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Subcommittee on Government Operations

Hearing titled  
"Revitalizing the Federal Workforce"

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Chairman Connolly, Ranking Member Hice, and members of the subcommittee: thank you for the opportunity to participate in today’s important hearing on revitalizing the federal workforce. I am the Adelbert H. Sweet Professor of Law at Stanford University, an appointed senior fellow at the Administrative Conference of the United States (an independent agency dedicated to improving agency procedures), and a contributor to the Center on Regulation and Markets at the Brookings Institution. I am a proud former federal government employee, having served as an Honors Program attorney at the Department of Justice’s Federal Programs Branch from 2001 to 2003. A Harry S. Truman Scholar, I also have worked short stints in the Department of Defense (Offices of the General Counsel and Inspector General), the Federal Trade Commission (Bureau of Competition), and the Department of Justice (Office of Legal Counsel). In addition, as a resident of Fairfax County, I worked many summers in high school and college for the U.S. Army at Ft. Belvoir’s Research, Development, and Engineering Center. The views I express in this testimony are my own and not those of any institution with which I am (or was) affiliated.

Federal agencies arguably do more “lawmaking” than Congress and more “judging” than the federal courts.<sup>1</sup> While these agencies are typically led by Senate-confirmed appointees, the political layer is thin and has many vacancies. Career employees do the bulk of the agencies’ critical work, as a matter of course and in staffing crises. For example, senior career officials at the Food and Drug Administration (FDA) oversee over 17,000 other employees in inspecting food, testing medical devices, and approving drugs and vaccines (including those for COVID-19), among other important duties.<sup>2</sup> In the State Department, career employees perform a broad range of tasks, including advising on foreign affairs, training diplomats, and adjudicating visa applications.<sup>3</sup>

Federal career workers reflect the American public more than members of Congress, federal judges, or political appointees.<sup>4</sup> They are, however, “older, whiter, more educated, and more likely to be male than the average U.S. resident.”<sup>5</sup> Of the approximately two million federal employees, there

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<sup>1</sup> Agency “lawmaking” consists mostly of regulations. According to the Congressional Research Service, between 1976 and 2018, agencies annually published between 3,281 (in 2017) and 7,745 (in 1980) final rules in the Federal Register. In addition, in the period between 1997 and 2018, “major rules,” which are rules expected to have an annual economic impact of at least \$100 million or other significant economic effects, ranged between an annual low of 49 (in 2017) and a high of 119 (in 2016). CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 22-24 (2019), <https://bit.ly/2Zi5o6S>. To compare, looking at two-year Congresses between 1977 and 2021, enacted laws ranged from 284 (for the 112th Congress) to 804 (for the 95th Congress). *Statistics and Historical Comparison*, GOVTRACK, <https://bit.ly/3puyyKz>. Agencies also adjudicate. For instance, in FY 2019, the Social Security Administration decided over 2.3 million initial claims for disability benefits (and presided over 790,000 hearings). SOC. SEC. ADMIN., ANNUAL PERFORMANCE REPORT FISCAL YEARS 2019-2021 44, 46 (2020), <https://bit.ly/3akmSWA>. There are also many agency adjudications involving veterans and immigrants, among others. By contrast, from April 2018 to March 2019, including both civil and criminal matters, the federal regional appellate courts saw nearly 48,000 filings and district courts received over 376,700 filings. Many of these matters, particularly at the district court level, are settled (or result in court-approved pleas). *Federal Judicial Caseload Statistics 2019*, U.S. COURTS, <https://bit.ly/2Zotgpp>.

<sup>2</sup> Patrizia Cavazzoni, Peter Marks, Susan Mayne, Judy McMeekin, Jeff Shuren, Steven Solomon, Janet Woodcock & Mitch Zeller, *Senior FDA Career Executives: We’re Following the Science to Protect Public Health in Pandemic*, USA TODAY (Sept. 10, 2020, 10:01 AM), <https://bit.ly/3pTeEd3>.

<sup>3</sup> CORY R. GILL, CONG. RESEARCH SERV., R45203, U.S. DEPARTMENT OF STATE PERSONNEL: BACKGROUND AND SELECTED ISSUES FOR CONGRESS 17-18 (2018), <https://bit.ly/37h7qIF>.

<sup>4</sup> RACHEL AUGUSTINE POTTER, *BENDING THE RULES: PROCEDURAL POLITICKING IN THE BUREAUCRACY* 190-91 (2019).

<sup>5</sup> *Id.* at 189-90. According to the Partnership for Public Service: “As of June 2018, women held only 34 percent of the government’s more than 7,100 Senior Executive Service positions, according to the Office of Personnel Management. . . . Percentage-wise, women fared better in the overall federal workforce, making up 43 percent of the

were over 634,000 veterans in FY 2018, 31 percent of the federal workforce.<sup>6</sup> The U.S. Postal Service, which is not counted in the two million count above, is third largest civilian employer after Walmart and Amazon. Its workers are significantly more diverse than the country's labor force: over 40 percent of the agency's workers, "including mail carriers, postal clerks, and mail sorters and processors," are persons of color, compared to 22 percent of the entire U.S. workforce.<sup>7</sup>

Many call these agency workers civil servants, but that label is not always technically correct. Every nonmilitary job in an executive agency has two defining (and often overlapping) components: its payment classification and its appointment process.<sup>8</sup> The appointments process is broken into two primary categories: civil service positions filled by a merit process (the competitive service) and positions "excepted" from the traditional merit system (the excepted service). There is also the Senior Executive Service (SES), but it is much smaller, comprising only 0.4 percent of the workforce.<sup>9</sup> Outside the SES, federal workers are split between the competitive and excepted services. In 2015, 69.9 percent of positions fell into the competitive service, and 29.7 percent were in the excepted service.<sup>10</sup> Many excepted service positions, however, are nonpolitical jobs. When I refer to "career" or "nonpolitical" workers, I mean federal agency officials who are essentially chosen for their expertise and merit through nonpolitical mechanisms.

