

# BACKGROUND

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## Reforming the Federal Bureaucracy: Challenge and Opportunity

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### Abstract

*The federal bureaucracy is not meeting its own performance-based civil service ideals, and the problem is greater than bureaucratic administration. The federal bureaucracy's inefficiency, expense, and irresponsiveness to political leadership are rooted in the Progressive belief that unelected experts should be trusted with promoting the general welfare in just about every area of social life. If political interests continue to force Congress and the President to act directly on all manner of societal problems, the federal bureaucracy will continue to be overwhelmed. Unlimited utopian Progressive aspirations cannot be squared with constitutional government. Reform must address both the merit system's failures and the Progressive vision of government that has created an overweening bureaucracy unable to meet its own ideals.*

At the very pinnacle of the modern Progressive program to make government competent stands the ideal of a professionalized, career civil service. Since the turn of the 20th century, Progressives have sought a system that could effectively select, train, reward, and guard from partisan influence the neutral scientific experts they believe are required to staff the national government and run the administrative state. The U.S. merit system, initiated by the Pendleton Act of 1883<sup>1</sup> and elaborated upon by the Intergovernmental Personnel Act of 1970<sup>2</sup> and the Civil Service Reform Act of 1978,<sup>3</sup> is a set of principles and practices that are meant to ensure that merit rather than partisan favors or personal favoritism reigns within the federal bureaucracy.<sup>4</sup> Yet, as the public frustration with the civil service grows and calls to “drain the swamp” rise, it is clear that this system has had serious unintended consequences.<sup>5</sup>

### KEY POINTS

- The federal bureaucracy is failing to meet its own performance-based civil service ideals. Ability, knowledge, and skills are no longer the basis for recruitment, selection, or advancement, while pay and benefits for comparable work are substantially above those in the private sector.
- Retention is not based primarily on performance, and inadequate performance is largely neither corrected nor punished.
- The federal bureaucracy's inefficiency, expense, and irresponsiveness to political leadership are rooted in the Progressive belief that unelected experts should be trusted with promoting the general welfare in just about every area of social life.
- Political leadership cannot effectively manage a bureaucracy vast enough to fulfill all of the functions now performed by the national government.

This paper, in its entirety, can be found at <http://report.heritage.org/bg3357>

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Our current system, largely implemented during the New Deal, was designed to replace the amateurism and corruption endemic to the old spoils system, wherein government jobs were used to reward loyal partisan foot soldiers, with professionalized, scientific, and politically neutral administration. While Progressives designed the merit system to promote expertise and shield bureaucrats from partisan political pressure, it now insulates civil servants from accountability. The modern merit system has made it impossible to fire all but the most incompetent civil servants. Complying with arcane rules regarding recruiting, rating, hiring, and firing has replaced the goal of cultivating competence and expertise.

The current system is long overdue for a thoroughgoing makeover. Employee performance should come first when it comes to basic human resources decisions. The federal government should remove red tape that prevents agencies from hiring, promoting, and retaining top talent.

The quality of the career civil service is not the only problem. The high operating costs of our bloated federal bureaucracy are equally unsustainable. While the military's unofficial motto is "do more with less," the career civil service often does less with more. Agency payrolls are laden by federal employees who are paid more than they could earn in the private sector.

Finally, elected officials must assert firm control over the career civil service. While the federal service is mostly comprised of capable and competent individuals, careerists by themselves should not be tasked with formulating and executing the details of an agenda for major policy change.

## Putting Performance First

**Merit Hiring in a Merit System.** It should not be impossible even for a large national government to hire good people through merit selection. It did so for years, but it has proved difficult in recent times to select personnel based on their knowledge, skills, and abilities (KSA) as the law dictates. For the past 34 years, the United States Civil Service has been unable to distinguish consistently between strong applicants for employment and unqualified applicants.

As the Jimmy Carter presidency was winding down, the U.S. Department of Justice and U.S. Office of Personnel Management (OPM) ended the use of civil service IQ examinations because minorities did not appear to score as highly on them. In the past, agencies had used the Professional and Administrative Career Examination (PACE) general intelligence exam to select college graduates for government employment. Officials of the Carter Administration—probably without the President's informed concurrence—abolished the PACE through a legal consent agreement capitulating to demands by civil rights petitioners who contended that it was discriminatory.<sup>6</sup> The decree was to last only five years but still controls federal hiring and now has been applied to all KSA tests.<sup>7</sup>

General ability tests such as the PACE can measure broad intellectual qualities that may be useful and cost-effective for employers across many separate occupations, but critics have noted that minorities, on average, achieve lower scores on generalized exams (so-called disparate impact) than do

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1. 47th Cong., January 16, 1883, 22 Stat. 403, <http://legisworks.org/sal/22/stats/STATUTE-22-Pg403a.pdf> (accessed September 26, 2018).
  2. Public Law 91-648, 91st Cong., January 5, 1971, 84 Stat. 1909, <https://www.gpo.gov/fdsys/pkg/STATUTE-84/pdf/STATUTE-84-Pg1909.pdf> (accessed September 26, 2018).
  3. Public Law 95-454, 95th Cong., October 13, 1978, 92 Stat. 1111, <https://www.gpo.gov/fdsys/pkg/STATUTE-92/pdf/STATUTE-92-Pg1111.pdf> (accessed September 26, 2018).
  4. See Kay Cole James, *Biography of an Ideal: A History of the Federal Civil Service* (Washington: U.S. Office of Personnel Management, 2003), passim, <https://archive.opm.gov/biographyofanideal/PDF/BiographyOfAnIdeal.pdf> (accessed September 21, 2018).
  5. In 2015, The Pew Research Center found that 22 percent of Americans said they were "angry" at U.S. government performance, 57 percent were "frustrated," and only 18 percent were "basically content" with the way it worked. Loss of confidence is bipartisan: 40 percent of Democrats and 75 percent of Republicans concluded that government was almost always wasteful and inefficient, and 89 percent of Republicans and 72 percent of Democrats said they could seldom, if ever, trust the federal government. Pew Research Center, "Beyond Distrust: How Americans View Their Government," November 23, 2015, <http://www.people-press.org/2015/11/23/beyond-distrust-how-americans-view-their-government/> (accessed September 21, 2018).
  6. *Luévano v. Campbell*, 93 F.R.D. 68 (D.D.C. 1981).
  7. Donald Devine, *Reagan's Terrible Swift Sword: An Insider's Story of Abuse and Reform Within the Federal Bureaucracy* (Ottawa, IL: Jameson Books, 1991), pp. 123-126.
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non-minorities.<sup>8</sup> Courts have ruled that even without evidence of overt, intentional discrimination, such results suggest discrimination.<sup>9</sup> Others have responded that more direct evidence is required.<sup>10</sup> In any event, the result is that the federal government has been denied the use of a rigorous entry examination for three decades, relying instead on self-evaluations that have forced managers to resort to subterfuge such as preselecting friends or associates they believe competent to obtain qualified employees.

