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**TESTIMONY OF
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**HEARING ON
“REPLACING NON-PARTISAN CIVIL SERVANTS WITH POLITICAL HIRES”**

**BEFORE THE
SENATE HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS COMMITTEE**

SEPTEMBER 17, 2024

Chairman Peters, Ranking Member Paul, and members of the Committee:

Thank you for inviting my testimony. This committee has been the leader for legislation to protect whistleblowers, those employees who use freedom of speech to challenge uses of power that betray the public trust. My name is Thomas Devine, and I serve as legal director of the Government Accountability Project,¹ a nonprofit, nonpartisan, public interest whistleblower protection and advocacy organization. Government Accountability Project has led or been on the front lines of campaigns to enact or defend nearly all modern whistleblower laws passed by Congress, including the Whistleblower Protection Act of 1989,² as well as 1994 and 2012 amendments to this legislation.

We led the campaigns for passage of all three generations of the Whistleblower Protection Act, the primary law that empowers federal employees to report violations of laws, rules or regulations, gross mismanagement, gross waste of funds, abuses of authority, and substantial and specific dangers to the public health and safety free from retaliation. Our work for corporate whistleblower rights includes those in the government contractor law,³ the Sarbanes-Oxley law to protect some 40 million workers in publicly-traded corporations,⁴ the 9/11 law for ground transportation employees⁵, the defense authorization act for defense contractors,⁶ the Consumer Product Safety Improvement Act for some 20 million workers

¹ Founded in 1977, Government Accountability Project promotes corporate and government accountability by protecting whistleblowers, advancing occupational free speech, and empowering citizen activists.

² Whistleblower Protection Act, 5 U.S.C. § 2302 (b)(8)-(9).

³ National Defense Authorization Act for Fiscal Year 2013, 41 U.S.C. § 4712.

⁴ Sarbanes-Oxley Act of 2002 (SOX) (2002) 18 U.S.C. § 1514A.

⁵ National Transit Systems Security Act of 2007 (NTSSA), 6 U.S.C. § 1142.

⁶ National Defense Authorization Act for Fiscal Year 1987, 10 U.S.C. § 4701.

connected with retail sales,⁷ the Energy Policy Act for the nuclear power and weapons industries,⁸ and AIR 21⁹ for airlines employees, among others.

Internationally, we teamed up with professors from American University Washington College of Law to author a model whistleblower law approved by the Organization of American States (OAS) to implement its Inter-American Convention against Corruption. In 2004, we led the campaign for the United Nations to issue a whistleblower policy that protected public freedom of expression for the first time at intergovernmental organizations, and in 2007 analogous campaigns at the World Bank and African Development Bank. Last December we led a successful campaign with the United Nations Convention Against Corruption for a resolution favoring best practice global whistleblower rights enacted unanimously by 160 nations. Government Accountability Project served as the technical expert on the front lines of successful campaigns to pass whistleblower laws in Serbia and Ukraine, and to defeat an anti-whistleblower law in Slovakia. I regularly participate in speaking tours for the State Department in countries that consider whistleblower laws.

Government Accountability Project has published numerous books and law review articles analyzing and monitoring the track records of whistleblower rights legislation. *See The Whistleblower's Survival Guide: Courage Without Martyrdom*;¹⁰ *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*;¹¹ *The Whistleblower*

⁷ Consumer Product Safety Act (CPSA) (text added by the Consumer Product Safety Improvement Act of 2008), 15 U.S.C. § 2087.

⁸ The Energy Policy Act of 2005, 42 U.S.C. §15801, amended the whistleblower protection provisions of the Energy Reorganization Act of 1974, 42 U.S.C. §§5841 and 5851.

⁹ Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) (2000) (text added by the Aircraft Certification, Safety, and Accountability Act of 2020), 49 U.S.C. § 42121.

¹⁰ Tom Devine, *The Whistleblower's Survival Guide: Courage Without Martyrdom* (Fund for Constitutional Government, 1997)

¹¹ Thomas M. Devine, "The Whistleblower Protection Act of 1989: The Foundation for the Modern Law of Employment Dissent," *Administrative Law Review*, 51, no. 2 (1999): 531–79. <http://www.jstor.org/stable/40709996>.

Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers;¹²; The Art of Anonymous Activism (with Public Employees for Environmental Responsibility (PEER) and the Project on Government Oversight) (POGO), in 2001, revised in 2017 as Caught Between Conscience and Career: Expose Abuse Without Exposing your Identity (again with PEER and POGO);¹³ the global survey and evaluation of whistleblower laws, Are Whistleblower Laws Working? A Global Study of Whistleblower Protection Litigation (with the International Bar Association);¹⁴; and The Corporate Whistleblower's Survival Guide: A Handbook for Committing the Truth.¹⁵ The latter won the International Business Book of the Year Award at the Frankfurt Book Fair.

Along with the POGO, Government Accountability Project also is a founding member of the Make it Safe Coalition, a non-partisan, trans-ideological network of 75 organizations whose members pursue a wide variety of missions that span defense, homeland security, medical care, natural disasters, scientific freedom, consumer hazards, and corruption in government contracting and procurement. We are united in the cause of protecting those in government who honor their duties to serve and warn the public. Our coalition led the citizen campaign for passage of the Whistleblower Protection Enhancement Act (WPEA). Our coalition's members include good government organizations ranging from the National Taxpayers Union to Common Cause; environmental groups from Council for a Livable World, Friends of the Earth and the

¹² Robert G. Vaughn, Thomas Devine and Keith M. Henderson, "The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers," *The George Washington International Law Review* 35 (2003): 857

¹³ Government Accountability Project, Project on Government Oversight, and Public Employees for Environmental Responsibility, *Caught Between Conscience & Career: Expose Abuse Without Exposing Your Identity* (2017), https://s3.amazonaws.com/docs.pogo.org/publication/Caught_Between_Conscience_and_Career.pdf.

¹⁴ Samantha Feinstein and Tom Devine, "Are whistleblower laws working? A global study of whistleblower protection litigation," *Government Accountability Project and the International Bar Association* (2021), <https://whistleblower.org/wp-content/uploads/2021/03/Are-Whistleblowing-laws-working-REPORT.pdf>

¹⁵ Tom Devine and Tarek F. Maassarani, *The Corporate Whistleblower's Survival Guide: A Handbook for Committing the Truth* (Berrett-Koehler Publishers, 2010).

Union of Concerned Scientists; conservative coalitions and organizations such as the Competitive Enterprise Institute, American Conservative Defense Alliance and the American Policy Center; to unions and other national member based groups from American Federation of Government Employees and the National Treasury Employees Union; to the National Organization for Women. But the coalition itself is only the tip of the iceberg for public support of whistleblowers. Some 400 organizations with over 80 million members joined the petition for passage of the Whistleblower Protection Enhancement Act of 2012.

My testimony includes an analysis of Executive Order (EO) 13957, Creating Schedule F in the Excepted Service, issued October 21, 2020.¹⁶ This Order would allow replacement of non-partisan professionals in the civil service with political hires. However, I think I've been invited to share a history lesson, because history repeats itself. Schedule F is a déjà vu structure for the "Malek Manual" (officially titled the Federal Political Personnel Manual), a comprehensive effort issued in 1973 during the Nixon Administration to functionally replace the civil service with a political spoils system.¹⁷ My knowledge comes from reviewing thousands of pages of Freedom of Information Act (FOIA) documents from 70 federal agencies that implemented the system. The research was to prepare a Fund for Constitutional Government report with attorneys Joseph Gebhardt and William Dobrovir, "Blueprint for Civil Service Reform" (henceforth "Blueprint").¹⁸

¹⁶ Executive Order 13957, "Creating Schedule F in the Excepted Service," (October 21, 2020), <https://www.federalregister.gov/documents/2020/10/26/2020-23780/creating-schedule-f-in-the-excepted-service>.

¹⁷ See "Federal Political Personnel Manual: The "Malek Manual," *The Bureaucrat*, Vol. 4, No. 4, pp. 429-508 (January 1976), reproduced at <https://whistleblower.org/wp-content/uploads/2024/09/122473090-Malek-Manual-1.pdf>.

