

Serving Two (or More) Masters: Civil Service and Bureaucratic Resistance in our Administrative State

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“[The President] must place in each member of his official family, and his chief executive subordinates, implicit faith.”

— Chief Justice Taft, *Myers v. United States* (1926)

“All happy families are alike; each unhappy family is unhappy in its own way.”

— Leo Tolstoy, *Anna Karenina* (1877)

I. Introduction: Welcome to the “Resistance”

The Environmental Protection Agency’s staff had been working hard, and the President was grateful for their efforts. So President Obama visited the EPA headquarters on January 10, 2012, to thank them in person. “I know the hours can be long,” he told them, “[b]ut I also know what compelled you to enter public service in the first place—and that’s the idea that you could make a difference; that you could leave behind a planet that is a little cleaner, a little safer than the one we inherited.”² The staff applauded his words, and he in turn applauded the work that they had been doing for nearly three years to promulgate regulations on greenhouse gas emissions, on mercury emissions, on water pollution, and other policies under the leadership of EPA Administrator Lisa Jackson. “So all of you, and all of those who served before you, have made a difference. Our environment is safer because of you. Our country is stronger because of you. Our future is brighter because of you. And I want you to know that you’ve got a President who is grateful for your work and will stand with you every

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² White House, *Remarks by the President to EPA staff* (Jan. 10, 2012), at <https://obamawhitehouse.archives.gov/the-press-office/2012/01/10/remarks-president-epa-staff>.

inch of the way as you carry out your mission to make sure that we've got a cleaner world," Administrator Jackson told them.³

Five years later, Obama's and Jackson's successors would receive a rather different welcome at the EPA. Immediately upon the newly inaugurated President Trump's appointment of EPA Administrator Scott Pruitt, journalists began to report that anonymous EPA officials would "resist" Trump's and Pruitt's initiatives—indeed, it began even before Pruitt actually received his Senate-confirmed appointment. Days before the Senate voted to approve Pruitt's nomination, EPA staff walked out of the agency's regional office in Chicago and held a rally outside to protest his nomination.⁴ President Obama's former EPA communications director urged, "the EPA career staff are committed to the mission. They won't stand for rollbacks of progress made reducing pollution. They'll fight dirty."⁵

Weeks earlier, the president of the union representing many EPA employees explained that EPA staff would begin leaking information to undermine Pruitt. Asked whether EPA staff were already joining a "resistance" movement within the agency. "It kind of sounds like it," the union president replied. "I'm going to guess what was going on during the Reagan years when people started leaking to the press because they were worried about the agency being dismantled. . . . Today, we have social media. We get it out there real quick[.]"⁶

The nascent "resistance" movement was applauded by still more friends outside the agency—including Administrator Pruitt's immediate predecessor, Gina McCarthy, who told the *New York Times* that "[i]t's fine to have differing opinions on how to meet the mission of the agency. Many Republican administrators have had that. . . . But here, for the first time, I see someone who has no commitment to the mission of the agency."⁷ The president of the Union of Concerned Scientists warned, "EPA is composed of civil servants who have been there a long time and believe in the mission of EPA and believe in the work they've done . . . I don't expect they'll go quietly into that good

³ *Id.*

⁴ "Hundreds of current and former EPA employees protest Trump's nominee in Chicago," *Chicago Tribune* (Feb. 6, 2017).

⁵ *Id.* (quoting Tom Reynolds).

⁶ Kevin Bogardus & Robin Bravender, "Snarky Twitter activists, fearful feds wage war on Trump," *Greenwire* (Jan. 26, 2017).

⁷ Coral Davenport, "E.P.A. Head Stacks Agency With Climate Change Skeptics," *N.Y. Times* (Mar. 7, 2017).

night and just wave a white flag and surrender.”⁸ The Environmental Defense Fund’s executive director posted an open letter to EPA staff, urging them to stay at the EPA for the sake of “the fight ahead.”⁹ Former EPA staff published “A Practice Guide for Resisting the Trump De-Regulatory Agenda,” which they described as “best practices for *making agencies listen*”¹⁰; their advice included holding protests, resorting to social media, and “[e]nlisting your members of Congress in resistance efforts[.]”¹¹

As President Trump and Administrator Pruitt began to implement the Administration’s agenda through executive orders,¹² notices of proposed rulemaking,¹³ and the President’s announcement of the nation’s intent to withdraw from the Paris Climate Accord,¹⁴ scattered EPA staff continued to announce their opposition through the press. One anonymous official in the EPA’s regional office for the Pacific northwest told the *Seattle Weekly* that withdrawing from the Paris Accord was “a huge miscalculation on Pruitt’s part. He’s likely lost any ability to get the career staff at the agency to do what needs to be done for his agenda.”¹⁵ A year into Pruitt’s administration, an EPA engineer

⁸ Alex Guillen, “‘Anxiety’ abounds at EPA as Senate confirms Pruitt,” *Politico* (Feb. 17, 2017).

⁹ Diane Regas, “A message to public servants committed to enviro protection: Keep it up,” LinkedIn.com (Feb. 1, 2017).

¹⁰ Available at <http://saveepaalums.info/Resistance+Guide> (emphasis in original, quotation marks omitted).

¹¹ *Id.* at p. 21.

¹² *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule*, Exec. Order 13778 (Feb. 28, 2017); *Promoting Energy Independence and Economic Growth*, Exec. Order 13783 (Mar. 28, 2017).

¹³ *Definition of “Waters of the United States”—Recodification of Pre-Existing Rules*, 82 Fed. Reg. 34899 (July 27, 2017); *Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 82 Fed. Reg. 48035 (Oct. 16, 2017); *State Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units*, 82 Fed. Reg. 61507 (Dec. 28, 2017).

¹⁴ White House, *Statement by President Trump on the Paris Climate Accord* (June 1, 2017), at <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord>.

