

From: The Washington Post <email@e.washingtonpost.com>
To: Adams, ChaneyChaneyAdams@gov.sc.gov
Date: 1/31/2017 12:00:33 PM
Subject: Federal Insider: To resist or not, the federal employee's dilemma

To resist or not, the federal employee's dilemma

By Joe Davidson

Dozens of pro-immigration demonstrators cheer and hold signs at Dulles International Airport to protest President Trump's travel ban to the United States. (Mike Theiler/Reuters)

What would you do if you worked for an impetuous blunderbuss who ordered an action of dubious legality?

More precisely, when, if ever, do federal employees have the right to disregard a presidential order or administration policy?

That question became relevant with people here and abroad in a mighty [uproar over President Trump's immigration order](#). It shamed the nation by temporarily restricting immigration from certain Muslim majority countries — an action that one judge after another blocked.

Officials who detained some of the foreign citizens “were following illegal orders,” said Louis Clark, chief executive of the Government Accountability Project (GAP). “Those federal agents could have refused to do so.”

But civil servants don't make policy, they implement it. And deciding to defy even an illegal order is risky. While the resisting employee might be right on the law, the danger of revenge is major, particularly from an administration led by a man whose New York-size ego seems unable to countenance criticism or admit error.

That was demonstrated by White House press secretary Sean Spicer's rebuke of State Department employees using a long established “[Dissent Channel](#)” to voice their opposition to the travel ban: “Either get with the program or they can go.”

Sally Yates didn't get with the program and now she's gone. In another disturbing episode of this debacle, Trump fired her late Monday after Yates, the now former acting attorney general and Obama administration holdover, said in a memo that the [Justice Department will not defend Trump's order](#) in court. She was not convinced his directive is "consistent with this institution's solemn obligation to always seek justice and stand for what is right."

As Yates quickly learned, standing up for what is right can have consequences. Federal employees know they can be right and right out of a job.

After acting attorney general Sally Yates issued a memo on Jan. 30, for Justice Department lawyers not to defend President Trump's immigration order, he "relieved Ms. Yates of her duties," according to a White House statement. Dana Boente, the U.S. attorney for the Eastern District of Va., was sworn in to replace her. (Jenny Starrs/The Washington Post)

"The golden rule remains 'comply now, complain later,' even where there is substantial reason to believe that an order or policy is improper, or an employee can face discipline or removal for a charge of insubordination," cautioned Debra D'Agostino, founding partner the Federal Practice Group that provides feds with legal counsel. "Under current MSPB [Merit Systems Protection Board] case law, the employee must obey an order, and then challenge its validity, except in 'extreme or unusual circumstances' in which the employee would be placed in a clear danger or which would cause irreparable harm to the employee, or, presumably, the safety of the public."

ADVERTISEMENT

A federal judge in New York did block action against deportations based on the order because the government could not guarantee the foreigners would be safe from irreparable harm if deported.

“Ultimately,” D’Agostino continued, “a federal employee may have to make a judgment call like any private sector employee would as to whether the benefits of the job override the employee’s personal objection to the employer’s policies and agenda.”

There are some safeguards, however, for federal employees who refuse to carry out illegitimate orders and more are on the way. Currently, a whistleblower protection law shields those who reveal they have been told to break a law, but they are left unguarded if they have been told to break a regulation.

Coincidentally — but right on time — the House Oversight and Government Reform Committee will consider bipartisan legislation on Tuesday that would fix that by closing “a gap in whistleblower protections [that] is threatening their ability to stand up for what is right,” said Rep. Sean Duffy (R-Wis.) when he introduced the bill with Rep. Gerald E. Connolly (D-Va.) last year.

Added Connolly: “The [Follow the Rules Act](#) will close a loophole that undermines whistleblower protections for federal employees. Federal employees who defy a supervisor’s direction to violate rules and regulations should not be subject to retaliation.”

Furthermore, Tom Devine, GAP’s legal director, points out that “the [Government Employee Code of Ethics](#), on the wall of every agency, declares that government workers must put loyalty to the law and the country ‘above loyalty to persons, party, or Government Department.’”

That includes loyalty to Donald J. Trump.

In an informal email survey, federal employees and retirees were cautious, with some, but not all, saying they would refuse an illegal order.

“I can disagree with the policy, but once the decision is made I owe the people an apolitical response — or resign,” said Ray Levesqu, a Defense Department employee. Doing otherwise, “would violate the public trust of an apolitical civil service system that MUST serve any president whether we agree with his/her policies or not.”

Paul Davison, a retired Air Force civilian attorney in Kathleen, Ga., said if a

policy violated the Constitution, statutes or regulations, “I would have an obligation to refuse, recognizing that this administration in particular seems less inclined to tolerate any dissent.”

Current employees willing to resist were not willing to acknowledge it openly, given the risk of reprisal.

“I am sick to my stomach and have trouble sleeping already over this ‘President’ and his misguided ‘policies,’” said one worker who did not want to be identified. “The major concern I believe I and other government employees have is the carelessness and impulsiveness with which life-changing decisions are being made without debate or common sense at the highest level of government. ... Yes I will disregard ill-conceived policy. But not to the extent of losing my livelihood. I have bills to pay like everyone else.”

Another who would resist, depending how the order “affected the world in general,” was succinct about Trump: “He ain’t the boss of me.”

Read more:

Spicer: Diplomats opposed to immigration ban should ‘either get with the program or they can go’

Acting Attorney General declares Justice Department won’t defend Trump’s immigration order

Shock. Outrage. Resistance. Repeat. Is this the new normal in Trump’s America?

More from Federal Insider

Trump transition leader’s goal is two-thirds cut in EPA employees

EPA’s “regulatory overreach” would be much harder “if the agency is a lot smaller,” said Myron Ebell, the former head of President Trump’s EPA transition team

By Joe Davidson | Columnist • [Read more »](#)

ADVERTISEMENT

Recommended for you

Today's WorldView

What's most important from where the world meets Washington, plus the day's most essential reads and interesting ideas.

[Sign Up »](#)

Share Federal Insider: [Twitter](#) [Facebook](#)

Trouble reading? [Click here](#) to view in your browser.

You received this email because you signed up for Federal Insider or because it is included in your subscription. For additional free newsletters or to manage your newsletters, [click here](#). We respect your **privacy**. If you believe that this email has been sent to you in error or you no longer wish to receive email from The Washington Post, [click here](#). [Contact us](#) for help.

©2017 The Washington Post, 1301 K St NW, Washington DC 20071