



The voice of career federal executives since 1980

June 2, 2025

VIA FEDERAL eRULEMAKING PORTAL
(<http://regulations.gov>)

U.S. Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

RE: Senior Executives Association comments on OPM proposed rule, “Improving Performance, Accountability and Responsiveness in the Civil Service,” RIN 3206-AO80, Docket No. OPM-2025-0004

Dear Acting Director Ezell:

The Senior Executives Association (SEA) is a nonprofit, nonpartisan professional association which represents the interests of career federal executives in the Senior Executive Service (SES), those in Senior Level (SL), Scientific and Professional (ST) and equivalent positions and other senior career federal leaders. Since the association’s founding in 1980, directly following the establishment of the SES as one of the government’s three career personnel services via the Civil Service Reform Act (CSRA) of 1978, SEA has served as “the voice of the SES” before OPM, administrations, courts, and the Congress. Today, the federal government employs nearly 10,000 members of the SES, which includes a majority of career appointees and a smaller portion of political, term, noncareer, and limited appointment SES.

SEA strongly contends that OPM’s proposed rule, “Improving Performance, Accountability and Responsiveness in the Civil Service” (“Schedule P/C”) will not achieve the objective its title suggests. A far more effective and durable approach for the Trump administration would involve taking time and effort to engage in performance management and supervision of the workforce, a typical role for executive leaders and certainly for constitutional officers. In contrast, this rule would make a large portion of the senior ranks of the government workforce “at-will” employees and fireable without due process -- inconsistent with nearly 150 years of bipartisan laws passed by Congress to develop a career federal civil service that has become the model for the free world. OPM’s selective adherence to parts of Title 5, while ignoring the plain language of other provisions of law in this proposed rule, will not result in a higher-performing, accountable, and responsive workforce – in fact, in many ways the opposite is more likely to occur.

The association’s comments are organized as follows:

- 1) Congress has passed successive bipartisan laws over nearly 150 years to codify and strengthen the merit based federal civil service system.
- 2) The Senior Executive Service (SES) was a keystone provision of the CSRA and merit based federal civil service. The proposed rule selectively cites from Title 5 to support its arguments, while obfuscating the plain statutory language in other provisions, including regarding the SES.
- 3) This proposed rule, as with other broader attempts by the administration to change the merit-based federal civil service system, goes too far, contrary to clear Congressional intent and statutory language regarding multiple statutory due process authorities.
- 4) The proposed rule goes too far in stretching recent Supreme Court decisions that impact constitutional officers, to also impact civil servants.
- 5) SEA offers regulatory, policy, and management alternatives based on our 45-year history of advocating improvements in the civil service to address the very issues this proposed rule says Schedule P/C can address.

I. Congress passed the CSRA and established a merit-based career civil service to help faithfully carry out the laws of the nation.

As part of the CSRA, Congress codified the merit system principles.¹² These principles suggest all employees should maintain high standards of integrity, conduct, and concern for the public interest. Also as part of the CSRA, Congress updated and codified the policies and procedures for employee performance and conduct. The CSRA codified civil service employment rights and due process protections for career civil servants in the competitive service, excepted service, and the Senior Executive Service (SES).³ This proposed rule is inconsistent with this history and statutory language, by applying a Supreme Court ruling about principal constitutional officers to also include civil servants; this would advance policies that, if enacted, could strip tens to hundreds of thousands of career federal employees of their rights with no due process.

Congress codified civil service protections for the federal workforce not to protect federal employees from accountability. Congress passed these laws to ensure the delivery of government programs and services are not influenced by partisan political affiliation, nor by political favor. It did so because of demonstrated abuses under the administration of President Richard Nixon to abuse government agencies and programs, primarily to target Americans and members of the other political party. Government is supposed to work for everyone in America, not only those who are part of the party in power. The Oath of Office⁴ that each federal employee takes – the same oath taken by members of the armed forces and all Executive Branch officials – ensures this democratic ideal can be and is delivered upon.

