

Bureaucracy and Distrust: The Civil Service in the Constitution

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1. Introduction

In 2019, PM Boris Johnson prorogued Parliament so that he could ‘get Brexit done’ and avoid scrutiny and obstruction by ‘remainer’ MPs. Since then, there have been revelations about what was happening behind the scenes by Tim Shipman, then chief political commentator at *The Times*. Perhaps the most interesting revelation concerns discussions by Johnson and his then chief special adviser, Dominic Cummings, on circumventing the 2019 European Union (Withdrawal) (No 2) Act 2019 (the Benn Act). Under certain circumstances, the Benn Act required Johnson to write a letter to the EU’s European Council asking for an extension to Brexit. Cummings suggested simply ignoring the Benn Act. When told the police might come for them for non-compliance, Cummings and Johnson mused aloud that they could barricade themselves in Number 10, with the police having to drag them out. It would be the perfect photo opportunity, demonstrating Johnson’s determination to deliver Brexit. But Helen MacNamara, a senior civil servant and then deputy secretary to Cabinet, warned Cummings and Johnson that the civil service would not protect them in such a situation:

The police don’t work for you in that situation ... they work for me ... They work for us. It’s not your building. These aren’t your people. The police work for the Queen. We all work for the Queen.¹

The idea was quietly dropped. Johnson ultimately sent the letter.

There are various ways we could frame this story. The obvious way that public lawyers would frame this would be to emphasise the role of the civil service in enforcing constitutionality and legality, acting as constitutional guardian. MacNamara and others warned Johnson and his advisers a number of times; they pressed him to obey the law and counselled him about the consequences of breaching it. Ultimately Johnson complied with the law and good sense, validating the role of the civil service as constitutional backstop.

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1. Tim Shipman, “Can the Queen Sack a PM?": How Boris Johnson Prorogued Parliament' *Sunday Times* (10 November 2024) <www.thetimes.com/uk/politics/article/boris-johnson-queen-tim-shipman-nch7ntg5f> accessed 16 December 2025.

But there is another framing, which is to stress how much officials supported Johnson. Shipman notes, for instance, that the Palace was initially worried about the length of the proposed 2019 prorogation of Parliament but was reassured by senior officials that ‘everything was above board’.² Another official justified Johnson’s request to the then Attorney-General Geoffrey Cox that he withhold information from Cabinet about the legality of the proposed prorogation as ‘questionable but not unconstitutional’, because Johnson was

only *briefing* Cabinet; it was not a meeting in which Cabinet was reaching a decision.³ Whatever the plausibility of these arguments, we should note the extent to which officials strained to defend the Prime Minister. MacNamara, for instance, continued to support Johnson and work in the Cabinet Office throughout the Covid-19 pandemic.⁴ And it is striking how much the civil service has supported successive governments in the past decade over very dramatic events, such as Brexit.

The strangeness of this Janus-like role of the civil service prompts us to ask: what *is* the role of the civil service in a democracy? What are the limits of this role? It is surprising how rarely public lawyers have addressed these questions.⁵ They are certainly big questions, but they are worth asking, not least because of the dark times that we are in. We face a moment where faith in democracy and established institutions seems at a particularly low ebb. Democratic backsliding – the weakening or evisceration of institutions designed to sustain democracy – is spreading.⁶ ‘Intermediary’ institutions like the bureaucracy are seen as obstructing populist politicians, who portray themselves as direct representatives of the people. Should our answers about the role of the bureaucracy be different, given this context?

In this article, I explain that the doctrine of ministerial responsibility remains the dominant constitutional principle underpinning the role and work of the civil service. Ministerial responsibility appeals to public lawyers, politicians and the public because it appears to reconcile the role of the civil service within the traditional framework of the separation of powers, parliamentary sovereignty and commonsense notions of democracy. It follows that the *primary* duty of civil servants is to support the incumbent government, which makes it difficult to see the civil service as a constitutional guardian. Ministerial responsibility crowds out other institutional norms and practices that the civil service has quietly maintained but whose basis has been kept deliberately ambiguous. This leaves the bureaucracy vulnerable in the face of a government intent on democratic backsliding.

2. *ibid.* 3. *ibid.* 4. See, eg, ‘INQ000273841 – Witness Statement of Helen MacNamara’ (9 October 2023) UK Covid Inquiry, <<https://covid19.public-inquiry.uk/documents/inq000273841-witness-statement-of-helen-macnamara-dated-09-10-2023/>> accessed 16 December 2025. 5. Notable exceptions are Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (CUP 2012); Janet McLean, ‘Between Sovereign and Subject: The Constitutional Position of the Official’ (2020) 70 (Supp 2) UTLJ 167; Janet McLean, ‘The Authority of the Administration’ in Elizabeth Fisher, Jeff King and Alison Young (eds), *The Foundations and Future of Public Law* (OUP 2020) 45; Terence Daintith and Alan Page, *The Executive in the Constitution* (OUP 1999); Terence Daintith and Alan Page, *Executive Self-Government and the Constitution* (OUP 2025); Robert Thomas, *Administrative Law in Action: Immigration Administration* (Hart 2022). 6. Nancy Bermeo, ‘On Democratic Backsliding’ (2016) 27(1) 5 *Journal of Democracy* 5; David Waldner and Ellen Lust, ‘Unwelcome Change: Coming to Terms with Democratic Backsliding’ (2018) 21 *Annual Review of Political Science* 93.

The article has seven sections, including this Introduction. Section II sets out in more detail the global rise of democratic backsliding and populism, and the impact on bureaucracy. Section III examines how the civil service has been traditionally understood in public law. The civil service has largely been neglected for a number of reasons, but the primary reason is the doctrine of ministerial responsibility. Section IV analyses the internal law of the civil service – in particular, the Constitutional Reform and Governance Act 2010, the *Civil Service Code* and the *Ministerial Code* – with the aim of determining what resources the civil service might have for pushing back against a populist government and backsliding. Section V examines an alternative view: that the civil service has a constitutional personality separate from the incumbent government—also sometimes expressed as a higher duty to ‘the Crown’ or state. Section VI addresses a hypothetical: how would the civil service respond to a populist

government intent on backsliding? The answer is responsiveness and eventual capitulation. The final section asks: how might the civil service prepare for democratic backsliding?

Some brief caveats. First, the civil service is an enormous public sector organisation in the UK, numbering about 450,000 staff.⁷ This article, however, is about ministerial–official relations, and in practice, contact with ministers is largely the province of the Senior Civil Service (SCS), who number about 7,500,⁸ civil servants in the level immediately below the SCS, and fast streamers.⁹ This article also does not cover the way the civil service operates in the devolved administrations, and in particular the Northern Ireland civil service, which is separate from the UK civil service.¹⁰ Second, I use the terms ‘bureaucracy’ and ‘civil service’ interchangeably, although the former is a more generic term which can also cover private sector administration as well.

2. Bureaucracy, its discontents and the rise of democratic backsliding

The modern state is so complex that elected politicians cannot do everything. Delegation is inevitable. And so there must be a bureaucracy to support them. But from bureaucracy’s inception, a key problem has been finding the appropriate balance between the need for its autonomy and maintaining adequate democratic control over it.¹¹

7. This includes the ‘Home Service’ and the ‘Foreign Service’ (the bureaucracy of the Foreign, Commonwealth & Development Office). It does not include the Northern Ireland civil service. 8. Cabinet Office, ‘Statistical Bulletin – Civil Service Statistics: 2025’ (29 October 2025) <www.gov.uk/government/statistics/civil-service-statistics-2025/statistical-bulletin-civil-service-statistics-2025> accessed 16 December 2025. 9. It is because of their contact with ministers that this broad group is subject to restrictions on their political activity. ‘Conduct: Political Activities’ in *Civil Service Management Code* (2016) section 4.4. 10. The Northern Ireland civil service is established under the prerogative; the Constitutional Governance and Reform Act 2010 does not apply to the Northern Ireland civil service: s 1(2)(d). 11. See, eg, Edward Page, *Political Authority and Bureaucratic Power: A Comparative Analysis* (2nd edn, Harvester Wheatsheaf 1992); Johan Olsen, ‘The Ups and Downs of Bureaucratic Organization’ (2008) 11 *Annual Review of Political Science* 13.

Max Weber, the towering figure in the study of bureaucracy, argued that bureaucracy was a technically efficient instrument of administration.¹² The key characteristics of bureaucracy – a hierarchy of offices; expertise; the full-time commitment of officials; and a system of stable, general rules to be followed – made it superior to any other form of organisation. They ensured unity, precision and speed, impartiality, institutional memory and continuity across government. Indeed, ‘no one has yet shown that the quality of life that citizens in modern democracies demand can be sustained without bureaucracy’.¹³

But Weber emphasised that the bureaucracy was *only* technically efficient. Bureaucracy had a tendency to extend its own power and become a separate force within society. Weber feared the bureaucracy would over time usurp the role of the politician. Expertise creates its own power: the dilettantism of the politician could not compete with the expertise of the bureaucrat. So Weber was highly ambivalent about bureaucracy: it increased our capability to achieve our desired collective ends, but he also feared bureaucracy would colonise everything. It needed to be balanced by and kept under the control of politicians.

