CIVIL SERVICE REFORM: REASSERT THE PRESIDENT'S CONSTITUTIONAL AUTHORITY

PHILIP K. HOWARD

The American Interest

COMMON GOOD

REPRINTED FROM

The American Interest

REMAKING GOVERNMENT

Civil Service Reform: Reassert the President's Constitutional Authority

PHILIP K. HOWARD

The civil service, once the elixir to ensure good government, has become a cancer killing good government.

Donald Trump wants to overhaul the civil service system. Even ardent liberals agree it needs to be rebuilt. Past efforts at reform in Congress, however, have withered in the face of union power and public indifference. But there's a more direct path to achieve success—for the President to repudiate the current civil service as a violation of the Constitution's mandate that, "The executive power shall be vested in a President…."

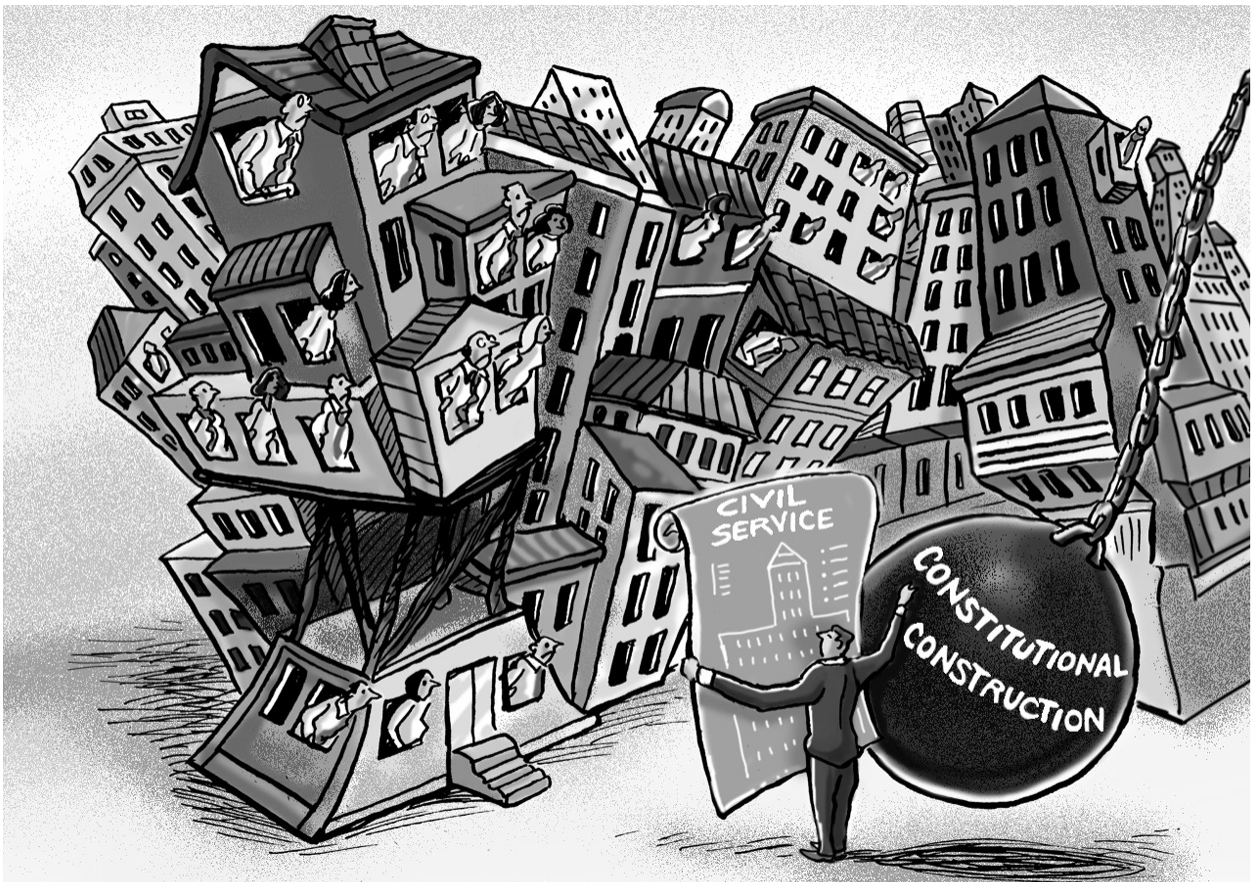
Executive power is toothless, as James Madison observed, if the President has no practical authority over personnel: "If any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws."[1] Taking away the President's power over Executive Branch employees is synonymous with removing the President's executive power altogether. Those employees exist only as the President's surrogates because, as George Washington noted, of "the impossibility that one man should be able to perform all the great business of the state."[2]

