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## Accountability in the Deep State

Heidi Kitrosser

*University of Minnesota Law School*, [hdk@umn.edu](mailto:hdk@umn.edu)

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# **U.C.L.A. Law Review**

## **Accountability in the Deep State**

Heidi Kitrosser

### **ABSTRACT**

In October of 2017, Joel Clement—a federal civil servant who had headed the U.S. Interior Department’s Office of Policy Analysis since 2011—wrote a stinging resignation letter to Interior Secretary Ryan Zinke. In it, Clement accused Zinke and President Trump of having “waged an all-out assault on the civil service by muzzling scientists and policy experts like myself.” The story behind Joel Clement’s resignation—a story still unfolding as of this Article’s writing in 2018—provides a window into the relationship between the political leadership and the civil service at the Interior Department in the first year of the Trump administration. It also serves as a jumping-off point to revisit the value in having a civil service with some independence from politics, and to consider mechanisms to protect that independence. This Article explores those questions through the lens of Clement’s resignation.

### **AUTHOR**

Professor, University of Minnesota Law School. I am very grateful to Katherine Atkinson, Louis Clark, and Joel Clement for taking time out of their very busy schedules to allow me to interview them.



## TABLE OF CONTENTS

INTRODUCTION.....	1534
I. REASSIGNMENTS AT THE INTERIOR DEPARTMENT.....	1536
II. ACCOUNTABILITY AND THE CIVIL SERVICE .....	1542
III. THE ECOLOGY OF CIVIL SERVANT INDEPENDENCE.....	1545
CONCLUSION.....	1550

## INTRODUCTION

Since taking office, President Trump and his supporters have railed repeatedly against the “deep state.”<sup>1</sup> By the deep state, they appear to mean, in substantial part, the civil servants—including career scientists, lawyers, national security analysts, economists, and administrative personnel—who comprise much of the federal government.<sup>2</sup> These career bureaucrats, President Trump and his supporters charge, are insufficiently loyal to the president and his agenda.<sup>3</sup> As Paul Verkuil, who chaired the Administrative Conference of the United States from 2010 through 2015, puts it, “[t]he career bureaucracy is seen by many in the administration, and by the president himself, as sort of the problem.”<sup>4</sup> Many civil servants, in turn, reportedly feel demoralized and worried both about their job security and their respective agencies’ futures.<sup>5</sup>

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1. See Charles S. Clark, *Deconstructing the Deep State*, GOV’T EXEC., <http://www.govexec.com/feature/gov-exec-deconstructing-deep-state> [https://perma.cc/B4GF-B62E]; Michael Crowley, *The Deep State Is Real but It Might Not Be What You Think*, POLITICO MAG. (Sept. 5 2017), <https://www.politico.com/magazine/story/2017/09/05/deep-state-real-cia-fbi-intelligence-215537> [https://perma.cc/4UG3-2U74]; Adam Gopnik, *The J.F.K. Files, Trump, and the Deep State*, NEW YORKER (Oct. 29, 2017), <https://www.newyorker.com/news/daily-comment/the-jfk-files-trump-and-the-deep-state> [https://perma.cc/9KDL-THJN]; Jon D. Michaels, *Trump and the “Deep State”—The Government Strikes Back*, FOREIGN AFF. (Aug. 15 2017), <https://www.foreignaffairs.com/articles/2017-08-15/trump-and-deep-state> [https://perma.cc/K6MG-9JFB].
  2. See Clark, *supra* note 1 (characterizing Trump allies’ complaints about “the deep state” as directed mostly at career federal bureaucrats); Gopnik, *supra* note 1 (deeming complaints about the “deep state” to stem from concerns that “there are civil servants or functionaries within the government whose chief trait is loyalty to the Constitution and to the ongoing administration of the state”); Crowley, *supra* note 1 (“To Trump and his allies, the new president is now the victim of conspiratorial bureaucrats . . . .”); Michaels, *supra* note 1 (explaining that current critics of the “deep state” largely have career bureaucrats in mind).
  3. See *supra* note 1.
  4. Charles Flavelle & Benjamin Bain, *Washington Bureaucrats Are Quietly Working to Undermine Trump’s Agenda*, BLOOMBERG (Dec. 18, 2017, 1:00 AM), <https://www.bloomberg.com/news/features/2017-12-18/washington-bureaucrats-are-chipping-away-at-trump-s-agenda> [https://perma.cc/T543-A9SM]; see also Paul R. Verkuil: Senior Fellow, ADMIN. CONF. OF THE U.S., <https://www.acus.gov/contacts/paul-r-verkuil> (noting that Verkuil chaired the ACUS for a five-year term beginning on April 6, 2010).
  5. See, e.g., JACOB CARTER ET AL., SIDELINING SCIENCE SINCE DAY ONE (July 2017), <https://www.ucsusa.org/sites/default/files/attach/2017/07/sidelining-science-report-ucs-7-20-2017.pdf> [https://perma.cc/XV7S-KVKG]; Emily Atkin, *It’s Never Been Harder to Be a Climate Scientist*, NEW REPUBLIC (July 27, 2017), <https://newrepublic.com/article/144056/its-never-harder-climate-scientist> [https://perma.cc/7BXL-KGN8]; Devin Henry, *Federal Employees Step up Defiance of Trump*, HILL (Aug. 5, 2017, 4:55 PM), <http://thehill.com/policy/energy-environment/345404-federal-employees-step-up-defiance-of-trump> [https://perma.cc/5B36-XN3N].

