

INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER



August 24, 2017

VIA EMAIL

The Honorable Adam Miles, Acting Special Counsel
Office of Special Counsel
Suite 218
1730 M Street N.W.
Washington, D.C. 20036

Re: Complaint of Joel Clement, MA-17-4617

Dear Mr. Miles,

The Institute for Constitutional Advocacy and Protection (“ICAP”) at Georgetown University Law Center submits this letter on behalf of 13 scholars (“Scholars”) of constitutional, administrative, and civil service law. Through this letter, Scholars urge the Office of Special Counsel to conduct a thorough investigation into the complaint of whistleblower retaliation filed by Joel Clement, an employee of the Department of Interior (“DOI”) and a member of the Senior Executive Service (“SES”).

Mr. Clement’s complaint presents important questions about the extent of agency heads’ authority to reassign members of the SES. The Executive Branch employees who make up the SES are responsible for, and integral to the success of, countless federal programs. Robust whistleblower protections and insulation from undue political influence are thus key to the efficacy not only of Senior Executives but also of the Executive Branch as a whole. If Mr. Clement’s allegations are substantiated, the OSC should seek his reinstatement and send a clear message, consistent with the statutes governing the SES and prohibiting retaliation, that the reassignment power is designed to promote agency efficiency and *not* to be used as tool of retribution for protected disclosures or the proper articulation of views out-of-step with a particular administration’s politics.

BACKGROUND

The DOI is charged with “protect[ing] and manag[ing] the Nation’s natural resources and cultural heritage; provid[ing] scientific and other information about those resources; and honor[ing] its trust responsibilities or special commitments to American Indians, Alaska Natives, and affiliated island communities.”¹ Nine separate bureaus, ranging from the Bureau of Safety and Environmental Enforcement to the U.S. Fish and Wildlife Service,² as well as numerous

¹ Department of the Interior, *About*, <https://www.doi.gov/whowere> (last visited August 16, 2017).

² See Department of the Interior, *Bureaus*, <https://www.doi.gov/bureaus> (last visited August 16, 2017).

offices³ sit within the DOI and carry out its mission. The DOI employs approximately 70,000 people, 225 of whom are members of the SES.⁴

On his first day in office, President Trump nominated Ryan Zinke to be Secretary of the DOI, and the Senate confirmed his nomination on March 1, 2017.⁵ In mid-June, less than four months into Secretary Zinke's tenure, approximately 50 Senior Executives—over one-fifth of all SES employees in the DOI—were provided notice that they would be reassigned to new positions.⁶ To date, beyond vague claims of a need to reorganize, the DOI has provided no public explanation of why these specific SES employees—many of whom have been reported to have unimpeachable records and who, collectively, helped lead numerous DOI bureaus and offices—were selected for reassignment.⁷ Secretary Zinke did, however, testify in front of the Senate Appropriations Committee shortly after ordering the reassignments that he intended to reduce the DOI's staff by 4,000 through, among other means, reassigning employees,⁸ a method that, by definition, ordinarily shifts, but does not reduce, staff—unless an employee “voluntarily” resigns as a result of his or her placement in an unfavorable and inapt new position.

Joel Clement was one of the roughly 50 Senior Executives reassigned in mid-June. Until recently, Mr. Clement served as Director of the Office of Policy Analysis. In that capacity, he supervised 24 employees and played a key role in the DOI's response to climate change.⁹ Of particular relevance here, Mr. Clement worked to prepare coastal Alaska Native communities for the effects of climate change, which threaten literally to wash away the communities.¹⁰ He also co-chaired the implementation of President Obama's North Bering Sea Climate Resilience Executive Order,¹¹ which directed the federal agencies involved in regulating and conducting

³ See Department of the Interior, *Other Interior Offices*, <https://www.doi.gov/bureaus/offices> (last visited August 16, 2017).

