

POLICY BRIEF SERIES

Civil Service: Pulling In or Pushing Away

Sally Katzen, Professor of Practice and Distinguished Scholar in Residence at NYU School of Law

August 2020

Policy Brief No. 1



THE C. BOYDEN GRAY //

Center *for the* Study
of the Administrative State

ANTONIN SCALIA LAW SCHOOL • GEORGE MASON UNIVERSITY

About the Gray Center and the Policy Brief Series

The C. Boyden Gray Center for the Study of the Administrative State is dedicated to fostering scholarship on new and timeless questions about the modern administrative state, in order to elevate and improve debates occurring in the courts, in Congress, in the executive branch, and in the broader public.

Since its founding in 2015, the Gray Center has hosted countless scholars, practitioners, and policymakers to research and debate the constitutional and practical issues of administrative power and discretion.

At George Mason University's Antonin Scalia Law School, across the Potomac River from our nation's capital, the Gray Center serves as a bridge between the work of academia and the work of courts, Congress, the executive branch, and private practitioners.

Because the Gray Center is an open forum for vibrant debate, the Center takes no institutional positions on the issues discussed in the papers that it publishes or the conferences that it organizes. All views expressed in Policy Briefs and other materials reflect only the views of the authors.

Civil Service: Pulling In or Pushing Away

By Sally Katzen

Sally Katzen is Professor of Practice and Distinguished Scholar in Residence at NYU School of Law, and a Distinguished Senior Fellow at the C. Boyden Gray Center for the Study of the Administrative State. She served as a political appointee in the Carter and Clinton Administrations (1979-1981 and 1994-2001), the designated liaison to the George W. Bush transition team for the Office of Management and Budget (2000) and as a member of the Steering Committee for the Agency Review Group of the Obama/Biden Transition (2008-2009). She wishes to acknowledge the significant contributions of her research assistant, Rachel Rothschild, to this article.

Executive Summary: Tension between political appointees and career civil servants is not a new phenomenon, but it is more fraught now, with unfortunate adverse consequences for the people involved and for our country. Bureaucrat bashing or ignoring those with expertise and experience is destructive to our government; far better to listen to what they have to contribute and then make your own decision. Otherwise, the public will suffer.

There has been much chatter recently about the so-called “Deep State.” The term is not intended as a compliment reflecting deep, thoughtful expertise and experience, but rather as a disparaging label for the civil service that is seen by those who use the term as a haven for government workers’ undercutting or sabotaging the plans and policies of the lawfully elected (and appointed) officials in the Executive Branch. The argument runs something like this: Elections have consequences. So the newly selected political appointees can (and should) call the shots. If the career civil servants disagree or resist, that’s bad form, inappropriate and wholly illegitimate.

The tension between political appointees and career civil servants is not a new phenomenon, with traces of it extending back at least to the time I first entered government (1979). But it seems to be qualitatively different now, with more hostility and antagonism among the players and greater pernicious and destructive consequences for our government and our country.

The changing of the guard, especially from one political party to the other, is unsettling, if not disruptive, for government workers in the best of circumstances. Where the orders had been to go in one direction and then the orders are to go in a different, or opposite, direction, there will necessarily be some rolling of eyes,

furrowing of brows, smirks or even voiced objections. This is not surprising, nor is it disrespectful of the newly appointed officials. Career civil servants have been there, done that, often for different administrations, and the wealth of knowledge they possess is a valuable asset. The new guys and gals in town should listen and learn; they do not have to agree and/or follow the path suggested by the career staff, but there is undoubtedly useful information to be had from those who have worked on the issues before.

