TALES FROM THE SWAMP: HOW FEDERAL BUREAUCRATS RESISTED PRESIDENT TRUMP

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EXECUTIVE SUMMARY

American democracy operates on the principle of government by the consent of the governed. Americans regularly elect the president and Members of Congress. However, difficult-to-fire career employees with entrenched job security—not political appointees who serve at the discretion of the President—perform most federal work. These employees' jobs do not depend on election outcomes. Career employees thus exercise federal power without adequate transparency and democratic accountability.

Most career federal employees honorably serve the American people, diligently following orders and implementing policies of elected officials. However, a significant minority does not. This report documents cases of career bureaucrats resisting Trump Administration policies. Political appointees who served under President Trump reported:

- Career staff at the Department of Education assigned to work on politically sensitive regulations, including the Title IX due process regulations, would either produce legally unusable drafts that would never withstand judicial review or drafts that significantly diverged from the Department's policy goals. As a result, political appointees had to draft the regulations primarily by themselves.

- Career employees in the Department of Justice Civil Rights Division refused to prosecute cases they ideologically disagreed with, even when the facts showed clear legal violations. This included Civil Rights Division career staff refusing to work on cases charging Yale University for racial discrimination against Asian-Americans and protecting nurses from being forced to participate in abortions.

- Department of Health and Human Services (HHS) career staff circumvented President Trump's hiring freeze issued soon after taking office by crossing out new hires' start dates on their hiring paperwork. Staff used Sharpie pens to retroactively adjust the start dates to January 19, 2017—the day before President Trump took office.

- Career lawyers at the National Labor Relations Board routinely gave political appointees misleading legal analyses. They would only cite cases supporting their preferred position and omit contrary precedents. Some career lawyers refused to draft documents whose positions they disagreed with.

- Career attorneys in the Environmental Protection Agency did not inform political appointees about major cases the agency was involved in or the government's positions in pending cases. Political appointees had to monitor public court filings to learn what the agency was doing.

- Department of Labor (DOL) regulatory staff intentionally delayed producing a departmental priority regulation. A competent private sector attorney could have produced a draft regulation in two to three weeks. The team of about a dozen career staff claimed they needed a year to do so—a pace that amounted to each attorney in the unit writing less than one line of text a day.

Civil service protections enable this policy resistance. They make removing career employees for any reason prohibitively difficult. This is not what the founders of the civil service intended. They wanted to prevent patronage hiring but feared removal protections would protect incompetent or intransigent employees. Thus, after America converted to a merit service, federal employees could not appeal dismissals for over six decades. Federal employee appeals did not arise until the 1940s.

Congress should return to the original vision for the civil service and make all federal employees at-will. Removal protections shield career bureaucrats from accountability for how they exercise federal power. Government of, by, and for the people should not operate this way.

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America was founded on the principle of government by consent of the governed. Regular elections keep government leaders accountable to the people. Nonetheless, elected officials rely on career employees to do most government work. These career employees' jobs do not depend on who wins the election.

Many career staff diligently and impartially serve whoever holds office. However, many do not. Many career employees resisted the President's agenda during the Trump Administration. Interviews with former Trump Administration appointees reveal these employees used similar strategies to stymie the President's policies. These included:

- Withholding information;
- Refusing to implement policies;
- Intentionally delaying or slow-walking priorities;
- Deliberately underperforming;
- Leaking to Congress and the media; and
- Outright insubordination.

This report documents how hostile career employees utilized these tactics during the Trump Administration. Such bureaucratic resistance undermines the government's democratic accountability. Americans do not vote for federal career employees. Those employees should not stymie lawful policies elected officials' support.

Current civil service protections help enable this behavior. The law presumes federal employees deserve their jobs. Agencies face a high burden of proof to affirmatively demonstrate that employees deserve dismissal. Employees can then appeal. The entire process can take years. This makes it difficult for political appointees to meaningfully address poor performance or remove intransigent career staff. In FY 2020, agencies removed just one-quarter of one percent of tenured federal employees.[1]

The civil service's founders did not want the government to operate like this. The Pendleton Act that created the civil service did not allow employees to appeal dismissals. Federal employees did not get this ability until the 1940s—six decades after the spoils system ended. To protect America's democracy, Congress should make federal employees at-will once again. While restrictions on patronage-based hiring are appropriate, agencies should not have to go through a "virtual trial at law" to dismiss an employee. The President should also use his existing constitutional and statutory authorities to make policy-influencing career employees at-will. This would restore the original vision for the civil service. It would also stop intransigent career employees from undermining the democratically expressed will of the people.

[1] Author's calculations based on data released by the U.S. Office of Personnel Management. See footnote 49.

GOVERNMENT BY CONSENT OF THE GOVERNED

In America, governing authority flows, as the Declaration of Independence explains, "from the consent of the governed." The people elect the president; the president appoints senior agency officials; those officials carry out the law with the assistance of their subordinates. The Constitution thereby gives the American people a role (albeit indirectly) in choosing the officials who govern them (Erickson & Berry, 2019, p.2).

However, career employees fill almost all federal positions. Political appointees make up less than 3,800 of the federal government's approximately 2.2 million civilian jobs (U.S. Office of Personnel Management, 2021; U.S. Government Policy and Supporting Positions, 2020, p. 212).[2] Career employees make up over 99.8 percent of the federal workforce. The President and his appointees necessarily delegate most federal responsibilities to career staff.

This delegation stands in tension with the concept of government by the consent of the governed. Career staff keep their jobs irrespective of election results. If the American people do not like the job a cabinet secretary is doing, they can vote against the President who appointed him. Presidents routinely remove underperforming cabinet secretaries for precisely this reason.

But voters have no recourse if they do not like the job a career bureaucrat is doing. Career staff keep their jobs no matter who Americans elect. Anthony Fauci, for example, became the Director of the National Institute of Allergy and Infectious Diseases in 1984, when Ronald Reagan was President. He kept this powerful position through the subsequent elections of Presidents George H. W. Bush, Bill Clinton, George W. Bush, Barack Obama, Donald Trump, and Joe Biden. Voters' views on Fauci's performance—approval, disapproval, or indifference—did not affect his tenure.

In theory, staffing the executive branch with primarily career employees can be consistent with democratic self-government—if those staff neutrally implement the elected President's policies. Public administration scholars often espouse this vision of the civil service (Moynihan, 2004). In this framework, career employees are a neutral tool, impartially using their expertise to implement their politically accountable superiors' directives.

In reality, career federal employees are human beings with opinions and wills of their own. Many career employees joined the federal government because they wanted to make a difference. They often feel strongly about how their agencies should operate. Political scientists have long documented that some career staff pursue their policy preferences over and against those of elected officials (Johnson & Libecap, 1994, pp. 156-171). Such behavior undermines the government's democratic accountability.

The author of this report served on the White House Domestic Policy Council from 2017 to 2021. Agency appointees frequently described career staff resistance during his White House tenure. After leaving the White House, the author interviewed numerous political appointees about their time in government. This report documents their experiences with career staff. [3]

[2] During the 2021 Presidential transition there were 3,762 executive branch positions available for Presidential appointees, non-career members of the Senior Executive Service, and Schedule C political appointees (U.S. Government Policy and Supporting Positions, 2020, p.212).

[3] This report does not identify political appointees interviewed by name in order to protect sources. However, these appointees are known by the author to have served in senior policymaking positions in the Trump administration. In many cases they recounted examples of policy resistance that the author heard contemporaneously while serving in the White House.

FAITHFUL PUBLIC SERVANTS

It needs to be emphasized that many career employees are faithful public servants. Almost every political appointee interviewed for this report recounted career employees who did their jobs diligently. Many mentioned career staff who worked long hours and weekends to advance urgent priorities, especially during the COVID pandemic. Not a few liberal career employees would provide their perspective and concerns to conservative appointees, then faithfully implement policies political leadership decided on—even if they strongly disagreed. Those employees are a credit to the civil service. Public administration scholars' vision of career employees setting aside their views to provide neutral expertise is not baseless. Faithful public servants were either a majority or near-majority of career employees in most agencies.

However, an antagonistic minority has caused significant problems. And in some agencies—like the Department of Justice (DOJ) Civil Rights Division or the Environmental Protection Agency (EPA)—the vast majority of career staff appeared hostile to Trump Administration policies. Career employees in those agencies treated political appointees not as the representatives of the will of the people but as an occupying army to be resisted. Additionally, many (though not all) non-hostile career staff in agencies dominated by hostile career staff kept their heads down. They knew they could face internal retaliation for helping political appointees implement their agenda. While many career employees are faithful, many others undermine the elected President's agenda.

CAREER FEDERAL EMPLOYEES DISPROPORTIONATELY LIBERAL

This problem is exacerbated during conservative administrations. Federal employees are disproportionately liberal and thus are particularly likely to object to a conservative President's policies.