¹⁵ Sara Bernard, “‘Pruitt Blew It’: At the EPA, Resistance Is Just Part of the Job,” *Seattle Weekly* (June 19, 2017). The same staffer further stated that the President’s and EPA Administrator’s statements and actions regarding climate policy had spurred EPA staffers to direct “an increasing amount of ‘f-- you’” toward the agency’s leadership. *Id.*; see also, e.g., Eric Nolthaus, “‘We Will Never Stop’: An EPA Employee Blasts the Trump Administration,” *Mother Jones* (Feb. 22, 2017).

boasted to the *New Yorker*, “Pruitt is a temporary interloper. We are the real agency”; the public “is expecting us to protect the planet.”¹⁶

Having recounted this recent history, it is important to note that so far there is no documented evidence of precisely what—if anything—the self-styled “resistance” movement within the EPA actually has accomplished, in terms of deterring or slowing Trump’s and Pruitt’s agenda. Nor is there any indication of how many current EPA officials actually are taking action to back up the “resistance” rhetoric that is being ascribed to them. Nor is there any comparative measure of how many career EPA officials are affirmatively working in support of the new EPA leadership’s aims. Talk of an EPA “resistance” movement may amount to nothing more than a tale “full of sound and fury, [s]ignifying nothing.”¹⁷

Still, reports of “resistance” were prominent throughout the Trump Administration’s first year, and not just at the EPA. Countless news articles suggested that the President and his appointed agency leaders faced “a growing wave of opposition from the federal workers charged with implementing any new president’s agenda,” a resistance movement that “is so early, so widespread and so deeply felt that it has officials worrying about paralysis and overt refusals by workers to do their jobs.”¹⁸

Regardless of whatever might be novel about the current political situation in Washington, tales of friction between the President, his appointed agency leadership, and agency staff are anything but new; under our Constitution, such friction seems inevitable. The Constitution obligates the President to “take Care that the Laws be

¹⁶ Margaret Talbot, “Dirty Politics,” *New Yorker* (Apr. 2, 2018), at 38, 51.

¹⁷ William Shakespeare, *Macbeth*, act 5, scene 5.

¹⁸ Juliet Eilperin, Lisa Rein, & Marc Fisher, “Resistance from within: Federal workers push back against Trump,” *Wash. Post* (Jan. 31, 2017); see also, e.g., Nancy Cook & Andrew Restuccia, “Revenge of the bureaucrats,” *Politico* (Jan. 23, 2017); Joe Davidson, “To resist or not, the federal employee’s dilemma,” *Wash. Post* (Jan. 21, 2017); Abigail Tracy, “An Anti-Trump Resistance Movement Is Growing Within the U.S. Government,” *Vanity Fair* (Feb. 1, 2017); John F. Harris & Daniel Lippman, “Trump’s Enemies Within,” *Politico* (Feb. 2, 2017); Andrew Restuccia, Marianne Levine, & Nahal Toosi, “Federal workers turn to encryption to thwart Trump,” *Politico* (Feb. 2, 2017); Stuart Leavenworth, “Federal lawyer urges colleagues to resist ‘indefensible’ Trump policies,” *McClatchy DC* (Feb. 23, 2017); Marin Cogan & Nick Tabor, “Should They Stay or Should They Go? Federal Employees Talk About the Ethics of Sticking It Out With the Trump Administration,” *New York* (July 5, 2017); Christopher Flavelle & Benjamin Bain, “Washington Bureaucrats Are Quietly Working to Undermine Trump’s Agenda,” *Bloomberg Politics* (Dec. 18, 2017).

faithfully executed,”¹⁹ but as Chief Justice Taft explained (with firsthand experience), “the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.”²⁰ Therein lies the opportunity for what today we would call “principal-agent problems.”

A century earlier, Publius had not focused explicitly on the assistance of subordinates when he wrote that “Energy in the Executive is a leading character in the definition of good government” because it is “essential to the steady administration of the laws,” and that energy requires “unity”²¹—that is, a single President. But, if anything, his seminal defense of executive power seems to presume the need for unity of purpose among the President and his subordinates; after all, Publius himself warned in the same essay that “[w]herever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion.”²² Publius thus seemed to presume (implicitly) that the President would face little or no risk that “difference of opinion” with subordinates would detract from the President’s “energy,” or at least that this is what good government would require.²³

But two centuries of experience counsels to the contrary. Hence Clinton Rossiter’s observation that the president’s authority over administration “is, in fact, the one major area of presidential activity in which his powers are simply not equal to his responsibilities.” The president’s powers and duties are forever subject to innumerable federal bureaucrats’ “ethics, loyalty, efficiency, frugality, and responsiveness to the public’s wishes[.]”²⁴

Indeed, even the first President endured opposition within his own Cabinet, when Washington’s agreement with Treasury Secretary Hamilton on matters “ranging from redemptions of war debt to creating a national bank” left the dissenting Secretary of State Jefferson reaching for auxiliary weapons capable of eliminating Hamilton turning the tide: “to assail [Washington] outright was

¹⁹ U.S. Const. art. II, § 3. And to that end, he swears an oath to “faithfully execute the Office of President of the United States.” U.S. Const. art. II, § 1.

²⁰ *United States v. Myers*, 272 U.S. 52, 117 (1926).

²¹ Federalist No. 70 (Hamilton).

²² *Id.*

²³ Of course, Publius also expected the President to largely be free to pick his Administration’s officers. See Federalist No. 76.

²⁴ Clinton Rossiter, *The American Presidency* 19 (2d ed. 1960).

thought to be political suicide,” Ron Chernow writes, and so Jefferson instead “us[ed] proxies while keeping his own lips sealed.”²⁵ It was, in a sense, the very first “Resistance” movement.²⁶

As the federal bureaucracy grew, so too did presidents’ frustrations in relying upon bureaucrats to administer their policies. “I thought I was the president,” Harry Truman is said to have complained, “but when it comes to these bureaucrats, I can’t do a damn thing.”²⁷ Looking ahead in 1952 to the possible election of General Eisenhower to succeed him, he predicted that someone accustomed to the military’s efficiency and *esprit de corps* would be sorely disappointed with the domestic-policy bureaucracy:

“He’ll sit here,” Truman would remark (tapping his desk for emphasis), “and he’ll say, ‘Do this! Do that!’ *And nothing will happen*. Poor Ike—it won’t be a bit like the Army. He’ll find it very frustrating.”²⁸

And, as Richard Neustadt further recounted, Truman was prescient: “‘The President still feels,’ an Eisenhower aide remarked to me in 1958, ‘that when he’s decided something, that *ought* to be the end of it . . . and when it bounces back undone or done wrong, he tends to act with shocked surprise.”²⁹

Such complaints did not end with Truman and Eisenhower. President Kennedy is reported to have once quipped to a caller, “I

²⁵ Ron Chernow, *Hamilton* 395 (2004); *see also id.* at 397 (“Though Jefferson and Madison were the chief instigators . . . Jefferson had to move cautiously, while [Congressman] Madison could be more open.”); *id.* at 424–25 (“Jefferson assured the president that he would strive for unity and that he had ‘kept myself aloof from all cabal and correspondence on the subject of the government.’ . . . Even as Jefferson mouthed sedative pledges of peace, he and Madison were secretly orchestrating the first concerted effort in American history to expel a cabinet member for official misconduct.”)