Recent events at the U.S. Department of the Interior (the Department) present a microcosm of this dynamic. Interior Secretary Ryan Zinke's attitude toward the career bureaucrats was captured in comments that he made to a large gathering of the National Petroleum Council. He told the group that he realized, upon arriving at the Department, that "I got 30 percent of the crew that's not loyal to the flag."<sup>6</sup> Zinke was quickly rebuked for these remarks by a bipartisan group of former Department political appointees. The former officials wrote to Zinke that "[t]he Department's career employees swear to defend the Constitution; they do not swear personal allegiance to individual Secretaries or to anyone else."<sup>7</sup> And in a stinging resignation letter, Joel Clement—who headed the Department's Office of Policy Analysis (OPA) from 2011–2017 as a senior career official—told Zinke that "[y]ou and President Trump have waged an all-out assault on the civil service by muzzling scientists and policy experts like myself...."<sup>8</sup>

The story behind Clement's resignation—a story still unfolding as of this Article's final edits in mid-2018—provides a window into the relationship between the political leadership and the civil service at the Department in the first year of the Trump administration. It also serves as a jumping-off point to explore more fundamental questions. In particular, it occasions our revisiting the value in having a civil service with some independence from politics. And it prompts us to consider mechanisms by which that independence can be protected.

In Part I of this Article, I recount some of the major events that precipitated Clement's October 2017 resignation from the Department. The most important of these was Clement's sudden reassignment in June 2017 from his position as a senior scientist and policy analyst to a job processing royalty checks from fossil fuel companies. Clement alleges that he was reassigned in retaliation for his work on and statements about the climate change-related

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6. Evan Halper, *Interior Secretary Zinke Calls His Staff Disloyal in Speech to the Oil Industry*, SPOKESMAN-REV. (Sept. 26, 2017, 1:30 PM), <http://www.spokesman.com/stories/2017/sep/26/interior-secretary-zinke-calls-his-staff-disloyal/> [https://perma.cc/PT3N-84TE].
  7. Letter From Former Officials of the U.S. Dep't of the Interior to Ryan Zinke, Sec'y, U.S. Dep't of the Interior, <https://apps.washingtonpost.com/g/documents/national/letter-from-former-department-of-interior-officials/2574/> (referenced and linked to by Darryl Fears, *Interior Department Whistleblower Resigns, Calling Ryan Zinke's Leadership a Failure*, WASH. POST (Oct. 4, 2017), <https://www.washingtonpost.com/news/energy-environment/wp/2017/10/04/whistleblower-resigns-keeping-my-voice-more-important-than-keeping-my-job>).
  8. Letter From Joel Clement, Former Dir., Office of Policy Analysis, to Ryan Zinke, Sec'y, U.S. Dep't. of the Interior (Oct. 4, 2017), <https://apps.washingtonpost.com/g/documents/national/read-joel-clements-resignation-letter/2566> [https://perma.cc/MQ62-S57F].

needs of several Native Alaskan villages. Clement and other critics also suggest that the mass reassignment of about thirty members of the Department's Senior Executive Service—including Clement's reassignment—constituted an unlawful effort to push senior civil servants out of the Department. In Part II, I situate these events within a broader debate about the meaning of accountability in the federal government. The Department's alleged actions suggest a very linear vision of accountability that demands full control by political leadership over all employees and executive actions within an agency. In contrast, I argue that pockets of political independence among agency employees not only are compatible with, but also are necessary to ensure political and legal accountability within and outside of an agency. From this perspective, Clement's allegations and the related facts known thus far are deeply troubling. In Part III, I use Clement's case to consider existing safeguards that protect the political independence of civil servants and the conditions that give rise to and sustain such safeguards.

## I. REASSIGNMENTS AT THE INTERIOR DEPARTMENT

In Joel Clement's words, he learned of his reassignment "in the dark of night," with no previous warning, after receiving a call from a colleague who had also just been reassigned. Upon checking his email,<sup>9</sup> Clement discovered a mostly boilerplate letter, dated June 15, 2017, from Associate Deputy Director James Cason.<sup>10</sup> In the letter, Cason informed Clement that he would be removed from his position as the Director of the OPA and made a Senior Program Advisor with the Office of Natural Resources Revenue (ONRR).<sup>11</sup> ONRR collects and manages revenue payments for oil and gas leases on federal lands.<sup>12</sup>

About half of the reassignment letter's three substantive paragraphs emphasized the mobility of the Senior Executive Service (SES). The SES is a government-wide corps of high-level managers, mostly career appointees,

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9. Interview with Joel Clement, Former Dir., Office of Policy Analysis, in D.C. (Dec. 5, 2017).

10. Memorandum From James Cason, Assoc. Deputy Sec'y, U.S. Dep't of the Interior, to Joel Clement (June 15, 2017) [hereinafter Reassignment Letter], <https://www.doi.gov/sites/doigov/files/uploads/17-01174ch.pdf> [<https://perma.cc/6FA5-Z268>].

11. *Id.*

12. OFF. OF NAT. RES. REVENUE, <http://www.onrr.gov> (last visited Jan. 21, 2018); see also Joel Clement, Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity, U.S. Office of Special Counsel 12, (July 12, 2017) (on file with author) [hereinafter Clement OSC complaint].

situated throughout federal agencies.<sup>13</sup> Clement was a career member of the SES.<sup>14</sup> Apart from citing the SES's mobility, the letter's entire explanation for Clement's reassignment was as follows:

As the Director of the Office of Policy Analysis, you oversee cross-cutting analysis and coordination to support decision-making and policies. You oversee the development of the annual report on the Department's economic contributions to the National economy. You are experienced at leading experts that provide objective economic and policy analysis. You are well qualified to serve as Senior Program Advisor of the Office of Natural Resources Revenue.<sup>15</sup>

About a month after Clement received notice of his reassignment, he filed a whistleblower complaint with the Office of Special Counsel (OSC).<sup>16</sup> In it, he explained that he is a scientist and a policy expert. As Director of the OPA, he had promoted climate change resilience for Native Alaskan communities, including planning for the complex and expensive task of relocating several imminently threatened villages. In contrast, Clement had no training or experience relevant to the revenue collection and auditing work done at ONRR.<sup>17</sup>

Clement charged that his reassignment was designed to keep him from “work[ing] on mitigating the danger to Native Alaskan communities, to punish [him] for [his] past such efforts, and to push [him] to quit.”<sup>18</sup> In particular, he alleged that he had been retaliated against for making several statements about the danger to Native Alaskans. His statements included remarks to the United Nations just six days before his reassignment, to the effect that Alaskan Native “villages are sliding into the sea and the threats are growing.”<sup>19</sup> Another was an email that he sent on April 21, 2017 to the Special Assistant to the President for

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13. Maeve P. Carey, *The Senior Executive Service: Background and Options for Reform*, Congressional Research Service 1 (Sept. 6, 2012).