Researchers have repeatedly documented the federal bureaucracy's liberal lean. One recent study found twice as many registered Democrats as Republicans in the federal workforce (Spenkuch, Teso & Xu, 2021, p. 16).[4] This study found an even larger disparity in the Senior Executive Service (SES), the federal government's most senior career employees. Democrats outnumber Republicans in the SES by 3 to 1 (Spenkuch, Teso & Xu, 2021, p. 37).[5] Another study examined career employee campaign donations.[6] It revealed that most career federal employees' campaign donations go to politically liberal candidates (Feinstein & Wood, 2021,

[4] The study found that in 2019 approximately 50 percent of career federal employees were Democrats, while 26 percent were Republicans.
[5] The study found about two-thirds of SES employees are Democrats, compared to slightly more than one-fifth who are Republican.
[6] This study used data on campaign contributions between 1979-2014 from the Database on Money, Ideology in Politics. This database calculates a "CF score" that indicates how liberal or conservative political donors are based on the candidates they donate to. For example, a donor who gave exclusively to Republicans would be ranked as more conservative than most donors, and a donor who gave exclusively to Democrats would be ranked as more liberal. Further, a Republican donor who gave to prominent conservatives like Sen. Ted Cruz (R-TX) and Rep. Lauren Boebert (R-CO) would be ranked as more conservative than one who gave to moderates like Sen. Susan Collins (R-ME) and Rep. Fred Upton (R-MI). Similarly, a Democratic donor who gave to overtly socialist Sen. Bernie Sanders (I-VT) or Rep. Alexandria Ocasio-Cortez (D-NY) would be ranked as more liberal than one who gave to moderates like Sen. Joe Manchin (D-WV) or Rep. Henry Cuellar (D-TX).

p. 25).[7] While there are many conservative federal employees, the federal workforce as a whole stands well to the left of America's political center. Career staff are even more liberal than Democratic Presidential political appointees in some cases.

One political appointee who served at the Department of Health and Human Services (HHS) under the George W. Bush and Donald Trump administrations recalled a conversation with a counterpart who served in the same agency under President Bill Clinton. This political appointee had remarked that it must have been easier for his counterpart to work with HHS career staff because they were philosophically aligned. The Clinton administration official replied that managing the career employees was actually quite difficult—the career employees considered him and his fellow Clinton appointees insufficiently progressive "establishment sellouts." The Clinton official reported that career staff constantly leaked to Congress and the media to pressure political appointees to be more aggressive.

CAREER STAFF RESISTANCE

Researchers find that when conservatives lead agencies with liberal career staff, those agencies issue fewer policy changes and take longer to issue those changes (Feinstein & Wood, 2021, pp. 30- 37).[8] Similarly, researchers find that career employees are less productive and effective when their political views meaningfully differ from their agency's political leadership (Spenkuch, Teso & Xu, 2021, pp. 19-27). In some cases, left-wing career staff do not simply obstruct policies they oppose; they actively move policy in the opposite direction than that desired by political appointees (Wood, 1988).

Bureaucratic resistance was particularly pronounced during the Trump Administration. While career staff policy opposition usually occurs behind the scenes, it made national news under President Trump. Within two weeks of President Trump's inauguration, the Washington Post ran an article entitled "Resistance from within: Federal workers push back against Trump (Eilperin, Rein, & Fisher, 2017). Later that year, Bloomberg News reported how "career staff have found ways to obstruct, slow down or simply ignore their new leader, the president" (Flavelle & Bain, 2017). Several political appointees who served in the Trump and Bush administrations reported greater career staff resistance when they served under President Donald Trump than under President George W. Bush.

Some federal employees even boasted of their intransigence to each other. For example, President Trump appointed Peter Robb to serve as General Counsel of the National Labor Relations Board (NLRB). A Freedom of Information Act request uncovered NLRB regional directors celebrating how their self-described "resistance" stymied Robb's agenda (Nelson, 2021). While public administration scholars theorize about impartial career staff providing neutral administrative expertise, many federal employees do not approach their jobs that way.

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[7] CF scores are normalized to be mean zero with a standard deviation of one. Feinstein and Wood (2021, p. 25) report that the average career federal employee's CF score over the 1979-2014 is -0.560. Applying a Z-score table shows that an individual 0.56 standard deviations to the left of a normalized population mean is to the left of 71.33 percent of the overall population (Z Score Table, n.d.). This means the average federal employee gave to more liberal candidates than 71 percent of all campaign donors did.

[88] Regulation in this context refers to a formal change in agency rules required to go through the Administrative Procedures Act's notice-and-comment process. APA rulemaking is required for both regulatory and deregulatory actions. Career staff opposition does not simply make it harder for agencies to increase regulatory burdens, but also to promulgate regulations that reduce regulatory burdens.

THE HOSTILE CAREER STAFF PLAYBOOK

Polling shows Americans recognize this. A Monmouth University survey (2018) found 60% of Americans believe unelected officials have too much influence in determining federal policy. But there is much less public awareness of how the bureaucracy exerts its influence. Policy resistance usually occurs behind closed doors, and news reports paint only a partial picture. The former appointees the author interviewed often reported similar experiences; hostile career staff used similar tactics across agencies. This report publicly documents the playbook antagonistic staff used to impede policies they opposed.

WITHHOLDING INFORMATION

Hostile career staff can obstruct political appointees in many ways. Perhaps the most common tactic is simply withholding information. Career staff have agency-specific expertise. They know many things political appointees need to implement their agenda. Career employees can frustrate that agenda simply by withholding their expertise or knowledge. Hostile career employees did this frequently.

When political appointees asked questions, antagonistic staff would provide as little information as possible.[9] They might know where political appointees wanted to go with their questions and how to get there, but they would not volunteer that information. Often, they would only provide information supporting their preferred approach. In other cases, career staff withheld vital information from political appointees entirely. This forced political appointees to waste time gathering information their career employees could have easily provided. For example, political appointees reported that:

- NLRB career staff would only present precedents supporting their preferred case resolution. While they would accurately summarize prior cases, the staff appeared to be—or at least pretended to be—almost incapable of presenting cases that undercut their preferences.[10] Several NLRB subdivisions never presented arguments supporting the employer's position—only reasons why the union should prevail. This made evaluating cases very difficult. NLRB political appointees had to do their own research to understand both sides of the legal arguments. Career staff would then fiercely object if political appointees rejected their recommendations. One senior career employee frequently cried when her recommendations were overruled. Unfortunately, this behavior was not atypical. Many other agencies reported that career staff selectively presented only legal precedents that supported their preferred position.

- Department of Education (ED) career staff concealed documents political appointees wanted to review. Under the Obama Administration, ED alleged several for-profit colleges were effectively defrauding students. The Department subsequently denied these colleges access to federal student aid. This bankrupted them almost immediately, as they lost significant numbers of students and associated revenues. The schools had no opportunity to defend against these charges before going under. After President Trump

[9] Throughout this report the term "political appointees" is used to describe reports from officials at specific agencies, regardless of whether the author spoke to one or multiple former officials at such agency. This approach is used to help protect the confidentiality of the author's sources.

[10] For example, NLRB career staff would present decisions the NLRB made under the Obama administration overturning 50 or more years of prior precedent as settled law and would not present cases or precedents the NLRB made under previous administrations coming to different conclusions.

took office, political appointees asked to review the evidence that justified this administrative death penalty.

Career employees refused to turn over the internal documents. They provided various excuses, such as claiming that they did not have the data anymore or the people involved had left. However, ED subsequently had to turn over this evidence during a lawsuit. Career employees then promptly produced memos summarizing the Department's evidence against the for-profit schools. Those memos showed the Department had a weak case. This intransigence was very frustrating to ED political appointees. ED career staff had precisely the information they were looking for all along, but concealed it until legally required to disclose It.

- Career employees in the EPA Office of General Counsel (OGC) routinely failed to keep political appointees informed about significant cases. OGC would have weekly staff meetings about agency litigation. EPA political appointees would subsequently double-check with Department of Justice (DOJ) lawyers and find out the career staff were not providing updates for critical cases. The career employees were not telling political appointees about significant cases EPA was involved in or the legal arguments EPA was making. Staff omissions were so frequent and significant that political appointees resorted to regularly checking PACER to see what was happening.[11]

MISREPRESENTING THE FACTS

Some career employees went beyond withholding information—they actively misrepresented the facts about what agencies could, or could not, do. Political appointees had to do their own research to determine what actions they could lawfully undertake. For example, political appointees reported:

- The Food and Drug Administration (FDA) asserted authority to regulate laboratory developed tests. By late February 2020, the FDA had authorized only one COVID-19 test—a Centers for Disease Control and Prevention test that proved defective. On February 28, 2020, political appointees in the Department of Health and Human Services (HHS) held a conference call with FDA officials. HHS wanted to expand COVID testing capacity significantly. FDA officials asserted the law required them to review all lab-developed COVID tests, and those tests could not be used without their authorization. HHS ordered the FDA to allow tests under an emergency use authorization with the data to be reviewed by the FDA later. This decision significantly increased America's ability to detect COVID infections. HHS officials subsequently examined the law in detail. They discovered that the FDA had no authority to regulate laboratory-developed tests in the first place. HHS appointees concluded FDA staff had been fighting a turf battle. FDA career employees subsequently leaked both their opposition to expanded testing and the legal memorandum concluding the FDA lacked authority over laboratory-developed tests (Cancryn & Owermohle, 2020, U.S. Department of Health and Human Services, 2020).

