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SCIENTIFIC INTEGRITY UNDER ATTACK



Is Scientific Integrity the Latest Front in the Effort to Protect the Administrative State from Representative Democracy?

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Scientific Integrity: The Latest Front in the Effort to Protect the Administrative State from Representative Democracy

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Overview

The cornerstone of representative democracy is the principle that those making decisions are accountable to the people. This is the surest way to guarantee that the public and electorate's will be carried out in decisions and policies. Unfortunately, several impediments to this principle have been erected over time, many of which track back to the explosive growth in size and power of the administrative state.

Addressing this challenge and looking for solutions has been a focus of Council to Modernize Governance (CMG) since its inception. Numerous examples exist where career officials, whose positions enjoy civil service protections, have been empowered to influence or make decisions without exposure to the accountability required under our Constitution. President Trump's Schedule F Executive Order was one attempt to address this imbalance of officials imbued with authority but shielded from accountability. Another example is the federal permitting process, where federal officials are given far too much discretion to issue, withhold or delay permits.[1] Other examples abound, but a general theme is that the federal government, particularly career employees, have gained too much power without accountability.

A more recent example and the focus of this paper may be seen in the attempts to revise scientific integrity standards in order to remove political appointees from the decision-making process and stymie a future administration's ability to revisit controversial or ill-advised regulatory proposals. Like the move away from Schedule F, these "reforms" represent departures from representative democracy and a misunderstanding of the role of sound science in federal decision-making. At best, they rest on a legally shaky foundation.

In many ways, attempts to manipulate scientific integrity policies for political purposes are illustrative of the problem of the administrative state.

It appears that an otherwise laudatory policy that ensures government decision-making is not arbitrary or inappropriately influenced is being used to advance a political agenda. And, it would subvert the constitutional decision-making structure, in which principal and inferior officers make decisions, not their advisors or support staff, i.e., career employees. This paper explores recent changes to scientific integrity policies, the many challenges they could present to future policymakers, and the serious legal deficiencies they possess.

A. What is Scientific Integrity?

Under the Biden administration, executive agencies have been modifying "Scientific Integrity" policies. The Office of Science and Technology Policy's (OSTP) recent definition of scientific integrity, which other agencies have deemed to be the "federal definition," defines the term to mean:

Scientific integrity is the adherence to professional practices, ethical behavior, and the principles of honesty, objectivity, and transparency when conducting, managing, using the results of, and communicating about science and scientific activities. Inclusivity and protection from inappropriate influences are hall marks of scientific integrity.[2]

Historically, scientific integrity policies have been focused on having standards and procedures in place for science used in policymaking. In 1999, for example, Environmental Protection Agency's (EPA) "Principles of Scientific Integrity" focused upon having "work... performed objectively, without predetermined outcomes," to "represent [findings] fairly and accurately," to acknowledge the work of others, etc.[3]

This evolved with a Memorandum on March 9, 2009, issued by President Barack Obama.[4]

[1] CMG has written at length about how permit by rule would effectively fix this problem.

[2] White House Office of Science and Technology Policy, Scientific Integrity Policy, (May 17, 2023), 5, <https://www.whitehouse.gov/wp-content/uploads/2023/06/OSTP-SCIENTIFIC-INTEGRITY-POLICY.pdf>. ("OSTP Policy.")

[3] United States Environmental Protection Agency, Scientific Integrity at EPA, <https://www.epa.gov/scientific-integrity/scientific-integrity-epa>.

[4] The White House, Memorandum for the Heads of Executive Departments and Agencies, (March 9, 2009), <https://obamawhitehouse.archives.gov/the-press-office/2009/03/09/memorandum-for-the-heads-of-executive-departments-and-agencies-3-9-09>.