Our agencies' nonpolitical workers have suffered. They have also stepped up, including by filling critical vacant political jobs. In this statement, I focus first on the undermining of the government's nonpolitical workforce, particularly during the Trump Administration. Amidst reorganizations, constrained budgets and pay, government shutdowns, White House directives, and the lack of confirmed leaders at the Merit Systems Protections Board (MSPB), long-serving agency employees have fled the government. The morale of those who have stayed has plummeted in many places. The "losers" are the American taxpayers and all who rely on federal agencies. The "winners" arguably are government contractors, on whom agencies increasingly rely, often at considerable cost.

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roughly 2 million federal government employees. However, they mostly fill positions at the lower end of the pay scale. . . . Minorities comprised nearly 40 percent of the U.S. population, yet accounted for just 22 percent of senior leadership jobs, according [to] OPM's 2018 numbers. And they made up only 30 percent of supervisor or manager positions, even though minorities—defined by OPM as nonwhite employees—comprise 38 percent of the federal workforce." Dan Durak & Wendy Ginsberg, *Government's Lack of Diversity in Leadership Positions*, P'SHIP FOR PUB. SERV. (Mar. 11, 2019), <https://bit.ly/2ZBrW2r>.

<sup>6</sup> OFFICE OF PERS. MGMT., EMPLOYMENT OF VETERANS IN THE FEDERAL EXECUTIVE BRANCH, FISCAL YEAR 2018 3 (2020), <https://bit.ly/3ah6whk>.

<sup>7</sup> Drew Desilver & Katherine Schaeffer, *The State of the U.S. Postal Service in 8 Charts*, PEW RESEARCH CTR. (May 14, 2020), <https://pewrsr.ch/3jLSkA3> ("Around a quarter (23%) of Postal Service workers are black, 11% are Hispanic and 7% are Asian. In contrast, black Americans make up 13% of the national workforce, Hispanics 17% and Asian Americans 6%.").

<sup>8</sup> There are three major payment categories: "blue-collar, white-collar, and top-level management positions." DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 20 (2008). As Lewis explains: "The Federal Wage System (FWS) covers trade, craft, skilled, and unskilled laborers. The General Schedule (GS) defines the pay rates for administrative, technical, and professional jobs, while the Senior Level and Scientific and Professional (SL/ST) system does the same for high-level, but nonmanagerial, positions. Top-level management and professional jobs are covered under the Senior Executive Service (SES) pay schedule or the Executive Schedule (EX)." *Id.* at 20-21.

<sup>9</sup> OFFICE OF PERS. MGMT., EXCEPTED SERVICE HIRING AUTHORITIES: THEIR USE AND EFFECTIVENESS IN THE EXECUTIVE BRANCH 1, 8 (2018), <https://bit.ly/3qqCa1q>.

<sup>10</sup> *Id.* at 8. According to a new report by the Merit Systems Protection Board, agencies turned to "direct-hire authorities" for 27 percent of new hires in 2018 through the competitive service; in other words, agencies did not have to follow all of the traditional steps of civil service hiring. MERIT SYS. PROT. BD., *DIRECT-HIRE AUTHORITY UNDER 5 U.S.C. § 3304: USAGE AND OUTCOMES* 3 (2021), <https://bit.ly/3ddms5W>.

I then turn to vacancies in top political roles across federal agencies. Although President Trump apparently loved his “actings,” acting officials in the administrative state are not new and are not restricted to Republican Presidents. Less attention has been paid to the senior career workers who take on these key roles, either in an acting capacity or through delegation, often for years. Finally, I suggest some legislative reforms to support career acting officials.

## Undermining of Career Workers

Trust in the federal government is abysmally low. In 2020, only one-fifth of surveyed Americans noted that they “trust the federal government to do what is right just about always/most of the time.”<sup>11</sup> Public leaders sometimes foster this mistrust. President Reagan liked to joke: “The nine most terrifying words in the English language are: I’m from the Government, and I’m here to help.”<sup>12</sup> In setting up the National Performance for Reinventing Government, President Clinton stressed: “Our goal is to make the entire Federal Government less expensive and more efficient, and to change the culture of our national bureaucracy away from complacency and entitlement toward initiative and empowerment.”<sup>13</sup> More recently, President Trump labeled career officials as the “deep state” throughout his presidency, including calling the State Department “the Deep State Department” and accusing the “deep state” at the FDA of deliberately slowing COVID-19 vaccines and treatments.<sup>14</sup> He also called for “the destruction of the Deep State.”<sup>15</sup> By contrast, President Biden recently praised career diplomats at the State Department: “I believe in you. We need you badly. And I’m going to have your back — that, I promise you — just like you’re going to have the backs of the American people.”<sup>16</sup>

While some politicians like cutting red-tape (sometimes literally), efficiency is just one governmental objective. Accountability and stewardship of taxpayer dollars also matter. Interestingly, low levels of trust in government stem, in part, from reactions to political officials, rather than career workers. According to a 2018 survey by the Pew Research Center, when queried about political appointees in federal agencies, 42 percent of those surveyed say they have at least a “fair amount of confidence” in those officials. But when queried about career agency workers, 61 percent note they have that level of confidence in them.<sup>17</sup>

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<sup>11</sup> PEW RESEARCH CTR., AMERICANS’ VIEWS OF GOVERNMENT: LOW TRUST, BUT SOME POSITIVE PERFORMANCE RATINGS 6 (2020), <https://pewrsr.ch/3dgcWY2>. While this is lower than in previous Administrations, the figure was below 30 percent for President Obama’s Administration and the last years of President George W. Bush’s Administration. *Id.* Overall trust, however, does not match confidence in specific policy areas. Majorities of Americans believe that the government is doing a positive job in keeping the country safe from terrorism, responding to natural disasters, ensuring safe food and medicine, strengthening the economy, and maintaining infrastructure. *Id.* at 8.

<sup>12</sup> Ronald Reagan, News Conference (Aug. 12, 1986) (transcript available from the Ronald Reagan Presidential Library & Museum), <https://bit.ly/3jQe3Ha>.

