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# The American Deep State

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# THE AMERICAN DEEP STATE

Jon D. Michaels\*

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## INTRODUCTION

Whether cast as insidious or cast aside as fictitious, the American “deep state” is an increasingly compelling concept in the Age of Trump. In a year’s time, a label that had practically no domestic resonance has been elevated to the status of public enemy number one. Indeed, when things have gone badly for the Trump administration—as they often have—the President, his allies, and White House surrogates have been quick to blame the deep state. Such a deep state, characterized by Team Trump as disloyal and undemo-

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This Article builds on a short contribution penned for *Foreign Affairs*. See Jon D. Michaels, *Trump and the “Deep State,”* FOREIGN AFF. (Sept./Oct. 2017), <https://www.foreignaffairs.com/articles/2017-08-15/trump-and-deep-state>.

cratic forces within and around government,<sup>1</sup> has served as an all-purpose scapegoat, diverting attention from the mounting evidence of White House corruption and incompetence, demonizing and delegitimizing critics of the administration, and jeopardizing the long-term health and vitality of the federal bureaucracy and myriad pillars of civil society.

New to the United States,<sup>2</sup> the concept of a deep state has considerable transnational purchase. Usually any mention of a deep state conjures up images of shadowy and powerful antidemocratic cabals that threaten popular rule. For good reason, one may look at some precariously (or simply nominally) democratic countries' militaries, key ministries, and state-owned industries with trepidation. Close observers of places like Egypt, Turkey, Pakistan, and Iran have witnessed enough crackdowns on free speech and assembly, electoral subversions, and rollbacks of good governance reforms to know how that movie ends.<sup>3</sup>

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1 See, e.g., Daniel Benjamin & Steven Simon, *Why Steve Bannon Wants You to Believe in the Deep State*, POLITICO (Mar. 21, 2017), <https://www.politico.com/magazine/story/2017/03/steve-bannon-deep-state-214935>; Daniel Chaitin, *Trump Promotes "Deep State"-Focused Episode of "Hannity,"* WASH. EXAMINER (June 16, 2017), <http://www.washingtonexaminer.com/trump-promotes-deep-state-focused-episode-of-hannity/article/2626272>; Alexandra Glorioso, *Rooney Calls for "Purge" of "Deep State" Workers at DOJ, FBI,* POLITICO (Dec. 26, 2017), <https://www.politico.com/states/florida/story/2017/12/26/rooney-calls-for-purge-of-deep-state-workers-at-doj-fbi-161479>; Jeremy W. Peters, *The Right Builds an Alternative Narrative About the Crises Around Trump*, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/us/politics/trump-scandal-conservatives-media.html>; Tom Porter, *Deep State: How a Conspiracy Theory Went from Political Fringe to Mainstream*, NEWSWEEK (Aug. 2, 2017), <http://www.newsweek.com/deep-state-conspiracy-theory-trump-645376>; Brooke Seipel, *Donald Trump Jr. Shares Tweet He Says Is "Confirmation Deep State Is Real,"* HILL (July 7, 2017), <http://thehill.com/homenews/news/341074-donald-trump-jr-shares-tweet-he-says-is-confirmation-deep-state-is-real>; Z. Byron Wolf, *Trump Embraces Deep State Conspiracy Theory*, CNN (Nov. 29, 2017), <http://www.cnn.com/2017/11/29/politics/donald-trump-deep-state/index.html>.

2 Prior to 2017, references to an American deep state were few and far between, surely because the term was closely associated with institutions and regimes so utterly unlike those in the United States. See David Remnick, *There Is No Deep State*, NEW YORKER (Mar. 20, 2017), <https://www.newyorker.com/magazine/2017/03/20/there-is-no-deep-state>. But see MIKE LOFGREN, *THE DEEP STATE: THE FALL OF THE CONSTITUTION AND THE RISE OF A SHADOW GOVERNMENT* (2014).

3 See, e.g., Ryan Gingeras, *In the Hunt for the "Sultans of Smack: Dope, Gangsters and the Construction of the Turkish Deep State*, 65 MIDDLE EAST J. 426 (2011); Anil Kalhan, "Gray Zone" Constitutionalism and the Dilemma of Judicial Independence in Pakistan, 46 VAND. J. TRANSNAT'L L. 1 (2013); Mehtap Söyler, *Informal Institutions, Forms of State and Democracy: The Turkish Deep State*, 20 DEMOCRATIZATION 310 (2013); Charles Levinson & Matt Bradley, *In Egypt, the "Deep State" Rises Again*, WALL ST. J. (July 19, 2013), <https://www.wsj.com/articles/SB10001424127887324425204578601700051224658>; Bessma Momani, *In Egypt, "Deep State" vs. "Brotherhoodization,"* BROOKINGS (Aug. 21, 2013), <http://www.brookings.edu/research/opinions/2013/08/21-egypt-brotherhood-momani>; Sanam Vakil & Hossein Rassam, *Iran's Next Supreme Leader*, FOREIGN AFF. (May/June 2017), <https://www.foreignaffairs.com/articles/iran/2017-04-09/iran-s-next-supreme-leader>; Alex Vatanka, *Rouhani Goes to War Against Iran's Deep State*, FOREIGN POL'Y (May 18, 2017), <http://foreignpolicy.com/2017/05/18/rouhani-goes-to-war-against-irans-deep-state/>.

This Article, written for the *Notre Dame Law Review* Symposium on *Administrative Lawmaking in the Twenty-First Century*, considers the notion of bureaucratic *depth* and what it means in the American context. In what follows, I argue that the American deep state has very little in common with those regimes usually understood to harbor deep states; that, far from being shadowy or elitist, the American bureaucracy is very much a demotic institution, demographically diverse, highly accountable, and lacking financial incentives or caste proclivities to subvert popular will; that demotic bureaucratic depth of the American variety should be celebrated, not feared; and that, going forward, we need greater, not lesser, depth insofar as the American bureaucracy serves an important, salutary, and quite possibly necessary role in safeguarding our constitutional commitments and enriching our public policies.

### I. WASHING ONTO AMERICA'S SHORES

In response to the recent barrage of claims of a nefarious American deep state, most mainstream media outlets have treated such assertions—and the corresponding transnational comparisons—with the usual mixture of bemusement and outrage that marks professional reporting of the Trump presidency. To be sure, some commentators have gone further, strenuously shooting down cross-national comparisons to moneyed and mighty cliques as misleading and dangerously inflammatory.<sup>4</sup> Others, however, have gotten caught up in the frenzy, seemingly conflating bureaucratic depth with plutocratic government and any number of other grievances and fears, real or imagined.<sup>5</sup>

Given the mood of the nation, there is good reason to reject the very premise of an American deep state. This is especially true so long as the concept serves primarily as fodder for conspiracy mongering and as fuel for the domestic culture wars.<sup>6</sup> Yet such wholesale rejections come at the expense of accuracy, nuance, and opportunity. In truth, we do have—and have long enjoyed—bureaucratic depth. And Donald Trump, more than any other President, has brought into relief its legal and political *raison d'être*.