OPM's proposed rule relies significantly on several regulatory comments⁵ from officials who are also known to have been the architects of the original Schedule F and are also understood to be working with the administration now on Schedule P/C and other federal workforce actions. In other words, the same officials who at one time drafted Schedule F, and then commented against

¹ 5 USC § 2301

² [The Merit Systems Principles: Guiding the Fair and Effective Management of the Federal Workforce](#)

³ [What is Due Process in the Federal Civil Service Employment?](#)

⁴ 5 USC § 3331

⁵ [Regulations.gov - Comment from America First Policy Institute](#)

the OPM 2024 rule, are now influencing and involved in this rulemaking. More significantly, many incidents cited in the proposed rule's preamble are largely nothing but a series of anecdotes unsupported by data. The preamble to the rules notes "many" examples of poor performance or cases where career civil servants have advanced personal political or policy preferences, though also notes that "most" employees perform their jobs effectively -- but no objective data are provided.

Rather, the proposed rule claims widespread bureaucratic malfeasance and slow-rolling of administration priorities as justification for Schedule P/C. And yet, there is no evidence on the public docket at the Merit Systems Protection Board (MSPB), Office of Special Counsel (OSC), Equal Employment Opportunity Commission (EEOC), or DOJ Civil Rights Division, that Trump administration officials have attempted to use the authority and procedures available to address alleged conduct and performance issues of federal employees at agencies like the Justice Department, Education, EPA, and more.

The due process rights of civil servants, and the requirement for the government to produce evidence about accusations, help to ensure that an administration is acting fairly and within the law. There is no evidence the Trump administration tried to use the accountability tools available to it in law in the anecdotes the rule cites as evidence supporting the rule. Advancing this rule being made at the same time as administration officials are either unable or unwilling to use lawful tools provided by Congress; instead, the OPM proposal would enable agencies to manage the federal workforce in a manner inconsistent with law.

Congress also passed the CSRA and included within it the establishment of the new Senior Executive Service (SES), to improve career-political relations within the executive branch and to provide for a cadre of professional public service leaders who can help execute the laws of Congress subject to the President's priorities and direction. Congress intentionally created the SES as a career service within the federal civil service system and intended for these employees to support continuity of government and program execution across administrations. The SES system provides administrations flexibility for noncareer and limited term appointments, and for executive reassignment, to achieve their management and policy priorities.

II. Discussion of the Senior Executive Service (SES) as part of the CSRA and federal civil service system, relationship to appointed officials and constitutional officers.

Members of the SES, most of whom are career civil servants, are the critical link between the President's senior political appointees and the rest of the Federal workforce. Congress created the SES for the express purpose of "...ensur[ing] that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality."

While presenting a plan to overhaul the civil service to Congress in March 1978, President Jimmy Carter argued, "A critical factor in determining whether Federal programs succeed or fail is the ability of the senior managers who run them."⁶ But prior to establishing the SES, then-

⁶ President Jimmy Carter, Federal Civil Service Reform Message to the Congress (March 2, 1978) (available through The American Presidency Project).

Chairman of the Civil Service Commission Dr. Alan "Scotty" Campbell, observed, "We could see the dysfunctional effects of the career/noncareer interface."⁷ While career civil servants focused on technical programmatic details, political appointees focused on achieving political priorities and using executive skills to run the agencies. The differing objectives bred tension. In part to address this dichotomy, the President proposed a new Senior Executive Service, "A highly qualified corps of top managers with strong incentives and opportunities to improve the management of the Federal government."⁸

Initial career appointments to the SES are based on merit competition. Federal law requires agencies to establish Executive Resources Boards (ERBs) to oversee and participate in the merit staffing process.⁹ Generally, the process includes widespread public notification of the job announcement, where diverse populations are engaged in the recruitment phase and rating and ranking of applicants by a panel with in-depth knowledge of the job's technical requirements.

