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THE CURRENT: What will Trump's executive order mean for the future of the civil service?

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(MUSIC)

PITA: You're listening to The Current, part of the Brookings Podcast Network. I'm your host, Adrianna Pita.

President Trump recently signed an executive order which will remove civil service protections, and in some cases union representation, from potentially tens of thousands of federal employees. With us to discuss why this matters and what it means for the federal workforce is Scott Anderson, visiting fellow in Governance Studies and a senior editor at Lawfare. Scott, thanks for talking to us today.

ANDERSON: Thank you for having me.

PITA: I was really glad that you wanted to come back on and talk about this, maybe particularly this week. This may seem like something of an obscure topic when 99% of the news and people's attention is on the election. But for many people, maybe even most Americans, they work on an at-will basis, meaning that they can be fired at any time, for any reason, unless it can be proved that was based on racial, gender or disability discrimination. But for a lot of people hearing that the president is making it easier to hire and fire federal workers that might sound like it's no big deal, or maybe even a positive move. But it's raised a lot of alarms, not only from federal workers' unions, but also from government workers and governance experts who say that this undermines existing protections against corruption and political cronyism and really threatens to undermine the expertise of the career civil service. So, I thought this seemed appropriate for week in which people are deciding what they want their government to look like.

Maybe you could start us off by telling us who are the federal workers who are potentially affected by these changes, and then, what, what are some of these big changes that were being made.

ANDERSON: Absolutely. So, this executive order really applies to the vast majority of civil service employees. The Trump administration has indicated that it does not extend to the members of the senior executive service – it tends to be more senior management level officials in government, kind of throughout the different federal agencies – but it does apply to people beneath that. What it says, essentially, is that the president is telling agency heads to identify positions within the agency that are, quote, and this language is important because it kind of bears on the authority, “of a confidential policy-determining, policymaking, or policy-advocating character” and identify them so they can be put on a certain schedule in what it's called the excepted service.

Now what essentially this means is that normally civil servants can't be fired, except for cause. And there's a variety of procedural protections in place that prevent them from being fired at will or removed simply because supervisors don't like them or don't approve of them. And these were installed in the early 20th century as an effort to fight back against patronage systems, meaning systems in which politicians would appoint their political supporters and other people as a way of distributing largess to their supporters within government. Instead what they said: no, we're going to have merit-based civil service where civil servants will come in, they will have certain job rights as long as they perform to a certain level, that they can't be terminated and we're going to install these procedural protections to guarantee

that they any effort to remove them or severely punish them is actually in line with these sorts of for-cause reasons for removal, meaning violating some policy, doing something in a negligent manner.

Critics of the system have argued that the standards have become incredibly high, that it has become effectively impossible to remove these people and that that makes the government less efficient. But on the flip side of it is that the efforts to make employees at-will does open the way for return to a patronage system where you would have politicians, including the president and agency heads, being able to fill more of the ranks of government with their supporters in a way that might not comport with our general ideas about what actual good governance looks like, with actual experts in place, advising political decisionmakers and providing continuity and institutional memory across presidential administrations, in terms of the executive branch.

PITA: "People who work in a policymaking capacity" seems like a really wide swath of the government. Can do you have any particular examples, maybe that can help explain to people what we're talking about and the spread of jobs and responsibilities that get caught up in that kind of capacity?

ANDERSON: So that specific language, the "confidential policy-determining, policymaking or policy-advocating character" language, it comes from kind of two different places. One: it comes from a statutory provision that is in the law already that the president is invoking in issuing this executive order, which says essentially the president can identify certain positions that meet these criteria and exempt them through executive order from the usual set of procedural protections for government employment.

And the president has done this for certain categories of positions in the past. The most well-known is what are called Schedule C positions. This tends to be what we think of as conventional political appointee-type positions; so you know you have a young person who worked on a presidential campaign suddenly becomes a special assistant in the Department of Transportation or Health and Human Services, usually for a higher-level political appointee who might be appointed through Senate advice and consent or other procedures. The lower ranking, which can still be fairly senior but tend to be people who are the equivalent of the GS 13, 14, or 15 on the government service scale that goes from one to 15, tend to have a role where they're engaged in making decisions about policies or advocating for policies. There tends to be a political part of their role; they're often advising, again, political appointees, who are put in place through Senate advice and consent or through other sorts of roles, and therefore they're just deemed as having a role that is much more discretionary in terms of its function, which they're able to exercise a lot more judgment. And the logic is, well, these people, particular Schedule Cs, because they're in this role or they're advising and supporting people who are in these roles where they make big decisions for the political administration, they need to be at, well, they need to be able to be removed by the president because that's actually where we want the president to be able to appoint people who are agree with him, who agree with his views, who are going to implement his agenda.