- Career employees at DOL consistently told political appointees they could not take actions that were in fact within their legal discretion. One career employee repeatedly

[11] PACER is an acronym for Public Access to Court Electronic Records. It provides electronic access to U.S. federal court documents, such as filings and court orders in ongoing judicial proceedings.

told political appointees that they could not issue Direct Final Rules (DFR)—a method of issuing rules without going through notice-and-comment proceedings. On the first day of the Biden Administration, DOL used a DFR to rescind internal regulations governing DOL's rulemaking process. That DFR was signed by a career staffer who repeatedly told Trump political appointees, "you can never do a DFR."

- NLRB career employees "misstated" the dates the agency's union contract could be reopened for renegotiation. Had political appointees taken their word for it, the deadline would have passed, and they would have been stuck with the contract negotiated under the Obama Administration. Fortunately, they double-checked the contract themselves, found career staff gave them the wrong dates, and re-opened the contract.

REFUSING IDEOLOGICALLY DISAGREEABLE WORK

Career staff are supposed to implement political appointees' policy directives, regardless of their personal policy views. This is a fundamental obligation for government lawyers. Their profession ethically obligates them to represent their client—the federal government—to the best of their ability, irrespective of their personal views. Many career staff approach their jobs this way. But a significant minority will not work on projects they disagree with. Their attitude is they only do work they believe is good policy, regardless of the administration's policy views.

This approach undermines America's democracy. Career staff who refuse to enforce laws they personally oppose stop the American people from getting the policies they voted for. Political appointees are meant to manage and supervise career staff's general operations; they do not have the time to take over routine enforcement actions. Unfortunately, some career employees refuse to enforce laws they disagree with. For example, political appointees reported that:

- In 2016, an Asian-American advocacy group asked the Department of Justice (DOJ) to investigate Yale and other Ivy League universities' admissions practices. The advocates suspected racial discrimination against Asian-Americans in violation of the Civil Rights Act. The Educational Opportunities Section (EOS) within the DOJ Civil Rights Division exists to investigate such complaints. However, the complaint languished because EOS career staff did not support the case. Winning it would prohibit many race-based affirmative action programs.

  In 2018, political appointees directed the career deputy who ran the EOS to oversee the Yale investigation and move it along. The career deputy did so, despite philosophically disagreeing with the case. Two attorneys from outside EOS were assigned to work on the case. The investigation took much longer than usual despite being a straightforward case. Finally, after two years of investigating, the DOJ uncovered strong evidence of racial discrimination against Caucasians and even stronger evidence of discrimination against Asian-Americans. Political appointees personally drafted a racial discrimination complaint against Yale—a task that junior career lawyers would typically handle.

  DOJ then needed to assemble a team to pursue the Yale racial discrimination case. Political appointees asked EOS to provide eight lawyers to work on the case. The career staff refused outright, telling political appointees that none of them would work on it. DOJ instead had to assemble a team from outside EOS, primarily made up of employees

borrowed from the DOJ Civil Division, the U.S. Attorney's Office in Connecticut (where Yale is located), and the Civil Rights Division's front office. DOJ had clear evidence of racial discrimination at Yale and a clear legal theory, but no EOS career lawyers would work on the case because it did not support their worldview.[12]

- Unfortunately, Civil Rights Division career lawyers often approached their job this way. Political appointees had to pursue most religious liberty cases themselves, getting assistance from only one career attorney.[13] For example, the Church Amendments prohibit hospitals from requiring employees with moral objections to participate in abortions.[14] The Civil Rights Division's career lawyers personally opposed these conscience protections and would not enforce them. The Division did sue the University of Vermont Medical Center for blatantly violating the Church Amendments. However, political appointees had to largely handle this case themselves and run it from the front office. No career lawyers would work on it.

  Similarly, DOJ sought to protect the rights of girls and young women to compete on a level playing field in high school and college sports. The Civil Rights Division supported parents in Connecticut suing to prevent biological males who identified as women from unfairly competing against girls in track meets and an Idaho law barring biological males from competing against women. The Division's career staff opposed these efforts, and political appointees performed all related legal work. So while the Civil Rights Division has over 400 lawyers and professional employees, it had only about a dozen lawyers—primarily political appointees—willing to work on certain issues. Political appointees believed these limitations significantly impaired the Division's effectiveness.

- Some career lawyers at the National Labor Relations Board flat-out refused to draft decisions whose conclusions they disagreed with. Political appointees got the impression these career lawyers were almost daring the political appointees to dismiss them. The lawyers made it clear they would then claim the political appointees were not following the law and assert whistleblower protections. The political appointees were indeed seeking to change existing NLRB precedents—but this is well within the NLRB's authority. Under President Obama, the NLRB overruled a cumulative 4,500 years of existing precedents (Lotito, Baskins, & Parry, 2016). Nonetheless, these career lawyers would not write decisions overturning administrative precedents they supported.

DELAYS AND SLOW-WALKING

Outright refusing to work on a project can be risky; it gives political appointees legal justification to dismiss career staff who refuse orders. While the removal process is complex

[12] The Biden administration dismissed this case against Yale shortly after taking office, but a coalition of Asian-Americans are pursuing a similar case through private litigation.
[13] Additional examples include only one Civil Rights Division career lawyer being willing to work on letters warning state and local governments that the First Amendment prohibits them from applying more stringent COVID restrictions to places of worship than to similarly situated secular facilities.
[14] The Church Amendments were named after their principal sponsor, Sen. Frank Church (D-ID), and are codified at 42 U.S.C. § 300a-7 et seq. The Church Amendments depend on federal enforcement as they do not contain a private right of action that would allow hospital employees to file suit on their own behalf.

and time-consuming, it is possible to remove federal employees who refuse to work.[15] Consequently, even hostile staff typically accept assignments they object to. However, many will then slow-walk the project, taking far longer to complete it than work they supported. Political appointees would frequently find that career staff would take weeks or months to do work that political employees could do themselves in a few days. For example, political appointees reported that:

- A DOL enforcement agency has a subcomponent whose only job is to write regulatory and policy documents.[16] The unit has approximately 10 to 15 career employees at any given time. In the fall of 2017, political appointees requested a status update on a draft proposed rule. The unit had been working on this rule since the start of the Trump Administration. It was a department priority and this unit's primary responsibility during this period. Career staff reported the draft would not be complete until March 2018. Political appointees asked for the draft before the end of the year. Career staff said that pace was impossibly burdensome and would drive staff to quit. Political appointees subsequently calculated the staff's proposed pace amounted to each career employee writing one line of text per day. The appointee estimated a competent private-sector lawyer could complete the draft in two to three weeks by themselves. Political appointees subsequently gave up on these career staff and wrote many policy documents themselves.

- Under President Clinton, the U.S. Department of Agriculture (USDA) issued a rule prohibiting road construction on millions of acres of land under the Forest Service's jurisdiction. Since roads are necessary for mining and logging operations, this rule effectively banned legally permissible development in those areas. No federal law required this "roadless rule," but courts ruled it was within USDA's administrative discretion. The roadless rule shut down all but two logging mills in Alaska, badly hurting southeast Alaska's economy and workers and families in the area. Staff briefed President Trump on the roadless rule, and he directed USDA to repeal its application to the state of Alaska.

  The Forest Service has no political appointees, only career staff. Under President Clinton, Forest Service career employees issued the roadless rule quickly, going from a proposed to the final rule in less than 12 months. Under President Trump, USDA took over two years to rescind its application to just the state of Alaska (Special Areas, 2020). That effort—implementing a directive from the head of the executive branch—also required massive political appointee involvement. Forest Service career staff disagreed with the policy and did not actively support issuing the rule. They knew the steps the National Environmental Policy Act (NEPA) requires to justify decisions affecting the environment. Still, they either would not do them, dragged their feet doing them, or produced unusable work product. Political appointees ultimately had to heavily edit and rewrite the rule to get it issued.

- Career lawyers also attempted to slow-walk the DOJ Civil Rights Division's investigation into the Cuomo nursing home scandal. Former New York Gov. Andrew Cuomo required nursing homes to re-admit residents who contracted COVID-19. This order exposed many uninfected nursing home residents to the coronavirus, and thousands subsequently died.

[15] Under 5 U.S.C. § 7513(a) federal employees may be removed for such cause as will improve the efficiency of the service. Refusal to perform their duties constitutes one such cause.
[16] E.g. Notices of Proposed Rulemakings (NPRM) and Final Rules. Such rules can be either regulatory or deregulatory actions.

The Cuomo Administration initially reported very low nursing home death rates. DOJ political appointees found these reported figures questionable. They knew New York had a high COVID death rate, and the elderly were particularly vulnerable, so the low reported figures for nursing homes seemed odd. DOJ requested additional data from several states, including New York and Michigan, that required nursing homes to admit individuals with COVID.[17]

Civil Rights Division career lawyers tried to block this request. They argued DOJ should request data from states with Republican governors, like Texas and Indiana, based on historical surveys of how well-run nursing homes had been before the pandemic. At the time, Texas and Indiana had far lower death rates than New York State. Political appointees overruled these objections, saying they were only examining how states were currently responding to the COVID pandemic. The Division's career lawyers dragged their feet and did not draft the letters requesting additional data. Frustrated with the delay, DOJ political appointees drafted the letter and sent it out themselves (Department of Justice, 2020). This action helped to expose the Cuomo Administration's cover-up of deaths in New York nursing homes. Subsequent investigations showed New York's official figures underreported nursing home deaths by as much as 50 percent (New York State Office of the Attorney General, 2021).

