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

**Re: Comment on Proposed Rule concerning Upholding Civil Service Protections and Merit System Principles | Docket ID: OPM-2023-0013**

Dear Director Ahuja,

Thank you for the opportunity to provide comment on OPM’s proposed rule concerning Upholding Civil Service Protections and Merit System Principles.<sup>1</sup> The Democracy Forward Foundation (Democracy Forward) is a non-profit organization that uses legal tools to counter threats to people, communities, and democracy in the United States. Our clients and partners’ missions depend on the federal government’s commitment to professionalism, robust oversight, and the rule of law. We have filed hundreds of legal actions and regulatory submissions to defend these principles, and are uniquely attuned to the dangers that follow from government abuse, politicization, and corruption. We believe that this is a perilous moment for the federal civil service and our democracy as a whole. We applaud OPM for proposing to clarify and strengthen protections for career civil servants, and encourage OPM to finalize its proposed rule, and support OPM’s proposals.

The independence and stability of the civil service came under direct assault in the prior presidential administration. It remains in substantial danger as certain critics try to build a case for destroying what they refer to as the “Deep State.” These critics argue that the federal government is overrun by anti-democratic left-wing ideologues, and rely on examples from the Trump administration to justify dismantling the professional civil service.

This worldview risks the ability of the federal government to faithfully follow the law, advance federal programs created by Congress, and protect the public interest. This comment explains why these critics’ arguments for purging the civil service in favor of political loyalists are wrong. As OPM considers comments on its Proposed Rule, it should reject these critics’ arguments as baseless.

- Section I of this comment emphasizes that civil servants are not meant to be political actors whose sole focus is execution of the President’s agenda. Rather, while civil servants are tasked with implementing a particular administration’s policy goals, they also must defend the Constitution, faithfully execute programs created by Congress, and protect the public interest. A focus on the president’s agenda to the complete exclusion of these other goals represents a warped notion of the role of the executive branch.

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<sup>1</sup> 88 Fed. Reg. 63,862 (2023).

- Section II of this comment explains why examples from critics that civil servants ostensibly resisted President Trump’s agenda and undermined democratic accountability are neither credible nor representative.
- Section III of this comment highlights a number of instances in which political appointees have undermined the rule of law and public trust, including seeking to use the power of government for illegal or unconstitutional courses of action. A robust and protected civil service provides an essential bulwark against such efforts, and it would not be in the public interest to further empower political officials to quash dissent or stifle transparency by purging the civil service.

## **I. The civil service protects the Constitution, Congress’s programs, and the public interest, while implementing the President’s agenda**

The Proposed Rule correctly understands and seeks to protect the civil service’s role in the federal government:

The 2.2 million career civil servants active today are the backbone of the Federal workforce. They are dedicated and talented professionals who provide the continuity of expertise and experience necessary for the Federal Government to function optimally across Presidents and their administrations. These employees take an oath to uphold the Constitution and are accountable to agency leaders and managers who, in turn, are accountable to the President, Congress, and the American people for their agency’s performance. At the same time, these civil servants must carry out critical tasks requiring that their expertise be applied objectively (performing data analysis, conducting scientific research, implementing existing laws, etc.).<sup>2</sup>

Beginning with its rejection of the spoils system more than 150 years ago, Congress has consistently acted to establish and protect the federal civil service as nonpartisan experts dedicated to the public service and the public trust. Today, civil servants affirm that they will uphold the Constitution and the laws of the United States, not any particular party agenda. And they do so across administrations and political parties.

Some critics argue that the role of civil servants is “diligently following orders and implementing policies of elected officials,”<sup>3</sup> or “accomplishing the agenda of a president” rather than protecting “the office of the president [or] their institutions.”<sup>4</sup> But civil servants are not simply political footsoldiers for a president’s policy goals. They have responsibilities to the Constitution, to Congress, to the law, and to the American people. The critics’ exclusive focus on implementation of a president’s agenda misunderstands and distorts the structural role of our civil servants. The

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<sup>2</sup> 88 Fed. Reg. at 63,862.

<sup>3</sup> James Sherk, America First Policy Institute, *Tales from the Swamp: How Federal Bureaucrats Resisted President Trump* 1 (Sep. 10, 2023) (“TFTS”), [https://assets.americafirstpolicy.com/assets/uploads/files/Tales\\_from\\_the\\_swamp\\_V8\\_Reissue.pdf](https://assets.americafirstpolicy.com/assets/uploads/files/Tales_from_the_swamp_V8_Reissue.pdf).

<sup>4</sup> H.J. Mai & Steve Inskeep, *If Trump Is Reelected, the Independence of Federal Agencies Could Be at Risk*, NPR (Aug. 16, 2023), <https://www.npr.org/2023/08/07/1192432628/conservatives-mull-how-2nd-trump-presidency-could-re-shape-the-federal-government> (Quoting President Trump’s former OMB Director Russell Vought arguing “Civil servants should be oriented toward accomplishing the agenda of a president — not the office of the president, not their institutions.”).

Proposed Rule correctly emphasizes the many responsibilities of civil servants, and the need for them to channel their expertise into objective analysis and counsel without fear of reprisal.<sup>5</sup> OPM should reject critics' arguments as ahistorical in its finalization of the proposed rule.

A. Congress rejected the view of the civil service as political actors when it dismantled the spoils system almost 150 years ago

Civil service critics argue that “democratic accountability” in the United States demands that the President be empowered to fire career staff at will for failing to “neutrally implement the elected President’s policies.”<sup>6</sup> But focusing exclusively on accountability to the president ignores the role of the other elected branch of government. Congress has spoken clearly about its vision for the civil service for a century and a half, and consistently rejected a civil service that is merely an extension of a President’s will.

In 1866, a Joint Select Committee of Congress presented a report on the civil service, which persuasively articulated the justifications for a system based on merit, and in which civil servants could not be arbitrarily dismissed. The report explained how such a system would change the character of the government’s subordinate officers (civil servants):

The subordinate officers . . . would begin to breathe more freely from the moment they felt themselves responsible to the state, instead of a mere servant of the state. Every officer would feel the sense of this responsibility. It would increase his self-respect, by penetrating him with the conviction that he was no longer doomed to be dependent upon the caprices of heads ‘dressed in a little brief authority,’ but that, if he performed his duties well, the state would recognize his services.”<sup>7</sup>

Congress envisioned civil servants dedicated to the public interest rather than the transitory political agenda of presidential administrations; to the country rather than superiors exercising arbitrary authority; and to duty and work ethic rather than more parochial or narrow interests.

Notably, Congress believed that dismantling the spoils system would not only strengthen the civil service, but also amplify political appointees’ commitment to the public interest. When discussing the importance of civil service reform, the Joint Select Committee of Congress’ 1866 report on the Civil Service stated:

These functionaries [political appointees] would have no longer the power to appoint or to remove their subordinate officers. Stripped of these dangerous and improper prerogatives, they would be the better able to devote themselves exclusively to their official duties, without using them, as at present, as a cloak for ulterior personal or party purposes, or for otherwise selfish and unpatriotic designs.<sup>8</sup>

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<sup>5</sup> See 88 Fed. Reg. at 63,862-63.

<sup>6</sup> See TFTS, *supra* note 3, at 4.

<sup>7</sup> J. Select Comm., *Civil Service of the United States*, J. Rep. No. 8, 39th Cong. (1866), reprinted in Thomas Allen Jenckes, *Civil Service of the United States*, Ticknor & Fields, at 6 (1867), [https://www.google.com/books/edition/\\_/UQovAAAAYAAJ?hl=en&gbpv=1&pg=PA1{JSC..](https://www.google.com/books/edition/_/UQovAAAAYAAJ?hl=en&gbpv=1&pg=PA1{JSC..)

<sup>8</sup> *Id.* at 5-6.

In other words, by protecting civil servants from arbitrary firings and terminations, political appointees are better insulated from the corrosive effects of concentrated power and ambition that our founders understood too well.<sup>9</sup>

Ultimately, this vision of a civil service would become the foundation for the Pendleton Act of 1883, which replaced the spoils system in America. It required that federal government jobs be awarded on merit through a selection process based on competitive exams, and prohibited firing or demoting many federal employees for political reasons.<sup>10</sup> The Act was intended to ensure that “the offices of the Government [would be] trusts for the people,” with federal employees officials selected for their “fidelity, capacity [and] honesty.”<sup>11</sup> Indeed, as written, the law was intended to eliminate the influence of “personal fidelity and partisan activity” as the key qualifications for federal officials, and replace them with “fitness, capacity, honesty [and] fidelity.”<sup>12</sup>

Congress would continue to provide additional protections to civil servants throughout the 20th century. The Lloyd-LaFollette Act of 1912 created whistleblower protections for civil servants and ensured civil servants could only be removed for cause.<sup>13</sup> Finally, Congress passed The Civil Service Reform Act of 1978, which further entrenched merit principles within the civil service and importantly, bolstered protections for “employees who disclose government illegality, waste, and corruption,”<sup>14</sup> including by creating the Merit Systems Protection Board and Office of Special Counsel.

