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The Tangled Web of Federal Sector Employment Law

In 1883, the federal government had 130,000 employees. Today, it has 2.2 million. We navigate through the complex morass of civil service regulations, federal sector collective bargaining laws, and Appointments Clause case law to try and shed some light on the behemoth that is the modern federal workforce.

> Those who, figuratively speaking, live by the political sword must be prepared to die by the political sword.
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> - *AFL-CIO v. Shapp,* 1971 (443 Pa. 527)

Administrative law scholarship has devoted massive attention to the President and his Article II removal power. It is a singular issue beset by wide and ongoing controversies over its origin, justification and extent, between unitarists who defend a plenary power of removal incidental to that of appointment, and those who argue for various removal protections conceptually distinct from the power of appointment. The dispute boils down to whether or not offices are at-will revocable and held at pleasure of the President, or whether offices are tenure-protected property interests in line with some of the English common law conceptions prior to the American Revolution.

But those officers subject to Article II removal are only a small minority of the wider federal government workforce and personnel, about 9000 positions out of 2.2 million other posts, variously called civil servants, public servants or employees. The latter are subject to a highly complex body of statutory law, regulations and collective bargaining agreements that is understudied and does not even have a conventionally accepted name – it may be called 'federal employee law,' 'federal employee rights law,' 'federal labor management law,' 'federal labor relations law' and so on. This includes Title 5 of the United States Code, Title 5 of the CFR, but also opinions, guidance and case law from the MSPB, FLRA and OSC, directives by OPM, collective bargaining agreements made under Title VII of the Civil Service Reform Act of 1978, and so on. A specialized cadre of legal professionals has grown around this area, but it has not left much of an imprint on general administrative law scholarship.

Treading through this jungle is a difficult task, and we will stick to a few general topics: the distinction between officers and employees in federal law, the contested historical legacy of patronage, civil service regulations, federal sector collective bargaining, and the tensions between civil service commissioners and public sector unions.

The officer-employee distinction

The 19th century does not know of "federal employees." Below officers there were aids, servants, clerks, deputies and so on, all under the authority of a department head. An early proposal for civil service reform that failed to pass – the Jenckes bill of 1867 – speaks generally of "civil officers," with no further distinction. Even today, the definition of "employee" is something of a statutorily floating signifier. 5 USC 2105 defines "employee" to include "an officer and individual who is appointed in the civil service … acting in an official capacity, engaged in the performance of a Federal function under authority of law or an Executive act." Hence an Officer of the United States could be an employee. 5 USC 8101 defines "employee" for the purposes of work injury compensation to include "a civil officer or employee in any branch of the Government of the United States, including an officer or employee of an instrumentality wholly owned by the United States" and "an individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay, when a statute authorizes the acceptance or use of the service, or authorizes payment of travel or other expenses of the individual," which again overlaps with Officers. 5 USC 4101 gives the trivial definition of "an individual employed in or under an agency." Similary, 5 CFR 2641.104 defines it as "any officer or employee of the executive branch or any independent agency that is not a part of the legislative or judicial branches."

The Constitution and case law speak of "inferior officers", with the implied corollary of "principal officers." The latter must be Senate-confirmed, the former may be unilaterally appointed by the President or a department head if statutory authority so exists.

Several 19th century cases attempt to define an "Officer of the United States," all of them predating the modern civil service structure.

Indeed, the case of *United States v. Germaine* (1878) assumes that personnel and hiring decisions are to be ratified by heads of departments:

> Here we have the Secretary of State, who is by law the head of the Department of State, the Departments of War, Interior, Treasury, &c. And by one of the latest of these statutes reorganizing the Attorney General's office and placing it on the basis of the others, it is called the Department of Justice. The association of the words "heads of departments" with the President and the courts of law strongly implies that something different is meant

> from **the inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of the departments**. Such also has been the practice, for it is very well understood that t**he appointments of the thousands of clerks in the Departments of the Treasury, Interior, and the others, are made by the heads of those departments**, and not by the heads of the bureaus in those departments.

According to *United States v. Hartwell* (1867), "an office is a public station or employment, conferred by the appointment of government, and embraces the ideas of tenure, duration, emolument, and duties." Later, in *United States v. Mouat* (1888), drawing on the constitutional text: "unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the President or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States."

This concerns the dividing line between officers and non-officers. That dividing line, if one goes by original meaning, is much narrower than the standard of "significant authority" used today – many officeholders that are currently considered to be "employees" in the competitive or excepted service would really qualify as "Officers" under the older standard.[1] Enforced consistently, this would require that hiring decisions, currently made autonomously by human capital officers and HR bureaus in compliance with OPM guidelines, go through ratification by the agency head.

The question of what distinguishes principal and inferior officers, on the other hand, became an issue of contention in the 20th century[2]:

> How to distinguish between inferior and non-inferior officers was the central issue in the Supreme Court's 1997 decision in Edmond v. United States. In that case, the Court held that the key to determining whether an officer is inferior is the extent to which the officer is directed and supervised by other non-inferior officers. In making that assessment, the Court articulated three factors to be considered: the extent to which (1) the official is protected from removal, (2) the official's day-to-day work is overseen by others, and (3) the official has the power to issue a final decision without approval from the official's superiors. Since Edmond, the removal factor has figured most prominently in the case law

1 Mascott, Jennifer, Who Are "Officers of the United States"? (February 2018). 70 Stanford Law Review 443 (2018), George Mason Legal Studies Research Paper No. LS 17-21

2 Schiff, Damien M. and Dunford, Oliver, Distinguishing Between Inferior and Non-Inferior Officers Under the Appointments Clause: A Question of 'Significance' (September 4, 2021). Pacific Legal Foundation Research Paper 2021–02

—that is, if an officer enjoys substantial protection against removal, he is very likely to be viewed as non-inferior, even if his day-to-day work is supervised or guided by others.

In its recent decision in United States v. Arthrex, the Supreme Court appeared to signal a shift in the Edmond analysis. As we shall see, neither the day-to-day supervision nor the removal factor played any meaningful role in the Court's analysis of whether the federal officials there at issue were inferior, despite the prominence of those factors in the Federal Circuit's decision below. Instead, what the Supreme Court found decisive was that the officers at issue could render a final decision for the Executive Branch on important federal matters—in that case, whether a patent worth billions of dollars should be canceled. Essentially on that basis alone, the Court concluded that the officers were non-inferior. The third Edmond factor thus appears to have become a determinative consideration.