That Memorandum sought to bring trustworthiness to science in “informing public policy decisions.”[5] It did so by ordering agencies to develop policies whereby candidates for executive scientific positions would be judged upon their knowledge, credentials, experience, and integrity.[6] It also directed policy development to ensure integrity of the scientific process, create transparency by making available to the public scientific findings, and appropriate whistleblower policies to “ensure the integrity of scientific and technological information and processes on which the agency relies.”[7]

The following year, OSTP issued its own Memorandum.[8] That Memorandum gave directives to agencies that they ensure a culture of scientific integrity through “open discussion” and a “firm commitment to evidence,” among other factors.[9] It also stated that hiring practices should be based upon knowledge and credentials, that information should have a “free flow” including making scientists available to media, and it directed agencies to establish principles for conveying scientific information.[10] Under this directive, advisory committees of scientists were to be created and scientists were encouraged to publish and present their work.[11]

Early in President Biden’s term, on January 27, 2021, he issued a Memorandum purported to build off of these two memos now over a decade old.[12] Here, however, focus shifted toward outside influence. The executive order proclaimed that “Scientific findings should never be distorted or influenced by political considerations.”[13] “Improper political interference in the work of Federal scientists or other scientists who support the work of the Federal Government and in the communication of scientific facts undermines the welfare of the Nation....” It charges agency heads to identify instances of “deviations from existing policies [that] have resulted in improper political interference in the conduct of scientific research....”[14]

In theory, it is agreeable that science should not be influenced by outside, non-scientific, pressures. But on the heels of 2020, it became apparent that the Biden administration wished to wrest policymaking power from the leadership of future administrations.

B. How Have Agencies Been Imposing Policy Changes?

1. Rulemaking

A number of agencies have enacted their scientific integrity policy changes through rulemaking. OSTP,[15] Department of Health and Human Services (DHHS),[16] the EPA,[17] the Social Security Administration,[18] the Consumer Product Safety Commission,[19] the National Science Foundation,[20] and the National Institutes of Health[21] have all engaged in rulemaking to impose these scientific integrity policy changes. [22]

a. OSTP

The root of these policies is the OSTP policy. It even provides the “federal definition” that other agencies quote. Like the Biden executive order, the OSTP policy describes a “culture of scientific integrity” to mean one free from “political interference or inappropriate influence” and states that scientific findings “must not be suppressed, delayed, or altered for political purposes and must not be subjected to inappropriate influence.”[23]

OSTP does claim to be “inclusive of all scientists,” using the definition of “inclusion” related to the term “diversity, equity, and inclusion.”[24] So-called “different modes of science, such as citizen science community-engaged research, participatory science, and crowdsourcing” are to be given “recognition, support, and resources to meet the same high standards of scientific integrity.”[25]

[5] Ibid.
 [6] Ibid.
 [7] Ibid.
 [8] John P. Holdren, Office of Science and Technology Policy, Memorandum for the Heads of Executive Departments and Agencies, (Dec. 17, 2010), <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf>. (“Obama Memo.”)
 [9] Ibid.
 [10] Ibid. 2.
 [11] Ibid. 3.
 [12] The White House, Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking, (January 27, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/memorandum-on-restoring-trust-in-government-through-scientific-integrity-and-evidence-based-policymaking/>. (“White House Memo”).
 [13] Ibid.
 [14] Ibid.
 [15] Executive Office of the President, “Request for Information to Support the Development of a Federal Scientific Integrity Policy Framework,” Federal Register 87, No. 42 (March 3, 2022) 12165. <https://www.govinfo.gov/content/pkg/FR-2022-03-03/pdf/2022-04466.pdf>.
 [16] Department of Health and Human Services, “Request for Comments on the Draft HHS Scientific Integrity Policy,” Federal Register 88, No. 138 (July 20, 2023), 46802, <https://www.govinfo.gov/content/pkg/FR-2023-07-20/pdf/2023-15408.pdf> (“HHS Rule”).

[17] Environmental protection Agency, “Scientific Integrity Policy Draft for Public Comment,” Federal Register 89, No. 16 (January 24, 2024), 4606. <https://www.govinfo.gov/content/pkg/FR-2024-01-24/pdf/2024-01313.pdf>. (“EPA Rule”)
 [18] Social Security Administration, “Request for Information on Social Security Scientific Integrity Policy,” Federal Register 89, No. 17 (January 25, 2024), 5083. <https://www.govinfo.gov/content/pkg/FR-2024-01-25/pdf/2024-01494.pdf>
 [19] Consumer Product Safety Commission, “Draft CPSC Scientific Integrity Policy,” Federal Register 88, No. 192, (October 5, 2023), 69172. <https://www.govinfo.gov/content/pkg/FR-2023-10-05/pdf/2023-22110.pdf>
 [20] National Science Foundation, “Notice of Public Listening Sessions on Federal Agency Implementation of National Science and Technology Council Framework for Federal Scientific Integrity Policy and Practice,” Federal Register 88, No. 170 (September 5, 2023), 60713. <https://www.govinfo.gov/content/pkg/FR-2023-09-05/pdf/2023-19094.pdf>
 [21] National Institutes of Health, “Request for Information on the DRAFT Scientific Integrity Policy of the National Institutes of Health,” Federal Register 88, No. 184 (September 25, 2023), 65696. <https://www.govinfo.gov/content/pkg/FR-2023-09-25/pdf/2023-20733.pdf>.
 [22] Each of these policies have similar patterns as those described herein, that would effectively prevent political appointees from having full authority over career employees.
 [23] OSTP Policy 6.
 [24] Ibid.
 [25] Ibid. 7.

