



## Chapter 4 - No! Minister

This chapter discusses what might or should happen if civil servants have grave concerns about what Ministers are asking them to do. Broadly in order of increasing seriousness, it addresses these questions:-

What should you do if ...

- 4.1 ... a Minister rejects your advice?
- 4.2 ... a Minister requires you to implement a policy with which you profoundly disagree?
- 4.3 ... a Minister will not provide adequate resources?
- 4.4 ... a Minister asks you to do something illegal or improper?
- 4.5 ... you believe that a previously legitimate government is developing clear authoritarian tendencies?
- 4.6 The Effectiveness Trap: Can an unhappy official achieve more by leaving - or by staying and seeking to improve things from within?

### 4.1 What should you do if a Minister rejects your advice?

Ministers will sometimes, for their own reasons, indicate that they intend to take a decision which, although legally allowed, is not in accordance with your advice. How hard should you push back?

In most cases – you do nothing. There are lots of decisions which are close calls and do not need to be challenged

Other decisions are inevitably and properly influenced by Ministers' political beliefs. Officials cannot be expected to lose sleep if they are asked to implement policies with which they strongly disagree and/or which reverse the policies endorsed by previous Ministers. (See Paul Johnson's essay on fairness<sup>1</sup> if you are not already aware of how perfectly decent people can have diametrically opposed views of what is 'fair'.) And then, as one official rather sarcastically remarked: Sometimes you have to let Ministers find out for themselves that an unnegotiable position is ..er.. unnegotiable.

This extract from a 1983 Reith Lecture<sup>2</sup> is the classic statement of your duty.

Now, a good official will not normally take a single apparently perverse decision by his Minister as the final word: he will seek to bring him round to his own way of thinking. Indeed, if his professional conscience drives him to argue for a course of action – within the framework set by Ministers – he believes to be right, it is positively his duty to face any unpopularity he may be courting.

A wise Minister will respect an official who does this, and realise that an apparently tiresome adviser may be the best safeguard against his own folly. .... But if he fails to persuade his Minister on a particular issue, what should a civil servant do? As our system operates, his duty is to accept, as phlegmatically as possible, the verdict of the publicly accountable Minister.

My own less elegant advice is as follows:

First, your boss and your colleagues need to be told about your concerns. They will help you decide whether to try to change the Minister's mind, and should support you if you decide to try to do so. If time is short, you may need to bring in the 'big guns'.

Barbara Hosking, author of *Exceeding My Brief*, tells a nice story of when she was a duty press officer in the Department of the Environment over a weekend in the middle of the 1976 drought. There were strict nationwide laws restricting the use of water for many non-essential purposes, but she picked up that officials intended to press on with Monday's scheduled and legally-permitted washing of the windows of a large office block in central London. She tried to persuade the Permanent Secretary that this would be a PR nightmare (as well as wrong) but he argued that there was a contract in place and then put the phone down on her. Her only option - other than to let the story unfold - was to call Robert Armstrong, the Cabinet Secretary, and get him to ring the stupid Perm Sec. The details of the conversation were not recorded ... but the window cleaning did not take place.

If a Minister makes a decision that you and your colleagues consider to be seriously wrong then you have the right – indeed it is your responsibility – to check (a) that the Minister has been presented in writing with all the relevant facts and arguments, and with a clear recommendation, in a form which he can easily assimilate, and (b) that he or she has read the advice and has understood all the important factors. If this has not happened then you should consult the Minister's Private Secretary about the best way to correct matters.

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<sup>1</sup> [https://www.civilservant.org.uk/library/2018-Paul\\_Johnson-fairness.pdf](https://www.civilservant.org.uk/library/2018-Paul_Johnson-fairness.pdf)

<sup>2</sup> [https://www.civilservant.org.uk/library/1983\\_reith3.pdf](https://www.civilservant.org.uk/library/1983_reith3.pdf)

Why written advice? Important decisions must never be based merely on oral briefing, or on a PowerPoint presentation. This is to ensure that such decisions are soundly based on proper consideration of all the relevant facts and arguments, clearly laid out in a logical way.

If you feel that the Minister needs to think again then further written advice will often be enough, including any necessary apology for failing to prepare comprehensive advice the first time round. But if comprehensive advice has already been submitted, and the decision is important enough, then you should press for the opportunity to argue the case a second time, preferably in person. If the Minister then still rejects your recommendation then you must accept the decision. It is not for you to question the political or strategic thinking that might have contributed to the decision in question unless, exceptionally, the Minister appears to be ignoring legal advice or defying Government policy, e.g. by failing to consult interested colleagues.

You should throughout keep careful records. If it all goes pear-shaped, you need to be able to demonstrate, after the event, that you did speak truth to power<sup>3</sup> but were not heeded. Hopefully, you will never need to use your record but writing it will help you relax and get over it.