The "final decision" standard, however, is seriously complicated by the pervasive existence of delegations and subdelegations of authority throughout the executive branch. Career civil servants can effectively be elevated into "principals" if they possess non-reviewable sign-off authority on a major statutory power that is delegated by a superior. This occurs extensively.[3]

In short, the civil service structure as it currently exists produces systematic confusion as to the boundaries between officers/non-officers and principal/inferior officers.

As far as Senate-confirmed officers are concerned, many congressional bills purport to impose statutory qualifications for office. For instance, the Assistant Secretary for Immigration and Customs Enforcement Department of Homeland Security "shall have a minimum of 5 years professional experience in law enforcement, and a minimum of 5 years of management experience" under 6 USC 252(a)(2)(B). It has been the prevailing practice of the executive branch over the past several decades to sever off such qualification provisions as unconstitutional, with OLC memos and presidential signing statements supporting this position.[4]

When it comes to "employees," the traditional view is that government employment did not invest the beneficiary with any property right that entitled them to due process. This contrasts to English common law doctrines of tenure in office as property, which were repudiated by the establishment

3 Brian D. Feinstein & Jennifer Nou Submerged Independent Agencies, 171 U. Pa. L. Rev. 945 (2023)

4 Nachmany, Eli, The Senate vs. the Law: Challenging Qualification Statutes Through Senate Confirmation (March 30, 2020). 43 Harv. J.L. & Pub. Pol'y 575 (2020)

of the American republic and its principle that all offices are or ought to be created by the legislative power. In line with this prevailing understanding, Andrew Jackson stated in his first annual message that “no individual wrong is, therefore, done by removal, since neither appointment to nor continuance in office is a matter of right. The incumbent became an officer with a view to public benefits, and when these require his removal they are not to be sacrificed to private interests.”[5]

Into the first half of the 20th century, civil service regulations did not construe for-cause removal as requiring any trial or hearing, hence an executive order by Theodore Roosevelt clarified that “it is hereby declared that the term 'just cause," as used in section 8, Civil Service Rule II, is intended to mean any cause, other than one merely political or religious, which will promote the efficiency of the service; and nothing contained in said rule shall be construed to require the examination of witnesses or any trial or hearing except in the discretion of the officer making the removal.”[6] The Civil Service Commission reiterated in 1912 that its rules “are not framed on a theory of life tenure, fixed permanence, nor vested right in office.” The Lloyd-LaFollette Act concurred that “no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal.” The first major congressional measure granting protection to federal employees against adverse personnel actions was the Veterans' Preference Act of 1944, which established the category of “preference eligibles” and gave veterans an appellate right before the Civil Service Commission, which at that point meant specifically for service veterans, not for all classes of competitive service employees. Kennedy and Nixon would eventually extend these rights of appeal to the entire civil service.

The prevailing doctrine was encapsulated in cases such as *Gadsden v. United States* (1951) before the Court of Federal Claims, where it was held that “the determination of whether or not an employee's discharge would promote the efficiency of the Government service was vested in the administrative officer, and that no court had power to review his action if that action was taken in good faith.”

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5 Quoted in: Gerald E. Frug, “Does the Constitution Prevent the Discharge of Civil Service Employees?,” U. Pa. L. Rev., vol. 124 (1976), 949

6 Ibid.

Keim v. United States (1900), in connection to a plaintiff dismissed from a competitive service position in the Department of the Interior, ruled in strong terms that:

> The appointment to an official position in the government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power.
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> In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment.
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> "It cannot for a moment be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment." In re Hennen, 13 Pet. 230, 38 U. S. 259; Parsons v. United States, 167 U. S. 324. Unless, therefore, there be some specific provision to the contrary, the action of the Secretary of the Interior in removing the petitioner from office on account of inefficiency is beyond review in the courts either by mandamus to reinstate him or by compelling payment of salary as though he had not been removed.

The existing classified service regulations at the time were not held to contain "specific provisions to the contrary," and no special remedies beyond the common law (mandamus, quo warranto, etc.) were available for reinstatement into office to begin with.

As late as 1950, in *Bailey v. Richardson* (1950), the courts reaffirmed that "it has been held repeatedly and consistently that Government employ is not 'property' and that in this particular it is not a contract. We are unable to perceive how it could be held to be 'liberty'. Certainly it is not 'life'. So much that is clear would seem to dispose of the point. In terms the due process clause does not apply to the holding of a Government office." Furthermore it was held that "never in our history has a Government administrative employee been entitled to a hearing of the quasi-judicial type upon his dismissal from Government service."

This began to change from the 1970s onward amid the "rights revolution" and highly expansive readings of the Due Process Clause[7] that became in vogue with such cases as *Goldberg v. Kelly* (1970), *Perry v. Sindermann* (1972), *Goss v. Lopez* (1975) and *Cleveland Board of Education v. Loudermill* (1985). The judicial doctrine of "property interest in continued employment" would subsequently receive statutory formalization in the Civil Service Reform Act of 1978 and its sections on prohibited personnel practices and unfair labor practices.

"Patronage" and "spoils": contested ideas

Any introduction to the civil service system will invariably begin with a brief statement about the "spoils system," implied to be a dark age of graft, corruption and patronage, before immediately moving on to the Pendleton Act. Seldom will any real description of the so-called "spoils system" ever be given; it is simply a lacuna used to separate the "prehistory" of the civil service from its actual beginning. It will therefore be helpful to put this issue in context. A valuable study which we rely on for this is Ronald N. Johnson and Gary D. Libecap's *The Federal Civil Service System and the Problem of Bureaucracy: The Economics and Politics of Institutional Change* (1994).

The federal workforce stood at about 130,000 people in 1883. The majority of it was concentrated around patronage positions at post offices and customhouses. "Postal workers accounted for 56 percent of all federal employees in 1881, and the cities covered by the Pendleton Act had 2,746 post carriers, 71 percent of all postal carriers in the postal service," according to Johnson and Libecap. In 1884, slightly over 10 percent of the total federal civilian labor force of 131,208 were within the classified or competitive service. By 1921, however, the federal labor force was much larger, with 562,252 employees, and 80 percent were in the classified civil service.