¹⁸ Fund for Constitutional Government, "Blueprint for Civil Service Reform," (1976). <https://whistleblower.org/wp-content/uploads/2024/09/Blueprint-for-Civil-Service-Reform.pdf>. Text drawn from the Malek Manual will be specifically referenced. Any other passages will be drawn from the 1976 Blueprint report, for which footnote documents no longer are available.

Attempts to substitute patronage hires for civil servants are as old as the government labor force. However, traditionally the civil service largely has kept politics out of public service. As the National Civil Service League observed in 1961, “The great battles against the corruption of the federal spoils system have been largely won.”¹⁹ The Malek Manual was an unabashed effort to abolish the merit system, and it was thoroughly discredited in the Watergate hearings. Eerily, its roots were strikingly similar to the practices enabled by Schedule F.

Today’s testimony should be put in perspective. Attempts to engage in political control of the federal labor force are a tireless, bi-partisan tradition. For example, Government Accountability Project has as active a whistleblower docket under President Biden as we did under President Trump. Schedule F, however, stands out. It is a structure to openly do what President Nixon tried to accomplish in secret.

DOES THE MERIT SYSTEM SERVE OR UNDERMINE GOVERNMENT SERVICE?

The Malek Manual emphatically answers that question: “There is no merit in the merit system!” (emphasis in original).²⁰ Outside of open political objectives, the main justification was that cumbersome legal rights are a barrier to overhauling the federal labor force. The Malek Manual rejects them as lengthy red tape procedures that can greatly harm agencies due to litigation burdens, delays and bad publicity.²¹ The Manual’s conclusions also are ominous for whistleblowers. Mr. Malek justified using its tactics to avoid “the costs of the frequent crescendos of bad publicity that are sure to occur frequently and indefinitely if you do not.”²²

¹⁹ Blueprint, p. 105.

²⁰ Malek Manual, p. 478.

²¹ Ibid, p. 480.

²² Ibid, p. 508.

In the name of accountability for poor performance, Schedule F at Section 1 has an analogous justification: competitive hiring procedures are too complicated and elaborate; and the merit system's due process litigation procedures are too extensive, lengthy and difficult to remove employees.

These justifications do not justify canceling the merit system. A political spoils system replaces accountability to the Constitution, Congress and the public with accountability to the President. This is particularly dangerous, when the Supreme Court has held that the President has no accountability for official acts.

Congress enacted the merit system in 1883, because corruption from the spoils system was so extreme that a disappointed patronage seeker assassinated President Garfield. Further, corruption is a threat to democracy. There are almost 3 million federal employees. It would be hard for any leader to lose reelection with a head start of three million employees who have no other choice than to serve the politician's interest or be fired.

By contrast, despite the rule of law's messiness, the job rights protected by the merit system have strengthened government legitimacy by enforcing the law without regard to politics. It has assured continuity for expertise despite changes in political power. Because of tenure, the merit system attracts a far higher quality of candidates. The government needs top professionals, not patronage hires, for decisions where to award high-stakes grants; to call the bluffs of those operating illegally; to conduct life-saving research; to oversee government contractors; and to prevent mistakes due to ignorance or political abuse of power.

Whistleblower protection is a merit system cornerstone. Consider how this right has made a difference. Due to their merit system rights, whistleblowers have been able to:

- expose and spark corrective action against routine Pentagon purchases of the world's most expensive nuts, bolts, toilet seats and coffee pots.