UNACCEPTABLE WORK PRODUCT

Hostile career employees can only delay projects for so long. Sufficient delay can become an effective refusal to perform work, which could justify termination. So hostile career staff unwilling to formally refuse an assignment need to ultimately complete it. However, they often then produce unacceptable work product. Draft regulations are complex documents with many legal facets. Sophisticated career staff can draft regulations that formally comply with their directives but are unlikely to withstand judicial review. This allows them to technically complete their assignment—making it harder to dismiss them—while stymieing the administration's policy objectives. Such obstruction frequently forced political appointees to do work that career staff should have performed themselves. For example, political appointees reported that:

- All politically sensitive regulations at the Education Department (ED) had to be written by political appointees. Career employees assigned to produce drafts of these regulations would come back with "completely unusable" drafts that either diverged significantly from Department priorities or would never withstand judicial review. So political appointees had to do it themselves. For example, the Education Department's Title IX rule (providing due process when students are accused of sexual misconduct) was drafted almost entirely by political appointees (Nondiscrimination on the Basis of Sex, 2020). Career involvement served only to preview the arguments that opponents of the rule would eventually make in the courts and the public sphere once the rule was published. Political appointees at many other agencies reported similar experiences.

- The USDA participated in the administration-wide effort to reduce the NEPA regulatory burden. The administration wanted to clarify that the federal government simply guaranteeing a loan is not a "major federal action" subject to a burdensome NEPA

[17] These states were New York, New Jersey, Pennsylvania, and Michigan.

review.[18] The Council on Environmental Quality (CEQ) was working on the rule and turned to USDA to write that section. USDA career staff included attorneys and experts who were highly competent and well versed in these issues. But when it came time to draft the rule, these career staff somehow could not produce anything that political appointees thought passed legal muster. Career staff spent 30 days creating unusable work product for an administration priority. Ultimately political appointees had to write the analysis themselves. It took political appointees 10 days to do the work and then turn it over to CEQ. Political appointees found it "unbelievable" that capable career employees did such shoddy work.

- Senior leaders at the Department of Justice wanted to issue guidance clarifying that the law allowed states that modified voting policies during the COVID-19 pandemic to return to their pre-pandemic practices afterward. Career lawyers in the Civil Rights Division instead argued that federal law makes voting policies a one-way ratchet: once states expand them, they cannot revert to previous practices. Political appointees directed a career attorney to write a memo providing legal justification for the guidance. That career lawyer accepted the assignment. But his memo argued against the policy and said it lacked any legal justification. The project had to be assigned to political appointees, who found solid legal arguments justifying the memo. In a 6-to-3 decision, the Supreme Court subsequently held federal law does not make voting policies a one-way ratchet—precisely the opposite position the career lawyer took (*Brnovich v. Democratic National Committee*, 2021).

LEAKING

When internal obstruction does not block an initiative, hostile career staff will often leak to the press or Congress. Political appointees find leaks extremely damaging. While they can work around career obstruction—such as having political appointees do tasks career staff would typically perform—leaks consume enormous amounts of time and attention. They can create a media or congressional firestorm, especially when career staff misrepresents the policies in question. Political appointees must then respond to the resulting inquiries, taking time away that should be spent advancing their policy agenda. Selective leaking is a deliberate career staff tactic to divide political appointees' time and attention and pressure them to change policy. For example, political appointees reported that:

- The Trump Administration began developing an executive order directing the General Services Administration (GSA)—which oversees most federal building construction—to design buildings that most Americans find beautiful. Surveys show most Americans prefer traditional architectural styles for federal buildings (National Civic Art Society, 2020). However, the architectural community—including many GSA career employees—broadly prefers modernist designs. GSA has consequently built a series of federal buildings that local residents find off-putting.[19] For example, GSA awarded the design contract for the San Francisco Federal Building to Thomas Mayne, a leading modernist architect. He describes himself as creating "art-for-art's-sake architecture that only other

[18] This proposal would exclude NEPA review when the federal government's sole action involved guaranteeing the loan and, if necessary, making the lender whole and selling the underlying asset. It kept NEPA review when USDA itself was making the loan.

[19] The U.S. Federal Court House in Salt Lake City, Utah is another example. GSA career staff selected the architect and gave him broad discretion to choose his preferred design, while giving little input to the local community. Locals now derisively refer to this courthouse as a "Borg Cube" or a "gigantic air conditioning condenser" (SLC Weekly).

architects can appreciate" (Cordeiro, 2009). San Franciscans now rank the San Francisco Federal Building as one of the ugliest structures in their city (Keeling, 2016).

In December 2019, career lawyers at GSA were asked to review an early draft of the order. To avoid leaks, it was not shared with other GSA components. Nonetheless, a copy of that draft appeared in the press in February 2020 (McGuigan, 2020; Make Federal Buildings 'Beautiful Again'?, 2020). The leak created a media firestorm, with many critics comparing support for traditional architecture to Hitler's Nazi Germany (Baskin, 2020; Wagner, 2020; Pinto, 2020). GSA subsequently determined that a career lawyer gave a physical copy of the draft to the career chief architect. The chief architect converted it into a PDF using an agency scanner. He then e-mailed it to several external recipients and his personal e-mail account with the subject heading "For your eyes only … for now." A week later, he resigned in protest.

Ironically, the provision that attracted the most criticism—language making classical architecture the default style for all new federal buildings—had already been cut from the working draft before the chief architect resigned.[20] The executive order that President Trump ultimately signed instead eliminated GSA's institutional bias against traditional architecture while directing GSA to seek community input on new building designs and prioritize designs that non-architects appreciate (Exec. Order 13967). However, the leak made the ultimate executive order controversial. President Biden rescinded it shortly after taking office (Exec. Order 14018).

- The Interior Department (DOI) wanted to revise Obama Administration regulations on preventing well blowouts in offshore drilling. While everyone agreed regulations were necessary, industry experts reported the Obama Administration regulations were more costly and cumbersome than necessary to achieve the safety objectives (Oil and Gas and Sulfur Operations, 2018). Political appointees and career staff disagreed on how to best implement new safety standards. The career employees responded by refusing to do the work necessary to draft the new rule. They would also send internal e-mails deliberately mischaracterizing what political appointees asked for. After much effort, political appointees were ultimately able to get the rule issued. Career employees promptly leaked their opposition and e-mails mischaracterizing the process to the press. Multiple articles came out about how political appointees had strong-armed these career staff (Mann, 2020). The career staff used leaks to make it politically costly to overrule their policy preferences.

- NLRB career staff leaked fabricated allegations the agency was going to close regional offices. On a conference call with regional directors, political appointees were asked if they planned to close or consolidate any regional offices. They told the directors that they had no plans to do so, but they would look at everything to make the agency run more efficiently. A regional director promptly wrote a letter to a Democrat NLRB Member claiming the General Counsel's office planned to close several regional offices. That Member shared the letter with Sen. Elizabeth Warren (D-MA) and Bloomberg News. The allegations were entirely false. At no point did the political appointees ever contemplate closing regional offices—even though the Obama administration had closed regional offices due to declining caseload. However, the leak damaged political appointees' relations with the regional directors and NLRB employees.

[20] The final executive order made classical architecture the default style for the District of Columbia, rather than nationwide.

INTRANSIGENCE AND INSUBORDINATION

Some career staff went beyond refusing assignments or doing them poorly: they would flatly disregard political appointees' directions and instead do what they thought best. Such insubordination and intransigence occurred commonly in some agencies and infrequently in others. For example:

- President Trump issued a federal hiring freeze shortly after taking office (Hiring Freeze, 2017). A few months later, political appointees at the HHS reviewed several HHS advisory committees' HR records. They noticed that many committee members initially had starting dates after the hiring freeze. HHS career staff had crossed out the initial hiring dates with a sharpie pen, writing in January 19, 2017, instead—the day before President Trump's inauguration.

- NLRB regional staff commonly tried to avoid implementing policy directives.[21] They would also find creative ways to avoid reporting that fact back to political appointees. One way they did so was by manipulating the NLRB's system for tracking case resolutions. That database only tracked cases where a decision was recorded. Thus, career staff would avoid recording decisions in cases political appointees might be interested in—hiding those cases from political appointees' view. In one case, political appointees directed a region to dismiss a case. But the region did not send a letter to the parties notifying them of the dismissal; sending that letter would have triggered reporting a dismissal in the database. Regional career staff tried to keep the case alive until political appointees realized what was going on and ordered them to complete the process. Once political appointees discovered this technique, they directed staff to report all cases where no decision had been made. They accounted for one-tenth of all NLRB cases.

- Peter Ohr, an NLRB regional director, refused to implement directives on conducting union elections.[22] During the COVID-19 pandemic, the NLRB set protocols to determine when regions should conduct in-person or mail-in elections (2020). The NLRB typically prefers in-person elections, which have higher turnout and are more representative of employee views. During the pandemic, the NLRB expanded the use of mail-in elections, which have lower turnout. Mail-in elections are also seen as easier for unions to win because—unlike employers—unions can campaign at workers' homes (Morris, 2020; National Labor Relations Board, 2017, pp. 349-50). Ohr disregarded these protocols. He only scheduled mail-in elections, even when protocols called for a higher turnout in-person election.