This question of finding the appropriate balance between autonomy and control remains today:¹⁴ there is an irresolvable tension here.¹⁵ But there is now a new twist on the question: what happens to ‘bureaucratic autonomy in situations where the political principal is manifestly incompetent, corrupt, or acting in something other than [the] public interest’?¹⁶ In recent years we have seen the rise of democratic backsliding: the ‘state-led debilitation or elimination of any of the political institutions that sustain an existing democracy’.¹⁷ It involves ‘unprincipled’

political principals deliberately undermining key aspects of liberal democracy, including the electoral process and the institutions which serve to check executive power. What makes democratic backsliding particularly pernicious is that it is often ‘legitimated through the very institutions that democracy promoters have prioritized: national elections, voting majorities in legislatures and courts, and the “rule” of the laws that majorities produce’.¹⁸

Backsliding is often closely linked to, and propelled by, populism.¹⁹

12. See, eg, Max Weber, ‘Politics as a Vocation’ in David Owen and Tracy Strong (eds), *Max Weber: The Vocation Lectures* (Hackett 2004) 32. There is an excellent discussion of Weber’s views on bureaucracy in David Beetham, *Max Weber and the Theory of Modern Politics* (2nd edn, Polity Press 1985) 63–94. 13. Dennis Thompson, ‘Bureaucracy and Democracy’ in Dennis Thompson (ed), *Restoring Responsibility: Ethics in Government, Business, and Healthcare* (CUP 2005) 50, 51. See also Kenneth Meier and Gregory Hill, ‘Bureaucracy in the Twenty-First Century’ in Ewan Ferlie, Laurence Lynn and Christopher Pollitt (eds), *The Oxford Handbook of Public Management* (OUP 2005) 51, 53. 14. NW Barber, *The United Kingdom Constitution: An Introduction* (OUP 2021) 193. 15. Olsen (n 11) 15. 16. Francis Fukuyama, ‘Failing States and Failed Politics: A Call for Public Administration Research’ (2024) 44(3) *Public Administration and Development* 197, 198. 17. Bermeo (n 6) 5. Legal scholars have also documented this phenomenon: see, eg, Kim Lane Scheppele, ‘Autocratic Legalism’ (2018) 85 *University of Chicago Law Review* 545; Tom Ginsburg and Aziz Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018). 18. Bermeo (n 6) 15. 19. Sean Kippin, ‘Democratic Backsliding and Public Administration: The Experience of the UK’ (2025) *Policy Studies* (forthcoming) 4–5.

an ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, ‘the pure people’ versus ‘the corrupt elite’, and which argues that politics should be an expression of the ... general will ... of the people.²⁰

Populist governments often push to undermine and remove institutions which frustrate the will of the people – the intermediary institutions which tend to check or at least mediate executive power.²¹ One of these institutions is the bureaucracy.²²

In recent years there have been signs of populism and backsliding in European Union states, such as Hungary and Poland.²³ But perhaps the most disquieting example is the US: change there has historically served to foreshadow changes in other established Western democracies.²⁴ There, attacks on key institutions have advanced with alarming rapidity.²⁵ And what has been striking in both the first and the second Trump administrations is the assault on the federal civil service.²⁶

There have also been concerns about the direction of travel in the UK, with various institutions undermined and attacked in recent years.²⁷ There were attacks on judges following the *Miller I*²⁸ and *Miller II* judgments;²⁹ an opposition politician recently called for ‘root-and-branch changes’ to the processes for appointing and removing judges so that ‘activist’ judges can be dealt with;³⁰ there was an attempt to prorogue Parliament to push through Brexit;³¹ and statutory changes have been made to the oversight of the Electoral Commission (in particular, a government may now set a strategy and policy statement for the Commission).³² There has also been sustained criticism of the civil service, because it has been

20. Cas Mudde, ‘The Populist Zeitgeist’ (2004) 39(3) *Government and Opposition* 541, 543. See also Jan-Werner Müller, *What is Populism?* (University of Pennsylvania Press 2016). 21. Michael Bauer and others, ‘Introduction’ in Michael Bauer and others (eds), *Democratic Backsliding and Public Administration* (CUP 2021) 1; Andrew Sabl, ‘Afterword: Political Ethics and Institutional Renovation’ in Edward Hall and Andrew Sabl, *Political Ethics: A Handbook* (Princeton University Press 2022) 265. 22. See generally on this Michael Bauer and others (eds), *Democratic Backsliding and Public Administration* (CUP 2021). 23. Ginsburg and Huq (n 17). cf Mark Tushnet and Bojan Bugarić, *Power to the People: Constitutionalism in the Age of Populism* (OUP 2021). 24. See generally Peter Wagner, *A Sociology of Modernity: Liberty and Discipline* (Routledge 2002). 25. See Don Moynihan, ‘The Authoritarian Checklist’ (*Substack*, 28 August 2025) <<https://donmoynihan.substack.com/p/the-authoritarian-checklist>> accessed 16 December 2025. 26. Stuart Shapiro, *Trump and the Bureaucrats: The Fate*

of *Neutral Competence* (Springer 2023); Nick Bednar and Peyton Baker, 'A Primer on the Senior Executive Service' (*Lawfare*, 2 September 2025) <www.lawfaremedia.org/article/a-primer-on-the-senior-executive-service> accessed 16 December 2025.²⁷ See Meg Russell, Alan Renwick and Lisa James, 'What Is Democratic Backsliding, and Is the UK at Risk?' *The Constitution Unit* (UCL 2022) <www.ucl.ac.uk/social-historical-sciences/sites/social_historical_sciences/files/backsliding_-_final_1.pdf> accessed 16 December 2025; Alison Young, *Unchecked Power? How Recent Constitutional Reforms are Threatening UK Democracy* (Bristol University Press 2024); Kippin (n 19).²⁸ *R (Miller) v The Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) (*Miller I*).²⁹ *R (Miller) v The Prime Minister* [2019] UKSC 41 (*Miller II*). Both *Miller* judgments and the media's response to them are discussed in Joshua Rozenberg, *Enemies of the People? How Judges Shape Society* (Bristol University Press 2020) ch 2.30. Michael Carroll, 'Robert Jenrick Lists 30 "Activist Judges" He Vows to Axe in War on UK's Open Border' *Daily Express* (7 October 2025) <www.express.co.uk/news/uk/2118007/robert-jenrick-lists-30-activist-judges-he-vows-to-axe> accessed 16 December 2025.³¹ *Miller II* (n 29).³² See Elections Act 2022, s 16. See also Young (n 27) 178–84.

seen as either obstructing Brexit³³ or ineffective in delivering government policy – or both.³⁴ The civil service has been portrayed as part of 'the blob', or part of the so-called 'deep state'.³⁵

We need not take a firm position on whether or not the UK is also currently experiencing democratic backsliding – itself a deceptively simple term.³⁶ The point is that it is happening elsewhere, and it is worthwhile doing a stocktake here in the UK: how would a government with an agenda of democratic backsliding impact on the civil service? To answer that, we must ask: what are the role and functions of the civil service, and its limits? In contrast to Weber, some scholars now portray the bureaucracy as a crucial check on immediate passions and whims of charismatic politicians.³⁷ Some suggest that the bureaucracy should not simply resist unprincipled political principals but, under certain circumstances, *actively* protect democracy.³⁸

3. The civil service in public law

Public lawyers have largely vacated the field of bureaucracy to public administration.³⁹ This stems partly from a more general problem with the treatment of the Executive in public law. Traditionally, public law has viewed the Executive in terms of its compliance with requirements imposed by Parliament and the courts.⁴⁰ The Executive is something to be constrained, not something to be studied or justified: executive power is seen as a 'stubborn stain' that should be washed out of the fabric of the constitution.⁴¹ There is administrative law, which focuses on how the Executive administers the law (primarily