While job-specific qualifications are important, the keystone of the SES is executive leadership. Candidates for SES career positions must exhibit professional integrity, broad perspectives, and commitment to the highest ideals of public service. OPM administers independent Qualification Review Boards (QRBs) consisting of senior executive service members who assess the executive core qualifications of SES candidates.¹⁰ All SES candidates must have their executive qualifications certified by an independent QRB before being appointed as career members of the SES. This independent and objective review ensures that the Government is hiring executives with the qualifications needed in today's environment, especially the ability to lead in times of change.

It is often hard to distinguish the role career senior executives play in federal agencies from their support for policy-related activities. Indeed, Congress defined one of the key functional criteria for the SES as "exercises important policy-making, policy-determining, or other executive functions."¹¹ Many SES are indeed engaged in activities that the president's executive actions have sought to increase political accountability over. However, career executives are already supervised and directed by their political agency leadership, who are directly accountable to presidential control.

According to OPM's SES Desk Guide, last updated in December 2020, there are five elements of functional criteria to determine what roles should be classified as SES level.¹²

"Functional criteria. A position meets the SES functional criteria if its incumbent engages in any of the following activities:

- directs the work of an organizational unit;
- is held accountable for the success of one or more specific programs or projects;
- monitors progress toward organizational goals and periodically evaluates and makes

⁷ Maeve P. Carey, CONGR. RSCH. SERV., R41801, *The Senior Executive Service: Background and Options for Reform* 4 (2012).

⁸ President Carter, *supra* note 2.

⁹ 5 U.S.C. 3393(b).

¹⁰ 5 U.S. Code § 3393 ; 5 CFR § 317.502

¹¹ 5 U.S.C. 3132(a)(2).

¹² *OPM Senior Executive Service Desk Guide*, Office of Personnel Manager (December 2020).

appropriate adjustments to such goals;

- supervises the work of employees (other than personal assistants); or
- ***otherwise exercises important policy-making, policy-determining, or other executive functions.*** [emphasis added]

OPM's SES Desk Guide provides further guidance and clarity on classification of executive level roles. Several of the provisions included in OPM's SES Desk Guide make clear that SESers jobs support policy, including the following:

- "Directing the work of an organizational unit includes the responsibility to— assess **policy**, program, and project feasibility;" [emphasis added]
- "A position with **policy-making or policy-determining functions** [emphasis from original OPM document] would be expected to include responsibility for:
 - reviewing staff recommendations of policies developed to affect the organization's mission;
 - considering political, social, economic, technical, and administrative factors with potential impact on the recommended policies; and
 - approving the policies or formally recommending action to the approving official."

As stated in 5 U.S.C. 3131, "It is the purpose of this subchapter to establish a Senior Executive Service to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality."

The law further stipulates several criteria governing the administration of the SES as a third personnel service, all fourteen of which bear repeating in our comments for this regulatory proposal because OPM otherwise selectively cites provisions of the clear statute while ignoring those that do not support its proposal:

- (1) provide for a compensation system, including salaries, benefits, and incentives, and for other conditions of employment, designed to attract and retain highly competent senior executives;
- (2) ensure that compensation, retention, and tenure are contingent on executive success which is **measured on the basis of individual and organizational performance (including such factors as improvements in efficiency, productivity, quality of work or service, cost efficiency, and timeliness of performance and success in meeting equal employment opportunity goals);**
- (3) assure that senior executives are accountable and responsible for the effectiveness and productivity of employees under them;
- (4) recognize exceptional accomplishment;
- (5) enable the head of an agency to reassign senior executives to best accomplish the agency's mission;
- (6) provide for severance pay, early retirement, and placement assistance for senior executives who are removed from the Senior Executive Service for nondisciplinary reasons;
- (7) **protect senior executives from arbitrary or capricious actions;**

- (8) provide for **program continuity and policy advocacy** in the management of public programs;
- (9) maintain a merit personnel system free of prohibited personnel practices;
- (10) ensure accountability for honest, economical, and efficient Government;
- (11) **ensure compliance with all applicable civil service laws, rules, and regulations, including those related to equal employment opportunity, political activity, and conflicts of interest;**
- (12) provide for the initial and continuing systematic development of highly competent senior executives;
- (13) **provide for an executive system which is guided by the public interest and free from improper political interference;** and
- (14) appoint career executives to fill Senior Executive Service positions to the extent practicable, consistent with the effective and efficient implementation of agency policies and responsibilities.