<sup>13</sup> William J. Clinton, Remarks Announcing the Initiative to Streamline Government, 29 WEEKLY COMP. PRES. DOC. 350, (Mar. 3, 1993), <https://bit.ly/3tXk2OT>.

<sup>14</sup> Peter Baker, Lara Jakes, Julian E. Barnes, Sharon LaFraniere & Edward Wong, *Trump’s War on the “Deep State” Turns Against Him*, N.Y. TIMES (Oct. 23, 2019), <https://nyti.ms/2ZdthMQ>; Donald J. Trump, Press Conference, (Mar. 20, 2020) (transcript available from C-SPAN), <https://bit.ly/3ajZN6b>; Laurie McGinley, Carolyn Y. Johnson & Josh Dawsey, *Trump Without Evidence Accuses “Deep State” at FDA of Slow-Walking Coronavirus Vaccines and Treatments*, WASH. POST (Aug. 22, 2020, 4:35 PM), <https://wapo.st/3jVZ4LO>.

<sup>15</sup> Baker, Jakes, Barnes, LaFraniere & Wong, *supra* note 14.

<sup>16</sup> Dan Diamond, Lisa Rein & Juliet Eilperin, *Trump Left Behind a Damaged Government. Here’s What Biden Faces as He Rebuilds It*, WASH. POST. (Feb. 6, 2021, 5:07 PM), <https://wapo.st/2N8MWLp>.

<sup>17</sup> LEE RAINIE, SCOTT KEETER & ANDREW PERRIN, PEW RESEARCH CTR., TRUST AND DISTRUST IN AMERICA 16 (2019), <https://pewrsr.ch/3rWWBmO>. While party affiliation shapes the responses to the career workers question, it

In recent years, we have witnessed numerous interventions that have undermined agency career workers' morale and willingness to serve. First, given the barriers to shifting agency procedures and policies, Presidents like to reorganize the federal bureaucracy, or to try to—often without sufficient buy-in from agency workers.<sup>18</sup> In the last Administration, the Department of Agriculture sent most of its Economic Research Service and its National Institute of Food and Agriculture from Washington, D.C. to the Kansas City area. The Department of Interior moved much of the D.C. headquarters staff of the Bureau of Land Management to Grand Junction, Colorado.

More accurately, the agencies sent the positions away, but the people did not follow. At the research entities in the Department of Agriculture, a former leader claimed that most of the workers left the agency instead of moving.<sup>19</sup> According to the *Washington Post*, despite a round of hiring last year, the staff at both the Economic Research Service and the National Institute of Food and Agriculture has decreased by about one-third since 2016.<sup>20</sup> In the Bureau of Land Management, close to 90 percent of affected workers quit (or found other jobs).<sup>21</sup> Morale also plummeted in the Agriculture organizations. In 2019, employee satisfaction sat at 36.5 and 20.3 (on a 100-point scale) at the Economic Research Service and the National Institute of Food and Agriculture, respectively—drops of more than 30 points at each agency since 2016.<sup>22</sup>

The Trump Administration also tried to merge the Office of Personnel Management (OPM) into the General Services Administration. Congress refused to permit the merger in the National Defense Authorization Act of 2020 and solicited a study of the issues from the National Academy of Public Administration (NAPA).<sup>23</sup> In addition to OPM's Office of the Inspector General and others, Chairman Connolly criticized the reorganization attempt: "This administration continues its discredited attempts to attack the beating heart of our federal government—the agency that services

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"strongly" affects the responses to the political appointee question. *Id.* at 16-17 ("Democrats are more likely than Republicans to say they have confidence in career employees; Republicans are more likely than Democrats to say they have confidence in political appointees.").

<sup>18</sup> JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 282 (1989).

<sup>19</sup> Frank Morris, *USDA Research Agencies "Decimated" by Forced Move. Undoing the Damage Won't Be Easy*, NPR (Feb. 2, 2021, 12:13 PM), <https://n.pr/3pV5oVR>.

<sup>20</sup> Diamond, Rein & Eilperin, *supra* note 16. NPR reported larger job losses. Morris, *supra* note 19 ("Despite aggressive recruiting in Kansas City and making many new hires, both USDA research agencies are now roughly half the size they were before the move.").

<sup>21</sup> Juliet Eilperin, *Trump Officials Moved Most Bureau of Land Management Positions Out of D.C. More than 87 Percent Quit Instead*, WASH. POST (Jan. 28, 2021, 6:24 PM), <https://wapo.st/3jl1IdA> (noting that of the 328 positions moved to Colorado, only 41 of their former occupants came). One former employee, with over four decades of experience at the agency, "worried about the agency's diversity in the wake of the exodus because a disproportionately large number of Black employees had left." *Id.*

<sup>22</sup> Emily Badger, Quoctrung Bui & Alicia Parlapiano, *The Government Agencies That Became Smaller, and Unhappier, Under Trump*, N.Y. TIMES (Feb. 1, 2021), <https://nyti.ms/36N7hwhf> (using analysis by the Partnership for Public Service and the Boston Consulting Group of the OPM's Federal Employee Viewpoint Survey). Satisfaction at the Bureau of Land Management placed at 58.1 in 2019, up from 55.8 in 2016. *Agency Report: Bureau of Land Management*, P'SHIP FOR PUB. SERV., <https://bit.ly/3qfZXRd>. A smaller percentage of that agency was relocated.