33. For example, Matt Honeycombe-Foster, 'Civil Service Chief Slams "Sniping" against Brexit Negotiator Olly Robbins' (*PoliticsHome*, 16 October 2018) <www.politicshome.com/news/article/civil-service-chief-slams-sniping-against-brexit-negotiator-olly-robbins> accessed 16 December 2025; John Dunne, 'Civil Servants Hold "Remain Bias" and Are Stopping Plans to Ditch EU Legislation, says Attorney General' *The Express* (3 July 2022) <www.standard.co.uk/news/politics/brexit-news-suella-braverman-civil-servant-remain-b1009918.html> accessed 16 December 2025.³⁴ Sebastian Payne, 'Cummings and Gove Join Forces in Battle against Whitehall "Blob"' *FT* (29 June 2020) <www.ft.com/content/be9e73c1-d5b0-43d6-8771-d5435b93de34> accessed 16 December 2025.³⁵ Liz Truss, 'I'm a Former British Prime Minister who Believes the West is Doomed unless Conservatives do This' *Foxnews* (21 February 2024) <www.foxnews.com/opinion/im-former-british-prime-minister-believes-west-doomed-unless-conservatives-do-this> accessed 16 December 2025. On the origins of the term 'deep state', see generally Stephen Skowronek, John Dearborn and Desmond King, *Phantoms of a Beleaguered Republic: The Deep State and the Unitary Executive* (OUP 2021) ch 1.36. Bermeo (n 6); Stephan Haggard and Robert Kaufman, *Democratic Regress in the Contemporary World* (CUP 2021).³⁷ See, eg, Josh Chafetz, 'Constitutional Maturity, or Reading Weber in the Age of Trump' (2019) 34 *Constitutional Commentary* 17; Sabl (n 21) 265. See also Aileen Kavanagh, *The Collaborative Constitution* (CUP 2023) 146.³⁸ Barry Bozeman and others, 'The Deformation of Democracy in the United States: When does Bureaucratic "Neutral Competence" Rise to Complicity?' (2024) 84 *Public Administration Review* 796, 806; Kutsal Yesilkagit and others, 'The Guardian State: Strengthening the Public Service against Democratic Backsliding' (2024) 84 *Public Administration Review* 414.³⁹ McLean, 'Between Sovereign and Subject' (n 5) 167.⁴⁰ Daintith and Page, *The Executive in the Constitution* (n 5). But see now Paul Craig, *English Administrative Law from 1550: Continuity*

and Change (OUP 2024).⁴¹ Timothy Endicott, *The Stubborn Stain Theory of Executive Power* (Policy Exchange 2017).

through the civil service) but ‘administrative law is not the law *of* the administration; it is the law directed *against* the administration’.⁴²

There are theoretical issues surrounding the Executive. The sheer size and complexity of the Executive make it difficult to conceptualise.⁴³ Moreover, the public law concerning the Executive also obscures its strange multivalence.⁴⁴ We can think of the ways in which the UK Executive continues to be understood as unitary (for instance, the creaking doctrine of the indivisibility of the Crown),⁴⁵ when its plural nature – that is, in terms of personnel (ministers and civil servants) and structure (the UK Executive is departmental in nature, with a weak centre) – continues to plague successive governments in their pursuit of coherent action.⁴⁶

There are also practical and methodological problems. Daintith and Page point to the ‘low visibility’ of executive rules – often expressed through codes, guidance, memoranda and practices.⁴⁷ Moreover, to understand how the Executive works often requires time-consuming qualitative research and severe problems of access.⁴⁸ Coupled with the preference of lawyers for case law, this has meant the internal workings of the Executive have largely gone underexamined.

But there are more specific reasons why the civil service has been ignored by public lawyers. The separation of powers doctrine, which remains the overarching framework of public law, developed prior to the growth of bureaucracy and the study of the internal workings of the state.⁴⁹ Thus, bureaucracy often sits awkwardly in statements of constitutional arrangements. It is sometimes treated as ‘a fourth branch’ or as a delegate of one (or more) of the branches of government; or simply ignored. McLean and Tushnet note, for instance, that many constitutions enacted prior to the twentieth century remain silent on the authority and role of the administration.⁵⁰

The other key reason the civil service has been neglected in public law is the advent of democracy and ministerial responsibility, the doctrine used to explain the role and work of the civil service.⁵¹

42. HW Arthurs, *‘Without the Law’: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press 1985) 6. To be fair, that is a normativist view of administrative law: functionalists would take a different approach – see, eg, Carol Harlow and Rick Rawlings, *Law and Administration* (4th edn, CUP 2021). See also Elizabeth Fisher and Sidney Shapiro, *Administrative Competence: Reimagining Administrative Law* (CUP 2020).⁴³ Barber (n 14) 194–96.⁴⁴ For example, Martin Loughlin, ‘The State, the Crown and the Law’ in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (OUP 1999) 34.⁴⁵ See, eg, *R (BAPCO Action Ltd) v Secretary of State for the Home Dept* [2008] UKHL 27, contrasting Lord Scott [27]–[29] and Lord Rodger [33]–[34].⁴⁶ The classic text on the Executive’s plural nature is Daintith and Page, *The Executive in the Constitution* (n 5) and now *Executive Self-Government and the Constitution* (n 5).⁴⁷ Daintith and Page, *The Executive in the Constitution* (n 5) 13.48. Public administration scholars face a similar challenge; thus, quantitative research is favoured over more nuanced qualitative research: Robert Durant, ‘Perverse Incentives and the Neglect of Big Questions’ (2016) 29(3) *Governance* 330, 331.⁴⁹ Patrick Overeem, ‘Public Administration and Politics: The Art of Separation’ in Thomas Bryer (ed), *Handbook of Theories of Public Administration and Management* (Edward Elgar 2021) 7, 7–8.50. Janet McLean and Mark Tushnet, ‘Administrative Bureaucracy’ in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge 2013) 121.⁵¹ But contrast Lorne Sossin, ‘Speaking Truth to Power? The Search for Bureaucratic Independence in Canada’ (2005) 55 *UTLJ* 1.

Ministerial responsibility is the doctrine whereby ministers of the Crown are accountable to Parliament for what happens in their respective departments. And because ministers have been

elected and are ‘chosen’ by and politically responsible to Parliament, civil servants should support ministers and are accountable to them.

Ministerial responsibility is a ‘compliance’⁵² theory of bureaucracy where elected politicians decide and unelected officials merely advise and implement. Indeed, under the *Carltona* doctrine, officials are usually treated in law as almost irrelevant: their work is deemed to be that of the minister.⁵³ Ministerial responsibility is a simple view of the bureaucracy, which sits neatly within our commonsense understanding of what democracy is – or ought to be. We elect politicians: politicians decide; unelected officials obey. There is a simple chain of delegation.

So we can see that ministerial responsibility serves not only as a description of practice but also as a normative justification for democratic control over the bureaucracy. However, the surface simplicity of ministerial responsibility hides the complexity of what the civil service is and does. Ministerial responsibility presumes a distinct divide between politics and administration; between ends and means. Officials deal with means, and means are secondary. On this view, civil servants have little to no discretion.⁵⁴

But the idea that civil servants have no discretion or role in the policy process is an unrealistic view of the complex, modern-day state.⁵⁵ A ministerial decision (if there is one) is just one stage amongst many in the policy-making process, and at almost every stage of this process officials are exercising discretion; instructions from ministers are rarely specific enough to guide officials. There may, for instance, be cross-cutting issues which require interdepartmental discussion. The detail is not just detail – it can determine the entire policy and how it is perceived and how it works in practice.⁵⁶

Moreover, ministerial responsibility ignores the role of values and how those enter into and influence the process of discretion. Compliance with statute will often require discretion, because statutory language may be open-ended; there may be disagreement about the appropriate means. Values are important: it is not just *what* the state does but *how* it does it. We expect the state to provide services in a way that upholds democratic political culture.⁵⁷

52. Bernardo Zacka, ‘Political Theory Rediscovered Public Administration’ (2022) 25 Annual Review of Political Science 21, 23–26. 53. *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560, 563 (CA). But see Claire Archbold, ‘Beyond *Carltona*: *R v Adams*, Accountability and the Delegation of Powers’ in Brice Dickson and Conor McCormick (eds), *The Judicial Mind: A Festschrift for Lord Kerr of Tonaghmore* (Hart Publishing 2021) 243. See also David Richards and Martin Smith, ‘The Westminster Model and the “Indivisibility of the Political and Administrative Elite”: A Convenient Myth Whose Time Is Up?’ (2016) 29(4) Governance 499. 54. Zacka (n 52) 24–25. 55. Herbert Kaufman, ‘Ruminations on the Study of American Public Bureaucracies’ (2008) 38(3) American Review of Public Administration 256. 56. Edward Page and Bill Jenkins, *Policy Bureaucracy: Government with a Cast of Thousands* (OUP 2005). 57. Zacka (n 52) 25.

Criticisms of ministerial responsibility like these are nothing new.⁵⁸ But we continue to see the authority of the administration – the role of the civil service – as being largely based on its role in supporting ministers.⁵⁹ There is also a limited sense that the civil service has an important role in government and the constitution *because* of its institutional values – that it provides expertise and competence⁶⁰ while adhering to legality, due process and impartiality. However, these sources of authority are now under attack.⁶¹ The civil service is now rarely seen to have any particular expertise, and it is criticised for its sluggishness and the insistence on red tape.⁶²

Put differently, ministerial responsibility is the civil service analogue of parliamentary sovereignty in UK constitutional law. The democratic credentials of Parliament are such that there can be no constraint on what Parliament can do; once Parliament has asserted its sovereignty, that is the end of the matter.⁶³ Similarly, the democratic credentials of ministers

are such that their determination of the public interest is decisive.⁶⁴ The civil service cannot look outside the incumbent government to seek an independent understanding of the public interest. Its only role is to implement the will of ministers.