Assessments on the salaries of patronage workers were the primary sources of campaign funding for political parties:

> Patronage positions were awarded to the party faithful, who engaged in campaign work and contributed part of their salaries in the form of political assessments. These

7 e.g. " We have made clear in Roth, supra, at 408 U. S. 571-572, that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." Id. at 408 U. S. 577. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." Perry v. Sindermann, 408 U.S. 593 (1972)

> assessments on the salaries of patronage workers were a means of transferring federal tax revenues to political parties. The payments ranged from 2 to 10 percent of an individual patronage worker's salary, depending on the position held. Solicitation letters were sent by the party to each worker, return envelopes were provided to ensure that payments were made, and compliance was carefully monitored. Those who did not contribute the requested amount lost their positions (Fowler 1943, 157-60). Federal patronage jobs appear to have paid more than the market wage for comparable private positions in order to cover the payment of assessment. These funds were an important source of campaign financing in the nineteenth century. For example, Louise Overacker (1932, 103-9) states that, in 1878, the Republican Congressional Committee alone raised $106,000 for political campaigns, of which $80,000 came from federal employees. The control of assessment funds rested mainly within the local party apparatus.

This system was in line with the prevailing Jacksonian ideal of rotation in office. Political appointments were negotiated between party machines, senators and the President. Eventually the growth of the workforce reached a point that the costs of screening and monitoring applicants became excessively time-consuming. The resolution lay in a new arrangement that involved both testing and removing targeted positions from patronage. Once dislodged from the spoils system, federal employees would no longer be required to fulfill local party duties. Accordingly, the allocation of federal jobs on the basis of test scores instead of patronage considerations would reduce the influence of local party officials among federal workers, lower monitoring costs, and increase output as workers were able to devote their full attention to the provision of government services. If the problems associated with patronage were to be resolved effectively, legislators had collectively to institute a politically neutral system for hiring and administering federal workers.

In a sense, patronage began to lose its political utility, since the increasing necessity of delegating the bargaining process meant that lower-level party officials would get the credit for any good selections, while cases of waste and inefficiency would be blamed on the higher-ups in D.C.

The Pendleton Act, although it created the classified service, did *not* create tenure protection, much less any kind of appeals process for adverse actions. The contemporary Senate report stated that the bill "does not touch the questions of tenure of office, or removals from office, except that removals shall not be made for refusing to pay political assessments or to perform partisan service. It leaves both where it finds them." The classified service was supposed to restrict hiring, not firing. Section 13 of the act therefore provided that "no person in the public service is for that

reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so."

Since classified workers could no longer make assessments to political parties, their value to Congress fell. Indeed, the relative salaries of federal sector to private sector employees fell from 1883 to 1917, as "between 1900 and 1917, nominal regular federal salaries rose by 25 percent, postal salaries by 30 percent, but private salaries by 63 percent. At the same time, however, the all-item CPI index rose by 54 percent." This began to change with the establishment of the modern civil service position structures and pay grades starting from the Classification Act of 1923. Federal civil servants were also beneficiaries of hours-of-work, pension and workers' compensation legislation well before this was extended to the private sector. Real wages therefore began to rise relative to the private sector following these changes. Even though federal sector collective bargaining would not be formally legalized until the 1960s, interest groups representing federal employees (such as NFFE and AFGE) exerted significant congressional lobby power.

While the last vestiges of patronage had mostly subsided by the 1930s in federal employment, it persisted as a democratically accepted practice in state and local governments to the 1970s. Two landmark Supreme Court cases, *Elrod v. Burns* (1976) and *Branti v. Finkel* (1980), established the doctrine that patronage dismissals were violations of protected speech under the First Amendment.[8] The same was reaffirmed in *Rutan v. Republican Party of Illinois* (1990).

In each of these three cases, there were noteworthy dissents – by Justice Powell in *Elrod* and *Branti*, and by Justice Scalia in *Rutan*. Given the sordid connotations that "patronage" evokes in our time, these dissenting opinions may prove insightful.

8 Roy E. Hoffinger. First Amendment Limitations on Patronage Employment Practices, The University of Chicago Law Review, 1982, Volume 49, Issue 1,

Justice Powell's dissent in *Elrod v. Burns:*

> As indicated above, patronage hiring practices have contributed to American democracy by stimulating political activity and by strengthening parties, thereby helping to make government accountable. It cannot be questioned seriously that these contributions promote important state interests. Earlier this Term, we said of the government interest in encouraging political debate:
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> "[Public financing of Presidential campaigns] is . . . [an effort] to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." Buckley v. Valeo supra at 424 U. S. 92-93 (footnote omitted).
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> "Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech. . . ."
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> Id. at 427 U. S. 93 n. 127. We also have recognized the strong government interests in encouraging stable political parties and avoiding excessive political fragmentation. Through the medium of established parties the "people . . . are presented with understandable choices and the winner in the general election with sufficient support to govern effectively," Storer v. Brown, 415 U. S. 724, 415 U. S. 735 (1974), while "splintered parties and unrestrained factionalism [might] do significant damage to the fabric of government." Id. at 415 U. S. 736. See Buckley v. Valeo, supra at 424 U. S. 98, 424 U. S. 101.
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> Without analysis, however, the plurality opinion disparages the contribution of patronage hiring practices in advancing these state interests. It merely asserts that such practices cause the "free functioning of the electoral process [to suffer]," ante at 427 U. S. 356, and that "we are not persuaded that the elimination of . . . patronage dismissals, will bring about the demise of party politics." Ante at 427 U. S. 369. One cannot avoid the impression, however, that even a threatened demise of parties would not trouble the plurality. In my view, this thinking reflects a disturbing insensitivity to the political realities relevant to the disposition of this case.

The complaining parties are or were employees of the Sheriff. In many communities, the sheriff's duties are as routine as process serving, and his election attracts little or no general public interest. In the States, and especially in the thousands of local communities, there are large numbers of elective offices, and many are as relatively obscure as that of the local sheriff or constable. Despite the importance of elective offices to the ongoing work of local governments, election campaigns for lesser offices in particular usually attract little attention from the media, with consequent disinterest and absence of intelligent participation on the part of the public. Unless the candidates for these offices are able to dispense the traditional patronage that has accrued to the offices, they also are unlikely to attract donations of time or money from voluntary groups. In short, the resource pools that fuel the intensity of political interest and debate in "important" elections frequently "could care less" about who fills the offices deemed to be relatively unimportant. Long experience teaches that at this local level traditional patronage practices contribute significantly to the democratic process. The candidates for these offices derive their support at the precinct level, and their modest funding for publicity, from cadres of friends and political associates who hope to benefit if their "man" is elected. The activities of the latter are often the principal source of political information for the voting public. The "robust" political discourse that the plurality opinion properly emphasizes is furthered -- not restricted -- by the time-honored system.

