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May 17, 2019

The Honorable Gerald Connolly
Chairman
Subcommittee on Government Operations
2238 Rayburn House Office Building
Washington, DC 20515

The Honorable Mark Meadows
Ranking Member
Subcommittee on Government Operations
2160 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Connolly, Ranking Member Meadows, and Members of the Subcommittee:

On behalf of the Senior Executives Association (SEA) – which represents the interests of career federal executives in the Senior Executive Service (SES), those in Senior Level (SL), Scientific and Professional (ST) and equivalent positions and other senior career federal leaders – I write to offer perspective on the Administration’s proposal regarding the U.S. Office of Personnel Management (OPM) and merging many of its responsibilities into the General Services Administration (GSA) and the Office of Management and Budget (OMB).

To begin, it is fair to say that many have become frustrated with OPM over the years and that OPM’s fundamental business model must be updated in light of the loss of revenue from the move of the National Background Investigation Bureau (NBIB) to the Department of Defense. In this regard, many parts of the Administration’s business case for the merger do make sense.

Prior to analyzing the Administration’s proposal, which has been difficult given the dearth of public information that has been made available by which to assess its soundness, it is important to first examine why Congress created a statutorily independent OPM in the first place. This examination (Exhibit A) is critical because this issue appears absent from the little analysis that the Administration has shared with stakeholders or the public.

The politicization of the federal workforce to abuse the power of the U.S. Government for partisan purposes during the Nixon administration directly informed the post-Watergate reforms, that included the passage of the Civil Service Reform Act of 1978, the Ethics in Government Act of 1978, and others. Reflecting on those threats, Congress decided to split the then-Civil Service Commission into several statutorily independent agencies responsible for oversight of the civil service, including OPM, the Merit Systems Protection Board (MSPB), and the Federal Labor Relations Authority (FLRA).

Congress specifically and intentionally baked statutory independence into OPM's mission as the guardian of an apolitical merit-based civil service.

Maintaining this independence has long been seen as a challenge, but as a necessary endeavor none the less. Kay Coles James, former OPM Director under President George W. Bush, wrote in the *Biography of the Ideal*, "The challenges are many as we work to perfect our ideal and create an even better, fairer system based on the merit principles, a system that will attract and motivate the best and the brightest of the rising generation to heed the call to public service... It is my hope that we will continue to honor their legacy, and in the spirit of former Civil Service Commissioner and President Theodore Roosevelt, remain in the arena of public service to stand tall in the face of danger and place service to our country first."

Maintaining OPM's role in this regard is of absolute and paramount importance, and changes to that can only occur through Congress, not the Administration via fiat. The Administration to date has not provided clarity about what, if any, independence OPM would maintain should it be folded under GSA. The OPM Director is independent from the President; the GSA Administrator is not.

Stuart Eizenstat, President Carter's domestic policy adviser who helped shaped the reforms of the late 1970s, [said](#) that civil service law was never intended to be completely static and left to its own devices. Rather, the civil service system — and the Office of Personnel Management, Merit Systems Protection Board, and Federal Labor Relations Authority — need consistent attention and care.

"We also recognized that in order to have it fulfill all of the hopes and dreams that we had ... it requires constant nurturing," Eizenstat said. "It requires a president and an administration that values the civil service system — that wants to enhance it, that wants to improve it, that wants to incentivize and not politicize it. They require nurturing by the White House, by the president and by the leadership. If you create an environment where this is a disincentive for the career civil service, [where] they're viewed in a negative way, then it undermines the purpose. An act is only as good as those in whose hands it can be shaped and implemented."

President Jimmy Carter said upon passage of the CSRA, "By itself, the law will not ensure improvement in the system. It provides the tools; the will and determination must come from those who manage the government." That will include both the Executive Branch as well as Congress, sadly both of whom over the past 40 years have demonstrated significant neglect for their obligation to tend the civil service garden.

This hearing and the Administration's proposal provide an ideal opportunity to work through important and fundamental issues that are admittedly not politically sexy or interesting to most members of the public but have to be addressed. Those questions include:

- OPM's focus has been on Title 5, while Congress and agencies have created a slew of alternative personnel authorities outside of OPM purview. Should OPM's purview over core civil service issues be extended to the whole of government?

- Are there logical separations between core issues of independent civil service management and oversight versus broader human capital policy?
- How should centralization versus decentralization be handled with regard to management and oversight of the civil service and the merit system?
- What should OPM's core focus be, what should it maintain independent responsibility for?
- Once Congress determines what OPM's core focus and mission should be, what level and type of resources does it need to accomplish that mission?