The constitutional question is this: Does Congress have the power to tell the President that he cannot terminate inept or insubordinate employees? The answer, I believe, is self-evident. By Executive Order, the President could replace the existing civil service system with a framework consistent with legitimate goals—a new civil service system that honors principles of neutral hiring and is designed to foster a culture of excellence. Templates for this already exist from groups such as the nonpartisan Partnership for Public Service.

A historical halo hovers over the civil service because it replaced the Jacksonian spoils system, in which public jobs were handed out to political hacks. As originally designed in the Pendleton Act of 1883, the civil service was a system of neutral hiring. As reform leader George William Curtis said, "if the front door [is] properly tended, the back door [will] take care of itself."[3] The civil service did not diminish the President's power to manage or fire Federal employees (other than barring demands for campaign contributions), because that was considered unconstitutional and also bad policy.

Fast forward to today. The President has personnel authority over a grand total of two percent of the Federal workforce.[4] The slow dissipation of presidential power is a story rich with irony—designed to avoid interest group capture, the civil service became its own special interest. First public employees got Congress to legislate protections against politically motivated termination. Then JFK, as a reward

[1] James Madison, "Speech in Congress on Presidential Removal Power," in Madison, *Writings*, p. 456.
[2] George Washington, "Letter to Count de Moustier," May 25, 1789, Gilder Lehrman Collection Documents.
[3] Paul P. Van Riper, *History of the United States Civil Service* (Row Peterson, 1958), p. 102.
[4] There are about 4,000 presidential appointments out of 2.1 million Federal civil employees.



CHAD CROWE

for public employee support, signed an Executive Order allowing public unions to bargain collectively with the government. Then the Supreme Court held that all these legal protections meant that public employment was a form of property right, protected by the Due Process Clause. Then Congress gave JFK's Executive Order statutory power.[5]

So we've come full circle: Instead of guarding against public jobs as political property, the civil service has become a property right of the employees themselves. The layers of legal protection put the President in the position of a legal supplicant, facing union and constitutional hurdles that effectively eliminate accountability as a meaningful concept. Public employees answer to no one.

The Rot Inside Government

The civil service, once the elixir to ensure good government, has become a cancer killing good government. Everyone within government knows that job performance is irrelevant. Indeed, more people die on the job than are terminated or demoted.[6] How many people lost their jobs for falsifying waiting lists at forty VA hospitals?[7] So far, about nine, and that was only because it was a front-page scandal.[8] Periodic stories emerge of employees who cannot be terminated despite outrageous behavior—such as the EPA employee who spent the day surfing porn sites.[9]

[5] Prior to the passage of the statute, President Nixon's Executive Order 11491 (1969) reaffirmed and expanded the provisions of JFK's executive order.
[6] Dennis Cauchon, "Some Federal Workers More Likely to Die than Lose Jobs," *USA Today*, July 19, 2011.
[7] Donovan Slack, "VA Bosses in 7 States Falsified Vets' Wait Times for Care," *USA Today*, April 7, 2016.
[8] D'Angelo Gore, "Fired Over VA Wait Times," FactCheck.org, October 6, 2016.
[9] Colby Itkowitz, "Congressman Seeks Ban to Stop Federal Employees from Watching Porn All Day," *Washington Post*, September 24, 2014.