14. See Reassignment Letter, *supra* note 10 (referencing Clement's SES membership and his “career appointment”).

15. *Id.*

16. See Joel Clement, *I'm a Scientist. I'm Blowing the Whistle on the Trump Administration*, WASH. POST (July 19, 2017), [https://www.washingtonpost.com/opinions/im-a-scientist-the-trump-administration-reassigned-me-for-speaking-up-about-climate-change/2017/07/19/389b8dce-6b12-11e7-9c15-177740635e83\\_story.html](https://www.washingtonpost.com/opinions/im-a-scientist-the-trump-administration-reassigned-me-for-speaking-up-about-climate-change/2017/07/19/389b8dce-6b12-11e7-9c15-177740635e83_story.html) [<https://perma.cc/5L95-XDNJ>]; Clement OSC Complaint, *supra* note 12.

17. Clement OSC Complaint, *supra* note 12, at 12.

18. *Id.*

19. *Id.* at 6.

International Energy and Environment. In the email, Clement emphasized the “importance of building resilience” for at-risk Alaskan Native communities and claimed that “coordinating the resilience efforts would save the federal government money.”<sup>20</sup> Clement also cited two similar statements as bases for retaliation, both of which he had made at public speaking events.<sup>21</sup>

Clement argued that his statements constituted statutorily protected whistleblowing activity,<sup>22</sup> because they revealed a “substantial and specific danger to public health or safety,”<sup>23</sup> and because one of the statements revealed a “gross waste of funds.”<sup>24</sup> While members of the SES are subject to more lateral mobility than most civil servants,<sup>25</sup> they remain protected by the civil service laws,<sup>26</sup> including provisions against retaliation for protected disclosures.<sup>27</sup> More broadly, SES members are protected against “arbitrary and capricious actions,”<sup>28</sup> and they may not be reassigned to positions for which they are unqualified.<sup>29</sup>

Clement resigned from the Department on October 4, 2017. In his resignation letter to Secretary Zinke, Clement wrote, among other things, that:

[R]eassigning and training me as an auditor when I have no background in that field will involve an exorbitant amount of time and effort on the part of my colleagues, incur significant taxpayer expense, and create a situation in which these talented specialists are being led by someone without experience in their field. I choose to save them the trouble, save taxpayer dollars, and honor the organization by stepping away to find a role more suited to my skills. Secretary Zinke, you and your fellow high-flying Cabinet

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20. *Id.*
  21. *Id.* at 7. In a “response continuation” section of his complaint, Clement noted that he also had “disclosed the danger to Alaskan Native communities directly to other Interior Officials and cited several examples of such disclosures. *Id.* at 12.
  22. See *id.* at 4. This page of the complaint consists of the OSC’s own form indicating the types of disclosures protected pursuant to 5 U.S.C. § 2302(b)(8).
  23. *Id.* at 6–7.
  24. *Id.* at 6.
  25. Email From Joshua A. Geltzer, Exec. Dir., Inst. for Constitutional Advocacy & Prot., to the Honorable Adam Miles, Acting Special Counsel, Office of Special Counsel 4 (Aug. 24, 2017).
  26. 5 U.S.C. § 3131(11) (2012).
  27. 5 U.S.C. § 2302 (a)(2)(A)(iv), (a)(2)(B), (b)(3), (b)(8), (b)(9) (2012).
  28. 5 U.S.C. § 3131(7) (2012).
  29. Email From Joshua A. Geltzer et al., *supra* note 25, at 6 (quoting 5 U.S.C. § 3395(a)(1)(A)).

officials have demonstrated over and over that you are willing to waste taxpayer dollars, but I'm not.<sup>30</sup>

As of this Article's writing, Clement's OSC complaint remains pending. Because Clement resigned, OSC cannot seek his reinstatement. OSC could, however, declare that there is reasonable cause to believe that Clement was retaliated against in violation of the civil service laws. It could also seek payment of attorneys' fees.<sup>31</sup>

Clement's reassignment was part of a larger, mass reassignment of about thirty SES members at the Department.<sup>32</sup> The Department's Inspector General (IG) investigated that larger action recently, documenting its findings in an April 2018 report.<sup>33</sup> Eight U.S. Senate Democrats had requested the investigation.<sup>34</sup> In their request letter, the senators acknowledged that agency heads have discretion to reassign senior executives but stressed that that discretion has limits. In particular, they noted that SES employees may not be reassigned in an effort to "force them to resign, to silence their voices, or to punish them for the conscientious performance of their public duties."<sup>35</sup>

As evidence that Zinke seeks to force SES members out through undesirable reassessments, critics point to Zinke's own testimony to a Senate subcommittee to the effect that he plans to cut 4000 jobs at the Department, and that he hopes to achieve this goal partly through reassessments.<sup>36</sup> They