- An DOI coal plant inspector planned to shut down a mine that employed approximately 30 workers for three months. The mine violated technical DOI protocols, but this paperwork violation did not create any health or safety risks. The mine had the right to appeal and remedy the violation without penalty—keeping the mine open and letting workers keep their incomes through the Thanksgiving and Christmas holidays. Political appointees directed the inspector to allow the mine to stay open while remedying the violation. However, the inspector refused to obey these directives and persisted in driving to the mine to order it to shut down. The inspector only stood down after the Interior

[21] Another example of this phenomenon frequently occurred in litigation. Regional directors would not make the legal arguments in cases that headquarters instructed them to make.
[22] President Biden designated Peter Ohr as acting general counsel shortly after taking office.

Secretary personally ordered him over the phone to let the mine stay open and the workers keep their jobs.

HIRING IDEOLOGUES INTO CAREER POSITIONS

The media often describes career employees as non-partisan. This is only sometimes true. Career staff are typically less partisan than political appointees (Feinstein & Wood, 2021, pp. 25-30). However, agencies often hire partisan ideologues Into career positions. Sometimes political appointees hire fellow partisans into these roles. In other cases, ideological career staff hire like-minded applicants. Either way, ideological career staff make implementing a contrary policy agenda very difficult. Examples political appointees reported of agencies hiring overtly ideological career staff include:

- The Department of Justice Inspector General (IG) found that, during President Obama's first term, all but one employee hired into a section of the Civil Rights Division had previously worked for left-wing activist organizations or the Democrat party. The remaining employee had no obvious partisan affiliation. This section did not hire a single conservative or Republican during this period (Department of Justice, 2013, p. 209). The IG criticized the hiring committee for using superficially neutral standards that effectively skewed hiring towards left-wing activists. For example, the hiring committee strongly preferred applicants with experience in public interest or civil rights litigation. The IG found this requirement had little relationship to employees' actual job duties. But most of the organizations doing this work—such as the American Civil Liberties Union (ACLU)—are left-wing. Consequently, preferring employees with civil rights litigation experience meant hiring preferences for liberal activists (Department of Justice, 2013, pp.219-222).

  These problems remained unchanged in the Trump Administration. Career staff continued to apply superficially neutral hiring criteria that effectively screened out conservative or nonpartisan applicants. Career staff also appeared to "blackball" anyone whose resume indicated they were conservative, even if that was not the stated reason for their not getting hired. At the same time, Civil Rights Division career staff hired many overtly liberal and progressive activists.

- Most senior career lawyers hired by the Obama DOL were affiliated with left-wing organizations. For example, the Obama Administration hired a former Service Employees International Union lawyer to run the regional solicitor's office in California. This attorney continued her left-wing activism at DOL, filing weak cases on ideological grounds. Near the end of the Obama Administration, she brought charges alleging Oracle systemically discriminated against women and minorities. A DOL administrative law judge comprehensively rejected her complaint, holding DOL provided no credible evidence to support its charges (Kaylin, 2020).

  The Obama DOL similarly appointed the head of New York State's "Joint Enforcement Task Force on Misclassification" to head the Fair Labor Standards Division of the Solicitor of Labor's Office. This Task Force sought to reclassify workers as employees instead of independent contractors—a longtime priority of left-wing labor activists. This appointee continued that work for the Obama DOL. She is highly ideological and was functionally an Obama Administration political appointee—but was hired into a powerful career

position that she retained throughout the Trump Administration. Trump appointees had to work around her opposition to their policies.

- The Obama National Labor Relations Board hired highly ideological union activists into career positions. Political appointees believed the Obama Administration did this deliberately to make it hard for a future administration with different policy preferences to get anything done. Senior career NLRB employees openly discussed their opposition to political appointees' policies over internal e-mails, boasting how their "resistance" frustrated that policy agenda (Nelson, 2021).

  This hiring philosophy has been carried into the Biden Administration. The Biden NLRB recently hired a prominent labor law writer for a career position in a regional office (Magner, 2021). This writer has extensively written about how the NLRB could radically rewrite longstanding precedent to boost union organizing. He has called for the Board to prohibit employers from discussing unionization with employees, order employers to bargain with unions their employees did not vote for and give unions authority over businesses' capital allocation (Magner, 2020).

CAREER EMPLOYEE RESISTANCE CHANGES POLICY

Career employee resistance changes policy. While political appointees can often work around hostile career staff, career opposition sometimes changes policy initiatives or defeats them outright. This typically happens for one of several reasons.

Reducing Policy Bandwidth

First, career staff resistance reduces political appointees' bandwidth. When career staff refuse assignments or produce unusable work product, they force political appointees to implement policy reforms on their own. But agencies do not have enough political appointees to assume all these responsibilities by themselves. Thus, policy resistance forces agencies to triage their agenda, focusing political appointees' efforts on their highest priorities and leaving tertiary projects undone. Career staff opposition prevented agencies from issuing many rules during the Trump Administration. Political appointees could not delegate these tasks to career employees, and they did not have enough time to do them themselves.

- For example, political appointees reported the ED wanted to roll back Obama-era regulations requiring states to use a standard methodology to determine if a "significant disproportionality" occurs for the purposes of the Individuals with Disabilities Education Act (Assistance to States for the Education of Children With Disabilities, 2017). Career staff said they could not write those regulations. They claimed the Obama regulations were the only possible interpretation of the statute. Political appointees examined the statute and disagreed. They believed the law allowed ED to return to the pre-Obama regulatory state. Nonetheless, the Department did not have enough political appointees to write the rule rolling back the Obama regulations themselves. Since career staff were unwilling to work on it, the rule was never issued.

Academic research confirms these reports. Researchers find that agencies with hostile career staff issue fewer and less significant regulations (Feinstein & Wood, 2021, pp. 35-37).

Running out the Clock

Second, hostile career staff can defeat policy changes by running out the clock. Stalling tactics like delays and slow-walking usually just postpone policy changes. However, in some cases—especially in the final year of a presidential term—stalling can block policy changes outright.

- For example, political appointees reported that in 2020 the USDA wanted to reinstate regulations reforming the school lunch program. USDA had published regulations in 2018 giving states more flexibility to meet the school lunch program's nutritional standards (Child Nutrition Programs, 2018). This rule allowed states to serve meals that students would actually want to eat. Opponents sued, and in April 2020 a federal district court judge ruled against USDA on procedural grounds. The court held the agency had the authority to make those changes but had made mistakes in complying with notice-and-comment requirements (*Center for Science in the Public Interest v. Perdue*, 2020).[23]

  If a court invalidates a rule for procedural reasons the agency can bring it back in effect by re-doing the rulemaking process and fixing the procedural defect. The first step is to re-publish the proposal in the Federal Register—this time providing adequate notice of the intended final policy. Putting this notice together is a ministerial task; the agency has previously done almost all the work of creating the rule. It must simply republish that proposal with only slight modification. The task generally takes only a few days. After the district court ruled against USDA, political appointees directed the Food and Nutrition Service (FNS) to publish a revised notice in the Federal Register.

  Career FNS staff pretended they did not know how to put the notice together. The task should have been done by the summer. Instead, hostile staff dragged the process out for months. Political appointees were preoccupied with the coronavirus pandemic and did not have the bandwidth to drive the career FNS team. As a result, the notice was not submitted to the Federal Register in time for USDA to re-do the regulatory process, and the rule was never issued. FNS career staff ran out the clock on the rulemaking process and killed a policy they opposed.

  The same FNS career staff who dragged their feet on this ministerial task rapidly implemented significant policy changes for the Biden Administration. In the first year of the Biden Administration, FNS expanded food stamp benefits by 30 percent while weakening work requirements for able-bodied adults (Supplemental Nutrition Assistance Program: Rescission of Requirements for Able-Bodied Adults Without Dependents; 2021; Department of Agriculture, 2021a; Department of Agriculture, 2021b).

Weakening Legal Defenses

Third, career staff can also defeat policy changes by undermining their legal defense. The Administrative Procedures Act (APA) requires agencies to follow technical procedural steps

[23] The Administrative Procedures Act and associated caselaw generally requires agencies to issue a Notice of Proposed Rulemaking (NPRM) and give the public an opportunity to comment before finalizing regulatory changes. To finalize the rule agencies must give a reasoned response to the arguments the commentators make. Agencies can modify the final regulation in response to comments, but any changes must be a "logical outgrowth" of the initial proposal. Agencies cannot make changes in the final rule that commentors could not have logically foreseen from the initial NPRM. In this case the federal judge held that the changes USDA made between the NPRM and final rule were significant enough that the agency needed to give the public an opportunity to comment on them before implementing the final rule.

to issue new rules. Courts routinely overturn rules if agencies do not follow these steps. Career staff can undermine policy changes by following APA procedural requirements sloppily. Similarly, career lawyers can undermine policies by defending them poorly in court. Political appointees believed this frequently happened.

