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## Ministers' Business Appointments and Criminal Misconduct

Jeremy Horder\*

**Abstract:** The offence of misconduct in office has an important role to play in the deterrence and punishment of corrupt conduct engaged in by officials. However, the offence has been under-used against politicians. There should be a more politically engaged approach by the CPS and the courts to change this.

There should be a greater willingness to charge Ministers whose ethical behaviour in taking up lucrative opportunities upon leaving office is a gross breach of the public's trust, even if that involves some extension of the scope of the misconduct offence.

### **1. The case for using the misconduct offence against Crown servants.**

In English law, the offence of misconduct involves the following elements:

- (A) a public officer acting as such;
- (B) wilfully neglects to perform his or her duty and/or wilfully misconducts himself or herself;

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(C) to such a degree as to amount to an abuse of the public's trust in the office holder;

(D) without reasonable excuse or justification.<sup>1</sup>

The offence has been widely criticised for its uncertainty and breadth.<sup>2</sup>

I will not pursue that criticism here, although I will be concerned in due course with one respect in which the offence may in fact be too restrictive. By contrast with the offences under the Bribery Act 2010,<sup>3</sup> the misconduct offence does not apply if the relevant part of the defendant's conduct is connected to his or her *past* performance of a public function, rather than taking place while he or she is in public office.<sup>4</sup>

In so far as the criticisms in terms of uncertainty and breadth hold good, though, the brunt of any consequential risk of injustice has been borne principally by criminal justice officials, rather than by any other category of public official (such as Members of Parliament). For example, Sjölin and Edwards' research has revealed that when the offence has been used in an attempt to deter and punish various manifestations of sexual misconduct, the defendants are

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<sup>1</sup> *Attorney-General's Reference (No. 3 of 2003)* [2004] EWCA Crim 868, para 61.

<sup>2</sup> See e.g. Law Commission, Law Commission, *Reforming Misconduct in Public Office: A Consultation Paper* (Law Com. 229, 2016), at para. 2.18.

<sup>3</sup> See section 4(3).

<sup>4</sup> See text at n.69 below for further discussion.

overwhelmingly criminal justice officials.<sup>5</sup> In their examination of reported and unreported cases of this kind, dating back to 2002, 36 defendants were police officers or police employees, 15 worked in prisons, 4 were probation officers, 2 were Council CCTV operators, and there was one Church of England cleric and one Court Clerk. Two MPs were investigated, but not charged.<sup>6</sup>

Something these figures also tell us is that prosecution of the offence of misconduct has been used as a way of seeking to mark out lines which must in no circumstances be crossed (involving *completely* unacceptable - not just regrettable or inappropriate - conduct), when criminal justice officials, in particular, engage in sexual contact in the course of their duties. Just as actions in tort have been used to vindicate rights, such as a right to education,<sup>7</sup> so, over time, the prosecution of the criminal law has been used to hammer out certain fundamental duties. Perhaps, as Sjölin and Edwards forcefully argue, when sexual misconduct by public officials is in issue, it would make more sense to seek to perform this task through reform of the Sexual Offences Act 2003.<sup>8</sup> Quite apart from the well-known virtues of codification, such a step would also make it possible to take matters

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<sup>5</sup> Catarina Sjölin and Helen Edwards, 'When Misconduct in Public Office is Really a Sexual Offence' (2017) 81 *Journal of Criminal Law* 292.

<sup>6</sup> Sjölin and Edwards, n. 5 above.

<sup>7</sup> See e.g. Donal Nolan, 'New Forms of Damage in Negligence' (2007) 70 *MLR* 59.

<sup>8</sup> Sjölin and Edwards, n.5 above.

further, by paying attention to sexual exploitation by those, like doctors, holding key powers not only within but also outside public office contexts.

However, Sjolín and Edwards' analysis raises a broader question. Why should the offence of misconduct not be used, in a parallel way, to mark out lines that politicians must in no circumstances cross, focussing on completely unacceptable conduct relating (for example) to the use of office in connection with personal gain? It may be argued that there is a special responsibility on prosecutors (in bringing cases before the courts) and on the courts (in taking a non-restrictive interpretive approach to the law) to use their respective powers to undertake this task. Legislators have a purpose of their own to serve - minimising the scope and impact of scrutiny of their conduct - in any reform of the offence as it applies to politicians.<sup>9</sup> Legislators' risible efforts to bring the criminal law to bear on their self-serving financial abuses<sup>10</sup> have, to date, inspired no confidence that they understand the seriousness with which the public regards financial misconduct by

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<sup>9</sup> An argument to this effect can be found in Jeremy Horder, *Criminal Misconduct in Office: Law and Politics* (Oxford; Oxford University Press, 2018), chs 2.4 and 4.13.

<sup>10</sup> I refer to the minor offence Parliament created to deal with the major scandal of fraudulent expenses abuse by MPs, under the Parliamentary Standards Act 2010, s.10.

MPs, or that they are prepared to create the necessary deterrents to engaging in such misconduct.<sup>11</sup>

In the eighteenth century, judges and commentators saw the application of the criminal law as an equal partner, alongside the use of judicial review, as a ‘republican’ means of controlling and deterring the abuse of public power.<sup>12</sup> For example, Hawkins explains that Justices of the Peace may be prosecuted and punished, ‘if they abuse the authority with which they are entrusted’,<sup>13</sup> and goes on to explain the relationship with mere illegality (appropriately dealt with by judicial review) thus:

The Court of King’s Bench...will never grant an information against a Justice of the Peace for a mere error in judgment even when a Justice does an illegal act...but if they act improperly *knowingly*, an information shall be granted.<sup>14</sup>

Similar formulations of the law can be found in a number of eighteenth century cases, (with Lord Mansfield often playing a key role) developing this close relationship between the role of the criminal law, and the law of judicial review, in relation to the supervision of public

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<sup>11</sup> See e.g. Nicholas Allen and Sarah Birch, *Ethics and Integrity in British Politics* (Cambridge: Cambridge University Press, 2015), who found that whereas only 15% of MPs regarded their use of allowances to employ their relatives as a kind of personal corruption, over 54% of the public so regarded it.

<sup>12</sup> See the discussion in Jeremy Horder, n. 9 above, ch 3.

<sup>13</sup> Sir William Hawkins, *Pleas of the Crown*, vol ii, BK 2, sec 74.

<sup>14</sup> *Ibid.*, citing *Rex v Jackson* (1737) 1 Term Rep 653 (my emphasis).

decision-making.<sup>15</sup> In *R v Young*,<sup>16</sup> for example, Mr Justice Denison, giving the judgment of the King's Bench expressed the view that:

But though discretion does mean (and can mean nothing else but) exercising the best of...judgment upon the occasion that calls for it; yet, if this discretion be wilfully abused, it is criminal, and ought to be under the control of this court.<sup>17</sup>

In modern times, judicial review has developed and expanded out of all recognition, as a means by which the courts can discharge this supervisory function, even in controversial political contexts (as when it concerns Ministerial conduct). By contrast, the public role of the criminal law has in this respect atrophied. Yet, there is an important role in constitutional contexts for the criminal law, and for the misconduct offence in particular, in deterring what Hawkins calls knowing impropriety, through the threat of punishment. This is where, (a) the misconduct is so egregious that it meets the test set out in *Attorney-General's Reference (No. 3 of 2003)*,<sup>18</sup> and in particular where (b) the impropriety is outside the scope of judicial review, and there is no other means by which it can effectively be challenged. A good example concerns public officials', and especially Ministers',

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<sup>15</sup> See e.g. *R v Young* (1758) 1 Burr 556, and the discussion in Jeremy Horder, n. 9 above.

<sup>16</sup> (1758) 1 Burr 556.