#### **4.2 What should you do if a Minister requires you to implement a policy with which you profoundly disagree?**

The short answer is 'nothing'. Civil servants are duty bound to obey those who have been properly elected to form a government. Who are we to judge whether a policy is truly dreadful, when it has been properly publicised and appears to be supported by a majority of Parliamentarians? This is even more true when a policy has been included in the manifesto on which a new government has been elected. Officials should point out any negative and other unintended consequences of a manifesto policy, but their principal responsibility is to help Ministers fulfil the promises on which they were elected.

The classic statement is again to be found in that 1983 Reith lecture. Note in particular that 'the civil service cannot be thought of as an in-built safeguard against what some people might call the excesses of a radical or reforming government'.

... what is a career civil servant to do if he finds himself having to implement a policy with which he may strongly disagree? As I have already said, his professional code requires him to carry out his instructions with complete loyalty. But how enthusiastically and how energetically should he be expected to do this? Enthusiasm may be asking rather a lot, but I have my doubts in any case about its place in administration: it can colour judgment and lead to unwise decisions. Even the politically committed should be wary of enthusiasm. But energy is a different matter. This is a question of conscience, and of dedication to the professional ethic. The energetic pursuit of Ministerial objectives is something that must be required of officials. And this obligation on civil servants transcends by far any qualms they may feel about the rightness of policy.

Pushed to extremes, of course, this sounds like the philosophy of Eichmann and of the German officials who loyally carried out the orders of the Hitler regime on the grounds that it was not their business to challenge government policy. I do not, however, accept the parallel. Notwithstanding the loyalty of a civil servant to the government, his conscience should clearly require him to oppose actions which are either unlawful,

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<sup>3</sup> [https://www.civilservant.org.uk/richborne\\_publishing.html#STtP](https://www.civilservant.org.uk/richborne_publishing.html#STtP)

unconstitutional, or which involve some great affront to human values. In the last analysis he must be prepared to resign his appointment. But in such circumstances, I believe, he should be relieved of his normal obligation to refrain from commenting on policies for which he may have drafted official advice.

But all this is to describe an exceptional situation. What the basic doctrine means, and it is important to understand this, is that the Civil Service cannot be thought of as an in-built safeguard against what some people might call the excesses of a radical or reforming government. The only effective safeguards, if it is safeguards we are seeking, have to be found in the political and judicial processes, or in the force of circumstances themselves – and let me say parenthetically that I have usually found that force of circumstances is the most effective safeguard of the three.

The Armstrong Memorandum<sup>4</sup>, first published two years later, codifies the above as follows:

When, having been given all the relevant information and advice, the Minister has taken a decision, it is the duty of civil servants loyally to carry out that decision with precisely the same energy and good will, whether they agree with it or not.

**The Windrush crisis** was perhaps a good example of officials carrying out a policy about which they had serious concerns. It arose because duly elected Ministers mandated a deliberately 'hostile environment' for undocumented immigrants. Home Office policy officials were not the only ones who warned that this would lead to severe and unwarranted hardship for undocumented British citizens. But it was for HM Opposition in Parliament, the media, and maybe the courts, to challenge the policy if they felt it was wrong - and it is to the credit of the media that they eventually did so. The system worked, eventually, without civil servants appearing to turn on the Prime Minister and Home Secretary. As Adam Wagner correctly surmised:

'People will forget this scandal, and nobody will resign from their jobs. Why should they? They were doing their jobs. The hostile environment was never a secret. The system will remain unfair unless we [the public] fundamentally rethink our approach to migration.

But it is well recognised<sup>5</sup> that, if a decision offends a civil servant's personal conscience, they have the right to ask to be moved to different work or, ultimately, to leave the civil service.

And some do indeed resign. I return to this subject towards the end of this chapter but here are some examples:

Richard Haviland resigned in 2019. He then released his resignation letter which stressed that his decision was 'based not on Brexit, but on what has ensued from it [including Theresa May's] refusal to be honest with the British population about the implications of [her post-referendum policy] choices'.

Alexandra Hall resigned from the Foreign Office because she felt that she was asked to lie about the likely consequences of the UK leaving the EU Single Market and Customs Union. Her 'internal struggle' will resonate with every public servant that has considered resigning because they are unhappy with what they are being asked to do. In it she draws a helpful distinction

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<sup>4</sup> See Chapter 1.3 for more detail

<sup>5</sup> Confirmed by a former Cabinet Secretary in a letter to *The Times* on 4 July 2019

between resigning because you do not agree with a policy, and resigning because you believe that a policy is unethical or even illegal.

‘My resignation came after many months of internal struggle. As I agonized over my decision, I grappled with many of the same dilemmas that have faced other public servants, in both the United States and the United Kingdom, when tasked with implementing a policy with which they do not agree, or that they consider unethical or even illegal. Is our primary duty to the elected government of the day, even when it may be breaking the law or wilfully deceiving the public? Or is our duty to some broader notion of the “public good”? If the latter, how is that to be defined, and by whom?