Broadly speaking, prior to 2017 our deep state has simply been referred to as our state. At its center—and at the center of the instant political maelstrom—is the vast expanse of federal administrative agencies. These entities are responsible for making and enforcing regulations, designing and running welfare programs, combating crime and corruption, and providing for

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4 See David A. Graham, *There Is No American "Deep State,"* ATLANTIC (Feb. 20, 2017), <https://www.theatlantic.com/international/archive/2017/02/why-its-dangerous-to-talk-about-a-deep-state/517221/>; Rebecca Ingber, *The "Deep State" Myth and the Real Executive Branch Bureaucracy,* LAWFARE (June 14, 2017), <https://lawfareblog.com/deep-state-myth-and-real-executive-branch-bureaucracy>; Remnick, *supra* note 2.

5 See *What Is the Deep State?, To the Point,* KCRW (Dec. 21, 2017), <http://www.kcrw.com/news-culture/shows/to-the-point/what-is-the-deep-state> (podcast commentary by Mike Lofgren).

6 Jon D. Michaels, *The War on Federal Employees,* AM. PROSPECT (Dec. 11, 2017), <http://prospect.org/article/war-on-federal-employees>.

the national defense.<sup>7</sup> Our deep state also includes the personnel entrusted with the day-to-day operations of those agencies.<sup>8</sup> Principal among them are federal employees<sup>9</sup>—though we ought not forget the legions of private government contractors,<sup>10</sup> state and local officials,<sup>11</sup> and members of civil society who play any number of key, supporting, and contrarian roles when it comes to matters of administrative design, implementation, and oversight.<sup>12</sup>

Drawing on their own sources of legal authority, professional credibility, and, occasionally, populist bona fides, and regularly functioning at some distance from the elected leaders in the White House and Congress, federal bureaucrats are a force to be reckoned with.<sup>13</sup> This is particularly true in a modern, complex political economy such as ours, which is seemingly far more dependent on the hundreds of thousands of expert administrators and field agents than on a few hundred lay legislators and a single chief executive.

Much has been made of contemporary bureaucratic *resistance*, which some frame as subversive. Yet federal bureaucrats generally can be counted on to support and advance the President's programmatic goals. They do so out of deference, not docility, with the practical effect that Presidents enjoy considerable but not unbounded leeway. In those rare instances when Presidents (and their hand-chosen agency heads) go beyond the proverbial pale, those in the civil service are particularly well positioned to challenge, and even resist, directives lacking a scientific, legal, or commonsense foundation.<sup>14</sup>

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7 Jon Michaels, *How Trump Is Dismantling a Pillar of the American State*, GUARDIAN (Nov. 7, 2017), <https://www.theguardian.com/commentisfree/2017/nov/07/donald-trump-dismantling-american-administrative-state>.

8 See *id.*

9 See, e.g., DAVID E. LEWIS & JENNIFER L. SELIN, ADMIN. CONFERENCE OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 66–68 (2012), [https://www.acus.gov/sites/default/files/documents/Sourcebook-2012-Final\\_12-Dec\\_Online.pdf](https://www.acus.gov/sites/default/files/documents/Sourcebook-2012-Final_12-Dec_Online.pdf).

10 See, e.g., PAUL C. LIGHT, THE VOLCKER ALL., THE TRUE SIZE OF GOVERNMENT 3–4 (2017), [https://www.volckeralliance.org/sites/default/files/attachments/Issue%20Paper\\_True%20Size%20of%20Government.pdf](https://www.volckeralliance.org/sites/default/files/attachments/Issue%20Paper_True%20Size%20of%20Government.pdf); PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY (2007); Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 717 (2010).

11 See, e.g., Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 663 (2001).

12 See Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414, 443 (2005); see also Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 352 (2016) (examining the “thick political surround” that influences Congress, the President, and federal agencies); Jon D. Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1435, 1438 (2010) (describing the deputization of private individuals and groups to serve as, among other things, force multipliers for the federal government).

13 See, e.g., JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 7–9 (2017); PAUL R. VERKUIL, VALUING BUREAUCRACY 97–100 (2017).

14 See Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 534 (2015).

For instance, the career workforce in regulatory agencies can continue—defiantly, but lawfully—to enforce civil rights laws and health and safety regulations, leak information, drag their feet on the implementation of new but tendentious or insupportable orders, and produce reports useful to any number of audiences, including Congress, judges, the media, and civil society.<sup>15</sup> Likewise, career diplomats and military and intelligence officials can point to longstanding treaties, bilateral agreements, international law, the laws of war, foreign aid appropriations, and extant, long-term projects to justify ongoing cooperation and to provide assurances of continuing support and engagement even during times of jarring political transition and programmatic upheaval at home.<sup>16</sup> Lastly, any number of agency officials may use the authorities granted to them as whistleblowers, inspectors general, and the like to investigate, document, and publicize instances of high-level government malfeasance, suggestive of either venality or run-of-the-mill incompetence.

To be clear, these bureaucratic officials are emboldened to speak truth to power because most of them are civil servants, insulated by law and custom from politics and owed what in effect amounts to job tenure.<sup>17</sup> They are further emboldened to speak truth to power because that is what's expected of them, both as professionals—lawyers, economists, scientists, and the like—and as loyal and faithful stewards of the laws, regulations, and conventions of the United States.<sup>18</sup>

## II. THE DEMOTIC DEEP STATE

Conceding the existence of an American deep state does not commit us to accepting its toxic transnational connotations. That is surely the intention of the current President, his surrogates, and some especially strident critics of the American administrative state.<sup>19</sup> But just as national governments come in many stripes of varying degrees of legal and political legitimacy at home and abroad, so too do their respective bureaucracies and ministries. As such,

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15 See, e.g., Michael Crowley, *America's Deep State Is Real*, POLITICO (Sept. 9, 2017), <http://www.politico.eu/article/us-donald-trump-james-comey-edward-snowden-the-deep-state-is-real/> (describing EPA reports leaked to the *New York Times* and reporting on the right-wing media's characterization of that leak in terms of a deep state conspiracy); Jennifer Nou, *Bureaucratic Resistance from Below*, YALE J. ON REG. NOTICE & COMMENT (Nov. 16, 2016), <http://yalejreg.com/nc/bureaucratic-resistance-from-below-by-jennifer-nou/>.