using the example of “indigenous knowledge.”[26] This support is extended to “Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color, members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQI+) persons....”[27]

OSTP policy prohibits “political interference or other inappropriate influence *in the design*, proposal, conduct, management, evaluation, reporting and *use of* scientific data.”[28] Employees are “able to conduct their work free from reprisal or concern for reprisal.”[29] Findings cannot be “delayed or altered for political purposes,” and it requires “that agency officials...shall not alter, nor direct any agency scientists...to alter, scientific...research findings.”[30] Officials “shall neither ask nor direct nor suggest that agency scientists...alter the presentation of their scientific findings....”[31] The policy even requires scientists to participate in policy decisions.[32]

Finally, the policy creates mechanisms to report anyone who commits a “loss of scientific integrity” pursuant to these provisions.[33] “Those who report concerns and allegations need not be directly involved or witness a violation.”[34]

b. EPA

The EPA already had a scientific integrity policy in place since 2012.[35] But on the heels of the Biden Memorandum and the OSTP Policy, the EPA updated its policy to add the “new Federal definition of scientific integrity” and, among other changes, “strengthen several policy elements” such as “ensuring the free flow of scientific information, supporting decision making processes, ensuring accountability, etc.”[36]

The EPA’s policy, too, has language stating that “political appointees”[37] would not be able to impact the EPA’s direction.

All covered entities, including political appointees, are prohibited from “directing or suggesting that another covered entity interfere or inappropriately influence or unreasonably delay scientific activities.”[38] Employees have to be able to “conduct their work free from reprisal, or concern for reprisal.”[39] The EPA is to create “independence and objectivity of personnel” that “will insulate the implementation of program evaluations, including how program evaluation staff and managers are selected and how they operate, from political and other undue influences that may affect staff/managers...”[40]

The policy also dramatically expands the types of work product subject to protections under the modified scientific integrity regulation. For instance, “In an economic analysis, the decision of whether and how to quantify and value the benefits and costs of a policy option are scientific decisions.”[41] It is not hard to imagine that at least one objective behind this important policy change is to protect controversial and costly regulations from being easily revisited by a future administration. Even armed with real-world economic data showing the deleterious impact of regulations such as the electric vehicle mandate and its climate rule aimed at power plants, future EPA agency leadership could find themselves hampered by the confines of this rule.

c. Department of Health and Human Services

Like the other policies, DHHS applies to “political appointees” and prevents “suppress[ion], delay[], or alter[ation] for political purposes and must not be subjected to political interference or inappropriate influence.”[42] They cannot use “political interference or other inappropriate influence in the design, proposal, conduct, management, evaluation, communicating about, and use of scientific activities.”[43]

[26] “Indigenous Knowledge is a body of observations, oral and written knowledge, innovations, practices, and beliefs developed by Tribes and Indigenous Peoples through interaction and experience with the environment.” The White House, White House Releases First-of-a-Kind Indigenous Knowledge Guidance for Federal Agencies, Dec. 1, 2022. <https://www.whitehouse.gov/ostp/news-updates/2022/12/01/white-house-releases-first-of-a-kind-indigenous-knowledge-guidance-for-federal-agencies/>.

[27] OSTP Policy 11.

[28] *Ibid* 8.

[29] *Ibid*.

[30] *Ibid* 9.

[31] *Ibid*.

[32] *Ibid* 10.

[33] *Ibid*.

[34] *Ibid* 11.

