



GOVERNMENT
ACCOUNTABILITY
PROJECT

1612 K Street NW, Suite 1100
Washington, DC 20006
(202) 457-0034
whistleblower.org

By Email

United States House of Representatives
Committee on the Judiciary
Washington, DC 20515

United States Senate
Committee on the Judiciary
Washington, DC 20510

U.S. Office of Special Counsel
1730 M Street NW, # 218
Washington, DC 20036

Office of Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

March 10, 2021

Re: Protected Whistleblower Disclosures of Abuse of Authority by Former
Department of Justice Political Appointee **Jeffrey Bossert Clark**

To Whom It May Concern,

We, Government Accountability Project, represent whistleblowers who are current federal employees who wish to remain anonymous. Our clients possess original information concerning significant acts of misconduct committed by Jeffrey Bossert Clark in January 2021 constituting abuse of authority -- a protected disclosure under the federal whistleblower statute, 5 U.S.C. § 2302.

Mr. Clark served as the Acting Assistant Attorney General (AAG) in charge of the Civil Division (CIV) of the Department of Justice (DOJ) from September 5, 2020 until noon on January 14, 2021; he also served as the AAG of the Environment and Natural Resources Division (ENRD) from November 1, 2018 to January 14, 2021.

Misuse of Career Personnel Promotion Authority

The problem disclosed here concerns Mr. Clark's improper intervention in the CIV personnel promotion process. On January 12, 2021, two days before he resigned, staff were informed that Mr. Clark had appointed as a CIV Assistant Director -- a career management position -- an individual with significantly less experience and achievements than other, passed-over candidates.

What set the successful appointee apart from the other candidates was that the appointee -- unlike the others -- had volunteered and was part of the DOJ litigation team defending a controversial Trump administration policy. The policy barred pregnant, unaccompanied minors in federal immigration custody from obtaining abortions. Civil rights organizations had filed suit

challenging the policy on constitutional grounds; CIV attorneys defended the policy. In *Garza v. Hargan*, the policy was declared unconstitutional and enjoined.¹

Relevant Background

Established Custom and Practice

CIV Assistant Director is a career appointment, officially classified as a Supervisory Attorney at the GS-15 level. In this case, the Assistant Director position filled in January 2021 had been vacant as a result of a retirement for 21 months, since April 2019. In the interim, an Acting Assistant Director occupied the position.

In anticipation of filling the vacancy, the position was first advertised to eligible DOJ attorneys in February 2020. As a matter of long-standing custom and practice at the time, the Branch Director and one or more Deputy Branch Directors interviewed candidates and made the selection, which was then forwarded to the political appointees for approval. Contrary to this custom and practice, applicants were informed that the promotion process was being changed -- the CIV Deputy Assistant Attorney General (DAAG), Scott Stewart, would now conduct interviews and make the selection. He was a political appointee

Involvement of Political Appointees

Five candidates applied, including the attorney ultimately appointed by Mr. Clark 11 months later. DAAG Stewart interviewed all five in May 2020 and chose two finalists. The two finalists each had more than 15 years of DOJ experience and were Senior Litigation Counsel (SLC), one promoted 12 years ago, the other at least seven years ago and both had received multiple performance commendations. One was the incumbent Acting Assistant Director who had by then held the position for over one year.

Notably, the attorney whom Mr. Clark eventually picked as Assistant Director in January 2021 was *not* one of the two finalists chosen by DAAG Stewart. While the chosen attorney was an SLC, the attorney was considerably junior to the two original finalists who each had at least five more years of DOJ experience and many more years of experience as SLCs.

AAG Hunt resigned effective July 3, 2020 without approving an Assistant Director. On his next to last day, he issued a memorandum enshrining the involvement of political appointees in the promotion process for senior career civil servants. The Hunt memorandum inserted the DAAG into the process as an interviewer of candidates and Hiring Official in place of the career Branch Director.

¹ 874 F. 3d 735 (D.C. Cir. 2017) (en banc) (per curiam). The Supreme Court dismissed the case as moot after the plaintiff had an abortion.