16 See, e.g., Idrees Ali, *Pentagon's Mattis Again Seeks to Reassure U.S. Allies*, REUTERS (Aug. 19, 2017), <https://www.reuters.com/article/us-usa-mattis-trump/pentagons-mattis-again-seeks-to-reassure-u-s-allies-idUSKCN1AZ0D0>; Ellen Mitchell, *Military Pushes Back on Trump's Transgender Ban*, HILL (Aug. 13, 2017), <http://thehill.com/policy/defense/346261-military-pushes-back-on-trumps-transgender-ban>; *U.S. Nuclear General Says Would Resist "Illegal" Trump Strike Order*, REUTERS (Nov. 18, 2017), <https://www.reuters.com/article/us-usa-nuclear-commander/u-s-nuclear-general-says-would-resist-illegal-trump-strike-order-idUSKBN1DI0QV>.

17 See Michaels, *supra* note 14, at 582–83.

18 See, e.g., VERKUIL, *supra* note 13.

19 See Benjamin & Simon, *supra* note 1.

comparing the American bureaucracy to that of Egypt or Turkey or Pakistan may be just as unilluminating as comparing the respective constitutional systems: in both contexts, the cross-national gap couldn't be wider.

Specifically, unlike the deep states of popular lore, the American version is:

#### A. *Not Elitist*

U.S. domestic and national security bureaucracies are hardly bastions of privilege. American bureaucrats are, after all, drawn from a far greater set of schools and family backgrounds than is generally the case in Western Europe, where Oxbridge and *École Nationale d'Administration* graduates have historically predominated<sup>20</sup>—let alone in Asia or the Middle East, with its clannish, cliquish ministries and state-owned enterprises, control of which may be a family affair and a remunerative one at that.<sup>21</sup> Instead, American bureaucrats, even those serving in such prestigious redoubts as the State Department, are decidedly middle or upper-middle class, lacking the cultural or caste proclivities or financial incentives to deviate particularly far from median voter sentiments or statutory obligations.<sup>22</sup>

One can push this claim further: the American bureaucracy is arguably even more demotic—and more in tune with median voters—than are our elected legislatures, which are increasingly populated by economic, educational, and dynastic elites. There were, in recent years, approximately 228 millionaires in the House—that's more than half of all representatives to the People's chamber; and there were seventy-two millionaires in the Senate.<sup>23</sup> Around this time, no fewer than twenty senators were graduates of Harvard or Yale.<sup>24</sup>

By contrast, federal civil servants earn on average around \$80,000 a year, and only about half are graduates of any four-year college.<sup>25</sup> What's more, federal bureaucrats tend to serve their entire careers in government, meaning they have not had the opportunity, occasion, or intent to amass wealth in the private sector, an increasing necessity for those who want to run for Congress. For these reasons, and no doubt counterintuitively, ordinary Americans may have far more in common with federal civil servants than they do with members of Congress, cabinet secretaries, and certainly the President.

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20 See JOEL D. ABERBACH ET AL., BUREAUCRATS AND POLITICIANS IN WESTERN DEMOCRACIES 62, 73 (1981); Liesbet Hooghe, *Images of Europe: How Commission Officials Conceive Their Institution's Role*, 50 J. COMMON MKT. STUD. 87, 88 (2011).

21 See, e.g., MELANI CAMMETT ET AL., A POLITICAL ECONOMY OF THE MIDDLE EAST 81 (4th ed. 2015).

22 See ABERBACH ET AL., *supra* note 20.

23 See *Personal Finances*, CTR. FOR RESPONSIVE POL., <http://www.opensecrets.org/personal-finances/top-net-worth?type=W&year=2014&filter=A> (last visited Jan. 28, 2018).

24 See Congressional Yellow Book, Winter 2018 (115th Cong., 2d Sess.).

25 U.S. OFFICE OF PERS. MGMT., COMMON CHARACTERISTICS OF THE GOVERNMENT FISCAL YEAR 2016, at 17–19 (2017) [hereinafter COMMON CHARACTERISTICS].

### B. *Not Shadowy*

American agencies by law and custom are overwhelmingly transparent and accessible,<sup>26</sup> far more than are many Middle Eastern, Asian, and European ministries and, again, often more so than Congress and the White House, too.<sup>27</sup> Indeed, unlike most conventionally invoked deep states that function best in the shadows, ours is *phototrophic*, gaining strength and legitimacy by operating in the sunlight and with full and extensive participation from the public at large.

American deep state photophilia is perhaps best evidenced by the fact that purportedly “rogue” bureaucratic muscle-flexing today regularly takes the forms described above—that is, tweets,<sup>28</sup> leaks,<sup>29</sup> investigations,<sup>30</sup> and widely distributed (and carefully annotated) reports<sup>31</sup> supporting or discred-

26 See, e.g., Administrative Procedure Act, 5 U.S.C. §§ 551, 553–559, 701–706 (2012); Freedom of Information Act, 5 U.S.C. § 552 (2012); Government in the Sunshine Act, 5 U.S.C. § 552b (2012).

27 For holdings affirming the unreviewable nature of presidential actions, see, for example, *Dalton v. Specter*, 511 U.S. 462, 475 (1994); *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). And, for Congress’s part, the House and Senate have been known to conceal the terms of significant bills until mere hours before scheduled votes. See Benjy Sarlin & Leigh Ann Caldwell, *The Senate’s Health Care Bill Remains Shrouded in Secrecy*, NBC NEWS (June 15, 2017), <https://www.nbcnews.com/politics/congress/senate-s-health-care-bill-remains-shrouded-secrecy-n772456>; Z. Byron Wolf, *The Senate Voted on a Tax Bill Pretty Much Nobody Had Read*, CNN (Dec. 2, 2017), <http://www.cnn.com/2017/12/01/politics/senate-vote-still-writing-tax-bill/index.html>. For a comparison of national governments along dimensions such as transparency and accessibility, see *Worldwide Governance Indicators*, WORLD BANK, <http://info.worldbank.org/governance/wgi/index.aspx#reports> (last visited Jan. 28, 2018) (select “Voice and Accountability,” “Government Effectiveness,” “Regulatory Quality” Indicators; then select “East Asia & Pacific,” “Europe & Central Asia,” “Middle East & North Africa,” “United States”).

28 See, e.g., Kayla Epstein & Darryl Fears, *Rogue Twitter Accounts Spring up to Fight Donald Trump on Climate Change*, WASH. POST (Jan. 25, 2017), <https://www.washingtonpost.com/news/energy-environment/wp/2017/01/25/rogue-pro-science-protest-sites-are-sticking-up-for-federal-research/>.

29 See, e.g., Brian Beutler, *Keep the Trump Leaks Coming*, NEW REPUBLIC (Aug. 4, 2017), <https://newrepublic.com/article/144197/keep-trump-leaks-coming>; Ben Wizner, *How More Trump Leaks Can Save America*, TIME (May 16, 2017), <http://time.com/4780889/trump-leaks-save-america/>.