The features of the civil service that frustrate its critics—fealty to Congressional programs, dedication to government institutions, consideration of the public interest, and a mission broader than simply serving political appointees—are core components of the system set up by an elected Congress almost 150 years ago, and reinforced by elected Congresses repeatedly since then in a variety of legislation, signed by elected presidents.

## B. Civil servants take an oath to the Constitution, not to a president

According to Article VI of the Constitution, every federal official “shall be bound by Oath or Affirmation, to support this Constitution.”<sup>15</sup> That oath reads:

I, [name], do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I

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<sup>9</sup> See, e.g., The Federalist No. 51 (Alexander Hamilton or James Madison) (Libr. of Cong. Rsch. Guides, last accessed Nov. 15, 2023) (“In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”).

<sup>10</sup> Pendleton Act, S. 133, 47th Cong. 22 Stat. 4032, Ch. 27, §§ 2, 13 (1883). TFTS misleadingly suggests that Congress only intended to target “patronage-based hiring” when it created the Pendleton Act, and that allowing for political firing would restore the vision of the “[t]he civil service’s founders,” see TFTS, *supra* note 3, at 3, but the Act’s restrictions on firing federal employees for political reasons directly contradict that argument.

<sup>11</sup> 14 Cong. Rec. 206 (1882).

<sup>12</sup> *Id.*

<sup>13</sup> 37 Stat. 539 at 555 (Aug. 24, 1912).

<sup>14</sup> S. Rep. No. 95-989, at 748 (1978) (Conf. Rep.) (report of the Senate Committee on Governmental Affairs to accompany S. 2640).

<sup>15</sup> U.S. Const. art. VI, cl. 3.

will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.<sup>16</sup>

That oath does not mention fealty to a particular president or their political agenda. And the Constitution does not vest all government power in the Executive Branch. “We the People” are supreme,<sup>17</sup> Congress is tasked with passing laws and creating agencies to carry out those laws,<sup>18</sup> and the Judicial branch is responsible for deciding cases arising under the Constitution and federal laws.<sup>19</sup> Civil servants’ oaths to uphold the Constitution and faithfully discharge the duties of their office thus involve balancing a number of worthy goals: responsiveness to a president’s political agenda, stewardship of the agencies and programs Congress created, faithfulness to the law, and service to the American people.

Federal employees are also bound by standards of ethical conduct for employees of the executive branch, codified in regulations by the Office of Government Ethics.<sup>20</sup> The first basic obligation of public service reads, in part, “Public service is a public trust. Each employee has a responsibility to the United States government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain.”<sup>21</sup> Nowhere do these standards imply that public service is defined by single minded fealty to a president’s political agenda; rather, they emphasize responsibilities to the government, U.S. citizens, the Constitution, laws, and ethical principles.

The breadth of this responsibility is ignored by critics who believe public service is synonymous with unquestioning advancement of the priorities of political leaders. Civil servants have a responsibility to balance a number of different considerations in their role as public servants, and on occasion, that will rightly mean that implementation of a president’s political agenda may be slowed or limited by other important equities.

### C. Critics’ focus on partisanship within the civil service is misguided, and would lead to more extremism in federal agencies

Critics of the civil service attack it as a Deep State of partisan, anti-democratic ideologues.<sup>22</sup> But the civil service is not a modern creation or a function of one party or ideological movement or another. It is a system designed to ensure government employees are faithful to the country rather than to fleeting partisan interests. And, in fact, these employees can provide democratic accountability in both Democratic and Republican administrations.

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<sup>16</sup> 5 U.S.C. § 3331.

<sup>17</sup> U.S. Const. pmb.

<sup>18</sup> U.S. Const. Art. I § 8.

<sup>19</sup> U.S. Const. Art. III § 2.

<sup>20</sup> See 5. C.F.R. pt. 2635.

<sup>21</sup> 5 C.F.R. § 2635.101(a).

<sup>22</sup> See, e.g., Kevin D. Roberts, *Taking On the New “Big Government,”* Heritage Foundation (May 17, 2023), <https://www.heritage.org/conservatism/commentary/taking-the-new-big-government> (President Trump’s former director of the Office of Management and Budget, Russell Vought, described “battling the deep state” over the antiracist ideology of “committed Marxist[s]”).

While critics cite studies finding that the average federal employee leans more liberal than the average American political donor,<sup>23</sup> these same critics routinely exclude crucial context from these studies. As an initial matter, as described in prior sections, civil servants are called upon to serve the public interest by balancing myriad, non-partisan values, putting aside their personal political views. But even conceding that, as critics have noted, “career federal employees are human beings”<sup>24</sup> studies have shown that career federal employees are substantially more *moderate* than political appointees of either party, and that federal employees are “not nearly as far left as the median Democratic agency head.”<sup>25</sup>

Adopting critics’ proposals to replace thousands of career employees with more political appointees would dramatically *expand* ideological extremism in the federal government, leftward and rightward depending on the administration. And these critics would pair the expansion of personal ideological extremism with a reorientation of the civil service towards prioritizing political directives above all other considerations. The result would be hugely destabilizing to the executive branch’s ability to faithfully and consistently manage federal programs.

Beyond the theoretical problems with the critics’ views on partisanship in the civil service, in practice, the simplified perspective of liberal civil servants grinding conservative presidents’ agendas to a halt is not well-supported.<sup>26</sup> Notably, the Trump Administration accomplished a wide range of deregulatory goals throughout the government in four years, including “nearly 100 environmental rules officially reversed, revoked or otherwise rolled back under Mr. Trump.”<sup>27</sup> The so-called “Deep State” did not stop these deregulatory efforts.

And to the extent that the Trump administration’s regulatory agenda was significantly delayed, the best explanation is not left-wing civil servants’ resistance to a conservative agenda. Other conservative administrations, notably President George W. Bush’s administration, have been much more successful in implementing their agendas promptly.<sup>28</sup> For the Trump administration, lack of organization and staffing in political leadership roles was a much more significant cause of delayed agenda implementation. As one report published by the Cato Institute has found, “[a]n unusual feature of the Trump administration is that the White House has been relatively slow to nominate candidates for top regulatory posts and the Republican-majority Senate has been correspondingly slow to approve the nominations that were made.”<sup>29</sup>

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<sup>23</sup> See, e.g., TFTS, *supra* note 3, at 5-6 (citing Brian D. Feinstein & Abby K. Wood, *Divided Agencies*, 96 S. Cal. L. Rev. 731, 737 (2022)).

<sup>24</sup> TFTS, *supra* note 3, at 4.

<sup>25</sup> Feinstein & Wood, *supra* note 23, at 755. See also *id.* at 737, 782 (noting that the civil service can play a promajoritarian role in both Democratic and Republican administrations, aligning the federal government more closely with the median voter).

<sup>26</sup> See TFTS at 6 (criticizing “left-wing career staff” for “obstruct[ing] policies they oppose” and “mov[ing] policy in the opposite direction than desired by political appointees” during the Trump Administration).

<sup>27</sup> Nadja Popovich et al., *The Trump Administration Rolled Back More than 100 Environmental Rules. Here’s the Full List*. N.Y. Times (Jan. 20, 2021), <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html>.

<sup>28</sup> President George W. Bush took more regulatory actions in his first 24 months than Presidents Obama or Trump. Keith B. Belton & John D. Graham, *Deregulation Under Trump*, 43 Regul., no. 2, 14, 16 tbl.1 (2020), <https://www.cato.org/regulation/summer-2020/deregulation-under-trump>.

<sup>29</sup> *Id.* at 16.