If we stay silent in the face of wrongdoing, do we become complicit ourselves? But if we speak out, are we breaking our pledge of impartial service to the government of the day and undermining the foundation of trust between politicians and officials? If we resign, do we let down our colleagues and institutions? Do we merely allow others with fewer scruples to fill our shoes? But if we stay on, are we knowingly violating our duty to provide ethical public service to our fellow citizens?’

Personal circumstances will affect individual decisions, of course. Age, available savings and re-employment prospects may all be relevant.

In most cases, however, the resignation decision is taken out of individuals hands. Dissenters will typically begin by politely refusing to acquiesce in dubious policy decisions, and/or gently challenging what they are being asked to do. But their dissent will be noted and – unless strongly backed by their bosses – their ‘corridor reputation’ and hence promotability will be negatively impacted. They will – rather sooner than later – find themselves in jobs where they are no longer (in the view of their Permanent Secretary) rubbing Ministers up the wrong way. And if they are themselves Permanent Secretaries they will find themselves out of a job – accompanied by a good deal of taxpayers’ cash, as happened to quite a few of them following Prime Minister Johnson’s appointment.

It is rather harder to sideline or dismiss someone who questions the very legality of a government policy. Carne Ross resigned from the British Foreign and Commonwealth Office in 2004 after giving (then-secret) evidence to the Butler Inquiry — a review set up by the British government to examine the intelligence on Iraq’s weapons of mass destruction. He had concerns about the legality of the basis for war, that the case for war was being exaggerated, and that no serious effort was being made to explore alternatives to war.

Elizabeth Wilmshurst, former deputy legal adviser in the Foreign and Commonwealth Office, threatened to resign over Iraq, in March 2003. Here is her resignation letter:

1. I regret that I cannot agree that it is lawful to use force against Iraq without a second Security Council resolution to revive the authorisation given in SCR 678. I do not need to set out my reasoning; you are aware of it.

My views accord with the advice that has been given consistently in this office before and after the adoption of UN security council resolution 1441 and with what the attorney general gave us to understand was his view prior to his letter of 7 March. (The view expressed in that letter has of course changed again into what is now the official line.)

I cannot in conscience go along with advice - within the Office or to the public or Parliament - which asserts the legitimacy of military action without such a resolution, particularly since an unlawful use of force on such a scale amounts to the crime of aggression; nor can I agree with such action in circumstances which are so detrimental to the international order and the rule of law.

2. I therefore need to leave the Office: my views on the legitimacy of the action in Iraq would not make it possible for me to continue my role as a Deputy Legal Adviser or my work more generally.

For example in the context of the International Criminal Court, negotiations on the crime of aggression begin again this year.

I am therefore discussing with Alan Charlton whether I may take approved early retirement. In case that is not possible this letter should be taken as constituting notice of my resignation.

3. I joined the Office in 1974. It has been a privilege to work here. I leave with very great sadness.

(Although she made clear her readiness to resign, Wilmshurst sought and was eventually approved to take early retirement instead.)

As well as lawyers, UK Diplomats and overseas development officials seem to hate being asked to talk nonsense or tell lies – at least when the lies are easily exposed. The dismissal of UKRep’s Ivan Rogers, for speaking truth to Prime Minister Theresa May, is another example, as was the 2021 resignation of Alexandra Hall Hall. Here are some further extracts from her account of it:

...for most of my time as a British diplomat, I felt proud about how our system functioned ... [but] ... when I was asked to brief American businesses with significant investments in the United Kingdom, I found myself struggling to maintain the line that there would be no harmful consequences for them, even if the United Kingdom left the European Union without any deal at all. I found it hard to brush aside the concerns of congressional aides working for members of the Irish-American caucus. Sometimes I had no answers to the questions that U.S. stakeholders posed to me. The internal dissonance became acute: The professional ethos of the British Diplomatic Service was that we were upstanding civil servants, steeped in integrity, who never told lies. And yet, that was precisely what I was being asked to do.

But when I relayed back to London that the talking points needed changing, or tried to persuade British Ministers passing through Washington of the need for more compelling arguments, I had little success. A few officials in London agreed with me, and for a while we chipped away to tighten the points here and there. But eventually we reached the limit of what could be achieved. Colleagues told me that the prevailing atmosphere in Whitehall meant that all civil servants had to be “on message,” and that any points which did not comport with Ministers’ preconceived notions were simply rejected. One colleague working on Northern Ireland was nearly in tears as he told me how he simply could not get his Minister to register the enormous damage that would be done to the fabric of Northern Ireland, politically and economically, if the United Kingdom left the European Union without a deal. A low point for me was when I heard a senior British

Minister openly and offensively, in front of a U.S. audience, dismiss the impact of a “No Deal” Brexit on Irish businesses as just affecting “a few farmers with turnips in the back of their trucks.”

