



Peter M. Shane's Public Comment on OPM's Proposed Rule: "Improving Performance, Accountability and Responsiveness in the Civil Service"

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This comment is in opposition to OPM's proposed new rule, which would permit the movement of "policy-influencing positions" in the federal government from the competitive service into a new Schedule Policy/Career (P/C). Under the new rule, persons reclassified as P/C would no longer be entitled to the procedural protections of Chapter 75 of Title 5, United States Code, which are applicable to such adverse employment actions as an agency may initiate "for such cause as will promote the efficiency of the service." Any career professional doing policy-relevant work would now be susceptible to a reclassification making them dischargeable at will.

For reasons well explained in detail by other commenters, the proposed new rule goes beyond the President's statutory authority to provide exceptions from the competitive service. The soundest reading of the relevant portions of Title 5 precludes so radical a change, and if a statutory interpretation "is not the best, it is not permissible." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400, 144 S. Ct. 2244, 2266 (2024). OPM's new interpretation of "positions of a confidential, policy-determining, policy-making, or policy-advocating character" to include career professionals, as well as political appointees, is unpersuasive. Nor can removing tenure protections for career professionals be justified under the President's statutory obligation "to ensure that personnel management is based on and embodies the merit system principles," 5 U.S.C. § 2301(c). Among those principles is Congress's determination that federal "[e]mployees should be—protected against arbitrary action, personal favoritism, or coercion for partisan political purposes." 5 U.S.C. § 2301(b)(8)(A). OPM's P/C proposal would facilitate, rather than prevent arbitrary adverse employment actions. Moreover, the statutory invalidity of OPM's P/C proposal is all the more evident because OPM relies on a very general statutory provision to authorize a transformative and largely unprecedented exercise of regulatory authority on a matter of exceptional economic and political significance. *W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 716 (2022). Neither OPM nor the President has statutory authority to implement Schedule P/C.