The main harm done by the absence of no accountability is not legions of shiftless bureaucrats but an awful public culture. The accountability vacuum has removed the oxygen of purpose and replaced it with stale resignation. The 1989 Volcker Commission report found that seven of ten public employees who witnessed fraud, abuse, or waste did not even bother to report what they saw.[10] It's organizational psychology 101: "When a single individual free rides," as one study found, there is a "precipitous decline in teammate contributions."[11] The second Volcker Commission, in its 2003 report, found deep resentment at "the protections provided to those poor performers among them who impede their own work and drag down the reputation of all government workers."[12]

The mechanism for executive paralysis is red tape. Union contracts, typically about 300 pages long, require elaborate procedures for almost any negative supervisory decision.[13] A comment in the personnel file, for example, gives rise to a right to file a grievance and demand a legal hearing. It's no coincidence that a 2016 GAO report found over 99 percent of civil servants were rated "fully successful" or better.[14] Terminating a civil servant is so difficult that almost no one tries. Public unions see their job as contesting a decision even when the victims are other public employees.

Union leaders argue that these protections are "just a matter of due process." Due process has a sacred quality that even reformers feel obligated to kneel before. But due process is much more that a neutral safeguard of fairness. Due process, originating with the Magna Carta, is our hallowed presumption against state power: The state must prove its case before taking any citizen's liberty or property. When applied to management decisions, due process inverts both the authority to decide and the aspiration for success. Instead of judging employees against a standard of excellence, due process looks to the lowest acceptable standard: Is this person so bad that he should lose his job? In a government that wants to attract people who get As, due process as currently interpreted protects people who get Ds (or worse). That's why due process, so noble sounding, is poisonous in civil service. It's a race to the bottom.[15]

Reimagining Civil Service

There seem to be two approaches to reforming civil service, one using sticks and the other carrots:

- Conservatives see the civil service as a bloated workforce filled with people who use taxpayer money to twiddle their thumbs, or, worse, act like petty tyrants, until they can retire early with a rich pension. The capacity of civil servants to resist the new ideas of any incoming President is legendary. Indeed, there's an acronym for their ability to drag their feet until someone new is elected: Webehwyg (pronounced We-be-wig)—"We'll be here when you're gone." To conservative reformers, what's needed, to quote our new President, is to say, "you're fired."

[10] National Commission on the Public Service, "Leadership for America: Rebuilding the Public Service" (1989), p. 45.
[11] Will Felps, Terrence R. Mitchell, and Eliza Byington, "How, When, and Why Bad Apples Spoil the Barrel: Negative Group Members and Dysfunctional Groups," in Barry Staw, ed., *Research in Organizational Behavior, Volume 27: An Annual Series of Analytical Essays and Critical Reviews* (Elsevier, 2006), p. 194.
[12] The National Commission on the Public Service, "Urgent Business for America: Revitalizing the Federal Government for the 21 Century" (2003), p. 12.
[13] See, for example, VA Pamphlet 05-68, "Master Agreement Between the Department of Veterans Affairs and the America Federation of Government Employees 2011" (March 2011).
[14] U.S. Government Accountability Office, "Federal Workforce: Distribution of Performance Ratings Across the Federal Government, 2013," GAO-16-520R (2016), p. 5.
[15] See generally Philip K. Howard, *Life Without Lawyers: Restoring Responsibility in America* (W.W. Norton, 2009), pp. 122–30.

- Good government experts think that government bureaucracy is excessively constrained by legislative contradiction and red tape, and also usually understaffed—hence critics point to the dramatic increase in outside contractors whose interests often do not run parallel to public service as evidence. These reformers generally call for more carrots—more responsibility and better pay—to attract a new generation of qualified public employees. When it comes to individual accountability, they whistle past the union graveyard with euphemisms. The 2003 Volcker Commission report, for example, concluded that "a new level of labor-management discourse is necessary," without saying what that entails.[16]

They're both needed. The only way to rebuild a healthy civil service, as conservatives argue, is to restore individual accountability. But it's not because lots of people need to be fired; indeed, that would be dispiriting. The *prospect of accountability*, not actual accountability itself, is vital to a healthy workplace culture—it inspires confidence that others will do their share. "A social organism of any sort … is what it is," William James observed, "because each member proceeds to his own duty with a trust that the other members will simultaneously do theirs."[17]