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30. Letter From Joel Clement, *supra* note 8, at 2.
  31. Interview with Katherine Atkinson, in D.C. (Dec. 5, 2017). *See also* 5 U.S.C. § 1214(b), (g) (2012) (enumerating courses of action available to OSC, including remedies that it may seek through the offending agency or through the Merit Systems Protection Board).
  32. MARY L. KENDALL, OFFICE OF INSPECTOR GEN., U.S. DEP'T OF THE INTERIOR, REASSIGNMENT OF SENIOR EXECUTIVES AT THE U.S. DEPARTMENT OF THE INTERIOR 4 (2018) [hereinafter INSPECTOR GENERAL REPORT], [https://www.doiig.gov/sites/doioig.gov/files/FinalEvaluation\\_SESRe\\_assignments\\_Public.pdf](https://www.doiig.gov/sites/doioig.gov/files/FinalEvaluation_SESRe_assignments_Public.pdf) [<https://perma.cc/6FCT-LAEB>] (noting that between June 15, 2017 and October 29, 2017, the Department proposed reassigning 35 SES members and did reassign 27 of them).
  33. *Id.*
  34. See Joe Davidson, *Interior's "Unusual" Transfer of Senior Executives Spurs Official Probe*, WASH. POST: POWERPOST (Sept. 12, 2017), <https://www.washingtonpost.com/news/power-post/wp/2017/09/12/interiors-unusual-transfer-of-senior-executives-spurs-official-probe> [<https://perma.cc/S899-92BW>]; *see also* Letter From U.S. Senators, Comm. on Energy & Nat. Res., to Mary L. Kendall, Deputy Inspector Gen., U.S. Dep't of the Interior (July 24, 2017), [https://www.energy.senate.gov/public/index.cfm?a=files.serve&File\\_id=A8DB3B66-E5B6-43D8-A98F-DEC7E512E51D](https://www.energy.senate.gov/public/index.cfm?a=files.serve&File_id=A8DB3B66-E5B6-43D8-A98F-DEC7E512E51D) [<https://perma.cc/9LZX-JXYH>].
  35. Letter From U.S. Senators, *supra* note 34, at 1.
  36. Fears, *supra* note 7. *See also, e.g.*, Email From Joshua A. Geltzer et al., *supra* note 25, at 9 (noting that reassessments may not, under the CSRA, be used "to pressure Senior Executives to quit").

also note that the scope of the mass reassignment action is highly unusual,<sup>37</sup> and that some of the reassessments move SES members “across the country . . . to serve in . . . ill-fitting jobs.”<sup>38</sup> They further observe that the reassessments were noticed, though not effectuated, prior to the end of the four-month period in which new administrations are statutorily barred from making SES reassessments.<sup>39</sup>

In its April 2018 report, the IG concluded that the Department’s records were so sparse and disjointed that the IG could not determine whether the reassessments complied with the law.<sup>40</sup> The IG explained that the Department “did not document its plan or reasons for the reassignment decisions or gather the information needed to make informed decisions.”<sup>41</sup> Furthermore, the Department’s Executive Resources Board (ERB)—the body that made the reassignment decisions—offered “inconsistent” rationales to the IG.<sup>42</sup> Given these deficiencies, the IG was “prevented from making a clear determination whether or not the DOJ met the legal requirements” for the reassessments.<sup>43</sup>

Throughout its factual findings, the IG elaborated on the premise underlying its reluctance to draw legal conclusions—that is, that the ERB’s decisionmaking process and documentation were weak. The IG noted, for example, that none of the ERB members could provide an answer when asked “who in the Departmental leadership ordered the reassignment[s].”<sup>44</sup> The IG

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37. See Davidson, *supra* note 34.

38. Clement, *supra* note 16. See also Halper, *supra* note 6 (noting that several reassigned senior executives who were “interviewed by the Los Angeles Times/Tribune Washington Bureau said that they were puzzled” by the reassessments, “which sent them to corners of the agency where they had no expertise”); Nicole Ogrysko, *Interior Senior Executives Left in the Dark Amid Reorg, Reassessments*, FED. NEWS RADIO (Aug. 17, 2017, 2:15 PM), <https://federalnewsradio.com/ses/2017/08/interior-senior-executives-left-in-the-dark-amid-reorg-reassessments> [https://perma.cc/8YD4-KXYQ] (observing that many of the senior executives’ “new roles vastly differ from the positions they once held and span other fields and areas of expertise” and noting, with respect to geography, that one “was asked to move from a position in Washington, D.C. to another in Alaska”).

39. Email From Joshua A. Geltzer et al., *supra* note 25, at 8 (“Whether or not [the timing] violates the letter of the CSRA’s 120-day moratorium on reassessments . . . there can be no doubt that the DOI’s conduct violates its spirit.”). The moratorium is imposed by 5 U.S.C. § 3395(e)(1).

40. INSPECTOR GENERAL REPORT, *supra* note 32, at Cover Memorandum.

41. *Id.* See also *id.* at 5 (noting that the Department’s Executive Resources Board (ERB) members “did not have meeting minutes, notes, voting or decision records, or other documentation records for [their] meetings or for any other activities or discussions related to the reassessments, other than photographs of poster boards”).

42. *Id.* at 27.

43. *Id.*

44. *Id.* at 5–6.

also “found no documented evidence—nor [was it] provided a methodology or record of discussion—that the ERB reviewed the senior executives’ qualifications before proposing reassessments.”<sup>45</sup> Furthermore, despite repeated questioning of each ERB member, the IG “only received broad explanations” for the reassessments, which boiled down to three criteria: “[t]ime in position,” “[m]oving senior executives out of the Washington, DC area,” and “[m]oving senior executives to other functional areas to share knowledge.”<sup>46</sup> However, the IG “found no evidence that the ERB evaluated the proposed reassessments against the three stated reasons.”<sup>47</sup>

The IG report also cited a lack of notice to, or consultation with, the parties most directly impacted by the reassessments. The IG interviewed thirty-one of the thirty-five SES members who had been scheduled for reassignment.<sup>48</sup> Of the thirty-one interviewed, twenty-nine had received no “indication of the reassignment before receiving official notification.”<sup>49</sup> Nor, “in the majority of cases,” was a reassignee’s “supervisor, acting bureau director, [or] assistant secretary . . . aware of the reassignment until hours before the ERB sent the reassignment notifications.”<sup>50</sup>

Although the IG reached no conclusions as to whether the reassignment decisions were politically motivated, it noted that all six of the ERB’s voting members at the time of the reassessments<sup>51</sup> were political appointees.<sup>52</sup> The Department added two career senior executives to the ERB in November 2017, during the IG’s review.<sup>53</sup> Of the thirty-one SES members interviewed for the IG report, ten expressed suspicions that they were targeted for reassignment for political or punitive reasons,<sup>54</sup> and twelve “believed their reassignment may have been related to their prior work assignments, including climate change, energy, or conservation.”<sup>55</sup>

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45. *Id.* at 7.