With the public messages still containing several egregious distortions, in September 2019 I decided to submit a formal complaint to the Foreign and Commonwealth Office, identifying the specific points where I felt they had violated the civil service code of integrity and political impartiality. This had a stronger effect: I received a reply a few weeks later, telling me that the process for approving the talking points had been changed, to ensure that a career civil servant, not a political adviser, was the last person to sign off on them before they were distributed to embassies.

But although this resulted in the official talking points improving a bit, it did not stop the Prime Minister and other members of his cabinet from continuing to use the old lines, with their distortions and inaccuracies. When I briefed American audiences using the new messages, the first question would always be why the prime Minister was saying something different, to which there was no easy comeback. What I was saying was not convincing to me, and no matter how I spun it, it was not convincing to my audiences. But, in the end, my decision to leave was more personal. The internal conflict over what I was being asked to do simply became unbearable.

#### **4.3 What should you do if a Minister will not provide adequate resources?**

Ministers are frequently accused of being too ready to seek political advantage by announcing impossible or badly thought-through policy objectives, or by allocating insufficient time and resources to otherwise achievable policy objectives. Jill Rutter’s half jest summarised the underlying issues rather well:

Civil servants say to Ministers that “We won’t tell you it can’t be done if you won’t sack us when it is not done”. Maybe it is time we recognised that this constitutional pact has run out of road?

Select Committees and others have responded by recommending that it should be made easier for senior civil servants to challenge Ministers’ policy decisions in the same way as they have for many years been able to challenge a Ministerial spending decision. (Officials can already ask for a formal written ‘Direction’ if Ministers want to spend public money in a way that appears to be irregular, or improper, or to represent poor value for money.) Further information about these developments is in chapter 6. The following paragraphs consider the recent controversies, before these developments have bedded in.

#### **Austerity**

The austerity policies of PMs David Cameron and his successors caused difficulties for all officials who were leading front line public sector organisations. What were they to say and do, internally and externally?

First, of course, they were under a profound duty to speak truth to power and to be very clear about the consequences of budget cuts. Their warnings should have drawn attention to the likelihood of life-changing consequences such as more frequent accidents, violence and deaths.

There were for instance six Justice Secretaries between 2009 and 2017 who between them required Prison Service staffing to fall by 25%. One has to hope that they were clearly warned that prisons there would be many more assaults on staff (they doubled over that period) and many more prisoner suicides. (Total deaths in custody rose from 169 in 2009 to 354 in 2016, including 104 and 206 suicides respectively.)

It will also be interesting to read, in due course, whether Department of Health officials required their Ministers to acknowledge the risks involved in running down pre-Covid pandemic precautions, and whether DCLG Ministers were aware of the risks taken by their department and agencies that probably helped cause the Grenfell Tower fire.

But what should those leading delivery organisations say to their staff and their external 'customers', if that is the right word? Permanent Secretaries and their policy-making colleagues can remain anonymous but those in other leadership positions cannot. There have been particularly stark problems in the criminal justice system.

### **Criminal Justice**

Durham Chief Constable Mike Barton set an excellent example when he said that ...

"You can hold me to account on the quality and the efficiency with which we do our work. But you can't hold me to account on the resources that we have. That is decided by others.... There has been a 30% real term cut in police resources since 2010."<sup>6</sup>

But others were less honest.

Richard Foster, the retiring Head of the Criminal Cases Review Commission, was challenged on the Today Programme in October 2018 by Liam Allan, a young man whose life had been nearly destroyed by police service mistakes. The CCRC, it transpired, was now working with only 30-40% of resources that had previously been made available to it but - according to Mr Foster - its performance was just fine. Mr Allan was not persuaded.:

"... now is the time for everyone to turn round and say " You know what, we'll hold our hands up ... we aren't at the place we all want to be" ... [It would set an] example [for others in the system] if the CRRC [were] willing to accept that it is under resourced and can't to the inquiries properly".

Susan Acland-Hood (the Chief Executive of *the Courts and Tribunal Service*) and Alison Saunders (the Director of Public Prosecutions (DPP)) were later criticised for acquiescing in and defending or down-playing staff and budget cuts. Cuts in legal aid exacerbated the problems. The result was well documented in the media and also in *the Secret Barrister's 'Stories of the Law and How it is Broken'*. By way of contrast, Ms Saunders' successor, Max Hill, warned the Commons Justice Committee, only a few weeks after his appointment, that the Crown Prosecution Service could "absolutely not" take any more staff cuts, having already lost 30% of its staff over the previous five years.

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<sup>6</sup> Radio 4 Today Programme, May 2018

It was, to many, particularly galling that DPP Alison Saunders' gave an interview shortly before she retired in which she said that her organisation and the police were critically short of the skills and resources required to combat crime. *The Secret Barrister* responded:

“Gosh. If only this Alison Saunders, talking honestly about the chronic under-resourcing of the Crown Prosecution Service, had been DPP. Instead for 5 years we've had that obliging civil servant blithely insisting that all was well as the CPS burned.”