<sup>23</sup> Erich Wagner, *House Committee Investigates Whether Officials Misled Congress on OPM-GSA Merger*, GOV. EXEC. (July 1, 2020), <https://bit.ly/38sgE6b>; see also National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1112, 133 Stat. 1198, 1601-03 (2019).

our dedicated federal employees—at a potential cost to American taxpayers of more than \$14 million.”<sup>24</sup>

Second, Congress has largely tamped down meaningful growth in agency budgets and employee pay. The 2011 Budget Control Act places yearly limits on discretionary defense and nondefense spending through FY 2021. The Act enforced these caps through sequestration (that is, automatic spending cuts).<sup>25</sup> Sequestration, which drove downsizing and froze hiring in some entities, also is linked to lower agency morale.<sup>26</sup> The size of the federal workforce (excluding the postal service) has remained essentially flat since the mid 1950s—hovering around two million employees.<sup>27</sup> While government spending has increased in the intervening decades, private contractors, states and local governments, and non-governmental organizations have played increasing roles.<sup>28</sup>

According to the Congressional Budget Office (CBO), federal workers with a high school or college degree earn more than their counterparts (by education level) in the private sector, but those with a professional degree or doctorate receive about a quarter less than their private peers.<sup>29</sup> Salary increases, however, have been uncertain. President Trump proposed such minor increases that Congress overrode his recommendations twice—enacting a 3.1 percent jump in 2020 and a 1.9 percent increase in 2019 after the five-week shutdown.<sup>30</sup> Despite urgent calls in 2017 and 2018 from NAPA, no headway was made to improve pay and job classification procedures for career workers that were largely defined over seven decades ago.<sup>31</sup>

Third, Congress and the White House have increasingly failed to keep the government open. There have been 21 shutdowns (some partial) since 1976.<sup>32</sup> In the most recent shutdown, from December 22, 2018 to January 25, 2019, 380,000 federal workers were furloughed, and 420,000 essential workers had to work despite not being paid.<sup>33</sup> Soon after the shutdown, almost 90 percent of excepted service workers noted worsening morale (compared to before the shutdown) in a

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<sup>24</sup> Erich Wagner, *Inspector General Blasts Efforts to Transfer OPM Facility Authority to GSA*, GOV. EXEC. (Aug. 7, 2020), <https://bit.ly/3pHGxUL>.

<sup>25</sup> CONG. RESEARCH SERV., R44874, THE BUDGET CONTROL ACT: FREQUENTLY ASKED QUESTIONS 1 (2019), <https://bit.ly/3qq6x8c>.

<sup>26</sup> P'SHIP FOR PUB. SERV., GOVERNMENT DISSERVICE: OVERCOMING WASHINGTON DYSFUNCTION TO IMPROVE CONGRESSIONAL STEWARDSHIP OF THE EXECUTIVE BRANCH 21 (2015), <https://bit.ly/3b3S9fi>.

<sup>27</sup> Paul C. Light, *The True Size of Government Is Nearing a Record High*, BROOKINGS (Oct. 7, 2020), <https://brook.gs/37co3FE>.

<sup>28</sup> JOHN J. DI IULIO, JR., BRING BACK THE BUREAUCRATS: WHY MORE FEDERAL WORKERS WILL LEAD TO BETTER (AND SMALLER!) GOVERNMENT 14-19 (2014).

<sup>29</sup> CONG. BUDGET OFFICE, COMPARING THE COMPENSATION OF FEDERAL AND PRIVATE-SECTOR EMPLOYEES, 2011 TO 2015 2 (2017), <https://bit.ly/3agS490>.

<sup>30</sup> Nicole Ogrysko, *Federal Pay Parity for Civilian Employees Should Continue in 2021, House Members Say*, FED. NEWS NETWORK (July 10, 2020, 3:38 PM), <https://bit.ly/2ZgHxEr>.

<sup>31</sup> NAT'L ACAD. OF PUB. ADMIN., NO TIME TO WAIT: BUILDING A PUBLIC SERVICE FOR THE 21ST CENTURY 1 (2017), <https://bit.ly/3shLPbk> (“We launch this White Paper with a profound sense of urgency. . . . [T]he federal government's human capital system is fundamentally broken.”); NAT'L ACAD. OF PUB. ADMIN., NO TIME TO WAIT, PART 2: BUILDING A PUBLIC SERVICE FOR THE 21ST CENTURY (2018), <https://bit.ly/3bvWR61> (identifying recommended reforms to address problems identified in 2017 report).

<sup>32</sup> CONG. RESEARCH SERV., RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS 3-4 (2018), <https://bit.ly/3amgzkY>. The latest were: November 14 to 19, 1995; December 16, 1995 to January 6, 1996; October 1 to 13, 2013; January 19 to 22, 2018; and December 22, 2018 to January 25, 2019. CONG. RESEARCH SERV., R41759, PAST GOVERNMENT SHUTDOWNS: KEY RESOURCES, 9-13 (2019), <https://bit.ly/2N7oYjt>.

<sup>33</sup> P'SHIP FOR PUB. SERV., SHUTDOWN LETDOWN: HOW THE LONGEST SHUTDOWN IN U.S. HISTORY DID LASTING DAMAGE TO OUR GOVERNMENT AND THE PEOPLE IT SERVES 3 (2019), <https://bit.ly/3pp7sEy>.

Federal News Network survey.<sup>34</sup> The head of human capital at the Department of Commerce warned that “the recurring possibilities of the government shutting down due to lapsed funding could be an impediment to recruiting young people.”<sup>35</sup>

Fourth, President Trump issued many directives that undermined the career workforce in the federal government. He started his term with a nearly three-month hiring freeze.<sup>36</sup> In 2018, he issued three executive orders to make it easier to remove federal workers, to cut the time that workers can spend on union activities, and to renegotiate contracts between agencies and their unions.<sup>37</sup> In 2020, President Trump tried to create a new Schedule F, which would have moved considerable numbers of career employees “in confidential, policy-determining, policy-making, or policy-advocating positions” out of the competitive service and into a new series of the excepted service, with no protection from removal. (President Biden has since rescinded these last four orders.)<sup>38</sup>

Finally, the MSPB, which adjudicates disciplinary actions against federal workers, has not been able to function effectively since 2017, when it lost its quorum.<sup>39</sup> By 2019, when the Senate did not confirm President Trump’s two nominees (because there was not a third) and did not approve legislation (voted by the House) to extend the term of the one remaining leader, it had no Senate-confirmed board members—a first in its four-decade history.<sup>40</sup> At the end of 2020, more than 3,000 petitions for review sat unresolved.<sup>41</sup> In addition, during the Trump Administration, MSPB administrative judges (AJs) dismissed appeals (without prejudice) when federal agencies questioned the constitutionality of the AJs, leaving fired employees without even a tentative decision until the MSPB (with a quorum) resolves the issue.<sup>42</sup>

While these interventions have contributed to departures and lower morale of agency workers, their consequences go deeper. To start, governmental operations suffer. After the relocations, the productivity of the Agriculture Department’s Economic Research Service dropped by half (as measured by its research reports).<sup>43</sup> Sponsored research by the National Institute of Food and Agriculture is receiving less supervision and oversight.<sup>44</sup> Each departure of a career worker can represent years, if not decades, of lost expertise. These losses are therefore also felt outside of the government.