Thank you for your consideration of SEA's perspective. Please have your staff contact SEA Executive Director Jason Briefel (jason.briefel@seniorexecs.org); 202-971-3300) for further information.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Valdez". The signature is written in a cursive, flowing style.

Bill Valdez
President
Senior Executives Association

CC: The Honorable Elijah Cummings, Chairman, House Committee on Oversight and Reform;
The Honorable Jim Jordan, Ranking Member, House Committee on Oversight and Reform

Exhibit A

The Death of an Ideal: Why the Dissolution of OPM is Bad for the Country

I. Introduction

The Trump Administration is about to do something that will have a harmful (and potentially irreparable) impact on one of our Nation's most valuable assets: The Federal government's politically neutral career civil service. That career service is one of the secrets to the success of our very democracy, continuing to deliver the essential services of government under even the most turbulent of political circumstances...including the impeachment of two Presidents (and the resignation of one) and at least one contested Presidential election.

That career civil service was founded on the bedrock principle of merit—that is, that merit, rather than political affiliation or allegiance, should serve as the basis for all personnel decisions affecting most government employees. However, the ability of Federal civil servants to do their jobs free from political influence is now threatened by the Administration's unilateral dissolution of the Office of Personnel Management (OPM).

Proposed by OMB as part of the President's Management Agenda, the break-up would send the various parts of OPM to either the General Services Administration or OMB, all intended to provide better integration with the Federal government's other central management functions—financial management, procurement, information technology, etc. They are the responsibility of those two agencies, and from that purely functional vantage, that integration makes sense.

Thus, we believe that the Administration is dissolving OPM without malign intent—that is, for structural reasons that may make perfect sense in the private sector. Indeed, there are many plausible reasons to break up the agency, not the least of which is an ossified, 'just say no' culture that has stymied government-wide efforts to field innovative, 21st century human capital policies. However, those intentions, no matter how benign or beneficial, cannot excuse an unintended and deleterious result. In other words, let's not throw the baby out with the bath water.

II. The Ideal: A Politically Neutral, Merit-Based Civil Service

A politically neutral Federal civil service—one that does its jobs according to the rule of law and the principles of merit, rather than the politics of the day—is vital to our Nation. This principle can be traced all the way back to the Pendleton Act of 1883, enacted after years of the politically-driven 'spoils system' culminated in the assassination of President Garfield by a disgruntled job seeker who 'only' wanted his share of those spoils.

The Pendleton Act changed all that. It established an independent, three-member civil service commission at the Federal level—none other than Teddy Roosevelt was one of its first (and the most famous) Commissioner—to ensure that principles of merit governed the vast majority of Federal jobs, especially of the sort sought by President Garfield’s assassin. In other words, the Pendleton Act abolished the dysfunctions of the old ‘spoils system’—where one’s politics were all that mattered—and replaced it with the beginnings of today’s merit-based, politically neutral civil service.

This political neutrality has its limits, of course. The President has the authority to appoint thousands of individuals in various policy-making positions based on political affiliation and allegiance. These appointees are not intended to be politically neutral. Indeed, just the opposite is the case...their job is to ensure that the politically neutral civil service is responsive to the wishes of the American electorate. That said, one would hope that these appointments also consider the qualifications of the individuals so appointed (indeed, some positions require this as a matter of law), and many of those appointments require Senate confirmation to address that very issue.

However, for the almost two million employees in the Federal government’s career civil service, political affiliation and allegiance cannot be considered. It is not a factor in their hiring, advancement, or retention. Thus, while political appointees at the top of the Executive Branch may drive an Administration’s policy agenda, they are supported by civil servants employed on the basis of their technical and managerial qualifications...and without regard to their personal political views or affiliation, or those of their superiors.

III. The Reality: Role of the Office of Personnel Management

To assure this merit-based neutrality, the Congress, in the 1978 Civil Service Reform Act, created OPM as an ‘independent establishment’ in the Executive Branch (5 USC §1102 et seq), and it specifically charged its Director with “...executing, administering, and enforcing...the civil service rules and regulations of the President and the Office and the laws governing the civil service” as may be found in title 5 of the US Code. Moreover, in the Act’s legislative history, House and Senate conferees stated that OPM was established “...to protect against prohibited personnel practices and the use of unsound management practices by the agencies.”