4. The internal law of the civil service

The internal law of the civil service reflects its constitutional underpinnings: it is driven by an insistence on responsiveness to ministers. Examined more closely, however, there are also various qualifications, silences and ambiguities. Below, I shall primarily refer to the Constitutional Reform and Governance Act 2010 (CRA), the *Civil Service Code* and the *Ministerial Code*. There are other important guidance documents,⁶⁵ but these are the most salient for our purposes.

The current law of the civil service is a mixture of statute, convention, prerogative, codes and internal guidance. In 2010, the management of the civil service was put on a statutory footing under CRA. CRA, however, is a bare-bones codification of practice, rushed through at the end of a Labour government with limited time for scrutiny.⁶⁶ It states that the civil service is managed by the Minister for the

58. See, eg, Ian Harden and Norman Lewis, *The Noble Lie: The British Constitution and the Rule of Law* (Hutchinson 1986) ch 5.59. McLean, 'The Authority of the Administration' (n 5) 61–64.60. Fisher and Shapiro (n 42).61. McLean, 'The Authority of the Administration' (n 5) 61–64.62. See, eg, Dominic Cummings, 'The Hollow Men II: Some Reflections on Westminster and Whitehall Dysfunction' (*Dominic Cummings' Blog*, 30 October 2014) <<https://dominiccummings.com/2014/10/30/the-hollow-men-ii-some-reflections-on-westminster-and-whitehall-dysfunction/>> accessed 16 December 2025.63. The literature on parliamentary sovereignty never ends, but some useful works include Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP 2010); Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart 2015). Of course, the analogy can go further, since some scholars argue that parliamentary sovereignty is subject to limitations, but I do not explore this here.64. This is the 'Whitehall view' of the UK constitution: see David Howarth, 'Westminster versus Whitehall: What the Brexit Debate Revealed about an Unresolved Conflict at the Heart of the British Constitution' in Oran Doyle, Aileen McHarg and Jo Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (CUP 2021) 217, 218.65. For example, the UK *Cabinet Manual* (2011); *Civil Service Management Code* (2016).66. Mark Ryan, 'The Constitutional Reform and Governance Act 2010: The Evolution and Development of a Constitutional Act' (2014) 35 *Liverpool Law Review* 233.

Civil Service;⁶⁷ that civil servants are to be appointed on the basis of merit;⁶⁸ and that a civil service code, which 'forms part of the terms and conditions of service' for civil servants, must be published.⁶⁹ There are minimal requirements for the code.⁷⁰

The *Civil Service Code* adds flesh to the impoverished provisions of CRA. It has an odd legal status. First published in 1996, the *Code* is the descendant of a number of predecessor documents and is now an instrument issued under CRA.⁷¹ There are three sections relevant here. The first section states that 'Civil servants are accountable to ministers, who in turn are accountable to Parliament'. Again, what is emphasised is ministerial responsibility. In a recent case, *R(FDA) v Minister for the Cabinet Office (FDA)*⁷² (which concerned the Safety of Rwanda (Asylum and Immigration) Act 2024 and civil service compliance with international law), Chamberlain J stated that the *Code's* provisions had to be interpreted within its proper context or framework – of which a key aspect was ministerial responsibility.⁷³

The second section sets out the core values of the civil service: integrity, honesty, objectivity and impartiality. The third section, entitled 'political impartiality', is perhaps the most subtle of the three sections. It tells civil servants to:

- serve the government whatever its political persuasion, to the best of your ability in a way which maintains political impartiality and is in line with the requirements of this code, no matter what your own political beliefs are;
- act in a way which deserves and retains the confidence of ministers, while at the same time ensuring that you will be able to establish the same relationship with those whom you may be required to serve in some future government;
- comply with any restrictions that have been laid down on your political activities.⁷⁴

We can note three matters.⁷⁵ First, this final section is a directive of self-denial. It emphasises the subordination of the official's own political views to those of the politician. As Max Weber said:

When an official receives an order, his honour lies in his ability to carry it out ... exactly as if it corresponded to his own convictions ... even if the order seems wrong to him.... Without this discipline and self-denial ... the entire apparatus would collapse.⁷⁶

67. Constitutional Governance and Reform Act 2010, s 3(1) (CRAG). For the purposes of this article, I do not discuss the Diplomatic or Foreign Service, who are managed by the Foreign Secretary.⁶⁸ CRAG, s 10(2).⁶⁹ *ibid*, s 5(1).⁷⁰ *ibid*, s 7.⁷¹ For a history of the *Civil Service Code*, see Rodney Brazier, *Ministers of the Crown* (OUP 1997) 132–41. The latest iteration of the *Code* was published in 2015.⁷² *R(FDA) v Minister for the Cabinet Office* [2024] EWHC 1729 (Admin) (FDA).⁷³ *ibid*, esp [83], [116].⁷⁴ *Civil Service Code* (2015). This makes reference to more detailed restrictions in the *Civil Service Management Code* (2016).⁷⁵ This section draws on the analysis of Richard Mulgan, 'How Much Responsiveness is Too Much or Too Little?' (2008) 67(3) *Australian Journal of Public Administration* 345.⁷⁶ Weber (n 12) 54.

Second, the section is an instruction of *responsiveness*: the readiness of civil servants to do what the incumbent government wants.⁷⁷ The section makes clear that this is the *primary* duty of the civil service. But responsiveness is complex. To begin with, responsiveness to whom? Should officials be responsive to the minister of their department – or to the government as a whole? Moreover, being 'responsive may be a matter of looking past the minister's immediate demands and noting other wants temporarily eclipsed in the minister's mind'.⁷⁸ It can mean advising on the long term as well as the short term. Again, the civil service has much more discretion than suggested by ministerial responsibility.

Finally, the section qualifies the primary obligation of responsiveness in two ways. The first provision states that officials must be responsive, but in a way that maintains political impartiality and is consistent with the civil service's core values: integrity, honesty, objectivity and impartiality. So, for instance, under integrity, civil servants are expected to comply with the law; under objectivity, civil servants are expected to 'provide information and advice ... on the basis of the evidence, and accurately present the options and facts'.⁷⁹ These civil service values constitute one qualification on responsiveness: the principle of public integrity.

The second provision points to another limit on responsiveness: the principle of constrained partisanship. Officials must be responsive to present day ministers, but their actions should not affect any relationship that they might have with future ministers. There is a limit to the degree and type of support they give any one government. This involves 'pragmatic calculations of the effect of appearances':⁸⁰ too much support to an incumbent government could undermine confidence that the civil service can serve future governments equally well.

The various strictures in the *Civil Service Code* are reinforced by provisions in the *Ministerial Code*. The *Ministerial Code* states that ministers have 'a duty to give fair consideration and due weight to informed and impartial advice from civil servants'; that ministers must uphold political impartiality, and 'not ask civil servants to act in any way which would conflict with the *Civil Service Code*'.⁸¹ But whereas the *Civil Service Code* and its strictures form part of

civil servants' terms and conditions of service, and therefore its enforcement is underpinned by contract law, ministerial compliance with the provisions in the *Ministerial Code* relating to the civil service is merely convention.

So the internal law of the civil service makes clear that the *primary* duty of the civil service is to be responsive to the incumbent government. Much of what is popularly portrayed as 'speaking truth to power' is just responsiveness: 'speaking back' may simply be officials taking into account interests not immediately at the forefront of the minister's mind.⁸² And where the civil service is being less than responsive, it is more likely to be due to the plural nature of the Executive and the multiple voices that the civil service must listen to and accommodate: the minister (and their short-, medium- and long-term

77. Mulgan (n 75) 345.78. *ibid* 346.79. *Civil Service Code* (2015).80. Mulgan (n 75) 351.81. *Ministerial Code* (2024) paras 1.8–1.9. See also *Ministerial Code* (1997) para 58.82. Mulgan (n 75) 354.

needs); the government as a whole; the department; Parliament and the courts; and the public.⁸³ The civil service is not, as might be thought, acting as a backstop.

Responsiveness is qualified by the principles of public integrity and constrained partisanship, both of which demand a distance from the incumbent government. But given Chamberlain J's comments in *FDA* that the *Code* needed to be interpreted in its constitutional context,⁸⁴ any tension between those principles and responsiveness is likely to be resolved in favour of ministers.

5. The idea of a separate constitutional personality – or a higher duty to the Crown

So, the internal law of the civil service largely focuses on responsiveness. It is not a strong basis for a civil service facing a populist government. And yet, there remains a nagging belief that the civil service and its resources are not *entirely* at ministers' disposal. From time to time, this argument has been run by civil servants and scholars.⁸⁵ Thus, CH Sisson, a poet and civil servant, once said: 'Our large bureaucracy is a constitutional nonentity ... A suspicion that it is none the less not absolutely nothing remains. And indeed it is something.'⁸⁶ Helen MacNamara's comment to Johnson and Cummings is just the most recent example. It is often expressed as the civil service having a separate constitutional personality; or having a higher duty to the Crown, as something separate from the incumbent government.

