GOVERNING FOR IMPACT

Legal Vulnerabilities of Schedule F

January 2025

Issue Brief

I. INTRODUCTION

Donald Trump and his allies' promises to gut the federal civil service have received significant attention. They have said they will purge the executive branch of staff who are insufficiently loyal to the President and his political cause. In doing so, they will seek to return our government to a patronage system under which political allegiance, not merit, matters most for federal employment. They have proposed numerous means of accomplishing this goal, including reducing the size of the federal workforce, relocating agency offices, and even abolishing agencies entirely.[1]

One policy likely to figure prominently in the new administration's efforts is called "Schedule F." Schedule F, first floated in 2020, would purport to strip vast swaths of the federal workforce of procedural job protections and make them fireable at will. The Trump campaign promised that "[o]n Day One," Trump would "re-issue" an "executive order restoring the president's authority to fire rogue bureaucrats."[2]

The threat of Schedule F is, by now, well known. Less attention has been paid, however, to its legal vulnerability. Schedule F is very likely unlawful, both under Congress's civil service laws and the Constitution. Federal law affords the vast majority of federal workers protections against arbitrary or politically motivated firing. An exception to that rule applies to senior political officials, who naturally turn over at the start of a new administration. Donald Trump will seek to use that narrow exception to fire at will thousands of career civil servants. That dramatic and unprecedented policy, which would overturn the protections Congress established for federal employees, is unlawful. At any rate, even if the President could remove broad swathes of the federal workforce from the civil service on paper, bedrock principles of due process — embedded both in the civil service laws and the Constitution itself — would bar the government from stripping federal employees of the job protections they have previously accrued.

It is essential that civil servants — as well as advocates, commentators, and the public — understand that Schedule F's vulnerability means its implementation is not a sure thing.

This Issue Brief explains why Schedule F is unlawful.

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[1] *See, e.g.*, Steven Greenhouse, *Project 2025's Plan to Gut Civil Service with Mass Firings: "It's Like the Bad Old Days of King Henry VIII,"* The Guardian (Sept. 25, 2024); Eric Katz, *Trump's "DOGE" Commission Promises Mass Federal Layoffs, Ending Telework*, Gov't Exec. (Nov. 18, 2024).

[2] Agenda47: President Trump's Plan to Dismantle the Deep State and Return Power to the American People (Mar. 21, 2023).

II. BACKGROUND

For much of the nineteenth century, the so-called "spoils system" governed federal employment. Federal employees were hired and fired based on their political affiliation rather than their competence. It was a patronage system rife with corruption. Congress eventually stepped in, enacting a series of laws over the last century and a half establishing a merit-based system of federal employment. One of the most important of these is the Civil Service Reform Act of 1978 ("CSRA").[3]

The CSRA establishes a set of "merit system principles" for the federal workforce, including that "selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills," and that federal employees "should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation" and be "protected against arbitrary action, personal favoritism, or coercion for partisan political purposes."[4]

As part of safeguarding federal employees from undue partisan influence, the CSRA provides that an agency may only fire, demote, or issue a lengthy suspension to an employee "for cause," not for arbitrary or improper reasons.[5] And it must first provide notice of its reasons and an opportunity for the employee to respond.[6] The employee may then appeal the action to a neutral federal adjudicator, the Merit Systems Protection Board.[7] If the Board rules against her, she may go to federal court.[8]

Not every employee gets these procedural protections. As relevant here, the CSRA carves out employees "whose position[s] ha[ve] been determined to be of a confidential, policy-determining, policy-making or policy-advocating character."[9] This group, which we'll refer to as "confidential and policymaking" employees, may be fired at will — that is, for any reason or no reason at all.

The confidential and policymaking designation has historically applied only to a small group of employees: political appointees.[10] Political appointees are those in high-level government positions who have no expectation of continued employment after the end of the

[3] For an overview of this history, see Upholding Civil Service Protections and Merit System Principles, 89 Fed. Reg. 24,982, 24,984–86 (Apr. 9, 2024).

[4] 5 U.S.C. § 2301(b).

[5] 5 U.S.C. § 7513(a).