Patronage hiring practices also enable party organizations to persist and function at the local level. Such organizations become visible to the electorate at large only at election time, but the dull periods between elections require ongoing activities: precinct organizations must be maintained; new voters registered; and minor political "chores" performed for citizens who otherwise may have no practical means of access to officeholders. In some communities, party organizations and clubs also render helpful social services.

It is naive to think that these types of political activities are motivated at these levels by some academic interest in "democracy" or other public service impulse. For the most part, as every politician knows, the hope of some reward generates a major portion of the local political activity supporting parties. It is difficult to overestimate the contributions to our system by the major political parties, fortunately limited in number compared to the fractionalization that has made the continued existence of democratic government doubtful in some other countries. Parties generally are stable, high-profile, and permanent

> institutions. When the names on a long ballot are meaningless to the average voter, party affiliation affords a guidepost by which voters may rationalize a myriad of political choices. Cf. Buckley v. Valeo, 424 U.S. at 424 U. S. 668. Voters can and do hold parties to long-term accountability, and it is not too much to say that, in their absence, responsive and responsible performance in low-profile offices, particularly, is difficult to maintain.
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> It is against decades of experience to the contrary, then, that the plurality opinion concludes that patronage hiring practices interfere with the "free functioning of the electoral process." Ante at 427 U. S. 356. This ad hoc judicial judgment runs counter to the judgments of the representatives of the people in state and local governments, representatives who have chosen, in most instances, to retain some patronage practices in combination with a merit-oriented civil service. One would think that elected representatives of the people are better equipped than we to weigh the need for some continuation of patronage practices in light of the interests above identified, and particularly in view of local conditions. See CSC v. Letter Carriers, 413 U.S. at 413 U. S. 564; United Public Workers v. Mitchell, 330 U. S. 75, 330 U. S. 99 (1947). Against this background, the assertion in the plurality opinion that "[p]atronage dismissals . . . are not the least restrictive alternative to achieving [any] contribution they may make to the democratic process" is unconvincing, especially since no alternative to some continuation of patronage practices is suggested. Ante at 427 U. S. 369 (footnote omitted).
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> I thus conclude that patronage hiring practices sufficiently serve important state interests, including some interests sought to be advanced by the First Amendment, to justify a tolerable intrusion on the First Amendment interests of employees or potential employees.

Powell would reiterate his opinion in *Branti v. Finkel*, emphasizing the legitimacy of partisan affiliation as an indicator of loyalty in office:

> The broad, new standard is articulated as follows:
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> "[T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."

Ante at 445 U. S. 518. The Court gives three examples to illustrate the standard. Election judges and certain executive assistants may be chosen on the basis of political affiliation; college football coaches may not. Ibid. And the Court decides in this case that party affiliation is not an appropriate requirement for selection of the attorneys in a public defender's office, because "whatever policymaking occurs in the public defender's office must relate to the needs of individual clients, and not to any partisan political interests."

The standard articulated by the Court is framed in vague and sweeping language certain to create vast uncertainty. Elected and appointed officials at all levels, who now receive guidance from civil service laws, no longer will know when political affiliation is an appropriate consideration in filling a position. Legislative bodies will not be certain whether they have the final authority to make the delicate line-drawing decisions embodied in the civil service laws. Prudent individuals requested to accept a public appointment must consider whether their predecessors will threaten to oust them through legal action.

One example at the national level illustrates the nature and magnitude of the problem created by today's holding. The President customarily has considered political affiliation in removing and appointing United States attorneys. Given the critical role that these key law enforcement officials play in the administration of the Department of Justice, both Democratic and Republican Attorneys General have concluded, not surprisingly, that they must have the confidence and support of the United States attorneys. And political affiliation has been used as one indicator of loyalty.

Yet it would be difficult to say, under the Court's standard, that "partisan" concerns properly are relevant to the performance of the duties of a United States attorney. This Court has noted that "[t]he office of public prosecutor is one which must be administered with courage and independence.'" Imbler v. Pachtman, 424 U. S. 409, 424 U. S. 423 (1976), quoting Pearson v. Reed, 6 Cal. App. 2d 277, 287, 44 P.2d 592, 597 (1935). Nevertheless, I believe that the President must have the right to consider political affiliation when he selects top ranking Department of Justice officials. The President and his Attorney General, not this Court, are charged with the responsibility for enforcing the laws and administering the Department of Justice. The Court's vague, overbroad decision may cast serious doubt on the propriety of dismissing United States attorneys, as well as

> thousands of other policymaking employees at all levels of government, because of their membership in a national political party.
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> A constitutional standard that is both uncertain in its application and impervious to legislative change will now control selection and removal of key governmental personnel. Federal judges will now be the final arbiters as to who federal, state, and local governments may employ. In my view, the Court is not justified in removing decisions so essential to responsible and efficient governance from the discretion of legislative and executive officials.

Finally, in *Rutan v. Republican Party of Illinois*, Justice Scalia emphasized the proprietary rights of governments in their capacity as employers:

> The restrictions that the Constitution places upon the government in its capacity as lawmaker, i.e., as the regulator of private conduct, are not the same as the restrictions that it places upon the government in its capacity as employer. We have recognized this in many contexts, with respect to many different constitutional guarantees. Private citizens perhaps cannot be prevented from wearing long hair, but policemen can. Kelley v. Johnson, 425 U. S. 238, 425 U. S. 247 (1976). Private citizens cannot have their property searched without probable cause, but in many circumstances government employees can. O'Connor v. Ortega, 480 U. S. 709, 480 U. S. 723 (1987) (plurality opinion); id. at 480 U. S. 732 (SCALIA, J., concurring in judgment). Private citizens cannot be punished for refusing to provide the government information that may incriminate them, but government employees can be dismissed when the incriminating information that they refuse to provide relates to the performance of their job. Gardner v. Broderick, 392 U.S. 273, 392 U. S. 277-278 (1968). With regard to freedom of speech in particular: Private citizens cannot be punished for speech of merely private concern, but government employees can be fired for that reason. Connick v. Myers, 461 U. S. 138, 1 461 U. S. 47 (1983). Private citizens cannot be punished for partisan political activity, but federal and state employees can be dismissed and otherwise punished for that reason. Public Workers v. Mitchell, 330 U. S. 75, 330 U. S. 101 (1947); CSC v. Letter Carriers, 413 U. S. 548, 413 U. S. 556 (1973); Broadrick v. Oklahoma, 413 U. S. 601, 413 U. S. 616-617 (1973).
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> Once it is acknowledged that the Constitution's prohibition against laws "abridging the freedom of speech" does not apply to laws enacted in the government's capacity as