[35] United States Environmental Protection Agency, Scientific Integrity Policy, 1. https://www.epa.gov/system/files/documents/2023-12/scientific_integrity_policy_2012_accessible.pdf.

[36] EPA Rule 4807.

[37] “Covered Entities” include “all EPA employees, political appointees, contractors....” United States Environmental Protection Agency, “USEPA Scientific Integrity Policy,” 5. <https://www.regulations.gov/document/EPA-HQ-ORD-2023-0240-0002>. (“EPA Policy”).

[38] *Ibid* 10.

[39] *Ibid*.

[40] *Ibid*.

[41] *Ibid* 12.

[42] Department of Health and Human Services, The Scientific Integrity Policy of the U.S. Department of Health and Human Services, 3, 5, 7. <https://www.hhs.gov/sites/default/files/draft-hhs-scientific-integrity-policy.pdf>.

[43] *Ibid* 8.

2. Union Negotiations

The EPA is using another strategy to embed and shield its revised scientific integrity policies from future changes: negotiating it into the agency's collective bargaining agreement with the respective union. The American Federation of Government Employees (AFGE) and the EPA are currently bargaining to include language in their new collective bargaining agreement (CBA) that would cement the language into, effectively, contractual terms. [44] AFGE has already said the quiet part out loud: "As we enter into an election year, we need to ensure our ability to protect human health and the environment is preserved no matter who is in power." [45]

That proposed portion of the CBA references and incorporates, "The Agency's forthcoming Scientific Integrity Policy." [46] It would create a reporting mechanism for employees to "report scientific misconduct or a suspected violation of the Scientific Integrity Policy" and said employees would be immune from "retribution, reprisal, or retaliation by the agency." [47] And, this provision would prevent future amendment of the definitions within the agency's scientific integrity policy, stating, "Changes in these definitions from current Agency policy will be subject to negotiation...." [48]

C. Dangers

The clear danger with these scientific integrity policy changes is how to define what science is "political," "inappropriate," "unjustified," etc. During the height of Covid-19, certain scientific theories about masks, alternative medicine, or vaccines were branded "political" or "inappropriate" or "unjustified." Yet science has evolved from what used to be the conventional wisdom. The economic consequences of lockdowns would now be limited to the siloed analysis of a select group of unaccountable bureaucrats shielded from both electoral accountability and consideration of the wide range of information that senior appointed officials use to inform their policy choices. A future cost/benefit analysis for closing schools could be manipulated in such a way that the deck is stacked against officials' ability to make informed and independent decisions expected of principal officers.

These policy changes would prevent any policy directives from agency leadership because those directives could be deemed "political." Political appointees would be unable to change the direction of the agency's scientific research, even down to the base level of "design" and "proposal" of the research. Career employees, historically demonstrated to have a significant partisan leaning to the left, [49] could be effectively shielded from scrutiny, direction, and appropriate supervision under the presumption that they are in the right and leadership is solely interested in inappropriately influencing the outcome of their work product. Otherwise, standard feedback on agency work product could quickly lead to claims of suppression. Officials with a visceral attachment to policy outcomes they helped shape in a prior administration would be given power to prevent a future administration from reversing them. And, as with some of the policies, career scientists would not only be given a seat at the policy table, they could be positioned at the head of it to the detriment of the constitutionally placed officials. Scientists will now be permitted to perform the agency leadership (e.g., political appointee), role, while themselves being insulated from "politics." This is hardly democratic or constitutional.

Indeed, the policies handcuff the ability of a new administration to change the direction of what scientific ideas are explored and which ones are dismissed. Of course, no science should be manipulated to fit the whims of any administration. But certain theories should be permitted to be explored. Decisionmakers should be able to order studies to explore a potential solution. Good "science" starts with an observation, then a hypothesis, then testing. But these scientific integrity policies would prohibit even impacting the "design" of studies, meaning agency leadership may be prevented from simply asking scientists to test a hypothesis. That is not scientific.

Ultimately, scientific findings must remain a component of a final agency decision, balanced against other important factors such as economic impact, legal obligations of the government, administration policy priorities endorsed by the public via elections, and a variety of other important factors. When "economic" factors are categorized as "science" and thus protected from legitimate scrutiny over its inputs and assumptions, then decision-makers could find themselves denied access to rigorous cost/benefit analysis.