This comes out in various ways. For instance, as a general election approaches, there may be pre-election contact between the civil service and key opposition parties.⁸⁷ There is the accounting officer regime, in which permanent secretaries are personally responsible to Parliament for the management of public money for their department.⁸⁸ On an everyday level, the separateness of the civil service might be seen in the principles of public integrity and constrained partisanship. All these practices demand a certain distance from the incumbent government, enforcing the sense that the civil service is somehow separate from its temporary masters.⁸⁹

This is not surprising. Institutions build up practices, understandings and values which seem to persevere and outlast temporary officeholders. Hugh Heclo called this 'thinking institutionally':⁹⁰ it is about valuing continuity and the long term over the short term. It means thinking of one's role as a profession and as an office, with reference to ethical standards and fiduciary responsibilities, and with a shared

83. Kaufman (n 55) 263.84. *FDA* (n 72) esp [83], [116].85. For example, Lord Bancroft, 'Whitehall and Management: A Retrospect' (1984) 132 *Journal of the Royal Society of Arts* 367, 371; David Faulkner, *Servant of the Crown* (Waterside Press 2014) 213; Sossin (n 51).86. CH Sisson, *The Spirit of British Administration and Some European Comparisons* (2nd edn, Faber & Faber 1959) 150. Sisson was slightly tongue-in-cheek, but he did later argue that the civil service *did* ultimately serve something other than the incumbent government – the Crown.87. *Cabinet Manual*, para 2.21.88. HM Treasury, *Managing Public Money* (2025) ch 3; Daintith and Page, *Executive Self-Government and the Constitution* (n 5) 72–74.89. Ferdinand Mount, *The British Constitution Now* (Mandarin 1992) 107.90. Hugh Heclo, *On Thinking Institutionally* (Paradigm Publishers 2008).

normative vision; and it means stewardship – not just guarding but investing in assets on behalf of those to whom assets will be passed in the future. Just as lawyers have duties not just to their clients but also to the court, we might say that the civil service has duties not just to the incumbent government but also to something greater – the Crown.

But there are problems with the idea of the civil service having a separate constitutional personality, or a higher duty to the Crown. The first is the narrowness of the examples intended to demonstrate this. Most of these activities are limited in time and scope, and do not represent what the civil service is doing on an everyday basis. And some (such as pre-election contact) require the PM's authorisation.⁹¹

The second problem is that it is far from clear what 'the Crown' is. As FM Maitland once said: '[T]he crown is a convenient cover for ignorance: it saves us from asking difficult questions.'⁹² What was MacNamara referring to when she said 'We all work for the Queen'? Did she mean the actual monarch, the monarch as a personification of the state, or something else? The Crown in UK law can be many things: a symbol; a person; an office; the Executive; and the state.⁹³ Its shapeshifting nature is largely due – like almost everything else in the UK constitution – to the various accommodations made over time to make law fit with political reality.⁹⁴ The Crown may be the closest approximation to the state in UK law,⁹⁵ but academic literature on the state suggests it is 'a complex and messy set of agents and processes that do not necessarily share a common purpose at all'.⁹⁶

Ultimately, recourse to the Crown (or state) might be best understood as a reference to 'overarching principles such as those of integrity of the law or the public interest, which ought to inform the work of every institution of government'.⁹⁷ But then we move into the area of unwritten constitutional principles and the attendant problems that these bring with them.⁹⁸ How would we give these principles sufficient clarity so that they would not hinder effective government and ministerial–official relations? And even if we could agree that in some circumstances the Crown was something separate from the incumbent government, it is difficult to pin down under what conditions this would matter, what the Crown's interests might be, and how those interests were separate from the (partisan) interests of the incumbent government.

91. *Cabinet Manual*, para 2.14.92. FW Maitland, *The Constitutional History of England* (HAL Fisher ed, first published 1908, CUP 1961) 418. See also the critical discussions of the Crown as a useful concept in *Town Investments Ltd v Department of the Environment* [1978] AC 359, 380–81 (per Lord Diplock) and 400 (per Lord Simon).93. Contrast *Town Investments* (n 92) 380–81 (per Lord Diplock); JG Allen, 'The Office of the Crown' (2018) 77(2) CLJ 298; Cris Shore, 'The Crown as Metonym for the State? The Human Face of Leviathan' in Cris Shore and David V Williams (eds), *The Shapeshifting Crown: Locating the State in Post-Colonial New Zealand, Australia, Canada and the UK* (CUP 2019) 53.94. See, eg, Ernst Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* ([1957] Princeton Classics Edition, Princeton University Press 2017); Loughlin (n 44).95. McLean, *Searching for the State* (n 5) 2.96. Shore (n 93) 62.97. Maurice Sunkin and Sebastian Payne, 'The Nature of the Crown: An Overview' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (OUP 1999) 1, 3.98. On unwritten constitutional principles, see Se-shauna Wheatle and Roger Masterman, 'The Legal and Political Dimensions of Unwritten Constitutional Principles and Conventions' (unpublished manuscript with author).

The argument that the civil service has a separate constitutional personality was also raised in *FDA*. Recall that this concerned civil service compliance with the Safety of Rwanda (Asylum and Immigration) Act, which in effect breached international law. It was argued that the civil service had duties and a personality distinct from that of ministers. Chamberlain J was wary: he did not know what a separate legal personality would mean in practice. He preferred to decide the issue by reference to key ‘propositions’ about the UK constitution, in particular that ministers decide government policy and that the role of officials is to advise and implement policy.⁹⁹

The final problem is that successive ministers and senior civil servants have worked to downplay this sense of a separate personality or a higher duty. The classic statement of this is the 1985 Armstrong memorandum. Following the acquittal of Clive Ponting, a civil servant who had leaked government information ‘in the public interest’ and had been charged with violating the Official Secrets Act,¹⁰⁰ Lord Armstrong, then Cabinet Secretary, was prompted to draft a memorandum on the role of the civil service. He argued:

Civil servants are servants of the Crown. For all practical purposes the Crown in this context means and is represented by the Government of the day ... The civil service as such has no constitutional personality or responsibility separate from the duly elected Government of the day.¹⁰¹

So Armstrong denied *both* that the civil service had a separate constitutional personality *and* that the Crown was something separate to the incumbent government.

And what is striking is how, historically, the civil service has largely worked to paper over any tensions between its duty of responsiveness and any separate institutional loyalties. The exact nature of the ministerial–official relationship can be seen as a constitutional abeyance – an implicit agreement ‘to collude in keeping fundamental questions of political authority in a state of irresolution’.¹⁰² Silence – or a studied vagueness or ambiguity – is a prudential practice or technique to allow the civil service to finesse its fragile role within government: ‘[R]ather than wanting more clarity in ... principles, officials are far more likely to defend the necessary shade in them. The principle exists; doing the job is something else.’¹⁰³

Neither ministers nor the civil service benefit from an ongoing conflict with the other: ministers need the machinery of government to get things done; officials have no legitimacy without democratically elected politicians. What holds this relationship together is mutual trust. Declarations of loyalty or dis-

99. *ibid* [83]–[85]. 100. On this, see Clive Ponting, *The Right to Know: The Inside Story of the ‘Belgrano’ Affair* (Sphere Books 1985) 190–91. 101. The Armstrong memo was the subject of serious criticism, however: it was later revised, and ultimately replaced with the *Civil Service Code*. The original version of the 1985 Armstrong memorandum can be found at <https://civilservant.org.uk/library/1985-Armstrong_Memorandum.pdf> accessed 16 December 2025. See also Brazier (n 71) 132–41. 102. Michael Foley, *The Silence of Constitutions* (Routledge 1989) xi. For an excellent discussion of Foley’s book, see Aileen McHarg, ‘Michael Foley, *The Silence of Constitutions*: Gaps, ‘Abeyances’ and Political Temperament in the Maintenance of Government’ in Patrick O’Brien and Ben Yong (eds), *Leading Works in Public Law* (Routledge 2025) 86. 103. Patrick Weller and Catherine Haddon, ‘Westminster Traditions: Continuity and Change’ (2016) 29(4) *Governance* 483, 492.

loyalty from either side weaken and threaten to undermine that trust. Irresolution has been a useful accommodation for both sets of actors.¹⁰⁴ That said, the price of conflict is much higher for the civil service than for ministers: in a fight against ministers, the civil service would lose, not just with the incumbent government but potentially with any future government.

This prudential practice of constitutional silence has other costs. It means a lack of certainty and transparency over the rules, it emphasises expediency over principle, and it suppresses

conflict at the cost of potential resolution.¹⁰⁵ It also presumes that the civil service has the capability to manage that ambiguity, and that ministers, present and future, are willing to tolerate such ambiguity. And it means that, in practice, responsiveness ‘crowds out’ institutional thinking and loyalty.¹⁰⁶

6. A hypothetical: the ‘transform’ government

How would the civil service respond if a populist government came to power with an agenda to engage in democratic backsliding? Let us call this populist government the ‘Transform government’, which has a small majority in the Commons and shares a similar agenda to the current Trump administration – a hostility to expertise and diversity, and an intolerance to established institutions.