46. *Id.* at 5.

47. *Id.*

48. *Id.* at 2.

49. *Id.* at 8.

50. *Id.*

51. Memorandum From Ryan Zinke, Sec’y, U.S. Dep’t of the Interior, to Assoc. Deputy Sec’y et al. (May 19, 2017) (establishing the ERB “[e]ffective the date of this memorandum” and naming its members).

52. INSPECTOR GENERAL REPORT, *supra* note 32, at 9.

53. *Id.* at 10. *See also id.* at 24 (app. 5).

54. *Id.* at 20–21 (app. 4); *id.* at 7.

55. *Id.* at 7. *See also id.* at 20–21 (app. 4).

David L. Bernhardt, the Department's Deputy Secretary and the ERB's Chair, submitted a two-page response to the IG report.<sup>56</sup> Bernhardt's only remark on legality was that "I continue to believe the actions taken by the ERB and covered in the [IG Report] are lawful."<sup>57</sup> He agreed, however, that "improvements" would be desirable, and wrote that he has initiated some changes.<sup>58</sup> For example, he cites the addition of two career SES employees to the ERB in November 2017,<sup>59</sup> as well as his efforts to identify "best practices for managing SES reassessments."<sup>60</sup>

## II. ACCOUNTABILITY AND THE CIVIL SERVICE

At the heart of the controversy over the reassessments at the Department are divergent philosophies about the meaning of accountability in the federal government. Because Clement's OSC investigation is still pending, we do not yet know the full array of defenses that the Department may raise. Nonetheless, the timing, scope, and nature of the reassessments, the apparent laxity of the procedures followed, and the sparse and generic cast of the justifications articulated thus far suggest an aggressively narrow reading of the relevant civil service laws, if not a disregard for them. When juxtaposed with Secretary Zinke's comments about disloyalty throughout the Department, and with similar warnings of a bureaucratic deep state by other administration members and supporters, the reassessments may reflect something more fundamental still—that is, a suspicion of anyone in the Department not appointed by the current president or his own political appointees. Such suspicion itself suggests a very linear, top-down vision of accountability in the executive branch. In this vision, which is closely associated with unitary executive theory, the president must have full control of all discretionary executive activity and personnel in

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56. More precisely, Bernhardt responded to a draft of the report that the IG shared with him prior to the report's public release. Memorandum From David L. Bernhardt, Deputy Sec'y, Office of the Inspector Gen., U.S. Dep't of the Interior, to Mary L. Kendall, Deputy Inspector Gen. (Mar. 30, 2018), in INSPECTOR GENERAL REPORT, *supra* note 32, at 22–24 (app. 5).
57. *Id.* at 23 (app. 5).
58. *Id.*
59. *Id.* at 24 (app. 5). See also *id.* at 10.
60. *Id.* at 24 (app. 5). He places most of the blame for past problems on the Obama administration's failure to adopt Office of Personnel Management recommendations, *id.* at 23 (app. 5), and on "delays in confirming key presidentially nominated, Senate confirmed officers" since January 20, 2017. *Id.* at 23 (app. 5).

the federal government.<sup>61</sup> Only when executive branch officials are fully accountable to the president in this way can the president truly be responsible for executing the law, and thus be fully accountable to the people at the ballot box.<sup>62</sup>

If the Department's actions and statements thus far suggest a conception of accountability that demands broad political control of the civil service, then the pushback that Secretary Zinke has faced, and the civil service laws invoked by Clement and others, reflect a more complex vision of accountability.<sup>63</sup> Proponents of the latter vision acknowledge that the bureaucracy is not and ought not to be fully disconnected from political control in light of the president's political and constitutional responsibilities. Yet they also recognize that the president himself is constrained by legislative and political directives. Unfettered presidential control of the executive branch would enable the president to evade such directives and thus to dodge legal and political accountability. From this perspective, some degree of political independence

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61. Elsewhere, I have detailed these aspects of unitary executive theory. See, e.g., Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1742, 1746–48 (2009) (citing, *inter alia*, Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 35–37, 45, 59, 65–66 (1995); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158, 1166 (1992); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 97–99 (1994); Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 998–99, 1012–15 (1993)).

62. See *supra* note 61.

63. This more complex vision is manifest in scholarship contesting unitary executive theorists' conception of accountability. See, e.g., Kitrosser, *supra* note 61, at 1748–50 (citing, *inter alia*, Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 552–59, 564–65 (1998); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 992–1007, 1017–20 (1997); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1785 (1996); Jerry L. Mashaw, *Structuring a "Dense Complexity": Accountability and the Project of Administrative Law*, 5 ISSUES IN LEGAL SCHOLARSHIP 1, 12–15, 35–38 (2005); Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 613–14 (1989); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2076–83, 2119, 2121–22, 2134–35 (2005); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 197–209 (1995)). For a more recent example of a relatively complex vision of accountability in the administrative state, see JON D. MICHAELS, *CONSTITUTIONAL COUP* 64, 176–77 (2017) (associating an “administrative separation of powers,” including a professional civil service, with legal and political accountability). Cf. PAUL VERKUIL, *VALUING BUREAUCRACY* 1 (2017) (arguing that bureaucratic professionalism provides “energy” that “ensures directed, purposeful, and accountable government”).

within the executive branch is not only permissible but is necessary to preserve accountability.<sup>64</sup>