[44] "Scientific Integrity-Tentative Agreement," [afge238.org](https://afge238.org/wp-content/uploads/sites/46/Scientific-Integrity-TA.fully-signed.pdf), Dec. 23, 2023. <https://afge238.org/wp-content/uploads/sites/46/Scientific-Integrity-TA.fully-signed.pdf>. ("CBA Proposed Language").

[45] Kevin Bogardus, "EPA Enters High-Stakes Mediation With Union," E&E News, Dec. 5, 2023. <https://www.eenews.net/articles/epa-enters-high-stakes-mediation-with-union/>

[46] CBA Proposed Language.

[47] Ibid.

[48] Ibid.

[49] The average career employee will give to liberal candidates. For example, career employees gave to liberal candidates even more than did President Barack Obama's political employees. James Sherk to Tim Curry, November 15, 2023, in RIN 3206-AO56, Comment of the America First Policy Institute in Opposition to the Proposed Rule upholding Civil Service protections and Merit System Principles, 88 Fed. Reg. 63862 (Sept. 18, 2023), 30. https://americafirstpolicy.com/assets/uploads/files/AFPI_Comment_on_OPM_RIN_3206%E2%80%9393AO56-Anti-Schedule_F_NPRM-FINAL.pdf.

For example, some environmental regulations may be scientifically ideal, but may be prohibitively expensive for the citizens or businesses to shoulder. Or, looking back at the COVID years, while stopping the spread may have been scientifically ideal, the non-biological costs were undeniable and essential to consider. The policy changes that the Biden administration has imposed are likely to prevent those considerations in the future

Further alarming is that reporting mechanisms create a workplace where everyone is an informant. When every employee is encouraged to report perceived violations of scientific integrity – and defining violations so broadly as to constitute any input from agency leadership – objective and informed decision-making is certain to be impaired.

Finally, while other agencies do not seem to have taken OSTP's lead, the prioritization of OSTP to be "inclusive of all scientists" with a focus on diversity, equity, and inclusion is not scientific and itself holds the potential to constitute improper influence. Why the OSTP feels compelled to expressly identify such an extensive list of identities and classes of individuals, which should presumably be irrelevant to a policy with a stated intent of being blind to subjective factors and human characteristics, remains unclear.

D. What Can Be Done?

It is generally accepted that one executive order can be undone by a subsequent one and the president can order executive agencies to make changes consistent with executive orders.^[50] The same holds for agency policies promulgated or issued outside of the rulemaking process outlined in the Administrative Procedures Act (APA). Therefore, any scientific integrity policy solely reliant on a secretary's order or similar level of authority outside the public comment process, could be rescinded by an executive order.

A future administration wishing to do away with inappropriately issued scientific integrity policies should quickly issue an executive order rescinding, or ordering agencies to immediately rescind, any politically-driven or amended scientific integrity policy that has not gone through rulemaking.

However, because a sufficient number of agencies have put these problematic policy changes through rulemaking, a more strategic executive order may be necessary. Presidents have a statutory right to "prescribe regulations for the conduct of employees in the executive branch."^[51] And, "rules of agency organization, procedure, or practice"^[52] are statutorily exempted from rulemaking "to ensure that agencies retain latitude in organizing their internal operations."^[53] This exception only applies if the policy has no impact upon parties outside the agency.^[54] This strategy may work, so long as the orders are crafted in such a way as to address decision-making within an agency. Indeed, at their core, scientific integrity policies are issued to guide the conduct of agency employees.

Otherwise, the agency actions consistent with the executive orders are subject to the APA, meaning any policy that has gone through notice-and-comment rulemaking must again go through a similar process to be rescinded.^{[55][56]} This process can be time-consuming. It is for this reason that the focus of any changes should be expressly directed at improving and aligning internal policy with presidential direction and management priorities, as described above.

With regard to the possibility of such policies being embedded in a newly negotiated CBA, as the EPA appears intent to do, another approach and set of authorities may be required. A CBA is effectively a contract, which AFGE is unlikely to break or amend voluntarily, given their stated intent to maintain the status quo "no matter who is in power."

[50] Valerie C. Brannon, "Can a President Amend Regulations by Executive Order?," Congressional Research Service, (July 18, 2018). <https://sgp.fas.org/crs/misc/LSB10172.pdf>.

[51] 5 U.S.C. §7301.