OPM’s independent standing is no fluke. OPM must be able to stand up to agency heads, Cabinet Secretaries and yes, even Presidents when it comes to executing, administering, and enforcing ‘the civil service laws’ that embody the merit system. Yet this statutory mandate notwithstanding, the Administration would assign responsibility for accomplishing those things to the General Services Administration (GSA) and the Office of Management & Budget (OMB) in the Executive Office of the President, even though neither agency has ‘independent’ status

under the law, and even though by law, the GSA Administrator is of lower rank than the Director of OPM.¹

Under common rules of statutory construction, one must assume that the Congress had specific meaning and intent in expressly granting the Office that independence, and it has particular importance when it comes to assuring that Federal civil servants are free of improper political influence. Thus, assigning that responsibility to an agency other than OPM runs contrary to the express language of the law. And assigning that that role to an agency head like the GSA Administrator—who by law, “shall perform functions subject to the direction and control of the President”—is a sure way to undermine the political neutrality of the civil service.

IV. Contested Terrain: Civil Service Policy vs. Human Capital Management

This does not mean that OPM must be (or remain) responsible for all aspects of Federal human capital management. In that regard, we make a distinction, admittedly somewhat arcane, between execution and enforcement of ‘the civil service laws’ that Congress entrusted to OPM, and those many other elements of human capital that are peripheral to that fundamental mission.

For example, we would assert that any matter that deals with the entry, advancement, accountability, and retention (or termination) of a civil servant—all critical personnel decisions that may be tempting targets for a prohibited personnel practice—should be subject to OPM oversight. For example, those policies governing the examination for, and permanent appointment to a career civil service position, with all of the rights and privileges (such as due process) accorded thereto should remain within OPM’s purview, as should the rules and procedures for performance evaluation and promotion.

And obviously, anything to do with taking disciplinary and adverse action against a civil servant, for either conduct and/or performance, should also stay put, as should policies governing other personnel decisions (such as involuntary reassignment) that may be used with ulterior and improper motive.

This is especially the case when it comes to members of the Senior Executive Service (SES) and its various equivalents. Operating at the oft-ambiguous interstices between the ‘deciding’ and the ‘doing’ of government, those senior career civil servants are perhaps the most vulnerable to improper political interference. Indeed, this fact was specifically noted by the Congress in the Civil Service Reform Act of 1978, in which it specifically charged OPM with the establishment and administration of the then-new Senior Executive Service (SES). And implementing directives expressly took responsibility for “devising and establishing programs...to select, train,

¹ Congress specifically gave the Director of OPM the subcabinet rank of EX-II, the equivalent of the Office of Management and Budget’s Deputy Director for Management, whereas it pegged the Administrator of GSA at EX-III.

develop, motivate, deploy and evaluate the men and women who make up the top ranks of Federal civil service” from OMB and gave it to OPM.

The wisdom of this should be obvious...if there is a component of the career service that should be protected from arbitrary, improperly motivated actions, it is the SES. However, that underscores the challenge of ‘splitting hairs’ such as we suggest, for SES members should also be held to a higher standard of accountability and responsiveness; they are expected to carry out the lawful orders of their political superiors to the very best of their abilities, whether they personally agree with them or not. It is their job. And if those orders ever cross one of their personal ‘red lines’ (moral, ethical, political, or programmatic), they are free to resign.

To be sure, these are daunting issues, and they make for difficult policy choices and difficult practical applications, but that is the essence of civil service policy—as distinguished from human capital policy—and that is a distinction worth preserving.

However, there are many substantive human capital policies, including some of the most impactful, that are sufficiently distinguishable from ‘civil service laws’ that they could be aligned just about anywhere. Strategic initiatives established by the Chief Human Capital Officers Act of 2002 that emphasize planning, metrics, and data analytics are essential for effective human capital management, but they are not ‘civil service policy’ per se. In that regard, we agree that the Administration’s proposal to realign various OPM policy functions to GSA so that they may be better integrated with other management areas (like acquisition and financial management) makes perfect sense.

For example, the Federal government’s job classification system and its overall salary structure are human capital areas that have little to do with maintaining a politically neutral, merit-based civil service system. The same may be said for areas like the size and structure of the Federal workforce, as well as its training and development, general compensation levels, and benefit programs...these too could be transferred to another agency without significant impact on the fabric of our civil service.

And obviously, this also means that OPM need not remain configured as it is today. Here again, the Administration’s proposal makes sense. Many operational areas, especially those that are transactional in nature and thus require expertise in process technology, are ‘human capital’ in name only...areas like retirement claims, clearance checks, health benefit elections, etc.

