



April 3, 2023

Submitted electronically

Kiran Ahuja  
Director  
U.S. Office of Personnel Management  
1900 E Street, NW  
Washington, DC 20415

**Re: Public comment regarding the proposed rule “Suitability and Fitness Vetting”**  
**RIN: 3206-AO17**

Dear Director Ahuja:

Family Research Council (FRC) respectfully submits the following comment regarding the proposed rule issued by the Office of Personnel Management (OPM) on January 31, 2023, entitled, “Suitability and Fitness Vetting.”<sup>1</sup> This proposed rule would make changes that FRC finds unacceptable to 5 C.F.R. § 731.202(b)(7). Accordingly, we urge the OPM to withdraw the proposed rule changes and reconsider whether this type of rule change is necessary.

“Suitability and fitness” are terms used in the federal employment context that describe facets of an agency’s decision-making process regarding whether an “an individual does or does not have the required level of character and conduct necessary to perform work for a Federal agency.” Such “determinations are based on whether a person’s character or conduct may have an adverse impact on the integrity or efficiency of the service.” Neither term describes anything related to a candidate’s assessed job qualifications.<sup>2</sup>

Under the current rule related to “suitability and fitness,” located at 5 C.F.R. § 731.202(b), eight specific factors bear on suitability determinations. Only one of them, § 731.202(b)(7), is relevant here. Currently, that rule section reads that “[k]nowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force” can be used as evidence of unsuitability.

The OPM proposed rule intends to replace § 731.202(b)(7) with five sections, 5 C.F.R. §§ 731.202(b)(7)-(10), (b)(12):

- (7) Knowing engagement in an act or activity with the purpose of overthrowing Federal, State, local, or tribal government;
- (8) An act of force, violence, intimidation, or coercion with the purpose of denying another individual the free exercise of rights under the U.S. constitution or any state constitution;
- (9) Attempting to indoctrinate another or to incite another to action in furtherance of an illegal act;

(10) Active membership or leadership in a group with knowledge of its unlawful aim, or participation in such a group with a specific intent to further its unlawful aim;

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(12) Violent conduct.

The overall effect of this proposed change would be to replace one section focused on actions taken to overthrow the United States *by force* with a collection of provisions that are broad, ill-defined, and over-inclusive.

### **Comments on Each Proposed Rule Section**

#### Section 731.202(b)(7) (as proposed)

We believe that the deletion of the modifier “by force” is an error. “By force” provides an element of tangibility to the behavior in question that is otherwise lacking and leaves “overthrow” as the defining term in the provision. “Overthrow” standing by itself does not carry much precision. The original wording of the provision should be restored but allow for the new levels of government to be included.

#### Section 731.202(b)(8) (as proposed)

“[D]enying ... the free exercise of rights under the U.S. constitution or any state constitution” presents enormous breadth for application. It is not accompanied by any modifiers like “under color of law” that could provide some detail to the kind of acts being described by limiting the activity to law enforcement and related activities.

- Recently, the idea that mere speech can be deemed “violence” has gained some acceptance in much of America. Such thinking, if absorbed into OPM legal practice, could transform pure speech into “violence,” “intimidation,” and “coercion.” There needs to be a precise definition of violence in the rule to preclude such unconstitutional, post-modern interpretations of the law.
- We note that the proposed rule does not require evidence of a criminal conviction to establish that the predicate action has occurred. There must be such a requirement.
- If such a requirement (evidence of a criminal conviction) will not be added to the rule section, then how does the OPM plan to decide whether state constitutional provisions have been violated?

#### Section 731.202(b)(9) (as proposed)

This proposed rule is highly problematic. First, we note that the U.S. Supreme Court has provided First Amendment protection for speech that lies short of “incitement to imminent lawless action.” *Brandenburg v. Ohio*, 399 U.S. 444, 448-9. We question whether indoctrination, a prolonged process, could lead to conduct “in furtherance of an illegal act.” We need to know more about the envisioned nexus between indoctrination and the furtherance of such activity.

Furthermore, no definition of “indoctrination” is provided. That term does not seem far removed from teaching, instructing, or preaching doctrine—a common practice in churches, seminaries, and schools. This problem is compounded by a lack of clarity as to what constitutes “attempting to indoctrinate another.” How does one attempt to indoctrinate?