Giving senior public employees more responsibility, as good government reformers argue, is also essential to attracting qualified people. But the "lack of public trust" noted by the 1989 Volcker Commission report will not be overcome by wishful thinking.[18] It's unimaginable that the public would support more responsibility for civil servants unless ineffective, insubordinate, or mean-spirited officials can be removed. Indeed, accountability holds the key to most good government proposals. For example, "thickening government"—the proliferation of presidential appointees that sometimes creates a chain of command of dozens of people—is the result in part of frustration over unresponsive civil servants.[19] Similarly, why does government outsource so many responsibilities to outside contractors? In part, because of a civil service that is hard to manage and impossible to hold accountable.[20]

In 2014 the Partnership for Public Service issued a report describing civil service as "a relic of a bygone era," and called for "a new civil service framework," including ending the presumption of lifetime careers.[21] Like other good government reports, however, it, treated accountability with kid gloves. But once the power of accountability is restored, designing a new civil service system requires no genius. The basic elements are: 1) neutral hiring, without the endless red tape of the current system; 2) a safety net to treat public employees fairly if they are let go; and 3) a neutral body (perhaps the current Merit System Protection Board) with responsibility to guard against unfairness. But that safeguard of fairness should involve an inquiry, not a legal trial, and the presumption should be in favor of the supervisor, since that's his job. Whether a person is not trying hard, or has bad judgment, or doesn't work well with others, or is less capable, are matters of perception not readily "proved" in a legal trial.

Rebuilding a healthy public culture is not a utopian dream. As recently as the 1950s, Federal officials could make practical and timely public choices, and three-quarters of Americans trusted

[16] National Commission on the Public Service, "Urgent Business for America," p. 10.
[17] William James, *William James: Essays and Lectures*, Richard Kamber and Daniel Kolak, eds. (Routledge, 2016), p. 188.
[18] National Commission on the Public Service, "Urgent Business for America," p. 2.
[19] See Paul C. Light, *Thickening Government: Federal Hierarchy and the Diffusion of Accountability* (Brookings, 1995).
[20] See John J. DiIulio Jr., *Bring Back the Bureaucrats: Why More Federal Workers Will Lead To Better (And Smaller!) Government* (Templeton, 2014).
[21] Partnership for Public Service, "Building the Enterprise: A New Civil Service Framework" (April 2014), p. 7.

government.[22] Forest rangers had autonomy to manage million-acre parcels of public land, balancing different interests. They were guided by a pamphlet of legal goals and principles, and overseen by supervisors who intervened only when needed.[23] This was a period when the Interstate Highway System was authorized in a 29-page statute and substantially completed a little more than a decade later. Running government this way didn't require heroics—nothing special compared with the massive public works programs of the New Deal or the even more massive mobilization of World War II. What was required was the same as for any well-functioning organization: employees who were willing to take responsibility and could count on their colleagues to do the same. Some agencies, such as NASA and the Centers for Disease Control, still enjoy a healthy work culture.

"Any government," Paul Volcker observed, "is only as good as its workers."[24] Indeed, the challenges facing modern democracy are almost impossible to fix without a manageable Federal work force. Take regulatory reform. What replaces red tape? People taking responsibility. Scrapping mindless rules requires empowering humans to take responsibility for results. Only then can daily choices be practical again. Thick rulebooks can be replaced by pamphlets. But no one will give officials flexibility to use common sense unless they are accountable when they don't.

A Short History of Presidential Power over Executive Employees

The present quagmire, as noted, is of relatively recent vintage. What went wrong?

For 170 years following ratification of the Constitution, the President's authority to terminate Executive Branch employees was considered his constitutional prerogative. Congress's power to curb the President's discretion was generally limited to public jobs independent of the President, such as quasi-judicial officers. Safeguards against politically motivated firings were as far as Congress thought it could go.