Finally, while agencies may occasionally move more slowly through rulemakings when disagreements exist between political appointees and agency staff, this deliberate pace may lead to more effective policymaking, building more robust rulemaking records without reducing the likelihood that proposed rules become final.<sup>30</sup>

## **II. Accounts of career staff “resistance” to the Trump administration distort the civil service’s record and ignore the service’s broader responsibilities**

Civil service critics argue that career civil servants regularly impeded President Trump’s agenda as a form of political resistance. One such report, *Tales from the Swamp* (“TFTS”), provides a lengthy catalog of such examples. TFTS, along with similar critics, argues that a future administration must remove civil service protections, such as by permitting hiring and firing at will by political leaders, to prevent this kind of resistance.<sup>31</sup> A closer look at many of the examples in TFTS makes clear that the report regularly engages in cherry-picking, slanted interpretation, and outright inaccuracy to justify its conclusions. OPM should reject any such arguments made against its proposed rule.

### **A. Mischaracterizations of the civil service’s work during the Trump Administration**

TFTS engages in frequent mischaracterizations of the regulatory process, criticizing agency staff for factors often out of their control, and failing to consider the role of political appointees in creating the problems these officials faced in the regulatory process.

- **Agency losses in court:** TFTS attempts to argue that career staff committed “legal sabotage” of the Trump Administration’s agenda, arguing that career staff were “sloppily” following the requirements of the Administrative Procedure Act, or defended policies poorly in court, resulting in an unusually high loss rate in court for President Trump’s agencies’ policies.<sup>32</sup>

But the report makes a substantial and baseless leap from the Trump Administration’s loss rate in court (true) to career staff sabotage being the culprit (unsupported). In fact, the most thorough report prepared on the Trump Administration’s record in court found that the Administration regularly “ignored clear-cut statutory and regulatory duties,” with losses on statutory interpretation grounds making up the bulk (117) of the administration’s losses in court.<sup>33</sup> In many of these cases, the Administration lost “because the agency had acted outside of the bounds of its authority or had adopted an interpretation that blatantly contradicted the statute at issue.”<sup>34</sup> These losses were the result of unlawful policy efforts by political decisionmakers, not the product of agency staff doing a poor job of building a rulemaking record.

Finally, as TFTS admits, the Trump Administration’s losses in court were also the

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<sup>30</sup> See Feinstein & Wood, *supra* note 23, at 736.

<sup>31</sup> TFTS, *supra* note 3, at 2.

<sup>32</sup> *Id.* at 19.

<sup>33</sup> Bethan A. Davis Noll, “Tired of Winning”: *Judicial Review of Regulatory Policy in the Trump Era*, 73 *Admin. L. Rev.* 353, 397-98, 397 fig.5 (2021).

<sup>34</sup> *Id.* at 399.

product of a robust and effective litigation strategy by third-parties, not something that career staff at federal agencies have any control over.<sup>35</sup>

- **Department of Education enforcement against for-profit colleges:** TFTS accuses career staff at the Department of Education (DOE) of hiding documents from political appointees that would have shown that the Obama administration had built a “weak case” against a for-profit college for defrauding students.<sup>36</sup>

Although the report does not name this lawsuit, it is likely referring to claims against The Center for Excellence in Higher Education (CEHE), a legal action initiated under the Obama Administration, and settled by the Trump Administration in 2018, allowing CEHE to designate itself a non-profit to receive federal student aid while channeling over \$100 million in profits to parallel for-profit institutions.<sup>37</sup> TFTS’s characterization of the case as “weak” is baseless. Litigation against CEHE at the state level continued since the Trump Administration settled federal claims, with the Attorney General of Colorado winning a verdict that CEHE was knowingly false and misleading in its marketing materials concerning its students’ job prospects.<sup>38</sup>

- **FDA laboratory test oversight:** TFTS criticizes FDA officials for asserting authority to regulate laboratory-developed COVID tests early on in the COVID pandemic, leading to a backlog in the deployment of tests.<sup>39</sup> The report characterizes this as an instance of civil servants “actively misrepresent[ing] the facts about what agencies could, or could not, do” to political appointees.<sup>40</sup> But FDA officials were asserting a disputed authority that they had claimed for decades.<sup>41</sup> Regardless of the merits of FDA’s claim of authority, it was longstanding and unrelated to the Trump Administration.

Further, this instance was not a conflict between career and political staff; it was a conflict between two agencies, with President Trump’s politically-appointed FDA head siding with FDA officials against HHS.<sup>42</sup> And far from being stymied by career staff,

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<sup>35</sup> See TFTS, *supra* note 3, at 19 n.24 (blaming the Trump Administration’s legal losses on “opponents filing suit in jurisdictions with activist liberal judges appointed by Democratic presidents . . .”).

<sup>36</sup> *Id.* at 7-8.

<sup>37</sup> Robert Shireman, The Century Foundation, *How For-Profits Masquerade as Nonprofit Colleges* (Oct. 7, 2020), <https://tcf.org/content/report/how-for-profits-masquerade-as-nonprofit-colleges/>.

<sup>38</sup> See Findings of Fact, Conclusions of Law, and J. at 119-20, 124-25, 128-29, *State et al. v. Ctr. for Excellence in Higher Educ., Inc. et al.*, No. 14CV34530 (Dist. Ct., City and Cnty of Denver, Colo. Aug. 21, 2020).

<sup>39</sup> TFTS, *supra* note 3, at 8.

<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., Jeffrey K. Shapiro, *Regulation of Laboratory Developed Tests by FDA: Time for the Agency to Cease and Desist Until Congress Enacts Legislation*, The FDA Law Blog (Oct. 21, 2019), <https://www.thefdablog.com/2019/10/regulation-of-laboratory-developed-tests-by-fda-time-for-the-agency-to-cease-and-desist-until-congress-enacts-legislation/> (noting a “handful of cases during a period spanning more than 30 years” in which the FDA had asserted this disputed authority).

<sup>42</sup> Adam Cancryn & Sarah Owerhohle, *HHS Chief Overrode FDA Officials to Ease Testing Rules*, Politico (Sep. 15, 2020), <https://www.politico.com/news/2020/09/15/hhs-alex-azar-overrode-fda-testing-rules-415400> (noting



President Trump’s political appointees at HHS were ultimately able overrule FDA’s institutional position. Also of note - contemporaneous reporting showed that one of the key figures in recognizing and seeking to solve the interagency conflict over authority that slowed down testing was none other than longtime career civil servant Dr. Anthony Fauci.<sup>43</sup>

- **United States Department of Agriculture (USDA) attempts to narrow food stamp eligibility:** TFTS identifies an effort to revise work requirements for the federal food stamp program, which allows work requirements to be waived in counties with high unemployment.<sup>44</sup> Political leaders at USDA wished to raise the threshold for “high unemployment” from six percent in order to lower the number of counties where food stamps would be more widely available. TFTS complains that “[p]olitical appointees told career experts to locate the data necessary to support the 7% threshold” that USDA political leaders were targeting.<sup>45</sup> According to TFTS, “USDA career staff made no effort to find or generate that data,” and the six percent threshold remained in place.

It is striking that TFTS characterizes this incident as a failure of career staff. TFTS envisions a government in which a political appointee can designate an arbitrary quantitative target for federal policies, and then order agency staff to “find the data to support” that number, and fire them if they fail to do so. This approach would not serve the public interest, and is certainly not what Congress intended either for the civil service or the food stamp program.

- **Rollback of offshore drilling safety requirements:** In the aftermath of the Deepwater Horizon disaster, the Department of the Interior (DOI) under President Obama issued regulations to prevent well blowouts in offshore drilling operations.<sup>46</sup> The Trump Administration sought to weaken these safety standards in response to industry complaints that they were “more costly and cumbersome than necessary.”<sup>47</sup> TFTS claims that “career staff used leaks to make it politically costly to overrule their policy preferences,” because career staff opposition to the rollback was reported in the media.<sup>48</sup> TFTS also accuses career employees of sending “deliberately” misleading emails about the rollback, but provides no specific information to establish the credibility or significance of this assertion.<sup>49</sup>

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that HHS chief Alex Azar revoked FDA’s authority over laboratory-developed tests by “[o]verriding objections from FDA chief Stephen Hahn,” appointed by President Trump).

<sup>43</sup> Michael D. Shear et al., *The Lost Month: How a Failure to Test Blinded the U.S. to Covid-19*, N.Y. Times (Mar. 28, 2020), <https://www.nytimes.com/2020/03/28/us/testing-coronavirus-pandemic.html>.

<sup>44</sup> TFTS, *supra* note 3, at 19-20.

<sup>45</sup> *Id.*

<sup>46</sup> See *Oil and Gas and Sulfur Operations in the Outer Continental Shelf—Blowout Preventer Systems and Well Control*, 81 Fed. Reg. 25,888 (Apr. 26, 2016).

