RIDGEWAY CHAMBERS

The Chambers of David Wolchover

HEAD OF CHAMBERS *EMERITUS* AT

BELL YARD

Saturday, September 23, 2017

Cressida Dick, CBE, QPM,
Commissioner of the Police of the Metropolis
New Scotland Yard,
35 Victoria Embankment,
Westminster,
London SW1A 2JL

Dear Commissioner

Misconduct in Public Office in relation to "Brexit"

As you will no doubt be aware a large number of citizens have over the course of the last few days been contacting chief officers of various UK police forces including, I gather, yourself, seeking to register a complaint against the Prime Minister, Mrs May, and the "Brexit" Secretary, Mr David Davis. The complaint of course is that they, together with other unidentified senior members of the government, have committed the offence of Misconduct in Public Office in connection with the government's handling of the "triggering" of Article 50 of the Treaty on European Union.

The letter-writing and the making of complaints in person have been invited by a Facebook campaign calling itself the "Wolchover Action Group." I desire to stress that I have in no respect been engaged with the organisers in the establishment or management of their campaign, the title of which was inspired by an article I contributed to *Criminal Law and Justice Weekly*, entitled "Non-mandated Brexit: Are the Responsible Cabinet Members Criminally Liable?" (2017) 181 JN, July 15, 487-491, with a postscript "Criminal Implications of Non-Mandated Brexit: A Postscript," *ibid*, July 21. The article should be read in conjunction with a number of other related articles I have recently published, the details of which I set out at the end of this letter.

The WAG organisers did ask me if I had any objection to the use of my name and I agreed as long as they made it clear that I had no connection with the campaign. However, I do not disapprove of what they have been doing and in fact I am concerned that many of the responses, of which I have been apprised, have been disappointing, consisting of lame excuses for taking no action. On the other hand, I have been given to understand that Commander Stuart Cundy of MPS Specialist Crime & Operations has written to them to say that he will wait until all the incoming correspondence has been considered before updating them.

Any prevarication, indeed – not to put too fine a point on it – stonewalling, would be quite unconscionable since there is the very clearest evidence of the commission of what amounts to a grave criminal offence. Please forgive me if you are already familiar with the essential factors but as so often with serious offences the "devil is in the detail."

The unchallengeable facts are as follows:

- Article 50(1) of the Lisbon Treaty permits any EU Member State to withdraw from the EU "in accordance with its own constitutional requirements."

- Where a Member State decides to leave the EU in accordance with Art 50(1), Art 50(2) requires that it must notify the European Council

- There has been no such constitutional decision by the UK to withdraw and Mrs May's letter to Donald Tusk of 29 March, this year, therefore did not "trigger" Article 50. There was nothing to notify. *You cannot give notification about something which hasn't happened*.

- In the *Gina Miller* case the Supreme Court (SC) laid down with crystal clarity that a withdrawal decision made under Article 50(1) "in accordance with [the UK's] own constitutional requirements" meant a decision by Act of Parliament.

- By way of explanation the SC confirmed that the 2016 European Referendum was merely advisory or consultative and was not in itself capable of standing as a constitutionally binding decision for the purposes of Article 50. To be determinative of the leave/remain question the result of the Referendum had to be ratified as such by an Act of Parliament, serving as the mechanism by which a decision had to be made.

- The Referendum result has not been so ratified, so there has been no statutory decision to leave the EU in accordance with Article 50(1).

- The European Union (Notice of Withdrawal) Act 2017, sponsored by the government supposedly in response to *Miller*, did not in the event ratify the Referendum result.

- In bringing forward the Bill (which became that Act) the government stated quite unequivocally that it was not intended to be the mechanism for making the withdrawal decision. On the floor of the House of Commons, David Davis, introducing the Bill, stated that it was merely procedural, the decision *having already been made by the Referendum*. His statement has been backed by briefing documents and numerous ancillary assertions by the government. A similar statement was made in introducing the Bill to the Lords.

- That statement flew in the face of the Supreme Court's clearest possible pronouncement that a leave decision had to be made by Parliament, as Mr Davis and the Prime Minister, as executive head of the government, can hardly have failed to be aware.

- The wording of the Act is wholly consonant with the Secretary of State's avowal that it was not intended to make the decision. Section 1 states "The Prime Minister may notify, under Article 50(2) of the TEU, the UK's intention to withdraw from the EU."

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- The wording clearly does not ratify the decision, nor was it so intended. Had it done so the two words "hereby affirmed" or "hereby declared" would have been inserted after the word "intention."

