Reforming the Prerogative in the UK

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Note: Other prerogative powers not considered in this paper: Diplomacy, ceding territory; Passports; Honours; Pardons; Public Inquiries; National Emergencies.

Introduction

1 This is a factual account of how the prerogative powers in the UK have gradually been made subject to tighter regulation over the last 20 years. It is confined to tighter political regulation: Sebastian Payne will talk about control of the prerogative by the law and the courts. And it is confined to the main prerogative powers: lesser powers, to issue passports, grant Honours, and pardons are for the moment omitted.

PART I: Tighter regulation of the prerogative powers exercised by ministers

2 The first part of this paper considers the main prerogative powers exercised on behalf of the Crown by ministers. They still enjoy considerable discretion, but in recent years most of the important prerogative powers have come under tighter parliamentary control. The initiative for this came originally from the House of Commons Public Administration Select Committee (PASC), chaired by Tony Wright MP, with the baton then being taken up by Gordon Brown. In his first week as Prime Minister in 2007 he published a bold constitutional reform agenda in *The Governance of Britain*, in which he stated that 'The Government believes that in general the prerogative powers should be put onto a statutory basis and brought under stronger parliamentary scrutiny and control'.[1] The white paper went on to enumerate what it called the 'prerogative executive powers' which were going to be more tightly circumscribed: organisation of the civil service; ratification of treaties; going to war; and making public appointments. It also announced a wider review of the remaining prerogative executive powers, to consider whether in the longer term all these powers should be codified and put on a statutory basis.

Organisation of the civil service

3 In 1854 the Northcote-Trevelyan report recommended that the core values and principles of the civil service be enshrined in legislation, but no government felt inclined to do so. The Prime Minister exercised prerogative powers to regulate the civil service, which was governed by Orders in Council. In response to a long parliamentary campaign, supported by the Committee on Standards in Public Life and the civil service unions, the Brown government agreed to embed the core values of the civil service in statute, and to put the Civil Service Commissioners on to a statutory footing.[2] This was eventually done in Part 1 and Schedule 1 of the Constitutional Reform and Governance Act 2010. The legislation is less detailed than in Australia, Canada and New Zealand, essentially putting into statute what had previously been set out in Orders in Council.

[1] *The Governance of Britain* (2007), para 24.

[2] Committee on Standards in Public Life, *Reinforcing Standards* (Sixth Report), January 2000, ch. 5; Public Administration Select Committee, *A Draft Civil Service Bill: Completing the Reform*, HC 128-I 2003-04, January 2004.

4 It might be questioned what practical difference it has made.[3] It did put the requirement for civil servants to be appointed on merit after fair and open competition, the four civil service values (of integrity, honesty, objectivity and impartiality) and the independence of the Civil Service Commission firmly into primary legislation. But the powers to appoint civil servants and to draw up the Code of Conduct defining the values remain firmly with the Prime Minister. Nevertheless Whitehall insiders say the Act provides a firewall. In the face of growing attempts to politicise the civil service, and with Brexit adding unprecedented political and executive stress, it is important that the principles which underpin the civil service are firmly contained in the law, and that they could only be changed by legislation, subject to proper parliamentary scrutiny, and wider public discussion.

Making and ratification of treaties

5 It is estimated that the UK is subject to over 12,000 international treaties, and the UK government ratifies around 30 new treaties a year. For almost a century parliamentary scrutiny of treaties was governed by a convention known as the Ponsonby Rule. It was named after Arthur Ponsonby, Parliamentary Under-Secretary for Foreign Affairs, who in 1924 told the House of Commons

> It is the intention of His Majesty's Government to lay on the table of both Houses of Parliament every treaty, when signed, for a period of 21 days, after which the treaty will be ratified ... In the case of important treaties, the Government will, of course, take an opportunity of submitting them to the House for discussion within this period.[4]

6 The campaign to codify the convention was led by Lord Lester, who introduced Private Member's Bills in 1996, 2003 and 2006, and was supported by various Select Committee reports from 1994 to 2004. Part 2 of the Constitutional Reform and Governance Act 2010 put the convention on to a statutory footing, and provides an enforcement mechanism if parliament believes that a treaty should not be ratified. The House of Commons can resolve against ratification and make it unlawful for the government to ratify a treaty. The House of Lords cannot prevent the Government from ratifying, but can require the government to think again, and produce a further explanatory statement explaining why the agreement should be ratified.

7 The detailed process is as follows:

- The government must lay before Parliament treaties it wishes to ratify, together with an Explanatory Memorandum. It may not ratify the treaty for 21 sitting days after it was laid.
- If either House resolves that the treaty should not be ratified, the government must lay before Parliament a statement setting out its reasons for nevertheless wanting to ratify.
- If the Commons resolves against ratification, a further 21 sitting day period is triggered. During this period the Government cannot ratify the treaty.
- If the Commons again resolves against ratification, the process is repeated. This can continue indefinitely, in effect giving the Commons the power to block ratification.