Today, the federal government employs nearly 10,000 members of the SES, the vast majority of whom are career federal executives. There are “two types of positions and four types of appointments in the SES.”¹³

Career Reserved positions are those which, as defined in law, are *“to ensure impartiality, or public’s confidence of impartiality of government.”* These positions can only be filled by career appointees. [emphasis added]

General positions may be filled by any type of SES appointee – career, noncareer, limited term or limited emergency.

Career appointments may be to a General or Career Reserved position; rights of the individual are the same in either case. Incumbents are selected by agency merit staffing process and must have their executive qualifications approved by a Qualifications Review Board (QRB) convened by OPM.

Noncareer appointments are approved by OPM on a case-by-case basis and the appointment authority reverts to OPM when the noncareer appointee leaves the position. Appointments may be made only to General positions and cannot exceed 25% of the agency’s SES position allocation. Governmentwide, only 10% of SES positions may be filled by noncareer appointees.

A **Limited Term appointment** may be made for up to 3 years, is nonrenewable and must be to an SES General position which will expire because of the nature of the work (e.g., a special project).

A **Limited Emergency appointment** is also a nonrenewable appointment, may be for up to 18 months, and must be to an SES General position established to meet a bona-fide, unanticipated, urgent need.

Since January 20, 2025, the President and OPM have taken successive actions focused on the SES, including this proposed rule, that are inconsistent with law. This began on the first day of the administration when an executive order declared that all SES are constitutional officers with

¹³ *Senior Executive Service Overview & History*, Office of Personnel Management, <https://www.opm.gov/policy-data-oversight/senior-executive-service/overview-history/>.

no civil service rights.¹⁴ The president acted on this claimed authority on the same day, firing several SES and citing a broad “Article II authority” —without mentioning Title 5 or statutory civil service appeal rights.¹⁵ These actions have continued with the pronouncement of new policies to reallocate SES “career reserved” positions for “general” billets, increase political representation in and influence over agency Executive Resource Boards (ERB) and Performance Review Boards (PRB), introduction of new standardized performance management templates and rating schemes, and more recent regulatory proposals to allow for the forced distribution of SES performance ratings-- all in contravention with law and existing OPM regulations.

Collectively, those actions, including this rulemaking, would minimize – not increase – the effectiveness of the Senior Executive Service and equivalent executive leadership cadres as Congress intended. If senior executives have no civil service or merit system rights, if agencies refuse to engage in fair and transparent performance management, if rewards are not tied to performance, if there is no systematic vision nor process for cultivating and sustaining this career service to support government administration, what purpose would the SES serve, and how would it be distinct from other appointment types? None of the administration’s actions or policies to date provide answers to these questions. Left unanswered, the performance and durability of federal agencies and programs in the near term and long run will become major challenges for agencies and the administration. A decade ago, the Merit Systems Protection Board (MSPB) identified inadequate investment in the SES as a major challenge for government.¹⁶ Absent leadership from the White House and OPM, as the capability and integrity of the SES degrades, it will surely lead to programmatic breakdowns, errors, malfeasance, scandals, or inability to deliver.

For over a decade, the U.S. Congress has debated making more of the career federal civil service, including the SES, at-will employees. There is no bipartisan majority of Congress calling for these types of reforms, and no law has been passed advancing these ideas. Multiple “accountability” reforms focused on the Department of Veterans Affairs have been struck down by courts due to the inclusion of unconstitutional provisions or overly zealous implementation by agencies that deprived employees of their rights. During this time period SEA has surveyed its members and senior executives across government about the prospects of at-will employment and how it would affect them as employees, as senior executives, and in terms of the programs and missions they are responsible for leading.¹⁷ The responses from senior executives reflect a serious concern about politicization, degradation of the SES capability, and challenges in recruiting and retaining quality leaders and managers to enter the SES ranks.