- expose blanket domestic surveillance to congressional oversight committees that began the process of restoring accountability long before media leaks made the issue popular, disclosures that led to passage of the USA Freedom Act.
- force delivery of Mine Resistant Armored Protection (MRAP) vehicles to Iraq and Afghanistan that reduced land mines from 90% of casualties and 60% of fatalities, to only 5% of casualties.
- prevent the Federal Air Marshals from canceling its defensive missions and effectively going AWOL before a confirmed, more ambitious Al Qaeda rerun of 9/11.
- reveal indefensible breakdowns in aviation security such as routine exposure of undercover Federal Air Marshals.
- prevent the trillion dollars next phase of Star Wars, after the Army's top scientist blew the whistle on the program's inherent, structural inability to intercept enemy missiles.
- force repairs on nuclear power plants that were accidents waiting to happen, and plug leaks that were spewing millions of gallons of radiation into America's water supplies.
- expose and end the practice of our law enforcement agencies selling weapons to Mexican drug smugglers.
- expose that drugs such as Vioxx were pain killers that actually killed, leading to its removal from the market.
- reveal that federally funded programs to help abused foster children were diverted while the abuse victims were put in hails with adult criminals.
- disclose evidence how U.S. funded international programs at the United Nations and other Intergovernmental Organizations in practice was financing mass rapes and other human rights abuses by IGO "peacekeepers."

I could continue indefinitely, but the point should be clear. Thanks to their merit system rights, over and over whistleblowers have been able to expose national security and other government breakdowns and abuses of power that only could be sustained by secrecy. Over and over, they have saved the public from government breakdowns. These would not have occurred if they did not have the merit system freedom to expose the truth.

SUMMARY OF EXECUTIVE ORDER 13957

Schedule F was the centerpiece of a sweeping plan to cancel civil service rights. President Trump ordered it just weeks before the 2020 election, so there was not time to

implement the new system. It subsequently was canceled by the Biden administration but has resurfaced in the current election campaign. In the introduction the EO's stated scope is that it applies to confidential policy-determining, policy making or policy advocating "jobs not normally subject to change after an election." In other words, competitive service jobs. In Section 2, the EO defines its scope as all positions whose appointment would require assent by the White House Office of Personnel. While this could limit Schedule F's reach, the White House can expand or shrink that list. Even if initially limited, the history of the Malek Manual was first to test its techniques in more limited beach head settings before replacing the entire civil service.

The text of the EO is so open-ended, however, that the limited boundaries are not reliable even now. For example, section 5(c), positions of a "confidential, policy-determining, policy-making, or policy-advocating character," include employees who work on agency regulations; have discretion in exercising legal functions; engage in activities covered by the deliberative process; work for or with anyone who is GS-13 or higher; or conduct collective bargaining negotiations. What else is left?

Further, in section 4 the EO's scope subsumes merit system positions in Schedules A, B, C, D, E, and F. This means the merit system will not apply for jobs when competitive examinations and academic qualifications are "impracticable." Administrative Law Judges and government attorneys would become at will, political employees. The new Schedule F would apply to existing jobs and incumbents, not just new positions.

While prohibited personnel practices would still apply, their independent enforcement would vanish. Section 6 of the EO directs agencies to create internal systems for enforcement of prohibited personnel practices. This means that the same agencies which for 45 years have been

defendants in prohibited personnel practice cases now will have an honor system as the organizational judge and jury of their own alleged misconduct. The fox will be defending the chicken coop.

Schedule F may run into significant legal barriers. For example, the Supreme Court has held that due process is a constitutional right for positions with for cause removal. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). In *Roth v. Brownell*, 215 F.2d 500 (D.C. Cir.1954), the court held that employees retain their prior due process rights when removed at will. Merit Systems Protection Board (MSPB) case law respects this principle. *Briggs v. National Council on Disability*, 68 M.S.P.R. 296 (1996)

THE MALEK MANUAL

In January 1973, the Malek Manual was introduced to 40 federal agencies at a four-day rollout. It consolidated policies that had been evolving since 1969. Although Fred Malek had responsibility as Director for the White House Personnel Office, Alan May actually wrote the document and actively participated in beach head programs at agencies such as ACTION.²³ Other agencies that functionally served as pilot programs included the Federal Communications Commission, Department of Health, Education and Welfare, Department of Housing and Urban Development, General Services Administration and Small Business Administration. In December 1970, Mr. Malek completed an assignment for a management report on the civil service system. The report recommended that the White House make all personnel decisions for the federal government, with agencies providing bi-weekly personnel reports to the White House

²³ ACTION was “the federal domestic volunteer agency” that centralized programs such as the Peace Corps and Volunteers In Service to America (VISTA). See Ryan Wells, “Volunteers in Service to America,” *Encyclopedia Britannica* (last visited September 15, 2024), <https://www.britannica.com/topic/Volunteers-in-Service-to-America>.

using a political rating system for “must” and “priority” and less favored applicants. In January 1971 President Nixon approved the recommendations. The Malek Manual served as a blueprint for how to implement them.