In 2015, OPM announced that it was planning to introduce a merit examination called USAHire, which it had been quietly testing since 2012 in a few agencies for a dozen job descriptions. The tests had multiple-choice questions with only one correct answer. Some questions even required essay replies: questions that would change regularly to depress cheating. Although OPM deserves high praise for this audacity, it probably will never be implemented government-wide, and even if it were implemented, it would not last long. Test results would likely soon reveal that some groups would not pass the exams at levels as high as others, and the government would be forced once again to end “discriminatory” tests.<sup>11</sup>

The courts have agreed to review the consent decree if the Uniform Guidelines on Employee Selection Procedures setting the technical requirements for sound exams are reformed.<sup>12</sup> However, changes that threaten current antidiscrimination regimes are highly charged and politically difficult. In the meantime, a government based on merit principles cannot select employees based on KSA qualifications. OPM should nonetheless quickly press forward with KSA exams. This would greatly improve the federal government’s ability to identify and hire talented civil servants of the future.

### **The Centrality of Performance Appraisal.**

In order to reward or discipline federal employees, managers must first identify who their top performers are and who is performing less than adequately. In fact, all performance management depends on a functioning appraisal system, and it must be set at the pinnacle of public-sector administration. After all, it is impossible to reward top performers if top performers are not identified in the first place. Yet the collegial atmosphere of a bureaucracy in a multi-faceted appraisal system open to appeals makes this a very challenging ideal to implement successfully.<sup>13</sup>

Generations of reform efforts have failed to alter significantly the accuracy of performance appraisal. Presidents Jimmy Carter, Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush all attempted to implement ratings systems that would truly reflect differences in performance and skill. While their efforts occasionally resulted in short-lived improvement, the U.S. Government Accountability Office (GAO) continues to report that overly high performance ratings plague the government. In 2016, 99.6 percent were rated fully successful or above by their managers, a mere 0.3 percent were rated as minimally successful, and 0.1 percent were rated unsuccessful.<sup>14</sup>

It is not hard to understand why these systems are so difficult to manage. No one appreciates being told that they are less than outstanding in every way. Informing subordinates in a close-knit bureaucracy that they are not performing well is difficult. Rating compatriots is even considered rude. Moreover, managers can be and often are accused of racial or sex discrimination for a poor rating, and this discourages honesty.<sup>15</sup>

Despite these circumstances, however, meaningfully evaluating employees’ performance is a critical part of a manager’s job. The failure to provide

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8. Clifford I. Gould, Deputy Director, Federal Personnel and Compensation Division, U.S. General Accounting Office, statement on “The Impact and Validity of PACE: A Federal Employment Examination” before the Subcommittee on Civil Service, Committee on Post Office and Civil Service, U.S. House of Representatives, May 15, 1979, <https://www.gao.gov/assets/100/99061.pdf> (accessed September 21, 2018).
  9. *Texas Department of Housing v. The Inclusive Communities Project*, 135 S. Ct. 2507 (2015), majority decision.
  10. *Ibid.*, minority decision. See also U.S. Equal Employment Opportunity Commission, “Shaping Employment Discrimination Law,” <https://www.eeoc.gov/eeoc/history/35th/1965-71/shaping.html> (accessed September 21, 2018).
  11. Eric Yoder, “Republicans Push Through Change to Personnel Policies,” *The Washington Post*, July 8, 2016.
  12. Gould, statement on “The Impact and Validity of PACE,” and Devine, *Reagan’s Terrible Swift Sword*, pp. 123–130.
  13. George L. Morrissey, *Performance Appraisals in the Public Sector: Key to Effective Supervision* (Reading, MA: Addison Wesley Longman, 1983), Chapter 1.
  14. “Measuring Federal Employee Performance,” U.S. Government Accountability Office WatchBlog, October 18, 2016, <https://blog.gao.gov/2016/10/18/measuring-federal-employee-performance/> (accessed September 21, 2018).
  15. Eric Katz, “The Federal Agencies Most Often Accused of Discrimination,” *Government Executive*, August 29, 2014, <https://www.govexec.com/management/2014/08/federal-agencies-most-often-accused-discrimination/92819/> (accessed September 21, 2018).

clear assessments hurts both the federal government's effectiveness and federal employees' potential. Indistinguishable from their coworkers on paper, hard-working federal employees often go unrewarded for their efforts. Federal workers who are performing inadequately do not often get the benefit of an honest appraisal and clear guidance on how to improve.

**Merit Pay.** Performance appraisal means little to daily operations if it is not tied directly to "real consequences" for success as well as failure.<sup>16</sup> According to a survey of major U.S. private companies, 90 percent use a system of merit pay for performance based on some type of appraisal system,<sup>17</sup> but despite efforts to institute merit pay in the federal government, compensation is still based on seniority rather than merit.

Merit pay for executives and managers was part of the Carter reforms and was implemented early in the Reagan presidency. Beginning in the summer of 1982, the Reagan OPM entered 18 months of negotiations with House and Senate staff on extending merit pay to the entire workforce. Long and detailed talks between OPM and both Democrats and Republicans in Congress ensued, and a final agreement was reached in 1983 that supposedly assured the passage of legislation creating a new Performance Management and Recognition System (PMRS) for all (not just management) GS-13 through GS-15 employees.