There is a problem in forecasting the possible actions that Transform might take and dealing with them in a manageable way: the scale of action could be wide, narrow or (most likely) a mix. However, the aim is not to be comprehensive but rather to point to civil service vulnerability. Thus, we will ignore changes that Transform might make – such as vastly increasing the number of Transform peers in the House of Lords, or appointing non-parliamentarians to ministerial posts, or implementing specific substantive policy (like repealing the Human Rights Act and leaving the European Convention on Human Rights) – and focus primarily on the possible impact on the civil service.

We will deal here with possible non-statutory changes – even with the enactment of CRAG, the Executive has always preferred to manage the civil service by non-legislative means, because it allows for flexibility.¹⁰⁷ But this ‘strength’ becomes a weakness if we get a populist government intent on democratic backsliding. Some possible changes include:

- The alteration of structures and redistribution of resources: the restructuring or elimination of departments; budget changes
- Personnel changes: large scale redundancies; increases to the number of special advisers and temporary staff; the performative ‘firing’ of senior civil servants
- The overhaul of bureaucratic norms: changes to guidance

104. Skowronek, Dearborn and King (n 35) 10.105. McHarg (n 102) 100.106. See generally David Fontana and Aziz Huq, ‘Institutional Loyalties in Constitutional Law’ (2018) 85(1) *University of Chicago Law Review* 1.107. Daintith and Page, *Executive Self-Government and the Constitution* (n 5).

Most, if not all, of these changes could be easily done. All would be legal, and difficult to describe as ‘undemocratic’.

Government departments can be relatively easily modified or even abolished. Most are creatures of the prerogative, and transfers of functions are usually done via Orders in Council under the Ministers of the Crown Act 1975, with limited parliamentary scrutiny.¹⁰⁸ Parallel structures and units can be created with relative ease as well: the growth of the office of the Prime Minister is testament to that.¹⁰⁹

Transform could certainly carry out widescale redundancies. By statute, civil servants now broadly have the same protections as private employees,¹¹⁰ but the 2010–15 coalition government was able to reduce civil service numbers by approximately 100,000 over five years.¹¹¹ Officials can also be shifted around, sidelined or dismissed – for instance, shortly

after becoming Chancellor in 2022, Kwasi Kwarteng, with the support of PM Liz Truss, asked the then Treasury Permanent Secretary Sir Tom Scholar to leave his post. And whatever the formalities, if a minister does not want a permanent official, that official must leave.¹¹²

The number of special advisers ('spads') – political advisers who are personal appointments of ministers – could be radically increased, since there is no statutory cap on numbers. And while, under CRAG, spads are not allowed to exercise management powers over civil servants,¹¹³ large numbers of spads might end up controlling access to the minister and diminishing the influence of the permanent civil service. Transform could also introduce 'outsiders' to the civil service – CRAG does allow for the appointment of individuals to the civil service who are exempt from the merit principle.¹¹⁴

Guidance and the orientation of the civil service can be changed with relative ease. Esther McVey (Minister for the Cabinet Office, 2023–24) published new guidance which stopped all external spending on

108. Anna White and Patrick Dunleavy, *Making and Breaking Whitehall Departments: A Guide to Machinery of Government Changes* (Institute for Government 2010). 109. House of Commons Public Administration and Constitutional Affairs Committee, *The Role and Status of the Prime Minister's Office* (HC 67 2021). 110. For example the Trade Union and Labour Relations (Consolidation) Act 1992 and the Employment Rights Act 1996. On the status of civil servants in employment law, see Simon Deakin, Gillian Morris and Zoe Adams, *Deakin and Morris' Labour Law* (7th edn, Hart 2021) 164–66; Robert Watt, 'The Crown and Its Employees' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (OUP 1999) 283. 111. Martin Stanley, 'Civil Service Numbers' (*Understanding the Civil Service Blog*) <www.civilservant.org.uk/information-numbers.html> accessed 16 December 2025. 112. On Sir Tom Scholar's 'resignation', see Anthony Seldon and Jonathan Meakin, *Truss at 10: How not to be Prime Minister* (Atlantic Books 2024) ch 3. 113. CRAG, s 8(5) requires that the Special Advisers Code must provide (amongst other matters) that spads cannot exercise any power of management over the civil service. 114. CRAG, ss 10(3)(c) and 12; Civil Service Commission, 'Recruitment Principles' (2018) 8–9, 13–16; Ben Yong and Robert Hazell, *Special Advisers: Who They Are, What They Do and Why They Matter* (Hart 2013) 142–43. More recently, see Civil Service Commission, 'Review into Appointments by Exception Delegated to Departments' (2024) <<http://civilservicecommission.independent.gov.uk/wp-content/uploads/2024/11/2024-11-20-CSC-delegated-exceptions-review-final.pdf>> accessed 16 December 2025.

equality, diversity and inclusion activity within the civil service.¹¹⁵ Suella Braverman as Attorney-General (2020–22) amended the government's guidance on legal risk, which set out how government lawyers should provide, assess and communicate legal advice to ministers, mostly because she thought that government lawyers had become too cautious and were 'blocking' policy.¹¹⁶

Transform ministers might simply sideline or ignore the work of civil servants. While the odd rejection of advice is perfectly legitimate, what about blanket rejection from ministers or ongoing sidelining of official advice? As we have seen, ministerial acceptance of the work of the civil service is largely taken for granted, but this is all convention.

How would officials respond to such changes? We should bear in mind that the civil service has a history: it has, in the past, been confronted with various proposals and has proved remarkably resistant to reform.¹¹⁷ That said, there is concern that successive changes to various aspects of civil service practice have led to an erosion of the civil service's ability to be responsive while maintaining its own capability and institutional norms.¹¹⁸

Everything will depend on the concrete particulars, but there would be a spectrum of possible responses. *FDA* established that civil servants can refuse to comply with ministerial instructions which are clearly illegal under domestic law.¹¹⁹ But rejecting blatantly illegal action is perhaps the easy case. The more likely and more difficult example is a Transform

minister giving a legal instruction that is unambiguously bad, in the sense of damaging to the government (and potentially the state), in the short or long term.

In normal times, responsiveness will be the default response. Officials will attempt to clarify what the minister wants and suggest possible solutions and alternatives to flesh out the minister's instructions. Officials will also try to genuinely implement the instruction of the minister. After all, it is possible that as a policy works its way through the various parts of the government its weaknesses will be revealed and remedied.

Depending on the nature of the instruction, there might be escalation to the Law Officers on matters of legality;¹²⁰ in the case of conflict with the *Civil Service Code*, this may lead to referral to the Civil

115. HC Deb 14 May 2024, vol 750, col 10WS. See also Cabinet Office, 'Guidance on Diversity and Inclusion and Impartiality for Civil Servants' (14 May 2024) <[https://www.gov.uk/government/publications/guidance-on-diversity-and-inclusion-and-impartiality-for-civil-servants](https://www.gov.uk/government/publications/guidance-on-diversity-and-inclusion-and-impartiality-for-civil-servants/guidance-on-diversity-and-inclusion-and-impartiality-for-civil-servants)> accessed 16 December 2025. 116. Jonathan Jones, 'What Does the New Legal Risk Guidance for Government Lawyers Mean?' (Institute for Government, 7 November 2024) <www.instituteforgovernment.org.uk/article/comment/Hermer-new-legal-risk-guidance> accessed 16 December 2025. The 2022 guidance was replaced in 2024 under the new Labour government. 117. On the history of civil service 'reform', see Vernon Bogdanor, 'The Civil Service' in Vernon Bogdanor (ed), *The British Constitution in the Twentieth Century* (OUP 2004) 237; Daintith and Page, *Executive Self-Government and the Constitution* (n 5). 118. For example Janet McLean, 'The Unwritten Political Constitution and Its Enemies' (2016) 14(1) *ICON* 119; Janet McLean, 'Outsourcing Government Advice' [2023] *Public Law* 189. 119. *FDA* (n 72) esp at [85]–[86]; *Civil Service Management Code* (2016) paras 12.1.2, 12.1.6. 120. Questions of legality can be escalated to senior lawyers and ultimately to the Law Officers: *Cabinet Manual* (Cabinet Office 2011) para 6.6.

Service Commission;¹²¹ or the permanent secretary as accounting officer may ask for a ministerial direction where the proposed action involved public money and it potentially violated regularity, propriety, value for money or feasibility.¹²² These routes vary in their effect.

On the other hand, where there is a new government, the civil service might be *over-responsive* 'to prove it can work with its new masters'.¹²³ And the civil service works not just on direct instruction but also on cues and steers, so for example it may get cues from Transform ministers that certain kinds of advice are unwelcome; over time, the danger then becomes that important considerations are left out of any advice given.