I understand the suspicion that a new political appointee may have toward the staff he or she has inherited, particularly if that staff was assembled (at least in part) during the tenure of the predecessor of the president he or she is serving. I fell victim to those same feelings when I was Administrator of the Office of Information and Regulatory Affairs (OIRA) during the Clinton Administration. I had decided that when someone on my staff left, I would do an “exit interview,” from which I could learn, among other things, more about the workings of, and the relationships within, the office. The very first exit interview took me totally by surprise. I had assumed that because this person had been hired by and worked for people serving Presidents Reagan and Bush, he was a Republican and anti-regulatory and disapproving of the direction I wanted OIRA

“What I learned was that the career staff at OMB generally, and those at OIRA in particular, worked diligently and conscientiously for the Office of the President and the President in office until 11:59 a.m. on January 20th and then worked, just as diligently and conscientiously, for the new President beginning with his oath of office at 12:00 noon.”

to go. I was dead wrong. He was fully on board with my approach and was leaving because he had been offered a better position within the Administration. So much for assumptions about the political leanings of the staff. What I learned was that the career staff at OMB generally, and those at OIRA in particular, worked diligently and conscientiously for the Office of the President and the President in office until 11:59 a.m. on January 20th and then worked, just as diligently and conscientiously, for the new President beginning with his oath of office at 12:00 noon. I was the recipient of that dedication and determination from the staff I inherited from my predecessor; I saw the same dedication and determination by “my” staff for my successor in the George W. Bush Administration.

Civil servants make crucial contributions to well-functioning government.¹ In just the past year, federal workers have rolled out new facial recognition systems at airports to provide a faster, smoother travel process while identifying potential terrorists.² They have revamped health care centers to offer better care to veterans and developed new warning systems for hurricane storm surges.³ The work of these talented professionals saves lives and improves our health and our economy.

This storyline is generally accepted in Washington, particularly by those who have had the privilege of serving in the Executive Branch. But outside Washington, where many of the incoming political appointees and all of the elected officials in Congress come from, the story told, again and again, is very different. Civil servants,

who are disparagingly called bureaucrats, are said to be lazy and unresponsive; by some telling, they are incompetent; by others, bureaucrats are accused of being on a mission of their own without any regard for the interests of the public. I used to say that bureaucrat bashing is the favorite spectator sport of Washington’s elected officials. But, in fact, it is not limited to Washington. Virtually every politician runs as an “outsider,” against Washington. And rarely does anyone give full-throated endorsement or praise to the civil service. I am not saying that career government employees are perfect – no one is. But the rhetoric about the civil service – especially what has become the applause line in candidates’ speeches when they denigrate Washington – is greatly overstated and often beyond the pale.

Because one of the many lessons I learned from my time in government was that career civil servants were the repository of considerable talent and knowledge, I have urged new political appointees in each transition I was involved in to reach out to – and listen to – their career civil servants. In my view, this message to the incoming political appointees could not be overemphasized or repeated too frequently.

This message was typically better received in Democratic than in Republican Administrations, in large part I suspect because the conventional wisdom is that career civil servants are somewhat more likely to vote Democratic than Republican.⁴ But more disconcerting is that over time this message has been harder to get through to those in both political parties. I saw

considerable reluctance to accept this advice during the Obama/Biden transition, and much greater reluctance – to the point of hostility – with the incoming Trump/Pence Administration.

There have been numerous reports about the negative attitudes of people in the Trump transition, who were referred to as “landing teams” as though they were entering occupied territories.⁵ These landing teams were frequently unprepared for their meetings with civil servants or displayed outright animosity towards federal workers. For example, the transition team for the Department of Energy immediately requested the names of all employees who had been involved in any meetings on climate change;⁶ that did not bode well for their careers in the new administration, even if they had just been following instructions from their former political bosses, as good civil servants should. In many agencies, the landing teams arrived with “to do” lists for the career employees, requesting information and/or documentation on a number of items without any indication of why they wanted that material or how it was to be used. The absence of context and purpose necessarily diminished the ability to provide the most useful information. At the National Security Council, the landing teams met in person with some career officials to discuss the transition; nevertheless, the subject matter experts who comprise the bulk of career staff there were “largely ignored, even shunned.”⁷