²⁶ Perhaps President Washington was fortunate to have just *one* Cabinet secretary resisting his decisions. Jack Goldsmith recently recounted ways in which several of President Trump’s Cabinet secretaries were publicly resisting the president’s policies. Jack Goldsmith, “Our Non-Unitary Executive,” *Lawfare.com* (July 30, 2017); *see also* Yuval Levin, “The Supernumerary Executive,” *NationalReview.com* (Jan. 5, 2018).

²⁷ Richard P. Nathan, *The Administrative Presidency 2* (1983) (quoting Burt Schorr & Andy Pasztor, “Reaganites Make Sure That the Bureaucracy Toes the Line on Policy,” *Wall St. J.* (Feb. 10, 1982), p. 1).

²⁸ Richard E. Neustadt, *Presidential Power: The Politics of Leadership from FDR to Carter* 9 (1980).

²⁹ *Id.*

agree with you, but I don't know if the government will."³⁰ If JFK's line is apocryphal, the sentiments were evidently still accurate, in light of Arthur Schlesinger Jr.'s similar complaints. Visiting his friend Henry Kissinger at Harvard in August 1962, Schlesinger lamented that the bureaucracy had "an infinite capacity to dilute, delay, obstruct, resist, and sabotage presidential purposes."³¹ After just one year of energetic reforms, "the ice [was] beginning to form over government again," with "the press, the Congress and (tacitly) the bureaucracy . . . pick[ing] the New Frontiersmen off as if from ambush."³²

Truman's and JFK's (and Schlesinger's) complaints about bureaucracy are a useful reminder that while we tend to think of such issues in terms of conservative Republican presidents (Nixon, Reagan, George W. Bush) against non-conservative non-Republican bureaucrats, that is not entirely the case. True, it appears much more *commonly* the case,³³ but not exclusively so. Thus, when the first Hoover Commission delivered its Truman-era report on the organization of the executive branch, its first findings focused on presidents' difficulty in meaningfully directing the bureaucracy to carry out their programs: "The line of command and supervision from the President down through his department heads to every employee," the Commission found, "and the line of responsibility from each employee of the executive branch up to the President, has been weakened, or actually broken, in many places and in many ways"; and,

³⁰ *Id.* at 1.

³¹ Niall Ferguson, *Kissinger, 1923–1968: The Idealist* 542 (2015) ("Ruefully, he told the participants that the U.S. president had less power than in the past because there were now four branches of government: legislature, judiciary, presidency, and 'executive (bureaucracy).'")

³² *Id.* Just two years earlier, conservative intellectual James Burnham noted that conservatives might find that bureaucratic inertia can be a good thing. The "permanent bureaucracy" had come to be a fourth branch of government, one that had "gradually achieved a status of its own . . . more and more independent of both the contending constitutional branches." As such, a "partially independent professional bureaucracy, sharing in the sum of governmental power and able to stand on its own political feet," could help to diffuse power at the federal level. James Burnham, *Congress and the American Tradition* 54–56 (1959). Not an ideal state of affairs, Burnham made clear, but not an entirely harmful one.

³³ See Joel D. Aberbach & Bert A. Rockman, *Clashing Beliefs Within the Executive Branch: The Nixon Administrative Bureaucracy*, 70 *Am. Pol. Sci. Rev.* 456, 458 (1976) ("In any event, the belief that a Republican administration does not have natural political allies within the federal bureaucracy seems well-justified."); cf. David Lowery & Caryl E. Rusbult, *Bureaucratic Responses to Antibureaucratic Administrations*, 18 *Admin. & Soc'y* 45 (1986).

it added, “[t]he President and the heads of departments lack the tools to frame programs and policies and to supervise their execution.”³⁴

But, having begun with these generalities, it is again important not to overstate things. Presidents’ frustrations with bureaucracy might owe less to bureaucratic *resistance* than to the bureaucratic *inertia*, or to limited agency resources, or to presidents’ unrealistic expectations.³⁵ James Q. Wilson, for one, found complaints of bureaucratic resistance greatly exaggerated: “What is surprising is not that bureaucrats sometimes can defy the president but that they support his programs as much as they do.”³⁶

Indeed, sometimes the White House’s primary fear is not that there will be too *much* friction between the bureaucracy and the leadership appointed atop it, but too *little*. This was the tendency that President-elect Reagan’s aides sought to preemptively combat, when they directed Reagan’s appointees “to avoid contact with their own agency staff during the transition period” and inundated the appointees “with reports and briefings about agency policies” in order “to inoculate the political appointees with the conservative antibodies that would provide protection against the liberal viruses to which the administration expected appointees to be exposed once they began to have close contact with civil servants.”³⁷

In the end, “bureaucratic resistance” is probably most prudently framed in the cautious terms offered by Dennis Riley in *Controlling the Federal Bureaucracy*:

First of all, the term resistance probably implies some presidential initiative that bureaucrats must counter. *That happens seldom.* Presidential inattention is the rule for most agencies, so, in effect, those agencies are merely reciprocating, that is, ignoring him more than resisting him. Second, *when bureaucrats do resist, the classic—and definitely preferred—mode is passive resistance.* Simply do not act. The odds of follow-up are extremely low, and even a second call can

³⁴ *The Hoover Commission Report* 5 (McGraw-Hill 1949)

³⁵ Cf. Arthur Bloch, ed., *Murphy’s Law Book Two: More Reasons Why Things Go Wrong* 52 (1980) (“Never attribute to malice that which is adequately explained by stupidity.”).