A more serious response would be 'guerilla government', where civil servants 'work against the wishes – either implicitly or explicitly communicated – of their superiors'.¹²⁴ This covers a wide range of actions: shirking, leaking and whistleblowing.¹²⁵ All these actions go against the grain of civil service values. And the *Civil Service Code* prohibits obstruction: officials must not 'frustrate the implementation of policies once decisions are taken'.¹²⁶ Responsiveness is the default; non-compliance is exceptional. The most formal mode of resistance is resignation. Elizabeth Wilmschurst, for instance, resigned from the Foreign Office in 2003 over the advice provided to the Labour government on the legality of the invasion of Iraq.¹²⁷ More recently, Sir Jonathan Jones KC resigned as Treasury Solicitor (Permanent Secretary of the Government Legal Department) in 2020 over government proposals to breach international legal obligations through the then Internal Market Bill.¹²⁸

But resistance and resignation present two dilemmas. First, when is enough enough? It will be difficult to tell at what point compliance becomes complicity and it becomes legitimate to 'resist'. What measures do officials have to determine this?¹²⁹ For instance, an instruction to do something unconstitutional – an example of something that might be formally lawful but certainly bad – suffers from the problem that the UK has no codified constitution. There may

be no pre-existing law on the matter, no agreement on what is the ‘right’ answer, and no clear view on who might provide an authoritative answer.

121. CRAG, s 9; *Civil Service Code* (2015); Civil Service Commission, *The Civil Service Code: A Guide for Civil Servants Bringing an Appeal to the Civil Service Commission* (2017) <https://civilservicecommission.independent.gov.uk/wp-content/uploads/2019/03/03c_The-Civil-Service-Code-A-Guide-for-civil-servants-bringing-an-appeal-to-the-Civil-Service-Commission.pdf> accessed 16 December 2025.122. HM Treasury (n 88) para 3.6.123. Jill Rutter, ‘Will Civil Service Impartiality be a Casualty of Brexit?’ in Steve Barwick (ed), *Impartiality Matters: Perspectives on the Importance of Impartiality in the Civil Service in a ‘Post Truth’ World* (The Smith Institute 2019) 58.124. Rosemary O’Leary, *The Ethics of Dissent: Managing Guerrilla Government* (2nd edn, CQ Press 2014).125. See, eg, Anthony Barker and Graham Wilson, ‘Whitehall’s Disobedient Servants? Senior Officials’ Potential Resistance to Ministers in British Government Departments’ (1997) 27(2) BJPS 223.126. *Civil Service Code* (2015).127. Ewen MacAskill, ‘Adviser Quits Foreign Office over Legality of War’ *The Guardian* (22 March 2003) <www.theguardian.com/politics/2003/mar/22/uk.iraq> accessed 16 December 2025.128. ‘Senior Government Lawyer Quits over Brexit Plans’ *BBC News* (8 September 2020) <www.bbc.co.uk/news/uk-politics-54072347> accessed 16 December 2025.129. Bozeman and others provides a list but sets an onerous threshold, including the incitement of political violence by elected officials and extraordinary efforts to abridge voting rights: Bozeman and others (n 38) 807–08.

Second, in the context of ongoing backsliding, should one stay to try to ameliorate the worst of what is to come? This is a legitimate concern: one recent analysis suggested that, over time, democratic backsliding can lead to bureaucratic backsliding:

‘principled bureaucrats’ ... depart, leaving ‘unprincipled’ principals a freer hand to pursue policies against the public interest. ... with longer rule, ‘unprincipled’ political principals become less and less constrained in their policies by an increasingly ‘unprincipled’ bureaucracy.¹³⁰

In short, come a populist government with an agenda of backsliding, it is quite unclear that the civil service will be able to do much at all. Its normative framework is not resistance but responsiveness. Institutional values can only take officials so far.

7. What can be done?

What, then, can be done? This depends on what we think is ‘the problem’ and its severity. What I have been describing is the way in which ministerial responsibility crowds out any alternative normative and legal basis for the work of the civil service itself, and, because of that, the potential for the erosion of key institutional norms like permanence, impartiality and objectivity. Concerns about the decline and politicisation of the civil service have been made many times;¹³¹ harking back to a ‘golden age’ is a perennial temptation.

My concern has been to show that the law of the civil service also involves norms other than supporting the incumbent government, but that these norms seem frail and exposed. If we do not attend to these norms, they will wither. There is limited clarity on these norms and on the role of the civil service and its relationship with ministers, which leaves the civil service in a vulnerable position where there are ministers intent on democratic backsliding. We cannot continue to take the status quo for granted. Even if those currently intent on capturing and transforming the state in the UK seem amateurish, we can expect them to learn and evolve: think of the difference between the first and second Trump administrations.

The civil service will certainly not (and cannot) itself publicly advocate for change. There might be some preparation for unprincipled political principals, but this would not be made public. Any sign that the civil service was acting to protect itself from a populist party would damage its capability to gain the trust of that party. If there were to be scenario planning within

the civil service for a populist government with a stated intention of backsliding, it would be limited to a select few senior officials and entirely off the record.¹³²

There is space for departments and the Cabinet Office to do more work on strengthening integrity – for instance, by quietly carrying out exercises to see where weaknesses lie in various processes and pract-

130. Christian Schuster and others, 'Exit, Voice, and Sabotage: Public Service Motivation and Guerrilla Bureaucracy in Times of Unprincipled Political Principals' (2022) 32(2) *Journal of Public Administration Research and Theory* 416, 432. 131. See, eg, Colin Campbell and Graham Wilson, *The End of Whitehall: Death of a Paradigm* (Blackwell 1995). 132. The civil service did something similar prior to the 2010 hung parliament: see Robert Hazell and Ben Yong, *The Politics of Coalition: How the Conservative-Liberal Democrat Coalition Works* (Hart 2012) 28.

ices. For instance, the *Civil Service Code*'s provisions are general and it is hard to know what they mean and how they are used in practice, since much of what officials actually do is learned on the job, via osmosis.¹³³ Representatives of the civil service could also take a role here, being more distanced from government. The Civil Service Commission has a role in promoting the *Civil Service Code* – although it remains unclear what this role in fact involves.¹³⁴ The Association of First Division Civil Servants (FDA), one of the main trade unions for much of the civil service, has a long history of defending impartiality and civil service ethics.¹³⁵

The Institute for Government (IfG)¹³⁶ and the UK Governance Project (UKGP) have recently suggested certain reforms, which although not specifically targeting backsliding would go towards strengthening the civil service. The IfG has proposed a new statute – the Civil Service Bill (CSB) – to amend and supplement the minimalist content of Crag.¹³⁷ The proposed CSB has two key features. First, it would make clear that the civil service 'exists as part of the state', presumably to enforce the idea of the permanence of the civil service.¹³⁸ Second, and more practically, the CSB sets out the civil service's core functions. The primary function of the civil service is responsiveness: serving the administrations of the UK, Scotland and Wales.¹³⁹ But there is also a secondary function: the civil service must 'maintain the capability to fulfil its primary function'¹⁴⁰—what the IfG sometimes refers to as 'stewardship'¹⁴¹ (drawing inspiration from the New Zealand Public Services Act 2020).¹⁴² This secondary function would be strengthened by oversight from the Civil Service Commission¹⁴³ and the parliaments of the UK,

133. Kenneth Kernaghan, 'Promoting Public Service Ethics: The Codification Option' in Richard Chapman (ed), *Ethics in Public Service* (Edinburgh University Press 1993) 15. 134. Civil Service Commission, 'Promotion of the Code' <<https://civilservicecommission.independent.gov.uk/code/promotion-of-the-code/>> accessed 16 December 2025. See also this list published by the Civil Service Commission, 'Best Practice: Checklist of Actions for Departments' <https://civilservicecommission.independent.gov.uk/wp-content/uploads/2019/03/03b_Best-Practice-Checklist.pdf> accessed 16 December 2025. 135. The FDA was lead claimant, for instance, in *FDA* (n 72) and it was instrumental in the publication of the *Civil Service Code*. 136. The Institute for Government is a London think tank which focuses on public sector issues. 137. Institute for Government, *A New Civil Service Act: Improving the Management, Functioning and Oversight of the Civil Service* (Institute for Government 2025) <www.instituteforgovernment.org.uk/sites/default/files/2025-05/A-new-civil-service-act.pdf> accessed 16 December 2025. The IfG published an earlier version of this bill, along with a much more detailed report in 2022: Institute for Government, *A New Statutory Role for the Civil Service* (Institute for Government 2022) <www.instituteforgovernment.org.uk/sites/default/files/publications/new-statutory-role-civil-service.pdf> accessed 16 December 2025. I refer only to the 2025 version. 138. CSB, cl 19A. 139. *ibid*, cl 19C (1). 140. *ibid*, cl 19C (3). 141. For example, Institute for Government, *New Civil Service Act* (n 137) 3. 142. Public Service Act 2020 (NZ), s 12(1)(e). However, the current NZ government has proposed amending this statutory stewardship function on the basis that it distracts the NZ public service from its primary duty of supporting the government in power. The justifications for amending the Public Service Act are set out in 'Cabinet Paper – Amendments to the Public Service Act 2020 Paper 1: Clarifying the Role and Responsibilities of the Public Service' (NZ Cabinet Paper, 6 May 2025) <www.publicservice.govt.nz/assets/DirectoryFile/Cabinet-Paper-Public-Service-Act-Amendments-Paper-1.pdf> accessed 16 December 2025. The Public Sector Amendment Bill 2025 was

introduced on 28 July 2025: <www.legislation.govt.nz/bill/government/2025/0190/23.0/LMS1461228.html> accessed 16 December 2025.¹⁴³ CSB, cl 19E.