The situation did not dramatically improve with the inauguration and the arrival of the first confirmed political appointees, who were largely supported by the remnants of the landing teams and people from the campaign sent over by the White House. There were many stories of political appointees meeting with people outside the government without any career civil servants’ having participated in any “pre-meetings” to provide background or having attended the actual meetings.⁸ The administration’s reluctance to consult with career civil servants even led to physical changes to agency offices. At the State Department, a new corridor on the seventh floor was built for a cadre of recent hires from outside the government, which longtime foreign service officers viewed as part of a broader effort to reduce their role in decision-making.⁹ Career employees at the EPA were no longer allowed to visit the floor where the administrator’s office is located unless they had an escort.¹⁰

One of the Trump administration’s top priorities – and the subject of many early meetings with agency officials – was to roll back Obama-era regulations. The administration had some initial success moving toward this goal by following the well-trodden path of their predecessors. President Trump’s Chief of Staff, Reince Priebus, signed the traditional “Stop Order” directing agencies to pull back from the Federal Register and from OIRA everything that had not been published by January 20th (which was standard operating procedure since President Reagan when the incoming administration was

“At the State Department, a new corridor on the seventh floor was built for a cadre of recent hires from outside the government, which longtime foreign service officers viewed as part of a broader effort to reduce their role in decision-making. Career employees at the EPA were no longer allowed to visit the floor where the administrator’s office is located unless they had an escort.”

“Early in the Administration, the Department of Interior announced it was reassigning certain members of the Senior Executive Service (SES), who are, as the name implies, the most experienced, well trained, highly valued managers within the civil service. These workers were reassigned to positions that did not reflect their expertise, with some of the new positions requiring relocation. Many suspected that the Department’s decisions were politically motivated. For example, an experienced climate scientist was reassigned to the agency’s accounting office.”

from a different political party than the preceding Administration).¹¹ A Republican-controlled House and Senate, using the Congressional Review Act, sent the President 14 Resolutions of Disapproval of regulations issued during the Obama Administration, which the President signed.¹²

But once the Trump appointees moved from the well-travelled path to do their own thing, they were not nearly as successful. There were a series of agency decisions to extend or stay the effective date or the compliance date of Obama-era regulations, to defer enforcement of Obama-era regulations, or to revise or rescind Obama-era regulations. Most of these ended up in the courts and the vast majority were remanded to the agencies.¹³ The Institute of Policy Integrity found that 74 of 80 Trump Administration regulatory actions challenged in court were held invalid as of April 2020, an astoundingly bad record considering the deference agencies typically receive during judicial review.¹⁴ And many of these actions were so clearly erroneous that decisions were often issued in record time. For example, when several states, conservation groups, and Native American tribes sued the Bureau of Land Management over its postponement of compliance dates for a regulation limiting methane leaks from natural gas extraction, the district court granted their motion for summary judgment mere months after the lawsuit was filed.¹⁵ In another case involving the delay

of a Department of Homeland Security rule that allows foreign entrepreneurs to temporarily come to the United States, the district court vacated the delay just a few weeks after oral argument.¹⁶ Most telling was that the reasons for the remands were agency failures to follow very obvious procedures, such as affording sufficient time for comment, providing a reasoned basis (supported by the record) for a decision, or explaining why the data relied on in support of the earlier regulation were unsound or out-of-date – that is, steps that any experienced rule writer (like the typical rule writer in a regulatory agency) would know to competently complete.¹⁷ By essentially taking matters into their own hands, or by dismissing or excluding the career staff from their discussions, the Trump appointees lost a lot of time and lost a lot of cases. And to be clear, the decisions remanding the cases to the agencies came from judges that were appointed by both Democratic and Republican Presidents, underscoring the Administration’s disregard for basic, historically well accepted principles of administrative law.