<sup>47</sup> *Id.* at 14.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* TFTS also does not assert that any ethics rules were broken or confidential information was revealed by civil servants in this instance. As a general proposition, federal employees retain some first amendment rights to speak on certain matters of public concern, although the scope of these rights is complex and fact-specific. See, e.g., Ofer Raban, *The Free Speech of Public Employees at a Time of Political Polarization: Clarifying the Pickering Balancing Test*, 60 Hous. L. Rev. 653 (2023).

But TFTS seems to operate from the presumption that political appointees are entitled to a politically costless regulatory process. On the contrary, the rule was politically costly because many Americans did not believe that it was wise to weaken offshore drilling rules put in place in the aftermath of the Deepwater Horizon disaster. The rule garnered ample negative coverage on the merits, criticizing the agency for choosing to weaken protections for workers and the environment, for ignoring the vast majority of comments in support of strong safety standards, and for tying federal standards to standards drafted by petroleum industry lobbyists.<sup>50</sup>

While career staff statements may have generated some negative coverage, they were also not the only source of negative information from within the agency. For example, documents obtained by Freedom of Information Act (FOIA) requests, not leaks, showed President Trump's appointed head of offshore drilling regulation to be almost comically solicitous of regulated industry and aggressive about trying to keep his conversations with industry out of the public record.<sup>51</sup>

- **Re-issuance of school nutrition rule:** TFTS criticizes career staff at USDA's Food and Nutrition Service (FNS) for not rapidly moving to re-issue a proposed rule concerning school nutrition in milk, whole grains, and sodium after a prior version had been struck down in court for failing to meet procedural requirements.<sup>52</sup> TFTS argues that the re-issuance of the proposed rule should have "take[n] only a few days" because "the agency ha[d] previously done almost all the work of creating the rule."<sup>53</sup> As a result, TFTS argues that re-publication of the proposal, which "should have been done by the summer," was delayed too long for USDA to finalize the rule before a change in administration.<sup>54</sup>

But TFTS's characterization of the work of re-proposing the rule as "a ministerial task"<sup>55</sup> is undercut by the actual substance of the proposal the Trump administration released in November 2020. Far from simply being a re-issuance of the prior rule, the new proposal went to great lengths to highlight and address the concerns that a federal District Court had in April of that year used to justify striking down the rule; indeed, the District Court decision is mentioned in the proposal over two dozen times.<sup>56</sup> Huge swaths of the November 2020 proposal were clearly re-worked rather than simply re-issued.

And while TFTS seeks to blame career staff for "running out the clock"<sup>57</sup> by delaying the new proposal, this charge is not credible. The Trump Administration's rule was struck

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<sup>50</sup> See, e.g., Ben Lefebvre & Eric Wolff, *Trump Erases Offshore Drilling Rules Enacted after BP Oil Spill*, Politico (May 2, 2019), <https://www.politico.com/story/2019/05/02/offshore-drilling-rules-1404098>.

<sup>51</sup> Ashley Feinberg, *Text Messages Show Trump's Top Offshore Safety Regulator Trawling for Industry Praise*, Slate (Apr. 24, 2020), <https://slate.com/news-and-politics/2020/04/texts-show-trump-regulator-trawling-for-praise.html>.

<sup>52</sup> TFTA, *supra* note 3, at 18.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Restoration of Milk, Whole Grains, and Sodium Flexibilities*, 85 Fed. Reg. 75,241 (Nov. 25, 2020).

<sup>57</sup> TFTA, *supra* note 3, at 18.

down in mid-April 2020;<sup>58</sup> at that point, the Administration had to re-start the rulemaking process. And after the Trump administration re-issued its proposal in November, it received over 4,800 comments,<sup>59</sup> which the agency would need to process prior to finalizing a new rule. Notably, the GAO has previously estimated that rulemakings can take anywhere from a year to over a decade, with the average time around 4 years.<sup>60</sup> Given the realities of the rulemaking process, it is difficult to conceive of how the re-started process after the April court decision could have yielded a final rule before President Biden took office, and TFTS cannot credibly blame career staff for failing to navigate impossible timing constraints. In any event, re-issuing a legally invalid rule would have nearly certainly doomed it in subsequent litigation. The decision by career staff to take the time to correct the prior rule's errors made for a final product that was more likely to be lawful as well as legally defensible.

- **Classical architecture mandate:** TFTS criticizes leaks of a proposed policy mandating the use of classical architecture for federal buildings for creating a “media firestorm.”<sup>61</sup>

But media attention resulted from the significance of the policy proposal, not the leak. The Trump Administration was demanding that federal buildings conform to architectural preferences matching the personal preferences of a President, one who concurrently owned a real-estate and hotel company with a highly-visible commitment to classical-architecture;<sup>62</sup> and requiring that the President be personally notified when federal buildings were to be built that departed from those preferences.<sup>63</sup> Career staff publicly shared information about an attempt to formalize at the government's procurement agency a commitment to one President's idiosyncratic aesthetic preferences—a highly unusual and inappropriate exercise of government power. The public interest would not have been served by secrecy about this effort.

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<sup>58</sup> See *Ctr. for Sci. in the Pub. Int. v. Perdue*, 438 F. Supp. 3d 546 (D. Md. 2020).

<sup>59</sup> *Rulemaking Docket: Restoration of Milk, Whole Grains, and Sodium Flexibilities*, Regulations.gov, <https://www.regulations.gov/docket/FNS-2020-0038/comments> (last accessed Nov. 14, 2023).

<sup>60</sup> U.S. Gov't Accountability Off. (GAO), GAO-09-205, *Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews* 5 (2009), <https://www.gao.gov/assets/gao-09-205.pdf> (“the average time needed to complete a rulemaking across our 16 case-study rules was about 4 years, with a range from about 1 year to nearly 14 years.”).

<sup>61</sup> TFTS, *supra* note 3, at 14. TFTS misleadingly claims that the provisions that attracted the most criticism from the proposal were ultimately stricken from the final order issued by the President. *Id.* But the final order still set a default architectural style for all buildings in the District of Columbia, and required presidential notification anytime a wide variety of federal buildings anywhere in the country were proposed to be built using non-classical architecture, Exec. Order No. 13,967, 85 Fed. Reg. 83,739 (Dec. 18, 2020), both of which are closely related in substance to the stricken provision

<sup>62</sup> See, e.g., Barbara Marshall, *Donald Trump and His Opulent Mar-A-Lago Estate*, The Palm Beach Post (Nov. 4, 2015), <https://www.palmbeachpost.com/story/lifestyle/2015/11/05/donald-trump-his-opulent-mar/6783476007/> (describing Mar-a-Lago's “gold-leafed living room, [ ] 15th century tiles paving the entrance, [and] dining room's painted frescoes,” noting Trump's efforts to “restore[ ] the mansion to its original state of over-the-top ostentation,” and that the “living room whose 1920s construction exhausted the country's supply of gold leaf was perfect for a guy who liked to put his name on everything in big gold letters.”).

<sup>63</sup> See Exec. Order. No. 13,967 § 6(b).

## B. Omission of crucial context regarding agency work

TFTS asserts that civil servants sabotaged the President's agenda, but conspicuously omits crucial context that belies the claim that these people were acting in bad faith.

- **The Church Amendments** - TFTS claims that career attorneys at the Department of Justice (DOJ) would not enforce protections for healthcare providers with moral or religious objections to performing or helping to perform abortions or sterilization procedures. Specifically, TFTS claims that when DOJ sued the University of Vermont Medical Center for violating the Church Amendments, “[n]o career lawyers would work on [the lawsuit]” for ideological reasons.<sup>64</sup>

In fact, less than a year after filing the lawsuit, DOJ voluntarily dismissed it. As HHS explained in 2021 when withdrawing a parallel Office for Civil Rights investigation, the agency determined that “[n]o court has upheld the application of the standard” that the Trump Administration sought to enforce.<sup>65</sup> HHS determined there was no legal precedent for the case initiated by the Trump administration, and DOJ dismissed the case. These facts dispel TFTS's characterization: career staff would likely have had obvious *legal*, rather than ideological, concerns about the merits of the case Trump appointees sought to bring.

- **COVID Nursing Home Investigations** - TFTS claims that career DOJ lawyers delayed in acceding to Trump officials' order that they open a civil rights investigation into New York, New Jersey, Pennsylvania, and Michigan (all states with Democratic governors).<sup>66</sup> According to TFTS, career staff believed that this civil rights investigation request should include other states, like Texas, that had poor track records of nursing home operations. TFTS notes that political appointees ultimately drafted and sent a letter to Democratic states only, and that their work helped reveal underreported nursing home deaths in New York in 2020.