30 See, e.g., Aaron C. Davis, *HHS Inspector General Is Investigating Price’s Travel on Private Charter Planes*, WASH. POST (Sept. 22, 2017), [https://www.washingtonpost.com/investigations/investigation-launched-into-hhs-secretary-tom-prices-travel-on-charter-jets/2017/09/22/f7659a0c-9f9b-11e7-8ea1-ed975285475e\\_story.html?utm\\_term=.7850d0d34130](https://www.washingtonpost.com/investigations/investigation-launched-into-hhs-secretary-tom-prices-travel-on-charter-jets/2017/09/22/f7659a0c-9f9b-11e7-8ea1-ed975285475e_story.html?utm_term=.7850d0d34130); Katie Bo Williams, *FBI Investigating Possible Coordination Between Russia, Trump*, HILL (Mar. 20, 2017), <http://thehill.com/policy/national-security/324754-comes-fbi-investigating-possible-collusion-between-trump-team-moscow>.

31 See, e.g., Brady Dennis et al., *Trump Administration Releases Report Finding “No Convincing Alternative Explanation” for Climate Change*, WASH. POST (Nov. 3, 2017), [https://www.washingtonpost.com/news/energy-environment/wp/2017/11/03/trump-administration-releases-report-finds-no-convincing-alternative-explanation-for-climate-change/?tid=SS\\_tw&utm\\_term=.310a7a861bbf](https://www.washingtonpost.com/news/energy-environment/wp/2017/11/03/trump-administration-releases-report-finds-no-convincing-alternative-explanation-for-climate-change/?tid=SS_tw&utm_term=.310a7a861bbf).



iting a particular economic, scientific, or legal claim. Even in the oft-secretive world of diplomacy, we see career foreign service personnel availing themselves of the State Department’s “dissent channel,” publishing objections to the President and Secretary’s policies for all the world to see. Recent dissents have been written in opposition to positions taken by both John Kerry<sup>32</sup> and Rex Tillerson.<sup>33</sup> Occasionally, career officials may go so far as to sue the President or agency heads, as career immigration officials did during the Obama presidency when they challenged the then-President’s “deferred action” programs as inconsistent with statutory law;<sup>34</sup> and as an active duty Army captain did when he challenged President Obama’s allegedly unauthorized military campaign against the Islamic State.<sup>35</sup>

In short, in those rare instances when the American bureaucracy takes sides against the elected leadership, it tends to show its work, laying bare the justifications for any apparent affront to the White House. What’s more, bureaucrats tend to bring others—judges, members of Congress, and the public at large—into the policymaking and policy-scrutinizing fold. Obviously, such transparency and inclusiveness is all the easier when deep state participants enjoy job tenure and are acting in a clearly non-self-serving fashion.

### C. *Not Monolithic*

Not only is the American deep state accessible and knowable, it is also internally diverse and fragmented. Consider first the geographic sprawl within and among the federal agencies, with offices and bureaus dotting the vast American landscape. A sizable majority—close to 85% of civilian, non-postal federal employees—work well outside the Beltway, and about half of all civilian, nonpostal federal employees work (and live) in so-called “red states,” that is, politically conservative states that in 2016 voted for President Trump.<sup>36</sup> This sprawl suggests that federal bureaucrats are not, as commonly thought, fully enveloped in the DC bubble; if anything, they may feel the centrifugal forces of their sometimes far-flung communities more strongly than the centripetal pull of headquarters. After all, these employees live,

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32 See Karen DeYoung, *In Memo, U.S. Diplomats Urge More Aggressive Stance on Syria*, WASH. POST (June 17, 2016), [https://www.washingtonpost.com/world/national-security/in-memo-us-diplomats-urge-more-aggressive-stance-on-syria/2016/06/16/ff30596a-3431-11e6-8758-d58e76e11b12\\_story.html?nid&utm\\_term=.453297e849a0](https://www.washingtonpost.com/world/national-security/in-memo-us-diplomats-urge-more-aggressive-stance-on-syria/2016/06/16/ff30596a-3431-11e6-8758-d58e76e11b12_story.html?nid&utm_term=.453297e849a0).

33 See Emily Baumgaertner, *Tillerson Accused of Violating Federal Law on Child Soldiers*, N.Y. TIMES (Nov. 21, 2017), <https://www.nytimes.com/2017/11/21/us/politics/tillerson-child-soldiers.html>; Jeffrey Gettleman, *State Dept. Dissent Cable on Trump’s Ban Draws 1,000 Signatures*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/world/americas/state-dept-dissent-cable-trump-immigration-order.html>.

34 See, e.g., Alex Hemmer, Note, *Civil Servant Suits*, 124 YALE L.J. 758, 776 (2014).

35 See Niraj Chokshi, “My Conscience Bothered Me”: Army Captain Sues Obama over “Illegal War” on the Islamic State, WASH. POST (May 4, 2016), [https://www.washingtonpost.com/news/checkpoint/wp/2016/05/04/my-conscience-bothered-me-army-captain-sues-obama-over-illegal-war-on-isis/?utm\\_term=.Ac9a4239c07f](https://www.washingtonpost.com/news/checkpoint/wp/2016/05/04/my-conscience-bothered-me-army-captain-sues-obama-over-illegal-war-on-isis/?utm_term=.Ac9a4239c07f).

36 COMMON CHARACTERISTICS, *supra* note 25, at 11 tbl.5.

raise families, and develop personal and professional ties in places geographically and culturally different from Washington—and from one another. As David Fontana has recently observed in his work on a “decentralized” federal government, geographic dispersal is an essential component of limited government—as officials “in places distant and therefore different from Washington compete with and constrain one another.”<sup>37</sup>

Consider next the demographics. According to recent data, women total around 42% of the federal civilian workforce.<sup>38</sup> And, as to race and ethnicity, Caucasians constitute about 63% of all civilian, nonpostal federal employees; African Americans 18%; Asian Americans 6%; and Latinos 5%.<sup>39</sup> This makes the federal administrative workforce far more diverse, inclusive, and reflective of American society than, say, Congress. In 2017, Congress was its most diverse in history, yet it was still 78% white—and only 20.5% female.<sup>40</sup> Importantly, the federal civil service’s 37% nonwhite population practically mirrors the nation’s 38% nonwhite population.<sup>41</sup>

Consider too the partisan affiliations of civil servants. Surveys indicate that Republican and Republican-leaning bureaucrats represent approximately 40% of the federal, civilian workforce—not that far behind the 44% who identify as or lean Democratic.<sup>42</sup> The Democratic plurality is a bit larger among the most senior civil servants<sup>43</sup>—and that surely matters in terms of bureaucratic influence and agenda setting. Still, the number of Democrats

37 David Fontana, *Federal Decentralization*, 104 VA. L. REV. (forthcoming 2018) (manuscript at 3), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3029180](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3029180). It is not surprising that Fontana’s work is gaining considerable attention right now, as politicians and policymakers strive to find ways to make government more diverse, responsive, and representative. See, e.g., Richard Florida, *It’s Time to Move Some Federal Agencies out of D.C.*, CITYLAB (Nov. 30, 2017), <https://www.citylab.com/equity/2017/11/its-time-to-move-some-federal-agencies-out-of-dc/547172/>; Evan Halper, *Spread the Swamp? Trump Administration Wants to Move Government Offices out of Washington*, L.A. TIMES (Dec. 7, 2017), [www.latimes.com/politics/la-na-pol-spread-the-swamp-20171207-story.html&ccd=1&chl=en&ct=clnk&gl=us](http://www.latimes.com/politics/la-na-pol-spread-the-swamp-20171207-story.html&ccd=1&chl=en&ct=clnk&gl=us).