> employer the same way it does to laws enacted in the government's capacity as regulator of private conduct, it may sometimes be difficult to assess what employment practices are permissible and what are not. That seems to me not a difficult question, however, in the present context. The provisions of the Bill of Rights were designed to restrain transient majorities from impairing long-recognized personal liberties. They did not create by implication novel individual rights overturning accepted political norms. Thus, when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. Such a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed.

As a practical matter, the ideal of merit did not entirely supersede, but coexisted with that of patronage and rotation in office. Even today "merit" mostly denotes the complex system of appeals and grievance procedures that employees are entitled to against federal supervisors, and not the original ideal of competitive examination. Civil service exams in the strict sense have barely been used ever since PACE (Professional and Administrative Career Examination) was phased out by OPM in 1981, after signing a consent decree to resolve a legal dispute over race and disparate impact. *Luévano v. Campbell*, [93 F.R.D. 68 (D.D.C. 1981)]

Meritocracy and collective bargaining: principles at odds

Ever since the Civil Service Reform Act of 1978, merit system principles have been codified alongside collective bargaining rights of exclusive representation. The dual system of prohibited personnel practices and unfair labor practices, respectively overseen by MSPB and FLRA, or in other words the dual system between civil service and labor rights protections, exists as a single "meritocratic" ideal. But as a historical matter, the two principles – merit systems and collective bargaining -- have generally been viewed as antithetical and not complementary.

It was the opinion of FDR in 1937 that "all government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of government make it impossible for administrative officials to

represent fully or to bind the employer in mutual discussions with government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many cases restricted, by laws which establish policies, procedures, or rules in personnel matters."[9] The situation would change with JFK's promulgation of EO 10988 in 1962.

Merit systems were generally upheld by civil service commissions, which stressed the rights of management over labor to determine standards, performance reviews, assessment methods, and so on. Public sector unions, in contrast, tend to adopt an antagonistic or at least contesting position vis-a-vis management and its prerogatives.[10] One example of this is how many collective bargaining agreements will mandate the use of reemployment priority registers and career transition assistance plans, as well as the right to advance notice, in the case of reductions in force and other workforce restructuring plans by agency management.

The passage of the CSRA significantly expanded the scope of the grievance procedure[11]:

> Among those matters included are: removals or demotions for performance reasons; adverse agency actions such as removals, reductions in grade or pay, and suspensions or furloughs for 30 days or less; grievances concerning the Fair Labor Standards Act; grievances over the withholding of within-grade increases; reductions in work force; and adverse suitability ratings. The only matters specifically excluded by the Act itself are those concerning prohibited political activities, retirement, life insurance, health insurance, suspensions or removals for national security reasons, examinations, certifications or appointments, and the classification of any position which does not result in a reduction in

9 Christine G. Cooper & Sharon Bauer, Federal Sector Labor Relations Reform, 56 Chi.-Kent L. Rev. 509 (1980).

10 "One traditional function of a civil service commission is to provide a procedure and appellate body for appeal of disciplinary decisions. Union members, however, do not view the civil service commission as an impartial body for review of disciplinary decisions but rather view it as part of management's personnel system. For that reason, unions increasingly have attempted to negotiate both standards for employee discipline and contractual grievance procedures for challenging such adverse actions. These increasing efforts to negotiate contractual limitations on management's disciplinary authority and contractual procedures for appeal of management's disciplinary decisions have posed the issue of whether civil service standards and procedures or contractual standards and procedures should govern disciplinary decisions. The issue arises not only in contract enforcement actions, but also in contract negotiations when management resists bargaining about discipline and grievance and arbitration machinery on the basis that civil service laws prohibit negotiation over such matters." [Ann C. Hodges, The Interplay of Civil Service and Collective Bargaining Law in Public Sector Employee Discipline Cases, 32 B.C. L. Rev. 95. (1990)]

11 Van Allyn Goodwin. Federal Sector Arbitration under the Civil Service Reform Act of 1978, San Diego Law Review, 1980, Volume 17, Issue 4,

> grade or pay of an employee. Thus, within the broad definition of "grievance," grievance arbitration procedures can potentially extend to a wide variety of labor relations disputes which were, heretofore, within the exclusive province of a statutory appeal procedure.

In fact, Jimmy Carter's intentions for this legislation, as transmitted to Congress on March 2, 1978, were to "make Executive Branch labor relations more comparable to those of private business" and "displace the multiple appeals systems which now exist and which are unanimously perceived as too costly, too cumbersome, and ineffective." But that is not what happened – administrative grievance procedures coexist with negotiated procedures, alongside jurisdiction over "mixed cases" that involve discrimination complaints with the EEOC.

Civil service regulations

As stated, the modern federal personnel system was instituted and formalized via the Civil Service Reform Act of 1978 (CSRA). The CSRA made significant organizational changes to civil service management, adjudications, and oversight. It abolished the Civil Service Commission (CSC) and divided its duties among OPM and the MSPB, which initially encompassed the Office of Special Counsel (OSC). OSC later became a separate agency to which specific duties were assigned. OPM was obligated to, among other things, advise the President regarding appropriate changes to the civil service rules, administer retirement benefits, adjudicate employees' entitlement to these benefits, and defend adjudications at MSPB. MSPB adjudicates challenges to personnel actions taken under the civil service laws, among other things, and OSC investigates and prosecutes prohibited personnel practices. The 12 "merit system principles" are codified in 5 USC 2301.

The federal civil service consists of three services: the competitive service, the excepted service, and Senior Executive Service.