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<sup>34</sup> Nicole Ogrysko, *Excepted Employees Say Shutdown Did Irreparable Damage to Morale*, FED. NEWS NETWORK (Jan. 30, 2019, 6:31 PM), <https://bit.ly/2ZuozdP>.

<sup>35</sup> P’SHIP FOR PUB. SERV., *supra* note 33, at 10.

<sup>36</sup> Memorandum on Hiring Freeze, 82 Fed. Reg. 8,493 (Jan. 25, 2017). The freeze ended April 12, 2017. Brian Naylor, *Trump Lifting Federal Hiring Freeze*, NPR (Apr. 12, 2017, 12:00 AM), <https://n.pr/3aguysK>.

<sup>37</sup> Exec. Order No. 13,836, 83 Fed. Reg. 25,329 (June 1, 2018); Exec. Order No. 13,837, 83 Fed. Reg. 25,335 (June 1, 2018); Exec. Order No. 13,839, 83 Fed. Reg. 25,343 (June 1, 2018).

<sup>38</sup> Exec. Order No. 14,003, 86 Fed. Reg. 7,231 (Jan. 27, 2021); *see also* Erich Wagner, *Biden Signs Executive Order Killing Schedule F, Restoring Collective Bargaining Rights*, GOV. EXEC. (Jan. 22, 2021), <https://bit.ly/3qlWp0g>.

<sup>39</sup> Eric Katz, *Federal Employee Appeals Board Can No Longer Decide Appeals*, GOV’T EXEC. (Jan. 5, 2017), <https://bit.ly/37hij1d>.

<sup>40</sup> Nicole Ogrysko, *Senate Forces “First” for MSPB as the Agency Loses All Members*, FED. NEWS NETWORK (Mar. 1, 2019, 10:49 AM), <https://bit.ly/3sggipW>.

<sup>41</sup> Nicole Ogrysko, *Historic Absences at MSPB Hit 4-Year Mark, Creating Potentially Costly Backlog*, FED. NEWS NETWORK (Jan. 13, 2021, 6:27 PM), <https://bit.ly/37wRzWw>.

<sup>42</sup> Eric Katz, *New Trump Administration Strategy Leaves Fired Feds Seeking Recourse in Indefinite Purgatory*, GOV’T EXEC. (Sept. 2, 2020), <https://bit.ly/3bqv9HD>.

<sup>43</sup> Morris, *supra* note 19.

<sup>44</sup> *Id.*

The CBO estimated that the last government shutdown, which lasted five weeks, “delayed approximately \$18 billion in federal discretionary spending for compensation and purchases of goods and services and suspended some federal services,” resulting in a \$3 billion cut in GDP.<sup>45</sup> The CBO noted: “Underlying those effects on the overall economy are much more significant effects on individual businesses and workers. Among those who experienced the largest and most direct negative effects are federal workers who faced delayed compensation and private-sector entities that lost business. Some of those private-sector entities will never recoup that lost income.”<sup>46</sup>

Harder to measure, but also costly, are the delays in agency initiatives from these shutdowns. The Partnership for Public Service’s report on the last shutdown detailed how “a short-term shutdown can do lasting, and sometimes irreparable, harm.”<sup>47</sup> For instance, the Federal Aviation Administration had planned to hire over 1,400 air traffic controllers in FY 2019; the shutdown made them cut that goal by over one-third.<sup>48</sup> In addition, the shutdown delayed National Transportation Safety Board investigations of 15 aviation accidents responsible for 21 fatalities.<sup>49</sup> That interruption jeopardized perishable evidence and disrupted cause determinations.<sup>50</sup> The harm from government shutdowns extends to small businesses as well. For example, in the last shutdown, craft breweries across the country lost revenue while waiting for label approvals from the Alcohol and Tobacco Tax and Trade Bureau, which received about 3,000 applications per week in 2018.<sup>51</sup> One brewer estimated that he lost 20 percent in sales because of the shutdown.<sup>52</sup>

As the disruptions from the 2018 shutdown illustrate, work by career workers is critical to government operations and business. The COVID-19 pandemic has highlighted the essential nature of federal employees’ work even more clearly. Yet agency reorganizations and shutdowns, paired with President Trump’s rhetorical attacks and sweeping directives, have damaged morale and driven away skilled employees. Solving these problems stands to help not only the federal workforce, but all Americans who benefit from their work.

## Vacancies in Political Jobs and Career Actings

Despite these intentional or unintentional measures undermining agency workers, the federal workforce has continued to serve the public in critical ways. One of these ways has received little public attention, but raises interesting issues: senior career officials often step in to fill political roles while the appointments process churns. These officials usually stand in for short periods, but some serve for much longer stints.<sup>53</sup> Congress should encourage their service in acting roles and in carrying out delegated authority when there are staffing gaps, particular in inspector general (IG) positions.

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<sup>45</sup> CONG. BUDGET OFFICE, THE EFFECTS OF THE PARTIAL SHUTDOWN ENDING IN JANUARY 2019 1 (2019), <https://bit.ly/3jOOcix>.

<sup>46</sup> *Id.* at 2.

<sup>47</sup> P’SHIP FOR PUB. SERV., *supra* note 33, at 3.

<sup>48</sup> *Id.* at 4.

<sup>49</sup> *Id.* at 4-5.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 8.