Specifically, a survey of SES conducted by SEA in 2014 on at-will employment proposals revealed the following:

- At will employment is overwhelmingly viewed as a bad idea.

¹⁴ [Civil Service Reform is Here – What Does President Trump’s SES Accountability Order Mean for the Civil Service — FEDmanager](#)

¹⁵ [Ousted career execs at DOJ are considering options after being given vague rationale for firings - Government Executive](#)

¹⁶ [Training and Development for the Senior Executive Service: A Necessary Investment](#)

¹⁷ [“At Will Employment in the Career Senior Executive Service: Promoting Accountability or Threatening Federal Government Effectiveness and Senior Management Capability?”](#) Senior Executives Association Professional Development League, March 2015.

- Enactment of at will employment would have a highly damaging impact on career SES recruitment and retention and further erode morale within the government's executive ranks.

- At will employment would lead to politicization of the SES system, subjugation of career executives and suppression and deterioration of relationships between career managers and political appointees as well as other government stakeholders.

- At will employment would be harmful to the efficiency, effectiveness, integrity, productivity, innovation and operational stability of government, as well as the public's confidence in it.

- Current laws, government-wide regulations and agency management tools and flexibilities provide ample authority for holding career executives accountable for satisfactory performance and conduct.

The reactions of senior executives to at-will legislative proposals of the past give voice to these concerns. SEA hears these same concerns from members today while the administration is pursuing this Schedule P/C rule and other changes to the SES and federal civil service system. Executive survey reactions include:

- “Will gut the SES. No one in their right mind would want to join or stay in the SES.”
- “This will make it very difficult to recruit the talent we need to lead and sustain the federal workforce.”
- “Fear is already palpable in SES ranks. At will legislation will only exacerbate these problems and there will no longer be ‘career’ SES just quasi-political SES.”
- “I am in my early 40s and somewhat reluctantly joined the SES last year after putting aside significant reservations about the invasive financial reporting requirements and loss of legal protections available to non-SES employees. Had-at will provisions been in place, I would have declined an SES appointment.”
- “I’m a GS-15 who has spent more than a decade preparing for the SES. I believe in serving the public and was looking forward to having a position with more responsibilities. I’m reconsidering my career plans.”
- “It will make the SES less attractive for the best and brightest and encourage a lot of knowledge to walk out the door – retire or go to private industry where they can at least be paid adequately.”
- At will employment “will undermine the merit system and create a culture of fear and intimidation that will inhibit excellence.”
- “A senior executive’s job should not be placed in jeopardy for...telling the truth, or rendering advice that may be unpopular.”

Central to the Schedule P/C proposal is taking career employees out of the statutory Title V procedures, thereby stripping employees of their due process rights. The president and OPM suggests it needs to do this because, essentially, performance management is too hard, and they don’t want to bother with it. SEA’s experience over successive administrations, as well as the results of the 2014 survey on at-will employment, find that political appointees often pay little interest or heed to their roles and responsibilities for organizational performance management, to include oversight and leadership of their career SES cadres. Additional survey responses:

- “The mechanisms for holding SES accountable already exist. The problem is that leadership has not exerted the fortitude necessary to confront non-performing SES and hold them accountable.”
- “I believe that current procedures are adequate. Political leadership should not blame the system for their failure to employ it, as designed.”
- “Accountability is simple, and most people don’t mind being held accountable. But that means having clear expectations and holding us to those expectations.”
- “Stronger and clearer performance requirements should be the mechanism for improved accountability.”

The current SES performance management system can also be abused. The minimal civil service rights afforded to career senior executives ensured the government itself was recently held accountable for violating the rights of a SES. In the case of a top-performing U.S. Army SES, a federal judge found the U.S. Army violated her rights for depriving her of her SES status following a demotion.¹⁸ The court determined that the government was required to provide her, at a minimum, some form of meaningful notice and an opportunity to be heard before removing her from the SES.