To be sure, I have not conducted a systematic study of the goings-on at all of the regulatory agencies. But I have heard many in the government say that they were side-lined, not trusted, not consulted, not asked, “how can we do this successfully.” Many of these people may have preferred to retain the Obama regulations if they had been charged with making the policy

decision, but they knew that that was not their job and they also knew that if they had been called upon to do their job, the end result (even if they didn't like the outcome) would have been more professional (and in the case of some regulations, more sustainable on review).

Another obvious example of the Trump Administration's choice to push away rather than embrace career civil servants involves the assignment and location of the workforce. Early in the Administration, the Department of Interior announced it was reassigning certain members of the Senior Executive Service (SES), who are, as the name implies, the most experienced, well trained, highly valued managers within the civil service.¹⁸ These workers were reassigned to positions that did not reflect their expertise, with some of the new positions requiring relocation. Many suspected that the Department's decisions were politically motivated. For example, an experienced climate scientist was reassigned to the agency's accounting office.¹⁹ Can anyone imagine that this would be viewed as a good corporate business practice in the private sector? It does not need to rise to a level of bad faith to be seen as bad management of the workforce.

More recently, the Department of the Interior has sought to move employees from the Bureau of Land Management Office out of Washington D.C.²⁰ This raised a lot of questions. While ostensibly intended to place workers close to "the people they are there to serve," some in Congress believed that the real rationale was to make it "easier for special interests to walk in the door demanding favors without congressional oversight or accountability" as well as reduce the size of the workforce.²¹

The Department of Agriculture also tried a variation on this theme, announcing the physical relocation of two offices: the National Institute of Food and Agriculture and the Economic Research Service.²² Nearly 550 career employees were designated for relocation from the Washington DC area to Kansas or Missouri.²³ To

keep families together, spouses (with or without jobs) and school-aged children would have had to agree to move with just 33 days' notice or the employees would have to resign – two thirds of whom did exactly that.²⁴ This led to the President's Chief of Staff's boasting about how they are successfully reducing the government workforce.²⁵ Surely there is a more efficient, effective, humane way to do that and preserve the important functions of the government.

On the surface, it appears that, like so much in Washington these days, precedent has been shattered and lessons from old no longer hold. If so, the public is the loser.

Endnotes

1. See PARTNERSHIP FOR PUBLIC SERVICE, 2016 ANNUAL REPORT 19 (June 2017) (noting that "the federal workforce achieves amazing things every day: from preventing cyberattacks on federal computer systems to ensuring the safety of our food supply and air quality to providing important services to small businesses, farmers, seniors, veterans and students"); John Nichols, *Yes, Federal Workers Are Essential*, THE NATION (Oct. 6, 2013), <http://www.thenation.com/article/yes-federal-workers-are-essential/> ("Government workers form the human infrastructure that underpins a great deal of what is good and necessary in the American experiment."). See also Partnership for Public Service, *Service to America Medals: Program Overview and History*, <https://servicetoamericamedals.org/about/> (last visited Aug. 29, 2019)
2. See Samuel J. Heryman *Service to America Medals, 2019 Finalist National Security and International Affairs*, John P. Wagner, <https://servicetoamericamedals.org/honorees/john-p-wagner-2/> (last visited Aug. 29, 2019).
3. See Samuel J. Heryman *Service to America Medals, Finalist National Security and International Affairs*, Victoria Brahm, <https://servicetoamericamedals.org/honorees/victoria-brahm/> (last visited Aug. 29, 2019); Samuel J. Heryman *Service to America Medals, 2019 Finalist Na-*

tional Security and International Affairs, Jamie Rhome, <https://servicetoamericamedals.org/honorees/jamie-rhome/> (last visited Aug. 29, 2019).