³⁶ James Q. Wilson, *Bureaucracy* 275 (2d ed. 2000).

³⁷ Barry D. Friedman, *Regulation in the Reagan-Bush Era* 50–51 (1995) (quotation marks and brackets omitted).

probably be ignored. . . . *Standing toe to toe with the President and slugging it out makes headlines, but it doesn't happen often.*³⁸

With that in mind, how *can* it happen? In Parts III and IV of this paper, I explore some of the modern tactics of outright bureaucratic resistance and consider some ways in which those approaches are enabled or exacerbated by more fundamental features of the modern administrative state. But first, in Part II, I briefly recount how and why the modern civil service took shape.

II. From “Government by Gentlemen” to “Spoils” to Modern Civil Service: A Thumbnail Sketch

The Framers expected (or hoped) that government would attract men of high character—a presidency “filled by characters pre-eminent for ability and virtue,”³⁹ a legislature of “men who possess the most attractive merit and the most diffusive and established characters,”⁴⁰ and departments led by genuinely fit characters.⁴¹ And, in a similar vein, early presidents aimed to staff federal departments with men of similar qualities. In the pre-Jacksonian era, 1789–1829, “federal employment, though limited, was an extension of the dominance of the elites[.]”⁴² This came to be called the era of “Government by Gentlemen.”⁴³ For Washington, the “primary object” of staffing the Departments was “fitness of character”—and, as David Rosenbloom observes, “Washington probably had greater political and legal freedom” than any of his successors in pursuing such a course of action, because “his election generated no political campaign debts,” nor were there incumbent bureaucrats to handle or remove.⁴⁴

But Washington did place a premium on loyalty to the new government. He explained, in a 1795 letter to Timothy Pickering, that “I shall not, whilst I have the honor to administer the government,

³⁸ Dennis D. Riley, *Controlling the Federal Bureaucracy* 23 (1987) (emphasis added).

³⁹ Federalist No. 68 (Hamilton).

⁴⁰ Federalist No. 10 (Madison).

⁴¹ Federalist No. 76 (Hamilton) (explaining that the Constitution’s requirement of Senate advice and consent for officer appointments “would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity”).

⁴² David H. Rosenbloom, *Federal Service and the Constitution* 3 (2d ed. 2014).

⁴³ Frederick C. Mosher, *Democracy and the Public Service* 55 (1968).

⁴⁴ Rosenbloom, *supra* note 42, at 33.

bring a man into any office, of consequence knowingly whose political tenets are adverse to the measures which the *general* government are pursuing; for this, in my opinion, would be a sort of political suicide.”⁴⁵ He did not pursue this as a hard-and-fast rule—his own Vice President later observed that Washington “appointed a multitude of Democrats and Jacobins of deepest die”⁴⁶—but it was his overarching goal. And Adams, too, shared Washington’s basic sentiment: “Political Principles and Discretion” are not dispositive, Adams explained, but they “will always be considered with all other qualifications and well weighed in all Appointments.”⁴⁷

Again, Washington and Adams had greater practical freedom than their successors in staffing the bureaucracy, because Washington began with a blank slate and Adams inherited the bureaucracy of a like-minded predecessor. Thus Jefferson was the first president to find himself in a situation familiar to modern presidents: entering office with a bureaucracy that he himself certainly would not have chosen. “I had foreseen, years ago, that the first republican president who should come into office after all the places in government had become exclusively occupied by federalists would have a dreadful operation to perform,” he wrote to Attorney General Levi Lincoln. “That the republicans would consent to a continuation of everything in federalist hands was not to be expected, because it was neither just nor politic.” On Jefferson, then, “was to devolve the office of an executioner, that of lopping off.”⁴⁸

Accordingly, Jefferson sought to make the bureaucracy more ideologically representative, “by appointing only Republicans until the proportion of Federalists and Republicans in the civil service roughly approximated the proportion of each in the nation,”⁴⁹ a move that

⁴⁵ Letter from George Washington to Timothy Pickering (Sept. 27, 1795) (<https://founders.archives.gov/documents/Washington/05-18-02-0482>) (emphasis in original), *quoted in* Rosenbloom, *supra* note 42, at 33.

⁴⁶ Letter from John Adams to Oliver Wolcott, Jr. (Oct. 4, 1800) (<https://founders.archives.gov/documents/Adams/99-02-02-4637>), *quoted in* Rosenbloom, *supra* note 42, at 34.

⁴⁷ *Id.*

⁴⁸ Letter from Thomas Jefferson to Levi Lincoln (Aug. 26, 1801) (<https://jeffersonpapers.princeton.edu/selected-documents/levi-lincoln>), *quoted in* Patricia Wallace Ingraham, *The Foundation of Merit* 18 (1995).

⁴⁹ Rosenbloom, *supra* note 42, at 35.

Patricia Ingraham identifies as the origin of “patronage” in bureaucratic hiring.⁵⁰

But at the same time, Jefferson attempted to institute an explicit rule of political neutrality in the bureaucracy; to that end, he issued a circular ordering that every officer “will not attempt to influence the votes of others, nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it.”⁵¹ Yet whatever their differences in partisan or ideological orientation, Jefferson shared Washington’s basic view of administration as an elite enterprise, and appointed officials from what he later described to Adams as the “natural aristocracy.”⁵²

President Andrew Jackson saw things rather differently. First, he rejected the notion that government jobs required reliance on elite classes. “The duties of all public officers are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance,” he announced in his first annual message to Congress.⁵³ And, he continued, “I can not but believe that more is lost by the long continuance of men in office than is generally to be gained by their experience.”⁵⁴ Thus, Jackson introduced the principle of “rotation” into federal government, to dislodge incumbents from long-held government offices and replace them with a civil service “more socially representative of the president’s political party[.]”⁵⁵

Furthermore, Jackson emphasized the need for civil servants to have political loyalty to the party of the president who appointed them, and in so doing laid the groundwork for what became known as the “spoils” system,⁵⁶ which was eventually entrenched when the Whig

⁵⁰ Ingraham, *supra* 48, at 18.

⁵¹ *Id.* (quoting “Circular to the Heads of the Departments” (Nov. 6, 1801), in *A Compilation of the Messages and Papers of the Presidents, 1789–1897*, 10:99

⁵² Ingraham, *supra* note 48, at 19 (quoting Leonard D. White, *The Jeffersonians* 549 (1951) (quoting Letter from Thomas Jefferson to John Adams (Oct. 28, 1813))).