Accountability up the chain of authority to the President was not just a pillar of separation of powers, but reflected a deliberate managerial imperative. The issue came to a head in the very first Congress. In what became known as the "Decision of 1789," Congress by narrow vote decided that its powers of approval under the Constitution did not include powers related to termination.[25] James Madison carried the day, arguing that "the President should possess alone the power of removal from office," which would create an unbroken "chain of dependence … ; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President."[26] Madison argued that requiring the president to work with "subordinate executive officers" who rendered "inefficient service" or had "lack of loyalty" would "thwart[] the Executive in the exercise … of his great responsibility."[27]

In the fight with President Andrew Johnson over Reconstruction policy, Congress sought to assert personnel control with the Tenure of Office Act of 1867, requiring congressional approval for terminating high-level appointees. When Johnson defiantly dismissed Secretary of War Edward

[22] Pew Research Center, "Beyond Distrust: How Americans View Their Government" (November 2015), p. 18.
[23] See Philip K. Howard, Foreword, in Herbert Kaufman, *Red Tape: Its Origins, Uses, and Abuses* (Brookings, 2015).
[24] Paul Volcker, "The Endangered Civil Service," *New York Times*, August 5, 1990.
[25] Gerald E. Frug, "Does the Constitution Prevent the Discharge of Civil Service Employees?" *University of Pennsylvania Law Review*, Vol. 124 (1976), p. 949.
[26] Annals of Congress, 1st Cong., 1st sess., p. 518.
[27] *Myers v. United States*, 272 U.S. 52, 131. On the role of Congress, Madison argued that: "The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the legislative power ceases." *Annals of Congress*, 1st Cong., 1st sess., p. 604.

Stanton (a Lincoln holdover who was a Reconstruction hawk), Congress impeached him. Johnson was acquitted by the Senate. The statute was later repealed and, in 1926, the Supreme Court declared that the Act had been unconstitutional.[28]

By the 1860s, the excesses of the Jacksonian "spoils system" created broad demand for a professional civil service. ("Tell all the office seekers to come in at once," Lincoln is reported to have said when he got smallpox, "for now I have something I can give to all of them."[29]) Creating a civil service raised again the issue of congressional authority to control hiring. In 1871, the Attorney General concluded that it would be "manifest[ly]" unconstitutional for Congress to require the President or department heads to "appoint the persons named by a civil-service board."[30] Congress must "leav[e] scope for the judgment and will" of the President or other official who is making the appointment.[31] When finally enacted in 1883, the Pendleton Act provided a mechanism for neutral hiring but allowed the President to "apply the civil service rules where he saw fit."[32]

The Pendleton Act "did not restrict the President's general power to remove employees."[33] This was understood both as a constitutional imperative[34] and also as a clear policy guideline that any "merit system" must include accountability based on performance. As reformer George William Curtis put it:

> Having annulled all reason for the improper exercise of the power of dismissal [i.e., jobs were no longer distributed as spoils], we hold that it is better to take the risk of occasional injustice from passion and prejudice, which no law or regulation can control, than to seal up incompetency, negligence, insubordination, insolence, and every other mischief in the service, by requiring a virtual trial at law before an unfit or incapable clerk can be removed.[35]

In 1897, to guard against politically motivated firings, President McKinley issued an Executive Order requiring "no removal … except for just cause and upon written charges."[36] The Civil Service Commission was concerned that this order would be interpreted to require a trial and "would give a permanence of tenure in the public service quite inconsistent with the efficiency of that service."[37] In 1902, President Theodore Roosevelt clarified the order: "nothing contained in said rule shall be construed to require the examination of witnesses or any trial or hearing."[38] These Executive Orders were codified in the Lloyd-LaFollette Act of 1912—requiring notice in writing, a chance to respond in writing, but no "examination of witnesses, trial, or hearing." The upshot of these changes, in the words of civil service scholar Gerald Frug, was "merely that the executive had to have a legitimate, non-political reason for removal."[39]

