[75] Office of Personnel Management, "Federal Employee Viewpoint Survey: 2019," page 10. Available online at https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-management-report/governmentwide-report/2019/2019-governmentwide-management-report.pdf