⁴ See Department of the Interior, *Bureaus*, <https://www.doi.gov/bureaus> (last visited August 16, 2017); Eric Katz, Government Executive, *The 'Chilling Effect' of Forced Reassignments at Trump's Interior Dept.* (July 20, 2017), <http://www.govexec.com/management/2017/07/its-walking-morgue-whistleblower-explains-decision-speak-out/139612/>.

⁵ Congress.gov, *PN31 — Ryan Zinke — Department of the Interior*, <https://www.congress.gov/nomination/115th-congress/31?q=%7B%22search%22%3A%5B%22ryan+zinke%22%5D%7D&r=1> (last visited August 16, 2017).

⁶ Juliet Eilperin & Lisa Rein, *Zinke Moving Dozens of Senior Interior Department Officials in Shake-up*, Washington Post, June 16, 2017, available at https://www.washingtonpost.com/politics/zinke-moving-dozens-of-senior-interior-officials-in-shake-up/2017/06/16/11801d3a-5295-11e7-b064-828ba60fbb98_story.html?utm_term=.ac8a3ecd9178.

⁷ *Id.*

⁸ Eric Katz, Government Executive, *Interior Is Moving Forward With Buyouts, Leaves Door Open for RIFs* (June 21, 2017), <http://www.govexec.com/management/2017/06/interior-moving-forward-buyouts-leaves-door-open-rifs/138855/>.

⁹ Joel Clement, *I'm a scientist. I'm blowing the whistle on the Trump administration*, Washington Post, July 19, 2017, available at https://www.washingtonpost.com/opinions/im-a-scientist-the-trump-administration-reassigned-me-for-speaking-up-about-climate-change/2017/07/19/389b8dce-6b12-11e7-9c15-177740635e83_story.html?utm_term=.5ef34cb434d0.

¹⁰ *Id.*

¹¹ Complaint of Possible Prohibited Personnel Practice or Other Protected Activity, at 8 (July 12, 2017) (“Clement Complaint”), available at https://static1.squarespace.com/static/550c5930e4b0a2d2fd8f1a7b/t/59701680cf81e05c0d2e3df7/1500518017846/Clement_Complaint.pdf.

activities in the North Bering Sea area (which, among others, includes the DOI) to act “with attention to the rights, needs, and knowledge of Alaska Native tribes.”¹²

President Trump’s election and the resulting replacement of political appointees diminished the relative importance of Mr. Clement’s work in the DOI. After taking office, President Trump rescinded the North Bering Sea Order. He also, as has been widely reported, took other measures, such as withdrawing from the Paris climate accord, that have made clear that his administration is pursuing a different approach to the issue of climate change.¹³ Nevertheless, in recognition of the severe threat facing the Alaska Native communities with which he had worked, Mr. Clement continued, both within the DOI and in public speaking engagements attended by political appointees in the Trump Administration, to press the need to take action to protect the imperiled communities.¹⁴

On June 15, following his repeated statements voicing concern for the endangered communities, Mr. Clement was abruptly reassigned to the Office of Natural Resources Revenue (“ONRR”), the entity within the DOI responsible for collecting royalties from fossil fuel companies.¹⁵ Mr. Clement has no direct reports in his new position, which does not even appear on ONRR’s organizational chart. Indeed, as of mid-July, Mr. Clement had no duties in his new role.¹⁶ But, even if he did, he would, by his own admission, be ill suited to fulfill them: Mr. Clement has “no training in auditing and ha[s] never worked on such revenues.”¹⁷ No one consulted Mr. Clement before he was reassigned.¹⁸

Approximately one month after being reassigned, Mr. Clement filed his whistleblower complaint with the OSC.

DISCUSSION

The Senior Executive Service was created to provide the federal government with a body of highly skilled, permanent managers capable of taking on the challenges of running complex federal programs and providing continuity between administrations. Drawing on the experience of civil servants before the creation of the SES, Congress recognized that political independence and freedom from whistleblower retaliation would be key to the SES’s success. As explained below, these safeguards help the Federal Government to retain top talent; preserve agency expertise that, when used properly, allows political appointees to make better informed

¹² Exec. Order No. 13754, Northern Bering Sea Climate Resilience, 81 FR 90669, § 2, *available at* <https://obamawhitehouse.archives.gov/the-press-office/2016/12/09/executive-order-northern-bering-sea-climate-resilience>.