A group of legal scholars articulated this more nuanced vision of accountability in an August 2017 letter to the OSC regarding Clement's complaint. Extant statutory protections for members of the SES, they wrote, "enable[] Senior Executives to insist that the political leadership act fairly and rationally and comply with congressionally and judicially imposed mandates and thereby to help enforce limits on the invocation of Executive Branch authority consistent with our overarching constitutional commitment to the checking and balancing of Federal power."<sup>65</sup> At the same time, they stressed that "Senior Executives are entitled only to freedom from undue political influence, not to autonomy to pursue their own policy aims."<sup>66</sup>

Elsewhere, I have explained why I believe that a more complex vision of accountability, such as that expressed in the legal scholars' letter, is superior—both as a matter of constitutional law and as a matter of good policy—to an approach that relies on unitary presidential accountability. In addition to the arguments recounted above, I have explained that checks on presidential power, including civil service protections, can further accountability by fostering transparency about government abuse or incompetence, and about the evidentiary backdrop against which government decisions are made.<sup>67</sup>

Indeed, unfettered political control of civil servants can defeat accountability by enabling political actors to manipulate the information that emerges from the executive branch. For instance, such political actors could suppress or alter research that reflects best scientific practices, but that is at odds with an administration's policy goals. This would distort the very factual picture against which the public, Congress, and the courts can assess executive actions.<sup>68</sup>

Clement's allegations demonstrate precisely how excessive political control of civil servants can hinder accountability by manipulating the information the public receives and molding it to reflect political imperatives, rather than scientific or other expertise. Clement's conclusions about the imminent danger to several Alaskan Native villages, and the need to relocate

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64. See *supra* note 63.

65. Email From Joshua A. Geltzer et al., to the Honorable Adam Miles, *supra* note 25, at 8.

66. *Id.*

67. See HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY , EXECUTIVE POWER, AND THE U.S. CONSTITUTION 163–66, 172–73, 179–94 (2015); Kitrosser, *supra* note 62, at 1760–74.

68. Email From Joshua A. Geltzer et al., *supra* note 25, at 8.

those villages, stemmed from his years of work and research at the Department in which he repeatedly met with delegations from the affected villages, chaired an international body of eight Arctic nations, and worked with officials from Alaska and agencies across the federal government.<sup>69</sup> If Clement's allegations of whistleblower retaliation are true, they reflect much more than a new administration's disagreement with the policy conclusions that stem from his work. Rather, they mark an effort to prevent the public, and even other government officials, from understanding the work itself, and thus from grasping the factual bases underlying the (now) rejected policy goals.

### III. THE ECOLOGY OF CIVIL SERVANT INDEPENDENCE

In an important law review article, Seth Kreimer writes of the ecology of transparency.<sup>70</sup> Using the Freedom of Information Act (FOIA) as his focal point, he explains that FOIA cannot succeed in isolation. Rather, it requires an ecosystem of supportive factors. For example, “[f]or FOIA requests to generate illuminating documents, they must be precisely framed, and framing such requests requires knowledge regarding the activities to be illuminated.”<sup>71</sup> Such knowledge can come from whistleblowers who leak information, from members of the press who publish the same, or from civil servants—with some structural independence from the White House—who disclose politically inconvenient information in the course of their duties.<sup>72</sup>

Just as a protected civil service is part of the ecosystem that supports FOIA, so civil service independence, and the accountability and transparency that independence enables, require a network of supportive factors. The most obvious such supports are statutory civil service protections. Yet those too must contain sufficiently robust provisions and be buttressed by factors that include a free press, meaningful congressional oversight, and an independent judiciary.

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69. Interview with Joel Clement, *supra* note 9; Clement OSC Complaint, *supra* note 12, at 6–8.
  12. Also relevant in this regard is a major report that Clement coauthored on arctic warming. See JOEL P. CLEMENT ET AL., INTERAGENCY WORKING GRP. ON COORDINATION OF DOMESTIC ENERGY DEV. & PERMITTING IN ALASKA, MANAGING FOR THE FUTURE IN A RAPIDLY CHANGING ARCTIC: A REPORT TO THE PRESIDENT (2013), [https://www.afsc.noaa.gov/publications/misc\\_pdf/iamreport.pdf](https://www.afsc.noaa.gov/publications/misc_pdf/iamreport.pdf) [https://perma.cc/E8LJ-H6QX].
  70. Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011 (2008).
  71. *Id.* at 1025.
  72. See *id.* at 1037–45. The success of a FOIA request, once made, also depends on a network of supporting factors. See *id.* at 1047, 1056.

Consider what Clement's case, as it has developed thus far, tells us about some of the factors that comprise an ecology of civil service independence. Clement has invoked the statutory prohibition against employers taking certain personnel actions, including reassignments, to retaliate for disclosures that an employee "reasonably believes evidences...a gross waste of funds...or a substantial and specific danger to public health or safety."<sup>73</sup> This statutory provision exists in no small part because of the decades-long efforts of public interest organizations and other whistleblower advocates within civil society. For example, the Government Accountability Project (GAP), since its founding in 1978, has lobbied for and helped to shape virtually every major piece of federal whistleblower legislation in the United States, as well as much state legislation.<sup>74</sup> The fruits of these efforts include the first comprehensive federal government whistleblower law of the modern era, the 1978 Civil Service Reform Act,<sup>75</sup> and important improvements to it in the Whistleblower Protection Act of 1989<sup>76</sup> and the Whistleblower Protection Enhancement Act of 2012 (WPEA).<sup>77</sup> Among other things, the WPEA reversed judicial interpretations of earlier legislation that GAP and other whistleblower advocates had considered deeply problematic.<sup>78</sup> For example, the WPEA specified that disclosures may not be excluded from protection because they were "made during the normal course of duties of an employee," to "a

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73. 5 U.S.C. § 2302(b)(8)(A)(ii) (2012).