Meanwhile, OPM issued regulations to expand the role of performance throughout the entire workforce, but congressional allies of the employee unions, led by Representative Steny Hoyer (D) of government employee-rich Maryland, stoutly resisted this extension of pay-for-performance and, with strong union support, blocked OPM administrative pay reforms through the congressional appropriations process.<sup>18</sup> Bonuses for Senior Executive Ser-

vice (SES) career employees survived but tended to be very widely distributed instead of being targeted for the highest performers.

Ever since the original merit pay system for federal managers (GM-13–GM-15 grade levels, just below the SES) was allowed to expire in September 1993, little to nothing has been done to reinstate the federal merit pay program for managers throughout the government, much less to extend one to the remainder of the workforce. With a reform-friendly President in office and members of the same party controlling both houses of Congress, lawmakers should take action and impose a new PMRS similar to the plan President Reagan advanced in 1983.

**The Appeals Process.** Many argue that it is impossible to fire poorly performing federal employees. According to OPM, the non-military government dismissal rate in fiscal year (FY) 2017 was a mere 0.5 percent.<sup>19</sup> No private-sector industry employee enjoys greater job security than a federal employee enjoys. The real difficulty, however, is keeping them fired. The initial paperwork is not overwhelming, and managers could be motivated to act if it were not for the appeals process.<sup>20</sup> While the formal appeal processes in the private sector are rather simple, government unions, manager associations, and public administration academics view an extensive appeals process as essential to the civil service principle of fairness.

Today, there are multiple administrative appeals bodies: the Merit Systems Protection Board (MSPB); the Federal Labor Relations Authority (FLRA); the Office of Special Counsel (OSC); and the federal division of the Equal Employment Opportunity Commission (EEOC). While the MSPB can hear or review almost any appeal, the FLRA, OSC, and EEOC have narrower jurisdictions. Claims that an employee's removal violates the terms of a collective bargain-

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16. David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector* (New York: Penguin, 1993), p. 92.

17. National Research Council, *Pay for Performance: Evaluating Performance Appraisal and Merit Pay* (Washington: National Academies Press, 1991), Chapter 6.

18. George Nesterczuk, with Donald J. Devine and Robert E. Moffit, "Taking Charge of Federal Personnel," Heritage Foundation *Backgrounder* No. 1404, January 10, 2001, <http://www.heritage.org/jobs-and-labor/report/taking-charge-federal-personnel>.

19. U.S. Office of Personnel Management, FedScope, "Separations Trend Cubes," <https://www.fedscope.opm.gov/separations.asp> (accessed October 4, 2018).

20. Kellie Lunney, "Wielding the Ax," *Government Executive*, July 1, 2012, <http://www.govexec.com/magazine/briefing/2012/07/wielding-ax/56558/> (accessed September 21, 2018).

ing agreement between an agency and a union are handled by the FLRA, employees who claim their removal was the result of discrimination can appeal to the EEOC, and employees who believe their firing was retribution for being a whistleblower can go to the OSC.

In many cases, a fired federal employee can appeal to multiple forums. For instance, employees who believe they have been fired because of their race, gender, religion, age, pregnancy, disability, or national origin can appeal to either the EEOC or the MSPB—and, in some cases, to both. This gives employees multiple attempts to prove their case, and while the EEOC, MSPB, and FLRA may all apply the same burden of proof, depending on the sort of claim being brought and the administrative judge an appellant, the odds of success may be somewhat different in each forum. In fact, forum shopping among them for a friendlier venue is a common practice, but frequent filers face no consequences for frivolous complaints. As a result, meritorious cases are frequently delayed, denying equity to truly aggrieved individuals.

The success rate of federal employees in each of these venues is relatively low. According to its most recent figures, the EEOC found that discrimination contributed to an appealable adverse action—a suspension, demotion, or removal—only 2.6 percent of the time during FY 2014.<sup>21</sup> MSPB administrative judges, who issue initial decisions on appeals to the board, upheld agency decisions 84 percent of the time in 2016.<sup>22</sup>

While federal employees win appeals relatively infrequently, the deeper impact of the elaborate process that managers must undergo to fire an employee is impossible to determine. It is likely the case that the time and paperwork necessary to remove a single employee lead managers to turn their heads in all but the most egregious cases of poor performance or misconduct. If malfeasance can be ignored, the incentives to ignore it are very strong. As a result, the MSPB, EEOC, FLRA, and OSC likely see very few borderline cases. Viewed from this perspective, the low success rate of employees' appeals is not nec-

essarily evidence that agencies like the MSPB and EEOC defer to other agencies.

In a functioning civil service system, an unacceptable job rating would result in the supervisor discussing the employee's performance with him or her, with a second such rating followed by a notice of dismissal or reduction in rank. The employee could immediately appeal to the supervisor's manager, with the performance appraisal and an employee or union response the only evidence allowed. If the appeal were denied, the employee could immediately appeal again, but only to one review board. The employee would be placed on a 30-day paid leave and fired or disciplined on the 31st day unless the review board ruled otherwise.

Several straightforward changes could greatly streamline the removal of poor performers. First, a reimbursable fee system—sometimes called a “loser pays” system—could be implemented to discourage the filing of frivolous complaints, while minor matters could be made immune from appeal. Pay setting, promotions, and ratings of performance could be reviewable within each agency but not appealable outside the agency. With these lower-priority personnel issues addressed in-house, higher-priority items like disciplinary actions, separations, removals, and other serious adverse actions that do warrant outside review would be less subject to delay.

Moreover, there should be only one avenue for appeals for aggrieved employees. A consolidation would combine the MSPB, FLRA, OSC, and federal EEOC into a single agency, perhaps built around the civil service agency MSPB. This agency would be charged with handling all administrative appeals of merit infractions, dismissals, employee grievances, and complaints. Merging these separate agencies and processes would reduce duplication, forum shopping, and overhead to generate savings, which could also be used to expedite cases. In fact, it can be argued that a single forum is simpler for employees to understand and eliminates the complexities that result from cross-filing complaints across several agencies.

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21. U.S. Equal Employment Opportunity Commission, *Annual Report on the Federal Work Force, Part 1: EEO Complaints Processing, Fiscal Year 2014*, 2014, <https://www.eeoc.gov/federal/reports/fsp2014/index.cfm#1> (accessed September 21, 2018).