¹³ See also, e.g., Brakkton Booker, NPR, *Trump Questionnaire Raises Concerns About Retaliation Against Energy Department Staff* (Dec. 10, 2016), <http://www.npr.org/sections/thetwo-way/2016/12/10/505105258/trump-questionnaire-raises-concerns-about-retaliation-against-energy-department> (reporting on the presidential transition team’s “request for an inventory of all [Department of Energy] employees or contractors who attended meetings or conferences on climate change”). Scholars do no question President Trump’s or his appointees’ authority to redirect agency priorities and mention these facts only to highlight the role of politics in Mr. Clement’s case.

¹⁴ Clement Complaint at 8, 10, 12.

¹⁵ *Id.* at 14.

¹⁶ *Id.*

¹⁷ *Complaint* at 14.

¹⁸ *Id.*

decisions; and enable members of the SES to serve as an important check on any attempts by political appointees to abuse or distort Executive Branch authority. Thus, although SES employees are subject to reassignment, changes in position are, by statute, to be used only to advance an agency's operations. The alleged treatment of Mr. Clement contravenes Congress's design and illustrates the danger to the healthy functioning of our Federal Government of an SES subjected to undue political influence.

A. The Federal Workforce Has Long Been Shielded from Politics.

Political independence has long been a defining feature of the Federal Government workforce in the United States. The passage of the Pendleton Act in 1883 marked a shift from the “‘spoils system,’ under which the President could dispense federal jobs as rewards for political patronage, [to] a ‘merit system’ that would base selection and promotion of most civil servants on competence.” *Frazier v. Merit Sys. Prot. Bd.*, 672 F.2d 150, 153 (D.C. Cir. 1982). Though the Act proved an imperfect legislative solution, *see id.* at 153-54 (discussing shortcomings in the Act, including a lack of whistleblower protection); *infra* at 5, the salutary effect of its core innovation—freedom from politically motivated staffing decisions for the majority of civil servants—is now settled. A federal workforce staffed with a majority of career civil servants instead of political appointees allows for continuity of operations and the development of agency expertise. It also engenders public trust in the administration of federal programs.

B. A High-Functioning Executive Branch Depends on the SES Being Free from Undue Political Influence.

The SES sits atop the civil service in the Executive Branch as a corps of skilled managers that serve as “the major link between [the President’s political] appointees and the rest of the Federal workforce.”¹⁹ Critical to the SES’s efficacy is, with limited exceptions, independence from politics and, with no exceptions, freedom from retaliation for whistleblowing.

1. Congress Created the SES to Improve the Effectiveness and Efficiency of the Executive Branch.

The SES was created as part of the Civil Service Reform Act of 1978 (“CSRA”) in response to a “critical need to recruit and develop the highest quality federal executive.” S. Rep. 95-969, 11, 1978 U.S.C.C.A.N. 2723, 2733. To fill this gap in skilled upper-level employees, Congress structured the SES to be merit-based and centered on “individual[s] talents and performance” and the employees within it to be subject to “more lateral mobility” than previously permitted. *Id.* To that end, the CSRA “rewards [Senior Executives] with a high pay scale and generous benefits,” *Mintzmyer v. Babbitt*, No. CIV. A. 93-0773 (GK), 1995 WL 25342, at *3 (D.D.C. Jan. 12, 1995), and allows agency heads to reassign Senior Executives to meet agency needs or foster the Senior Executives’ development for the *long-term benefit* of the agency, *see* 5 U.S.C. § 3131(5). At the same time, to ensure high productivity, the CSRA also

¹⁹ Office of Personnel Management, *Senior Executive Service*, <https://www.opm.gov/policy-data-oversight/senior-executive-service/> (last visited August 16, 2017).

subjects members of the SES to the threat of performance-based removals. *See* 5 U.S.C. § 3592(a).