We raise two hypothetical cases pertaining to leaders of religious congregations and this proposed rule section:

- First, a pastor or priest leads a congregation or parish in an urban setting that supports establishing the church as a sanctuary for undocumented migrants. The member of the clergy regularly teaches that his congregation should directly support and assist his work in protecting undocumented migrants (living in the United States illegally) who do take sanctuary in the church. In the future, could that religious leader be denied federal employment pursuant to § 731.202(b)(9)? Under the proposed rule, we believe that he could be. Explain the OPM’s position with respect to the clergy member’s coverage under the proposed regulation.
- Second, a local municipality has promulgated health regulations mandating the cessation of all religious worship and communion services during a pandemic. A pastor refuses to stop holding church services. This pastor regularly teaches that his congregation will have Sabbath services and that doing so is supported by the biblical command to keep the Sabbath holy—which has no pandemic exception. Under his supervision, members of his congregation assist and support holding church services. Could that religious leader be denied federal employment pursuant to § 731.202(b)(9)? Under the proposed rule, we believe that he could be. Explain the OPM’s position with respect to the clergy member’s coverage under the proposed regulation.

#### Section 731.202(b)(10) (as proposed)

This provision is almost incomprehensibly vague and must be withdrawn. The OPM has posited that a problematic group has “an unlawful aim.”

- What is an “aim”?
- What is an “unlawful aim”?
- How would the OPM know if the “aim” is “unlawful”? Criminal conviction?
- Is this “unlawful aim” so characterized based on interpretations of federal, state, local, or tribal law? Or is only federal law in play here?
- If this provision is included to target criminal gangs and cartel members, the provision needs to be withdrawn and crafted more specifically.
- Does the OPM intend that active members or leaders in groups of political dissidents of some law—like church leaders who refused to hand over run-away slaves after the passage of the Fugitive Slave Act of 1950—are unqualified for federal service *per se*?<sup>3</sup>

Section 731.202(b)(12) (as proposed)

“[V]iolent conduct” is the entire provision, and it is inexcusably vague. This proposed rule section must be withdrawn.

- The provision is so poorly defined that one could ask whether “violent conduct” includes playing high school football or hockey.

**The Proposed Rule Changes Are Unnecessary, Misconceived, and Must Be Withdrawn**

We note that the OPM has not met its burden of providing the specific, detailed information needed to justify this rule change. Additionally, the OPM has not sufficiently explained the detailed meaning of the provisions listed above.

Most importantly, the OPM makes this claim with respect to the proposed rules:

These more nuanced factors are narrowly tailored to address conduct that is not protected by the First Amendment, that has a clear nexus to the integrity and efficiency of the civil service, and that poses significant insider threat risks to Federal agencies and to the public they serve.

We don’t see much nuance, narrowing, or tailoring here with respect to the First Amendment. Instead, we see vague and broad provisions that could target disfavored groups with unpopular beliefs—including groups of religious believers whose beliefs not infrequently challenge societal norms and loyalties. At times, such beliefs may even be deemed to be illegal. The words of Justice Robert H. Jackson in *West Virginia State Board of Education v. Barnette* (1943) are well-known and worth recalling here:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.<sup>4</sup>

**Conclusion**

For the reasons stated above, Family Research Council opposes the cited rule changes and urges that the proposed rule be withdrawn without change to the current regulations.

Respectfully submitted,

/s/ Chris Gacek, J.D. Ph.D.  
Coalitions Senior Research Fellow

Family Research Council  
801 G Street, NW  
Washington, DC 20001

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<sup>1</sup> U.S. Office of Personnel Management, Proposed Rule, “Suitability and Fitness,” *Federal Register* 88, no. 20 (January 31, 2023): 6192-209, <https://www.govinfo.gov/content/pkg/FR-2023-01-31/pdf/2023-01650.pdf>.

<sup>2</sup> *Ibid.*, 6193. While it is not central to the focus of this comment, “suitability” and “fitness” are used in different contexts: “The difference in terminology used, as to suitability or fitness, is based on the type of position being adjudicated. Suitability determinations are made in reference to positions in the competitive service or career Senior Executive Service, whereas fitness determinations are made for excepted service positions, contractor positions, or Department of Defense (DOD) non-appropriated fund positions.”

<sup>3</sup> *An Act to amend, and supplementary to, the Act entitled “An Act respecting Fugitives from Justice, and Persons escaping from the Service of their Masters,” approved February twelfth, one thousand seven hundred and ninety-three*, Public Law 31-60, *U.S. Statutes at Large* 9 (1950): 462-65.

<sup>4</sup> *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).