I chipped in, via Twitter, with the standard line that civil servants may not publicly attack Ministers' resourcing decisions and this generated some interesting further comments and questions.

- *The Secret Barrister* pointed out that “Alison Saunders went out of her way to pretend that there were no problems. That was the issue that really grated.”
- Michael Heery pointed out that officials in the health sector had gone much farther than the DPP in talking about the effect of cuts.
- AJP Wood asked “Surely civil servants already aren't allowed to be anything other than honest per the Civil Service Code?:- [civil servants] must not deceive or knowingly mislead Ministers, Parliament or others.”
- And ex-Home Office Lorraine Rogerson noted that budget cuts undermined the constitutional independence of the DPP who needed to maintain the support of the criminal bar and the police.

Where does all this leave us?

It seems to me that civil servants such Ms Acland-Hood and Ms Saunders acted constitutionally correctly in declining even to express mild concern about the consequences of Ministers' resourcing decisions. They cannot be as free as those running the health service (who are not civil servants) nor as free as those civil servants running non-Ministerial government departments<sup>7</sup> such as some of the regulators.

**However** ... as AJP Wood pointed out, senior officials have an overruling duty (under the Civil Service Code) to be honest<sup>8</sup>. If they don't feel able to tell the whole truth, they should keep quiet and make it clear that they are doing so at the request of Ministers. They should not write or speak in a way that suggests that all is well with their organisation when it is clear that there are problems.

And we do not have to continue to accept the current constitutional position. Dissenting voices, challenge, and creative tension should all be welcomed and indeed promoted if good services with integrity are to be delivered and improved. This point was made with some force by the Chair of the Public Accounts Committee, speaking to *the Times* in June 2018:

Britain should change a “crazy” system that stops Ministry of Defence officials from publicly voicing concerns about the armed forces budget for fear of harming their careers, a senior MP has said. Meg Hillier, chairwoman of the Public Accounts Committee, expressed her frustration at hearing evidence from several permanent

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<sup>7</sup> <https://www.civilservant.org.uk/information-definitions.html>

<sup>8</sup> See Chapter 2.3.

secretaries and military chiefs who failed to reveal the extent of a funding hole in the MoD's plans.

"I rail against the system which gets civil servants in front of us unable to say something that they would say is against government policy," Ms Hillier, who has served on the committee for seven years, told *The Times*. Accounting officers should be telling us there is a real challenge here in the budget. You don't get that enough. I think that there is a very big concern about how a civil servant can't say 'We can't afford this, we are going to have to cut something'. They would stray into what they would say is political territory and policy decisions, and they are not allowed to do that because that is what the Ministers do. It is a crazy system."

I return to this question in Chapter 6.

#### **4.4 What should you do if a Minister asks you to do something illegal or improper?**

Ministers are in practice very unlikely to ask officials to do something illegal - or 'improper' as (narrowly) defined by the Treasury and the Public Accounts Committee<sup>9</sup>. On the rare occasions that they do so, colleagues, including both senior Ministers and senior officials, will usually strongly resist such requests. You should certainly not comply with such a request, and you should immediately alert more senior colleagues, probably including your department's legal adviser.

It is telling that I can think of very few examples of such behaviour, but here are some possible examples:

##### **Suez**

Following the 1956 Suez Crisis, Cabinet Secretary Sir Norman Brook failed to prevent Sir Anthony Eden from lying to the House of Commons ('there was not foreknowledge that Israel would attack Egypt'), He then obeyed the PM's instruction to destroy documents, including the Sèvres protocol, which confirmed the collusion between Britain, France and Israel.

I doubt that any modern Cabinet Secretary would accept such an order, not least because of the likelihood of his/her behaviour being exposed. But they would have to think hard about what to do if a Prime Minister were to lie to Parliament. If the lie had been inadvertent, they would need to make sure that the PM was aware of this so that it could if necessary be corrected. If the PM were reluctant to correct a lie then a Cabinet Secretary would need to decide whether it was in the clear national interest to expose the lie, depending very much on whether it might have serious consequences.

##### **'Spycatcher'**

The 1987 book *Spycatcher*, by ex-MI5 officer Peter Wright, made explosive claims about the UK's espionage operations. The government tried to stop its publication, including in Australia where

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<sup>9</sup>Propriety is the further requirement that expenditure and receipts should be dealt with in accordance with Parliament's intentions and the principles of Parliamentary control, including the conventions agreed with Parliament.' [https://www.civilservant.org.uk/library/2004\\_Regularity\\_Propriety\\_VFM.pdf](https://www.civilservant.org.uk/library/2004_Regularity_Propriety_VFM.pdf) - Chapter 5

Cabinet Secretary Robert Armstrong was forced to reveal in court that he had been 'economical with the truth' when he signed a letter that was deliberately misleading.