As an initial matter, TFTS fails to note that *had* DOJ sought additional information from Texas, an investigation might have shed light on why Texas never disclosed any deaths in nursing homes at the beginning of the pandemic,<sup>67</sup> why Texas refused to release the locations of COVID outbreaks in nursing homes,<sup>68</sup> or why Texas's death rate from COVID in nursing homes was far above the national average at the time DOJ launched its

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<sup>64</sup> TFTS, *supra* note 3, at 10.

<sup>65</sup> Letter from Robinsue Frohboese, Acting Dir. and Principal Deputy, Off. for C. R., U.S. Dept't of Health and Hum. Services to David Quinn Gacioch, attorney, McDermott Will & Emery LLP, re: OCR Transaction Number 18-306427 (July 30, 2021), <https://www.hhs.gov/conscience/conscience-protections/uvmmc-letter/index.html>.

<sup>66</sup> TFTS, *supra* note 3, at 11-12, 12 n.17.

<sup>67</sup> Carla Astudillo & Karen Baker Brooks Harper, *COVID-19 Ravaged Texas Nursing Homes. Here Are the Stories Behind the Numbers*, Texas Tribune (Apr. 15, 2021), <https://apps.texastribune.org/features/2021/texas-nursing-home-deaths-coronavirus-pandemic/#:~:text=Texas%20did%20not%20report%20any,below%20100%20people%20per%20week>.

<sup>68</sup> Lomi Kriel & Vianna Davila, *Texas Still Won't Say Which Nursing Homes Have COVID-19 Cases. Families Are Demanding Answers*, Texas Tribune (Apr. 30, 2020), <https://www.texastribune.org/2020/04/30/coronavirus-nursing-homes-families/>.

investigation, while New York’s was far below.<sup>69</sup>

More importantly, contrary to TFTS’s characterization, it is appropriate for civil servants to question investigation requests made for partisan political reasons. Indeed, DOJ’s governing manual emphasizes that

The rule of law depends upon the evenhanded administration of justice. The legal judgments of the Department of Justice must be impartial and insulated from political influence. It is imperative that the Department’s investigatory and prosecutorial powers be exercised free from partisan consideration. It is a fundamental duty of every employee of the Department to ensure that these principles are upheld in all of the Department’s legal endeavors.<sup>70</sup>

TFTS fails to grapple with whether ordering an investigation exclusively into states led by one political party was appropriate, or served the public interest, in the first place. It also fails to note that President Trump’s appointees took the highly unusual, and improper, step of publicizing a request for information to evaluate “*whether* the Department of Justice will initiate investigations under the Civil Rights of Institutionalized Persons Act (CRIPA),”<sup>71</sup> i.e., a step prior to any decision to open an investigation had been made.

Publicizing this kind of preliminary request seems calculated to insert the significant authority of DOJ into an ongoing political debate during an election season by suggesting, before DOJ even had data, the possibility that these states had violated CRIPA. DOJ policy limits public disclosures of investigations to avoid this kind of improper influence. DOJ typical policy is to “not confirm the existence of or otherwise comment about ongoing investigations.”<sup>72</sup>

Last, the report also neglects to note that despite the change in presidential administration in 2021, DOJ has continued to issue negative findings about states with Democratic governors,<sup>73</sup> in line with the public’s expectations of a less politicized civil service.

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<sup>69</sup> AARP Nursing Home COVID-19 Dashboard, AARP <https://www.aarp.org/ppi/issues/caregiving/info-2020/nursing-home-covid-dashboard.html> (tracking nursing home resident deaths by state as of Aug. 23, 2020).

<sup>70</sup> U.S. Dep’t of Just., DOJ Justice Manual § 1-8.100 (2019) (DOJ Justice Manual), <https://www.justice.gov/jm/jm-1-8000-congressional-relations>.

<sup>71</sup> U.S. Dep’t of Just., *Department of Justice Requesting Data from Governors of States that Issued COVID-19 Orders that May Have Resulted in Deaths of Elderly Nursing Home Residents* (Aug. 26, 2020), <https://www.justice.gov/opa/pr/department-justice-requesting-data-governors-states-issued-covid-19-orders-may-have-resulted> (emphasis added).

<sup>72</sup> DOJ Justice Manual § 1-7400(b).

<sup>73</sup> See, e.g., *Justice Department Finds State of New Jersey Violated U.S. Constitution with Deficient Care at Two State Run Veterans’ Homes*, DOJ Off. of Pub. Aff. (Sep. 7, 2023), <https://www.justice.gov/opa/pr/justice-department-finds-state-new-jersey-violated-us-constitution-deficient-care-two-state>.

- **Roadless Rule** - TFTS argues that the Department of Agriculture career staff “slow-walked” repeal of the Roadless Area Conservation Rule in Alaska, which prohibited road construction on millions of acres of National Forest System lands.<sup>74</sup> TFTS claims that because the rule initially took less than 12 months to be promulgated during the Clinton administration but over two years to be partially rescinded during the Trump administration, that career staff must have slow-walked the regulatory process.<sup>75</sup>

These claims, however, do not provide important context for the lengthy rulemaking process. In 2018, the 90-day comment period for rescinding the rule in question included “over 144,000 entries,” and “the majority . . . opposed changing the 2001 Roadless Area Conservation Rule . . . .”<sup>76</sup> Given this voluminous record, the fact that new assessments had to be undertaken according to the National Environmental Policy Act, and the fact that the rule had been previously subject to litigation,<sup>77</sup> a two-year rulemaking process is to be expected.<sup>78</sup> Spending two years on a complex rule with a voluminous record is consistent with the civil service following well-established regulatory processes.

In sum, many of the anecdotes relied on by TFTS lack crucial context, or mischaracterize important facts about agencies’ work. The only thing these anecdotes consistently show is that some political appointees during the Trump administration occasionally found it challenging to implement their regulatory goals. But that experience is not unique to Trump-era political appointees, and it does not justify reorienting the civil service towards political fealty.

### **III. A balanced assessment of the value of the civil service must also account for the limitations of political leadership**

For all the attention civil service critics frequently lavish on the perceived failings of federal employees, these critics rarely grapple with the limitations of political appointees. While most political appointees are themselves dedicated public servants, others take office as ideological extremists, partisan loyalists, or simply neophytes to the complex and unique ethical demands of public service.

Career civil servants can help to prevent or deter misconduct by these officials by highlighting potential concerns or legal flags to political staff, advising them on proper courses of conduct, and, if needed, ensuring transparency and oversight by alerting agency inspectors general, Congress, or the public. Career civil servants can also help inexperienced political appointees implement difficult policies effectively and legally. Such action to protect the integrity and efficacy of government would become more difficult if civil servants were treated as at-will employees of the federal government, with political leaders further empowered to intimidate, silence, re-assign, or terminate career staff.

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<sup>74</sup> TFTS, *supra* note 3, at 10, 11.

<sup>75</sup> *Id.*

<sup>76</sup> USFS, *Alaska Roadless Rule Scoping Period: Written Public Comment Summary*, 2 (Feb. 2019), [https://content.govdelivery.com/attachments/USDAFS/2019/02/08/file\\_attachments/1152423/Alaska%20Roadless%20Rule%20-%20Scoping%20Public%20Comment%20Summary.pdf](https://content.govdelivery.com/attachments/USDAFS/2019/02/08/file_attachments/1152423/Alaska%20Roadless%20Rule%20-%20Scoping%20Public%20Comment%20Summary.pdf).

<sup>77</sup> *See, e.g., Organized Vill. of Kake et al. v. U.S. Dep’t of Agric. et al.*, 795 F.3d 956 (9th Cir. 2015) (en banc) (reinstating the roadless rule and vacating a prior attempt to exempt the Tongass National Forest in Alaska from the rule).

<sup>78</sup> *See* GAO, *supra* note 60, at 5.

The TFTS report discussed at length in the prior section attempted to use a handful of anecdotes to (misleadingly) portray an unaccountable civil service acting against the public interest, which the author argues must be reined in. OPM should reject this view. The civil service creates an important bulwark against the subset of political appointees who seek to impose unlawful policies or use their offices for personal gain. Tipping this balance to give these appointees more power risks enabling these bad actors.