- Political appointees at the DOI believed that career lawyers in the Justice Department intentionally sabotaged the legal defense of their cases, particularly those involving rulemaking or significant policy changes. Career lawyers refused to make strong arguments defending the rules Interior staff suggested, failed to prepare for oral arguments, and did not raise arguments offered by Interior. Instead, DOJ made much weaker arguments that courts predictably ruled against. DOI political appointees considered this legal sabotage a significant problem that blocked or stifled several policy changes. Certain Justice Department political appointees were unwilling to reassign staff attorneys who engaged in such behavior. Eventually, new Justice Department political appointees were confirmed who were more diligent about having effective counsel assigned to Interior's cases. At that point Interior prevailed much more frequently.

Legal sabotage was probably the most effective career staff resistance tactic. Agencies typically win about two-thirds of APA challenges to new rules (Barbash & Paul, 2019). However, under the Trump administration, opponents overturned most new rules they challenged in court (Institute for Policy Integrity, 2021).[24]

Constraining Procedural Discretion

Finally, career staff can change policy outcomes by constraining their agency's procedural discretion. The APA requires agencies to provide reasoned justifications for policy changes. Career staff can accordingly influence policy by not doing, or only partially doing, the work necessary to provide such justifications. Agencies cannot simply plow through such resistance, as courts frequently overturn regulations that violate this procedural requirement. This tactic can significantly influence policy when agency political appointees lack the time or technical expertise to create APA justifications on their own.

- For example, President Trump signed Executive Order 13828 (2018) directing agencies to strengthen work requirements. The Agriculture Department helped implement this initiative for the food stamp program. Federal law requires able-bodied food stamp recipients without dependents to work. States can waive these work requirements in counties experiencing high unemployment. Political appointees reported Agriculture Sec. Perdue wanted to raise the minimum unemployment rate necessary to waive work requirements; the previous regulations permitted many individuals in low-unemployment areas to collect benefits without working.[25] The APA required USDA to provide a reasoned justification for the unemployment "floor" it chose. USDA operated in

[24] The Trump administration litigation loss rate was also attributable in part to opponents filing suit in jurisdictions with activist liberal judges appointed by Democratic presidents (e.g. California and the 9th Circuit Court of Appeals). Democratic appointees ruled against the Trump administration almost 85 percent of the time (Institute for Policy Integrity, 2021). The Supreme Court frequently overturned these decisions on appeal. See for example *Trump v. Hawaii* (2018), *Trump v. Sierra Club* (2019), and *Department of Homeland Security v. New York* (2020).

[25] The regulations allowed states to waive work requirements for counties with unemployment rates 20% or more above the national average (7 CFR § 273.24(f)(3)(iii)). This relative definition meant that the threshold for waiving work requirements fell in tandem with the national unemployment rate. As the national economy improved this waived work requirements in many counties with low unemployment rates. For example, the national unemployment rate in 2018 and 2019 fell below 4%. The USDA standards meant any county with unemployment above 4.8% (20% higher than 4%) qualified for work requirement waivers. However, 4.8% is below what economists historically considered the natural rate of unemployment (approximately 5.5%).

the context of the Labor Department defining elevated unemployment as 6% or higher. The law automatically waives work requirements for any county with 10% or greater unemployment. USDA could thus set the unemployment floor to any rate between 6% and 10% but had to provide a reasoned justification for its decision. The higher the floor, the stronger the work requirements for able-bodied adults.

Sec. Perdue wanted to set the unemployment floor to 7%—the level Republicans in the House of Representatives supported. USDA needed to find research and studies justifying that decision. Political appointees told career experts to locate the data necessary to support the 7% threshold. USDA career staff made no effort to find or generate that data. Consequently, when it came time to finalize the rule, USDA had to default to the lower 6% threshold (Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents, 2019). USDA did not have enough evidence in the record to justify the higher rate. Career staff hostility forced USDA to substantially weaken work requirements that were a presidential and secretarial priority.

Constructive Red Teaming

Not all career staff hostility undermined policy changes. In some cases it improved them. For example, many senior career lawyers in the Department of Labor are very liberal. They argued strongly against several Trump DOL regulations, such as those defining joint employment or clarifying the legal test for independent contracting. In some ways their opposition impeded policy changes; DOL had to involve political staff in the regulation drafting teams to prevent delays or shoddy work product.

In other ways, this career opposition was very constructive. Ideologically hostile experts internally critiqued every controversial DOL regulation. These hostile career lawyers provided political appointees with every substantive legal and policy objection their proposals would face. This "Red Teaming"—as political appointees described it—enabled DOL to identify and eliminate legal or policy problems before their rules went public. Political appointees believed that—contrary to staff's apparent intentions—career employee Red Teaming meaningfully improved DOL's policymaking.

However, the benefits of Red Teaming had its limits. DOL career lawyers opposed and raised legal objections to almost everything political appointees wanted to do. Many of their legal objections were specious and simply masked policy objections. Consequently, political appointees sometimes found it challenging to determine when career staff were raising genuine concerns that needed to be addressed. The problem was not that some career employees personally opposed President Trump's agenda. Raising concerns was often helpful. The problems came when career employees actively obstructed policies they opposed.

CIVIL SERVICE REGULATIONS PREVENT MEANINGFUL ACCOUNTABILITY

Federal employees can be terminated for refusing directives or for poor performance. So, in theory, agencies can dismiss intransigent or insubordinate career staff. In practice, civil service protections make dismissing all but the worst employees prohibitively difficult.

Civil service rules presume tenured federal employees deserve to keep their jobs.[26] Agencies must prove that good cause justifies dismissal.[27] To establish good cause exists, agencies must collect evidence and navigate procedural steps, such as providing poor performers a "performance improvement period."[28] They must also demonstrate misconduct warranted removal—and not a lesser penalty—by evaluating that behavior through the twelve *Douglas* factors.[29]

These internal agency procedures typically take five months to one year. [30] Once an agency dismisses an employee, they have multiple options to appeal:

1. *The Merit Systems Protection Board*. Most federal employees can appeal their removal to the Merit Systems Protection Board (MSPB).[31] MSPB administrative law judges (ALJ) hold trial-like proceedings to determine if the agency had enough evidence to justify removal. The ALJ will also decide if the employee's conduct justified removal or if the punishment should be reduced to something less serious, such as a suspension. If the ALJ upholds the removal, the employee can appeal to MSPB headquarters in Washington, D.C. (5 U.S.C. § 7701). The MSPB shows deference to agency penalty determinations[32] but can reduce most dismissals to a lesser penalty, such as a suspension.[33] MSPB appeals take an average of about nine months if the

[26] Federal employees initially serve a probationary period of one year in most agencies, and, until 2023, two years at the Department of Defense. During this probationary period employees effectively serve at will and agencies do not have to justify their dismissal.

[27] Agencies can use two primary authorities to remove tenured employees: Chapter 43 and Chapter 75. Chapter 43 can only be used to remove employees for unacceptable performance. Agencies must demonstrate that "substantial evidence" shows the employee performed unacceptably (5 U.S.C. § 7701(c)(1)(A)). Agencies can use Chapter 75 authority to remove employees for "such cause as will promote the efficiency of the service" (5 U.S.C. § 7513(a)). This has been interpreted to cover removing employees for both poor performance and misconduct. Agencies using Chapter 75 authority must demonstrate that the "preponderance of the evidence" justifies removal (5 U.S.C. § 7701(c)(1)(B)).

[28]Before removing an employee for unacceptable performance under Chapter 43 agencies must give the poor performer an opportunity to demonstrate acceptable performance, colloquially known as a performance improvement period or "PIP (5 U.S.C. § 4302(c)(6)). If the employee continues to perform unacceptably at the end of their PIP, or the employee improves but relapses to an unacceptable level within 12 months, the agency may remove them. To do so the agency must first give the employee 30 days advance notice, informing the employee they intend to dismiss them and providing them an opportunity to respond. The agency must issue a decision within 30 days of the conclusion of the notice period (5 U.S.C. § 4303). Agencies using Chapter 75 authorities do not need to provide employees with a PIP. They do need to provide the 30-day advance notice period during which the employee may respond to the charges against them. The agency may remove the employee after considering the employees' response and weighing the evidence (5 U.S.C. § 7513).

[29] The *Douglas* factors are named after the seminal MSPB case establishing this framework, *Douglas v. Veterans Administration* (1981). The Douglas factors include the relationship of the infraction to the employee's responsibilities, the notoriety of the offense, consistency with discipline for similar infractions in the agency, the possibility of rehabilitation, the workers' disciplinary and work records, mitigating circumstances such as unusually high job tensions, and the efficacy of alternative punishments in deterring future misconduct. Managers must show they carefully evaluated each of the Douglas factors before proposing to remove an employee. If they do not the MSPB may reduce the penalty upon appeal.

[30]The Government Accountability Office (2015, p.15) estimates it takes 6 months to 1 year to remove an employee for unacceptable performance using Chapter 43 procedures. Chapter 75 based removals for poor performance or misconduct take approximately 5 months. Agencies typically spend about three months gathering evidence to support a proposed removal. They must then provide the employee with 30 days advance notice of their proposed removal, during which time the employee can respond to the charges against them (5 U.S.C. § 7513(b)(1)). Agencies can dismiss the employee at any point after the conclusion of the advanced notice period and the employee's response; 30 days is a not atypical response period.