The SES now includes over 7,000 employees throughout the Executive Branch.²⁰ Their work is critical to the effective implementation of federal programs. As a recent report from the Merit System Protection Board summarized:

[H]igh performing career senior executives have effectively managed the budgets of massive programs, saved the Federal Government billions of dollars, made significant contributions to increasing national security, facilitated commerce, and helped create positive relationships with foreign countries, to name but a few accomplishments. In contrast, poor leadership can result in mission failure, a demoralized workforce, tarnished agency reputation, and public distrust of the agency or Government as a whole.

Training and Development for the Senior Executive Service: A Necessary Investment 7 (2015), available at <https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=1253299&version=1258322&application=ACROBAT>.²¹

2. Congress Structured the SES to be Free from Improper Political Influence.

Congress recognized that the independence of the SES is critical to its success. The system that pre-dated the CSRA “fail[ed] to provide adequate protection against politicization of the career service” and “political abuse” of civil servants. S. Rep. 95-969, 11, 1978 U.S.C.C.A.N. 2723, 2733. The CSRA was crafted to remedy that shortcoming and thus directs that the SES be administered to “provide for an executive system which is guided by the public interest and free from improper political interference.” 5 U.S.C. § 3131(13); *id.* § 3131(8) (directing that Senior Executives be “protect[ed] . . . from arbitrary or capricious actions”).

To give teeth to this statutory mandate, the CSRA contains numerous provisions designed to ensure the independence of the SES. *First*, no more than 10% of the SES—and no more than 25% of Senior Executives within any given agency—can be noncareer employees. *See* 5 U.S.C.

²⁰ Office of Personnel Management, *Senior Executive Service, Facts & Figures*, <https://www.opm.gov/policy-data-oversight/senior-executive-service/facts-figures/#url=Demographics> (last visited August 16, 2017).

²¹ *See also, e.g.*, Senior Executives Association, *Presidential Distinguished Rank Award Winner Accomplishments*, <https://seniorexecs.org/2-uncategorised/150-presidential-distinguished-rank-award-winner-accomplishments> (last visited August 16, 2017) (cataloguing numerous accomplishments of SES employees, including, for example, “[d]eveloping and delivering to Afghanistan—within 4 and a half months—mobile, armored medical trauma bays capable of deploying forward with units in combat”). Not surprisingly, recent administrations have sought to ensure that the SES continues to be high-performing and capable of retaining top talent. President Bush proposed, and Congress ultimately passed, reforms aimed at both increasing pay for SES employees and fine-tuning the performance appraisal system. *See generally* Office of Personnel Management, *New Performance-Based Pay System for the Senior Executive Service* (Dec. 16, 2003), available at <https://www.chcoc.gov/content/new-performance-based-pay-system-senior-executive-service>. President Obama issued an Executive Order that, among other things, directed agencies to “allocate awards in a manner that provides meaningfully greater rewards to top performers.” *See* Exec. Order No. 13714, Strengthening the Senior Executive Service, 80 Fed. Reg 79223, § 3(a)(i), available at <https://obamawhitehouse.archives.gov/the-press-office/2015/12/15/executive-order-strengthening-senior-executive-service>.

§§ 3134(c)-(d); *see also* S. Rep. 95-969, 11, 1978 U.S.C.C.A.N. 2723, 2733 (“This statutory cap on noncareer appointments [serves as] an important check against politicization of the SES.”). *Second*, in recognition of the potential for abuse attendant to performance-based removals, each Senior Executive must be evaluated by a performance review board, and that board must be composed of a majority of career, not political, employees. 5 U.S.C. § 4314(c)(5). *Third*, and relatedly, performance evaluations “may not be made within 120 days after the beginning of a new Presidential administration.” *Id.* § 4314(b)(1)(C). *Fourth*, employees cannot be reassigned within 120 days of the appointment of either a new agency head or an immediate supervisor who is a noncareer appointee. *Id.* § 3395(e)(1). This imposes a “‘get acquainted’ period”²² that guarantees an opportunity for career Senior Executives to prove their merit and precludes reflexive, politically motivated reassignments. *Fifth*, Senior Executives are protected from adverse actions taken on account of “political affiliation” or as retribution for whistleblowing, which encompasses the disclosure of a violation of law or “gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.” *Id.* §§ 2302(b)(1)(E), (b)(8); *see also id.* § 2302(b)(3) (prohibiting the “coerc[ion] [of] political activity” of a covered employee).