However, the Hunt memorandum did *not* change the role of the AAG for selecting Assistant Directors. The memorandum provides that the AAG is the Hiring Official who interviews the best qualified candidates for Senior Executive Service Positions, that the DAAG is the Hiring Official who interviews Senior Level and Supervisory Attorney GS-15 candidates, and that Branch Directors select candidates to fill lower level openings.

Mr. Clark's Involvement

On September 8, 2020, Mr. Clark became the CIV Acting AAG. At that point and through November 2020, the Assistant Director position remained open. In late-November 2020, CIV staff were informed that the opening needed to be readvertised because it had remained open for too long. The position was readvertised on or about December 7, 2020; nine candidates applied, including the original five.

DAAG Stewart interviewed all nine applicants during the week of January 4, 2021. This time, he selected three finalists who were told they would be interviewed by Mr. Clark. Only one of the top two finalists originally chosen by DAAG Stewart was among the top three finalists. That finalist was the Acting Assistant Director, who by then had held the position for almost 21 months. The two other finalists had been among the original five applicants for the position and were both passed over by DAAG Scott Stewart earlier. One was the attorney who was a member of the *Garza* litigation team, selected by Mr. Clark days later.

Mr. Clark's participation in the interview process was unusual -- it was outside the Hunt memorandum's guidance and inconsistent with established prior practice. More notably, his interviews of the two unsuccessful finalists were perfunctory. Each was interviewed for a grand total of 15 minutes -- Mr. Clark used a timer and was not particularly engaged. Later, DAAG Stewart disingenuously told unsuccessful candidates that the chosen one had been selected because that person had had a very strong interview with Mr. Clark.

On January 12, 2021, Mr. Clark announced he would be resigning his DOJ positions effective at noon on January 14. Later that same day, staff were informed of Mr. Clark's Assistant Director selection. DAAG Stewart denied that selection had anything to do with the successful candidate's volunteering for and participation in the *Garza* case. The Branch Director, who admitted to being nothing more than a bystander in the selection process, also said he did not believe the appointment was politically motivated.

Abuse of Authority

Mr. Clark abused his authority by injecting himself into the career staff promotion process -- contrary to established and recently-revised protocols -- by acting with only days left on the job, by running a sham selection process, by choosing the least experienced finalist who had already

been passed over, and by selecting the one and only candidate who volunteered to defend one of the Trump administration's most controversial policies.

Notwithstanding the denials offered by DAAG Stewart and the Branch Director, the facts show that improper considerations *did* play a role. First, the Division's own practices and guidelines were ignored; Mr. Clark took the unprecedented step of making himself the Hiring Officer for a lower-level career appointment left to others, until now. Second, Mr. Clark carried out a meaningless selection process best represented by allotting just fifteen minutes (on a timer) to interviewing the unsuccessful finalists. Third, the reason offered for Mr. Clark's selection -- the successful candidate's supposedly "strong interview" -- rings hollow given the winner's participation in a high-profile political case. In other words, the process was tainted.

Other Incidents

This is not the only abuse of authority by Mr. Clark. Most shocking, on January 3, 2021 -- three days before the January 6 occupation of the Capitol -- he reportedly told then-Acting Attorney General Rosen that President Trump wanted to replace Mr. Rosen with him. President Trump apparently changed his mind when the entire DOJ leadership threatened to resign.² In a similar vein (though a different order of magnitude), days before he left office, Mr. Clark issued ENRD policy memoranda intended to enshrine in place Trump administration environmental policies and procedures.³

* * *

Like other instances of misconduct by departing Trump administration officials, these abuses of authority are disturbing. Mr. Clark's last-minute politicization of the DOJ hiring process and issuance of policy memoranda -- capped by his willingness to participate in what was close to an attempted coup d'état -- demands immediate, close and transparent oversight and investigations.

² N.Y. Times, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General* (Jan. 22, 2021), available at <https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html>.

³ Bloomberg, *Top Official Steps Down from DOJ's Environment, Civil Divisions* (Jan. 14, 2021), available at <https://news.bloomberglaw.com/environment-and-energy/top-official-steps-down-from-dojs-environment-civil-divisions>.

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We urge you to take prompt action.

Very truly yours,

/s/

DAVID Z. SEIDE

Government Accountability Project
davids@whistleblower.org