22. U.S. Merit Systems Protection Board, *Annual Report for FY 2016*, January 18, 2017, <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1374269&version=1379643&application=ACROBAT> (accessed September 21, 2018).

## Lowering the Expense of the Civil Service

One of the clearest reasons to take on civil service reform now is the high cost of the federal workforce. In recent years, the combined wages and benefits of the executive branch civilian workforce totaled \$276 billion.<sup>23</sup> While other sectors of the economy surge or shed employees as business expands or contracts, the federal government is recession proof. Throughout the economic downturn that started in 2008, federal employment stayed relatively constant at around 2 million. Further, virtually all studies show that public-sector workers make more on average than their private-sector counterparts make.<sup>24</sup> Congress badly needs to address the size and compensation of the federal civil service.

**Market-based Pay and Benefits.** According to current law, federal workers are to be paid wages comparable to equivalent private-sector workers rather than compared to all private-sector employees.<sup>25</sup> While the official studies find that federal employees are underpaid relative to the private sector by 20 percent or more, almost all outside studies find the reverse: Federal employees earn much more.<sup>26</sup>

A 2016 study by Heritage Foundation experts of federal pay and benefits found that federal employees receive wages that are 22 percent higher than similar workers in the private sector receive. Including the value of employee benefits, the total compensation premium increased to between 30 percent and 40 percent. The Congressional Budget Office found a small wage premium (2 percent) but substantially inflated benefits for an overall compensa-

tion premium of 17 percent. The American Enterprise Institute found a 14 percent pay premium and a 61 percent total compensation premium.<sup>27</sup>

Base salary is only one component of a federal employee's total compensation. In addition to high starting wages, federal employees normally receive an annual cost-of-living adjustment, available to all employees, and generous scheduled raises known as "step increases."<sup>28</sup> A federal employee with five years of experience receives 20 vacation days, 13 paid sick days, and all 10 federal holidays, compared to an employee at a large private company who receives 13 days of vacation and eight paid sick days.<sup>29</sup>

One of the most popular benefits among federal workers is the one driven largely by the market forces of consumer choice and competition in the Federal Employees Health Benefits Program (FEHBP), under which federal workers and their families can choose from almost 300 private health care plans nationwide that offer a wide variety of benefits at competitive premiums. This system has often been used as a model of competitive efficiency compared to standard employment-based health insurance in which enrollee health plan choices are much more limited. The government contribution to health plans is 72 percent of the weighted average premiums of all FEHBP health insurance plans. This is roughly the same level of contribution that large employers make to premium costs but much higher than that of the majority of private-sector firms, almost half of which do not offer employer contributions at all.<sup>30</sup> In addition, since federal employees

23. Table 6.2D, "Compensation of Employees by Industry," and Table 6.6D, "Wages and Salaries Per Full-Time Equivalent Employee by Industry," in U.S. Department of Commerce, Bureau of Economic Analysis, National Income and Product Accounts, September 2013, [www.bea.gov/iTable/index\\_nipa.cfm](http://www.bea.gov/iTable/index_nipa.cfm) (accessed October 1, 2018). Data are for civilian federal workers, excluding postal workers.

24. *Ibid.*

25. Pay comparability between federal and private-sector jobs was addressed in the Federal Employees Pay and Comparability Act of 1990. See 5 U.S.C. § 5303.

26. Nesterczuk et al., "Taking Charge of Federal Personnel."

27. Rachel Greszler and James Sherk, "Why It Is Time to Reform Compensation for Federal Employees," Heritage Foundation *Backgrounder* No. 3139, July 27, 2016, <http://thf-reports.s3.amazonaws.com/2016/BG3139.pdf>, and "Comparing the Compensation of Federal and Private Sector Employees, 2011-2015," Congressional Budget Office, April 2017, <https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/52637-federalprivatepay.pdf> (accessed November 27, 2018).

28. Each step increase results in an additional 3 percent increase in wages. This occurs annually for the first three steps, every two years from steps 4-6, and every three years for steps 7-9. Employees reach their final step increase (step 10) after 18 years. This leaves them with wages 30 percent higher than when they began with no necessary increase in responsibility or performance.

29. Greszler and Sherk, "Why It Is Time to Reform Compensation for Federal Employees."

30. For firms that offer health insurance, the private-sector employer contribution for employees' health premiums is about 70 percent. See Henry J. Kaiser Family Foundation, "2017 Employee Health Benefits Survey, Section 2: Health Benefits Offer Rates," September 19, 2017, <https://www.kff.org/report-section/ehbs-2017-section-2-health-benefits-offer-rates/> (accessed September 21, 2018).

pay only 25 percent of the premium of whatever plan they choose, this reduces federal employees' incentives to choose less expensive plans.

The obvious solution to these inequities is to move closer to a market model for federal pay and benefits, but the need for a neutral agency to oversee pay decisions is also clear. OPM has the knowledge of agency operations that is needed to assess true requirements in the federal workplace. For many years, through its Special Pay Rates program, OPM evaluated agency claims that federal rates in an area were too low to attract competent employees and allowed agencies to offer higher pay rates when necessary. OPM should put this expertise to work and establish an initial pay rate for every occupation and region of the country, monitor turnover rates and applicant-to-position ratios, and adjust pay on the basis of such factors.