<sup>17</sup> *Ibid.*

<sup>18</sup> See n. 1 above.

unauthorised decisions to take up lucrative opportunities in the private sector, a practice known as ‘revolving out’.<sup>19</sup>

## 2. Ministers’ Paths to Enrichment and The Work of ACoBA

Get into Parliament, make tiresome speeches; you will have great offers; do not accept them at first, then do: then make great provision for yourself and your family.<sup>20</sup>

Under a ‘republican’ constitution, perhaps MPs would give up all sources of income bar their Parliamentary salaries, to focus entirely on the promotion of the public interest;<sup>21</sup> but we do not live under such a constitution. Accepting this, it might nonetheless be possible to insist in law that any outside appointment to be taken up (or retained) by an MP must first pass a ‘public interest’ test. To be sure, in order to avoid undue restraint of trade, such a test would have to encompass the need for an MP to find appropriate employment, if not re-elected. However, crucially, the test would exclude appointments the sole purpose of which is simply to ‘feather one’s nest’. Something along these lines, albeit somewhat more restrictive, has been proposed by the House of Commons Public Administration and Constitutional Affairs Committee, which has suggested that:

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<sup>19</sup> The phrase of Stuart Wilks-Heeg, ‘Revolving Door Politics and Corruption’, in David Whyte (ed), *How Corrupt in Britain?* (London: Pluto Press, 2015), at 136.

<sup>20</sup> Hans Stanley MP (1721-1780), cited by Jesse Norman, *Edmund Burke* (William Collins, 2013), at 52.

<sup>21</sup> See, generally, James A Gardner, ‘Can Political Parties be Virtuous?’ (2000) 100 *Columbia Law Review* 667; Bruce James Smith, *Politics and Remembrance: Republican Themes in Machiavelli, Burke and Tocqueville* (Princeton University Press, 1985).



The only justification for a Minister or civil servant taking public or private sector employment in a field for which they had responsibility is where they might be returning to or continuing to work in an occupation or profession where they already had an established track record and experience.<sup>22</sup>

Currently, in England and Wales, the approach is different. The Ministerial Code is (deliberately?) ambiguous on the suggestion made by the Committee in the passage just cited. The Code does state that it is the public interest that former Ministers should be able to, ‘start a new career or resume a former one’ (an unexceptionable point, made above), but it also says that it is in the public interest that former Ministers, ‘should be able to move into business or into other areas of public life’.<sup>23</sup> This is a much more open-ended understanding of the ‘public interest’ that gives far too much freedom for former Ministers to act purely for the sake of gain.<sup>24</sup>

In that regard, remuneration beyond Parliamentary salary is guided by codes of conduct, and in key instances under consideration

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<sup>22</sup> HC Public Administration and Constitutional Affairs Committee, *Managing Ministers’ and Officials’ Conflicts of Interest: Time for Clearer Values, Principles and Action*, 13<sup>th</sup> Report of Session 2016-17 (HC252, 2017), para 71.

<sup>23</sup> *Ministerial Code* (Cabinet Office, 2018), Annex B.

<sup>24</sup> The position with civil servants is more complex, because some may only have been recruited on a short-term basis, and so need much greater freedom to look for employment than a former Minister who will remain an MP: see the comments of the Chair of ACoBA, Baroness Browning: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-administration-and-constitutional-affairs-committee/the-role-and-effectiveness-of-acoba-and-the-independent-adviser-on-ministers-interests/oral/42072.pdf>., Q166.

here, by the Advisory Committee on Business Appointments (ACoBA).<sup>25</sup> There is no legally binding ethical test that an MP must satisfy before taking up an appointment. Further, the guidance offered to MPs is focused not on the need positively to satisfy a public interest test, in taking up an outside appointment, but - as we will see - more narrowly on the need to avoid certain ethical negatives (such as bribery or conflicts of interest). That gives MPs, and other public servants, much greater scope to glide between the public and private sectors. Between 2000 and 2014, no less than 600 former Ministers and high-level civil servants were appointed to over 1000 roles in the private commercial sector.<sup>26</sup>

ACoBA was set up on a non-statutory basis in 1975. Sponsored by the Cabinet Office, with eight members appointed by the Prime Minister, it provides independent advice to senior Crown servants, and to all former Ministers, on any appointments they wish to take up within two years of leaving office.<sup>27</sup> The work done by ACoBA has increased in constitutional significance. This is in part attributable to the rise of privatisation and contracting-out, which has made the boundary between public and private sectors more porous. Civil servants' knowledge and skills are now more valuable in the private

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<sup>25</sup> <https://www.gov.uk/government/organisations/advisory-committee-on-business-appointments>.

<sup>26</sup> High Pay Centre, *The Revolving Door and the Corporate Colonisation of UK Politics*, 25<sup>th</sup> March 2015, p.5.

<sup>27</sup> HC Public Administration and Constitutional Affairs Committee, n. 22 above, at 4.

sector, perhaps particularly in markets prone to producing oligopolies.<sup>28</sup> ACoBA can impose conditions, such as a waiting period, on Crown servants (but not on Ministers) seeking to take up posts in the private sector.<sup>29</sup> That is significant, in that, for example, since 1996, some 3,500 former senior military officers and Ministry of Defence officials have taken up positions in arms companies.<sup>30</sup> However, ACoBA has the power only to advise Ministers on their obligations. In 2015-16, ACoBA advised thirty-three Ministers respecting 123 applications to take up positions outside politics.<sup>31</sup> ACoBA's advice is intended to do something to ensure that (a) appointments are not made in exchange for previous favours (which, as we will see, may involve bribery), that (b) improper advantages are not gained by the new employer from inside information possessed by the Minister, and that (c) the latter does not exploit his or her former contacts within government to the new employer's advantage. We will examine these three areas of concern below.

ACoBA has been criticised as a 'toothless regulator',<sup>32</sup> but what action can it take, especially when it is Ministers whose conduct is in

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<sup>28</sup> Stuart Wilks-Heeg, n.19 above, at 138.

<sup>29</sup> Notably, though, ACoBA's remit does not extend to more junior civil servants, even though it is such officials who may be responsible for negotiating contracts.

<sup>30</sup> HC Public Administration and Constitutional Affairs Committee, n. 22 above, para 55.

<sup>31</sup> HC Public Administration and Constitutional Affairs Committee, n. 22 above, para 22.

<sup>32</sup> Ibid.

issue? ACoBA says that where it judges public concern over an appointment to be significant:

It may recommend a delay in taking up the appointment, or that for a specified period the former Minister should stand aside from involvement in certain activities, for example, commercial dealings with his or her former Department, or involvement in particular areas of the new employer's business.<sup>33</sup>

Where Ministers are concerned, ACoBA effectively relies, for any deterrent effect it may achieve, on negative media coverage of an appointment in breach of its guiding principles; but such coverage is likely to be generated only when it is newsworthy, in relation to high-profile individuals. Six of the 52 ministers taking up external appointments in 2010-11 simply failed to provide ACoBA's with advance notification of their appointment.<sup>34</sup>

In 2012, the Public Administration Select Committee recommended that ACoBA's non-statutory advisory role should be replaced by a scheme of statutory regulation under an independent

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/579754/Business\\_appointment\\_rules\\_for\\_former\\_Ministers.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/579754/Business_appointment_rules_for_former_Ministers.pdf), para 7.

<sup>34</sup> Stuart Wilks-Heeg, n. 19 above, at 137.

