

I write to express serious legal concerns regarding a specific provision of the proposed rule published on April 23, 2025 (90 FR 17182), which delegates final authority over placement into Schedule Policy/Career to the President. This comment addresses the following provision:

“In a structural difference with the original Executive Order 13957, the President—not OPM—will now move positions into Schedule Policy/Career. Pursuant to that Executive Order, agencies will review their workforces and petition OPM to recommend that the President move specific positions into Schedule Policy/Career. OPM will review these petitions and make the recommendations it deems appropriate. However, the President will make the final decision about which positions go into Schedule Policy/Career. That decision will be effectuated by a new executive order issued under Presidential—not OPM—authority.”

This provision raises multiple legal concerns that warrant the immediate reconsideration and withdrawal of this aspect of the proposal.

1. Conflict with the Civil Service Reform Act (CSRA) and Title 5

The Civil Service Reform Act of 1978 (CSRA) assigns the Office of Personnel Management (OPM)—not the President—statutory responsibility to administer the federal civil service. Under 5 U.S.C. §§ 1103 and 1302, OPM is tasked with prescribing regulations to carry out civil service laws, overseeing personnel practices, and ensuring compliance with merit system principles.

By giving the President unilateral authority to move positions into Schedule Policy/Career, the proposal bypasses the regulatory authority that Congress expressly vested in OPM. Civil service rules are not meant to be redefined through executive order alone—particularly not when the effect is to strip career employees of procedural rights.

This shift in authority is not merely procedural. It changes the character of thousands of civil service positions and removes them from statutory protections. Such a structural alteration to the civil service framework requires congressional action or, at a minimum, formal rulemaking by OPM subject to public notice and comment—not unilateral executive fiat.

2. Separation of Powers and Nondelegation Concerns

The proposed rule allows the President to take final action based on agency petitions and OPM review, culminating in a new executive order for each classification change. This raises significant separation of powers concerns:

Civil service protections were created by statute, and changes to those protections should be made by legislative amendment or regulatory action, not individualized executive orders. Allowing the President to decide on a case-by-case basis which career positions lose due process protections under chapters 43 and 75 is a quasi-legislative function, for which the President lacks direct statutory authority.

This approach risks violating the principle established in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), in which the Supreme Court held that the President may not exercise lawmaking power independently of Congress or contrary to statutory limits. Here, the

President is acting outside the bounds of Title 5 by reshaping employee protections without congressional delegation.

3. Lack of Procedural Safeguards and Public Transparency

By empowering the President to classify positions through executive orders, this process evades the requirements of the Administrative Procedure Act (APA), including:

Notice-and-comment rulemaking;

Public availability of rationale and supporting data;

Judicial review of agency action.

Because each decision would be issued as a presidential action rather than a regulatory rule, affected employees and the public would have no opportunity to object, and the action may be insulated from judicial review. This lack of procedural safeguards undermines the transparency, accountability, and fairness required of federal rulemaking and administrative action.

4. Potential for Political Abuse

The proposal's centralization of classification authority in the President—without adherence to OPM's independent processes—opens the door to politically motivated or retaliatory reclassifications of civil servants. Even if agency heads or OPM conduct objective reviews, the final classification decision becomes inherently political when issued directly by the White House.

Such a structure violates the spirit of the Pendleton Act of 1883 and the merit system principles in 5 U.S.C. § 2301, which protect employees from discrimination, retaliation, or removal based on political views or affiliations.

Conclusion

Delegating final classification authority to the President in this manner is contrary to statutory mandates, undermines essential due process rights, and politicizes a system designed to ensure impartial and competent public service. This approach constitutes a major departure from lawful and accepted civil service practice and raises constitutional and statutory red flags.

I strongly urge OPM to revise the proposed rule to ensure that any decisions regarding the placement of positions into Schedule Policy/Career:

Are made exclusively by OPM under formal regulatory procedures;

Comply with Title 5 authorities and the APA;

Preserve appropriate due process and public transparency;

Prevent undue political influence over career positions.