**Reforming Federal Retirement Benefits.** Federal pay and benefits are not the only elements of the total federal employee compensation package that are out of line with the private sector. Career civil servants enjoy retirement benefits that are nearly unheard of in the private sector. Federal employees retire earlier, normally at age 55 after 30 years, enjoy richer pension annuities, and receive automatic cost-of-living adjustments (COLAs) based on the areas in which they retire. Defined-benefit federal pensions are fully indexed for inflation, a practice that is extremely rare in the private sector. A federal employee with a preretirement income of \$25,000 under the older of the two federal retirement plans will receive at least \$200,000 more over a 20-year period than will private-sector workers with the same preretirement salary under historic inflation levels (although they have been lower in recent years).<sup>31</sup>

During the Reagan years, many specific provisions of the federal pension program were reformed,

and this generated considerable savings.<sup>32</sup> Following changes in Social Security that included federal employees, the Reagan Administration also ended the old Civil Service Retirement System (CSRS) for new employees, which accounted for 51.3 percent of the federal government's total payroll (counting current disbursements for the unfunded liability). The retirement system that replaced it—the Federal Employees Retirement System (FERS)—reduced the cost of federal employee retirement disbursements to 28.5 percent of payroll (including contributions to Social Security and the employer match to the Thrift Savings Plan). More of the pension cost was shifted to the employee, but the system was made more portable, allowing participating employees to keep a greater share of the benefit even if they did not stay in government until they retired. This was far more equitable for the 40 percent of employees who received few or no benefits under the old system as a consequence of leaving federal employment before they qualified for an annuity.<sup>33</sup>

By 1999, over half of the federal workforce was covered by the new system, and the government's per capita share of the cost (as the employer) was less than half the cost of the old system: 20.2 percent of FERS payroll vs. 44.3 percent of CSRS payroll.<sup>34</sup> The FERS plan has a defined-benefit pension with an estimated cost of 14 percent of payroll, with employees contributing 0.8 percent. There is also a Thrift Savings Plan under which employees contribute up to the IRS's maximum allowance and taxpayers add as much as 5 percent of federal workers pay.<sup>35</sup>

Although the government's pension system has been changed to make it more like pension systems in the private sector, it remains more generous. Only half of private firms offer retirement benefits, mostly of the thrift plan type.<sup>36</sup> Private employers who offer

31. Nesterczuk et al., "Taking Charge of Federal Personnel."

32. In the 1970s, the COLAs were paid twice each year, compounding their cost. A specific provision called "look back" allowed a retiring employee to receive the previous year's COLA in addition to his immediate pension and a 1 percent "kicker" on top of that. The twice-a-year COLA, the look-back COLA, and the kicker were removed in 1981 as part of the Reagan budget package. The Reagan Administration also reduced an excessive 32 percent rate of disability retirement by 58 percent without significant complaint, for a savings of \$1.2 billion. An additional \$2 billion was saved through a large number of small changes in the formula used to compute the benefit.

33. Nesterczuk et al., "Taking Charge of Federal Personnel."

34. *Ibid.*

35. Greszler and Sherk, "Why It Is Time to Reform Compensation for Federal Employees."

36. Table 1, "Establishments Offering Retirement and Healthcare Benefits: Private Industry Workers, March 2017," in U.S. Department of Labor, Bureau of Labor Statistics, Employee Benefits Survey, <https://www.bls.gov/ncs/ebs/benefits/2017/ownership/private/table01a.htm> (accessed September 21, 2018).

retirement benefits contribute between 3 percent and 5 percent of their employees' salary compared to the federal government, which currently contributes between 15 percent and 18 percent of employees' pay.

Proposals have been offered to bring the system more in line with private-sector plans by making earned retirement benefits fully portable for federal employees who leave the public sector before their retirement plans vest. This would allow public-sector employees who really would prefer to leave government to do so without sacrificing all of the money waiting for them upon retirement.<sup>37</sup> Not surprisingly, these proposals have been mostly ignored.

**Function Consolidation.** A 2016 GAO study identified 92 actions that the executive branch or Congress could take to improve efficiency and effectiveness across 37 areas that span a broad range of government missions and functions. It identified 33 actions to address mission fragmentation, overlap, and duplication in the 12 areas of defense, economic development, health, homeland security, and information technology. It also identified 59 other opportunities for executive branch agencies or Congress to reduce the cost of government operations or enhance revenue collection across 25 areas of government.<sup>38</sup>

A logical place to begin would be to identify and eliminate functions and programs that are duplicated across Cabinet departments or spread across multiple agencies. Congress hoped to help this effort by passing the Government Performance and Results Act of 1993, which required all federal agencies to define their missions, establish goals and objectives, and measure and report their performance to Congress.<sup>39</sup> Two decades of reports later, however, we know that the government continues to grow and

that the number of levels between government and the people continues to increase as well.<sup>40</sup> The Trump Administration has proposed some possible consolidations, but these have not been received favorably in Congress, whose approval is necessary for most such proposals.<sup>41</sup>

**Reductions-in-Force.** Reducing the number of federal employees is an obvious way to reduce the overall expense of the civil service, and many prior Administrations have attempted to do just this. President Reagan argued that one of the best ways to improve government was to make it smaller, easier to manage, and cheaper.<sup>42</sup> Successors from the opposite party, Bill Clinton and Barack Obama, began their terms, as did Ronald Reagan and Donald Trump, by mandating a freeze on the hiring of new federal employees, but these efforts have not led to permanent and substantive reductions in the number of nondefense federal employees. The conceptual simplicity of this approach to cost reduction belies hidden challenges and serious disadvantages.

First, it is a challenge even to know which workers to cut. Actual federal employees number only two million people, while government contractors total 18 million or more.<sup>43</sup> Contractors have multiplied at every agency because the functions to be performed have burgeoned. Contractors are also less expensive because they are not entitled to benefits and are easier to fire and discipline. In addition, millions of state government employees work under federal grants, in effect administering federal programs and often reflecting their own local policy biases. Cutting employment can be helpful and can provide a simple story to average citizens, but cutting functions, funds, and grants is more important to reform-

37. Nesterczuk et al., "Taking Charge of Federal Personnel."

38. U.S. Government Accountability Office, "2016 Annual Report: Additional Opportunities to Reduce Fragmentation, Overlap, and Duplication and Achieve Other Financial Benefits," GAO-16-375SP, April 2016, <https://www.gao.gov/assets/680/676473.pdf> (accessed September 21, 2018).

39. Public Law 103-62, 103rd Cong., August 3, 1993, 107 Stat. 285, <https://www.gpo.gov/fdsys/pkg/STATUTE-107/pdf/STATUTE-107-Pg285.pdf> (accessed September 26, 2018), and Donald F. Kettl, "Implementation of the Government Performance and Results Act of 1993," Brookings Institution *Testimony*, March 6, 1996, <https://www.brookings.edu/testimonies/implementation-of-the-government-performance-and-results-act-of-1993/> (accessed September 21, 2018).