Scotland and Wales.¹⁴⁴ Giving this secondary function a statutory basis is important, the IfG argues, because of ‘the core, remarkable fact that nobody really runs the civil service’.¹⁴⁵ The plural Executive makes it difficult to think about the civil service as a whole over the long term.¹⁴⁶ But the CSB is also significant because it would make explicit that the civil service has a duty to maintain its capability beyond the needs of any incumbent government.

Some of the reforms proposed by the recent UKGP¹⁴⁷ are also suggestive. UKGP recommends that CRAG should be amended so that civil servants ‘have a *legal* obligation to act in compliance with their responsibilities under the Civil Service Code and Ministers cannot direct them to act in opposition to the Code’.¹⁴⁸ UKGP also recommends strengthening the role of permanent secretaries: they should also be accountable to Parliament for the health and operational performance of their department.¹⁴⁹ Permanent secretaries would report to Parliament on how they were meeting this duty, and the ‘Minister for the Civil Service and the head of the Civil Service should report to Parliament annually on the overall status, resourcing and performance of the Civil Service’.¹⁵⁰

The benefits of the IfG and UKGP’s proposed reforms are fourfold. First, they focus on the civil service as an institution with long-term interests. Second, the proposals are broadly incremental: they can be (in theory anyway) developed within the current law of the civil service – some were drafted to be inserted neatly into CRAG. Third, they resolve the problem of the source of this duty of stewardship via law: *Parliament* becomes the source of the duty. And finally, while imperfect, statutory change also offers a procedural constraint to erosion and perhaps helps strengthen consensus.

Against this, there are two problems. If implemented, the IfG and UKGP’s proposals would require the civil service to confront its ingrained practice of constitutional silence and be far more explicit about the limits of its responsiveness. The civil service would need to be far more transparent in its actions and in thinking about the long term – because putting duties on a statutory footing may involve Parliament, and potentially the courts. At the very least, the civil service would need to rethink its relationship to Parliament, which historically has been kept at a distance by both ministers and officials;¹⁵¹ that in turn would require some rewiring of the ministerial–official relationship. All this seems difficult, given the civil service’s traditional culture of opacity and ministerial loyalty. More fundamentally, though, it is unclear how Parliament could come to a consensus to enact a statute on the civil service. Even if it could, statutory reform of the civil service can be undone by a future government with a parliamentary majority.

144. *ibid.*, cl 18(3). 145. Institute for Government, *New Civil Service Act* (n 137) 3. 146. Daintith and Page, *The Executive in the Constitution* (n 5). 147. UK Governance Project, *Final Report* (2024) 38–41. Project members included Dominic Grieve KC, Margaret Hodge, Sir Jonathan Jones KC and Helen MacNamara. 148. *ibid.* 38 (emphasis added). 149. *ibid.* 150. *ibid.* 39. 151. See, eg, Cabinet Office, ‘Giving Evidence to Select Committees: Guidance for Civil Servants’ (2014) (also known as the ‘Ostmotherly Rules’) <www.gov.uk/government/publications/departmental-evidence-and-response-to-select-committees-guidance> accessed 16 December 2025.

Ultimately, the appropriate relationship between ministers and officials is a political one: what is needed is consensus. This might be achieved via a commission. Both the House of Commons Public Administration Select Committee (PASC)¹⁵² and the UKGP have argued for the establishment of a commission¹⁵³ to determine what the best model for the civil service should be. However, there is little incentive for ministers to establish a commission which might

recommend reducing ministerial control over the civil service; nor is there any incentive for politicians who think they may be in a future government to pay attention. We need to rediscover ‘common understandings of what good government entails. It really is all just a matter of norms’.¹⁵⁴ But at present, it is far from clear that there *is* a consensus in the UK.

Even more basic work needs to be done. A key aspect of democratic backsliding and populism is the characterisation of the civil service as a bumbling, lumbering bureaucracy with its own self-interests, and as obstructing change (either deliberately or out of incompetence). These are the images of the calculating Sir Humphrey Appleby of *Yes, Minister* or the hapless Terry Coverley in *The Thick of It*. Donald Moynihan is right: ‘After generations of bureaucracy bashing, there is a deep need to reaffirm the normative value of a professional bureaucracy.’¹⁵⁵ We need an image of the civil service that explains its fundamental role in a democracy.

Academic work on this has begun,¹⁵⁶ but we also need *stories* that can connect with the public and portray the civil service as an institution consisting of real people who help us realise our collective goals. Dan Honig’s *Mission Driven Bureaucrats*, for instance, notes that during the first Trump administration there was a government shutdown in 2018, in which nearly a million government officials were told they would not be paid; yet hundreds of thousands of them continued to show up to work regardless.¹⁵⁷ Michael Lewis’ *The Fifth Risk*¹⁵⁸ is ostensibly a book about the shambolic transition to government by the first Trump administration, but it is in fact a defence of the US federal bureaucracy, telling us what it does, its competence and expertise, and the risks it manages, through stories about individual people.

152. House of Commons Public Administration Select Committee, *Truth to Power: How Civil Service Reform Can Succeed* (HC 74, 2013). PASC took the unusual step of making a single recommendation: the establishment of a parliamentary commission on the future of the civil service. The House of Commons Liaison Committee later endorsed this: *Civil Service: Lacking Capacity* (HC 884, 2013). The then government rejected the recommendation: House of Commons Public Administration Select Committee, *Truth to Power: How Civil Service Reform Can Succeed: Government Response to the Committee’s Eighth Report of Session 2013-14* (HC 955, 2014). 153. PASC recommended a parliamentary commission (ie, a joint committee of both Houses); the UKGP recommended a royal commission. 154. Skowronek, Dearborn and King (n 35) 198. 155. Donald Moynihan, ‘Delegitimization, Deconstruction and Control: Undermining the Administrative State’ (2022) 699(1) *Annals of the American Academy of Political and Social Science* 36, 46. 156. See, eg, Joseph Heath, *The Machinery of Government* (OUP 2024); Fisher and Shapiro (n 42). There is also a positive public administration movement, which tries to move away from the ‘blunders of our governments’: see, eg, Patrick Lucas and others (eds), *Pathways to Positive Public Administration* (Edward Elgar 2024). 157. Dan Honig, *Mission Driven Bureaucrats* (OUP 2024) 4. 158. Michael Lewis, *The Fifth Risk* (Penguin 2018).

8. Conclusion

The civil service has far more discretion than traditional public law theory allows. At best, though, it is a quasi-independent actor in the UK constitution. While officials can ‘speak truth to power’ and offer ‘free and frank’ advice to ministers, there is, as Janet McLean has said, little ‘constitutional scaffolding’ for them to do so.¹⁵⁹ The primary role of civil servants is to support the incumbent government; any capability to push back is largely based on convention and ministerial forbearance.¹⁶⁰ Whatever legitimacy officials appear to have is derivative: in the first instance, from elected officials; then from Parliament in enforcing statute; and from the courts, in adhering to legality.¹⁶¹

There are functions that the civil service has which *do* hint at a different conception of the role – for instance, its role in managing government transition; its professional ideals of constrained partisanship and public integrity; and perhaps stewardship. Those glimpses of the civil service as something quasi-independent and whose fundamental duty is to ensure the continuity of the state, however, are quite limited.

This separateness has been wilfully obscured by both ministers and the civil service. The history of the relationship between the civil service and ministers is ultimately one of trust and a willingness by both sides to reach an accommodation. That accommodation is fragile and contingent; and too much depends on ministers, who have largely avoided defining the role of the civil service within the constitution.

Ultimately, the civil service exists as part of an ecosystem which underpins and supports democratic governance.¹⁶² But the existence of this ecosystem, and its various constituent parts, should not be taken for granted. Heclo was right: ‘institutions matter, and the danger in our times is not too much but too little institutional thinking.’¹⁶³ Institutions are weaker than we think.¹⁶⁴

159. McLean, ‘Between Sovereign and Subject’ (n 5) 180.160. Daintith and Page, *Executive Self-Government and the Constitution* (n 5) 138.161. Kavanagh (n 37) 123.162. Dean Knight, ‘Our Constitutional Ecosystem: Distinctive Features and Dangerous Foes’ (*Hapai Public*, 1 August 2025) <https://hapaipublic.org.nz/hapai-hapai-public/Article?Action=View&Article_id=150550> accessed 16 December 2025; House of Lords Constitution Committee, *Executive Oversight and Responsibility for the UK Constitution* (HL 72, 2025) 4.163. Heclo (n 90) 183.164. Eric Schickler, ‘What Donald Trump has Taught Us about American Political Institutions’ (2025) *Political Science Quarterly* (forthcoming).