[6] 5 U.S.C. § 7513(b), (c).

[7] 5 U.S.C. § 7513(d).

[8] 5 U.S.C. § 7703(a)(1), (b)(1)(A); 28 U.S.C. § 1295(a)(9).

[9] 5 U.S.C. § 7511(b)(2).

[10] *See* Upholding Civil Service Protections, 89 Fed. Reg. at 25,019–23.

presidential administration in which they were hired. That distinguishes them from career employees, whose tenures generally continue across administrations. Confidential and policymaking positions held by political appointees are documented on a list known as Schedule C.[11]

Schedule F was designed to dramatically reduce the scope of the CSRA's protections. In 2020, President Trump directed agencies to identify *career* employees who "discharge significant duties and exercise significant discretion in formulating and implementing executive branch policy and programs" as confidential and policymaking employees and place them on a new list — Schedule F.[12] The goal of the policy was to strip these employees of their CSRA tenure protections and make them fireable at will.

The incoming Biden Administration rescinded Schedule F before agencies could implement it, so its full scope never became clear. But Trump loyalists have suggested that it was designed to allow the Trump Administration to fire at will tens of thousands of employees with substantive responsibilities.[13] That would eviscerate the federal civil service's merit system principles and return large parts of the federal workforce to the spoils system.

The Biden Administration, in addition to rescinding the Schedule F executive order, took additional action to avoid this result. In 2024, the Office of Personnel Management enacted a rule providing that employees cannot be involuntarily stripped of their tenure protections, officially interpreting the confidential and policymaking designation to refer to political appointees only, and instituting certain procedures agencies must follow to reclassify employees.[14]

Even so, the second Trump Administration is certain to move quickly in restoring Schedule F.[15] While we do not yet know the precise form the policy will take, we expect that, as in 2020, it will move to strip CSRA protections from numerous career employees on the grounds that they occupy confidential or policymaking positions.

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[11] *See* Off. of Pers. Mgmt., Position Descriptions: Schedule C Positions (last updated Mar. 4, 2024) ("Schedule C positions are excepted from the competitive service because of their confidential or policy-determining character.").

[12] *See* Creating Schedule F in the Excepted Service, Exec. Order 13,957, 85 Fed. Reg. 67,631, 67,631 (Oc. 21, 2020).

[13] *See* Donald P. Moynihan, *Trump Has a Master Plan for Destroying the "Deep State,"* N.Y. Times (Nov. 27, 2023).

[14] *See* Upholding Civil Service Protections, 89 Fed. Reg. at 24,982.

[15] *See* Donald Devine et al., *Central Personnel Agencies: Managing the Bureaucracy*, *in Mandate for Leadership: The Conservative Promise* (Paul Dans & Steven Groves eds., 2023).

III. SCHEDULE F IS UNLAWFUL

Schedule F violates the CSRA and the Constitution.

The CSRA bars expanding the confidential and policymaking designation beyond political appointees. The CSRA does not extend removal protections to "an employee whose position has been determined" by the President "to be of a confidential, policy-determining, policy-making, or policy-advocating character."[16] But that phrase does not authorize the President to rove the executive branch for any employee who does substantive work. Instead, it has a specific meaning, established by the text and confirmed by years of unbroken practice: political appointees. Any effort to expand the reach of the exception beyond that settled meaning would be contrary to law.

The terms "confidential," "policy-determining," "policy-making," and "policy-advocating" on their face refer to the sorts of high-ranking positions held by an administration's political appointees. Those are the employees principally responsible for determining, making, and advocating federal policy. And, in this context, the term "confidential" is best read to describe employees with close working relationships to senior principals. Especially when taken together, these words connote leadership. Other federal statutes, in fact, draw an explicit equivalence between confidential, policy-determining, policy-making, policy-advocating positions and political appointee status. For instance, Section 349(d)(3)(B) of Title 6, which establishes an office within the Department of Homeland Security, provides that "the term 'political appointee' means any employee who occupies a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character."[17] There are several other statutes that make this same equivalence.[18]

Extensive past practice confirms that the confidential and policymaking designation describes political appointees. Walter M. Shaub, Jr., the former leader of the federal Office of Government Ethics, and the organization Protect Democracy, in a regulatory comment that heavily influenced the Office Personnel Management's 2024 anti–Schedule F

[16] 5 U.S.C. § 7511(b)(2); *see* 5 U.S.C. §§ 7511(b)(2)(A), 3302.