But a more serious issue was revealed when previously secret documents were declassified in December 2023. According to *the Financial Times*, Robert Armstrong also told the Australian court that it was totally untrue that he had in 1980 helped journalist Chapman Pincher write a sympathetic article about MI5 Chief Roger Hollis who was, for a time, suspected of being a Soviet agent. (Peter Wright's book contained a section about Hollis.) The papers published in 2023 revealed that this was a pure lie.

As with Suez (see above) I hope that no modern Cabinet Secretary would lie to a court, whether in the UK or overseas, not least because of the likelihood of their behaviour being exposed.

### **Export Guarantees**

There was one occasion - many years ago - when a trade minister and his officials were very keen to offer a government backed guarantee to facilitate a major export to a purchaser who was assessed as having a high risk of defaulting when it came to paying for the goods. The guarantee needed Treasury approval which was not forthcoming so, as a Friday evening deadline approached, the Minister ordered his officials to issue the guarantee anyway, which they did. Treasury Ministers were not amused and the trade minister was reprimanded, as were the officials for having complied with his instruction. But HMG stood behind the guarantee.

### **The Northern Ireland Protocol**

A Northern Ireland Minister, Kevin Poots, ordered his officials to cease work on the construction of Border Control Posts required by the NI Protocol. They refused. Further detail is in chapter 2.2.8.1.

### **Rendition**

I understand that Jack Straw's and other Ministers' decisions that the UK would cooperate with requests in 2004 to transfer terrorist suspects to American custody did not involve UK illegality.

An earlier example of rendition was the forced removal of individuals from a British Overseas Territory, the Chagos Islands, which host an American base on Diego Garcia. Again, as no UK laws were broken, I suspect that British civil servants were permitted to accept Ministers' decisions.

### **The Johnson Government**

We may in due course add Boris Johnson's Prime Ministership to the above list. Well informed observers and commentators suggested that the 2019-22 government may have been the least serious, least effective and most dishonest administration in British history. Most of Johnson's lies aimed to avoid taking personal responsibility for policy failures, or to defend indefensible behaviour such as partying during the Covid pandemic.

Even more serious, perhaps, were Mr Johnson's attempts to prorogue (suspend) Parliament so as to avoid scrutiny at the height of the 2020 Brexit crisis, and two attempts to legislate to evade responsibility for unwelcome aspects of the post-Brexit legal agreement with the European Union that he himself had praised and signed.

At the time of writing, shortly after Mr Johnson's resignation in the summer of 2022, the extent to which he had involved (corrupted?) the civil service remained unclear, though the Sue Gray 'Partygate' report<sup>10</sup> showed that many senior officials had partied alongside the Prime Minister when most of the population were scrupulously following Covid lockdown guidelines. Here is David Allen Green's 2022 description of Boris Johnson's government before Mr Johnson resigned:

The real problem with this government is not that it acts unlawfully or illegally. The problem is that it acts as if it is an outlaw - that for the government, law does not apply in the first place.

It is not so much that the government cares about breaking any law, or about whether it has any legal basis for what it does. Instead, the government does not see law as even applying to it. To use a lovely Scottish word - the government acts as if it is '*outwith*' the law.

The law applies to little people, and not this government. '*Law and Order*' is a campaigning slogan, but not a principle of government.

This government engages in three types of lawlessness.

- First, it often conducts itself without any lawful basis.
- Second, it seeks to introduce legislation that will enable it to freely break the law.
- Third, it permits law-breaking at the highest level.

It is difficult to imagine a government with less respect for law, and for the rule of law.

This is not so much a government of law breakers, but a government of outlaws.

The law is an inconvenience which can be disregarded as and when it is inconvenient.

## **International Law**

Northern Ireland Secretary Brandon Lewis conceded in 2020 that draft post-Brexit legislation (the Internal Market Bill) would, if enacted, breach the Brexit Withdrawal Agreement in a "specific and limited way". This led the Permanent Secretary to the Government Legal Department, Sir Jonathan Jones, to resign. The most concerning elements of the Bill were later removed.

Three years later, ministers introduced draft legislation (concerning the removal of asylum seekers to Rwanda) which also appeared to breach international laws and treaties. As of January 2024, this legislation is still going through Parliament.

The implications for civil servants are considered at Chapter 2.2.8.1 above.

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<sup>10</sup> [https://www.civilservant.org.uk/library/2022-Sue\\_Gray-Partygate\\_report.pdf](https://www.civilservant.org.uk/library/2022-Sue_Gray-Partygate_report.pdf)

#### 4.5 What should you do if you believe that a previously legitimate government is edging towards authoritarianism?

Brian Klaas observed that many of the leaders we loathe most were elected by our fellow citizens - from Hitler and Papa Doc Duvalier to Hugo Chavez, Rodrigo Duterte and Vladimir Putin.

'Corruptible people are disproportionately drawn to power, disproportionately good at wriggling their way into it and disproportionately likely to cling onto it once they've got it<sup>11</sup>.'