⁵³ <http://www.presidency.ucsb.edu/ws/index.php?pid=29471>

⁵⁴ Leonard D. White, *The Jacksonians* 4 (1956).

⁵⁵ Rosenbloom, *supra* note 42, at 44.

⁵⁶ Ingraham, *supra* note 48; *but see* White, *supra* note 54, at 4–5 (“The deterioration [of civil service] is often charged against Jackson, as the originator of the spoils system. Such a conclusion would be unjust. Jackson did introduce *rotation* into the federal system for reasons which carried weight in light of the situation that had grown up in the first forty years of national experience. He did not introduce the spoils system. . . . Jackson would have been as violent an enemy of ‘honest graft,’ favoritism, waste, misuse of public funds for party purposes, and outright

Party, long critical of the spoils system, embraced it in the Harrison and Tyler administrations.⁵⁷ This was an important shift: where Washington and Jefferson appraised loyalty in terms of political principle, Jackson and his successors focused the loyalty question much more pointedly on working for the president's political party *per se*.

“The true test of a good government,” Publius observed, “is its aptitude and tendency to produce a good administration.”⁵⁸ And, over time, the costs of the spoils-patronage system became painfully evident—especially in the Civil War, where the spoils system was blamed for the Union's early wartime failures.⁵⁹ Still, reform did not come quickly; “the great conflict over civil service reform was a major domestic issue of two decades,” Leonard White writes, “as party politicians resisted the reformers in their demand for a radical change” to the patronage system that many saw as “the natural order in a republic,” the “one means by which the people ruled[.]”⁶⁰

Still, over those two decades the calls for merit-centered civil service reforms intensified, especially after President Garfield was assassinated by the office-seeking Charles Guiteau in 1881.⁶¹ Two years later, Congress enacted the Pendleton Act, establishing the Civil Service Commission to set standards and procedures for a new merit system for hiring and promotion, and prohibiting the practice of requiring federal employees to financially support the president's political party.⁶² This initial reform was “both unsurprising and limited in its basic principles.”⁶³ And it was limited in scope, initially applying to only 10 percent of federal employees, but the portion of employees falling within the competitive or “classified” service rapidly expanded to a great majority of federal jobs.⁶⁴ A century later, Congress would modernize the merit selection framework still further with the Civil Service Reform Act of 1978, which replaced the Civil

embezzlement as any of his contemporaries, Whig or Democrat.”) (emphasis in original).

⁵⁷ Rosenbloom, *supra* note 42, at 48.

⁵⁸ Federalist No. 68 (Hamilton).

⁵⁹ Rosenbloom, *supra* note 42, 58.

⁶⁰ Leonard D. White, *The Republican Era: 1869–1901* 18 (1958).

⁶¹ Ingraham, *supra* note 48, at 26; Ronald N. Johnson & Gary D. Libecap, *The Federal Civil Service System and the Problem of Bureaucracy* 31 (1994).

⁶² Rosenbloom, *supra* note 42, at 63–64.

⁶³ Jerry Mashaw, *Creating the Administrative Constitution* 239 (2012).

⁶⁴ *Id.* at 64.

Service Commission with the Office of Personnel Management, the Merit Systems Protection Board, the Federal Labor Relations Authority, and the Office of Special Counsel.⁶⁵

Adoption of the merit system then paved the way once again for broad adoption of a political neutrality principle. Beginning with President Cleveland's 1886 order prohibiting civil servants from intervening in elections, to be followed by much stricter limits imposed by President Teddy Roosevelt in 1907, the political-neutrality approach ultimately was codified in 1939 with the first Hatch Act.⁶⁶

Taken together, the evolution in civil service from Washington through Jackson to the modern era is marked by important shifts in emphasis and ethos. First, government offices once viewed as opportunities for service by the nation's aristocratic elites came to be seen instead as jobs to be filled according to more specific technocratic criteria. Second, and relatedly, an emphasis on loyalty to the government's basic principles and overarching policy orientation was replaced an emphasis on loyalty to the president's political party *per se*, only to be replaced by ties between the officeholder and the agency specifically. Both of these trends are reflected in a term coined by Herbert Kaufman in the mid-20th century: "*neutral competence*," the notion that the "core value" of civil service is the "ability to do the work of government expertly, and to do it according to explicit, objective standards rather than to personal or party or other obligations and loyalties."⁶⁷

In short, the modern civil servant would be a technocratic elite, loyal to his agency's expertise-centric mission. It is hard to imagine a state of affairs more likely to produce bureaucratic resistance against politically elected presidents and the officers they appoint to lead the agencies.

III. Bureaucratic Resistance and Regulatory Outcomes

Generally speaking, bureaucratic resistance can be either passive or active. Passive resistance is exemplified by the EPA official who told the *Seattle Weekly* that President Trump's withdrawal from the Paris Climate Accord would likely cost Administrator Pruitt his "to get the career staff at the agency to do what needs to be done for his agenda."

⁶⁵ *Id.* at 83.

⁶⁶ *Id.* at 74–77.

⁶⁷ Herbert Kaufman, *Emerging Conflicts in the Doctrine of Public Administration*, 50 Am. Pol. Sci. Rev. 1057, 1060 (1956).

Active resistance is exemplified by the EPA union president and others who predicted a campaign of leaks and protests against the EPA's leadership. These are the two primary approaches to bureaucratic resistance, although they can be refined still further, as illustrated by recent decades' experience.⁶⁸ Marissa Golden, for example, breaks resistance tactics into categories such as "neglect," "exit," "voice" and "sabotage."⁶⁹

Much of this may seem obvious; bureaucratic leaking and shirking are hardly new in Washington.⁷⁰ But what is less obvious is the way in which bureaucratic resistance can have direct and significant impacts on judicial review of an Administration's regulatory policies.

As Tocqueville observed, "[t]here is almost no political question in the United States that is not resolved sooner or later into a judicial question."⁷¹ That is nowhere truer than in agency policymaking, where the political and technical judgments made by agencies are ultimately translated into "final agency action" invariably challenged, immediately, in court by an aggrieved party.