Commissioner, involving a code of conduct backed by a penalty regime.<sup>35</sup> It recommended, for example, that:

Appropriate civil sanctions should be available for contraventions of the legislation, and should include the possibility of sanctions against employers who hire former public servants in contravention of the rules (for example, exclusion from eligibility to bid for Government contracts).<sup>36</sup>

Any and all increased powers should clearly apply to Ministers, and not just to Crown servants. That being so, decisions about the membership of ACoBA need to be taken out of the hands of the Prime Minister.<sup>37</sup>

The Select Committee could have added that the new statutory body should have the power to sue the former public servant, or their employer, for any income (or equivalent financial gain) made in breach of the rules.<sup>38</sup> Predictably, though, the Government rejected the Select Committee's recommendations, as unlikely to produce a, 'tangible increase in compliance'.<sup>39</sup>

### **3. Keeping Political Noses out of Troughs: the Criminal Sanction.**

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<sup>35</sup> HC Public Administration Select Committee, *Business Appointment Rules*, Third Report of Session 2012-13, HC 404, <https://publications.parliament.uk/pa/cm201213/cmselect/cmpublicadm/404/404.pdf>.

<sup>36</sup> *Ibid.*, para 79.

<sup>37</sup> See text at n. 27 above.

<sup>38</sup> See Jeremy Horder, n. 9 above, at 109. I call this kind of remedial action, 'negation'.

<sup>39</sup> The Public Administration Select Committee, *Business Appointments Rules: Government Response to the Committee's Third Report of Session 2012-13*, First Special Report of Session 2014-15, HC 563, p. 9, para 32.

In France, a more republican approach is mandated by the Code Pénal. The mere creation, or toleration, of a conflict of interest between a public office holder's official position, and his or her involvement in private enterprise, may attract significant criminal penalties. Article 432-12 deals (in part) with 'revolving in', namely entering politics whilst retaining relevant business interests:

The taking, receiving or keeping of any interest in a business or business operation, either directly or indirectly, by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate who at the time in question has the duty of ensuring, in whole or in part, its supervision, management, liquidation or payment, is punished by five years' imprisonment and a fine of €75,000.

Article 432-13 deals with 'revolving out' or *pantouflage*<sup>40</sup>:

An offence punished by two years' imprisonment and a fine of €30,000 is committed by any person who, in his capacity as a civil servant or agent or official of a public administration, and specifically by reason of his office, is entrusted with the supervision or control of any private undertaking, or with the conclusion of contracts of any type with a private enterprise, or

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<sup>40</sup> 'Putting on slippers': using one's public position to secure a comfortable position upon leaving politics: Stuart Wilks-Heeg, n. 19 above, at 135.

who by services, advice or investment takes or receives any part in such an enterprise, before the expiry of a period of five years following the end of his office.

These provisions must be seen in context. Movement from the public to the private sector is common in France at the highest level. It has been estimated that 44.5 per cent of top managers in major French firms had previous experience in the senior civil service, being recruited externally and appointed to the top positions.<sup>41</sup> *Pantouflage* is common. In a 20-year career, 40 per cent of public sector finance directors have at least one spell in the private sector, a percentage that rises to 60 per cent in the course of a 30-year career.<sup>42</sup> By contrast, in Germany and the UK, only 3 per cent of top managers had previous civil service experience.<sup>43</sup> A special ethics commission (Commission de Déontologie de la Fonction Publique) is in charge of ruling on *pantouflage* secondments, although this has not always been sufficient to prevent perceived conflicts of interest.<sup>44</sup> It is, thus,

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<sup>41</sup> M Bauer and B Bertin-Mouro, *Vers un modèle européen de dirigeants? Ou Trois modèles contrastés de production de l'autorité légitime au sommet des grandes entreprises?: comparaison Allemagne, France, Grande-Bretagne*. (Abacus: Paris, 1996). A lower figure is given by Davoine and Ravasi, namely one-fifth of top managers (and a third of CEOs) with previous experience in the civil service: E Davoine and C Ravasi 'The Relative Stability of National Career Patterns in European Top Management Careers in the Age of Globalization: A Comparative Study in France/Germany/Great Britain and Switzerland' [2013] 31 *European Management Journal* 152.

<sup>42</sup> B Bouzidi, R Gary-Bobo, T Kamionka, and A Prieto 'Le Pantouflage des Énarques: Une Première Analyse Statistique', [2010] *Revue Française d'Economie*, Vol. XXV 115-146.

<sup>43</sup> See E Davoine and C Ravasi, n. 41 above. 38 per cent of university-educated top managers in France are graduates of the École Polytechnique, HEC or ENA. For comparison purposes, only 14 per cent of university-educated top managers in the United Kingdom graduated from Oxford or Cambridge.

<sup>44</sup> [http://in-formality.com/wiki/index.php?title=Pantouflage,\\_corpsards\\_\(France\)](http://in-formality.com/wiki/index.php?title=Pantouflage,_corpsards_(France)).

perhaps understandable that public procurement (which amounts to over 15% of GDP in France) is alleged to be the most corruption-prone sector in France.<sup>45</sup>

Even so, let us consider the provisions on their legal merits. A point of special importance about the second provision (Article 432-13) is that the commission of the offence does not depend on the public servant being in public office when he or she does what is prohibited. Indeed, the whole point of the offence is to capture conduct engaged in when he or she has left office ('who by services, advice or investment takes or receives any part in...an enterprise') before the expiry of a five-year period. I will come back to this point below. As is now clear, in England and Wales, no offence (or civil wrong) would, without more, be committed at all in such circumstances. This may still be true, even if the rules governing the movement from public to private sectors are completely ignored by those taking up external appointments. It is worth noting that, of such conduct, one Minister, giving evidence to the Select Committee in 2012, said:

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<sup>45</sup> <https://www.business-anti-corruption.com/country-profiles/france/>; Report from the Commission to the Council and the European Parliament, *EU Anti-Corruption Report* (February 2014), at 39 and 40 of the overall report and see Annex devoted to France. The proportion of tenders respecting which only one company made a bid (an acknowledged indicator of corruption) has been significantly higher in France, at 14%, than in other comparable European companies; European Research Centre for Anti-Corruption and State-Building, *Public Integrity and Trust in Europe* (Hertie School of Governance, Berlin 2015).



I think there is a fairly clear set of principles. The clear principle is that the people who leave public office should not be able to take paid employment from an employer whom they might have been in a position to benefit when they were holding their public office and that there should be a period within which that is simply unacceptable.<sup>46</sup>

I have already suggested that ACoBA should have the power to dictate terms to Ministers as well as to Crown servants leaving office, as well as the power to negate the benefits of taking up external appointments when the rules for doing so have not been followed.<sup>47</sup>

Going beyond this, is it possible that the offence of misconduct in office, or another corruption offence, could be applied to a Minister or Crown servant in an especially egregious case of rule-breaking?

First there is the situation in which an external appointment relates to favours done when in office.<sup>48</sup> If, when in office, a Minister gives an advantage to a private company, in the hope of obtaining position with that company (or a similar company) in the future, then his or her action will amount to bribery. Section 2(5) of the Bribery Act 2010 covers cases in which, ‘in anticipation...of...accepting a financial or other advantage, a relevant function or activity is performed

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<sup>46</sup> <https://publications.parliament.uk/pa/cm201213/cmselect/cmpublicadm/404/404.pdf>, para 34.

<sup>47</sup> See text at n. 37 above.

<sup>48</sup> See text at n. 38 above.

improperly'. To be motivated, in (say) awarding a contract to a company,<sup>49</sup> by the prospect of securing a job in the future with that company or with a similar company, may in law be to perform one's function improperly. That is because when one is in a position of trust, like a Minister, the inappropriateness of (some of) one's reasons for undertaking certain actions can make those actions improper,<sup>50</sup> for the purposes of the 2010 Act, even if one also undertook those actions for other (proper) reasons. Such cases are likely to turn on the question of, 'what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned'.<sup>51</sup> In the present political climate, it would be an uphill struggle for defence Counsel to cast significant doubt on whether this test is satisfied, in such cases.