The President is authorized by statute to provide for "necessary exceptions of positions from the competitive service" when warranted by "conditions of good administration." (5 USC 3302)

The President has delegated to OPM the concurrent authority to except positions from the competitive service when it determines that competitive requirements are not practicable.

The President has further delegated authority to OPM to "decide whether the duties of any particular position are such that it may be filled as an excepted position under the appropriate schedule." More generally, according to 5 USC 3301, The President may "prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service and ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought."

Four categories of appointments comprise the competitive service: those subject to delegated examining procedures; those filled through internal placement (merit promotion) procedures in accordance with 5 CFR 335; those filled on a non-competitive basis in accordance with 5 CFR 315 F and G; and those filled under direct hire authority in accordance with 5 CFR 337 B.

The excepted service is divided into five schedules from A to E, as documented in 5 CFR 213 Subpart C. Most notable and extensively used is Schedule C, through which "agencies may make appointments under this section to positions which are policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials."

Excepted service employees, except those in Schedule C and some employees in certain Federal agencies excepted by statute, maintain the same notice and appeal rights for adverse actions and performance-based actions as competitive service employees.

Personnel actions are taken by federal supervisors. According to 5 USC 7103, supervisor means "an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment."

Suspensions of 14 days or less are not directly appealable to MSPB. But an employee against whom such a suspension is proposed is entitled to certain procedural protections, including notice, an opportunity to respond, representation by an attorney or other representative, and a written decision. These are known as *Loudermill* rights, mandated according to modern Supreme Court jurisprudence on the Due Process Clause.

In some circumstances, individuals who have experienced a prohibited personnel practice can raise the issue in one of three different places: employee appeals to the MSPB under Chapter 77 (i.e., a formal appeal of a removal, demotion, suspension greater than 14 days, and other significant personnel actions); a grievance through the negotiated grievance procedure (i.e., union grievance); or by filing a complaint with OSC. Individuals are limited, by law, to choosing only one of those forums. So-called “mixed cases” involve discrimination complaints to the EEOC in addition to a grievance or adverse action appeal.

More rigorous procedures apply before agencies may pursue removals, demotions, suspensions for more than 14 days, reductions in grade and pay, and furloughs for 30 days or less, assuming the subject of the contemplated action meets the definition of an “employee” under 5 USC 7511. Incumbents, other than those who are statutorily excepted from chapter 75's protections, receive the full panoply of civil service protections in 5 USC 7513 after they satisfy the length of service conditions in 5 USC 7511.

Under section 7511(a)(1), “employee” refers to an individual who falls within one of three groups: (1) an individual in the competitive service who either (a) is not serving a probationary or trial period under an initial appointment; or (b) has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less; (2) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions in an Executive agency; or in the United States Postal Service or Postal Rate Commission; or (3) an individual in the excepted service (other than a preference eligible) who either (a) is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or (b) has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less. In the event of a final MSPB decision adverse to the employee, employees may petition the United States Court of Appeals for the Federal Circuit or another appropriate judicial forum to review MSPB's final orders and decisions.

Excepted from these procedural entitlements and rights to appeal conferred on other employees under chapter 75 are employees “whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character.” This is true regardless of veterans' preference or length of service in the position.

Finally, in addition to establishing the requirements and procedures for challenging adverse actions and performance-based actions, the CSRA includes a mechanism for employees in a "covered position" to challenge a "personnel action" that constitutes a "prohibited personnel practice" because it has been taken for a prohibited reason. "Covered position" means any position in the competitive service, a career appointee in the Senior Executive Service, or a position in the excepted service unless "conditions of good administration warrant" a necessary exception on the basis that the position is of a "confidential, policy-determining, policy-making, or policy-advocating character."

5 USC 2302(a)(2)(A) lists twelve types of personnel actions that can form the basis of a prohibited personnel practice under 5 USC 2302(b), including (1) an appointment; (2) a promotion; (3) an adverse personnel action for disciplinary or non-disciplinary reasons; (4) a detail, transfer, or reassignment; (5) a reinstatement; (6) a restoration; (7) a reemployment; (8) a performance evaluation; (9) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation; (10) a decision to order psychiatric testing or examination; (11) the implementation or enforcement of any nondisclosure policy, form, or agreement; and (12) any other significant change in duties, responsibilities, or working conditions.

There are two different statutes that authorize an agency to demote or remove an employee for performance-based reasons: (1) 5 USC 4303 (which can only be used for failure in a critical performance element); and (2) 5 USC 7513 (which can be used for performance or conduct that harms the efficiency of the service). Respectively, they are known as "chapter 43 actions" and "chapter 75 actions." The differences between them lie in the procedural requirements. For a chapter 43 action, the agency must prove that performance deficiencies are within a critical element of an employee's position (under 5 USC 4301(3)), does *not* have to prove that the adverse action will promote the efficiency of the service, and must issue a final decision within 30 days of the advance notice.

For chapter 75 actions, to implement a suspension, demotion, or removal for misconduct, the agency must be able to show that the action was "for such cause as will promote the efficiency of the service." This is called *nexus* – meaning that the agency must show a connection between the employee's conduct or performance and "the work of the agency, i.e., the agency's performance of its functions." For some offenses, such as going AWOL, the nexus is considered self-evident. Many offenses that take place in the workplace will have a connection to that workplace and thus

the work of the agency performing its functions. However, nexus can occur with off-duty as well as on-duty behavior. MSPB has recognized three methods by which the agency may meet its burden of establishing a nexus linking an employee's off-duty misconduct with the efficiency of the service: (1) a rebuttable presumption of nexus may arise in certain egregious circumstances; (2) the agency may show, by a preponderance of the evidence, that the misconduct at issue has adversely affected the employee's or co-workers' job performance or the agency's trust and confidence in the employee's job performance; and (3) the agency may show, by a preponderance of the evidence, that the misconduct interfered with or adversely affected the agency's mission.

MSPB applies a multi-factor test, known as the "Douglas factors," to adjudicate appeals over chapter 75 actions and determine if the agency's decision can be upheld. The Douglas factors are:

> (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
> (2) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position
> (3) The employee's past disciplinary record;
> (4) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
> (5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
> (6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
> (7) Consistency of the penalty with any applicable agency table of penalties;
> (8) The notoriety of the offense or its impact upon the reputation of the agency;
> (9) The clarity with which the employee was on notice of any rules that where violated in committing the offense, or had been warned about the conduct in question;
> (10) Potential for the employee's rehabilitation;
> (11) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
> (12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

MSPB has long held to the "disparate treatment standard" that in order to ensure that penalties are reasonable, same or similar offenses should be treated in a similar manner. To establish that penalties are disparate, an appellant must show that the charges and the circumstances surrounding the charged behavior are substantially similar to those of a comparator employee.