40. Tom Shoop, "The Truth About Government Performance," *Government Executive*, May 26, 2015, <https://www.govexec.com/federal-news/feb/2015/05/truth-about-government-performance/113674/> (accessed September 21, 2018).

41. Charles S. Clark, "White House Proposes a Massive Reorganization of Government Agencies," *Government Executive*, June 21, 2018, <https://www.govexec.com/management/2018/06/trump-reorganization-plan-would-merge-education-and-labor-recast-hhs/149183/> (accessed September 21, 2018), and Donald Devine, "Illuminating the Intricacies of Swamp Management," *The American Spectator*, July 4, 2018, <https://spectator.org/illuminating-the-intricacies-of-swamp-management/> (accessed September 21, 2018).

42. Ronald Reagan, "Inaugural Address," January 20, 1981, <http://www.presidency.ucsb.edu/ws/?pid=43130> (accessed September 21, 2018).

43. Paul C. Light, *The True Size of Government* (Washington: Brookings Institution Press, 1999).

ing government management than is setting simple employment size. The size can be reduced only by cutting functions and budgets.

Personnel cuts are not always financially wise decisions: Simply reducing numbers can actually increase costs. OMB instructions following President Trump's employment freeze told agencies to consider "buyout" programs encouraging early retirement in order to shift the costs to the retirement system rather than agency budgets and ease the personnel effects of the President's proposed reductions.<sup>44</sup> The Environmental Protection Agency immediately implemented such a program, and OMB urged the passage of legislation, which was introduced in the Senate soon thereafter, to increase payout maximums from \$25,000 to \$40,000.<sup>45</sup>

Past reductions in the federal workforce have had similarly costly repercussions. When the Clinton Administration was forced to deliver on its proposed reductions after its employment freeze, it too sought authority to foster early retirements with cash rewards. When word of the buyout program spilled out during the summer of 1993, the normal retirement levels plummeted from 42,000 per year to 28,000 that year as federal employees decided to stay in the civil service long enough to take advantage of the financial windfall to come. Then, for 1994 and 1995, 110,000 buyouts at an average cost of \$24,500 each were processed. The total cost to the Treasury

was \$2.8 billion, with 92 percent of these buyouts going to employees who were already eligible for voluntary or early retirement and would likely have left the civil service very soon with no added inducement (or perhaps would already have retired had they not heard of the rumored buyout program).<sup>46</sup>

Congress then legislated reductions of 270,000 full-time-equivalent (FTE) positions, to be achieved by FY 1997. Beginning under President George H.W. Bush, the government was into post-Cold War restructuring and downsizing so that during the Clinton Administration's first two years, 97 percent of the workforce reductions came from Defense. Forced by a newly Republican-led Congress, non-defense personnel were also reduced during the succeeding two years so that the number of federal employees was reduced at 29 of 39 major government agencies.<sup>47</sup>

The cost of these buyouts is made all the more maddening by the fact that reductions-in-force are often reversed in short order.<sup>48</sup> When a new employee is hired to fill a job recently vacated by the recipient of a buyout, the government—for a time at least—is paying two people to fill one job.

Further, reductions-in-force may mean letting go of talented and hardworking employees while keeping poor performers. Legislation making it possible to remove poor performers should be considered in conjunction with serious reductions-in-force. Today,

44. "Press Briefing by OMB Director Mick Mulvaney on a Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce," The White House, April 11, 2017, <http://www.presidency.ucsb.edu/ws/index.php?pid=123855> (accessed September 26, 2018), and Memorandum from Mick Mulvaney, Director, Office of Management and Budget, to Heads of Executive Departments and Agencies, "SUBJECT: Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce," April 12, 2017, <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-22.pdf> (accessed September 21, 2018).

45. Nicole Ogrysko. "Senate Bill Would Boost Early Buyout Offers for All Federal Employees," Federal News Radio, September 29, 2017, <https://federalnewsradio.com/legislation/2017/09/senate-bill-would-boost-early-buyout-offers-for-all-federal-employees/> (accessed September 21, 2018).

46. Nesterczuk et al., "Taking Charge of Federal Personnel."

47. Ibid.

48. The number of federal employees rose under President Obama even after an initial freeze. There were 2,790,000 federal workers in January 2009 when he took office and 2,804,000 workers when he left. There was no month during President Obama's term when the federal workforce was smaller than it was in January 2009 when Obama took office. By the end of his two terms, employment had increased 3.2 percent. President George W. Bush actually increased bureaucracy the most. Federal civilian employment rose from 1,738,000 million in 2001 under President Clinton to 1,978,000 in 2009 to a proposed 2,137,000 for 2017. Thus, employment grew 13.8 percent under Bush and 8.0 percent under Obama from the Clinton low point. It was not just defense increases following the 9/11 attacks, because the nondefense workforce grew 17.2 percent under Bush and 10.1 percent under Obama. While President Bill Clinton reduced the federal workforce substantially, nearly three-fourths of that number reflected the end of the Cold War rather than his government "reinvention" initiative, and the rest was forced by Republicans who later took control of the House of Representatives for the first time in 40 years. Ronald Reagan was the only President to set a reduction target for domestic cuts at the beginning and follow through with his plan, reducing the number of nondefense employees by 100,000 (75,000 FTE) by the end of his first term. OPM counted the agency changes through its employment statistics (rather than estimates from OMB) and reported them at Cabinet meetings. Such exposure before the President was enough to keep the agencies on target at least for his first four years.

four factors govern the decision to lay off workers: tenure, veterans' preference, seniority, and performance in that order of importance. Despite several attempts in the House of Representatives during recent Congresses to enact legislation that would modestly increase the weight given to performance, the predictable unity of federal managers and federal unions against the principle of rating employee performance over seniority should make it no surprise that the bills have failed to advance.<sup>49</sup>

### Responsiveness to Political Leadership

The President and his appointed officials should be wholly responsible for the execution of the law and the administration of regulations. The people elect a President who is charged by Article 2, Section 3 of the Constitution with seeing that the laws are "faithfully executed." His political appointees are democratically linked to that legitimizing responsibility. A wholly autonomous bureaucracy has neither independent constitutional status nor separate moral legitimacy. Therefore, career civil servants by themselves cannot properly be tasked with formulating and executing an agenda for major policy change.