[52] 5 U.S.C. §553.

[53] *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980).

[54] *Ibid*.

[55] *Ibid* 2-3.

[56] To the extent that rescinding a promulgated rule would be policy focused, it would require justification. Two cases are generally considered authoritative. First, in *Motor Vehicle Mfrs. Ass'n v. State Farm Mutl. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983), the Court stated that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." Years later, in *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009), the Court stated that "We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard." So long as the agency "display[s] awareness that it is changing position," the changed policy is only subject to arbitrary and capricious review. *Ibid*. 1810. Thus, in essence, so long as the agency explains why it is changing policy objectives, and the reason is something better than mere disagreement with a prior administration, the rulemaking can go forward. The explanations seen in Section C of this Primer should be plenty sufficient to justify such a revocation.

Thus, the only way to make changes would be to wait out the CBA until the next bargaining occurs, or to file a lawsuit against the union as a state actor. To avoid this lengthy process (which only occurs periodically), an administration could also declare the CBA language to be contrary to law and unenforceable.[57] Indeed, if an executive order were to remove the discretion agencies have to enforce the scientific integrity policy changes, then the agencies would not have the legal authority to enforce them.[58]

There are legal justifications that could support either litigation or presidential or agency head directives to not enforce the politically driven scientific integrity policy changes at issue in this paper.[59] There are a few legal theories that could be followed. First, the policies appear to improperly delegate power to federal employees while attempting to restrict the authority of principal and inferior officers under the Constitution. Congress can delegate power to executive agencies through their chief officers.[60] But that delegation does not extend all the way down to a career employees. The Appointments Clause of Article II of the Constitution, which gives the president alone the authority to appoint “Officers of the United States.” An officer of the United States is one who “exercise[es] significant authority pursuant to the laws of the United States.”[61] One of the purposes of this clause is to “ensure[] that the president, and those directly responsible to him, does not delegate his ultimate responsibility and obligation to supervise the actions of the Executive Branch.”[62] Only a president, a court of law, or a head of a department may appoint an officer.[63] When someone is “continuing and permanent” in their position and exercises “significant authority,” then he or she is an officer who cannot be appointed by other means.[64] Here, the scientific integrity policy changes would give subordinate career employees final decisional control over agency operations. Yet these officials were never appointed through a legal channel and would be attempting to claim ownership of greater decision rights than agency leadership lawfully appointed by the president and confirmed by the Senate.

As to OSTP or any future policy or bargained provision that includes preferences exclusive to a specific category of people, such provisions likely violate civil rights laws and the Equal Protection Clause of the Fourth Amendment.

These could be fertile areas to explore in the event that such policies remain in place and are relied on to protect or advance federal decisions.

Conclusion

While the principle underlying scientific integrity policies originates from a spirit of objective and informed decision-making, the changes discussed herein appear grounded in political motivations that are inconsistent with the constitutionally designed structure of the executive branch. By placing appropriate supervision and management by agency employees in the category of “political,” akin to interference to be countered with whistleblower-like protections, the scientific integrity proposals run afoul of the law. Much like the removal of Schedule F, these policy changes seek to effectively insulate career employees from management by agency leadership (i.e., political appointees) exercising the authority bestowed by the president and the electorate. The intent is to strip democratically elected presidents from having the power to make changes within executive agencies. These efforts should be stopped through all channels possible, including executive action, regulatory changes, and litigation.

[57] Contract provisions that are “found to be violative of the statute or any other applicable law, rule or regulation, they would not be enforceable but would be deemed void and unenforceable.” In re National Federal of Federal Employees, Local 1862 and Department of Health, Education and Welfare, Public Health Service, Indian Health Service, Phoenix, Arizona, 3 FLRA No. 25 (1980), available at <https://www.flra.gov/decisions/v03/03-025.html>.

[58] The only recourse that the union would have is to file an unfair labor practice grievance, which is appealable to federal court.

[59] Legal challenges would require an aggrieved party to serve as a plaintiff, however. Finding such a plaintiff could present a separate challenge.

[60] *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

[61] *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976).

[62] *Arthrex v. Smith & Nephew*, 941 F.3d 1320, 1328 (Fed. Cir. 2019).

[63] *Lucia v. SEC*, 138. St. 2044, 2051 (2018).

[64] *Ibid*.