- For a number of reasons (set out in my various articles) the Act cannot conceivably have ratified the Referendum result *by implication.*

In a nutshell, then, the Misconduct in Public Office attributed to Mr Davis, Mrs May and others consists in

- asserting that the Referendum result constituted the UK's leave decision,
- wilfully and knowingly contradicting therefore the Supreme Court's pronouncement that Article 50 required an Act of Parliament to make the leave decision
- shepherding through Parliament a Bill which they declared was not intended to make the decision and which did not do so
- purporting thereafter to invoke Article 50 by commencing the process of withdrawal negotiations with the European Union and doing so therefore without a constitutional mandate.

Criminal investigators customarily and pragmatically look for motive. What might have been the motive in this particular case? I have ventured to suggest in my various articles that the government wished to avoid giving Parliament the opportunity to subject the leave or remain question to debate for fear of becoming hostages to fortune. With so many committed remainers among the legislators any Bill would be likely to receive a rough passage and might well not get through, the government no doubt apprehended. For their part Parliamentarians were probably glad to be relieved of the obligation to decide the issue.

Whilst this may be of little concern to some people who support the departure of the UK from the EU the vast majority of the British public, both remainers and leavers, would, I dare say, be horrified if they appreciated the nature of the chicanery involved.

I now turn to the question of what the police ought to do about it.

I understand many of the letters which have been sent have asked for an investigation.

There is probably little to investigate.

All the evidence is there as a matter of record, requiring very little interpretation or clarification.

I understand that one particular person seeking to register a complaint at a Central London police station was treated to the mordant response "I can't see us going into Parliament to nick David Davis."

The officer was quite right. However such a facetious riposte is hardly any kind of an answer to what is sought.

The major players do not need to be arrested. Indeed, in my various writings over the years and in the media I have long argued that the police everywhere in this country consistently over-use arrest as a precursor to investigating suspects.

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If there be any need to question Mr Davis or the Prime Minister under caution this could and ought to be conducted by appointment, without arresting them and at a venue outside a police station. As you know all relevant PACE standards are guaranteed for suspects interviewed under caution but not under arrest and not questioned at a police station. Modern digital sound (or even video) recording does not require cumbersome equipment to be transported to 9 or 10 Downing Street.

Is there any need to investigate by questioning in this case? As I say, all the evidence is there on record. It is difficult to envisage what further questions it might be necessary to put to the suspects.

For example it is almost inconceivable that the suspects might have been unaware of the Supreme Court's stricture that an Act of Parliament was needed to ratify the Referendum result but it might be thought to be necessary to seek confirmation from them on this.

If they did not read the judgment in *Miller* for themselves no doubt they received advice as to its terms from the Government Legal Department. Might they be asked what advice they received? There is an interesting question as to whether legal advice given to the government by their lawyers on matters of high state would be protected by the normal privilege of lawyer-client confidentiality. That conundrum arose of course (but was never resolved) over the advice given by Lord Goldsmith to Prime Minister Blair on the Iraq question.

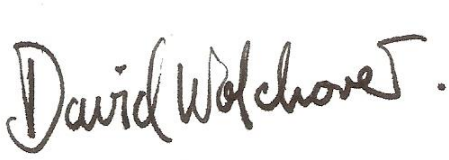
Even if the terms of advice were confidential it must have been discussed at the highest level in government outside the context of lawyer-client exchanges. It would be quite simply make-believe to suppose that Mr Davis and Mrs May and other leading members of the cabinet were unaware of what the Supreme Court had proclaimed. Nonetheless they went ahead "on a frolic of their own" and embarked on notifying the European Council of the UK's supposed "intention" to quit the EU and have conducted negotiations supposedly to that end when they have absolutely no constitutional mandate whatsoever for doing so.

Together, the Prime Minister's March 29 letter and the negotiations between David Davis and Michel Barnier, the EU Commission's chief negotiator, have amounted to a non-event and so may not be justiciable at civil law. (On the other hand, as steps towards the making of an illegal treaty they may in themselves be unlawful.)

However, by their actions the cabinet leaders have caused enormous alarm and distress for millions of British people and citizens of EU member states and having wasted a fortune in time and effort to no avail, a level of deceit and misconduct which must surely render them liable to criminal sanctions.

I feel sure you will take this matter seriously and act courageously.

Yours sincerely



C **David** H. **Wolchover**

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False Mantra of the "People's Will" – visit www.DavidWolchover.co.uk, clink link on front page.

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