

Barring federal employees from overtly political activity

Why civil servants should not be allowed to lead the #resistance

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The largest federal employee union in the country is suing the Office of Special Counsel (OSC) over a seemingly mild exhortation to career bureaucrats: Please do not promote the #resistance or impeachment movements during your working hours.

The American Federation of Government Employees (AFGE), the largest and most powerful federal employees' union in the country, has

challenged this directive. They claim that the OSC's guidance memo violates its members' right to free speech. If the AFGE wins its legal challenge, the career bureaucracy will become even more intractable and insulated from accountability.

In its November 2018 guidance to federal employees, the OSC points out that federal employees are barred from engaging in overtly political activity under the Hatch Act, at least while they are at work. This limitation has ordinarily been applied only to electioneering activities, not issue advocacy. In concrete terms, while bureaucrats cannot tack up campaign flyers in their cubicle, they are free to display a "Save the Whales" poster.

While AFGE contends that promoting the #resistance or impeachment is more like the latter than the former, the OSC disagrees. In its guidance memo, the OSC argues that terms like "resistance" are "inextricably linked with the electoral success (or failure) of the president." Insofar as impeachment "would bar an individual from serving as president," such statements are also "clearly directed at the failure of that candidate's campaign for federal office," according to the OSC.

Whether the OSC has correctly interpreted the Hatch Act is, in a sense, beside the point. The fact that our laws, on any plausible interpretation, would allow career bureaucrats to openly promote resistance to the president and remain at their post, is troubling. Unelected bureaucrats who vocally support impeachment of and resistance to a sitting president cannot be trusted to faithfully execute the law under that president's direction.

AFGE's lawsuit is just the tip of the iceberg. Other recent incidents illustrate just how insulated career bureaucrats are from political leadership and, as a consequence, how free they are to stymie elected officials.

Last month, the State Department inspector general chastised two political appointees in that department for "retaliating" against career bureaucrats that they judged to be undermining the president's agenda. What draconian reprisals did these political appointees mete out? According to the IG, the career bureaucrats in question were excluded from "sensitive discussions" and relieved of some job responsibilities. They even had the nerve to "berate employees with raised voices."

Knowing how far the scales are tipped in favor of careerists, even Peter Strzok has decided to contest his removal from the civil service. As a reminder: Mr. Strzok was fired from the FBI for using a government cellphone to text his then-girlfriend incendiary criticism of President Trump (whom he was actively investigating as a member of Robert Mueller's team) and seemingly alluding to a conspiracy to stop his ascension to the White House.

Consider what all of this means when taken as a whole. A federal employee could pin up a poster announcing his resistance to President Trump and his agenda. Then, that employee could spend his working hours maligning the president and slow-rolling and subverting directives from his political appointees. But if a political appointee bars that employee from sensitive, high-level meetings or shifts that employee's workload to someone who has not vowed to #resist, it is the political appointee who is in the wrong.

One need not be a devotee of the unitary executive theory to see the problem here. Since the president and his appointees cannot discipline, nor even side-step, actively oppositional career bureaucrats, there is very little reason for those bureaucrats to make a good-faith effort to fulfill an agenda they disagree with. A resident who does not meaningfully control executive branch personnel does not truly direct the execution of the law.

Completely divorcing those who execute the law from the president and, by extension, the American people was never the intent of the Progressive reformers who replaced the spoils system with a career bureaucracy. They wanted to eliminate pay-to-play arrangements and partisan bias in the enforcement of the law. They did not aim to create a cloistered, permanent and unelected cadre of policymakers free to act on biases of their own.

Nonetheless, many of the merit-system protections they initiated have had exactly this effect. While no one wants to return to the spoils system of the 19th century, a presidential administration — whether Republican or Democratic — should be able to count on the good-faith efforts of civil servants.

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