Although the CSRA permits “the head of an agency to reassign senior executives” and contemplates that Senior Executives will move throughout their agencies as needed, *see* 5 U.S.C. § 3131(5), the provisions governing reassignment do not afford agency heads carte blanche to shift Senior Executives for arbitrary reasons. Rather, a Senior Executive may be reassigned only to a position “for which the [employee] is qualified.” 5 U.S.C. § 3395(a)(1)(A); *see also Shenwick v. Dep’t of State*, 92 M.S.P.R. 289, 296 (M.S.P.B. Sept. 4, 2002) (holding that, where an employee is dismissed for failure to accept reassignment, “the initial burden of proof is for the agency to show . . . that the SES member was qualified for the reassignment”); 5 U.S.C. § 2301(b)(5) (providing that the “Federal work force should be used efficiently and effectively”); *id.* § 3131(14) (declaring that the SES shall be administered to “appoint career executives to fill Senior Executive Service positions to the extent practicable, consistent with the effective and efficient implementation of agency policies and responsibilities).²³ The necessary effect of this requirement is to ensure that Senior Executives’ skills are utilized, thereby limiting punitive reassignments designed to force “voluntarily” resignations.²⁴ And, even where an employee is qualified, the motivation for the reassignment cannot be retaliation for a protected whistleblower disclosure. *See id.*; *cf. also Hobson v. Herrington*, 704 F. Supp. 278, 279 (D.D.C. 1989) (“While

²² Office of Personnel Management, *Guide to the Senior Executive Service* 10 (2017), available at <https://www.opm.gov/policy-data-oversight/senior-executive-service/reference-materials/guidesesservices.pdf>.

²³ The DOI has previously recognized the necessity of reassigning an employee only to positions for which the employee is qualified. *See* Brief of Defendants, *Cobell v. Norton*, 2005 WL 3557078 (D.D.C.) (“Significantly, no showing has been made that Ms. Levine lacked the qualifications to occupy the State Director position, only that she did not wish to be reassigned there.”).

²⁴ The potential for such manipulation almost assuredly was not lost on the drafters of the CSRA. In the years immediately prior to the passage of the CSRA, the Nixon administration utilized a “Federal Political Personnel Manual . . . expressly designed to subvert the merit system.” Steven J. Eberhard, *The Need for the Hatch Act*, 1 HARV. J.L. & PUB. POL’Y 153, 192–93 (1978). The Manual encouraged the use of reassignments to force resignations. *See* Federal Political Personnel Manual 103 (1972) (“By carefully researching the background of the proposed employee-victim, one can always establish that . . . organizational unit to which the employee would rather resign than obey and accept transfer orders.”), available at <https://www.scribd.com/document/122473090/Malek-Manual>.

the Act contemplates that SES employees might be removed, clearly, this is to occur only if they cannot be placed elsewhere in the SES, and not because of political disagreements.”).

Collectively, these provisions, when combined with employees’ ability to enforce them through the Office of Special Counsel, the administrative appeals process, and the federal courts, provide a critical level of independence to the SES from political influence.

3. The SES’s Independence Promotes the Effectiveness of the Executive Branch.

In addition to the CSRA’s deliberate safeguarding of the SES’s political independence, practical considerations counsel that political boundaries be carefully policed and whistleblower protections rigorously enforced. An independent SES produces a more effective civil service, both by facilitating continuity in the operation of government programs and by serving as an internal check on overly political forces in the Executive Branch.