“I think that this lady was horrifically deprived of due process and I’m embarrassed that you’re standing here saying otherwise. I think that the process, the secretive process that took her out of the ability to respond, without knowledge of what was going on, where even the very supervisor who supervised her for many years and who continued to think she was outstanding, was cut out of the process of deciding what her performance review should be for the year, I think that behavior was outrageous. And I absolutely think it violates due process,” said Circuit Judge Kimberly A. Moore during oral arguments on October 9, 2020.

It is true that effective performance management is highly challenging, a topic that is widely discussed in leadership and business literature.¹⁹ But the answer seldom is to just do nothing to train leaders, improve measurement or reward employee performance. And overwhelming evidence finds that fear is an ineffective driver for performance or positive outcomes for organizations, and instead that leaders in high-performing organizations foster psychological safety and trust to enable maximum performance by individuals and teams.^{20,21} Ignoring and politicizing performance management will not yield effective and efficient government, and we offer alternative suggestions later in this comment.

¹⁸ *Esparraguera v. Department of the Army*, No. 22-5150 (D.C. Cir. 2024) ; [Army Lawyer Denied Due Process Before Her Demotion, DC Cir. Says](#)

¹⁹ See Gallup, Harvard Business Review, MIT Sloan Management Review, etc.

²⁰ Edmondson, A. C. (2018). *The fearless organization: Creating psychological safety in the workplace for learning, innovation, and growth*. John Wiley & Sons.

²¹ Edmondson, Amy and Kim Scott. “Follow these 4 steps to create psychological safety in your teams.” Fast Company, 11-22-2022. <https://www.fastcompany.com/90814937/follow-these-4-steps-to-create-psychological-safety-in-your-teams>.

III. **Managing a Federal Workforce with Vastly Differentiated Rights, While Also Channeling More Employment Disputes into EEO Proceedings, Would Raise Significant Challenges**

This rule would reclassify at least 50,000 employees, if not potentially hundreds of thousands of employees based on agency interpretation of the applicability of Schedule P/C. This rule would apply broadly to the SES and other Senior Professionals. What will remain is a federal workforce with vastly differentiated rights – many still with typical civil service rights, working alongside or for colleagues who have none. For federal managers and executives, who often lack both the support of agency political leadership and of knowledgeable HR specialists to assist them, the resulting management environment will be extremely challenging to succeed within and navigate. These managers, as well as their political appointee supervisors, will be subject to constant complaints of discrimination and retaliation, regardless of whether this conduct occurred. This reality already is a plague of the federal employee redress system and will get no better if this rule is effectuated.

In a drumbeat of reports to Congress and the President and studies and research briefs, the Merit Systems Protection Board (MSPB) provides significant evidence that the core challenge of the federal employee accountability and redress system is agency culture and the lack of preparation and support for managers, coupled with the complexity of the law. That said, the MSPB has found only 10% of federal managers think employees have too many rights.²² Meanwhile, 80% of managers say the culture in their agency around accountability is the primary barrier, above management and HR support.²³ While Schedule P/C will allow for discipline or termination of employees without due process, it is unclear how a positive performance culture will arise from this policy – in fact, research and evidence suggests the opposite. Ultimately, the best remedy to improve unacceptable performance is to focus more on hiring the right people in the first place.²⁴ While this rule does clarify Schedule P/C employees remain career federal employees, being deprived of their due process and civil service rights fundamentally alters the employment value proposition of government – whereby career civil servants provide informed input into and effective implementation of law and policy that serves both their agency’s statutory mission and Presidential priorities, in exchange for protection against inappropriate actions based on political patronage or loyalty tests.