Per 5 CFR 315, "a person employed in the competitive service for other than temporary, term, or indefinite employment is appointed as a career or career-conditional employee." To become a career employee one must serve at least 3 years of creditable service. The transition from career-conditional to career tenure is automatic upon completion of the service period. Permanent employees are generally put on the career-conditional track when first hired.

For most competitive service positions, the law provides that the first year of employment is a *probationary period*. An individual's appointment is not considered final until the completion of probation. An agency may terminate a probationer's appointment with no advance notice and only a limited right of appeal when it is not satisfied with the probationer's performance or conduct. For excepted service positions, the law does not require a probationary period per se, but it nonetheless provides that an agency may terminatean employee's appointment during the first two years with no advance notice and no right of appeal.

Generally, probationary employees are excluded from the definition of "employee" in 5 USC 7511(a)(1) as pertains to both the competitive and excepted services. Consequently, probationary employees do not have a statutory right to appeal their termination to MSPB.

Another means of waiving competitive examination requirements is through the use of *direct hire authority* (DHA). Under 5 USC 3304(a)(3), OPM can grant agencies the ability to use direct hire for government-wide or agency-specific positions in which there is a critical hiring need or severe shortage of candidates Under this authority, agencies can appoint applicants into the competitive service without regard to formal rating, ranking of applicants, and veterans' preference.

DHA can only be used for competitive service positions. The requesting agency must be an executive agency, as defined in 5 USC 105. DHA can be used for one or more occupations, grades (GS-15 or below), and/or geographic locations. Agencies may hire candidates into competitive service career, career-conditional, term, temporary, emergency indefinite, or overseas limited appointments.

There are three stages to the competitive hiring process:

- the assessment process (the rating and ranking of applicants and application of veterans' preference);
- the certification process (the process through which applicants are listed on a *certificate of eligibles* in order of their assessed scores, adjusted for veterans' preference);
- the selection process (the process for choosing among applicants based on their numerical rankings in accordance with veterans' preference requirements).

All internal agency authority for competitive hiring comes from a delegation by OPM, in turn through the President. This is known as “delegated examining authority.” Delegated examining is synonymous with competitive examining (5 USC 1104). Each agency with this delegated authority is required to enter into a written agreement with OPM.

Federal sector collective bargaining

Besides the civil service regulations proper, Title VII of the CSRA codifies collective bargaining rights for federal employees, which are further developed in case law by the Federal Labor Relations Authority (FLRA). Title VII of the CSRA is generally known as the Federal Service Labor-Management Relations Statute (FSLMRS), or simply “the Statute.”

The Statute establishes distinct components within the FLRA, including the Authority, the Office of the General Counsel of the Authority, and the Federal Service Impasses Panel (FSIP). Presidential appointees lead each of these three components. The FLRA structure also includes an Office of Administrative Law Judges (ALJs). The mission of the FLRA is to carry out five primary statutory responsibilities as efficiently as possible. These are: resolving complaints of unfair labor practices (ULPs), determining the appropriateness of units for labor organization representation, adjudicating exceptions to arbitrators’ awards, adjudicating legal issues relating to the duty to bargain, and resolving impasses during negotiations.

Section 7103(a)(12) of the Statute defines collective bargaining as “the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any

collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession."

Both parties have a duty to bargain in good faith with respect to "conditions in employment," defined in Section 7103(a)(14) as "personnel policies, practices, and matters, whether established by rule, regulation or otherwise, affecting working conditions." All matters provided by a separate federal statute or related to position classification are exempt from this definition.

Certain matters are excluded from the scope of bargaining: matters which are contrary to government-wide rules and regulations (section 7117 (a)(1)), matters contrary to agency rules and regulations for which there is a compelling need (section 7117(a)(2)), and proposals that interfere with the agency's right to determine its own internal security practices.

Section 7106(a) reserves certain "management rights," namely: to determine the mission, budget, organization, number of employees, and internal security practices of the agency; to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees; to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted, and to conduct competitive examinations (that is to say, collective bargaining is not intended to override civil service regulations, though matters can be more complicated).

What counts as a "grievance" is defined in section 7103(9). It includes any complaint: by any employee concerning any matter relating to the employment of the employee; by any labor organization concerning any matter relating to the employment of any employee; or by any employee, labor organization, or agency concerning (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

Under Section 7114(c), all agreements must be reviewed and ratified by the agency head. The agency head (or in practice someone who has been delegated the agency head's authority) has the right to disapprove any provision of the agreement that conflicts with law, rule or binding regulation. The agency head has 30 days to review and approve the agreement after it is executed. If the agency head does not approve or disapprove the agreement within 30 days, the agreement becomes binding on the agency and the union. The agency head review process is limited to identifying and rejecting contract provisions that conflict with law or government-wide

regulations. If a provision is disapproved, the union has several options, including: to accept the new contract that does not include the provision disapproved by the agency head, to appeal the decision to the FLRA, to return to the bargaining table to renegotiate the disputed provisions, or to file a grievance or ULP allegation.

Many collective bargaining agreement (CBAs) contain provisions that directly impact managerial rights in reshaping the agency's workforce. For instance, the "Master Agreement Between U.S. Citizenship and Immigration Services and American Federation of Government Employees - National Citizenship and Immigration Services Council"[12] contains the following:

> Except in the case of furloughs due to unforeseeable circumstances beyond the control of the Agency, prior to official notification of employees, the Union will receive ten (10) days advance notice of any pending reduction-in-force, transfer of function or reorganization. This notice, in writing, will include the reasons for the reduction-in-force, transfer of function or reorganization, the approximate number and types of positions affected, the approximate date of the action, and an invitation to the Union to a meeting conducted by the Agency to explain the reduction-in-force, transfer of function or reorganization procedures, and answer relevant questions.
>
> Minimize Adverse Action. The Agency will attempt to minimize actions that adversely affect employees which often follow a reduction-in-force by using, to the extent possible, attrition to accomplish reductions. In the event career or career- conditional employees are separated by reduction-in-force, the Agency will refer these names to the Department of Homeland Security for inclusion on the appropriate reemployment priority list in accordance with governing regulations.
>
> Employees will be given preference for reemployment consistent with governing regulations. The Agency will provide affected employees information regarding employment possibilities with other government agencies, retirement, severance pay and other benefits available to them.