38 COMMON CHARACTERISTICS, *supra* note 25, at 14 tbl.9.

39 *Id.* at 15 tbl.11; U.S. BUREAU OF LABOR STATISTICS, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2015 (2016), <https://www.bls.gov/opub/reports/race-and-ethnicity/2015/pdf/home.pdf>.

40 JENNIFER E. MANNING, CONG. RESEARCH SERV., R44762, MEMBERSHIP OF THE 115TH CONGRESS (2018).

41 See COMMON CHARACTERISTICS, *supra* note 25, at 15 tbl.11; Jens Manuel Krogstad, *114th Congress Is Most Diverse Ever*, PEW RES. CTR. (Jan. 12, 2015), <http://www.pewresearch.org/fact-tank/2015/01/12/114th-congress-is-most-diverse-ever/>.

42 Chris Cornillie & Mark Lee, *Government Executive 2016 Presidential Poll*, GOV’T EXECUTIVE (Aug. 13, 2015), <http://www.govexec.com/insights/government-executive-2016-presidential-poll-august-13-2015/119144/>. Somewhat different results have been reported by David Lewis and Mark Richardson. See David E. Lewis, “Deep State” Claims and Professional Government, REG. REV. (Dec. 5, 2017), <https://www.theregreview.org/2017/12/05/lewis-deep-state-professional-government/>.

43 Eric Katz, *There Are More Republicans in Federal Government than You Might Think*, GOV’T EXECUTIVE (Aug. 14, 2015), <http://www.govexec.com/oversight/2015/08/there-are-more-republicans-federal-government-you-might-think/119138/>.

and those leaning Democratic is below 50%.<sup>44</sup> And, as further testament to the political diversity of federal employees, only 43% of polled bureaucrats approved of President Obama's presidential tenure,<sup>45</sup> a number that suggests griping about the White House may have more to do with institutional dynamics than with partisan affiliations. If so, we may expect at least some bureaucratic pushback against any and all incumbent Presidents regardless of party affinities.

Of course, ideological diversity may not be distributed evenly across the federal administrative expanse. Personnel within any one agency may be especially supportive of a particular political party's beliefs, priorities, and goals, whereas personnel in another agency may tend to identify with the other party's commitments.<sup>46</sup> For instance, the Consumer Financial Protection Bureau or the Environmental Protection Agency (EPA) may be heavily staffed with Democrats,<sup>47</sup> while the Department of Homeland Security and the Department of Defense may each skew Republican.<sup>48</sup> Such ideological clustering may reflect nothing more than the fact that agency personnel truly believe in, and are initially drawn to, their respective missions, with EPA officials championing strong environmental policies, and Pentagon employees embracing hawkish stances. The existence of these pockets of "true believers" shouldn't be surprising, let alone suspect. We'd never be unnerved, say, by a judiciary that overwhelmingly believes in the rule of law and in the central role that courts play in promoting it. Indeed, we expect them to be "true believers."

And, lastly, consider the siloing of administrative responsibilities by subject matter, as exemplified by our having separate departments of education, labor, transportation, and health and human services, not to mention separate departments of defense, intelligence, homeland security, and justice. The limited jurisdictional scope of each agency coupled with the inevitable turf wars between each agency and its neighbors in adjacent regulatory fiefdoms serve to cabin the influence wielded by any small set of administrative officials. Though there are prominent examples of multiagency collaboration (and corresponding calls for more),<sup>49</sup> the truth is that much of the federal government's work remains relatively compartmentalized.<sup>50</sup>

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44 *Id.*

45 Cornillie & Lee, *supra* note 42.

46 *See* Lewis, *supra* note 42.

47 *See, e.g.*, Daniel Hemel, *The CFPB's Employees Will Determine the Agency's Fate*, ATLANTIC (Nov. 28, 2017), <https://www.theatlantic.com/business/archive/2017/11/cfpb-mulvaney-english/546899/>; Lewis, *supra* note 42.

48 *See, e.g.*, Lewis, *supra* note 42.

49 *See, e.g.*, Eric Biber, Response, *The More the Merrier: Multiple Agencies and the Future of Administrative Law Scholarship*, 125 HARV. L. REV. F. 78 (2012).

50 *See* Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499 (2011).

Given such geographic, partisan, and subject-matter fragmentation, the American deep state is (like Congress) best described as a they, not an it.<sup>51</sup> And this is important because our fragmented deep state has few of the interlocking features that characterize powerful clans' ready control over multiple ministries and state enterprises, as we find in nations with conventionally labeled deep states. Indeed, our fragmentation makes any type of coordinated, systematic attack on the political branches (or democracy itself) all but impossible and, in any event, implausible. Climate change experts are singularly focused on, well, climate change. Labor inspectors, in turn, zero in on wage theft or unsafe working conditions. And, cybersecurity officials are, for their part, concentrating their attention on data breaches, malware, and digital attacks. None of these groups is likely particularly interested in (or has any legal authority over) any of the others' *casus belli*, let alone in joining forces to categorically subvert Congress or the presidency.

What's more, it should be noted that the internally variegated American deep state—which becomes even more so if one chooses to lump in the likes of Wall Street, Silicon Valley, the media, public-interest advocacy groups, and/or the defense industry—reinforces rather than constricts the pluralism that we hope for but don't always get from the U.S. political branches. With elected leaders in America increasingly cut from the same cloth, studying at the same schools, feeding at the same campaign finance troughs, and owing allegiance to highly organized, concentrated, and polarized political parties and movement groups, there may well be concern that Congress and the President are insufficiently diverse, representative, and rivalrous (with one another). Thus, here too it is worth appreciating that the purportedly scary deep state may on some levels be more in keeping with American political pluralism than are the ostensible people's representatives cloistered in high elected office.