While far from exhaustive, the following examples demonstrate that agency political leaders during the Trump administration frequently bent or broke the law or norms of good governance. It would not serve the public interest to weaken checks on the power of similar actors in the future:

- **Travel restriction chaos:** Soon after taking office on January 27, 2017, President Trump issued an Executive Order that, with certain exceptions, “immediately suspended entry into the United States of immigrant and non-immigrant aliens” from citizens of seven majority Muslim countries, and banned refugees from entering the United States from Syria.<sup>79</sup> The DHS Inspector General found that the Order was drafted by political leaders at the White House, with minimal consultation or involvement from the agencies tasked with enforcing it.<sup>80</sup> “DHS and its components had no opportunity to provide expert input in drafting the EO,” and “[n]o policies, procedures, and guidance to the field were developed” to guide implementation.<sup>81</sup> As a result, “DHS and its interagency partners DOJ and the State Department” were forced to “improvise policies and procedures in real time.”<sup>82</sup> Field agents lacked clarity on how to implement the order; airlines were given conflicting information about whether to allow passengers to board;<sup>83</sup> and court rulings and public backlash to some of the most extreme elements of the Order (such as its initial claimed effect on Legal Permanent Residents) caused rapid and confusing changes to the scope of the Order from day to day.<sup>84</sup>

After a flood of defeats in court concerning the legality of President Trump’s initial Order, the White House went on to issue a narrower, revised Order that addressed many of the shortcomings of the initial Order.<sup>85</sup> This version of the Order would ultimately be upheld as lawful by the Supreme Court.<sup>86</sup> But the chaos of the original Order could have been avoided by a process that was not driven by highly-ideological political appointees, and involved career civil servants from the beginning. Those civil servants could have advised the Trump administration on how to avoid the plain illegality of the initial

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<sup>79</sup> Dep’t of Homeland Sec., Off. of Inspector Gen., OIG-18-37, *DHS Implementation of Executive Order #13769 ‘Protecting the Nation from Foreign Terrorist Entry Into the United States’ (January 27, 2017)* 3 (2018) (“DHS OIG Report”); see also Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

<sup>80</sup> See DHS OIG Report, *supra* note 79, at 5-6, 8-9.

<sup>81</sup> *Id.* at 5.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 6, 31-34.

<sup>84</sup> See, e.g., *id.* at 35-41, 58; see also Jerry Markon et al., *Judge Halts Deportations as Refugee Ban Causes Worldwide Furor*, Wash. Post (Jan. 29, 2017), [https://www.washingtonpost.com/local/social-issues/refugees-detained-at-us-airports-challenge-trumps-executive-order/2017/01/28/e69501a2-e562-11e6-a547-5fb9411d332c\\_story.html](https://www.washingtonpost.com/local/social-issues/refugees-detained-at-us-airports-challenge-trumps-executive-order/2017/01/28/e69501a2-e562-11e6-a547-5fb9411d332c_story.html).

<sup>85</sup> Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

<sup>86</sup> *Trump et al. v. Hawaii, et al.*, 585 U.S. --, 138 S.Ct. 2392 (2018).

restrictions, helped to draft legal versions that were far less disruptive; assisted in developing an effective public affairs strategy; and articulated how essential it was to provide the relevant agencies with advanced notice of the Order and a rollout plan.

- **Extortion of Ukraine:** In 2019, President Trump pressured the President of Ukraine, Volodymyr Zelenskyy, to launch a fabricated investigation into then-presidential political candidate Joe Biden. He also withheld foreign aid and other official support to Ukraine in order to pressure President Zelenskyy.<sup>87</sup> Multiple political leaders within the Trump administration assisted in this effort, and would later work to cover up President Trump’s extortion attempt and obstruct an investigation into the Ukraine pressure campaign.<sup>88</sup> This extraordinary breach of the public trust would ultimately result in the first impeachment of President Trump, and may never have come to light without a whistleblower report from a career employee.<sup>89</sup>
- **Attempt to overturn election:** In 2020, President Trump appointed Jeffrey Clark to be Acting Assistant Attorney General for the DOJ Civil Division.<sup>90</sup> In this role, Clark became a key ally in President Trump’s efforts to overturn the 2020 presidential election and was recently indicted in Georgia for the same. The indictment alleges that Clark solicited senior DOJ officials “to sign and send a document that falsely stated that the United States Department of Justice had ‘identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia,’” to state officials in Georgia.<sup>91</sup> And according to the Department of Justice’s separate indictment of President Trump, this document “sought to advance the Defendant’s fraudulent elector plan by using the Justice Department’s authority to falsely present the fraudulent electors as a valid alternative to the legitimate electors.”<sup>92</sup> This federal indictment also alleges that Co-Conspirator #4, presumed to be Clark,<sup>93</sup> “proposed sending versions of the letter to elected officials in other targeted states” and even includes a statement from him that suggests using the Insurrection Act to quell riots that would result from President Trump refusing to leave office.<sup>94</sup>

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<sup>87</sup> H.R. Permanent Select Comm. on Intel., 116th Cong., *The Trump-Ukraine Impeachment Inquiry Report* 8-9 (2019).

<sup>88</sup> *Id.* at 9.

<sup>89</sup> Nicholas Fandos, *Trump’s Ukraine Call Was ‘Crazy’ and ‘Frightening,’ Official Told Whistle-Blower*, N.Y. Times (Oct. 8, 2019, updated July 29, 2021), <https://www.nytimes.com/2019/10/08/us/politics/trump-ukraine-whistleblower.html>.

<sup>90</sup> Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, N.Y. Times (Jan. 22, 2021, updated Oct. 13, 2022), <https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html>.

<sup>91</sup> Indictment at 46, *State. v. Trump et al.*, No. 23SC188947 (Fulton Super. Ct. Aug. 14, 2023).

<sup>92</sup> See Indictment at 6, *United States v. Trump*, 1:23-cr-00257 (D.D.C. Aug. 1, 2023) (“DOJ Election Indictment”).

<sup>93</sup> Holly Bailey et al., *Here Are the Trump Co-Conspirators Described in the DOJ Indictment*, Wash. Post (Aug. 1, 2023), <https://www.washingtonpost.com/national-security/2023/08/01/doj-trump-indictment-trump-coconspirators/>.

<sup>94</sup> DOJ Election Indictment, *supra* note 92, at 28, 30.



Thankfully, some senior political officials at DOJ had the courage to rebuff Clark's attempts to use DOJ as a tool to overturn a legitimate election.<sup>95</sup> However, recent reporting suggests that this remains a sore spot for those in President Trump's orbit, who hope to find more lawyers like Clark to fill political leadership roles in a future administration.<sup>96</sup>

- **Corruption of federal broadcasters:** In June 2020, Michael Pack was confirmed to be CEO of the U.S. Agency for Global Media (USAGM).<sup>97</sup> The agency oversees Voice of America, Radio Free Europe/Radio Liberty, Radio Free Asia and other broadcasters funded by the U.S. government. Once in charge of USAGM, a Federal District Court found that Pack appointed individuals with “no discernible journalism or broadcasting experience” to senior leadership positions at USAGM, “sought to interfere in the newsrooms of the USAGM networks, in violation of their eighty-year practice, enshrined in law, of journalistic autonomy,” “worked systematically to eliminate those USAGM employees and network journalists who both oppose his interference and produce journalistic content that, in Pack’s view, does not align with the political interests of President Trump;” and sought to “quash not only coverage that is insufficiently supportive of President Trump, but also any coverage, unless unfavorable, of President Trump’s political opponents.”<sup>98</sup>

Pack’s illegal attempts to turn USAGM into an arm of the Trump campaign were brought to light in part through the whistleblowing process by career civil servants at the agency, whose security clearances Pack suspended in retaliation.<sup>99</sup>

- **Frequent waste and mismanagement of funds:** According to an Office of Special Counsel report, the Environmental Protection Agency, under the leadership of then-Administrator Scott Pruitt’s, “spent excessively and improperly” on travel and security, including almost \$125,000 on unwarranted airfare costs for Pruitt and his staff and over \$40,000 to install a soundproof booth in Pruitt’s office.<sup>100</sup> The agency also significantly expanded, without sufficient reason, Pruitt’s protective services detail (PSD), “which increased PSD costs from \$1.6 to \$3.5 million and tripled its size.”<sup>101</sup> Pruitt

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<sup>95</sup> See Benner, *supra* note 90.

<sup>96</sup> Jonathan Swan et al., *If Trump Wins, His Allies Want Lawyers Who Will Bless a More Radical Agenda*, N.Y. Times (Nov. 1, 2023), <https://www.nytimes.com/2023/11/01/us/politics/trump-2025-lawyers.html>.