[17] 6 U.S.C. § 349(d)(3)(B).

[18] *See* 7 U.S.C. § 6992(e)(2)(D) ("[T]he term 'political appointee' means an individual occupying a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character."); 5 U.S.C. § 9803(c)(2)(A) ("[T]he term 'political appointee' means an employee who holds a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character."); 38 U.S.C. § 725(c) ("[T]he term 'political appointee' means any employee . . . who holds a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character.").

rulemaking, have exhaustively documented the consistent meaning given to the confidential and policymaking designation since the 1930s.[19]

A few particularly useful historical examples: In 1937, the Brownlow Committee, a presidential commission studying the organization of the executive branch, recommended that "[t]he merit system should be extended upward, outward, and downward to cover all non-policy-determining posts."[20] It acknowledged the need for "a sufficient number of high policy-determining posts at the disposal of a newly elected President" — that is, who serve at the pleasure of the President — but cautioned that "[t]he positions which are actually policy-determining . . . are relatively few in number. They consist, in the main, of the heads of executive departments, under secretaries and assistant secretaries, the members of the regulatory commissions, the heads of a few of the large bureaus engaged in activities with important policy implications, the chief diplomatic posts, and a limited number of other key positions."[21] Brownlow himself made clear in testimony before Congress that while "policy-determining officers should be political officers" who "change when the President changes," "[a]ll of the other positions should be career positions."[22] President Roosevelt pursued this recommendation.[23]

During the Truman Administration, the influential first Hoover Commission (chaired by President Hoover) likewise equated the policymaking designation with political appointee status in "propos[ing] a far-reaching revision" in the civil service laws "to build a career service which will select the best of our citizens on merit, free of political influence."[24] "Top policy-making officials must and should be appointed by the President. But *all employment activities below these levels* . . . should be carried on within the framework of the decentralized civil service system."[25] Later, during the Eisenhower Administration, a second Hoover Commission emphasized the point, noting that "the term 'policy-determining' was used to describe positions which should properly be reserved for political executives."[26]

When President Eisenhower took office, his administration stated that the "types of positions that do not belong in the Civil Service System" were "[t]hose positions where the incumbents should receive, in the interests of sound administration, a delegation of authority from the

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[19] *See generally* Comment of Protect Democracy and Walter M. Shaub, Jr., on RIN-3206-AO56, OPM-2023-0013 ("Protect Democracy Comment"); *see also* Upholding Civil Service Protections, 89 Fed. Reg. at 25,020–23.

[20] President's Comm. on Admin. Mgmt., Administrative Management in the Government of the United States 3 (1937).

[21] *Id.* at 8.

[22] Hearings on Reorganization of the Executive Departments, before Joint Comm. on Gov't Org., 75th Cong., 112 (1937) (testimony of Louis Brownlow).

[23] Protect Democracy Comment 19–20.

[24] Comm'n on Org. of the Exec. Branch of Gov't, Personnel Management 7 (1949) (emphasis added).

[25] *Id.* (emphasis added).

[26] Task Force on Pers. and Civ. Serv., Report on Personnel and Civil Service 6 (1955).

head of the agency which enables them to shape the policies of the Government" and "[t]hose positions where the duties are such that there must be a close personal and confidential relationship between the incumbent of the position and the head of the agency."[27] These two categories of positions were to be listed on the newly created Schedule C, and Eisenhower characterized them as "positions of a confidential or policy-determining character."[28]

The narrow scope of the confidential and policymaking designation persisted. During the Kennedy, Johnson, Nixon, Ford, and Carter Administrations — that is, during the decades leading up to the CSRA's 1978 enactment — the number of confidential and policy-determining positions in the executive branch never exceeded 1,590.[29] And for its part, the Merit Systems Protection Board — charged by Congress to adjudicate the legality of federal personnel actions — has long held "that the terms 'confidential, policy-determining, policy-making, and policy-advocating' are a shorthand way of describing positions to be filled by 'political appointees.'"[30]