But while the courts are nominally focused on the reasonableness of the agency leadership's final decision on a matter, the courts also recognize that an agency is not just an "it" but a "they,"⁷² in terms of being a large bureaucratic entity comprised various departments of differing skills and roles. Judges are not ignorant; they read the news and are often aware of the fights within agencies and Administrations. And for that reason, career staff who find themselves on the losing side of a policy fight within an agency may be able to later rely on "key

⁶⁸ Jennifer Nou lists a few other possible tactics, such as resigning from office or even suing the agency to block a new policy. See Jennifer Nou, "Bureaucratic Resistance from Below," *Yale Journal on Regulation's Notice & Comment* (Nov. 16, 2016).

⁶⁹ Marissa Martino Golden, *Exit, Voice, Loyalty, and Neglect: Bureaucratic Responses to Presidential Control During the Reagan Administration*, 2 *J. of Pub. Admin. Research & Theory* 29 (1992); see also Marissa Martino Golden, *What Motivates Bureaucrats? Politics and Administration During the Reagan Years* (2000).

⁷⁰ See, e.g., Amanda C. Leiter, *Soft Whistleblowing*, 48 *Geo. L. Rev.* 425 (2014) (recounting examples where leaks of government documents to litigants, members of Congress, and other critics of agencies).

⁷¹ Alexis de Tocqueville, *Democracy in America* 257 (1835) (Harvey C. Mansfield & Delba Winthrop trans.) (Univ. Chicago Press 2000).

⁷² Cf. Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as an Oxymoron*, 12 *Int'l Rev. of Law & Econ.* 239 (1992).

administrative law doctrines [that] afford career staff strategic tools to vindicate their losing viewpoint.”⁷³

The most prominent example may have been, under George W. Bush’s presidency, career EPA staff’s sustained and ultimately successful resistance of the Bush Administration’s policy against regulating greenhouse gas emissions.

When Bush took office in 2001, greenhouse gas regulation was already a prominent priority among EPA staff lawyers. Moreover, the agency’s general counsel under President Clinton had issued a memorandum concluding that the Clean Air Act empowered the EPA to regulate greenhouse gas emissions.⁷⁴ Even though President Clinton’s EPA had not taken the final step of actually promulgating regulations limiting companies’ greenhouse gas emissions, the issue remained a high priority among career staff inside the agency. And when the new Bush Administration leadership arrived, with fundamental disagreements with EPA staff over the law and science of climate regulation, EPA staff responded with a campaign of leaks.

Copies of internal EPA memoranda were “obtained” and published by the *Washington Post*, the *New York Times*, the Union of Concerned Citizens, and other publications or organizations that cited the documents as evidence that the Bush Administration’s senior leadership was “politicizing” a scientific matter.⁷⁵

As professors Jody Freeman (later a key Obama White House official on climate policy) and Adrian Vermeule observe, “accusations of political interference with expert agency decisions were being made frequently during this time, and attracted significant media attention,” on climate change specifically and “concerning environmental, health,

⁷³ Daniel E. Walters, *Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control* 161–62 (2013).

⁷⁴ Memo from EPA General Counsel Jonathan Z. Cannon to EPA Administrator Carol M. Browner, “EPA’s Authority to Regulate Pollutants Emitted by Electric Power Generation Sources” (Apr. 10, 1998), at <http://www.law.umaryland.edu/environment/casebook/documents/epaco2memo1.pdf>.

⁷⁵ See, e.g., Andrew C. Revkin, “Bush vs. the Laureates: How Science Became a Partisan Issue,” *N.Y. Times* (Oct. 19, 2004); Andrew C. Revkin, “Bush Aide Softened Greenhouse Gas Links to Global Warming,” *N.Y. Times* (June 8, 2005); Daniel Smith, “Political Science,” *N.Y. Times* (Sept. 4, 2004); Jeremy Symons, “How Bush and Co. Obscure the Science,” *Wash. Post* (July 13, 2003); Union of Concerned Scientists, *Scientific Integrity in Policymaking* 34–38 (2004) (reprinting EPA staff memo titled “Issue Paper: White House Edits to Climate Change Section of EPA’s Report on the Environment” (Apr. 29, 2003)).

and safety regulation more generally.”⁷⁶ Freeman and Vermeule stress that those accusations came not just from outside the EPA, but from *inside* as well: “Scientists both within and outside government were becoming more vocal in calling for a policy response [to climate change], including federal regulation of greenhouse gas emissions.”⁷⁷

The EPA staff’s resistance to the Bush Administration is recounted in a remarkably candid memoir by Margo Oge, the longtime EPA staffer who directed the agency’s Office of Transportation and Air Quality from 1994 to 2012. When Massachusetts and other states and organizations sued the EPA to force the Bush Administration to move forward on climate-change regulations, the EPA staff largely sided internally with the agency’s *critics*, rather than with the agency’s own leadership’s position that the Clean Air Act did not actually empower the EPA to take the unprecedented step of regulating greenhouse gas emissions as “air pollutants.”

“Of course,” Oge concedes, “lawyers everywhere are frequently asked to effectively represent clients they don’t agree with[.]” But, she urges, “many of the lawyers at the EPA had joined the agency not just for a paycheck but because of their personal values. They wanted to spend their time working on the side of science and the law and, as the agency’s name suggests, protecting the environment. For the EPA lawyers, the psychological strain of working long hours on a legal argument to limit their agency’s authority to protect the environment was intense. Their frustration sometimes spilled over into shouting matches.”⁷⁸

Their frustrations would be short-lived. When the Supreme Court rejected the Bush Administration’s argument and ruled, by a bare 5-4 majority, that the Clean Air Act actually does empower the EPA to regulate greenhouse gas emissions, the EPA staff organized a party to celebrate their agency’s loss. “Technically, we had lost. The Supreme Court had decided in favor of Massachusetts,” Oge writes. “But in the black-is-white world of Bush-era environmental policy, ‘we won’ by losing the case. The court’s decision would now force EPA to take action on greenhouse gases . . . I had tears in my eyes . . . *Before too long we were offering champagne toasts to our defeat.*”⁷⁹

⁷⁶ Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 S. Ct. Rev. 51, 56 (2007).

⁷⁷ *Id.* at 60.