<sup>97</sup> David Folkenflik, *Federal Inquiry Details Abuses of Power by Trump’s CEO over Voice of America*, NPR (May 21, 2023), <https://www.npr.org/2023/05/21/1177208862/usagm-michael-pack-voa-voice-of-america-investigation-trump-abuse-of-power>.

<sup>98</sup> *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 342 (D.D.C. 2020).

<sup>99</sup> Letter from Henry J. Kerner, Special Counsel, to the President re: OSC File Nos. DI-20-1086 et al. at 2 (May 10, 2023), <https://osc.gov/Documents/Public%20Files/FY23/DI-20-1086/Redacted%20OSC%20Letter%20to%20President%20DI-20-1086%20et%20al.pdf>.

<sup>100</sup> Letter from Henry J. Kerner, Special Counsel, to the President re: OSC File Nos. DI-18-3786 et al. at 2 (May 26, 2022), <https://int.nyt.com/data/documenttools/osc-closure-letter-to-the-president-may-2022/174ad57a199092d5/full.pdf>.

<sup>101</sup> *Id.* at 4.

was also found to have “endangered public safety” by ordering his protective services detail to engage in unnecessary reckless driving behavior.<sup>102</sup> Other allegations not included in the OSC report were documented elsewhere. For example, the Public Employees for Environmental Responsibility filed a lawsuit claiming, “Pruitt deliberately avoided creating written records of meetings so they could not be archived or subject to oversight.”<sup>103</sup> Pruitt would ultimately resign under a cloud of scandal in July of 2018.<sup>104</sup> Notably, it is likely that were it not for whistleblower protections in this instance career staff would not have been able to come forward to ensure accountability for agency mismanagement.

Administrator Pruitt was far from the only Trump official who wasted or misappropriated public funds:

- President Trump’s first Secretary of Health and Human Services, Tom Price, resigned after the Department’s inspector general opened an investigation into his use of taxpayer-funded private jets for travel, including for distances as short as Washington, D.C. to Philadelphia;<sup>105</sup>
- Officials at the Department of Housing and Urban Development attempted to purchase a \$31,000 dining room set for Secretary Ben Carson’s secretarial suite, violating federal appropriations law setting maximums on such expenses, and only canceled the purchase after documents released via the Freedom of Information Act generated controversy about the improper spending;<sup>106</sup>
- President Trump’s Secretary of Veterans Affairs (VA), David Shulkin, was found to have misused VA funds for a personal trip for him and his wife to the Wimbledon tennis tournament in the United Kingdom. His Chief of Staff falsely represented that Secretary Shulkin would receive an award on the trip to justify it as an official expense, and Secretary Shulkin improperly accepted the Wimbledon tickets as a gift.<sup>107</sup> This misuse of funds was brought to light by an “anonymous

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<sup>102</sup> *Id.* at 3.

<sup>103</sup> Sam Wolfson, *The Ethics Scandals that Eventually Forced Scott Pruitt to Resign*, *The Guardian* (July 5, 2018), <https://www.theguardian.com/us-news/2018/jul/05/scott-pruitt-what-it-took-to-get-him-to-resign-from-his-epa-job>.

<sup>104</sup> *Id.*

<sup>105</sup> See Kevin Liptak & Miranda Green, *Price Out as HHS Secretary after Private Plane Scandal*, *CNN* (Sep. 29, 2017), <https://www.cnn.com/2017/09/29/politics/tom-price-resigns/index.html>.

<sup>106</sup> U.S. Dep’t of Hous. & Urban Dev., Off. of Inspector Gen., Report No. 2018SI006075I, *Investigation into Alleged Violation of Federal Appropriations Law by the Office of the Secretary* 1 (Sep. 11, 2019), <https://www.hudoig.gov/sites/default/files/2019-09/HUD%20OIG%20Report%20of%20Investigation%20into%20Alleged%20Violation%20of%20Federal%20Appropriations%20Law%20by%20OSEC%20%28Sept.%202011%2C%202019%29.pdf>; Jack Gillum & Juliet Eilperin, *‘I Do like 3 Meetings a Day on That:’ HUD Official Complained About Effort to Redecorate Carson’s Office*, *Wash. Post* (Feb. 27, 2018), [https://www.washingtonpost.com/politics/i-do-like-3-meetings-a-day-on-that-hud-official-complained-about-effort-to-redecorate-carsons-office/2018/02/27/b9ce3146-1be6-11e8-b2d9-08e748f892c0\\_story.html](https://www.washingtonpost.com/politics/i-do-like-3-meetings-a-day-on-that-hud-official-complained-about-effort-to-redecorate-carsons-office/2018/02/27/b9ce3146-1be6-11e8-b2d9-08e748f892c0_story.html).

<sup>107</sup> Dep’t of Veterans Affs., Off. of the Inspector Gen., Report No. 17-05909-106 i-vi, *Administrative Investigation VA Secretary and Delegation Travel to Europe* (Feb. 15, 2018), <https://www.va.gov/oig/pubs/VAOIG-17-05909-106.pdf>.

tip,”<sup>108</sup> which may well have been a career federal employee ensuring adequate oversight of improper conduct by agency leaders.

- Two appointees at the Department of Veterans Affairs likely engaged in “a pattern of abuse of authority and a gross waste of agency funds” by regularly using agency resources and security for non-official travel;<sup>109</sup>
- Interior Secretary Ryan Zinke used wildfire preparedness funds during an active wildfire season to pay for a helicopter ride in Nevada to scout sites for shrinking national monuments.<sup>110</sup>
- **Retaliation against journalists in grant funding:** Another political appointee at EPA tried to cancel grant funding for a newspaper covering environmental issues in the Chesapeake Bay because, according to this official, “the American public doesn’t trust the press,” and the newspaper “should not have weighed in” when it reported on proposed budget cuts to the Chesapeake Bay Program.<sup>111</sup> Perhaps cognizant of the significant First Amendment concerns over this official’s attempts to retaliate against a newspaper, EPA instead called the grant termination a “shift in priorities,” a characterization that former career staff said belied the politicized and constitutionally dubious nature of the decision.<sup>112</sup>
- **Politicized tampering with the Census:** At the Department of Commerce, political leaders waged an extensive, unusual, and often illegal campaign to try and tailor the 2020 Census to benefit Republican politicians. Secretary Wilbur Ross was found to have lied to Congress under oath on two separate occasions about the Trump administration’s attempt to add an extralegal question concerning citizenship to the 2020 Census.<sup>113</sup> When the Supreme Court examined the citizenship question, they concluded that the justification for the question was likely contrived.<sup>114</sup> And Department political appointees were said to have engaged in “unusually” high levels of micromanagement of the Census

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<sup>108</sup> *Id.* at i.

<sup>109</sup> Letter from Henry J. Kerner, Special Counsel, to the President re: OSC File No. DI-18-4035 (Oct. 10, 2019), <https://osc.gov/Documents/Public%20Files/FY20/DI-18-4035/DI-18-4035%20Letter%20to%20the%20President.pdf>.

<sup>110</sup> Bill Gabbert, *Secretary of Interior Used Wildfire Funds for Helicopter Tour of National Monuments*, *Wildfire Today* (Dec. 29, 2017), <https://wildfiretoday.com/2017/12/29/secretary-of-interior-used-wildfire-funds-for-helicopter-tour-of-national-monuments/>; Cristina Alesci et al., *Interior Secretary Ryan Zinke’s NRA visit among Several Trips being Questioned*, *CNN* (Feb. 27, 2018), <https://www.cnn.com/2018/02/27/politics/ryan-zinke-nra/index.html>.

<sup>111</sup> *After Outpouring of Support, Bay Journal’s EPA Grant Restored*, *Bay Journal* (May 26, 2018), [https://www.bayjournal.com/news/policy/after-outpouring-of-support-bay-journal-s-epa-grant-restored/article\\_7f11880e-4598-53b6-991b-141d190e4c6a.html](https://www.bayjournal.com/news/policy/after-outpouring-of-support-bay-journal-s-epa-grant-restored/article_7f11880e-4598-53b6-991b-141d190e4c6a.html).

<sup>112</sup> *Id.*

<sup>113</sup> Letter from Peggy E. Gustafson, Inspector Gen., U.S. Dep’t of Comm. to Charles E. Schumer, Majority Leader, U.S. Senate & Carolyn B. Maloney, Chairwoman, House Comm. on Oversight and Reform (July 15, 2021), <https://www.oig.doc.gov/OIGPublications/Inspector-General-Letter-to-Majority-Leader-Charles-Schumer-and-Chairwoman-Carolyn-Maloney-re-OIG-Case-No-19-0728.pdf>.

