



CARDOZO

Benjamin N. Cardozo School of Law

LARC @ Cardozo Law

Online Publications

Faculty Scholarship

7-23-2019

Gandhis of the Deep State

Michael E. Herz

Benjamin N. Cardozo School of Law, herz@yu.edu

Follow this and additional works at: <https://larc.cardozo.yu.edu/faculty-online-pubs>



Part of the [Administrative Law Commons](#), [Jurisprudence Commons](#), and the [Law and Politics Commons](#)

Recommended Citation

Herz, Michael E., "Gandhis of the Deep State" (2019). *Online Publications*. 46.

Available At <https://larc.cardozo.yu.edu/faculty-online-pubs/46>

This Article is brought to you for free and open access by the Faculty Scholarship at LARC @ Cardozo Law. It has been accepted for inclusion in Online Publications by an authorized administrator of LARC @ Cardozo Law. For more information, please contact larc@yu.edu.

Gandhis of the Deep State

Author : Michael E Herz

Date : July 23, 2019

Jennifer Nou, [Civil Servant Disobedience](#), 94 *Chi.-Kent L. Rev.* 349 (2019).

It is a truism that agency organizational charts are at least in part aspirational or idealized. The political appointees at the top lack perfect control over the career employees beneath them in the hierarchy. When all are rowing in the same direction, such agency costs matter little and may go unnoticed. But suppose they are not. What if they barely perceive themselves as in the same boat?

Right now, in many or most federal agencies, it seems that the always present gap between political and career officials is extraordinarily, perhaps unprecedentedly, wide. We see [calls for](#) and [examples](#) of outright [defiance](#). The historical moment raises the question: Can direct disobedience by agency rank and file ever be justified?

Here, in [Civil Servant Disobedience](#), [Jennifer Nou](#) offers an answer.

In two much-read blog posts, [Bureaucratic Resistance from Below](#) and [Taming the Shallow State](#), both themselves the subject of a [previous jot](#), Nou laid out a valuable taxonomy and practical guide to steps that both sides can take in these disputes. *Civil Servant Disobedience* is a different sort of project. First, Nou here focuses solely on the most extreme forms of civil servant “resistance.” This is not about job slowdowns, giving a miss to particular assignments, intentionally failing to understand, prioritizing the wrong tasks, or subtle undermining. This is about direct and overt defiance. Second, she assesses this practice from a more abstract and normative perspective.

The first step, of course, is definitional. For Nou, civil servant disobedience involves “conscientious [i.e., serious, sincere, and based on conviction] and public [i.e. visible] acts of defiance against political appointees” (Pp. 352, 355) by subordinate career staff—“overt, good-faith acts of protest by civil servants acting in their official capacity in violation of executive directives.” (P. 353.) Thus, it is the public employee equivalent of traditional acts of civil disobedience by private citizens, undertaken in the actor’s official capacity.

Nou’s premise, appropriately, is that it is extremely hard to justify such actions. After all, they violate both statutory provisions and settled norms and are at least superficially undemocratic. But regular old civil disobedience also violates laws and norms, and in the right circumstances it is not only understood to be permissible, it is celebrated. Drawing on philosophical literature regarding civil disobedience generally, Nou identifies the conditions under which civil servant disobedience is justified.

Given the constraints of the Jot form, I should just cut to the chase. For Nou, the prerequisites for legitimate civil servant disobedience are:

- A breakdown of the system of “reciprocal hierarchy.” Under many different theoretical understandings of the administrative state, bureaucracies only function properly in conditions of “reciprocal hierarchy.” Yes, there is an organizational pyramid, with the boss at the top exercising control. At the same time, there must also be opportunities for information, expertise, and ideas to flow upward. Political appointees do not have to adopt the views of the civil servants, but they must give those views attention. If the hierarchy is not reciprocal—the upward flow of ideas and expertise is blocked—disobedience can be justified and “understood as a form of bureaucratic process-perfection.” (P. 366.)
- Exhaustion of administrative remedies. Nou does not use this phrase, but it captures what she is asserting.

Before turning to disobedience, the civil servant must first have explored all non-futile internal mechanisms of protest and dissent—speaking to colleagues and superiors, perhaps going to the Inspector General, perhaps the Merit Systems Protection Board (MSPB), and so on. Civil servant disobedience is a last resort.

- Observance of professional norms; essentially, protestors should stay in their lane, limiting their disobedience to matters on which they have relevant expertise and complying with the norms of their profession even while violating the norms of their workplace.
- A willingness to accept the legal consequences of one's actions.
- A clear violation by the powers that be of a relevant value. These values include legality, scientific integrity, or morality. Nou's focus is on the first of these—the order that is clearly illegal—but she is alert to the possibility that a legal order may be so morally repugnant as to justify disobedience.

(I might offer three very quick comments on this checklist. First, as to the last item, Nou does not discuss the *importance* (by what metric?) of the value violated or the *extent* of the violation, only its *clarity*. That strikes me as too narrow a focus. Second, I wonder whether a European-style proportionality test might not be helpful here; the disobedience should be proportional to its justification. Third, one wonders whether a civil servant ever has not just the *option* but a *duty* of disobedience; that question goes unanswered.)

The article's final section briefly touches on two further considerations. First, Nou considers the argument that civil servant disobedience is never justified, and never comparable to regular civil disobedience, because the government employee always has the option of exit. She can just quit. ([Elliott Richardson](#) leaps to mind, though as a political appointee he is not a directly relevant example.) In a somewhat inconclusive discussion, Nou points out that exit has its own set of harms, to the government and to the individual, so it is not clear that saying "so quit if you don't like it" in fact is much of a response. Second, she acknowledges that one additional harm from civil servant disobedience, not factored into the earlier discussion, is that it will inevitably produce a presidential backlash and likely do harm to effective administration in general for some time after the immediate instance.

One might wish that the question of civil servant disobedience was moot or purely academic. Alas, its salience seems only to grow. Nou does not offer her schema as definitive or complete. So it seems unlikely that this article will be the last word on the subject. But this is an enormously useful first word in what is likely to be a vital scholarly, and practical, discussion.

Cite as: Michael E Herz, Gandhis of the Deep State, JOTWELL (July 23, 2019) (reviewing Jennifer Nou, Civil Servant Disobedience, 94 Chi.-Kent L. Rev. 349 (2019)), <https://adlaw.jotwell.com/gandhis-of-the-deep-state/>.