#### D. *A Bulwark, Not a Battering Ram*

When clashes arise with the political leadership, the relevant contingent of civil servants typically assumes a defensive posture, challenging a problematic initiative rather than hurtling forward with an initiative of its own. The defensive posture reflects their limited legal powers—civil servants, almost by definition, are circumscribed in terms of the authority they wield and the discretion they possess.<sup>52</sup> The legal fact that there's only so much that civil servants can do is buttressed by the political reality that civil servants are well

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51 See Kenneth A. Shepsle, Commentary, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

52 Were these employees to possess markedly more power, they'd likely be considered officers of the United States—and therefore hired and fired pursuant to Article II of the U.S. Constitution. See, e.g., *Edmond v. United States*, 520 U.S. 651, 662 (1997) (emphasizing that the distinction between federal officers of the United States and employees of the federal government turns on whether a job description calls for "[t]he exercise of 'significant authority pursuant to the laws of the United States'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam))).

aware of the dangers associated with overreaching. As unelected “mandarins,” they are—or at least very much ought to be—cognizant of their own, even more acute version of the federal judiciary’s “countermajoritarian difficulty,” and thus must proceed cautiously and transparently. That is to say, they are—or, again, very much ought to be—well aware of the distrust and skepticism surrounding American bureaucracy (which surely antedates and transcends the Trump insurgency<sup>53</sup>) and thus take pains to intervene carefully, modestly, and sparingly.

While one ought not make too much out of any act/inaction distinction, it is safe to say that foot dragging, report writing, leaking, and overall obstinacy all tend to be less dangerous, presumptuous, and liberty threatening than would be efforts to accelerate the workings of the State.<sup>54</sup>

### *E. Not an Extraconstitutional Force*

The defensive posture of American bureaucracy matters for two reasons. First, recognition that bureaucratic resistance is principally defensive in nature should serve to tamp down fears of a deep state putsch. Second, and of far greater importance to those who aren’t actually fearful of a deep state takeover but are nevertheless discomforted by the notion of mandarin insubordination, bureaucratic resistance is entirely in keeping with one of our principal constitutional defaults—namely, the separating and checking of state power. Our constitutional order is one of multidimensional separations of power, not just the singular tripartite division among Congress, the President, and the judiciary. The American Republic obtains its constitutional structure and, by some lights, its legitimacy from pervasive and, again, multidimensional conflict—conflict between the sometimes, but not always, rivalrous political branches, the feds and the several states, and the public and private sectors.<sup>55</sup> Since the New Deal, when Congress began delegating heaps of its own lawmaking power to a rapidly growing administrative state captained by the President, the instantiation of a strong, politically independent bureaucracy constituted a suddenly necessary internal counterweight to that otherwise unfettered, even imperial, President.<sup>56</sup>

This strong, independent bureaucracy—again protected by duly enacted civil service laws and rendered credible and formidable by virtue of its rea-

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53 See MICHAELS, *supra* note 13, at 8; Jon D. Michaels, *Running Government Like a Business . . . Then and Now*, 128 HARV. L. REV. 1152 (2015) (reviewing NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICA, 1780–1940* (2013)).

54 Cf. Kalhan, *supra* note 3, at 16–24 (describing self-aggrandizing initiatives muscled into law by Pakistan’s military).

55 See, e.g., Jon D. Michaels, *Separation of Powers and Centripetal Forces: Implications for the Institutional Design and Constitutionality of Our National-Security State*, 83 U. CHI. L. REV. 199 (2016).

56 See Michaels, *supra* note 14; see also Neal Kumar Katyal, Essay, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Gillian E. Metzger, Essay, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009).

soned, pragmatic, and impartial service to the State—redeemed and enlarged the Framers’ commitment to checks and balances even as Congress faded into the background, as it has in many policy domains.<sup>57</sup> With so much power already transferred from legislators (and judges) to agencies, it is the bureaucracy—not Congress (or even the courts)—that often serves as the last, if not best, check on presidential or agency-head overreach.<sup>58</sup> And it is to this bureaucracy that those aggrieved by imperious presidential and cabinet-level directives increasingly turn.

For this reason, if no other, deep state resistance to the President should be seen as an evolutionary and ameliorative feature, not a bug, in our modern constitutional system that has drifted far from its original blueprint. Robust, even feisty, bureaucracy, however unsettling that concept may be to those who insist on thinking of the American Republic in its pre–New Deal bloom, should therefore elicit support rather than distrust.

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Of course, any such endorsement of a bureaucratic counterweight hinges on the American deep state remaining true to form—that is, transparent, accessible, fragmented, and democratically pluralistic. Though we cannot take those defining characteristics of the American administrative state for granted—especially when confronted with evidence of the bureaucracy’s warts, shortcomings, and vulnerabilities—we can take some solace in the fact that each of those signature attributes of the federal bureaucracy is a logical outgrowth of our laws, conventions, and cultural and political commitments. Specifically, transparency rules and laws providing for full and open public participation, a merit-based (yet still solidly middle class) bureaucracy, and a fragmented (ideologically diverse, programmatically siloed, and geographically dispersed) infrastructure all reflect considered public policy choices—and, not coincidentally, guard against elite domination. Surely, unprincipled or immoderate pushback may occur from time to time, but nowhere to the extent we are apt to see in fledgling democracies lacking much by way of a thick, vibrant civil society, an ethos of public service, and a law-drenched administrative state. (Note that civil society—a key contributor to administrative governance—constitutes an independent rival to the bureaucrats as well as to the President and her agency heads, and thus nonprofit groups, journal-

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57 See MICHAELS, *supra* note 13. Disputes over the scope of agency authority are often complicated by years and years of congressional silence on some of the most pressing issues of the day. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007) (determining, in part, whether the Clean Air Act’s dated definition of pollution covers greenhouse gas emissions); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–26 (2000) (deciding whether the FDA’s enabling act can be read to cover tobacco and tobacco products).

58 For discussion of the courts adopting a deferential role when it comes to administrative governance, see, for example, ADRIAN VERMEULE, *LAW’S ABNEGATION* (2016). For discussion of a refashioned administrative separation of powers, which stands in for the original three-branch scheme, see Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016).

ists, captains of industry, and random gadflies serve to keep both of those administrative rivals in check.)<sup>59</sup> What's more, American bureaucracy is, in important respects, seemingly more resistant to systematic domination by special interests than is Congress, where the realities of permissive campaign finance laws, liberal lobbying rules, a revolving door culture, and generally tight party discipline conspire to enable readier capture.

### III. A KINDER, GENTLER DEEP STATE

Given how different, diverse, and salutary the American deep state is compared to many of its more insidious overseas counterparts, perhaps there is wisdom in emphatically rejecting the moniker. Maybe, that is to say, the commonly understood connotations are too unfavorable and too entrenched for the term to be applied usefully and benignly in the United States.