Malek Manual Objectives

Those behind the plan to bypass the civil service system repeatedly reaffirmed that political hiring was the objective. A June 23, 1971 White House memo with top Nixon aides discussed the importance of patronage so that Administration activities would be supported by “loyal troops.” As the Malek Manual later explained, “Political disloyalty and insimpatico relationships with the Administration, unfortunately, are not grounds for removal or suspension of an employee.”²⁴ The Manual listed two explicit objectives:

The overriding goal to be achieved is to insure placement in all key positions of ... politically reliable officials with a minimum burden on line managers in achieving that goal. The objective of that goal is firm political control of the Department, or agency....

Another function is to insure that personnel, which is a resource of the Government ... is utilized in a manner which creates maximum political benefit for the President and the Party.²⁵

While the Manual also had references to better government performance, the bottom line was clear: “reasonably guarantee the appointment to positions of candidates who are ‘clean’ with respect to previous political activity, national security matters, etc.”²⁶

Scope of the Program

Although entitled as applicable for non-career positions, in practice as Mr. Malek later conceded at the Watergate hearings, it was applied for competitive career jobs for pre-Manual incumbents. The Civil Service Commission confirmed the widespread practice for career jobs at

²⁴ Malek Manual, p. 500.

²⁵ Ibid., pp. 433-434.

²⁶ Ibid, p. 455.

GSA. At the FCC, compliance with the 1971 memo routinely extended to career positions. If a non-career job was unavailable, the favored candidate received a career position. At ACTION, even the most highly qualified candidate with a failing political acceptability code would be put in the rejection category. At HUD the selection criteria included loyalty, political support and political affiliation.

Both government attorneys and financial managers would be covered. The Manual explained why it was a “necessity” that those employees be “loyal members of the Administration team. Through the manipulation of money and slots they can be of invaluable aid and/or create insurmountable roadblocks to the programs and goals of your Department or Agency.”²⁷

To assure control, in 1971 agencies had to demonstrate compliance with a political ratings system for new hires – “must,” “priority,” “courtesy,” or “routine.” Agencies had to place all “musts” and at least 50% of “priority” applicants. In 1972 two new categories were added – “politically undesirable” and “political problem.” The latter referenced competing referrals from different political patrons.

The Manual refined and defined the ratings:

I—Must Placement The candidate because of his own past political activities and/or the importance of his placement to his political sponsor(s) leads the evaluator to believe that his placement in a position commensurate with his ability and background will bring great political credit to the party and/or the President, while, conversely, failure to place the individual will cause severe political damage to the party and/or the President.

II—Priority Placement The placement of the individual in a position commensurate with his ability and background will bring political benefit to the party and/or the President, while, conversely, failure to place the candidate will cause some political adversity to the party and/or the President.

III—Courtesy Referral The individual is to be judged on his own merits but should receive a massaging as a political courtesy, and if he is placed some small political benefit to the party

²⁷ Ibid., p. 497.

and/or the President will be derived, while failure to place him will cause little or no political adversity to the party and/or the President.

IV—Politically Undesirable The placement of the individual will create strong political adversity to the party and/or the President while, conversely, the failure to place the individual will be politically beneficial to the party and/or the President.

V—Political Problem This category is a holding category until a determination can be made whether or not to place the individual in one of the above four categories. For example: the Republican Senator from a state says a candidate is a must placement and is essential because the candidate's father is the Senator's largest contributor and finance chairman and crucial to the Senator's reelection. Meanwhile, the Republican Governor of that same state and a Republican Congressman from that same state who sits as a ranking Republican on your agency's appropriations committee strongly object to the individual's placement because he has traditionally and vocally backed their Democratic opponents in past campaigns. It is evident that some additional political research and decision making is going to have to take place before you can make him a Category I or a Category IV.²⁸

The political screening did not end with a rating. For long term oversight, the 1971 memo instructed that an “abstract” outside normal personnel records would track each employee’s political activities. In other words, a patronage dossier.