The "best reading" of the CSRA is that the confidential and policymaking designation only applies to political appointees, but the Supreme Court has made clear that "Executive Branch interpretation[s]" like these — which prevailed "contemporaneously with enactment of the statute and remained consistent over time" — are "entitled to very great respect" as well.[31]

Indeed, Congress enacted the CSRA against this legal backdrop. The Hoover Commissions' construction of the policymaking designation was discussed during floor debate on the bill.[32] And the House Committee responsible for the bill wrote expressly that the confidential and policymaking exception was meant to be largely coterminous with the list of positions on Schedule C — that is, political appointees. The "exception for positions of a confidential, policy determining, policy-making, or policy advocating character, is an extension of the exception for appointments confirmed by the Senate. These positions are currently placed in Schedule C . . . or filled by Non-Career Executive Assignment."[33] More generally, as discussed elsewhere in this Issue Brief, it is undisputed that the civil service laws were enacted to undo the spoils system, broadly entrench merit system principles across the

[27] White House, Press Release (Mar. 5, 1953), available at Protect Democracy Comment Attachment 1, at 39.

[28] Executive Order 10,440, 18 Fed. Reg. 1823 (Mar. 31, 1953).

[29] Protect Democracy Comment 27.

[30] *O'Brien v. Off. of Indep. Counsel*, 74 M.S.P.R. 192, 206 (1997); *Special Counsel v. Peace Corps*, 31 M.S.P.R. 225, 231–32 (1986).

[31] *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2257–58 (2024) (internal quotation marks omitted).

[32] *See* 124 Cong. Rec. (Senate) 27,540 (Aug. 24, 1978) (statement of Sen. Charles Percy).

[33] H. Comm. on Post Off. and Civil Serv., Legislative History of the Civil Service Reform Act of 1978, vol. II, at 1512 (Comm. Print 96-2) (1979).

federal workforce, and, in that way, prevent civil servants from being fired based on political whim or reprisal.

In view of this long history — and Schedule F's dramatic departure from it — the Office of Personnel Management recently issued a formal rule restating the settled understanding that

> Congress intended to except from chapter 75's civil service protections individuals in positions of a character exclusively associated with a noncareer political appointment that is both (a) identified by its close working relationship with the President, head of an agency, or other key appointed officials who are responsible for furthering the goals and policies of the President and the administration, and (b) that carries no expectation of continued employment beyond the presidential administration during which the appointment occurred."[34]

In sum, the CSRA's tenure-protection carveout applies only to political appointees, not all agency staff with substantive responsibilities. Schedule F, which disregards that well-established limitation, is unlawful.

One way to think about Schedule F's illegality is through the lens of the major questions doctrine. The doctrine, which the federal courts have wielded with increased force and frequency in recent years, calls for skepticism when the executive branch purports to newly locate a sweeping, consequential authority in a longstanding statute. The doctrine is based on the inference that Congress does not hide "elephants" (vast new authority) in "mouseholes" ("little-used" or "ancillary" statutes).[35]

This mode of reasoning confirms that Schedule F exceeds the President's statutory authority.[36] For the first time, a President would claim to find in the modest power to designate confidential and policymaking positions — which has only ever been applied to political appointees — the authority to remove civil service protections from many career federal employees with substantive responsibilities. That would topple the CSRA's merit system principles and unilaterally return the United States to the spoils system of federal employment. President Trump would use a narrow carveout from the CSRA to, in effect, repeal a great deal the Act itself — to "effectuate[] a fundamental revision of the statute."[37] That is exactly the sort of elephants-in-mouseholes mismatch the major question doctrine addresses.

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[34] Upholding Civil Service Protections, 89 Fed. Reg. at 25,020.

[35] *West Virginia v. EPA*, 597 U.S. 697, 746–47 (2022) (Gorsuch, J., concurring); *id.* at 724, 730 (maj. op.).