<sup>52</sup> *Id.*

<sup>53</sup> The White House sometimes chooses career leaders officially for Senate-confirmed agency spots. Until the last Administration, recent Presidents named more than two-thirds of ambassadors from the State Department’s Foreign Service corps. President Trump, by contrast, pulled from career diplomats for under 60 percent of the jobs. Ryan M. Scoville, *Unqualified Ambassadors*, 69 DUKE L.J. 71, 89 (2019).



As I and others have detailed, vacancies are rampant in top Senate-confirmed agency roles—and not just in the last Administration.<sup>54</sup> Since 1998, the Federal Vacancies Reform Act (Vacancies Act) has permitted certain officials—first assistants, other Senate-confirmed appointees, and qualifying senior agency workers (political and career)—to temporarily fill covered Senate-confirmed roles.<sup>55</sup> Both political and career officials qualify under the Act’s terms and have served in covered positions. The time limits for acting officials can extend to several years if the White House submits formal nominations. When the time limits run out, agencies typically delegate the nonexclusive duties of the vacant positions downward, often to career workers.<sup>56</sup>

Permitting acting officials from the third category—senior agency workers who have worked in the agency for at least 90 days in the year preceding the vacancy and are paid at least at the GS-15 level—marked a change from prior practice. From the middle of the nineteenth century to 1998, previous versions of the Vacancies Act typically restricted acting titles to first assistants and other Senate-confirmed officials.<sup>57</sup>

Presidents Trump and Biden have turned to career agency workers at the start of their Administrations for the highest agency jobs, as acting cabinet secretaries. On his first day, President Trump had only two confirmed secretaries. For the remaining thirteen slots, he relied on four Senate-confirmed officials from the Obama Administration and nine career officials.<sup>58</sup> At the Departments of Agriculture and Treasury, those career acting secretaries served for months. Only later in his Administration did President Trump turn to non-confirmed political officials—among others, Matthew Whitaker and Peter O’Rourke, to take on top acting roles at the Departments of Justice and Veterans Affairs, respectively.

President Biden had no confirmed secretaries on Inauguration Day. He used holdover Senate-confirmed officials from President Trump’s Administration at the Departments of Defense and Homeland Security, and thirteen non-confirmed agency officials at the start. One, Phil Rosenfelt, headed up the Education Department at the beginning of the last Administration as well. Of the thirteen, twelve came from the agencies’ career leadership.<sup>59</sup>

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<sup>54</sup> Using OPM start and end dates for cabinet departments and free-standing executive agencies (those run by single heads) from 1977 to 2005, I found that Senate-confirmed positions did not have confirmed or recess-appointed occupants between 15 and 25 percent of the time. Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 962, 965 (2009). Other scholars determined vacancy rates for individual Senate-confirmed jobs at the Departments of Commerce and Health and Human Services (HHS) between 1989 and 2009; averaging across those positions, one sees that Commerce and HHS lacked confirmed or recess appointees more than 20 percent of the time. Matthew Dull & Patrick S. Roberts, *Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees, 1989–2009*, 39 PRESIDENTIAL STUD. Q. 432, 441–42 figs. 3 & 4 (2009). Vacancies did seem to be greater in the last Administration. Anne Joseph O’Connell, *Actings*, 120 COLUM. L. REV. 613, 641-655 (2020) (detailing more acting officials in cabinet secretary roles, three top positions at the Environmental Protection Agency, and the head of the Federal Aviation Administration); P’SHP FOR PUB. SERV., *THE REPLACEMENTS: WHY AND HOW “ACTING” OFFICIALS ARE MAKING SENATE CONFIRMATION OBSOLETE* 6-8 (2020), <https://bit.ly/3qtmFFY>.

<sup>55</sup> These roles arise almost entirely in cabinet departments and executive agencies.

<sup>56</sup> Admin. Conf. of the U.S., Recommendation 2019-7, *Acting Agency Officials and Delegations of Authority*, 84 Fed. Reg. 71,352 (Dec. 27, 2019).

<sup>57</sup> O’Connell, *Actings*, *supra* note 54, at 625-626.

<sup>58</sup> Anne Joseph O’Connell, *Waiting for Confirmed Leaders: President Biden’s Actings*, BROOKINGS (Feb. 4, 2021), <https://brook.gs/3u2wXiK>.

<sup>59</sup> *Id.*

Career acting officials are prevalent in lower-level Senate-confirmed positions throughout the federal bureaucracy. Consider, for example, the general counsel of the Environmental Protection Agency. Since the Office of the General Counsel was created in 1983 (as a Senate-confirmed role) until the end of the Trump Administration, there have been more acting general counsels at the EPA than confirmed and recess appointed ones, treating service across Administrations separately.<sup>60</sup> Of the seventeen acting general counsels, only two were Senate-confirmed to other roles; five were political officials, and ten came from the career ranks.<sup>61</sup>

The three dozen Senate-confirmed IG jobs have long been plagued by vacancies.<sup>62</sup> The IG job at the Central Intelligence Agency has lacked a Senate-confirmed occupant for more than 2200 days. The Defense Department and OPM haven't had a confirmed IG for more than 1800 days. (OPM's report on the OPM-GSA merger was signed by the deputy IG "performing the duties" of the IG.) Compared to other agency roles, IG nominations are more likely to fail (mostly, in other words, to be returned by the Senate), and those that are confirmed, take longer.<sup>63</sup>

Until the last Administration, skilled senior career officials in the IG office typically have served as acting IGs or carried out the duties of the role through delegation once the Vacancies Act's time limits ran out. For instance, after the last confirmed IG left the Defense Department in January 2016, Glenn Fine, the principal deputy IG, became the acting IG and then continued doing the job through delegated authority when the acting time limits ran out in late 2017. His IG peers picked him to serve as Chairman of the Pandemic Response Accountability Committee, overseeing more than \$2 trillion in government stimulus spending. In April 2020, however, President Trump submitted a formal nomination for the DOD IG job, which allowed him to turn to the Vacancies Act to name a new acting IG to replace Fine.<sup>64</sup>

Consider also Christi Grimm, the current acting IG at the Department of Health and Human Services. She joined the Department's Office of the Inspector General in 1999 and rose to the principal deputy IG job in early 2020. In May 2020, Trump said that he was getting rid of her after she reported "severe shortages" in hospital supplies during the pandemic, but he did not carry through on that threat.<sup>65</sup> Grimm remained as the principal deputy IG, carrying out the vacant job's duties through delegation. (The arrival of the Biden Administration restarted the time limits for acting service, allowing her to regain the acting title).