⁷⁸ Margo Oge, *Driving the Future* (2015).

⁷⁹ *Id.* (emphasis added).

Astonishingly, Oge first heard of the court’s decision from John Hannon, the very same EPA career lawyer who had drafted the agency’s own legal arguments in the litigation . . . and who was now celebrating the fact that his agency had lost and “we”—the EPA career staff—had “won”: “We won the case!” he shouted into the phone.”⁸⁰ Oge candidly admits how this might appear to outside observers, but “I didn’t mind losing to win—the politically warped logic is just part of doing business in Washington.”⁸¹

Oge’s and Hannon’s exclamations—“We won the case!”—are actually more revealing than even sympathetic readers might recognize, and they point toward one important ramification of modern agency “resistance” movements. The most important aspect of the EPA’s resistance movement was not that the EPA staff celebrated the Bush Administration’s loss, but that the EPA’s resistance was likely a major *contributor* to the Bush Administrator’s loss. By fueling a sustained public debate over the Bush Administration’s credibility on climate policy, the EPA resistance movement created the environment in which the *Massachusetts v. EPA* was adjudicated by the Supreme Court. As Freeman and Vermeule explain, “by the time *MA v. EPA* reached the Court the general picture of which they are a part, including allegations of interference with climate-related science, had clearly taken shape, and concerns about politicization were widely known. . . . Whatever their personal views, it would have been impossible for the Justices not to know of the growing scientific consensus on climate change, or to be unaware of accusations that the administration was trying to suppress and manipulate agency science.”⁸²

One of the Justices pressed this point at oral arguments. Justice Ginsburg reacted skeptically to the Bush Administration, telling the U.S. Solicitor General, “the EPA has come out one way, but at least it is debatable because as you just said, the predecessors of the current people [leading the agency] said we do have the authority [to regulate greenhouse gas emissions].”⁸³ Ginsburg joined the Court’s majority, against the Bush Administration, in an opinion that highlighted the

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Freeman & Vermeule, 2007 S. Ct. Rev. at 60.

⁸³ Oral Argument Transcript, *Massachusetts v. EPA*, No. 05-1120 (Nov. 29, 2006).

Bush Administration’s departure from the Clinton EPA’s view of the Clean Air Act.⁸⁴

Freeman & Vermeule’s article focuses generally on the Court’s increasing prioritization (in *Massachusetts v. EPA* and other cases) of “expertise” over the democratic-accountability principles that are normally cited by courts as leaving space for one presidential administration’s agencies to depart from the policies of its predecessors. But their account of the case highlights Daniel Walters’s aforementioned point, that career staff who find themselves on the losing side of a policy fight within an agency may be able to turn bureaucratic losses into courthouse victories,⁸⁵ by leaking information that will color and support the arguments that eventually reach the courts.

Massachusetts v. EPA was not the first time that agency staff leaked internal information that would later affect judicial review of the agency’s decision. Walters recounts another Bush-era EPA controversy, in which EPA staff opposed to the Bush EPA’s Clean Air Act “New Source Review” policies “used a variety of mechanisms—leaks to interest groups, interviews with the media, complaints to the [Inspector General]—to highlight dissensus and signal interested actors that litigation was possible. This informal campaign was started early enough that litigants had almost four years to prepare a narrative” of “politicized” agency leadership.⁸⁶ The Inspector General issued a report amplifying some of the staff’s complaints, which became especially credible ammunition for litigants challenging the Bush EPA in court⁸⁷—litigants who eventually convinced the D.C. Circuit to vacate the Bush EPA’s policy.⁸⁸

The foregoing focuses on ways that an agency’s career staff’s active resistance can affect public perceptions of the agency’s policy. It is important to note, however, that *passive* resistance can have similar effects.

Oge’s memoir recounts the career staff’s refusal to let the agency leadership put their names on the agency’s official decision not to

⁸⁴ *Massachusetts v. EPA*, 549 U.S. 497, 510 (2007).

⁸⁵ Daniel E. Walters, *Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control* 161–62 (2013).

⁸⁶ *Id.* at 152

⁸⁷ *Id.* at 151.

⁸⁸ *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006).

regulate greenhouse gas emissions. Oge told Jeff Holmstead, the EPA's Assistant Administrator for the Air and Radiation Office, that "none of my staff wanted their names listed as the party responsible for responding to public comments." Recounting that decision, Oge observes that "[i]t was a small way of signaling how profoundly [EPA staff] disagreed with the new agency position."⁸⁹

This tactic has already been used in the Trump Administration's first year, when the Justice Department's career lawyers' refused to let their names be listed on a legal brief related to voting rights. In August 2017, an NBC News report on the Justice Department's brief in an Ohio voting rights case highlighted the fact that "[c]areer attorneys in [DOJ's] Civil Rights Department, which handles voting rights issues, did not sign this brief, as they did the prior one."⁹⁰ "It's a signal," a former DOJ lawyer told NBC, "[i]t says this was a political decision that did not have the buy in of the people who are the keel of the Justice Department."⁹¹

A few months later, in September 2017, the names of career Justice Department lawyers were omitted from another controversial brief: the brief in support of a baker who was punished by Colorado for refusing to bake a specialty cake for a same-sex couple's wedding. "Senior lawyers in the civil and civil rights divisions and within the U.S. solicitor general's office said the department should not take a position in the case," the *National Law Journal* reported. "Absent from the government's . . . brief was any career deputy solicitor general, whose name routinely appears on amicus and merits filings from the Justice Department."⁹²

Such passive resistance, refusing to be named on agency decisions and legal briefs, may not be as directly effective as the active-resistance measures employed by EPA staff resisting the Bush Administration. But as these recent news reports suggest, passive resistance can help to contribute to general narratives surrounding the controversy. Judges reviewing controversial Administration policies may notice the dogs that do not happen to be barking.

⁸⁹ Margo Oge, *Driving the Future* (2015).

⁹⁰ Jane C. Timm, "Justice Department Reverses Position in Ohio Voting Rights Case," *NBCNews.com* (Aug. 8, 2017).

⁹¹ *Id.*

⁹² Marcia Coyle, "Justice Department, Divided Internally, Backed Colorado Baker Over Gay Couple," *Nat'l Law Journal* (Oct. 13, 2017).