[36] The major questions doctrine very likely applies to presidential action. *See Louisiana v. Biden*, 55 F.4th 1017, 1029 (5th Cir. 2022); *Kentucky v. Biden*, 23 F.4th 585, 605–06 (6th Cir. 2022); *Georgia v. President of the United States*, 46 F.4th 1283, 1295–96 (11th Cir. 2022).

[37] *West Virginia*, 597 U.S. at 701.

Indeed, Donald Trump's allies have not hidden that the purpose of Schedule F is to permit political reprisals and patronage hiring — the precise evils a century and a half of civil service laws have been designed to prevent. It is not possible to believe that Congress hid in the CSRA's narrow exception the power to decimate the civil service. Such a view would not comport with "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude."[38]

A civil servant may not be stripped of job protections. There is another reason Schedule F is unlawful. Even if President Trump were empowered to broadly classify career employees as holding confidential and policymaking positions — which he is not — both the Constitution and the CSRA would prohibit him from actually carrying out at-will firings. That is because once a civil servant obtains statutory job protections, they may not be stripped away.

The Fifth Amendment's Due Process Clause prohibits the federal government from depriving a person of life, liberty, or property without due process of law. Generally, tenure protections for public employees create an expectation of continued employment that counts as "property" for due process purposes.[39] The CSRA's removal restrictions have been held to create this kind of constitutional property interest.[40] And the Due Process Clause provides that the government "may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."[41] In the public employment context, that means pre-termination notice and an opportunity for a hearing.[42]

The upshot is that federal civil servants, once granted CSRA protections, may not be fired (or otherwise deprived of their CSRA rights) without procedures closely tracking those the CSRA requires. Schedule F, by purporting to strip numerous civil servants of their tenure protections, blatantly violates that rule.

Likewise, under the CSRA, federal employees may not be stripped of their job protections. For more than half a century, the courts and the executive branch have agreed that under the civil service statutes, once federal employees obtain tenure protections, they retain them — even if their positions are reclassified as confidential and policymaking.

In the 1950s, the Eisenhower Administration sought to remove certain employees from the "classified civil service" — a group on whom the Lloyd-LaFollette Act, the civil service statute

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[38] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). For more on the major questions doctrine generally, see Will Dobbs-Allsopp, Rachael Klarman & Reed Shaw, The Major Questions Doctrine: Guidance for Policymakers, Governing for Impact (Nov. 2022). For further discussion of the doctrine's application to Schedule F, see Deploying the Major Questions Doctrine to Thwart Project 2025, Governing for Impact (Dec. 2024).

[39] *See Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 539–40 (1985).

[40] *See Stone v. FDIC*, 179 F.3d 1368, 1375 (Fed. Cir. 1999).

[41] *Loudermill*, 470 U.S. at 540–41.

[42] *See id.* at 542 (requiring "some kind of a hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment" (internal quotation marks omitted)).

of the day, conferred procedural removal protections similar to those now provided by the CSRA. One of those employees was then fired without notice or reasons. In *Roth v. Brownell*, the U.S. Court of Appeals for the D.C. Circuit held that notwithstanding the government's reclassification of the employee, he was entitled to the civil service law's protections. "Neither the formula of 'excepting' the kind of position a person holds, nor any other formula, can obviate the requirements of the Lloyd-LaFollette Act that [n]o person in the classified civil service of the United States shall be removed therefrom without notice and reasons given in writing."[43]

Roth's logic extends to Schedule F. The CSRA provides that an employee may only be terminated for cause, after notice and an opportunity to be heard. Firing an employee without notice or reasons violates that requirement. And it makes no difference that Schedule F will purport to remove these protections before any particular firing takes place. *Roth* rejected the argument that Roth was not "removed" from the civil service within the meaning of the Lloyd-LaFollette Act because the Eisenhower Administration had previously moved his position to a civil service category outside of the Act's protections.[44] "This is a paradox. Roth was once in the classified civil service, did not leave it voluntarily, and is now out of it. It follows that he was removed from it."[45]

Following *Roth*, the executive branch developed a consistent position—matinained for nearly 70 years—that a civil servant retains tenure protections even after her position is reclassified into an unprotected civil service category.[46] As a representative example, the Reagan Administration's Office of Personnel Management explained that, under the CSRA, while political appointees in confidential and policymaking positions generally "may be separated at any time," there is an exception for "those who were serving in a [tenure-protected] position . . . when OPM authorized its conversion to Schedule C and who

[43] *Roth v. Brownell*, 215 F.2d 500, 502 (D.C. Cir. 1954) (ellipsis and some internal quotation marks omitted).