4. See Jonathan Swan, *Government Workers Shun Trump, Give Big Money to Clinton*, THE HILL (Oct. 26, 2016), <https://thehill.com/homenews/campaign/302817-government-workers-shun-trump-give-big-money-to-clinton-campaign> (finding that of the “roughly \$2 million that federal workers from 14 agencies spent on presidential politics by the end of September, about \$1.9 million, or 95 percent, went to the Democratic nominee’s campaign”); Philip Bump, *What Campaign Contributions Tell Us about the Partisanship of Government Employees*, WASH. POST (Dec. 27, 2018), <https://www.washingtonpost.com/politics/2018/12/27/is-trumps-dismissal-unpaid-government-employees-democrats-accurate/>. But see Frank Newport, Dan Witters & Sangeeta Agrawal, *Democrats Lead Ranks of Both Union and State Workers*, GALLUP (Mar. 24, 2011), <https://news.gallup.com/poll/146786/democrats-lead-ranks-union-state-workers.aspx> (finding about 27 to 33 percent of federal employees identify as Republicans, compared to 29 to 40 of federal employees that identify as Democrats and 31 to 36 percent of federal employees who identify as Independents).

5. See Fox News, *Trump Dispatching ‘Landing Teams’ to Obama Agencies, as Cabinet Vetting Heats Up*, FOX NEWS (Nov. 17, 2016), <https://www.foxnews.com/politics/trump-dispatching-landing-teams-to-obama-agencies-as-cabinet-vetting-heats-up> (“A wave of Donald Trump “landing teams” will be storming the beaches of the federal government in the coming days and weeks in preparation for the transition.”).

6. See Steven Mufson & Juliet Eilperin, *Trump Transition Team for Energy Department Seeks Names of Employees Involved in Climate Meetings*, WASH. POST (Dec. 9, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/12/09/trump-transition-team-for-energy-department-seeks-names-of-employees-involved-in-climate-meetings/> (The request “has raised concern that the Trump transition team is trying to figure out how to target the people,

including civil servants, who have helped implement policies under Obama.”).

7. Nahal Toosi, *Inside the Chaotic Early Days of Trump’s Foreign Policy*, POLITICO (Mar. 1, 2019), <https://www.politico.com/magazine/story/2019/03/01/trump-national-security-council-225442>.

8. See, e.g., Alistair Bell & Ginger Gibson, *Confusion over Trump’s First Talks with Foreign Leader*, REUTERS (Nov. 16, 2016), <https://www.reuters.com/article/us-usa-trump/confusion-over-trumps-first-talks-with-foreign-leader-idUSKBN13BIUR> (noting that “Trump’s transition team had not been in contact with the department either to discuss the transition of government or to seek information ahead of his meetings with foreign leaders”); Robert Faturechi & Danielle Ivory, *Trump Has Secretive Teams to Roll Back Regulations, Led by Hires With Deep Industry Ties*, PROPUBLICA (July 11, 2017), <https://www.propublica.org/article/trump-has-secretive-teams-to-roll-back-regulations-led-by-hires-with-deep-industry-ties> (describing how a top Trump official at the Interior Department scheduled one of his first meetings with a representative from a pesticide manufacturer who had been pushing for changes to the Endangered Species Act); Eric Lipton & Lisa Friedman, *E.P.A. Chief’s Calendar: A Stream of Industry Meetings and Trips Home*, N.Y. TIMES (Oct. 3, 2017), <https://www.nytimes.com/2017/10/03/us/politics/epa-scott-pruitt-calendar-industries-coal-oil-environmentalists.html> (revealing that Scott Pruitt, the former EPA administrator, took many of his first meetings with industry representatives).

9. See Robbie Gramer, Dan De Luce & Colum Lynch, *How the Trump Administration Broke the State Department*, FOREIGN POL’Y (July 31, 2017), <https://foreignpolicy.com/2017/07/31/how-the-trump-administration-broke-the-state-department/>.

10. See Coral Davenport & Eric Lipton, *Scott Pruitt Is Carrying Out His E.P.A. Agenda in Secret, Critics Say*, N.Y. TIMES (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html> (“When career employees of the Environ-

mental Protection Agency are summoned to a meeting with the agency's administrator, Scott Pruitt, at agency headquarters, they no longer can count on easy access to the floor where his office is, according to interviews with employees of the federal agency. Doors to the floor are now frequently locked, and employees have to have an escort to gain entrance.”).