74. See MARK HERTSGAARD, BRAVEHEARTS: WHISTLE-BLOWING IN THE AGE OF SNOWDEN 59–76 (2016). See also Interview with Louis Clark, Exec. Dir., Gov't Accountability Project, in D.C. (Dec. 7, 2017).

75. See JON O. SHIMABUKURO & L. PAIGE WHITAKER, CONG. RESEARCH SERV., WHISTLEBLOWER PROTECTIONS UNDER FEDERAL LAW: AN OVERVIEW (Sept. 13, 2012) (noting that whistleblower "protections were first adopted for federal employees" in the 1978 Civil Service Reform Act (CSRA)). See also Interview with Louis Clark, *supra* note 74 (discussing GAP's involvement with the CSRA in 1978).

76. HERTSGAARD, *supra* note 74, at 60 (citing GAP's involvement in passage of 1989 Act); Interview with Louis Clark, *supra* note 74 (discussing 1989 Act and GAP's involvement in its passage).

77. HERTSGAARD, *supra* note 74, at 60–61 (citing GAP's involvement in passage of Whistleblower Protection Enhancement Act (WPEA)); Interview with Louis Clark, *supra* note 74 (discussing WPEA and GAP's involvement in its passage).

78. See, e.g., WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2012, S. REP. 112-155, at 1–3 (2012) ("The Federal Circuit has wrongly accorded a narrow definition to the type of disclosure that qualifies for whistleblower protection"—the legislation "would address these problems by restoring the original congressional intent of the WPA . . . ."); Jason Zuckerman, *Congress Strengthens Whistleblower Protections for Federal Employees*, 2012 A.B.A. SEC. LABOR & EMP. L. ("[S]everal Federal Circuit decisions . . . creat[ed] loopholes that were contrary to Congressional intent," and WPEA closes those loopholes); Interview with Louis Clark, *supra* note 74 (making similar points).

supervisor or to a person who participated in [the disclosed] activity,” or “not . . . in writing.”<sup>79</sup> In lobbying for the WPEA, GAP was joined by a number of other groups under the banner of the Make It Safe Coalition, which included the Project on Government Oversight, Public Citizen, the Union of Concerned Scientists, and the American Federation of Government Employees.<sup>80</sup>

Of course, civil society cannot pass legislation by itself. It needs willing members of Congress with whom to work and, ultimately, a majority of each house of Congress and presidential support.<sup>81</sup> Some of that support itself may stem from lobbying by private organizations and constituents. Media coverage can bolster support as well. In the case of the WPEA, for example, GAP joined forces with the National Public Radio program *On the Media* to launch a crowdsourcing project to determine which senator had placed a secret hold on the bill after it had passed both the Senate and the U.S. House of Representatives in 2010.<sup>82</sup> Among other things, the effort generated publicity in favor of reintroducing the WPEA in the next Congress.<sup>83</sup>

Once legislation passes, multiple factors shape the ecosystem in which it will succeed or fail. Among the most important factors are the enforcement mechanisms available to implement the law. In the case of the WPEA and its predecessor statutes, alleged whistleblowers can file complaints with OSC, as did Clement. OSC is empowered to investigate the complaints and take subsequent actions, including recommending disciplinary measures and lodging complaints with the Merit Systems Protection Board.<sup>84</sup>

Apart from the powers provided to the OSC by statute, the quality of its leadership is a significant determinant of success. For example, the tenure of Special Counsel Scott Bloch during the George W. Bush administration was referred to by one whistleblower advocate as a “pathetic chapter” in which “[d]edicated federal workers [were] left to hang without a protector on their

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79. Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 122-199, 126 Stat. 1465, at § 101(b)(2)(C) (amending 5 U.S.C. §§ 2302(f)(1)-(2)). See also Zuckerman, *supra* note 78 (citing these changes).

80. See Dylan Blaylock, *Statement of Make It Safe Coalition on 25th Anniversary of Whistleblower Protection Act* (Apr. 10, 2014), <https://www.whistleblower.org/blog/04102014-statement-make-it-safe-coalition-25th-anniversary-whistleblower-protection-act> [<https://perma.cc/H6XZ-MCHJ>].

81. Or, in lieu of presidential support, legislative passage could occur with a two-thirds majority of each house of the U.S. Congress. U.S. CONST. art. I, § 7.

82. *Blow the Whistle!*, WNYC, <https://www.wnyc.org/blowthewhistle> [<https://perma.cc/C2RJ-QSBK>].

83. See *id.*

84. 5 U.S.C. §§ 1212 (a)(2)(B), 1215(a).

side.”<sup>85</sup> Bloch resigned under pressure following allegations that he had himself engaged in improper personnel actions—including sexual orientation discrimination and politicized hiring.<sup>86</sup> Bloch also pled guilty to criminal contempt of Congress for withholding evidence concerning his conduct at OSC.<sup>87</sup> In contrast, Carolyn Lerner was widely praised for her recently completed term as Special Counsel.<sup>88</sup> The Republican and Democratic co-chairs of the House Whistleblower Protection Caucus credited Lerner with “increas[ing] both the number of claims [OSC] investigates and the number of cases resolved.”<sup>89</sup> Because the Special Counsel is appointed “by the President, by and with the advice and consent of the Senate,”<sup>90</sup> senators can influence the selection. Media coverage, as well as pressure from the public and from civil society, also may impact the selection.