What should civil servants do if an authoritarian gains power in the UK? Here is the classic answer, again from that 1983 Reith Lecture:

Notwithstanding the loyalty of a civil servant to the government, his conscience should clearly require him to oppose actions which are either unlawful, unconstitutional, or which involve some great affront to human values. In the last analysis he must be prepared to resign his appointment. But in such circumstances, I believe, he should be relieved of his normal obligation to refrain from commenting on policies for which he may have drafted official advice.

Stefan Czerniawski offered a fascinating analytical framework in *Civil Servants Civilly Serve*<sup>12</sup> in which starts by considering the boundaries to the legitimacy of politicians' decisions. He then considers how civil servants might respond if and when previously legitimate governments develop clear authoritarian tendencies.

Here are some extracts, with emphasis added:

- 'There is a simple answer, which is to carry on regardless. That is the answer still being assumed, based fundamentally on the idea that the government remains the government until it stops being the government and that, for as long as it does so, it is not for the civil service to look behind the formalities of its continuing existence or to question its authority.
- That position has some attractions: we don't want to be in a world where the civil service takes it on itself to decide whether it likes a government enough to be prepared to work for it. But there is also a profound weakness ... **There is no shortage of examples, historical and modern, of states which have kept the forms of democratic government while edging towards authoritarianism. The difficulty is that when those forms fall away, it's generally too late to do much about it.** Before that point, though, there is inevitably judgement and ambiguity, with a very understandable temptation to see the continuity of what is legitimate and fail to see the discontinuity to what is illegitimate.
- What should civil servants do if those boundaries are reached and crossed? In principle the answer to that is simple. **At the point any civil servant judges that the democratic legitimacy of Ministers has broken down, they must also accept that their ethical authority has also broken down. Whatever a civil servant does after that, they do as an independent moral agent, personally responsible for their decisions and actions. They may nevertheless choose to continue, accepting that responsibility. Or they may choose to walk away.**

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<sup>11</sup> Leaders, and how to get the right ones. Sunday Times 16 January 2022.

<sup>12</sup> <https://www.publicstrategist.com/2019/10/civil-servants-civilly-serve/>

- The institution, of course will remain. Authoritarian governments have civil services, just as democratic ones do. But the surface form hides a profound difference. In such a civil service, loyalty is ultimately to the holders of power, not to the idea of good government, and the consequences are very different. Those who choose to be part of them are choosing to accept those consequences.

Alexandra Hall agrees:-

- There will always be ambiguity — because who is to determine what is unlawful, unconscionable, or unethical? There will always be a different point of view. In many cases, the government may not actually be breaking the law, but nevertheless is acting in a manner which wilfully deceives the public over the true nature and consequences of its policies. Arguably, civil servants, in such cases, have a duty to speak out to ensure the electorate has the facts, but this runs the risk of civil servants being perceived as being political, or as trying to influence an election.
- In such circumstances, where doubt will always exist and criticism is almost certain, the only viable solution for a conflicted civil servant is to be accountable to themselves. Ultimately, the decision has to come down to a matter of personal judgment and conscience. As I put it in my own resignation letter, “each person has to find their own level of comfort.” You don’t have the right to change policy — that is for elected politicians and the ultimate verdict of voters. But you do have a right to your own personal conscience, and a right not to be a part of something you believe to be unethical.

**Examples** are thankfully rare, at least in the US and UK. But many from across the political spectrum have recently been able to point to some very worrying signs of authoritarianism in both the Trump administration and in the Johnson Government’s lack of interest in rational decision making<sup>13</sup> and disdain for the courts and for Parliament<sup>14</sup>. Two important Lords committees have published reports respectively entitled

- Government by Diktat: A call to return power to Parliament<sup>15</sup> - and
- Democracy Denied? The urgent need to rebalance power between Parliament and the Executive<sup>16</sup>.

I would therefore class Jonathan Jones’ resignation as a response to excessive authoritarianism. Mr Jones was the chief civil service lawyer who resigned in September 2020 over the government’s announcement that it intended to breach international law “in a limited and specific way”. Interviewed later he said that his view, aside from the legal principle involved, was that the approach was ...

“completely bonkers and hugely damaging ...

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<sup>13</sup> Hannah Arendt believes that authoritarian leaders are incapable of the serious thinking and analysis that is involved rational decision making.

<sup>14</sup> Historian Richard J Evans wrote that ‘democracies die when politicians give up on their own parliaments’ and that ‘By proroguing [Parliament], Johnson signals his contempt for MPs’.

<sup>15</sup> <https://committees.parliament.uk/publications/7941/documents/82225/default/>

<sup>16</sup> <https://committees.parliament.uk/publications/7960/documents/82286/default/>

... the government... was utterly disreputable [in] saying publicly that it was prepared ... to break the terms of the treaty which it had concluded and indeed, implemented into UK law only months before. That seemed to me to be disgraceful”.