**Fully Staffing the Ranks of Political Appointees.** The President relies on his top department and agency officials to run the government and a few top staff employees in the White House to coordinate operations through regular Cabinet meetings. In the absence of political oversight, the career civil service is empowered—and, in practice, required—to lead the executive branch. While many obstacles stand in his way, the President should work vigorously to fill all of the political appointee slots available to him.

Because of the closeness and angry tenor of the 2016 election, President Trump faced special hostility from the opposition party in the Senate and the media in getting his team into place. Interestingly, even within these restraints, the President did not generally remove the political appointees from the previous Administration, as most Presidents before him had done, but instead relied mostly on them and career civil servants to run the government in its critical early months.<sup>50</sup> This assumption of administrative professionalism led to the refusal of the Acting Attorney General, a holdover from the Obama Administration, to obey an order from President Trump<sup>51</sup> and the clumsy enforcement of an immigration order by the career leadership at Customs and Border Control, which resulted in unnecessary controversy for the President.<sup>52</sup>

In fact, the Trump Administration appointed fewer political appointees in its first few months in office than had been appointed in any other recent presidency, partially because of historically high partisan Senate obstruction<sup>53</sup> but also because President Trump and his advisers were blunt in announcing that they preferred fewer political appointees in the agencies as a way to cut federal spending.<sup>54</sup> Effectively, especially in the critical early years, they decided to rely instead on senior career civil servants, or even on Obama Administration appointees, to carry out the sensitive responsibilities that would otherwise belong to the new President's appointees.

While the President has had some major successes in changing or eliminating existing regulations, to make the most of his years in office, he will need a full cadre of sophisticated political appointees who can understand and direct the federal bureaucracy.<sup>55</sup>

49. In 2018, President Trump issued an Executive Order to encourage agencies to give greater weight to performance in reductions in force and other personal actions that is in the process of implementation. U.S. Office of Personnel Management, "Workforce Restructuring: Reductions in Force," <https://www.opm.gov/policy-data-oversight/workforce-restructuring/reductions-in-force/> (accessed November 29, 2018).

50. Karen Yourish and Gregor Aisch, "The Top Jobs in Trump's Administration Are Mostly Vacant: Who's to Blame?," *The New York Times*, July 20, 2017, <https://www.nytimes.com/interactive/2017/07/17/us/politics/trump-appointments.html> (accessed September 21, 2018).

51. Jordan Fabian, "Trump Fires Acting AG for Refusing to Defend Travel Ban," *The Hill*, January 30, 2017, <https://thehill.com/homenews/administration/317018-trump-fires-acting-ag-for-refusing-to-defend-travel-ban> (accessed September 21, 2018).

52. Matt Stevens, "First Travel Ban Order Left Officials Confused, Documents Show," *The New York Times*, October 2, 2017, <https://www.nytimes.com/2017/10/02/us/trump-travel-ban.html> (accessed September 21, 2018).

53. John Fritze, "Trump Claims Democrats 'Obstruct' His Nominees, but It's Much More Nuanced Than That," *USA Today*, May 20, 2018, <https://www.usatoday.com/story/news/politics/2018/05/20/trump-nominees-delayed-more-than-partisan-democratic-obstruction/621076002/> (accessed September 21, 2018).

54. Ed Kilgore, "Trump Says He's Deliberately Refusing to Fill Hundreds of Top Agency Jobs," *Daily Intelligencer*, February 28, 2017, <http://nymag.com/daily/intelligencer/2017/02/trump-says-hes-deliberately-not-filing-top-positions.html> (accessed September 21, 2018).

55. Donald Devine, "Trump Breaks Bureaucracy Dogma," *The American Spectator*, October 23, 2017, <https://spectator.org/trump-breaks-bureaucracy-dogma/> (accessed September 25, 2018).

Political leadership, not federal bureaucrats, should be firmly in charge of writing the next chapter of the career civil service.

### **Managing Personnel in a Union Environment.**

The greatest obstacle to promoting accountability to political leadership and promoting expertise in the career civil service is public-sector unions. Historically, unions were thought to be incompatible with government. While there is a natural limit to the bargaining power of private-sector unions—the financial bottom line of their employers—public-sector unions are not similarly constrained. If private-sector unions push too hard a bargain, they can so harm a company or so reduce efficiency that their employer is forced to eliminate union members' jobs or go out of business altogether. There is no such limit in government, which cannot go out of business, so demands can be excessive without unduly affecting employees.

Even President Franklin Roosevelt considered union representation in the federal government to be incompatible with democracy.<sup>56</sup> Striking and even threats of bargaining and delay were considered acts against the people and thus subversive. However, later Democratic Presidents did not share Roosevelt's antipathy toward public-sector unions. President John F. Kennedy established union representation in the federal government by executive order.<sup>57</sup>

Today, union power still tends to dictate substantial aspects of bureaucracy management under both political parties and under both expert and Cabinet-oriented administrations. Congress should closely circumscribe the role of public-sector unions. Unions should not be able to dictate the way an agency carries out its legal duties. Statutes passed by Congress, not collective bargaining agreements, are supposed to lay

out the duties of federal employees and the roles of an agency. Political appointees, not union leaders and arbitrators, are meant to direct the civil service.

Congress could also go further and consider whether public-sector unions are appropriate in the first place. The bipartisan consensus up until the middle of the 20th century held that these unions were not compatible with our form of government. After over half a century of experience with public-sector unions, it is hard to avoid this conclusion.

**Respecting a Career Service.** The temptation to allow erstwhile political appointees to transfer into the career civil service—sometimes referred to as “burrowing in”—should be avoided. Political appointees should lead the civil service, but they should not become permanently ensconced within it. New Presidents should not have to contend with career bureaucrats who enjoy all of the protections of the merit system but were chosen on the basis of political loyalty to their predecessors. Far from advancing career civil servants' accountability to political leadership, “burrowing in” allows former chief executives to blunt the efforts of their successors.