It seems doubtful that ACoBA, still less Ministers and MPs more generally, are as fully aware as they should be of the potentially far-reaching consequences of the 2010 Act in this respect. It may be said that it will be hard to prove that contracts were awarded in anticipation of employment in the private sector being given, further down the line (in France, there are around 30 convictions a year for

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<sup>49</sup> Or even something far less advantageous. There is no de minimis principle in the Bribery Act 2010. So, even simply agreeing to meet corporate executives, in anticipation of gaining an advantage in the future, could amount to bribery contrary to section 2(5).

<sup>50</sup> Bribery Act 2010, s4(2)(b).

<sup>51</sup> Bribery Act 2010, s.5(1).

granting an unfair advantage: favouritism<sup>52</sup>). However, there is no *de minimis* principle in the 2010 Act. Suppose, for example, that a Minister agrees simply to meet company executives for exploratory talks. That agreement may itself constitute the improper performance of a function. The Minister's conduct will be caught by section 2(5), if the agreement to meet is anticipated by the Minister to be an event at which it will be agreed with the company that he or she will be offered work, or even in some lesser way benefited, perhaps by being offered an interview at a later date.<sup>53</sup> It is worth noting that if such conduct amounts to bribery on the part of a public official (whilst in office), then it should also amount to misconduct in office as well.

What if, in a case of 'revolving out', the element of anticipated benefit - *quid pro quo* - simply cannot be proved? As we have seen, this is no obstacle to the imposition of criminal liability in French law.<sup>54</sup> Under French law, what is penalised is simply allowing a situation to arise in which personal and (former) public interest responsibilities conflict, whether or not benefit accrues therefrom to the individual or to the private business entity.<sup>55</sup> For example, in 2009 François Pérol

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<sup>52</sup> <https://www.tresor.economie.gouv.fr/Ressources/File/429893> (August 2016), at 4.

<sup>53</sup> See para 7.7 of the *Ministerial Code*, n. 23 above: 'Ministers' decisions should not be influenced by the hope or expectation of future employment with a particular firm or organisation'.

<sup>54</sup> See text at n. 40 above.

<sup>55</sup> See text at n. 40 above. There is also now a prohibition on acting as a lobbyist or consultant whilst holding public office: <https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/#wrapper>; <https://www.telegraph.co.uk/news/2017/06/01/bill-clean-french-politics-unveiled-government-refuses-fire/>.

was accused of a conflict of interest when he became CEO of BPCE, France's second-largest bank. BPCE had been created from the merger of two banks, Banque Populaire and Caisses d'Epargne. Pérol was said to have overseen the merger as an economic advisor to President Nicolas Sarkozy, but did not inform the ethics commission of his move. Pérol was prosecuted, although he was eventually acquitted in September 2015.<sup>56</sup>

It has been authoritatively claimed that 25 former Ministers in the coalition Government of 2010-15 took paid roles in the sectors that they once oversaw,<sup>57</sup> even though such conduct is frequently condemned at the highest level.<sup>58</sup> What should be the law's approach to such cases? Putting aside non-penal actions and remedies, mentioned above,<sup>59</sup> there are two further sets of circumstances on which we must focus (raised by ACoBA<sup>60</sup>), where the threat to the political integrity of the state posed by 'revolving out' is such that criminal prosecution may be justified even in the absence of bribery. These circumstances concern what one might call the knowing misuse of the executive's 'intellectual property': (i) information that comes

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<sup>56</sup> *The Economist*, February 7<sup>th</sup> 2014, 'Pantouflage. Tell it to the judge'; [http://informality.com/wiki/index.php?title=Pantouflage,\\_corpsards\\_\(France\)#cite\\_note-4](http://informality.com/wiki/index.php?title=Pantouflage,_corpsards_(France)#cite_note-4).

<sup>57</sup> HC Public Administration and Constitutional Affairs Committee, n. 22 above, at 67.

<sup>58</sup> See passage cited at n. 46 above.

<sup>59</sup> See text at n. 38 above.

<sup>60</sup> See text at n. 31 above.

to a public office holder in the course of their duties,<sup>61</sup> and (ii) contacts that they make in the course of their duties.<sup>62</sup> Suppose that a public office-holder has taken up an external appointment (revolved out), and has then gone on to use information or contacts acquired during his or her period in public office, in breach of a requirement not to do so set down or advised by ACoBA (or, obviously, where the appointment has been taken up without bothering to inform ACoBA properly or at all). Such is the damage done to the integrity of government by such conduct, it would be right to take action against it through criminal prosecution, even in the absence of proof that section 2(5) of the Bribery Act 2010 applies. As the House of Commons Public Administration and Constitutional Affairs Committee has said:

[I]t is clearly unacceptable for public servants to use the contacts or experience they acquire in the public sector with the intention of securing a future private gain...It is this possibility which opens

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<sup>61</sup> ACoBA defines such information as privileged information: 'official information to which a Minister or Crown servant has had access as a consequence of his or her office or employment and which has not been made publicly available':

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/585668/2017-01-24\\_lettertoGO-Blackrockfinal1.docx\\_\\_1\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/585668/2017-01-24_lettertoGO-Blackrockfinal1.docx__1_.pdf).

<sup>62</sup> See the evidence of Sheila Drew Smith, from the Committee on Standards in Public Life, to the House of Commons Public Administration and Constitutional Affairs Committee: Public Administration and Constitutional Affairs Committee, *Oral Evidence: The role and effectiveness of ACoBA and the Independent Adviser on Ministers' Interests* (HC 252, Tuesday 25 October 2016):

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-administration-and-constitutional-affairs-committee/the-role-and-effectiveness-of-acoba-and-the-independent-adviser-on-ministers-interests/oral/42072.pdf>, Q119.

them to the suspicion that they may have been conflicted during their time in public office.<sup>63</sup>

A prosecution for misconduct in office would be the obvious and proper choice of charge in such cases.

So far as the relevant elements of the offence are concerned, first, any misconduct must be ‘wilful’.<sup>64</sup> Whilst ACoBA’s guidance does not play a particularly prominent role in codes of conduct applicable to public officials,<sup>65</sup> this requirement is unlikely to prove a serious obstacle in the case of Ministers.<sup>66</sup> The problem has not been making officials aware of the rules, but to make them take the rules seriously.<sup>67</sup> More significantly, any misconduct must amount to an ‘abuse’ or perhaps a betrayal of the public’s trust.<sup>68</sup> It is submitted that misuse of the executive’s ‘intellectual property’ (information; contacts) supplies this element of betrayal. However, as indicated earlier, it seems likely that the misconduct offence, as presently defined,<sup>69</sup> would not cover many of the cases currently under discussion, because the relevant acts - the misuse of contacts or

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<sup>63</sup> HC Public Administration and Constitutional Affairs Committee, n. 22 above, para 62.

<sup>64</sup> See text at n.1 above.

<sup>65</sup> HC Public Administration and Constitutional Affairs Committee, n. 22 above, para 109.

<sup>66</sup> The rules are referred to in para 7.25 of the Ministerial Code.

<sup>67</sup> HC Public Administration and Constitutional Affairs Committee, n. 22 above, para 109.

<sup>68</sup> See text at n. 1 above.

<sup>69</sup> See text at n. 1 above.

information - are engaged in after the Minister or Crown servant has left public office.

As indicated earlier, this is not a problem under the Bribery Act 2010, because section 4(3) says:

Anything that a person does (or omits to do) arising from or in connection with that person's past performance of a relevant function or activity is to be treated for the purposes of this Act as being done (or omitted) by that person in the performance of that function or activity.