[31] Employees in some national security relevant agencies (e.g. the FBI or Central Intelligence Agency) generally do not have MSPB appeal rights.

[32] The MSPB holds that:

> Where the Board sustains an agency's charges, it will defer to the agency's penalty determination unless the penalty exceeds the range of allowable punishment specified by statute or regulation, or unless the penalty is so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion. That is because the employing agency, and not the Board, has primary discretion in maintaining employee discipline and efficiency. The Board will not displace management's responsibility, but instead will ensure that managerial judgment has been properly exercised (citations omitted) (Saiz v. Dep't of Navy, 2015).

[33] The MSPB can mitigate penalties for actions taken under Chapter 75 (for either performance or misconduct) but cannot mitigate performance-based actions taken under Chapter 43.

employee appeals to MSPB headquarters.[34] Once MSPB appeals are exhausted, employees may further appeal to the Federal Circuit Court of Appeals. However, agencies generally may not appeal decisions ordering employees reinstated.[35]

2. *Union Grievance Arbitration*. Federal unions represent approximately three-fifths of the Federal workforce.[36] Union-represented employees may file a grievance challenging their dismissal or appeal to the MSPB, but not both (5 U.S.C. § 7121(e)(1)). If the employee files a grievance, their union and agency will work through the grievance procedures in the agency's collective bargaining agreement (CBA). At the end of that process, the union can invoke binding arbitration (5 U.S.C. § 7121(b)(1)(C)(iii)). If binding arbitration is invoked, the agency and union jointly select an arbitrator.[37] The arbitrator will schedule a hearing and issue a decision either sustaining, overturning, or mitigating the removal. Arbitrators do not give agency penalty determinations the same deference the MSPB does.[38] The grievance and arbitration process frequently takes at least a year, and often longer. If the arbitrator upholds the removal, the employee can appeal to the Federal Circuit Court of Appeals. Like MSPB appeals, agencies generally cannot obtain judicial review of arbitral awards ordering an employee reinstated.[39]

3. *EEOC complaint*. Federal employees can alternatively allege their agency illegally discriminated against them and file a complaint with the Equal Employment Opportunity Commission (EEOC).[40] The employee must first file a discrimination complaint with their agency, which the agency will investigate. The employee can request the agency issue a formal determination about whether discrimination occurred or request a hearing before an EEOC administrative judge (AJ) (29 C.F.R. §§ 1614.106 et seq.). After the final agency determination or AJ ruling, the employee can appeal to the EEOC's Office of Federal Operations (OFO), which can order the employee reinstated (29 C.F.R. §§ 1614.401(a), 1614.405). The EEOC reports that the average discrimination complaint takes an average of 19 months to resolve, while cases that proceed to an AJ ruling take an average of nearly three years (2021, Table B-10).[41] Employees can then appeal an adverse OFO decision to federal court. As with

[34] The MSPB (2021, p. 12) reports it took an average of 102 days in FY 2020 to process initial appeals. The MSPB has not had a quorum since January 2017, and so MSPB headquarters not been able to process appeals of initial decisions since then. Prior to the MSPB losing its quorum the Board (2017, p. 15) reported that it took an average of 185 days for MSPB headquarters to review initial decisions. Thus it takes the MSPB an average of about 287 days to adjudicate appeals.

[35] 5 U.S.C. § 7703(b) Employees to appeal adverse MSPB decisions to the Federal Circuit Court of Appeals. 5 U.S.C. § 7703(d) allows only the director of the Office of Personnel Management (OPM)—not the agency—to seek judicial review of an MSPB order if the OPM director determines "that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive." Agencies cannot otherwise appeal MSPB decisions ordering employees reinstated.

[36] The Office of Personnel Management reports that federal unions represented 1.3 million federal employees in 2019 (U.S. Office of Personnel Management, 2019, p. A7). OPM also reports the federal government employed 2.1 million civilian employees that year (n.d.). These figures exclude Postal Service employees.

[37] Chapter 71 of title 5 leaves the selection of arbitrators to unions and agencies to negotiate. CBAs typically require the parties to jointly select an arbitrator from a list of potential arbitrators supplied by the Federal Mediation and Conciliation Service.

[38] See the concurring opinion of Member Abbott in *Department of Labor, Office of Workers' Compensation and American Federation of Government Employees* (2021).

[39] Arbitral awards in removal proceedings are subject to judicial review in the same manner as decisions of the Merit Systems Protection Board (5 U.S.C. § 7121(f)).

[40] Federal employees can also appeal their dismissal on the grounds it was discriminatory before a grievance arbitrator and the MSPB.

[41] The EEOC FY 2019 Annual Report on the Federal Workforce shows that, government-wide, EEO complaints closed in FY 2019 took an average of 587.3 days to process from the date they were filed. Complaints that proceeded to a final order from an administrative judge were processed in an average of 1,006.9 days (EEOC, 2021, Table B-10).

MSPB and arbitrator decisions, agencies cannot appeal an OFO decision ordering an employee reinstated.[42]

4. *Office of Special Counsel Complaint*. Employees can also file a complaint with the Office of Special Counsel (OSC) alleging a prohibited personnel practice, such as termination for exposing misconduct. OSC can obtain an MSPB order preventing an agency from firing an employee while it investigates the complaint. OSC aims to complete these investigations within eight months (5 U.S.C. §§ 1214(b)). If the OSC concludes a prohibited personnel practice occurred, they can seek an MSPB order directing the agency not to terminate—or to reinstate—the employee.

These procedures make firing a federal employee a long and challenging process. Between internal agency procedures and external administrative appeals, the process often takes between one and four years—potentially followed by federal court appeals.

Moreover, employees can put their supervisor on trial for trying to remove them. Employees facing removal frequently file meritless discrimination or whistleblower retaliation complaints. This forces the supervisor to prove they did not discriminate or retaliate against the employee. Nearly all federal employee discrimination or whistleblower complaints are meritless.[43] The EEOC closed 15,911 federal employee complaints in FY 2019. The government found discrimination occurred in only 175 of these cases (EEOC, 2021, Table B-10). Similarly, the Office of Special Counsel reports it substantiates only about 3 percent of whistleblower reports (2021, p.26).[44] Career staff use frivolous complaints to make dismissals against them harder. They also use the complaints to gain leverage, offering to drop their complaint if the agency agrees not to dismiss them.

Firing an employee is also financially risky for agencies. If a removal is overturned, the Back Pay Act (1966) generally requires paying employees back wages they would have otherwise earned. Agencies must also frequently cover any attorney fees, which typically range from between $300 and $900 an hour.[45] As a result, agencies that discipline rogue employees risk massive financial outlays.

This happened to the Department of Justice after it disciplined two prosecutors who intentionally withheld exculpatory information from Senator Ted Steven's defense during his corruption trial (Schuelke, 2011). DOJ suspended—not dismissed—these prosecutors for 55 days. The prosecutors appealed, and the MSPB overturned their suspensions on a technicality. The MSPB also ordered DOJ to pay the prosecutors back wages and $643,000 in attorney fees (*Goeke and Bottini v. Department of Justice*, 2016).

Merit Systems Protection Board surveys show that only two-fifths of federal career supervisors are confident they could remove an employee for serious misconduct. Only one-quarter are confident they could remove a poor performer (2019, pp. 6,15).

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[42] See 42 U.S.C. § 2000e–16(c), which allows federal employees and applicants for federal employment to appeal adverse EEOC decisions to federal court, but does not similarly allow agencies to appeal decisions they lost. See also *Laber v. Harvey* (2006), where the 4th circuit explained agencies have no right to obtain judicial review of EEOC OFO decisions.

[43] Genuine employment discrimination or whistleblower retaliation is of course abhorrent.

[44] Table 5 in the Office of Special Counsel's FY 2020 Annual Report to Congress (2021) shows that OSC received a cumulative 12,239 whistleblower disclosures between FY 2013 and FY 2020. After investigation, those disclosures were substantiated in only 396 of those cases—3 percent.

[45] Back Pay Act attorney fee awards often use the *Laffey* attorney fee matrix (Laffey Matrix, n.d.). Hourly *Laffey* rates range from $400 to $900 an hour, depending on the attorney's experience.

Political appointees similarly reported it was very difficult to dismiss career employees. They could transfer those employees or move them to a different office. But they said they could almost never remove them.[46] Even if the agency had clear evidence justifying removal, dismissing the employee would typically take too much time and effort. Political appointees provided many instances of career employees who deserved removal but kept their jobs. For example:

- An employee in a Department of Labor enforcement agency repeatedly sent sexually harassing text messages to an individual he was investigating. These messages included pictures of his genitals. This happened while on duty and using his government phone. The victim's attorney contacted the agency about the matter, at which point political appointees were informed of the situation. Political appointees wanted the employee dismissed immediately. Senior career leadership said that was impossible. They explained the employee was unionized and the union would defend him. The employee could also appeal and claim the agency discriminated against him because of his political affiliation. They also explained the MSPB is unpredictable, and there was a substantial chance it would overturn the removal. Political appointees reiterated they wanted the employee gone. Senior career staff were sympathetic but explained that was not possible. So the employee was instead put on paid administrative leave indefinitely. This effectively rewarded his misconduct with an indefinite paid vacation at taxpayer expense.