Maintaining a merit-based civil service is integral to the Executive Branch’s productivity. Changes in SES staffing resulting from political considerations, instead of an agency’s needs, necessarily disrupt ongoing federal programs and undermine the utilization of the SES as the “link” between political appointees and the remainder of the workforce in the Executive Branch. *Cf.* Maeve P. Carey, Congressional Research Service, *The Senior Executive Service: Background and Options for Reform 1* (2012) (“The creation of the SES was intended to bring a ‘measure of coherence’ to an otherwise fragmented federal bureaucracy.” (citation omitted)). Such disruption conflicts with the CSRA’s express direction that the SES be used to ensure “program continuity and policy advocacy in the management of public programs.” 5 U.S.C. § 3131(8) (emphasis added). Further, rewarding demonstrated performance and focusing on agency mission allows the SES to recruit and retain top-level employees. S. Rep. 95-969, 11, 1978 U.S.C.C.A.N. 2723, 2733 (explaining that “serving in the SES will be an honor because it will be earned on merit”). Rewarding political viewpoints does precisely the opposite. *Cf.* Paul R. Verkuil, *VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT* 126 (2017) (explaining that that “the SES faces a ‘pivotal moment’ in terms of recruiting and retaining members”).

The independence of the SES also ensures that there exists a group of highly qualified civil servants capable and willing to serve as an internal check, where appropriate, on political appointees’ exercise of authority. This yields two primary benefits. The first is operational. Senior Executives, as managerial-level staff who typically have long records of service in the federal workforce,²⁵ possess institutional knowledge of an agency’s operations that provides unique insight into the potential effects of a policy shift or new federal program. Cutting off that voice—whether through preemptive action to remove employees perceived (accurately or not) as roadblocks in the administration’s path or through a culture of fear of retribution—leads to less informed decision-making by political appointees. *See* Mark Seidenfeld, *The Role of Politics in A Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1426 (2013)

²⁵ *See* Office of Personnel Management, *Senior Executive Service, Facts & Figures*, <https://www.opm.gov/policy-data-oversight/senior-executive-service/facts-figures/#url=Demographics> (last visited August 16, 2017) (reporting that the average career SES employee has worked for over 18 years in the federal government before being elevated to the SES).

(“The deliberative promise of the administrative state stems from the fact that agency decisionmaking can be inclusive, knowledgeable, reasoned, and transformative.”). Given the complexity of tasks that agencies handle on a daily basis, the potential consequences of parochialism or even a lack of context and history are obvious. The second advantage of the internal check that an independent SES provides is structural. The size and scope of the administrative state today vests the Executive with expansive authority, far beyond what was originally contemplated or even conceived. By guaranteeing freedom from retaliation, *see* 5 U.S.C. § 2302(b)(8), the CSRA enables Senior Executives to “insist that the political leadership act fairly and rationally and comply with congressionally and judicially imposed mandates” and thereby to help enforce limits on the invocation of Executive Branch authority consistent with our overarching constitutional commitment to the checking and balancing of Federal power. *See* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 541 (2015).

To be clear, Senior Executives are entitled only to freedom from *undue* political influence, not to autonomy to pursue their own policy aims. If, in response to election results or the appointment of a new agency head, the priorities of an agency shift, a Senior Executive who inappropriately obstructs the implementation of lawful new policy aims will—and should—be subjected to adverse employment action. *See* 5 U.S.C. §§ 3592, 4312 (providing a mechanism for negative performance reviews and attendant consequences); *id.* §§ 7542, 7543(a) (allowing for removal or suspension for “misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function”). But, in stark contrast to such circumstances, merely voicing concern over planned agency action—especially when the concern voiced constitutes a covered whistleblower disclosure—falls far short of justifying removal or punitive reassignment.

C. *The DOI’s Reassignment of Senior Executives, Including Mr. Clement, Undermines the CSRA’s Goals.*

In light of this carefully delineated statutory framework for the operation and protection of the SES, it is clear that the recent reassignments within the DOI are, at a minimum, in tension with the CSRA’s purpose and endanger the advantages that Congress intended to bestow on the operation of the Executive Branch by providing for an independent SES.