So, for example, if in exchange for payment a former Minister engages in lobbying, within the prohibited two-year period,<sup>70</sup> then this should be regarded as bribery - other things being equal - in virtue of section 4(3).<sup>71</sup> It would, though, be open to a jury to find that engaging in lobbying was an improper performance of a (former) function even beyond that period, especially if the (mis)use of confidential information or contacts was involved. In passing, it is worth noting that, as in the example given earlier, it seems unclear that ACoBA, or any other official body, is in this respect aware of the potentially far-reaching consequences of the 2010 Act.

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<sup>70</sup> *Ministerial Code*, n. 23 above, para 7.25.

<sup>71</sup> Neither the *Ministerial Code*, nor ACoBA's rules make clear this important possibility.

It is submitted that the courts should extend the scope of the offence of misconduct so that it applies in similar circumstances: where (say) an ex Minister makes improper use of contacts or information acquired in the course of his or her former public role. This would bring English law closer to the apparently more stringent provisions applicable in France.<sup>72</sup> The stock objection to such a suggestion is the spectre of retrospective criminalisation; but in the context of government and administration, that objection overlooks the resources of public law for prospective law-making. It would be possible for a third sector organisation, such as Transparency International,<sup>73</sup> or indeed ACoBA itself, to seek a declaration that the offence of misconduct can in future be applied in such cases. Amongst the arguments would be (i) the public interest in treating bribery and misconduct in office in a similar way,<sup>74</sup> so far as former office-holders are concerned, and (ii) the claim that the change effected by section 4(3) in cases of bribery means that there is now no real and substantive unfairness or lack of warning to public sector defendants in

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<sup>72</sup> See text at n. 40 above.

<sup>73</sup> <http://www.transparency.org.uk/>.

<sup>74</sup> See the evidence of Sheila Drew Smith, from the Committee on Standards in Public Life, to the House of Commons Public Administration and Constitutional Affairs Committee: Public Administration and Constitutional Affairs Committee, *Oral Evidence: The role and effectiveness of ACoBA and the Independent Adviser on Ministers' Interests* (HC 252, Tuesday 25 October 2016 ): <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-administration-and-constitutional-affairs-committee/the-role-and-effectiveness-of-acoba-and-the-independent-adviser-on-ministers-interests/oral/42072.pdf>, Q120.



misconduct cases, if the offence is interpreted as applicable in a similar fashion.

Here is an example of the kind of facts that may give rise to the problem, although there is no suggestion of criminal misconduct in the example itself. It concerns events leading up to the decision in 2017 by George Osborne MP, former Chancellor of the Exchequer, to accept a post as adviser to the BlackRock Institute, part of the BlackRock Investment Group, an international investment management company.<sup>75</sup> In this case, Mr Osborne complied with the existing rules, and referred his potential move to ACoBA. However, ACoBA noted that Mr Osborne had been in contact with BlackRock, and with its competitors, to discuss the general economic situation, and sought assurance from the Treasury that none of Mr Osborne's decisions were specific to BlackRock (they were not).<sup>76</sup> ACoBA then advised Mr Osborne as follows:

You should not draw on (disclose or use for the benefit of yourself or the organisation to which this advice refers) any privileged information available to you from your time in Ministerial office; and- for two years from your last day in Ministerial office you should not become personally involved in

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<sup>75</sup> HC Public Administration and Constitutional Affairs Committee, n. 22 above, paras 68-71.

<sup>76</sup> *Ibid.*, at para 68.

lobbying the UK Government on behalf of BlackRock Investment Institute or any part of BlackRock group or its clients.<sup>77</sup>

A number of difficulties arise in relation to this episode, even if one puts aside the unedifying prospect of former ministers lobbying, at any time in the future, on behalf of companies with whom they had dealings in office.<sup>78</sup> As the Select Committee pointed out, a specific issue is that whilst none of Mr Osborne's decisions whilst in office were specific to BlackRock, as Chancellor he clearly took decisions that had business implications for BlackRock.<sup>79</sup> An example is the removal in 2014 of tax restrictions on pensioners' access to their pension pots, as a result of which BlackRock announced that the firm was, 'uniquely positioned because of our multi-asset strategies and our product development specifically tailored to the retirement area'.<sup>80</sup> More generally, it is unrealistic to suppose that someone involved day-to-day in economic decision-making over a number of years in Government, will later be able to separate out in their mind so-called 'privileged information' (supposedly not to be used) from their broader specialist

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/585668/2017-01-24\\_lettertoGO-Blackrockfinal1.docx\\_\\_1\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/585668/2017-01-24_lettertoGO-Blackrockfinal1.docx__1_.pdf).

<sup>78</sup> Currently, the ban on lobbying by former Ministers lasts two years: *Ministerial Code*, n. 23 above, para 7.25. I have already suggested that the expiry of the two-year ban may be no barrier to a prosecution for bribery: see text at n. 70 above.

<sup>79</sup> HC Public Administration and Constitutional Affairs Committee, n. 22 above, para 69.

<sup>80</sup> Financial Times, 18 April 2014, 'BlackRock Challenges UK Pension Providers'.

and general knowledge (which may be used) when advising their new employer.

Going back to a point made earlier,<sup>81</sup> what is needed is a requirement that it be positively in the public interest for a former Minister to take up an outside appointment, a requirement that would rule out taking up appointments simply to feather one's nest. Having said that, it might not be right to take *too* stringent a view of the public interest test. Such a view would, as in France,<sup>82</sup> rule out the taking up of an appointment with any public or private entity with which a Minister or Crown servant had specific dealings when in office; but such an approach may prove to be unworkable or unfair. For example, a Minister or Crown servant may have worked for the entity in question in the past and, having (say) left politics or the civil service, may wish merely to resume their old job.<sup>83</sup> With appropriately rigorous safeguards in place concerning the use of any confidential information acquired, that does not seem wrong. To prevent such a possibility altogether is contrary to a broader understanding of 'public interest' - which treats restraint of trade with suspicion - outlined earlier.<sup>84</sup> However, the length of time that a former Minister or Crown servant should be prevented from taking up an appointment should be

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<sup>81</sup> See text at n. 20 above.

<sup>82</sup> See text at n. 40 above.

<sup>83</sup> See the passage cited at n. 22 above.

<sup>84</sup> See text following n. 21 above.

allowed to vary, rather than being arbitrarily fixed as at present. The length of time should depend on how long there will remain a conflict of interest for the individual taking up the appointment, having been privy to privileged information and contacts of potential benefit to the new employer.

The House of Commons Public Administration and Constitutional Affairs Committee has suggested that:

It has become part of the culture in public life that individuals are entitled to capitalise on their public sector experience when they move into the private sector - the “new normal” - but there is a lack of clear boundaries defining what behaviour is or is not acceptable.<sup>85</sup>

The sense of entitlement to which the Committee refers should be resisted, in so far as any attempt to capitalise on public sector experience when moving to the private sector is purely self-interested, with no public interest served by the move. So far as the Committee’s second point is concerned, it is, of course, a public law regulatory task, and not a task for the criminal law, to fine-tune the rules on when politicians and civil servants may move from the public to the private sector. However, I have identified three sets of circumstances (conferring advantages in the hope of reward; misuse of contacts;

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<sup>85</sup> HC Public Administration and Constitutional Affairs Committee, n. 22 above, para 63.

misuse of information) in which completely unacceptable conduct attending such a move ought to fall within the scope of criminal misconduct in public office.