[44] *Id.* at 502.

[45] *Id.* at 502.

[46] *See, e.g.*, Amending the Civil Service Rules and Authorizing a New Appointment System for the Competitive Service, Exec. Order 10,577, 19 Fed. Reg. 7521 (Nov. 22, 1954) (Eisenhower Administration) ("[A]n employee who is in the competitive service at the time his position is first listed under Schedule A, B, or C shall be considered as continuing in the competitive service as long as he continues to occupy such position."); 33 Fed. Reg. 12,402, 12,408 (Sept. 4, 1968) (Johnson Administration) ("An employee in the competitive service at the time his position is first listed under Schedule A, B, or C remains in the competitive service while he occupies that position."); U.S. Civ. Serv. Comm'n, Fact Sheet: Civil Service and Transition to a New Administration 5 (1977) (Ford Administration) (providing that under *Roth*, incumbents to "Schedule C positions," which are generally "subject to change in the transition to a new Administration," maintain removal protections if they "have status in the position"); *Stanley v. Dep't of Justice*, 423 F.3d 1271, 1272–73 (Fed. Cir. 1999) (reviewing a Clinton Administration proclamation providing that "the position of [Bankruptcy] Trustee is confidential, policy-determining, policy-making, or policy-advocating in character and, as such, exempted from the civil service due process requirements" but "Trustees appointed prior to the proclamation would not be affected—they would retain appeal rights" (internal quotation marks and alteration omitted)).

still serve in those positions."[47] These civil servants, said to have "status in the position," were "covered by statutory appeal procedures."[48]

Consistent with this understanding, the Merit Systems Protection Board has held for decades that under the CSRA, a civil servant does not lose tenure protections merely because his position has been reclassified as being of a confidential and policymaking character. Such a determination "is not adequate" to strip CSRA rights "unless it is made before the employee is appointed to the position."[49] Once an incumbent is on the job, it is "too late to affect [her] rights under" the CSRA.[50] Under this reasoning, Schedule F violates the CSRA.[51]

IV. CONCLUSION

We know in advance what Schedule F's defining move will be—stripping civil service protections from career employees. That is unlawful. What we do not yet know is the details of how the incoming administration intends to implement Schedule F. And those details matter for another important issue: which procedures are available to challenge Schedule F. Opponents will need to determine the how, what, and when of their litigation strategy. Governing for Impact intends to write more on the procedural considerations for a Schedule F challenge once the policy's contours become clearer.

For the moment, what matters most is that under the traditional tools of statutory and constitutional interpretation, Schedule F is illegal. It is essential that advocates, the public, and civil servants understand just how vulnerable Schedule F is as they prepare to oppose it.

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[47] Memorandum from Constance Horner, Director, Off. of Personnel Mgmt. 8 (Nov. 30, 1988).

[48] *Id.*

[49] *Thompson v. Dep't of Justice*, 61 M.S.P.R. 364, 368–69 (1994); *see also Briggs v. Nat'l Council on Disability*, 60 M.S.P.R. 331, 336 (1994); *cf. Chambers v. Dep't of the Interior*, 116 M.S.P.R. 17 at ¶ 4 (2011) (Member Rose, concurring) ("For the section 7511(b)(8) exclusion to be effective as to a particular individual, the appropriate official must designate the position in question as confidential, policy-determining, policy-making, of policy-advocating before the individual is appointed.").

[50] *Thompson*, 61 M.S.P.R. at 368–69.

[51] For more on why federal employees cannot be stripped of accrued civil service protections, see Upholding Civil Service Protections, 89 Fed. Reg. at 25,008–12.