The reassignment of over one-fifth of all Senior Executives within an agency is more akin to the spoils system that our country abandoned over a century ago than the type of efficiency-inspired mobility that the CSRA contemplates.²⁶ The DOI’s dozens of reassigned Senior Executives were notified that they were to be imminently reassigned *before* Secretary Zinke had been in office for 120 days. Whether or not this violates the letter of the CSRA’s 120-day moratorium on reassignments, *see* 5 U.S.C. § 3395(e)(1)—a question on which Scholars do not take a position here—there can be no doubt that the DOI’s conduct violates its spirit.

²⁶ *See* Juliet Eilperin & Lisa Rein, *Zinke moving dozens of senior Interior Department officials in shake-up*, Washington Post, June 16, 2017 (reporting that the reassignments on this scale are, according to one longtime agency employee, “unprecedented”), *available at* https://www.washingtonpost.com/politics/zinke-moving-dozens-of-senior-interior-officials-in-shake-up/2017/06/16/11801d3a-5295-11e7-b064-828ba60fbb98_story.html?utm_term=.46d2e8086ac9.

Further, the DOI has not meaningfully explained to the public how it carried out this considerable shift in agency personnel pursuant to an actual strategic plan aimed at improving the DOI's operations, the only permissible reason for exercising the power of reassignment. Rather, Secretary Zinke's testimony, *see supra* at 2, strongly suggests that the reassignments were meant to pressure Senior Executives to quit—not, of course, an acceptable motivation under the CSRA.

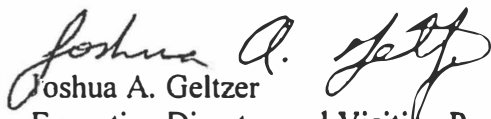
Beyond the generally problematic nature of the en masse reassignment, the specifics of Mr. Clement's account of his experience generate additional cause for concern. Accepting the facts as presented in his complaint, it is difficult to understand how the promotion of agency efficiency could have been the reason for his reassignment. Mr. Clement's complaint indicates that he has *no duties* in his new position.²⁷ Even if that has since changed, he is, in any event, unqualified for the type of work his new office performs. *Cf. Shenwick*, 92 M.S.P.R. at 296. And the apparent arbitrariness of his reassignment lends strong support to the inference that he suffered impermissible retaliation for voicing concern, consistent with his assigned responsibilities, for the fate of coastal Alaska Native communities. His case thus raises concerns not only that a political line has been crossed but also that the independent protection specifically provided to whistleblowers has been eviscerated. *See* 5 U.S.C. § 2302(b)(8)(A)(ii) (prohibiting retaliation for the disclosure of a "specific danger to public . . . safety").

If the seemingly improper motives underlying the DOI's conduct toward Mr. Clement are substantiated, the threat to the DOI, the broader Executive Branch, and thus the Federal Government as a whole is considerable. As discussed above, politically motivated and retaliatory personnel decisions have no place in the statutory scheme governing Senior Executives, and for good reason: insulation from undue political influence preserves agency expertise and bolsters an important check on the exercise of Executive authority. One can fairly anticipate that, if allowed to stand, these initial reassignments will denigrate both and, at the same time, embolden the current administration to continue to push the boundaries of acceptable personnel practices.

* * * * *

Mr. Clement's complaint presents an important opportunity for the OSC to ensure respect for the legal limits on the reassignment of members of the SES. The OSC should conduct a thorough investigation and, if the facts presented in Mr. Clement's complaint are substantiated, seek his expeditious reinstatement.

Sincerely and respectfully,



Joshua A. Geltzer
Executive Director and Visiting Professor of Law

²⁷ Relatedly, Mr. Clement's prior position remains occupied by an Acting Director, *see* Office of Policy Analysis, Department of the Interior, *Staff Directory*, <https://edit.doi.gov/ppa/about/office-of-policy-analysis-staff-directory> (last visited Aug. 22, 2017), evidencing that Mr. Clement also was not moved to make room for someone to take his place.

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