[28] *Myers*, 272 U.S. at 176.
[29] David Herbert Donald, *Lincoln* (Simon & Schuster, 1995), p. 467.
[30] Civil-Service Commission, 13 U.S. Op. Atty. Gen. 516 (August 31, 1871), p. 523.
[31] Civil-Service Commission, 13 U.S. Op. Atty. Gen. 516 (August 31, 1871), p. 520.
[32] Frug, "Does the Constitution Prevent the Discharge of Civil Service Employees?" p. 954. Preserving the President's right to pick ultimately resulted in the "rule of three," a protocol in which the executive has discretion to give the job to one of top three test takers. Van Riper, *History of the United States Civil Service*, p. 104.
[33] Frug, "Does the Constitution Prevent the Discharge of Civil Service Employees?" p. 955.
[34] The Supreme Court had already established that the power of termination was implicit in the power of appointment. *Ex Parte in the Matter of Hennen*, 38 U.S. (13 Pet.) 230 (1839).
[35] National Civil Service Reform League, "Proceedings at the Annual Meeting of the National Civil Service Reform League" (January 1, 1911), pp. 24–5.
[36] Executive Order 101 (July 27, 1897).
[37] U.S. Civil Service Commission, "Annual Report of the United States Civil Service Commission," Vol. 19, p. 18.
[38] Executive Order 173 (May 29, 1902).
[39] Frug, "Does the Constitution Prevent the Discharge of Civil Service Employees?" p. 956.

Other than the Tenure of Office Act, the main constitutional gray area concerned the President's power to terminate appointees before the end of a term fixed by Congress. In *Marbury v. Madison*, Chief Justice Marshall held that the President could not dismiss a justice of the peace before the end of the term. But a series of later decisions, culminating in *Myers v. United States* (1926), gave the President authority to terminate appointees before the end of a fixed tenure. During the New Deal, a crisis erupted when FDR terminated a commissioner of the Federal Trade Commission before the end of his term. In *Humphrey's Executor* (1935), the Supreme Court reaffirmed the ruling in Myers that "an officer … in the executive department … [is] inherently subject to the exclusive and illimitable power of removal by the Chief Executive," but ruled that the President lacked the authority to override Congress with "*quasi*-legislative or *quasi*-judicial" officers whose job requires them to act "independently of executive control."[40] The Court held that "whether the power of the President to remove an officer shall prevail over the authority of Congress … will depend upon the character of the office."[41]

During the "red scare" of the McCarthy years, Executive authority over public employees was reaffirmed but reached a low point. Executive Orders by both Presidents Truman and Eisenhower required loyalty oaths, and virtually every public employee and applicant was reviewed to see if "reasonable grounds exist for the belief that the person involved is disloyal."[42] Because of the nature of the charges, employees were given the right to a hearing and an appeal to a "loyalty review board," but had no right to confront accusers, and the final decision was still vested in the discretion of the reviewing boards. A Federal court held there was no right to more process: "Never in our history, even under the terms of the Lloyd-LaFollette Act … , has a Government employee been entitled as of right to the sort of hearing [the plaintiff] demands in respect to dismissal from office."[43] The case was affirmed when the Supreme Court equally divided. At the end, after the Civil Service Commission and FBI reviewed the files of some two million employees, about 375 lost their jobs.[44]

Beginning in the 1960s, however, an amazing shift occurred. As if suffering from constitutional amnesia, all three branches of government forgot about the President's constitutional authority over Executive Branch employees. The "rights revolution" started with civil rights, expanded to environmental protection, shut down colleges over Vietnam, and removed any respect for authority with Watergate. No one took to the streets over civil service rights, but all authority was suspect. Without any discussion of almost two centuries of jurisprudence, each branch changed its personnel frameworks to effectively remove the President's constitutional authority over Executive

[40] *Humphrey's Executor v. United States*, 295 U.S. 602, 627, 629 (1935). Humphrey's and Myers were reaffirmed in *Bowsher v. Synar*, 478 U.S. 714 (1986) (Congress lacks power to terminate Comptroller General). The Supreme Court in 1988 modified the test of Humphrey's when upholding the independent counsel statute, holding that Congress's ability to impose a "good cause" requirement on termination hinged on whether the limitation unduly interferes with officers acting under the executive authority of Article II: Congress may "not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." *Morrison v. Olson*, 487 U.S. 654, 690 (1988) (upholding Congress's power to create an independent counsel).

[41] Id. at 631. The Court also stated: "The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others has often been stressed, and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution, and in the rule that recognizes their essential coequality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there." Id. at 629–30.