President Trump did carry through with other IG removals. At Secretary of State Mike Pompeo's request, the President fired the Department's IG and, as with Fine's replacement, turned to the Vacancies Act to go around the career deputy IG to pick a political appointee. He also replaced the career acting IG for the Department of Transportation with a new interim political

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<sup>60</sup> O'Connell, *Actings*, *supra* note 54, at 650 tbl. 6. Since January 20, 2020, there was one additional acting General Counsel, David Fotouhi.

<sup>61</sup> *Id.* at 652 tbl. 8. The additional acting official since my analysis, Fotouhi, appears to be a political official, having joined the agency in 2017. *About EPA's Acting General Counsel: David Fotouhi*, ENVTL. PROT. AGENCY, <https://bit.ly/3deGzRu>.

<sup>62</sup> The Council of the Inspectors General on Integrity and Efficiency, among others, tracks IG vacancies online. *See Inspector General Vacancies*, COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, <https://www.oversight.gov/ig-vacancies>.

<sup>63</sup> Anne Joseph O'Connell, *Watchdogs at Large*, BROOKINGS (Aug. 6, 2020), <https://brook.gs/3rMeQeS>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

official.<sup>66</sup> The firings and the political replacements generated considerable attention at the Capitol and beyond. The House of Representatives' version of the latest National Defense Authorization Act included a provision restricting acting IGs to the principal deputy IG if there is one, or to a senior official in the IG office if there is not.<sup>67</sup> Ultimately, however, this provision did not end up in the bill enacted over President Trump's veto.<sup>68</sup>

In the first best world, according to many commissions, scholars (myself included), and other commentators, there would be fewer lower-level Senate-confirmed positions in federal agencies. In addition, in a first best world, both the nomination and confirmation processes would move more quickly for the jobs that remain. The Vacancies Act does not generally cover independent regulatory commission and board slots. As noted above, the MSPB has been without a quorum since January 2017.<sup>69</sup> As to the first, Congress rarely takes action, however, to pare down those slots.<sup>70</sup> Acting officials, particularly those drawn from the career ranks, may be a realistic and desirable solution for jobs outside of commissions and boards.<sup>71</sup> As an alternative to Congress reverting Senate-confirmed jobs to political positions chosen by the President or the agency head, the Vacancies Act permits senior career officials to serve temporarily.

## Potential Reforms

Members of this Subcommittee have proposed various pieces of compelling legislation to bolster the federal government's nonpolitical workforce. Drawing from my discussion above, I focus on several potential reforms. Change should not wait.<sup>72</sup>

- Retain and promote career workers

Agency workers are committed to the public service, yet they also need dependable and sufficiently paid jobs. At the least, the political branches must avoid shutdowns. The federal government closed (at least in significant part) twice in the last four years—once for five weeks—furloughing hundreds of thousands of workers. In addition, Congress and the White House should prioritize regular and meaningful cost of living increases.<sup>73</sup> The political branches should also work to establish more opportunities for career and salary growth, including pay reform to address

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<sup>66</sup> Catherine Lucey & Gordon Lubold, *Behind Trump's Removal of Inspectors General: Support for His Agenda*, WALL STREET J. (May 21, 2020, 11:12 AM), <https://on.wsj.com/3biLLAV>.

<sup>67</sup> H.R. 6395, 116th Cong. § 1115 (2020) (as passed by House of Representatives, July 21, 2020).

<sup>68</sup> National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388 (2021).

<sup>69</sup> Katz, *supra* note 39.

<sup>70</sup> For a rare example, see Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, 126 Stat. 1283 (2012).

<sup>71</sup> A recent study found that acting officials are “significantly more likely to fill high-capacity positions when presidents seek to expand an agency’s policy reach,” while these positions are more likely to be left without confirmed or acting leaders when Presidents seek to reduce agency activity. Christina M. Kinane, *Control Without Confirmation: The Politics of Vacancies in Presidential Appointments*, AM. POL. SCI. REV., Feb. 15, 2021 (pre-print), at 14, <https://bit.ly/3pKANt7>.

<sup>72</sup> In 2018, 60 percent of Americans surveyed by Pew Research Center reported that the federal government needed very major reform, compared to just 37 percent in 1997. Paul C. Light, *Introducing the Next Government Reform Majority: What Americans Want from Reform in 2018*, BROOKINGS (Aug. 10, 2018), <https://brook.gs/3qllzal>.

<sup>73</sup> The FAIR Act would improve salaries through a 3.2 percent increase pay increase for federal employees. H.R. 392, 117th Cong. (2021).

compression in salary scales.<sup>74</sup> Finally, agencies should turn to reorganizations and relocations only with buy-in from the current workforce.

- Encourage young people to enter government service

The government's labor force (but not at the top levels) largely reflects the diversity of the American public, but with an exception: it is significantly older. According to the Government Accountability Office, as of 2017, more than 31 percent of federal workers will be eligible to retire by the end of FY 2022, with more than 40 percent at the Department of Housing and Urban Development, Environmental Protection Agency, National Aeronautics and Space Administration, Small Business Administration, Department of the Treasury, and Nuclear Regulatory Commission.<sup>75</sup>

With so many workers eligible to retire in the next few years, we need to encourage younger individuals whom reflect the country to join the government—some for decades, but also some for shorter stints. Skilled young workers often opt for jobs with federal contractors rather than the government, in part because government shutdowns and hiring freezes suggest that their skills would not be utilized.<sup>76</sup> As Paul Light argues, “The millennials and Gen Zs are not saying ‘show me the money’ but rather, ‘show me the impact.’”<sup>77</sup> Congress permits the military to run hiring campaigns.<sup>78</sup> We need sustained campaigns for civilian jobs as well.