11. See Richard Revesz & Bethany Davis Noll, *Regulation in Transition*, 104 MINN. L. REV. 1, 4 n.11 (2019).

12. See Susan E. Dudley, *We Haven't Seen The Last Of The CRA Yet*, FORBES (Oct. 31, 2017), <https://www.forbes.com/sites/susandudley/2017/10/31/we-havent-seen-the-last-of-the-cra-yet/#2b90db962680>.

13. See Bethany A. Davis Noll & Denise A. Grab, *Deregulation: Process and Procedures that Govern Agency Decision-making in an Era of Rollbacks*, 38 ENERGY L. J. 269, 279 (2017) (arguing that many of the Trump Administration's regulatory rollbacks have failed, despite *Chevron* deference, because they fail to provide a “reasoned explanation” as required by law).

14. See INSTITUTE FOR POLICY INTEGRITY, ROUND-UP: TRUMP-ERA AGENCY POLICY IN THE COURTS, <https://policyintegrity.org/deregulation-roundup> (last visited Apr. 25, 2020).

15. See *California v. U.S. Bureau of Land Management*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017), appeal dropped (9th Cir. No. 17-17456).

16. See *National Venture Capital Association v. Duke*, 291 F. Supp. 3d 5 (D.D.C. 2017).

17. See Richard Revesz, *Pruitt Exemplified How Partisanship Hinders Policymaking*, SLATE (July 10, 2018), <https://slate.com/technology/2018/07/pruitt-exemplified-how-partisanship-hinders-policymaking.html> (“Another pathology common in federal-agency leadership in the Trump administration is the demonization and sidelining of career employees. . . [w]ithout the expertise of career employees, an agency is likely to struggle with some of its most basic tasks, particularly the notice-and-comment rule-making process.”).

18. See Eric Katz, *Political Pressure and Confusion Marked Interior's Reassignment of Career Execs*, *Internal Docs Show*, GOV'T EXECUTIVE (Mar. 9, 2018), <https://www.govexec.com/management/2018/03/political-pressure-confusion-marked-interiors-reassignments-career-execs/146531/>.

19. The scientist has since filed a whistleblower complaint, which is under investigation by the Office of Special Counsel. See Matthew Brown, *Reassigned Interior Employees Blame Politics, Climate Work*, ASSOCIATED PRESS (Apr. 11, 2018), <https://apnews.com/a3c5b15c04df4b4ab66c2bd839ae7117>.

20. See Juliet Eilperin & Lisa Rein, *Interior to Move Most of Bureau of Land Management's D.C. Staff out West as Part of Larger Reorganization Push*, WASH. POST (July 15, 2019), <https://www.washingtonpost.com/climate-environment/2019/07/15/interior-move-one-fifth-bureau-land-managements-dc-staff-out-west-part-larger-reorganization-push/>.

21. See *id.*

22. See Nicole Ogrysko, *USDA Relocation Could Cut Existing ERS, NIFA Workforces in Half*, Fed. News Network (July 17, 2019), <https://federal-newsnetwork.com/workforce/2019/07/usda-relocation-could-cut-existing-ers-nifa-workforces-by-half/>.

23. See *id.*

24. See Editorial Board, *The Administration Said It Was Moving These Agencies for Efficiency. Now the Truth Comes Out*, WASH. POST (Aug. 10, 2019), https://www.washingtonpost.com/opinions/the-administration-said-it-was-moving-these-agencies-for-efficiency-now-the-truth-comes-out/2019/08/10/854ccd10-b91a-11e9-b3b4-2bb69e8c4e39_story.html.

25. See Ben Guarino, *USDA Science Agencies' Relocation May Have Violated Law, Inspector General Report Says*, WASH. POST (Aug. 6, 2019), <https://www.washingtonpost.com/science/2019/08/05/usda-science-agencies-relocation-may-have-violated-law-inspector-general-report-says/>.