Patronage Infrastructure

The Malek Manual implemented the 1971 memo with a detailed, step-by-step blueprint to achieve political control through personnel actions. There were two overriding principles. The first was White House supremacy over the agencies, from initial interviews through clearances.²⁹ The second was absolute secrecy to keep the President “disassociated.” Indeed, instructions for patronage hires were to be made verbally. At ACTION, relevant documentation literally was thrown in the garbage.

The foundation for implementation was a Political Personnel Office at each agency. The Manual established that responsibility would lie with an Assistant Secretary for Administration,

²⁸ Ibid., pp. 441-442.

²⁹ Ibid., p. 456.

but the operation would be run by a “Special Assistant” from the White House.³⁰ To impress staff the Special Assistant’s operations should be located near the agency head with “majesty of décor.”³¹ The Offices would handle patronage, recruitment both for career and non-career jobs, initial interviews and clearances to enforce political and other criteria.

The Political Personnel Offices had decisive control of the process. Each agency had to provide three months of advance notice for vacancies. The Office then would interview candidates recruited or selected from its talent pool or other political referrals. After completing political checks and screening out unfavorables, the Special Assistant would refer selected candidates for agency personnel offices to formalize the position. Through this structure, personnel offices were reduced to a paperwork function. As observed in the Manual, “In this way the deck is essentially stacked before the cards are dealt and rarely is a selection disapproved.”³²

The operation had a research and development (R&D) Branch as well. The R&D team was charged with determining those positions in which a "loyal" competent incumbent is necessary to effect control.” In particular, this would include employees whose jobs included communications with the media or Congress, and those controlling disbursement of resources.³³ This function could easily be applied to creating newly designated confidential policy jobs under Schedule F.

Tactics to Purge Incumbents

After ruling that political disloyalty isn’t grounds for removal of civil service employees, the Malek Manual reassured “[T]here are several techniques which can be designed, carefully, to

³⁰ Ibid, p. 434-435.

³¹ Ibid., p. 435.

³² Ibid., p. 439.

³³ Ibid., p. 446.

skirt around adverse action proceedings.”³⁴ Below is a summary of tactics relied upon or to implement the 1971 memo.³⁵

- Designate non-policy jobs as policy positions although there were no relevant duties, a vulnerability directly relevant to Schedule F.
- Engage in a “frontal assault,” telling employees they are not wanted, and offering them the choice of resigning with positive references, farewell lunches and possible commendations; or refusing to go and getting fired with a permanent campaign to warn other employers about them.
- Use the “traveling salesman” tactic, assigning the employee to tasks scattered throughout the country nonstop “until his wife threatens him with divorce unless he quits.” Again, offer the same carrot and stick options with respect to the far-flung tasks.
- Transfer to new positions the employee cannot accept, due to financial, family or other obligations.
- Reassign the employee to a meaningless job.
- Reorganize the department to isolate or remove the employee.
- “Tear Up” the current job description and then rewrite it so the incumbent no longer fits duties tailored for the political hire.
- Engage in “layering” so that a “special assistant” employee duplicates the incumbent as a prelude before the latter is forced out.
- Notify the White House of vacancies before the Civil Service Commission, so that the political candidate list can be completed.
- Dilute the qualifications in vacancy announcements to justify selection of unqualified “must” applicants.
- Finalize but don’t post the vacancy announcement.
- Fill a position with a temporary appointment of the political hire before posting the vacancy announcement for a permanent position.
- Use “availability of service” to bypass the competitive process for “pressing need” appointments.

³⁴ Ibid., p. 500.

³⁵ Ibid., pp. 478, 497, 500-507.

- Make appointments as exceptions during strategically scheduled hiring freezes.