[42] Executive Order 9835, March 21, 1947.

[43] *Bailey v. Richardson*, 182 F.2d 46, 51 (DC Cir. 1950).

[44] Van Riper, *History of the United States Civil Service*, pp. 445–52.

Branch employees. No one dissented. Almost no one noticed. The singular focus on individual rights supplanted the capacity even to consider the constitutional or managerial implications of this sweeping change.

The first shoe to drop was JFK's Executive Order 10988, which, as noted, allowed public unions to engage in collective bargaining—effectively severing presidential authority over personnel except as unions would prescribe in the collective bargaining contracts. The Order also extended to all public employees a World War II veterans' preference that allowed veterans to appeal termination to the Civil Service Commission. The task force that recommended these changes, chaired by Arthur Goldberg, saw them as overdue improvements to give unions the power to help make government work better. It did not discuss any effects on Executive authority.

Next, the Supreme Court asserted a completely new jurisprudence for public employees; it viewed personnel decisions as a matter of due process under the Fifth Amendment instead of Executive power under Article II. An influential 1964 law review article by Yale Law Professor Charles Reich, "The New Property," argued that government benefits should have the same legal status as private property.[45] In a series of opinions, the Supreme Court ruled that if public employees enjoyed any legislative protection—including the Lloyd-LaFollette Act's requirement of notice and writings—then the public job constituted "property" and could not be constitutionally terminated without due process.[46] Even though Lloyd-LaFollette itself explicitly stated that there was no "requirement of examination, witnesses, or hearing," the Supreme Court held that it, not Congress, would be the judge of what due process required.[47] If Congress provided any protections, under the Court's reasoning, then the President had no authority over the employment status of Executive Branch employees unless the President (or Executive Branch manager) sustained its burden in a due process proceeding.[48] At no point in these decisions did the Court address the Article II implications of its rulings.

The Supreme Court bent over backwards to say that the process that was "due" would depend on the circumstances.[49] But the Court provided no mechanism or guidelines to figure out how to determine the correct process, and disagreements among the justices case by case hardly inspired confidence. Unlike Lloyd-LaFollette, which was intended to be a safeguard against politically motivated terminations, the Court was now imposing a broader fairness standard, focusing on the predicament of the individual employee. As it said in one case, "the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. . . . While a fired worker may find employment elsewhere, doing so will take some time, and is likely to be burdened by the questionable circumstances under which he left his previous job."[50]

[45] Charles A. Reich, "The New Property," *The Yale Law Journal*, Vol. 73, No. 5 (Apr. 1964).

[46] Frug, "Does the Constitution Prevent the Discharge of Civil Service Employees?" pp. 977–84.

[47] *Arnett v. Kennedy*, 416 U.S. 134 (1974).

[48] One opinion, by Justice Powell, emphasized the interest of the government in operational efficiency: "In the present case, the Government's interest, and hence the public's interest, is the maintenance of employee efficiency and discipline. Such factors are essential if the Government is to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial." Id. at 168.

[49] For example, id. at 154–55; *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985).

[50] *Loudermill*, 470 U.S. at 543.

The third shoe to drop was the Civil Service Reform Act of 1978. In addition to innovations such as a new "Senior Executive Service," Congress here stated that its goal was to clarify authority. But the clarification represented a legislative enshrinement of the Executive Order permitting collective bargaining and Supreme Court rulings which assumed that trial-type hearings were a neutral guarantee of fairness. The legislative history discussed accountability in general terms but not the President's constitutional authority under Article II. Representative Patricia Schroeder of Colorado warned that, "in years to come [civil servants] will have to put up with colleagues who do not pull the load."[51]

The President's authority over Executive Branch personnel had not completely disappeared. In 1981, President Reagan fired almost 12,000 air traffic controllers after they refused to return to work from an illegal strike. But the President's ability to hold particular individuals accountable for job performance—the basic precondition to managing any department—had been rendered null and void.