Yet why not wrest control of the descriptively powerful concept from the bad guys pulling the strings in Ankara, Islamabad, and Cairo? Turkey, Pakistan, and the like lack our bureaucratic *depth*. And it is precisely the superficiality of those nations' civic infrastructure that enables small coterie of elites to subvert democratic initiatives (while relatively weak contingents of bureaucrats and civil society groups look on helplessly). Besides, referring to a deep state adds color, meaning, and force above and beyond the rather bland—and, in fairness, already pejorative—appellation “bureaucracy.” This is because a deep state implies not simply the administrative architecture (which *bureaucracy* surely captures) but also a dynamic relationship between generally long-serving, independent, impartial, and expert agency personnel and partisan, political agency heads who typically serve short stints in government. Indeed, bureaucratic depth is a nice counterpoint to political shallowness, insofar as agency heads average less than two years on the job—and their political deputies cycle through with similar rapidity.<sup>60</sup>

I stress shallowness not in service of snark. To the contrary, shallowness plays a meaningful role in our system too. Shallowness suggests an agency leadership that is new and fresh, unburdened by ideas and practices that congealed decades, if not generations, ago. These short-term presidential appointees purposely and, I think, virtuously, ride the wave of the present political moment, only to be replaced in quick order by those catching the next big wave.

Without understanding this dynamic relationship—the yin and yang of the independent, career bureaucrats and the political high officeholders—and the important work the bureaucracy does in checking an otherwise often unfettered President, it is hard to fully grasp the utility, let alone the constitu-

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59 See, e.g., JACK GOLDSMITH, *POWER AND CONSTRAINT* (2012) (describing the presidential synopticon, in which the public at large is constantly scrutinizing—and thereby checking—the President); MICHAELS, *supra* note 13, at 60–61.

60 For discussions of the short tenure of most presidential appointees, see David Fontana, *Government in Opposition*, 119 *YALE L.J.* 548, 613–14 (2009); Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 *S. CAL. L. REV.* 913, 919–20 (2009).

tionality, of our administrative state. Indeed, failing to understand this dynamic may help explain the manifold legal and political challenges to the American administrative state.<sup>61</sup> These challenges date back to the earliest days of the New Deal and carry into the present, as evidenced by recent opinions by our newest Supreme Court Justice (urging us to “face the [bureaucratic] behemoth”)<sup>62</sup> and by promises by the Trump White House to “deconstruct[ ] . . . the administrative state.”<sup>63</sup>

#### IV. A DEEPER DEEP STATE

Casting the American bureaucracy as a shadowy, unrepresentative superstructure serves to discredit the administrative state and, no doubt, cow its personnel into meek compliance, lest the civil service be further demonized. It is, for instance, a revealing sign of the times that federal civil servants feel compelled to reaffirm their oath of loyalty to the United States,<sup>64</sup> as if their original avowal and years of heretofore unquestioned service were suddenly insufficient.<sup>65</sup> It is also a revealing sign of the times when a cabinet secretary declares, without a hint of substantiation (or fear of backlash), that a third of his department’s employees are disloyal;<sup>66</sup> when the President blithely maligns FBI agents;<sup>67</sup> and when a member of Congress (and former U.S. Ambassador) calls for a purge of the Justice Department.<sup>68</sup>

This is precisely what any weak and insecure President wants: for if such a President cannot discredit the bureaucracy, career personnel will remain at the ready to contest, resist, and oppose unprincipled or unlawful White House directives. By contrast, a confident and capable President recognizes

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61 See, e.g., *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1240 (2015) (Thomas, J., concurring in the judgment); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2015); see also Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

62 *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

63 Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for “Deconstruction of the Administrative State,”* WASH. POST (Feb. 23, 2017), [https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643\\_story.html?utm\\_term=.5b023d3d7840](https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html?utm_term=.5b023d3d7840) (quoting then-White House Chief Strategist Steve Bannon).

64 Jennifer Rubin, *The Hollowing out of the Federal Workforce*, WASH. POST (Sept. 7, 2017), [https://www.washingtonpost.com/blogs/right-turn/wp/2017/09/07/the-hollowing-out-of-the-federal-workforce/?utm\\_term=.7f751675f129](https://www.washingtonpost.com/blogs/right-turn/wp/2017/09/07/the-hollowing-out-of-the-federal-workforce/?utm_term=.7f751675f129).

65 See Jon D. Michaels, *Uphold the Oath*, TAKE CARE BLOG (Sept. 7, 2017), <https://take-careblog.com/blog/uphold-the-oath>.

66 Darryl Fears & Juliet Eilperin, *Zinke Says a Third of Interior’s Staff Is Disloyal to Trump and Promises “Huge” Changes*, WASH. POST (Sept. 26, 2017), [https://www.washingtonpost.com/news/energy-environment/wp/2017/09/26/zinke-says-a-third-of-interiors-staff-is-disloyal-to-trump-and-promises-huge-changes/?utm\\_term=.6ff8f8c6a80b](https://www.washingtonpost.com/news/energy-environment/wp/2017/09/26/zinke-says-a-third-of-interiors-staff-is-disloyal-to-trump-and-promises-huge-changes/?utm_term=.6ff8f8c6a80b).

67 See Adam Serwer, *Trump Escalates His Attacks Against FBI Officials*, ATLANTIC (Dec. 23, 2017), <https://www.theatlantic.com/politics/archive/2017/12/trump-escalates-his-attacks-against-fbi-officials/549164/>.

68 Glorioso, *supra* note 1.



the political and logistical benefits of preserving a vibrant, independent bureaucracy that both lends credence to her (or any other President's) reasonable and lawful agenda, and signals policy coherence and political stability to domestic and international audiences fearful of avulsive regulatory, diplomatic, or military change. Indeed, this recognition that Presidents may benefit from a strong civil service substantially maps onto the constitutional stage where we see prudent Presidents work with, not around, Congress.<sup>69</sup>

In any event, the very fact that bureaucratic scapegoating can so easily pervade contemporary political discourse underscores the present weakness of our deep state. For decades—well before the Trump administration announced its intention to “drain the swamp”<sup>70</sup>—the American bureaucracy has been under siege. Privatizing,<sup>71</sup> political layering atop agencies,<sup>72</sup> and converting civil servants into at-will employees<sup>73</sup>—often in the name of “running government like a business”—have damaged the administrative architecture, demoralized agency personnel, and limited the bureaucracy's capacity to be meaningfully rivalrous.<sup>74</sup>

In recognizing the full value of a vibrant, forceful bureaucracy, particularly in times of presidential instability and congressional dysfunction, perhaps the moment is ripe not simply to own the deep state terminology but also to fortify the clearly vulnerable and *insufficiently deep* deep state itself. Among other things, we should:

#### A. *Insource Privatized Responsibilities*

Republican and Democratic Presidents alike have been aggressive in outsourcing critical government services, replacing tenured civil servants with private contractors.<sup>75</sup> Contractors now play central roles in environmental, labor, and consumer protection policy design and enforcement; defense and intelligence planning and operations; welfare administration; and public safety and correctional work.<sup>76</sup> Proponents of outsourcing seek to tap into the efficiencies of competitive markets, where (so the story goes) firm employees, unlike career bureaucrats, are motivated by the lures of profits and the threat of ouster.<sup>77</sup>

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69 See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2007) (arguing that presidential unilateralism ultimately weakens executive power); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring) (explaining that the President's “authority is at its maximum” when he acts with the support of Congress).