The second place where this language comes from is from the context of Constitution law, specifically relating to the First Amendment. In a series of Supreme Court cases dating back to the 1960s and 1970s, the Supreme Court has basically said individuals who are in the government and government service have entitlement to their employment, where they're allowed to exercise their First Amendment rights without fear of losing their positions. And the concern was, essentially, well, if you have an entirely patronage-based system, then no government employee's gonna be able to exercise their political rights, because if they happen to disagree with their supervisor on something, or the president, then they will be removed at will and they won't have that job security that they need to be able to express their views. What the Supreme Court said basically is that, well, there is a countervailing interest here because we do need a president to be able to have people who can advise him and who will implement his agenda and therefore do agree with him politically. So, what they said is essentially, there's a class of people that meet this definition, this policy-determining character. Those are the people whose First Amendment rights can actually be curtailed by being put under at-will employment and then being terminated for reasons of the political activities or political beliefs, because they are, again, where they're supposed to

be implementing the president's agenda -- or the policymaker's agenda if this is a state official or local official, to which this also applies. A—b

But if they're not in that sort of role, then they are protected by the First Amendment and their views can't be infringed in that sort of way. This is relevant here and it's worth noting, while that the executive order the president issued doesn't really cite to this constitutional body of law, the memo that the Office of Personnel Management circulated implementing the executive order, giving additional directions, actually does point to this and note that this is the origin in part of some of these terms. The Supreme Court really defines it with a little more specificity, or at least a little more sense that these are really more senior positions. They really emphasize the discretionary nature of the policymaking, the fact that these are people who aren't bound by specific roles, specific sorts of obligations and responsibilities. They are the decisionmakers and that that is the sort of position it's talking about there, which might be a narrower scale and narrower universe of people that might fit within this sort of statutory language exception, at least the way may be interpreted by the executive branch.

So, there's a little potential tension here; or at least agency heads, if they're going to implement this in a way that will survive traditional scrutiny, have to meet kind of both definitions, both the statutory definition which is a little more open-ended, not well-defined, and this constitutional definition which, at least by my reading is a little bit of a higher bar to reach.

PITA: What sort of timeline are we talking about for an order like this? You mentioned it directs the heads of agencies to start reviewing their personnel and decide who could fit this classification. We are you know just at the tail end of an election here. In the chances that a Biden administration is who is going to come in in January, is this something that will just be reversed in January by an executive order from the Biden administration or will some of the effects of this already have been started to be put into place?

ANDERSON: What the executive order does it puts a 90-day timeframe and it says, agency heads, you have to return this analysis within 90 days, and that would basically run up until January 19, which is of course right before inauguration. So, if former Vice President Joe Biden were to win the presidency then he might be able to reverse this. But President Trump, while he's still in office, is at least going to get these returns from these agency heads. It's worth noting, nothing requires agency heads to take the full time frame. They could return this list tomorrow if they want it to, and then the president may act upon it in some way. What this might do, according to some accounts that people are concerned about, is that it creates both the ability for the Trump administration to kind of purge the civil service: The concern is that agency heads will say a huge swath of positions are in fact, fit within this definition of a policy-determining character and then therefore can be made at-will and then they can be fired once they are made at-will, by the president, by the agency heads, or by their supervisors. And then there's a possibility that they can then also be filled in certain ways by the Trump administration, maybe they can move people in. In particular concern is the idea that there may be an effort to take people who are currently in government in a Schedule C role, a more conventional political appointee, in other sort of political appointee roles for the Trump administration and transfer them over to this new Schedule F, where it says, yeah, you are at-will employee but the order says, you're not usually supposed to be the type of position that's turned at presidential transition and that therefore there's going to be at least politically awkward for the Biden administration to criticize the Trump administration and then come in and then remove these people sort of at-will. Though I don't necessarily think it's prohibitive.

So there's this kind of dual possibility. Both have a purge and have the kind of burrowing-in of certain Trump administration officials who might be appointed into these positions that have people concerned. And again, that could happen if the agency's return prior to January 19. If they only come back on January 19 that only leaves one day and it tends to be a very busy day, the day before inauguration, for the president to implement all this. Maybe the president and his administration could purge the ranks by making them at-will and just firing everyone writ large, but it doesn't leave a lot of window to do the hiring and replacing in, although they might be able to do some.

I think it's worth noting, though, that this does raise some legal questions. There are still the First Amendment restrictions that I mentioned before. If they remove people on the basis of their political views, or what clearly seems to be on the basis of their political views even if they don't say as much, or even colorably looks like it might be on their political views, those people might be able to sue in the courts by saying, a) my position is not of a policy-determining character of the nature that that Supreme Court was envisioning when it was discussing First Amendment protections. In fact, I am a more medium-level official who doesn't have that broad discretion in the sort of actions I can take and therefore, I should have First Amendment rights that protect my ability to have my own political views that this administration can't supersede just by changing this designation.

I think there's also likely to be a question of due process here. These were all are all individuals who were brought into the civil service and hired into positions with the understanding that they were entitled to certain job protections, job security, and that's now being changed. Now that may not be enough to say that the president, what the president is doing is categorically inappropriate; like the president does appear to have the statutory authority, at least to change these sorts of classifications. But if the president is really dismissing these people for no basis, doesn't justify the determination of the positions as putting them on the Schedule F and then the decision to terminate in an adequate way and doesn't give them an opportunity to make their case saying here's why I shouldn't be terminated, then it very well, I think, run afoul of due process limitations as well. Either way, these people are going to have causes of action to challenge their termination in the courts, separate from the statutory remedies that this is trying to get them out under. Now, they're going to have a set of constitutional questions that these sorts of removals will raise that may end up in litigation and that seems very unlikely to me to be resolved before January 20, in which case the Biden administration may have the opportunity to review this. But that does depend on the types of ways the administration – meaning the Trump administration -- chooses to use these authorities, how quickly it does it, how broadly it tries to do it to different types of officials.

But nonetheless, it's a very complicated endeavor that they are undertaking here. It's not clear to me that it's so easy that they can snap their fingers and implement these changes that they seem to be anticipating.

PITA: Wow. Yes, that sounds like a really complex situation and like there are a lot of wrangling behind the scenes on this. So Scott. Thanks very much for taking the time to try and write this out and explain this for us and we'll see what happens, of course.

ANDERSON: Absolutely. Thank you for having me.