Although initially the programs were identified as limited to non-competitive appointments, as seen earlier in practice the system covered competitive jobs as well. The impact was far-reaching. To illustrate, GSA Personnel Office whistleblower Arthur Palman and five others processed 700 “must” referrals in four years. Palman had to work full time implementing decisions by the White House and its agency liaison. The Civil Service Commission found that a Special Referral Unit worked outside the Personnel Office to, variously, make exceptions to hiring freezes; act outside the Personnel Office to create jobs; use temporary appointments to get “must” applicant’s feet in the doors; embellish the qualifications of unqualified “must” applicants; and manipulate job descriptions.

Examples illustrate the policy’s impact on the quality of public service. At the Environmental Protection Agency (EPA), a “must” hire’s qualifications included working enthusiastically at the Republican National committee for the previous five years. In February 1973, the White House wrote to all agency Political Personnel Offices reminding them that it had ordered jobs for a large number of campaign and inaugural workers throughout the government. White House staffer Jerry Jones wrote that “it is extremely important that you and your staff make these candidates your highest priority and complete their permanent placement in the near future.” Quite clearly, the goal was not improved public service. The federal labor force priority was restricting it to political loyalists in order to achieve political control.

This 1973 blueprint for political hiring is not merely a historical document. In 1981 and 1982, Special Counsel Alex Kozinski had it on his desk while he purged staff with civil service backgrounds from the Office of Special Counsel, the merit system’s watchdog agency. During the last Congress, Government Accountability Project opposed confirmation of the nominee for

Board Chair after MSB whistleblowers alerted us that he was studying the Malek Manual as a policy guide. Schedule F enables history to keep repeating itself.

RECOMMENDATIONS

There cannot be credible debate that the current personnel system has frustrated both management and employees alike. Nor can there be credible dissent that the federal government more effectively should be held accountable for misuse and abuse of power. The way to strengthen accountability, however, is not to cancel it in the rule of law. A spoils system will result in a labor force whose first duty is political loyalty, rather than public service.

There are better ways to further merit system public service goals than canceling the merit system. Below are recommendations for your consideration:

1) Require the Merit Systems Protection Board to issue a state of the merit system report. This has been a statutory duty required by 5 U.S.C. § 1204(a)(3) since passage of the Civil Service Reform Act of 1978 that the Board never has honored. By assessing strengths and weakness, it should be the necessary foundation to overhaul a frustrating administrative process. The Board's report should be followed by an independent General Accountability Office assessment of its findings.

2) Intensify congressional oversight. There has not been an oversight hearing on the Whistleblower Protection Act since 2017. The Board needs to know that Congress is watching.

3) Make oversight of and strengthening whistleblower protection a committee priority. Whistleblowers risk their professional lives to challenge government fraud, waste and abuse. Schedule F would transform those rights into agency honor systems.

4) Provide a “kick-out” due process safety valve for transfer of delayed MSPB whistleblower cases to federal court jury trials. Delays due to backlogs have been a primary source of frustration. The new Board still has roughly half of cases remaining from some 3,800 backlogged the end of 2023. This recommendation would upgrade civil service standards to those in all modern private sector laws, as well as rights for state and local government workers. They all have access to court and jury trials to defend their rights. Civil servants are the only major sector of America’s labor force without court access to defend their free speech rights. It also would significantly ease backlog pressures at the Board, as whistleblower cases are far more complex and burdensome than other civil service disputes.

5) Perform necessary maintenance on the administrative process. Rather than throwing out the baby with the bathwater, Congress should provide more funds for Board fact finders, promote them from Administrative Judges to Administrative Law Judges and require that their qualifications include prior service and respect for the merit system. Currently most AJ’s either come from agency lawyers who served as defense counsel in employee rights cases, or from the Judge Advocate General staff. They have grown up professionally by fighting merit system rights. Schedule F would intensify the bias by making them political appointees not requiring Senate confirmation.

The way to improve inadequate accountability is not by replacing the rule of law with no accountability for absolute presidential power that can be politically abused. Thank you for this opportunity to be heard. Government Accountability Project is on call to be helpful.