70 Michaels, *supra* note 7 (internal quotation marks omitted).

71 See, e.g., Michaels, *supra* note 10, at 717, 719.

72 See PAUL C. LIGHT, *THICKENING GOVERNMENT* 7–13 (1995).

73 See Jon D. Michaels, *Privatization's Progeny*, 101 *Geo. L.J.* 1023, 1026 (2013); see also VERKUIL, *supra* note 13, at 47–51.

74 MICHAELS, *supra* note 13, at 165.

75 See Michaels, *supra* note 73, at 1058.

76 See Michaels, *supra* note 14, at 578.

77 See KEVIN R. KOSAR, *CONG. RESEARCH SERV.*, RL33777, *PRIVATIZATION AND THE FEDERAL GOVERNMENT: AN INTRODUCTION* 10–11 (2006); see also JOHN D. DONAHUE, *THE PRIVA-*

Leaving aside the fact that contracting out rarely produces the promised economic windfall (and leaving aside the allegations of fraud and abuse that trail many a contractor),<sup>78</sup> this pivot to the private sector weakens the internal, administrative separation of powers. Whereas tenured civil servants are legally and culturally positioned to challenge the President and her appointed agency heads, contractors lack the requisite legal protections and incentives.<sup>79</sup> They are, after all, eager to have their contracts renewed and even extended, and thus are inclined to be especially solicitous of the President's agenda, irrespective of its prudence or fidelity to congressional mandates.<sup>80</sup> Indeed, while many decry privatization as representing an abdication of government authority,<sup>81</sup> the bigger problem may well be the converse one: the engendering of an entirely subservient contractor class that, unlike the civil service, cannot provide the checking and balancing we have come to expect and demand in our constitutional republic.<sup>82</sup>

### B. *Safeguard the Civil Service*

Unfortunately, simply insourcing jobs would be an insufficient step, at least given the complementary decades-long campaign to strip nonprivatized government personnel of their civil service protections.<sup>83</sup> This campaign to marketize the bureaucracy, effectively converting government workers into a de facto private labor force,<sup>84</sup> has already succeeded under Presidents George W. Bush and Barack Obama in reclassifying vast swaths of agency personnel as at-will employees.<sup>85</sup> These newly marketized government workers are subject to summary termination for any reason, including political disagreement.

If President Trump is able to follow through on his repeated promises, voiced most recently in his 2018 State of the Union Address,<sup>86</sup> much of the remaining civil service will likewise be converted. And even absent the formal, legal reclassification of federal employees, Trump has managed to force

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TIZATION DECISION (1989); E.S. SAVAS, *PRIVATIZATION: THE KEY TO BETTER GOVERNMENT* (1987); Michaels, *supra* note 14, at 579.

78 See Michaels, *supra* note 10, at 729 n.44 (quoting GOV'T ACCOUNTABILITY OFFICE, *CONTRACT MANAGEMENT: DOD VULNERABILITIES TO CONTRACTING FRAUD, WASTE, AND ABUSE 2* (2006), <https://www.gao.gov/new.items/d06838r.pdf>); see, e.g., PROJECT ON GOV'T OVERSIGHT, *BAD BUSINESS: BILLIONS OF TAXPAYER DOLLARS WASTED ON HIRING CONTRACTORS* 34–35 (2011), <http://pogoarchives.org/m/co/igf/bad-business-report-only-2011.pdf>.

79 See Michaels, *supra* note 73, at 1036–37.

80 See *id.*

81 See KOSAR, *supra* note 77, at 10.

82 See Michaels, *supra* note 14, at 590.

83 Michaels, *supra* note 73, at 1041.

84 See *id.*

85 See KOSAR, *supra* note 77, at 1; VERKUIL, *supra* note 13, at 47–51.

86 President Donald J. Trump, State of the Union Address (Jan. 30, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/>.

out hundreds of senior civil servants.<sup>87</sup> He has done so by marginalizing their work, conducting seemingly politically motivated audits and “opposition research” campaigns, and reassigning bureaucratic leaders to positions well outside of their zones of expertise.<sup>88</sup>

As with contracting out, there is an ostensible technocratic motivation for marketizing the bureaucracy. Some see government job protection—tenure—as inviting indolence and lethargy.<sup>89</sup> Presidents—and particularly one who popularized the phrase “You’re fired!” on *The Apprentice*—may thus be excused for preferring highly responsive workers.

But that doesn’t mean we should give them what they want. Any potential efficiency gain must be weighed against the near-certain loss of bureaucratic independence. At-will employees will be chilled from challenging a presidential administration on questions of policy or politics. Thus, once again, without a capable and confident bureaucracy, we sacrifice the last and perhaps most reliable line of defense against an overreaching President.

Note too that getting rid of the least productive workers—if that is indeed all that marketization aims to do—will hardly defang the deep state. It isn’t the stereotypical lazy bureaucrats—think DMV workers Patty and Selma from *The Simpsons*—who threaten the White House. Rather, it is the most competent, talented, and hard-charging ones that pose the threat, and the only justification for firing those folks is an unabashedly political one.

Support for the deep state thus requires an unflinching commitment to a strong and independent bureaucracy, ensuring our government personnel and the public authorized to participate in regulatory affairs have the legal and institutional platform to speak truth to power. It is this deep state that helped usher us through the Great Depression, World War II, the Cold War, Watergate, and the more recent travails of 9/11 and the Great Recession. Now, in this moment of great political, economic, and geostrategic upheaval, we will need to rely on the steady hand of this deep state more than ever.

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87 See Michaels, *supra* note 7.

88 See Eric Lipton & Lisa Friedman, *E.P.A. Contractor Has Spent Past Year Scouring the Agency for Anti-Trump Officials*, N.Y. TIMES (Dec. 15, 2017), <https://www.nytimes.com/2017/12/15/us/politics/epa-scott-pruitt-foia.html>; see also Michael Lewis: *Many Trump Appointees Are Uninterested in the Agencies They Head up*, FRESH AIR, NPR (Nov. 6, 2017), <https://www.npr.org/2017/11/06/562246599/michael-lewis-many-trump-appointees-are-uninterested-in-the-agencies-they-head-up>.

89 Justice Kagan, among many others, has suggested as much. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2341 (2001).