In hindsight, this inversion of authority was motivated not by practical problems with the prior framework, but by union political power and by the ideological power of the rights revolution. There was no rash of unfairness that could be laid at the door of public managers. To the contrary, getting public managers to make unpleasant personnel decisions was the challenge, not the norm. Doing nothing is the sure-fire way to avoid trouble in the public sector, so that's what bureaucrats tend to do. Executive power just got washed away by the "rights revolution," which assumed that the Constitution was supposed to protect civil servants—not, as Madison had argued, to empower the President to fulfill his "great responsibility."

In 1989, only a decade after Congress had encased civil service accountability in impenetrable red tape, the first Volcker Commission reported on the "quiet crisis" of "frustration inside government and a lack of public trust outside."[52] The gray powerlessness within agencies would not have surprised the Framers, the progressives who created civil service, or constitutional experts before 1960. Of course the executive branch is an exercise in futility—the links in the Constitution's chain of authority have been broken.

Challenging the Constitutionality of Civil Service

For thirty years, reformers have made the case for overhauling the civil service. Sitting presidents and leaders of Congress have generally praised the reports, but nothing has happened. The reason is not hard to discern. Civil service reform is too dry, and the unions are too powerful. In its evaluation of the 1989 Volcker report, the General Accounting Office basically said the proposals were dead on arrival: "There will never be a ground swell of support from around the country for the actions recommended by this Commission."[53]

The triumph of public unions in securing invincibility turns out to be their weakness. By disempowering the President from exercising one of his main constitutional prerogatives, they have opened the door for the President to assert his rights by Executive Order—not only to remake the civil service system, but also challenge Congress's authority to impose unions on the Executive Branch. Public unions, we now know after a half-century of experience, do not advance the public good. They have succeeded mainly in destroying any concept of merit in the merit system.[54]

[51] Committee on Post Office and Civil Service, "Legislative History of the Civil Service Reform Act of 1978," Vol. I (1979), p. 835.
[52] The National Commission on the Public Service, "Leadership for America: Rebuilding the Public Service," Preface, p. 2.
[53] U.S. Government Accountability Office, "Report of the National Commission on the Public Service," T-GGD-89-19 (1989), p. 4.
[54] Daniel DiSalvo, "The New Spoils System," *The American Interest* (March/April 2015).

An Executive Order by the President taking back responsibility over Executive Branch personnel will provoke a constitutional challenge, which ultimately must be resolved by the Supreme Court. Starting this war will also waken the public, and success may ultimately depend on public opinion. That's why it's critical to take the high road, and make sure the new civil service framework is fair-minded and respectful. Any approach seen as petty and vindictive, such as Wisconsin Governor Scott Walker's bloody battle with public unions, will prove counterproductive.

America needs to remake government for the 21st century. The only path forward is to return to constitutional first principles and, by Executive Order, create a civil service system that restores the authority of the President and Federal supervisors to manage public employees. Restoring accountability up the chain of responsibility is no silver bullet, but it will allow public executives to rebuild an energetic and responsive public culture. Instead of being bogged down in employee entitlements, government can once again work for the American people

About This Reprint

This article originally appeared in the January 28, 2017 issue of *The American Interest*. A condensed version—titled "The President's Right to Say 'You're Fired'"—was published on January 30, 2017 in the *Wall Street Journal*. Philip Howard is chair of Common Good and the author of, most recently, *The Rule of Nobody* (2014).

About Common Good

Common Good is a nonpartisan reform coalition which believes individual responsibility, not rote bureaucracy, must be the organizing principle of government. We present proposals to radically simplify government and restore the ability of officials and citizens alike to use common sense in daily decisions.

Common Good was founded in 2002 by Philip Howard. Our Advisory Board includes leaders from many areas of society, including former Senators Bill Bradley and Alan Simpson, former Governor Tom Kean, former Speaker Newt Gingrich, and Professors Francis Fukuyama and Jonathan Haidt.

In late 2016, Common Good launched a national bipartisan campaign—titled "Simplify Government"—to build support for basic overhaul of government. The campaign is co-chaired by Philip Howard and former Senator Bill Bradley. Learn more at www.simplifygov.org.

One Metrotech Center, Suite 1703, Brooklyn, NY 11201
Phone 212.681.8199
www.commongood.org
Email commongood@commongood.org