AMERICAN CENTER for LAW & JUSTICE

MEMORANDUM

This summary provides information and an overview of the law for educational purposes only. This summary may become outdated and may not represent the current state of the law. Reading this material DOES NOT create an attorney-client relationship between you and the American Center for Law and Justice, and this material should NOT be taken as legal advice. You should not take any action based on the educational materials provided on this website but you should consult with an attorney if you have a legal question.

On January 20, 2025, President Trump signed an executive order entitled, Restoring Accountability to Policy-Influencing Positions within the Federal Workforce.[1] This executive order is designed to make it easier for the President to hold accountable federal agency employees. It creates a new category of federal employees called "Schedule Policy/Career" who do not have the typical protections enjoyed by civil servants and can be fired at will. It applies to jobs "of a confidential, policy-determining, policy-making, or policy-advocating character." Other than the name, it is very similar with, and essentially a new version of, the "Schedule F" order that did something similar at the end of the first Trump Administration. According to the new order, "Employees in or applicants for Schedule Policy/Career positions are not required to personally or politically support the current President or the policies of the current administration. They are required to faithfully implement administration policies to the best of their ability, consistent with their constitutional oath and the vesting of executive authority solely in the President. Failure to do so is grounds for dismissal."

The National Treasury Employees Union, representing 150,000 federal employees, has already filed a lawsuit challenging this order.[2] This union represents employees across 35 agencies.

The case name is *National Treasury Employees Union v. Trump*. The case was filed in the US. District Court for the District of Columbia under the case number 1:25-cv-00170. The case was filed January 20, and the summons issued on January 21, 2025. Return of service has not yet been filed. Once it is filed, the federal defendants will have 60 days to file a response or Motion to Dismiss under Fed. R. Civ. P. 12. Unlike many other districts, this court routinely receives amicus briefs and even has a local rule, LCvR 7(o), that specifically provides for amicus filings, if the parties consent or through a motion.

The crucial issue in this case is the scope of the President's authority to manage and control federal employees. The present-day competitive civil service dates back more than 130 years to the Pendleton Civil Service Reform Act, which established a merit-based, competitive system for the appointment of federal employees. 89 Fed. Reg. 24982 (Apr. 9, 2024) (summarizing evolution of civil service reform laws). The primary idea behind this employment system is that employment

[1] https://www.whitehouse.gov/presidential-actions/2025/01/restoring-accountability-to-policy-influencing-positions-within-the-federal-workforce/

[2] https://www.reuters.com/world/us/can-unions-stop-trump-firing-thousands-federal-employees-2025-01-21/

should be merit-based. The current version of this system stems from the 1978 Civil Service Reform Act, which among other things created the MSPB. The straying away from the merit basis for these jobs (especially after the prior administration's bold DEI push) precisely underscores why the status quo should – and must – be changed.

And, recognizing that the President must have the ability to set policy and know that his policy-making executive branch employees are following his management, there is a subset of excepted service employees, unable to use the protections of the MSPB, "whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character and whom "the President has excepted from the competitive service." 5 U.S.C. § 7511(b)(2). Those who engage in such roles generally do not have an expectation of ongoing rights in employment, and the President has authority to designate who is in such roles. By law, "[t]he President may prescribe rules governing the competitive service. The rules shall provide, as nearly as conditions of good administration warrant, for— (1) necessary exceptions of positions from the competitive service." 5 USC § 3302. The Constitution gives the President executive authority, and courts have recognized that he generally may "when he declares the public service demands it in a particular case, suspend a rule of the civil service -- a practice which, as we have seen, has been indulged without challenge from time to time for half a century." *United States ex rel. Crow v. Mitchell*, 89 F.2d 805, 809 (D.C. Cir. 1937). Courts have upheld, for example, presidential orders excluding noncitizens from the civil service, in light of his constitutional authority over federal employees. *Mow Sun Wong v. Campbell*, 626 F.2d 739, 744 (9th Cir. 1980).

Previous Presidents have, by executive orders, created various exceptions through Schedules A, B, C, D and E, implementing this authority. Plaintiffs here have to argue that this time, the creation of exceptions is illegitimate on one ground or another. Their argument relies on administrative regulations that defined "confidential, policy-determining, policy-making, or policy-advocating" positions as noncareer political appointments. Those regulations of course cannot supersede or thwart the statutory definition of this term or an executive order. As common sense dictates, someone can be a "policy-advocating" individual while still in a career position.

Congress has expressly recognized the President's need to properly manage his policy-making executive branch authorities. The statute at issue here says this: "rules shall provide, as nearly as conditions of good administration warrant, for— **(1)** necessary exceptions of positions from the competitive service." 5 USC § 3302. They argue that this requirement sets up a mandatory statutory standard and that the President needed to provide "details" and "data" before making this order. It seems unlikely they will be able to justify burdening the President in this way, and the Plaintiffs do not appear to even have support for the requirement they advance. Plaintiffs also argue that the President cannot define policy-advocating positions to include career employees. Again, this is a significant burden to impose on the President when the law itself does not contain this "non-career" definition and, instead, actually recognizes his plenary authority.

Conclusion

The bottom line is that this lawsuit appears weak on its merits, but it is of course unwise to assume a victory; a result respecting the separation of powers and executive authority (and unitary executive) as already recognized by Congress. The ACLJ will continue to monitor this lawsuit closely as it proceeds.