Seemingly mundane concerns about performance appraisal and employment conditions can have direct political consequences, too. Immigration judges who oversee removal proceedings as employees of the Department of Justice are unionized through the National Association of

12 https://www.uscis.gov/sites/default/files/document/guides/USCIS_2016_CBA.pdf

Immigration Judges (NAIJ). Attempts by the Executive Office for Immigration Review to increase IJ caseloads and set performance quotas amidst surges at the border have led to NAIJ filing litigation with the FLRA alleging unfair labor practices. Quotas and performance metrics are governed by Article 22 of the union's CBA, which contains a number of provisions that restrict how the agency can evaluate judges: for example, measures of a judge's performance and efficiency must account for, among other things, the "availability of resources" and "other factors not in the control of the judge," effectively ruling out the use of case quotas for immigration court removal proceedings.

Restructuring mechanisms for the federal workforce

There are three main mechanisms for reshaping and downsizing the federal civil service: reductions in force, voluntary separation incentive payments ("buyouts"), and voluntary early retirement authority ("early-outs").

Reductions in force (RIFs) are "an administrative procedure by which an agency eliminates jobs for certain listed reasons, including lack of work or reorganization, and releases employees from their competitive levels by furlough of more than 30 days, separation, demotion, or reassignment requiring displacement" (*Sharma v. Dept. of Navy*, DA-0351-15-0179-I-1). Management is responsible for deciding if a RIF is necessary and, if so, what positions to abolish and when. 5 CFR 351.201(a).

There are three key concepts to a RIF: the competitive area[13], the competitive levels[14], and the retention standing. Management initiates the RIF process by defining the competitive area, which includes "all employees within the organizational units and geographical locations within the local commuting area." Employees in a competitive area compete for retention only with other employees in the same competitive area. Subsequently, a competitive level includes all positions within a competitive area that are the same grade, series, and similar duties, position qualification requirements, pay schedules, and working conditions. Then, within each competitive area the agency develops a *retention register* that ranks employees according to four criteria: tenure, veteran preference, performance ratings, and length of service. These criteria taken together form the retention standing. Employees who rank higher on the retention register according to their standing have *assignment rights*, which are entitlements to displace another employee with lower

13 The geographical and organizational limits within which employees compete for retention.
14 Competitive and excepted service positions are placed in separate competitive levels.

retention standing. The two kinds of assignment rights are bumping and retreating rights. Bumping means displacing an employee in the same competitive area who is in a lower tenure group[15], or in a lower subgroup within the released employee's own tenure group. Retreating means displacing an employee in the same competitive area who has less service within the released employee's own tenure group and subgroup.

Most agencies maintain a reemployment priority list (RPL) as part of their RIF procedures. The RPL provides placement priority to current and former competitive service employees who will be or were separated by RIF or have recovered from a compensable work-related injury after more than 1 year. Employees who register with the RPL will be given priority placement for most competitive service vacancies before hiring someone from outside of the agency's permanent competitive service workforce.

Senior Executive Service employees are generally exempt from standard RIF procedures.

A voluntary separation incentive payment (VSIP), or "buyout," is defined by OPM as:

> The Voluntary Separation Incentive Payment (VSIP or buyout) Authority allows agencies to offer lump-sum payments to employees who are in surplus positions or have skills that are no longer needed in the workforce, as an incentive to separate. Under VSIP, agencies may pay up to $25,000, or an amount equal to the amount of severance pay an employee would be entitled to receive, whichever is less. Employees may separate to accept VSIP by resignation, optional retirement, or by voluntary early retirement, if authorized.

Accepting the buyout bars the recipient from federal employment for 5 years unless he reimburses the sum.

In contrast, voluntary early retirement authority (VERA), or "early-out," is the authority pursuant to 5 USC 8414 or other regulation by which "as determined by [an] agency under regulations prescribed by OPM," an employee "is within the scope of the offer of voluntary early retirement, which may be made on the basis of: 1 or more organizational units; 1 or more occupational series or levels; 1 or more geographical locations; specific periods; skills, knowledge, or other factors related to a position; or any appropriate combination of such factors," hence may "after

15 Employee's status based on length of service and type of appointment.

completing 25 years of service, or after becoming 50 years of age and completing 20 years of service, [be] entitled to an annuity."

Buyouts and early-outs are frequently used in conjunction.

Due to the assignment and reemployment priority rights associated with RIFs, they are both hard to administer and often do not lead to a downsizing so much as a reshuffling of the workforce. A 1996 report by GAO found that buyouts were most cost-effective than RIFs since the recipients of buyouts tended to be on higher pay grades, and were not subject to assignment rights: "Our analysis shows that agencies could realize net savings over a 5-year period through workforce reductions using either buyouts or RIFs, because salaries and benefits saved from either strategy should exceed costs. However, savings from buyouts would generally exceed those from RIFs over a 5-year period, because buyout recipients typically have higher grades and salaries than employees separated by RIFs. Separation data from fiscal year 1993 through March 31, 1995, show that buyout recipients had an average annual salary ranging from $34,745 for resignees to almost $48,000 for retirees, while RIFed employees averaged $29,495. A primary reason for the salary differences is that a person who would otherwise be separated under a RIF can often displace a lower-graded employee with less retention rights who is then separated. This process, which is referred to as "bumping and retreating," has occurred in most recent RIFs."[16]

To conclude: the laws grounding federal sector employment have accrued a lot of cruft throughout the decades. What sticks out the most is the intrinsic "dualism" between civil service regulations and labor arbitration, with the former revolving around fixed procedures and standards of appraisal, and the latter revolving around negotiation and bargaining. What counts as an "unfair labor practice" to one party can be a legitimate right of management to the other. While there are mechanisms to restructure the federal workforce, they carry many intricate loopholes and exceptions, and are often preempted by union agreements. Merit and bargaining do not bode well together.

16 GAO/GGD-96-63 - Federal Downsizing: The Costs and Savings of Buyouts Versus Reductions-in-Force (May 14, 1996).