#### **4. Disregarding the Rules as Misconduct in Public Office**

I will now consider whether it should amount to misconduct in public office simply to disregard ACoBA, or to disregard its advice, whether or not some further wrong was done, such as misusing privileged information or contacts to benefit a new employer's business. This is not a purely academic concern. The Chair of ACoBA, Baroness Browning, has been reported voicing the opinion that it should be a criminal offence intentionally to disregard ACoBA's advice.<sup>86</sup>

The *Ministerial Code* is quite clear on Ministers' obligations in this respect. Para 7.25 states:

[Ministers] must also seek advice from the independent Advisory Committee on Business Appointments (ACoBA) about any appointments or employment they wish to take up within two years of leaving office. Former Ministers must ensure that no new appointments are announced, or taken up, before the Committee has been able to provide its advice.

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<sup>86</sup> <https://www.theguardian.com/politics/2016/apr/19/calls-for-ability-to-prosecute-exploitation-of-whitehall-contracts>.

As indicated earlier, it would be salutary, were ACoBA to be given the power of negation, to claw back any and all benefits gained through employment taken up without prior consultation, or with grossly inadequate consultation (negation).<sup>87</sup> Under the existing law, when (if ever) would a failure to consult ACoBA also amount to misconduct in public office?

There have been two recent incidents raising this question. The first involves grossly inadequate consultation. Having ceased to be Chancellor of the Exchequer, in 2017 George Osborne MP took up the Editorship of a prominent daily newspaper, the Evening Standard. Mr Osborne informed ACoBA of his intention to take up his new position on 13<sup>th</sup> March 2017, but the decision was announced by the newspaper itself only a few days later, on 17<sup>th</sup> March 2017 (the contract being signed on the 20<sup>th</sup> March 2017). ACoBA thus had no time to consider the ethical propriety of the appointment, putting Mr Osborne in breach of ACoBA's rules.<sup>88</sup> ACoBA was able to do little more than express its 'regret' at Mr Osborne's behaviour, saying that it was 'not appropriate',<sup>89</sup> although it expressed the view that there was no evidence that Mr Osborne's decisions when in office were influenced

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<sup>87</sup> See text at n. 38 above.

<sup>88</sup> See the discussion in Jeremy Horder, n. 9 above, 107-108.

<sup>89</sup> <https://www.gov.uk/government/publications/osborne-george-chancellor-of-the-exchequer-hm-treasury-acoba-recommendation/summary-of-business-appointments-applications-rt-hon-george-osborne-mp#editor-london-evening-standard>.

by the possibility of this appointment. The House of Commons Public Administration and Constitutional Affairs Committee also criticised the appointment as an ‘abuse’:

We disapprove of the announcement of Mr Osborne’s appointment as Editor of the Evening Standard without waiting for ACoBA’s advice. This demonstrates disrespect for ACoBA and for the Business Appointment Rules and sets an unhelpful example to others in public life who may be tempted to do the same...the system remains open to similar abuses.<sup>90</sup>

These turned out to be prophetic words.

On 9<sup>th</sup> July 2018, Boris Johnson MP resigned as Secretary of State for Foreign Affairs. On the 12<sup>th</sup> July 2018, he signed a contract with the leading daily newspaper, The Daily Telegraph, to write a weekly column for them for 46 weeks, a contract announced by the newspaper on the weekend of 14-15th July 2018. Mr Johnson also agreed to make himself available for public appearances and podcasts, to provide further benefit to the newspaper. It is, though, important to note that this was a return to a job he had previously had, but gave up upon becoming Foreign Secretary.<sup>91</sup> In breach of the rules, Mr Johnson did not inform ACoBA in advance of his intention to take up the position

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<sup>90</sup> HC Public Administration and Constitutional Affairs Committee, n. 22 above, para 75.

<sup>91</sup> <https://www.theguardian.com/media/greenslade/2016/jul/18/boris-johnson-takes-pay-cut-by-giving-up-his-daily-telegraph-column>.

with the newspaper. Instead, he made a retrospective application for approval on the 26<sup>th</sup> July 2018.<sup>92</sup> ACoBA's rules state that, 'Retrospective applications will not normally be accepted'.<sup>93</sup> ACoBA wrote to Mr Johnson, saying:

The Committee considers it to be unacceptable that you signed a contract with the Telegraph and your appointment was announced before you had sought and obtained advice from the Committee, as was incumbent on you when leaving office under the Government's Business Appointment Rules.<sup>94</sup>

Putting on one side, for the moment, the disregard for ACoBA's rules, there are clearly important differences between the Osborne case and the Johnson case. The Osborne case is arguably a less justifiable move into the private sector. First, the Osborne case is not one in which a Minister is simply returning to a previous role, by way of contrast with the Johnson case. As Mr Osborne, when taking up the Editorship, announced his intention at that time to remain an MP (although he resigned shortly thereafter),<sup>95</sup> this is a simple case of

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/732866/180808\\_Boris\\_Johnson\\_The\\_Telegraph.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/732866/180808_Boris_Johnson_The_Telegraph.pdf).

<sup>93</sup> Ministerial Code, n. 23 above, Annex B, rule 4.

<sup>94</sup> Office of the Advisory Committee on Business Appointments, Letter of 18<sup>th</sup> August 2018, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/732866/180808\\_Boris\\_Johnson\\_The\\_Telegraph.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/732866/180808_Boris_Johnson_The_Telegraph.pdf).

<sup>95</sup> <https://www.bbc.co.uk/news/uk-39304944>.



‘nest feathering’.<sup>96</sup> Secondly, Mr Osborne’s job as Editor involved in-principle control of the entire political direction of the newspaper (subject to any influence exercised, in that regard by the owner), a position of power very different from someone employed merely as a columnist, however popular, such as Mr Johnson.

Turning now to the Ministers’ breaches of section 7.25 of the Ministerial Code (ACoBA’s rules),<sup>97</sup> again, there is more that is of concern in the Osborne case than in the Johnson case. For example, ACoBA is clearly under a duty to have regard to any previous contact between a Minister and a private sector organisation, when the Minister was in post, in investigating the Minister’s subsequent decision to take up a position with that organisation. When he was Chancellor of the Exchequer, George Osborne pledged in 2015 that the Treasury would match pound-for-pound donations made by the public to the Evening Standard’s appeal on behalf of Great Ormond Street hospital.<sup>98</sup> That was a noble gesture, but one that casts a shadow over Mr Osborne’s subsequent decision to take up a leading role with the Evening Standard. Having said that, quite clearly ACoBA would equally have wished to assure the public from the outset, in the Johnson case, that he would not use information or contacts acquired during his time

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<sup>96</sup> See text at n. 21 above.

<sup>97</sup> See text at n. 86 above.

<sup>98</sup> <https://www.standard.co.uk/news/politics/give-to-gosh-george-osborne-pledges-to-match-every-pound-raised-by-evening-standards-great-ormond-a3122566.html>.

in office in the writing of his column, an opportunity denied to them by Mr Johnson's decision to seek only retrospective approval. One is left wondering whether there could ever be a case in which it could be in the public interest that a Minister, above all, should be entitled to seek wholly retrospective approval from ACoBA.

In both these cases, there has been wilful misconduct in relation to the obligations of public office: a deliberate decision not to bother with compliance. The additional question is whether, in one or both of these cases, the misconduct is such as to amount to an abuse of public trust in the office holder.<sup>99</sup> I have just indicated that there might be more to the Osborne case than to the Johnson case, so far as the additional question is concerned. More broadly, though, the cases raise the issue of the relationship between the two parts of the test. We are concerned with cases in which a public office-holder intentionally disregards rules he or she knows to have been made binding on him or her (the first part of the test) in the interests of maintaining public integrity. Does the attitude such conduct evinces in itself add to the sense in which, in law, there may have been an abuse of public trust (the second part of the test); or, would to take such an approach involve inappropriate double-counting, in point of fault? It is submitted that there need not necessarily be any illegitimate double-counting in

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<sup>99</sup> See text at n.1 above.

such an approach. The first part of the test involves a threshold question, namely whether D was - at a minimum - aware of the facts giving rise to his or her obligations, but nonetheless went on to breach those obligations.<sup>100</sup> In some cases, though, D's state of mind might go well beyond such a purely cognitive state, edging into an attitudinal disregard for the rule or rules in question. In such cases, there is an argument that a judge should be permitted to direct a jury that the latter state of mind can contribute to the sense in which, so far as the additional question is concerned, D's misconduct amounts to an abuse of the public's trust in the office-holder.