The press and public interest groups also can shine a spotlight on individual cases. For example, Clement’s attorney shared with me her sense, as of early December 2017, that OSC had been unusually responsive to Clement’s complaint. She observed that she had “never seen OSC move so quickly in investigating.” She received “a call from investigators within a week of filing the

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85. Joe Davidson, *Workers Applaud Special Counsel’s Return to Private Sector*, WASH. POST (Oct. 22, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/21/AR2008102102572.html> [<https://perma.cc/YG22-JA7T>] (internal quotations omitted).
  86. See Dan Friedman, *OSC Chief Announces He Will Resign on Jan. 5*, GOV’T EXEC. (Oct. 20, 2008), <https://www.govexec.com/oversight/2008/10/osc-chief-announces-he-will-resign-on-jan-5/27894/> [<https://perma.cc/L27X-QC7F>]; Carrie Johnson, *Special Counsel Bloch Resigns Under Pressure*, WASH. POST (Oct. 24, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/23/AR2008102303204.html> [<https://perma.cc/HWT7-ENAV>]. The Inspector General for the Office of Personnel Management issued a report in 2013 validating a number of the claims against Bloch. See Letter From Patrick E. McFarland to the Honorable Carolyn N. Lerner (Dec. 5, 2013) (transmitting Final Report of Investigation into March 3, 2005 and March 31, 2005 Complaints Filed with the Office of Special Counsel).
  87. Ann E. Marimow, *Sentencing Postponed for Scott Bloch, Former Head of the Office of Special Counsel*, WASH. POST (May 13, 2013), [https://www.washingtonpost.com/local/sentencing-postponed-for-scott-bloch-former-head-of-the-office-of-special-counsel/2013/05/13/1bc6ff56-bbe1-11e2-9b09-1638acc3942e\\_story.html](https://www.washingtonpost.com/local/sentencing-postponed-for-scott-bloch-former-head-of-the-office-of-special-counsel/2013/05/13/1bc6ff56-bbe1-11e2-9b09-1638acc3942e_story.html) [<https://perma.cc/VB87-8SV2>]; Press Release, FBI, *Former Head of U.S. Office of Special Counsel Pleads Guilty to Criminal Contempt of Congress* (Apr. 27, 2010), <https://archives.fbi.gov/archives/washingtondc/press-releases/2010/wfo042710.htm> [<https://perma.cc/U3UH-T68S>].
  88. See Joe Davidson, *Special Counsel Lerner Leaves Office as Trump Rejects Highly Praised Whistleblower Advocate*, WASH. POST: POWERPOST (June 7, 2017), <https://www.washingtonpost.com/news/powerpost/wp/2017/06/07/lerner-leaves-office-of-special-counsel-as-trumps-rejects-highly-praised-whistleblower-advocate/>.
  89. *Id.*
  90. 5 U.S.C. § 1211(b) (2012).

complaint,” whereas “[u]sually it’s two to three months.”<sup>91</sup> She attributes such responsiveness partly to the unusual level of public attention paid to Clement’s case.<sup>92</sup> On the same day that Clement filed his complaint with OSC, he also published an op-ed in *The Washington Post*. In the op-ed, he wrote of the mass reassignments at the Department, including his own, and characterized them as efforts to “[s]ilenc[e] civil servants, stifl[e] science, squander[] taxpayer money and spurn[] communities in the face of imminent danger....”<sup>93</sup> The op-ed generated considerable attention, which, in turn, led to further media scrutiny of the Department’s reassignments. Clement also received assistance from the Institute for Constitutional Advocacy and Protection (the Institute) at Georgetown University Law Center. The Institute sent a detailed letter to OSC, on behalf of thirteen scholars of constitutional, administrative, and civil service law, urging OSC to “conduct a thorough investigation” into Clement’s complaint.<sup>94</sup>

Clement’s op-ed also seemed to spark interest on Capitol Hill. While there had been some congressional inquiry into the Department’s reassignments prior to the op-ed,<sup>95</sup> Clement’s reassignment was singled out in subsequent oversight requests made by House and Senate Democrats to Secretary Zinke and to the Department’s Inspector General.<sup>96</sup> Apart from the light that these requests shed on the influence of Clement’s op-ed, they remind us of the important roles that Inspectors General and members of Congress can play in contributing to an ecology of civil service independence. Of course, as with the leadership of the OSC, it matters a great deal who fills these positions. Historically, levels of commitment to civil service independence have varied widely among members of Congress and among Inspectors General. While

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91. Interview with Katherine Atkinson, *supra* note 31.

92. *Id.*

93. Clement, *supra* note 16.

94. Email From Joshua A. Geltzer et al., *supra* note 25.

95. See Letter From Tom Udall, Senator, to Sec’y Ryan Zinke, U.S. Dep’t of the Interior (July 11, 2017) (expressing concern and seeking information about mass reassignments in Udall’s capacity as Ranking Member of the Senate Committee on Appropriations, Subcommittee on the Interior, Environment, and Related Agencies).

96. See *supra* notes 34–35 and accompanying text. See also Letter From Tom Carper, Heidi Heitkamp, and Tom Udall, U.S. Senators, to Sec’y Ryan Zinke, U.S. Dep’t of the Interior (Aug. 21, 2017); Letter From Elijah E. Cummings, U.S. Rep., to Sec’y Ryan Zinke, U.S. Dep’t of the Interior (Oct. 6, 2017) (on file with author).

both groups have had members devoted to civil service independence, both also have had members who actively enable agency politicization.<sup>97</sup>

## CONCLUSION

While politics has a perfectly legitimate role to play in the administrative state, that role is not unlimited. Neither the president nor his appointees have, nor should they have, unbridled power to reshape agencies in their political images. To be sure, such power would enhance agency political accountability in one very narrow sense. That is, it would heighten administrative responsiveness to the will of the nationally elected and highly visible president. Yet any positive effect would be dwarfed by the negative repercussions for other aspects of political and legal accountability. Among other things, political control over career experts can stifle the emergence of truthful, but politically inconvenient, information from their departments.

Joel Clement's allegations, and the larger factual context in which they arise, illustrate the dangers that excessive political control poses to expertise and truthful information flow, both in and from the administrative state. Yet these events also highlight some of the safeguards currently in place to protect against these threats. More broadly, Clement's story provides occasion to consider the many components that can comprise—and those that can undermine—an ecology of accountability and civil service independence throughout the administrative state.

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97. See, e.g., Interview with Louis Clark, *supra* note 74 (noting that Inspectors General are a “mixed bag” with respect to whistleblower protections).