- Use faster hiring authorities, where possible and while maintaining merit principles

Getting hired by the federal government for a nonpolitical job can be arduous.<sup>79</sup> Direct-hire authorities, which emphasize speed in federal hiring, offer an alternative to the traditional process. About 30 percent of recent competitive hires into federal agencies followed this faster path.<sup>80</sup> But confusion abounds, according to a recent report by the career staff of the MSPB. Under OPM guidance, agencies using these authorities are supposed to hire people essentially in order of application (assuming they meet the stated qualifications), but agencies are apparently trying to differentiate among qualified applicants.<sup>81</sup> Speeding up hiring and promoting expertise, while in some tension, are not necessarily tradeoffs. Congress and OPM should work collaboratively in improving (and perhaps expanding) these authorities.

We should also encourage temporary employment in federal agencies. For instance, the Intergovernmental Personnel Act (IPA) allows assignments between the federal government on the one hand, and “state and local governments, colleges and universities, Indian tribal governments,

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<sup>74</sup> James L. Perry, *Fixing Federal Compensation Should Be Civil Service Reform Priority No. 1*, GOV. EXEC. (Jan. 28, 2021), <https://bit.ly/3pgYMAAd> (suggesting pay reforms for the federal civil service); see also *supra* note 31 and accompanying text.

<sup>75</sup> *Strategic Management of Human Capital- High Risk Issue*, GOV'T ACCOUNTABILITY OFFICE, <https://bit.ly/2Oysxj4>.

<sup>76</sup> Paul C. Light, *Catch-22 Government: Federal Performance in Peril*, in PUBLIC SERVICE AND GOOD GOVERNANCE FOR THE TWENTY-FIRST CENTURY 18 (James L. Perry ed., 2020); see also Campbell Robertson, “We Didn’t Get Ph.D.s Just to Sit Around”: Civil Servants’ Good Will Erodes, N.Y. TIMES (Jan. 24, 2019), <https://nyti.ms/3u4oM5c>.

<sup>77</sup> Paul C. Light, *The Six Government Reforms We Need in 2021*, BROOKINGS (Oct. 14, 2020), <https://brook.gs/3ppcuRE>.

<sup>78</sup> JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC 216 (2017).

<sup>79</sup> *Civil Service Modernization*, P’SHIP FOR PUB. SERV., <https://bit.ly/3dgDiAZ> (“On average, it takes at least three times as long for federal agencies to hire employees as it does in the private sector.”).

<sup>80</sup> MERIT SYS. PROT. BD., *supra* note 10.

<sup>81</sup> *Id.*

federally funded research and development centers” and other entities, on the other.<sup>82</sup> While these assignments can and do work in both directions, more attention should be paid to getting experts into the federal government on these agreements.<sup>83</sup> In addition, given the pay disparities between the federal government and the private sector for the most educated workers, the IPA may provide an important mechanism for bringing in talent without major pay reform in the federal government.

- Restrict non-confirmed acting officials in principal offices to those that have substantial agency experience

Congress should amend the Vacancies Act to restrict non-confirmed acting officials in the highest Senate-confirmed positions—such as cabinet secretaries—to those who have substantial agency expertise. Currently, in addition to first assistants and other Senate-confirmed officials, senior agency workers can take on certain vacant Senate-confirmed positions in the federal bureaucracy if they have spent at least 90 days in the agency prior to the vacancy and are paid at least at the GS-15 level. Three months is not very long.

As I have previously advocated, this third Vacancies Act category should be restricted to senior officials who have worked in the agency for at least five years. This modification would have barred Whitaker from serving as acting Attorney General, while allowing Michael Young, who had worked for the Agriculture Department for over twenty-five years, to serve as acting Secretary of Agriculture at the start of the Trump Administration.<sup>84</sup> With such a change, any agency workers taking on top acting roles will likely be drawn from the career ranks, and thus will bring critical expertise.

- Restrict acting IGs to other IGs or senior career workers in IG offices

Congress should amend the Vacancies Act or the Inspector General Act to restrict who can serve as an acting IG, to prevent the White House from firing IGs and using the Vacancies Act to install political appointees in the job with an acting title (but with all the same power). As noted previously, the House’s version of the latest National Defense Authorization Act would have limited acting IGs to the principal deputy IG if there is one, or to a senior official in the IG office if there is not.<sup>85</sup> I might broaden the categories to include other confirmed IGs. After all, under the IG statutes, the President must select a nominee “without regard to political affiliation” and “on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigation” for the permanent role.<sup>86</sup> This seems like an easy fix for an agency position about which Republicans and Democrats care greatly.

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<sup>82</sup> *Intergovernmental Personnel Act*, OFFICE OF PERS. MGMT., <https://bit.ly/2Zh6UGa>; 5 U.S.C. §§ 3371-3376.

<sup>83</sup> For example, I am on a team of academic researchers at Stanford University working on using active learning to promote evidence-based law and government. Some of the team’s members are on agreements under the IPA assisting the Internal Revenue Service with developing an artificial-intelligence based system for a more effective and fairer audit selection process. (I am focusing on mechanisms, including the IPA, to build capacity in the federal government.) Sachin Waikar, *How an Active Learning System Can Help Close the U.S. Tax Gap*, STANFORD UNIV. INST. FOR HUMAN-CENTERED ARTIFICIAL INTELLIGENCE (Aug. 6, 2020), <https://stanford.io/3jSoZnn>. Projects like this one show how the IPA can attract temporary employees with specialized expertise to government service.

<sup>84</sup> O’Connell, *Actings*, *supra* note 54, at 712. To be fair, late in a President’s second term, acting leaders could be political officials who started early in the first term. *Id.*

<sup>85</sup> H.R. 6395, 116th Cong. § 1115 (2020).

<sup>86</sup> 50 U.S.C. § 3517(b)(1).

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This list is not exhaustive. After detrimental interventions in recent years, our career agency workers deserve sustained legislative and executive branch attention. The federal government cannot function without them.