It is obvious that a prosecution for misconduct based purely on an attitude of disregard for rules would pose problems of uncertainty, in terms of the case that D has to meet. There must be independent evidence pointing to grave misconduct, albeit evidence itself capable of giving rise to an inference that D was contemptuous of rules designed to uphold public integrity in the discharge of office. In the Osborne and Johnson cases, there was such independent evidence, in the form of a real risk - surely, known to both individuals - that information or contacts gained during tenure of public office might be used to benefit the private entity for which the former Minister was now employed to assist in making profits. In the Osborne case, Mr

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<sup>100</sup> Law Commission, n. 2 above, para 2.14.

Osborne must also have been aware that there were legitimate questions to be answered concerning the relationship, if any, between the offer of the appointment and his decision, three years previously, to use public money to contribute to the employing newspaper's charitable appeal.

Having said that, when it comes to disregard of ACoBA's rules, the case for commencing a prosecution would be stronger, in both cases, were the individuals to disregard the rules on appointments in the future, and hence to be guilty of having done so on more than one occasion. Such a 'two-strikes' rule of thumb for prosecution would permit ACoBA to incorporate into its guidance a warning that, if its rules are breached on more than one occasion, both instances will be referred to the Crown Prosecution Service.

## **5. Prosecutors, Courts and MPs: A More Abrasive Relationship?**

It is generally true that most misconduct prosecutions are of lower level, unelected public officials.<sup>101</sup> Historically, that reflects the important role for the offence in deterring and punishing betrayals of the trust placed by the monarch in public officials, appointed in his or her name, to act in good faith and in the public interest.<sup>102</sup> However, there has always been a subsidiary role for the offence in holding high

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<sup>101</sup> See e.g. Adriana Cordis and Jeffrey Milyo, 'Measuring Public Corruption in the United States: Evidence From Administrative Records of Federal Prosecutions' (2016) 18 *Public Integrity* 127.

<sup>102</sup> Jeremy Horder, n. 9 above, 52-53; Law Commission, *Misconduct in Public office: Issues Paper 1, The Current Law* (TSO, 2016), Appendix A.

level officials to account for betraying public trust.<sup>103</sup> It is still true that, when UK prosecutors and courts become involved in such cases,<sup>104</sup> they are acting in the name of the Monarch to deter and punish betrayals of his or her trust, a ‘top-down’ justification for prosecution. However, in such cases, there is also a sense in which a prosecution should reflect the ‘bottom-up’ interest of the general public in deterring high-level officials from relying on accountability only to themselves (marking their own homework).

In that regard, in *R v Chaytor*,<sup>105</sup> the Supreme Court found that Parliamentary Privilege did not extend to the submission of (fraudulent) expense claims by MPs. Nonetheless, the Supreme Court also made it clear that there could be no judicial intervention, casting aside Privilege, if an MP sought to make a claim that was ‘legitimate’ under a scheme that was itself corrupt or prone to corruption.<sup>106</sup> For example, if MPs set up a scheme in which they may claim for expenses up to (say) £30,000 without supporting explanation or documentation, a claim duly brought under such a scheme cannot be challenged in court. That is a disappointingly supine approach on the part of the courts to the applicability of anti-corruption principles to the highest

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<sup>103</sup> See e.g. Mark Knights, ‘Old Corruption: What British History Can Tell Us about Corruption Today’ (2016), <http://www.transparency.org.uk/publications/old-corruption-what-british-history-can-tell-us-about-corruption-today/#.W4fDOOhKjIU>.

<sup>104</sup> *R v Chaytor* [2010] UKSC 52.

<sup>105</sup> *R v Chaytor* [2010] UKSC 52.

<sup>106</sup> See the discussion in Jeremy Horder, n. 9 above, ch 4;

reaches of the political establishment. It manifests a failure to summon sufficient courage to allow the law as a means to challenge grave breaches of public trust that government will be clean.<sup>107</sup> What is the implication of this, in the current context?

It seems to follow that whether rules established for taking up external appointments by ACoBA, or in the Ministerial Code, are good, bad, or very ugly, a charge of misconduct (in respect of a decision to take up an appointment) is bound to fail, if the Crown servant or Minister has followed those rules. What if, as in a number of instances given above, the rules have been broken? The personal nature of a Minister's decision probably means that it falls outside the scope of judicial review, but I have argued that it is not beyond the scope of the misconduct offence. However, there seems to be little doubt that there is a strong reluctance, on the part of UK prosecutors and courts, to use the criminal law, and in particular the misconduct offence, to challenge high-end corruption in politics. That is wrong.

It is largely an impression, but there appears to be markedly less such reluctance in the USA. The FBI has a dedicated Public Corruption Unit, and describes public corruption as its, 'top investigative priority'.<sup>108</sup> Further, it has become more common at state level to

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<sup>107</sup> For similar criticism, see John Saunders, 'Parliamentary Privilege and the Criminal Law' [2017] Crim LR 521.

<sup>108</sup> <https://www.fbi.gov/investigate/public-corruption>.

establish public corruption ‘task forces’, multi-agency bodies designed to improve co-ordination at official level in the pursuit of cases.<sup>109</sup> In Connecticut, for example, such a task force is comprised of representatives from the US Attorney General’s Office, the FBI, the US Department of Housing and Urban Development, the US Department of Health and Human Services, the IRS Criminal Investigations Division and the US Postal Investigation office. In the USA, it is recognised that citizens have the, ‘intangible right of honest services’ on the part of politicians,<sup>110</sup> and it has been argued that:

Federal prosecutors are given broad weapons to prosecute public corruption, especially with respect to state and local corruption, where the pertinent statutes empowers them to challenge almost any unlawful, questionable or unethical conduct of a public official, subject to the prosecutor’s exercise of sound discretion.<sup>111</sup>

Whilst ‘public corruption’ is understood broadly to include, for example, drug trafficking across borders, it is said also explicitly to

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<sup>109</sup> Centre for the Advancement of Public Integrity, ‘Strategies for Increasing and Improving Public Corruption Prosecution: The Task Force Model (August 2016), [https://www.law.columbia.edu/sites/default/files/microsites/public-integrity/files/strategies\\_for\\_increasing\\_and\\_improving\\_public\\_corruption\\_investigations\\_-\\_the\\_task\\_force\\_model\\_-\\_capi\\_issue\\_brief\\_-\\_august\\_2016\\_2.pdf](https://www.law.columbia.edu/sites/default/files/microsites/public-integrity/files/strategies_for_increasing_and_improving_public_corruption_investigations_-_the_task_force_model_-_capi_issue_brief_-_august_2016_2.pdf). Some of these task forces are at Federal level only, some are joint Federal-State partnerships, and some are at State level only.

<sup>110</sup> 18 USC §1346. See Michael J Hutter, ‘Prosecuting Public Officials/Figures for Corruption: The Approach in the United States’, [https://www.americanbar.org/content/dam/aba/directories/roli/raca/asia\\_raca\\_prof\\_hutter\\_prosecuting.aut\\_hcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/roli/raca/asia_raca_prof_hutter_prosecuting.aut_hcheckdam.pdf).