These are not matters of ‘civil service policy’ at all—indeed, they are not even arguably inherently governmental, and while they may require intimate knowledge of the rules and regulations that govern them, individual decisions on claims or clearances are typically transactional...so long as there is an ‘escape valve’ to one of the Federal government’s many watchdogs (like an Inspector General, the Office of Government Ethics, or even a reconfigured OPM) should they ever be the subject of an alleged prohibited personnel practice.

The same may be said about those core civil service policy areas that we believe should remain independent. OPM's policy structure is forty years old, and it has its organizational roots in a bygone era. Thus, we believe that it could stand some restructuring itself.

If all but OPM's core policy areas are transferred to GSA or some other agency (or in some cases, even outsourced), what would what's left look like? Should it remain an Office, albeit significantly smaller than it is today? Should it revert to a bipartisan Commission, like it once was, with a comparatively small policy-making and oversight staff? Should its Director (or Chair) be given a term appointment, like the Commissioner of Internal Revenue, the Director of the National Science Foundation, or the Director of the FBI, initially subject to political appointment but removed only for cause?

And what of the relationship between a smaller, more focused OPM and its human capital counterparts in GSA and OMB? We suspect that there will be a natural tension between and among them, but that is hardly new. That tension exists today, in some cases between OPM's various separate organizational subdivisions, and in others between OPM and OMB, and we believe that if it is properly managed, it is ultimately a healthy tension...all that a focus on civil service policy does is reduce the contested terrain.

And of course, none of this obviates the tension between individual agencies and their civil service and human capital 'minders' wherever they may be. Those agencies are all on a quest for more flexibility and less oversight, and the fact that they are juxtaposed against agencies with a more 'enterprise' perspective—whether they be OPM, OMB, and/or GSA—is also healthy, if properly managed.

These are all matters worth considering, but as best we can tell, the alternative we pose—that of retaining OPM in its purest civil service policy role—has not been discussed. Whatever the case, we agree with the Administration's basic premise: That OPM is not currently structured for success. It needs reorganizing. We just disagree on its ultimate contours.

V. Reconciliation: Statutory Mandate vs. Administrative Fiat

It is thus clear that the Congress intended an independent OPM to assure a politically neutral, merit-based civil service, and that only the Congress can change that fact. And if Congress had wanted to do so, it had the opportunity at least twice...first in the Chief Financial Officers Act of 1990, and again with the Chief Human Capital Officers Act of 2002. The former actually established the Deputy Director for Management in OMB, and the latter further elaborated on the statutory responsibilities of both OPM and OMB with respect to human capital. Yet in both instances, the Congress chose to leave OPM's independence—and its statutory responsibilities—intact.

Thus, while some of its unstated operational functions (like the processing of security clearances, and its various fee-for-service functions like training and test validation) may be

aligned administratively to other agencies in the interest of efficiency, OPM's central statutory mission—promulgating and policing the laws governing the civil service, including those merit principles and prohibited personnel practices that keep the Federal career service free from political influence—can only be modified by an act of Congress. The Congress expressly established OPM as an independent agency, and only the Congress can change that fact.

Thus, deliberate or otherwise, OPM's putative dissolution puts the Nation's politically neutral civil service at risk. That civil service is the envy of the world, ensuring the delivery of vital public goods and services under the most turbulent of circumstances, both natural and manmade, that have challenged our Nation.

Whatever those challenges, the American people could always count on the Federal government's employees to keep doing their jobs...sometimes without pay, but always without regard to politics. But what happens if there is no agency—and more importantly, no set of government-wide rules and regulations issued and administered by such an agency—to assure that political neutrality?

In sum, we believe that a merit-based, politically neutral Federal civil service is an essential feature of our democracy, and that the Congress specifically established OPM as an 'independent establishment' in furtherance of that end. However, its proposed dissolution by the Administration risks shredding the very fabric of that civil service, even as it seeks to improve the management of the Federal government's workforce more generally. As laudable as that latter goal may be, only the Congress has the authority to change what it established in the first place.

Accordingly, the Administration's dissolution of OPM should be enjoined—at least with respect to that part of the agency that sets and enforces civil service policies—until its impact on the independence of our civil service can be fully examined by the Administration and the Congress.

We make this recommendation knowing full well that it is hard to defend OPM's current performance or structure; the agency continues to jealously guard a civil service system mired in the 20th century laws amended only by incremental accretions to the minutiae of title 5. However, as frustrating as OPM's compliance culture has become, that is insufficient cause to disband and dissolve the *ideal* that it embodies...that of a politically neutral, independent civil service.