- During the COVID-19 pandemic, the Department of Health and Human Services directed employees to work from home. Employees' access to the Department's Virtual Private Network (VPN) was monitored. Employees need to use the VPN to access agency servers and conduct most agency business.[47] Only 35% of agency employees signed into the network.

- The head of the DHS Intelligence and Analysis (INA) Division was caught spying on journalists who were using information leaked from his office. These leaks made his office look poorly managed. Career DHS lawyers found this behavior very concerning when it came to light. The matter was referred to the DHS inspector general, and the employee was reassigned to a different office while the investigation proceeded. The employee then filed a whistleblower complaint. He claimed he was directed to politicize intelligence reports by downplaying the threat of white supremacy and Russian election interference. The employee became a media golden boy for attacking the Trump administration (Kanno-Youngs & Fandos, 2020; Chapman, 2021; Vaillancourt, 2021). Political appointees believed the employee was simply gaming whistleblower protection statutes to protect his job after engaging in serious misconduct.

- A senior career employee simultaneously served as the procurement officer, budgetary official, and authorizer for grants and contracts in an HHS office. Federal contracting guidelines call for having different individuals perform these roles. This employee used her unusual position to distribute funds outside official procedures. For example, in one instance a grantee had run out of funds. The employee unilaterally cut funds from another grantee and gave them to the first grantee, cutting out the official channels for changing grant amounts. Other career staff flagged this problematic behavior. HHS tried to fire this employee for misappropriating funds. However, the *Douglas* factors protected

[46]Some political appointees reported firing career employees for poor performance or misconduct. Those appointees reported this took a lot of time and effort.
[47] Employees could access their e-mail accounts without using the VPN.

her job. The employee had previously received stellar job reviews and performance bonuses.[48] HHS concluded the MSPB would be unlikely to sustain a dismissal. HHS had to settle for transferring this employee to a different position.

- For nearly a decade, a career administrative employee in the Executive Office of the President (EOP) did not perform many of her basic job duties. When her supervisors asked for routine status updates—like checking the status of office furniture moves or verifying new employees received work phones and computers—the employee called those requests harassment. She once nearly cost the EOP $150,000 because she did not renew contracts in a timely manner (fortunately, other staff intervened after being alerted to the delinquent accounts). Once her supervisors made it clear they expected her to do her job, she filed an EEOC complaint alleging discriminatory treatment. She also began refusing to come to work. This employee was absent from work for four and a half months during a six-month period. She often provided little or no advanced notice of her absences. On the days she came into work, she often remained on the EOP campus for only a few hours.

  Eventually, the employee's supervisors met with her to discuss job duties and performance expectations. The employee responded by amending her existing EEOC complaint to include additional examples of alleged discriminatory treatment. That complaint prevented the EOP from removing or otherwise disciplining this employee, despite her failure to perform her job duties. EOP Human Resources advised that taking any actions against her would add to her case; if she were removed, she could claim it was in retaliation for her EEOC complaint. The EEO complaint protected her from dismissal. The employee eventually retired, but the EEOC was still processing her complaint when the Trump Administration ended.

Given these obstacles, agencies rarely dismiss federal employees for any reason. In FY 2020, agencies removed just one-quarter of one percent of tenured federal employees.[49] Civil service procedures shield many federal employees from removal for misconduct, insubordination, and unacceptable performance.

REMOVAL PROTECTIONS UNDERMINE VISION FOR THE CIVIL SERVICE

The reformers who created the civil service opposed federal employee removal protections. They wanted to create a merit service. They regulated *hiring* to prevent federal jobs from becoming patronage rewards. But they also feared removal protections would protect incompetent and intransigent employees. As George William Curtis, president of the National Civil Service Reform League and a co-drafter of the Pendleton Act, explained:

> [I]t 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 (Frug, 1976, p. 955).

[48] The *Douglas* factors include the employee's past disciplinary record and the employee's past work record.
[49] In most agencies the probationary period is one year, but it is two years at the Department of Defense (which accounts for over one-third of the Federal, non-postal workforce). FedScope data cubes, maintained by the Office of Personnel Management (n.d.), show that agencies removed 3,939 permanent full-time employees with at least two years of service for performance or misconduct in FY 2020. This represents approximately one-quarter of one-percent of the 1.6 million permanent full-time Federal employees with at least two years of service OPM reports the executive branch employed during this period (n.d.).

For six decades after the end of the spoils system the federal civil service implemented this vision. Civil service rules prevented agencies from rewarding political supporters with career jobs. But they placed only minimal restrictions on removals.

Federal employees could not appeal removals until the Second World War. In 1944 Congress passed veterans' preferences for federal jobs. That legislation also allowed veterans to appeal removals to the Civil Service Commission. This prevented agencies from circumventing veteran hiring preferences through pretextual firings (Frug, 1978, pp. 959-960).

The general federal workforce did not get removal protections until the 1960s. By that point veterans made up a large portion of the federal workforce. Allowing only some employees to appeal their removals came to be seen as arbitrary and unfair. So Presidents John F. Kennedy and Richard Nixon extended appeals rights to non-veterans too (Frug, 1978, pp. 960-961). Congress codified external appeals in the Civil Service Reform Act (1978), which created the civil service system that largely exists today.

Federal employee removal protections are a modern invention that protects entrenched bureaucracy. They also erode the morale of dedicated public servants, making it difficult for agencies to remove poorly performing or intransigent employees. The annual Federal Employee Viewpoint Survey consistently finds that agencies' failure to address poor performers is one of federal employees' greatest frustrations (OPM, 2020, pp. 3, 24). The original civil service reformers saw removal protections as undermining a merit service.

PROTECTING DEMOCRATIC ACCOUNTABILITY

For the government to be democratically accountable to the people, elected officials must be able to implement their platform and enforce the law. Current civil service procedures weaken this accountability. No one voted for career employees, but they can—and some do—substantially impede policies they disagree with. In some cases, career staff block policy changes altogether, or even refuse to enforce laws they personally oppose. This prevents Americans from getting the government they voted for.

The federal government could take two main steps to protect the government's democratic accountability. First, agencies could hire significantly more political appointees. This would enable politically accountable officials to supervise career staff more extensively. It would also give agencies greater ability to have political appointees drive key priorities and take over tasks—like writing regulations—that some career staff refuse to perform effectively. Career staff intransigence would matter much less if political appointees had more bandwidth to do tasks themselves.

Agencies do not need new legislation to hire more political appointees. They have the authority to create as many Schedule C political appointees as they consider necessary, provided the Office of Personnel Management approves (5 C.F.R. §213.3301).

Second, Congress could return the federal workforce to at-will employment. Removing employment protections would make career employees much more accountable to the President. They would know that if they attempted to pursue their own agenda instead of the President's they could be easily removed. This would also return the federal workforce to the reformers' original vision for the merit service.

A return to at-will employment would retain the government's existing merit-based hiring procedures. It would also maintain rules that prohibit dismissing employees because of their political contributions (or lack thereof). But agencies would enforce those policies themselves; employees could not bring lengthy appeals over dismissals. The merit service operated effectively under similar rules for six decades under the Pendleton and Lloyd-LaFollette Acts.[50] Returning to those policies would protect democratic self-government.

If Congress is unwilling to make the federal workforce at-will, the President can make policy-influencing career positions at-will unilaterally. The President has statutory authority to exempt policy-influencing positions from civil service appeals (5 U.S.C. § 7511(b)(2)). Historically this authority has only been applied to political appointees. In late 2020 President Trump signed an Executive Order that also removed employment protections from policy-influencing career staff (Exec. Order 13957). President Biden rescinded this order before it could take effect (Exec. Order 14003), but nothing prevents a future administration from bringing it back. Doing so would make the federal government much more accountable to the American people.

CONCLUSION

Democracy operates on the principle of government by the consent of the governed. When career employees attempt to prevent elected officials from implementing their agenda, they undermine American democracy.

Many federal employees do their best to implement the administration's policies. Unfortunately, many do not. During the Trump Administration, many career employees refused or defied directives, withheld information, slow-walked projects they opposed, performed unacceptably, and used strategic leaking to undermine the President's agenda. Some career employees even refused to enforce laws they did not support.

Political appointees cannot simply remove intransigent employees. Civil service removal protections make removing federal employees prohibitively difficult. The reformers who created the civil service wanted to avoid patronage hiring, but they also feared removal protections would entrench incompetence and insubordination. Congress can protect American democracy by returning to the original vision for the civil service: merit-based hiring and straightforward removals.

[50] For more on the history of the civil service see Sherk (2021). The Pendleton Act of 1883 placed considerable restrictions on the hiring process to ensure merit-based hiring. But it placed almost no restrictions on the dismissal process. Rather it made discharging employees based on their political contributions a misdemeanor. The Attorney General could bring charges to enforce the law, but individual employees had no right to appeal or otherwise contest their removal. Under the Lloyd-LaFollette Act of 1912 agencies had to provide a legitimate reason for an employee's dismissal, and the employee had a right to respond, but the agency's subsequent determination to retain or discharge the employee was final—the law gave them no right to appeal. Rather, the Lloyd-LaFollette Act expressly provided agencies were not required to justify dismissals in trial-like proceedings.

AUTHOR BIOGRAPHY

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