IV. Resistance and the Modern Administrative State: Some Brief Concluding Thoughts

As the examples in this essay show, an agency's civil servants may "resist" the Administration's policies for any number of reasons; there is no "unified theory" of resistance. As Tolstoy wrote, "each unhappy family is unhappy in its own way."⁹³ But two aspects of the modern administrative state's structure and growth strike me as particularly relevant to the trend of bureaucratic resistance.

A. Agency "Mission" and Overbroad Delegations of Power

In the aforementioned news accounts of EPA resistance to President Trump and Administrator Pruitt, Trump's and Pruitt's opponents refer constantly to the EPA's "mission."⁹⁴ But they use that term to refer not to specific, explicit grants of regulatory power from Congress, but instead to vague goals of environmentalism generally, detached from specific grants of statutory power. Thus, when politically appointed leadership arrives at an agency with the view that a federal statute limits an agency's policymaking discretion, the appointee is seen not as someone with a particular view of Congress's statutes, but as someone who (in the words of former EPA Administrator Gina McCarthy) "has no commitment to the mission of the agency."⁹⁵

It would be unfair to blame civil servants completely for lacking interest in the limits that Congress places on their power, because Congress itself seems little interested in limits on agency power. For century, Congress has legislated in the vaguest possible terms, often enacting laws that set virtually no limits on agency action. As Judge Henry Friendly quipped, too often Congress's passes statutes "so vaguely worded as to convey a mood rather than a message."⁹⁶

And rather than press Congress to write more precise laws, the Supreme Court tends to *encourage* Congress and Agencies on their current paths: the justices tell Congress that is perfectly constitutional to write statutes anchored to no more than a mere "intelligible principle,"⁹⁷ and they tell agencies that the courts will defer to the

⁹³ Leo Tolstoy, *Anna Karenina* (1877).

⁹⁴ See *supra* notes 4–8 and accompanying text.

⁹⁵ See *supra* note 7.

⁹⁶ Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 1263, 1311 (1962)

⁹⁷ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

agencies' interpretation of these statutes as long as the agency's interpretation is not altogether unreasonable.⁹⁸

So we might forgive agency staff for such grandiose assumptions. Congress and the courts have given agency civil servants good reason to think that federal statutes are sufficiently malleable to support the agency staff's pursuit of the agency's "mission," whatever it might be. Moreover, recent decisions like *Massachusetts v. EPA*, which promote agency "expertise" and denigrate supervision by the elected president and his Senate-confirmed appointees, further encourage agency staff to think of *themselves* as definers and keepers of the agency's "mission." That self-aggrandizing habit will likely continue until Congress and the courts place greater emphasis on limiting agency discretion with precise legal limits.

B. Progressive Presidents' First-Mover Advantage

Each new president inherits the agencies left behind by his predecessors—and thus inherits the vast stock of civil servants hired by past administrations. As seen in the anecdotes at the outset of this essay, from FDR onward, that is often distinctly unappealing to presidents of both political orientations.

But Democratic presidents are at a distinct advantage in an important respect: not only are they more likely to agree with left-leaning bureaucrats, but they are also more likely to create *new* bureaucracies to be filled anew with new civil servants to pursue their new agendas. When they do, Democratic presidents both avoid the problems of incumbent bureaucracy and create a distinct problem of incumbent bureaucracy for the next Republican president.

President Franklin Roosevelt recognized this and acted accordingly. In building the New Deal, FDR had little patience for the complacent bureaucracies he inherited. In *The Coming of the New Deal*, Schlesinger describes FDR's approach: "We have new and complex problems. We don't really know what they are. Why not establish a new agency to take over the new duty rather than saddle it to an old institution?" Roosevelt's new agencies proved "indispensable," with "administrative dash and *élan* which the old departments, sunk in the lethargy of routine, could not match."⁹⁹ They had "administrative dash and *élan*" because FDR's Administration staffed them in the first

⁹⁸ *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984).

⁹⁹ Arthur M. Schlesinger Jr., *The Coming of the New Deal, 1933–1935* at pp. 534–535 (1958).

instance, and staffed them with people attracted to FDR's own vision of the agency's mission.

A modern example would be the Consumer Financial Protection Bureau, an agency created by President Obama, then-Professor, Elizabeth Warren, and the 2010 Congress to energetically regulate banks, credit card companies, and other consumer lenders. In staffing up the CFPB from scratch, Obama and Warren built a new bureaucracy energized by a particular ideology and ethos. According to the *Washington Post*, “[a]pplications poured in from idealistic young lawyers, and Warren—then a special adviser to the Treasury and the CFPB’s de facto leader—brought on recruits from Harvard. The bureau’s headhunters especially liked passionate applicants who had some personal experience with the financial crisis—somebody they knew lost a house or job—and an intense devotion to the agency’s mission.”¹⁰⁰

Thus, even though the CFPB is legally “independent” from the President’s direct control, the initial CFPB was perfectly aligned with President Obama, because it was staffed overwhelmingly with civil servants attracted to the mission that Obama and Warren originally ascribed to it. But in 2017, when the CFPB’s leadership was for the first time appointed by a Republican president, at least some of the bureaucracy switched quickly into “resistance” mode. Just days after President Trump named Mick Mulvaney to be the CFPB’s interim director (upon the departure of the CFPB’s inaugural director, Richard Cordray), the *New York Times* reported that some CFPB staff, “pointing to Mr. Mulvaney’s earlier hostility toward the agency and its mission,” were already “resisting.”¹⁰¹

In this respect, bureaucratic resistance will be inherently less problematic for the president that initially creates and agency, and for future presidents whose policies align with the mission that the earlier president created the agency to pursue. Perhaps Republican presidents should think less about eliminating old agencies, and more about creating new agencies to supersede them.

¹⁰⁰ Lydia DePillis, “A watchdog grows up: The inside story of the Consumer Financial Protection Bureau,” *Wash. Post* (Jan. 11, 2014). Tellingly, the energized ideologues that were hired to staff up the CFPB clashed significantly with bureaucrats whose agencies were absorbed into the CFPB. *Id.*

¹⁰¹ Jessica Silver-Greenberg & Stacy Cowley, “Consumer Bureau’s New Leader Steers a Sudden Reversal,” *N.Y. Times* (Dec. 5, 2017).