<sup>114</sup> *Dep’t of Comm. v. New York*, 588 U.S. --, 139 S. Ct. 2551, 2575 (2019).

process, including ending the Census count process early, potentially in service of skewing the Census towards undercounting in Democratic-leaning areas.<sup>115</sup>

- **Misleading hurricane forecasts:** Political appointees at the National Oceanic and Atmospheric Administration (NOAA) were found to have “engaged in misconduct intentionally, knowingly, or in reckless disregard of” NOAA’s policies on scientific integrity,<sup>116</sup> in 2019, while preparing for the impending arrival of Hurricane Dorian on the East Coast. President Trump at the time tweeted his baseless belief that (at a time when no government forecast had predicted that hurricane winds would impact Alabama), while no weather forecaster was predicting Dorian would impact Alabama,<sup>117</sup> he believed Alabama, among other states, “will most likely be hit (much) harder than anticipated.”<sup>118</sup> That tweet caused worried phone calls to the National Weather Service’s Birmingham, Alabama office, which put out a tweet (while unaware of the President’s earlier tweet) clarifying that Alabama would not experience impacts from Hurricane Dorian.<sup>119</sup> Political appointees at the Department of Commerce and NOAA, more concerned about the perception of undercutting the President’s statement than about conveying accurate information about the path of a hurricane, forced NOAA to issue a statement that the hurricane could have impacted Alabama, contrary to the actual forecast from the National Weather Service.<sup>120</sup>
- **Illegal political campaigning:** Officials in the Trump administration were found to commit “pervasive”<sup>121</sup> violations of the Hatch Act, a law designed to prevent the federal

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<sup>115</sup> See email from Ron S. Jarmin, Deputy Dir., U.S. Census Bureau, to Enrique Lamas & Christa D. Jones (Sep. 14, 2020), <https://www.brennancenter.org/sites/default/files/2022-01/BC-DOC-CEN-2020-1602-1445-1447.pdf>; Hansi Lo Wang, *Trump Officials Interfered with the 2020 Census Beyond Cutting it Short, Email Shows*, NPR (Jan. 15, 2022), <https://www.npr.org/2022/01/15/1073338121/2020-census-interference-trump>.

<sup>116</sup> Nat’l Acad. of Pub. Admin., *An Independent Assessment of Allegations of Scientific Misconduct filed under the National Oceanic and Atmospheric Administration Scientific Integrity Policy* (NOAA Report) at 3 (2020). [https://sciencecouncil.noaa.gov/wp-content/uploads/2022/08/NOAA-Final-Report\\_scanned\\_061220.pdf](https://sciencecouncil.noaa.gov/wp-content/uploads/2022/08/NOAA-Final-Report_scanned_061220.pdf).

<sup>117</sup> Brian Stetler, *Trump claimed Dorian could hit Alabama - even after weather service refuted it*, CNN (Sep. 3, 2019), <https://www.cnn.com/2019/09/02/politics/trump-hurricane-dorian-false-claims-alabama>; Tom Embury-Dennis, *Trump Forced to Deny Personally Doctoring Hurricane Map after Sharpie Spotted on His Desk*, The Independent (Sep. 5, 2019), <https://www.the-independent.com/news/world/americas/us-politics/trump-map-hurricane-dorian-sharpie-fake-doctored-alabama-noaa-storm-a9092521.html>.

<sup>118</sup> @realDonaldTrump, Twitter (Sep. 1, 2019, 7:51 AM), <https://web.archive.org/web/20201225093629/https://twitter.com/realDonaldTrump/status/1168174613827899393>.

<sup>119</sup> NOAA Report, *supra* note 116, at 7.

<sup>120</sup> *Id.* at 7, 33-34.

<sup>121</sup> U.S. Off. of Special Counsel, *Investigation of Political Activities by Senior Trump Administration Officials During the 2020 Presidential Election*, 10 (2021), <https://osc.gov/Documents/Hatch%20Act/Reports/Investigation%20of%20Political%20Activities%20by%20Senior%20Trump%20Administration%20Officials%20During%20the%202020%20Presidential%20Election.pdf>

government from being turned into a political machine for the party in power.<sup>122</sup> The Office of Special Counsel found that the Trump administration “tacitly or expressly approved” of systematic disregard for the Hatch Act among its political officials, with the “cumulative effect” of these violations being to “undermine public confidence in the nonpartisan operation of government,” while also causing career officials to question whether the Hatch Act still bound their behavior, and undermining the rule of law.<sup>123</sup> As OSC concluded with regard to the Trump Administration,

[O]ne of Congress’s goals in passing the Hatch Act was to ensure that the power and prestige of the government would not be corrupted to create a taxpayer-funded campaign apparatus within the executive branch. Congress’s fear was realized here.<sup>124</sup>

- **Unlawful political appointments:** The Trump Administration routinely violated the Federal Vacancies Reform Act, relying on acting officials to exercise executive authority,<sup>125</sup> either out of an unwillingness to do the work to put forth permanent appointees, or a fear that their desired personnel would not get confirmed by the Senate. According to the Constitutional Accountability Center, as of September 2020, there were at least 17 high-level officials who weren’t validly serving in their roles, and that estimate “surely understate[d] the severity of the problem.”<sup>126</sup> This pervasive practice skirted the Constitution’s requirement that the Senate advise and consent on high-level political appointments, and ultimately led Trump-era agencies to begin losing cases in court because agency leaders were not validly exercising powers.<sup>127</sup> The same administration that sought to further empower political appointees to enforce their will at agencies, protesting the supposedly anti-democratic effects of civil service protections, actively sought to evade the democratic accountability for those political appointments embedded in the Constitution.

The incidents collected above represent only a selection of the harmful, unethical, or illegal actions taken by political appointees during the previous administration. These actions undermined the rule of law, weakened our allies, wounded public trust in government, and wasted exorbitant amounts of taxpayer money. OPM, and the American public at large, should be wary of arguments that the rule of law and the preservation of American democracy require that political appointees be further empowered to impose their will on federal agencies and the civil servants who staff them.

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<sup>122</sup> *Id.* at 7-9.

<sup>123</sup> *Id.* at 38-39.

<sup>124</sup> *Id.* at 44.

<sup>125</sup> See Becca Damante, *At Least 15 Trump Officials Do Not Hold Their Positions Lawfully*, Just Security (Sept., 17, 2020), <https://www.justsecurity.org/72456/at-least-15-trump-officials-do-not-hold-their-positions-lawfully>; GAO, *Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security—Reconsideration*, B-332451, 2020 WL 4923735 (Comp. Gen. Aug. 21, 2020).

<sup>126</sup> Damante, *supra* note 125.

<sup>127</sup> See, e.g., *L.M.-M., et al. v. Cuccinelli*, 442 F.Supp. 3d 1, 24-25 (D.D.C. 2020); *Behring Reg’l Ctr. LLC v. Wolf*, 544 F. Supp. 3d 937, 944 (N.D. Cal. 2021).

#### **IV. OPM is correct to take steps to reinforce civil service protections**

The Proposed Rule correctly identifies many of the risks the federal government faces from future attempts to weaken civil service protections: agency destabilization, “potentially repeatedly, each time there is a change in administration,” the loss of key “competitive advantage[s]” of federal employment relative to other sectors (“stable, fair, merit-based employment”), and “a loss of experienced staff, leading to a disruption, if not interruption, of agency mission operations.”<sup>128</sup>

In response to those risks, the Proposed Rule seeks to ensure that existing civil service protections remain in place for employees currently serving in career roles, that senior career staff are not misclassified as political appointees in the future, and that future attempts to restructure excepted service schedules are well-justified.<sup>129</sup>

Contrary to the view of many civil service critics, these proposals would reinforce the proper functioning of the civil service, and protect it against future attempts to politicize it in ways that run contrary to Congressional intent and the public interest. We encourage OPM to finalize this beneficial proposal.<sup>130</sup>

Thank you for the opportunity to comment on OPM’s important work, please do not hesitate to contact us if we can provide additional information or clarification.

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<sup>128</sup> 88 Fed. Reg. at 63,878.

<sup>129</sup> *See, e.g.*, 88 Fed. Reg. at 63,862.

<sup>130</sup> We would also encourage OPM to take steps to clarify that the protections in the Proposed Rule also attach to employees serving in career-reserved roles in the Senior Executive Service, wherever applicable.