He said in a subsequent interview that he was perfectly satisfied that he did the right thing but stressed that:

“I never, for a moment, tried to persuade anybody else that they should go. Plenty of people provided moral and personal support but in the end, this was a highly personal decision for me, and others took their own decisions. Because the business of government has to go on.”

#### 4.6 The Effectiveness Trap

Can an unhappy official achieve more by leaving (perhaps with significant publicity) - or by staying and seeking to improve things from within?

Not everyone who feels conflicted over government policy chooses to leave. Some make the decision to stay, and try to be a force for good from within. Alexandra Hall quotes ex-US Ambassador Volker who does not think it is appropriate for civil servants to resign simply as a way of protest: He reserved his strongest criticism for those whom he believes tried to undermine the Trump administration from within, because in his view that only exacerbated distrust and fed the narrative of the existence of a deep state:

“The only reason to resign is as a matter of personal choice. It’s not about changing the world but whether in good conscience you can continue what you are doing. The U.S. and U.K. are democracies, and the people who are elected have the right to decide. They have the right to make policy. If you don’t like it, that’s your issue. You can express yourself and have a clear conscience, but you can’t expect it to change policy.”

Mark Esper was US Secretary of Defense reporting to Donald Trump. Here are a few paragraphs from his autobiography *A Sacred Oath*:

At times like this, I asked myself why I didn’t resign. This was the existential question of the Trump administration: Why did good people stay even after the president suggested or pressed us to do things that were reckless, or foolish, or just plain wrong? Why did we remain even after he made outrageous or false statements, or denigrated our people, our departments, or us?

I wrestled with these questions many times during my tenure, and especially in the months following the events of June 1. It demanded a lot of soul-searching, reaching back in my upbringing, my education at West Point, and my training in the Army, studying historical examples, speaking with my predecessors in both parties, thinking hard about my oath, and talking it through with my wife. One more than one occasion, Leah would say to me, “As your wife, please quit. As an American citizen, please stay.”

Quitting in outrage would have made me feel good in the moment – it would have saved me a ton of stress and criticism. News outlets and social media would likely hail me as a “resistance” hero. However, I didn’t think it was the right thing to do *for our*

*country*. And as I told a reporter once near the end of my tenure, “my soldiers don’t get to quit” when the going gets tough, so I won’t either. I agonized nonetheless. Many of us did.

There was another major concern I had to factor into the equation: Who would replace me? There likely wasn’t enough time for the President to nominate and the Senate to confirm a new defense secretary. Nevertheless, Trump could certainly place a true loyalist as acting secretary. And given enough time, real damage could be done. We saw this earlier in the year when he installed Ric Grenell as the acting Director of National Intelligence. There were a number of people in the administration who would willingly do Trump’s bidding, and probably even his more extreme dictates, and it deeply concerned me.

James Thomson famously described ‘the effectiveness trap’ in his analysis of the disastrous Vietnam War – *How Could Vietnam Happen? – An Autopsy* – and it makes for both entertaining and sobering reading: The effectiveness trap is ...

... the trap that keeps men from speaking out, as clearly or often as they might, within the government. And it is the trap that keeps men from resigning in protest and airing their dissent outside the government. The most important asset that a man brings to bureaucratic life is his ‘effectiveness’, a mysterious combination of training, style, and connections. The most ominous complaint that can be whispered of a bureaucrat is: “I’m afraid Charlie’s beginning to lose his effectiveness”. To preserve your effectiveness, you must decide where and when to fight the mainstream of policy; ... . The inclination to remain silent or to acquiesce in the presence of the great men – to live to fight another day, to give on this issue so that you can be “effective” on later issues – is overwhelming.

Former FBI Director James Comey also summarised the problem very well:-

It starts with your sitting silent while [President Trump] lies, both in public and private, making you complicit by your silence. In meetings with him, his assertions about what “everyone thinks” and what is “obviously true” wash over you, unchallenged ... because he’s the president and he rarely stops talking. As a result, Mr. Trump pulls all of those present into a silent circle of assent. ...

I must have agreed that he had the largest inauguration crowd in history because I didn’t challenge that. Everyone must agree that he has been treated very unfairly. The web building never stops. From the private circle of assent, it moves to public displays of personal fealty at places like cabinet meetings. While the entire world is watching, you do what everyone else around the table does — you talk about how amazing the leader is and what an honor it is to be associated with him.

So you are well and truly trapped. A pathetic courtier if you stay. A hypocrite if you eventually leave.

Mr Comey presumably has some sympathy for Dr Deborah Bix who was forced to sit, looking down at her shoes, whilst President Trump suggested that Americans might inject bleach in order to treat COVID-19. Others, however, were not so forgiving and argued that she could

have saved hundreds of thousands of lives if she had stood up to the President during the pandemic's first surge.

In short, it behoves us all to bear in mind the reflections of the protagonist in Ivan Klima's *Judge on Trial*:- "We commit crimes, or at least we acquiesce in them, so we can go on leading normal lives. But we can never live normally again once we are implicated."

END of Chapter 4