This rule suggests that agencies channel employment disputes into the EEOC as a supposed remedy for a forum and avenue to seek redress where others have been deprived. This proposal would double down on what is broken with the federal accountability system – the issue around mixed cases of EEO and performance – and drive even more employees into the EEO process. According to EEOC statistics for the government, the vast majority of these complaints do not result in findings of discrimination, not because they lack merit, but because they do not meet the stringent legal standards for a formal finding and cost agencies tens of thousands of dollars to investigate and adjudicate, with formal resolution often taking a decade or longer.²⁵ SEA fears

²² [Adverse Actions: The Rules and the Reality](#)

²³ [Addressing Misconduct in the Federal Civil Service: Management Perspectives](#)

²⁴ [Remedying Unacceptable Employee Performance in the Federal Civil Service](#)

²⁵ [FY 2021 Annual Report on the Federal Workforce Part 1: EEO Complaint Processing Activity | U.S. Equal Employment Opportunity Commission](#)

systemic pressure the rule could impose on EEO structures, and on the legitimate right of federal employees to pursue claims of discrimination when other legal protections are eroded.

Moreover, this proposed rule would force employees who retained their rights to attempt enforcing them in adjudicative forums that have been crippled by the administration's actions. Specifically, the MSPB lacks a quorum, there is no Senate-confirmed Special Counsel to protect federal whistleblowers, and the EEOC itself also lacks a quorum. This would create a serious challenge for fairness and transparency and for employees to pursue the due process they are entitled to. Without a MSPB quorum, obtaining a decision to allow an employee to appeal to federal district court per the standard of *Perry v. MSPB* could take time.²⁶ Justice delayed is often justice denied.

At the same time, the proposed rules argues that OPM has no authority to extend MSPB rights to persons whose positions would be reclassified into Schedule P/C. And the debate within the Supreme Court during *Perry* also highlights the confusing nature of federal employee 'mixed cases.' "Nobody who is not a lawyer, and no ordinary lawyer could read these statutes and figure out what they are supposed to do," said Justice Alito during oral arguments and who subsequently asked, "[w]ho wrote this statute? Somebody who takes pleasure out of pulling the wings off flies?"²⁷ In his dissenting opinion, Justice Gorsuch stated that if the law required clarification, which he did not think it did, "there's a constitutionally prescribed way to do it. It's called legislation."²⁸ SEA will further discuss in the policy alternatives section.

IV. Administration's Claims of Presidential Power, Application of Supreme Court Rulings to Civil Service Employees, Go Too Far

This administration has taken actions that take a maximalist perspective on Executive power. Whether and how this view comports with the Constitution and the laws of the nation is currently being tested in federal courts around the nation, including the Supreme Court. This Schedule P/C rulemaking heavily relies on an extreme extrapolation of the Court's ruling in *Seila Law v. CFPB* that 'executive power vests in the president.' For examples, the rule makes several reference to the Executive Order 14071 "overriding" or "rendering inoperative" existing OPM regulations, which were made final inconsistent with the Administrative Procedures Act.

Seila Law, and a related cohort of decisions over the past decade on presidential power and constitutional authority over executive branch officials, have mostly focused on whether Congress could impose any form of for-cause protections for Senate-confirmed officials in Executive Branch agency leadership positions. SEA recognizes that the Court has increasingly found those types of restrictions to be an unconstitutional infringement on the President's authority over his principal officers.

Now, with this rulemaking, OPM seeks to apply this standard relating to constitutional officers to federal civil servants in the competitive service, excepted service, and Senior Executive Service,

²⁶ [District Courts to Decide "Mixed Case" Appeals — FEDmanager](#)

²⁷ [Supreme Court to Decide Appellate Jurisdiction in Federal Employee "Mixed Case" Appeals — FEDmanager](#)

²⁸ [Opinion analysis: Majority sides with employee in civil service argument, but Gorsuch announces his presence with authority - SCOTUSblog](#)

who also have for-cause protections under law. Career federal employees in the merit based civil service are creatures of Congress. SEA believes that OPM's proposal goes too far, as evidenced by nearly 150 years of efforts by Congress to codify and strengthen the merit system as the basis for the career federal civil service.

Simply because the administration seeks to selectively or not at all adhere to the laws passed by Congress establishing and governing the civil service, does not mean the law is inoperative. If the administration wants to change the law, it should propose legislation to Congress.