The desire to shape the civil service by insinuating political appointees into the careerist ranks has been widespread in every Administration, Democrat or Republican. Democratic Administrations, however, are typically more successful because the cooperation of Washington careerists, who lean heavily to the left, is essential.<sup>58</sup> Burrowing in requires job descriptions for new positions that closely mirror the functions of a political appointee, invoke a special hiring authority that allows them to bypass veterans' preference as well as other preference categories, and

56. On this point, see “Federal Government Employee Unions,” National Archives, Franklin D. Roosevelt Presidential Library and Museum, <https://fdrlibrary.org/unions> (accessed September 25, 2018).

57. Union collective bargaining did not actually become law until President Carter was forced to accept it as the price for his civil service reforms. See Devine, *Reagan's Terrible Swift Sword*, pp. 125–127. President Clinton actually expanded the legalization of union representation through Executive Order 12871 in 1993 to create a National Partnership Council consisting of both managers and union representatives, which he tasked with advising the Administration on a wide range of management issues. The executive order further promoted the creation of “labor-management partnerships” in every agency to enable the federal unions to act as “full partners with management” throughout the bureaucracy. The unions were given a say on both the management and labor sides of the table in negotiations. They were also allowed to bargain for a wider array of concessions than public-sector unions could prior to the Clinton Administration. See Nesterzuk et al., “Taking Charge of Federal Personnel.” Clinton's Order was revoked by President Bush, who claimed it was harmful to his prerogative and duty to manage the executive branch as he judged necessary, but President Clinton's policies were largely resumed under President Obama. In 2009, he signed an executive order creating the National Council of Federal Labor-Management Relations, which set up labor forums in which union representatives were given input into and influence over management decisions. Instead of bargaining over wages and hours of work, unions were now integrated into nearly all agency operations.

58. Mike Causey, “Are Feds Politically Red or Blue—or Both?,” Federal News Radio, November 15, 2016, <https://federalnewsradio.com/federal-report/2016/11/are-feds-politically-red-or-blue-or-both/> (accessed September 25, 2018).

ignore other highly qualified candidates. Civil servants are rarely willing to take these steps to assist a Republican Administration.

Not all Presidents have attempted to convert their political appointees to career civil servants. Despite significant pressure from various quarters, President Reagan's OPM limited burrowing in during the first term. Instead, the Reagan Administration argued that, if necessary, the proper course was to create more political positions. This simultaneously promotes the principle of political leadership of the bureaucracy and respects the professional autonomy of the career service. This Administration should follow President Reagan's lead.

### Prospects for Reform

The federal bureaucracy is failing to meet its own performance-based civil service ideals. The merit criteria of ability, knowledge, and skills are no longer the basis for recruitment, selection, or advancement, while pay and benefits for comparable work are substantially above those in the private sector. Retention is not based primarily on performance, and for the most part, inadequate performance is neither corrected nor punished.

A better administered central bureaucracy is crucial, but the problem is greater than bureaucratic administration itself. The specific deficiencies of the federal bureaucracy—its inefficiency, expense, and irresponsiveness to political leadership—are rooted in the Progressive belief that unelected experts should be trusted with promoting the general welfare in just about every area of social life.

The U.S. Constitution reserved a few enumerated powers to the federal government while leaving the great majority of activities to state, local, and private governance. As James Madison explained it, "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs,

concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."<sup>59</sup>

American government functioned largely according to this conception until the early 20th century. Until then, local governments accounted for a majority of total government spending, and the sum of all government spending—both state and federal—totaled only 6 percent of the economy. Today, government spending in the U.S. consumes about one of every three dollars of GDP. Federal government spending alone takes more than one-fifth of the economy—while regulating pretty much everything else. In contrast to much of U.S. history in which state and local governments played the dominant role in taxes and government services, the federal government now takes the largest share of taxes from the American people. Federal taxes accounting for 61 percent of total government revenues, compared to 28 percent for state governments and 11 percent for local governments.<sup>60</sup>

This shift resulted from the "scientific administration" revolution propounded by Woodrow Wilson, who convinced U.S. intellectuals that the Constitution's failure was to separate powers rather than consolidate them. Wilson's belief that experts could regulate society's problems from the center has now generally been accepted as America's governing philosophy.<sup>61</sup>

Should this worldview remain unchallenged, fundamental reform will remain out of reach. If the political interests continue to expect extensive social welfare programs and continue to force Congress and the President to act directly on all manner of societal problems, the federal bureaucracy will continue to be overwhelmed.<sup>62</sup>

It is simply impossible for political leadership to manage in an effective manner a bureaucracy vast enough to fulfill all of the functions now performed by the national government. Unlimited utopian Progressive aspirations just cannot be squared with constitutional government.

59. James Madison, *The Federalist Papers*, No. 45, Yale Law School, Lillian Goldman Law Library, Avalon Project, [http://avalon.law.yale.edu/18th\\_century/fed45.asp](http://avalon.law.yale.edu/18th_century/fed45.asp) (accessed September 25, 2018).

60. The Tax Policy Center, *The Tax Policy Center's Briefing Book: A Citizens' Guide to the Fascinating (though often Complex) Elements of the Federal Tax System* (Washington: Tax Policy Center, Urban Institute & Brookings Institution, 2016), pp. 12-13, [https://www.taxpolicycenter.org/sites/default/files/briefing-book/tpc-briefing-book\\_0.pdf](https://www.taxpolicycenter.org/sites/default/files/briefing-book/tpc-briefing-book_0.pdf) (accessed November 29, 2018)..

61. Donald J. Devine, *America's Way Back: Reclaiming Freedom, Tradition, and Constitution* (Wilmington, DE: ISI Books, 2013), pp. 9-10, 60-64, 164, 175, and 202.

62. Paul C. Light, "A Cascade of Failures: Why Government Fails, and How to Stop It," Brookings Institution, Center for Effective Public Management, July 2014, [https://www.brookings.edu/wp-content/uploads/2016/06/Light\\_Cascade-of-Failures\\_Why-Govt-Fails.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/Light_Cascade-of-Failures_Why-Govt-Fails.pdf) (accessed September 25, 2018).

Thus, serious reformers must wage a two-pronged offensive against both the specific failures of the merit system elaborated in this paper and the Progressive vision of government that has created an overweening bureaucracy that is unable to meet its own ideals.

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