<sup>111</sup> Michael J Hutter, n. 110 above, at 8.

cover high-end corruption, such as, ‘how verdicts are handed down in courts’.<sup>112</sup> Once again, though, some context is required here, as in the case of France.<sup>113</sup>

Lobbying activity enjoys First Amendment protection in the USA, whilst the regulation of lobbying is justified by the need for the public to be protected by being given information about who is engaged in lobbying.<sup>114</sup> As Justice Warren put it:

Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.<sup>115</sup>

A key driver of ‘favoured treatment’ is the participation of former members of the legislature in advocacy on behalf of special interest

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<sup>112</sup> *Ibid.*

<sup>113</sup> See text at n. 40 above.

<sup>114</sup> See *United States v. Harriss* 347 U.S. 612, 625 (1954).

<sup>115</sup> *Ibid.*, at 625 II.



groups. The practice has its defenders,<sup>116</sup> but to regulate this phenomenon, the legislature has intervened to impose restrictions and transparency requirements on lobbyists, through (for example) the Lobbying Disclosure Act 1995 and the Honest Leadership and Open Government Act 2007 ('the 2007 Act').<sup>117</sup>

GRECO has described the requirements for lobbying disclosure in America as, 'probably more [extensive] than in any other country', whilst recognising its particular importance there, in virtue of a high degree of private sector involvement in the process leading up to the passage of legislation.<sup>118</sup> At the time of the 2007 Act, some 43% of former legislators had become lobbyists. However, by 2016, one study found that the numbers of former law-makers now working in the lobbying industry had risen to 47%.<sup>119</sup> One reason for this is the perception that enforcement will be weak. The 2007 Act established criminal penalties of fines, or imprisonment for up to five years, or

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<sup>116</sup> See e.g. Nicholas W Allard, 'Lobbying is an Honourable Profession: The Right to Petition and the Competition to be Right' (2008) 19 Stanford Law & Policy Review 23.

<sup>117</sup> These restrictions and transparency requirements have frequently been criticised as inadequate, permitting, for example, too much 'shadow lobbying,' in which influence is exercised without direct contact between the lobbyist and government: <https://www.politico.com/story/2016/06/the-lobbying-reform-that-enriched-congress-224849>; <https://www.opensecrets.org/news/2015/01/coming-out-of-the-cool-as-congress-convenes-former-colleagues-will-soon-be-calling-from-k-street/>.

<sup>118</sup> GRECO, 'Corruption prevention in respect of members of parliament, judges and prosecutors' (January 2017), <https://www.state.gov/documents/organization/284848.pdf>, paras 32-33, and 95.

<sup>119</sup> GRECO, 'Corruption prevention in respect of members of parliament, judges and prosecutors' (January 2017), <https://www.state.gov/documents/organization/284848.pdf>, para 81. <https://www.politico.com/story/2016/06/the-lobbying-reform-that-enriched-congress-224849>. They were working either as registered lobbyists, or as policy advisers, strategic consultants, trade association chiefs, corporate government relations executives, affiliates of agenda-driven research institutes and leaders of political action committees or pressure groups.

both, for knowing and corrupt failure to comply with restrictions on lobbying activity. These restrictions included a ‘cooling off’ period between leaving government employment and engaging in such activity.<sup>120</sup> However, in 2015, a study revealed that around 30% of 104 former congressional members and so-called staffers, whose cooling off periods were due to end, were *already* actively engaged in lobbying activity, with 13 out of 104 openly registered as lobbyists. The requirement to prove, ‘knowing and corrupt’ failure to comply with the lobbying rules sets a very high bar that has proved very difficult to surmount.<sup>121</sup>

Nonetheless, whilst hardly a routine event, the prosecution and conviction of politicians or other high state officials for corruption, even if not corruption directly connected to lobbying, is not especially remarkable in the USA.<sup>122</sup> In 2010, public corruption cases handled by the FBI resulted in more than 900 convictions, most of which were at the federal level.<sup>123</sup> So far as elected officials are concerned, to give a recent example, on 28<sup>th</sup> August 2018, the former Pennsylvania State

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<sup>120</sup> Two years for former Senators and one year for former House Members.

<sup>121</sup> <https://www.politico.com/story/2016/06/the-lobbying-reform-that-enriched-congress-224849>. There are also civil penalties available for breach of the rules.

<sup>122</sup> <https://www.nytimes.com/2006/05/11/washington/11fbi.html>. In December 2011, former Illinois Governor Rod Blagojevich was sentenced to 14-years’ imprisonment, following allegations he had illegally conspired to trade an appointment to the US Senate in exchange for campaign contributions of \$1.5 million; sought campaign contributions of \$25,000 from a local hospital in exchange for legislation affecting an increase in pediatric reimbursement rates; and committed other FBI public corruption related crimes.

<sup>123</sup> <http://www.findacriminaldefenseattorney.com/Information-Center/Crime-Definitions-Information/Public-Corruption.aspx>. ‘Public corruption’ includes bribery, fraud, extortion, government fraud, kickbacks and misuse of Government funds.

Treasurer, Robert McCord was convicted on two counts of attempted extortion and sentenced to 30 months' imprisonment, in connection with his campaign to become Governor. He had sought campaign funds from a law firm and from a property management company, threatening to use his position as Treasurer to damage the businesses economically if they did not contribute enough.<sup>124</sup> Turning to the judiciary, on August 23rd 2018, former West Virginia Supreme Court of Appeals Justice Menis E. Ketchum II was prosecuted and convicted of wire fraud (an offence commonly used to target different types of corruption, as well as 'fraud' as it is understood in England and Wales).<sup>125</sup> Justice Ketchum was convicted in respect of repeated personal use of a State of West Virginia vehicle and State fuel credit card over the course of 2011 through 2014, in connection with his travel from his home in Huntington, West Virginia to and from a private golf club in western Virginia. The case provides a stark contrast to the tolerant attitude of the CPS towards over £1 million of expense abuses spread across 53% of MPs in the 'rotten Parliament' of 2005-2010.<sup>126</sup>

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<sup>124</sup> <https://www.justice.gov/usao-mdpa/pr/former-pennsylvania-treasurer-robert-m-mccord-sentenced-30-months-imprisonment>.

<sup>125</sup> <https://www.justice.gov/usao-sdvw/pr/former-wv-supreme-court-appeals-justice-menis-ketchum-ii-pleads-guilty-wire-fraud>.

<sup>126</sup> House of Commons Members' Estimates Committee, *Review of Past ACA Payments: First Report of 2009-2010* (HC 348, 2010), discussed in Jeremy Horder, n. 9 above, ch 4.7.

Of the successful prosecution of Robert McCord, US Attorney David J Freed and Michael T Harpster, Special Agent in Charge of the FBI's Philadelphia Division, said:

McCord's official actions to benefit his friends and punish his foes compromised the integrity of the Treasury and directly damaged the citizens of Pennsylvania. Although public corruption investigations are lengthy, difficult and complex, they have been and will remain a priority of our office. Our oaths demand it and the public deserves it...The FBI will continue to investigate public corruption and hold those responsible accountable, to send a message to public officials that crime truly doesn't pay.<sup>127</sup>

Regrettably, prosecutors in the UK simply do not have this kind of attitude or approach to political corruption.<sup>128</sup> My argument has been that they have the legal resources to turn anti-corruption ideals such as those of the FBI into a reality in the UK. So, it is their attitude, as well as that of the courts, that needs to change.

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<sup>127</sup> *Ibid.*

<sup>128</sup> Although, by contrast, they have seen public interest in prosecuting for corruption an entirely dormant company without assets: <https://www.lawgazette.co.uk/law/cps-secures-first-conviction-for-failure-to-prevent-bribery/5065201.article>. Given the state of the 'company', it had to be given an absolute discharge, and no fine.