V. Policy, Management, and Regulatory Alternatives

Improving executive leadership, performance, and accountability has been the centerpiece of this association's agenda since our inception in 1980 following the establishment of the SES in the CSRA. Too often administrations and agencies have ignored basic hygiene around federal workforce management, leadership, and executive development. Coupled with neglect from Congress, the civil service system increasingly is showing its age and need of reform. There is a need for civil service and government modernization.²⁹ Absent this, the resulting declines in federal workforce capability have put the government at increased risk of poor performance.³⁰ SEA believes that reform, both to the SES and to the civil service more broadly³¹, should come through legislation passed by Congress and not a president swiping away nearly 150 years of civil service law via regulatory fiat.

For decades Congress and administrations have debated improvements to federal employee performance and accountability. Consolidating the venues and avenues for federal employee redress, while still maintaining civil service rights and basic due process, have long been the center of these ideas. SEA has long endorsed the idea of creating a single Federal Employee Court of Appeals to handle these disputes.³² Given the challenges presented by complex case law, mixed cases, and inability to maintain quorums for operations at the civil service adjudicative bodies like the MSPB, this proposal is worth revisiting again.

SEA has presented a comprehensive agenda to strengthen the SES.³³ The agenda includes nearly a dozen modernization proposals to set executives up for success, strengthen performance management, improve political executive leadership, and strengthen the link between career and political leaders. Many of these proposals are intended to ensure that agencies support their political leaders as well as career leaders, and to ensure each understands and is prepared to successfully carry out their respective roles. SEA would welcome an opportunity to brief these proposals to current OPM and administration leadership.

²⁹ [Ten Considerations for Civil Service Modernization](#)

³⁰ Are Declines in U.S. Federal Workforce Capabilities Putting Our Government at Risk of Failing? Senior Executives Association, January 24, 2019, https://seniorexec.memberclicks.net/assets/docs/reports-and-publications/SEA_Are_Declines_In_US_Fed_Workforce_at_Risk_2019.pdf.

³¹ [SEA Policy Agenda, 119th Congress.pdf](#)

³² [JUSTICE DELAYED IS JUSTICE DENIED: A CASE FOR A FEDERAL EMPLOYEES APPEALS COURT | Congress.gov | Library of Congress](#)

³³ [SES Joint Policy Agenda](#)

A seemingly obvious solution to improving performance and responsiveness of career executive leaders is investing in their development. A decade ago the MSPB wrote a report that found agencies do not adequately invest in their executive leaders nor their development.³⁴ A few years later, in a “State of the Senior Executive Service” survey conducted by SEA and Deloitte of over 750 government executives, found that executives lack the support and infrastructure to improve performance and drive transformation in their agencies.³⁵

More broadly, the government needs to prioritize career management and leadership and provide tools, resources, and infrastructure to develop the career supervisors, managers, and executive leaders that federal agencies need to succeed. SEA has promoted these ideas since the early 1980s, and successive administrations have been largely disinterested in taking substantive action in this area. More recently, in 2018, SEA joined the other professional manager associations who constitute the Government Managers Coalition, reflecting the views of over 250,000 federal managers and executives to offer suggestions to improve performance and accountability.³⁶ In 2021, SEA convened a group of top government management and performance officials to pursue ideas on improving government performance. That group recommended the establishment of a Management Quality Improvement Learning Center to benefit all federal managers.³⁷

In conclusion, SEA strongly opposes this proposed rule and believes there are myriad more effective ways to improve government performance and responsiveness of the bureaucracy to political direction than advancing a regulation that deprives employees of their rights and due process.

Thank you for the opportunity to submit comments on this proposed rule.

Sincerely,

A handwritten signature in dark ink, appearing to read "M L Hill", with a stylized flourish at the end.

Marcus L. Hill
President

³⁴ [Training and Development for the Senior Executive Service: A Necessary Investment](#)

³⁵ [SEA State-of-SES-Findings 2017.pdf](#)

³⁶ [GMC civil service modernization letter to Chairman Meadows 7-16-18](#)

³⁷ [Creating and Supporting a Management Quality Improvement Learning Center for Federal Managers](#)