[3] J. Harris, *Legislating for a Civil Service* (London: Institute for Government, 2013); A. Paun and J. Harris, *Reforming Civil Service Accountability: Lessons from New Zealand and Australia* (London: Institute for Government, 2012).
[4] House of Commons Debates, 5th ser., vol. 171, cols 1999-2005, 1 April 1924.

8 The 2010 Act does not require Parliament to scrutinise, debate or vote on treaties (and it rarely does so). Neither House has yet resolved against ratification of a treaty under these provisions, and there are limited options for how they can do so. There have been calls for a process that results in more debates and votes on treaties, perhaps involving the committees, but Parliament has so far been reluctant to set up new mechanisms. This is in contrast to other countries where parliamentary approval is required. Even some 'dualist' countries have incorporated some kind of parliamentary scrutiny of treaties, for example Australia which has a dedicated Joint Standing Committee on Treaties.

9 Parliament can only oppose a treaty in full – it cannot amend treaties. There is no general requirement for parliamentary scrutiny while the government is negotiating treaties. So Parliament is not usually involved at the stage when changes could still be made to the text. Brexit has re-awakened the debate on how Parliament should be involved with treaties. Many of the proposed amendments to the European Union (Notification of Withdrawal) Bill 2017 concerned Parliament's role in the negotiating process or approving the final agreement. Although none of them passed, the government did agree to give Parliament a vote on a withdrawal agreement before it is signed. The likelihood of subsequent treaties having a major effect domestically, for instance on trade, may reignite calls for more parliamentary scrutiny of treaties.

The war making power

10 There are few political decisions more important than going to war. The prerogative power to engage in military action without the need for parliamentary approval has come under increasing criticism, particularly since the invasion of Iraq in 2003. In 2007 the incoming Prime Minister Gordon Brown proposed that 'On an issue of such fundamental importance, the government should seek the approval of the House of Commons for significant, non-routine deployments of the Armed Forces into armed conflict'.[5] He undertook to consult parliament and the public on how best to achieve this; and acknowledged the need not to prejudice operational security, or the need occasionally to take swift action with little time for parliamentary debate.

11 Parliamentary committees had already conducted several inquiries to consider how to ensure that the government could not embark on military action without the approval of the House of Commons. There are three possible mechanisms, in ascending order of stringency:

- An informal convention based upon precedent, starting with the Commons debate and formal vote approving the planned invasion of Iraq in 2003
- A formal parliamentary convention embodied in a resolution of the House of Commons, favoured by the Lords Constitution Committee[6]
- Legislation setting out the conditions the government would need to satisfy before it could wage war, proposed by the Commons Public Administration Committee.[7]

12 The Brown government subsequently opted for a parliamentary resolution, setting out in detail the processes parliament should follow before approving deployment of the armed forces; and appended a draft resolution to their white paper.[8] But a joint parliamentary committee criticised

[5] *The Governance of Britain* (2007), para 26.
[6] Constitution Committee, *Waging War: Parliament's Role and Responsibility*. HL Paper 236-I 2005-06, July 2006.
[7] Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, HC 422 2003-04, March 2004.
[8] Ministry of Justice, *The Governance of Britain – Constitutional Renewal*, Cm 7342-I, March 2008, para 215.

the definition of 'conflict decision', and the Commons Public Administration Committee was more critical, in particular of the Prime Minister's control of the information which would be made available to parliament. The Brown government made no further progress before it left office in 2010.

13 The coalition government soon had to address the issue in March 2011, with the deployment of forces in Libya. Although a parliamentary debate was held after the bombing of Libya had commenced, the government acknowledged the existence of a convention that normally there should be a prior debate, and undertook to observe the convention except in cases of emergency. The test came in August 2013, when the government wanted to engage in bombing in Syria, but was defeated by 272 to 285 votes. As a result the government dropped its plans. A year later the government again sought parliamentary approval for action against ISIS in Iraq in September 2014, and on this occasion the House supported the proposed deployment by 524 votes to 43. The following year the government sought parliamentary approval to extend the bombing of ISIS to Syria, and after a ten hour debate on 2 December 2015 the House again approved the proposed action by a large majority.

14 These successive precedents have enabled commentators to state with increasing confidence that there is now an established convention that the government will not deploy the armed forces overseas without prior recourse to parliament.[9] The convention is acknowledged in the Cabinet Manual (para 5.38), albeit in terms which leave the government with a degree of discretion and flexibility. Earlier proposals for legislation just raised too many difficult questions of definition: how to define the sort of military action that would trigger parliamentary involvement; under what circumstances the government could circumvent parliament on grounds of urgency; the risk of involving the courts. And there is the difficulty of future-proofing, when modern warfare is changing so fast, with new threats like cyber attacks or drone strikes. The latest parliamentary report on the subject, the sixth in 15 years, concluded:

> While the involvement of Parliament at the earliest opportunity is vital, any statutory formalisation of this expectation would create new risks, given the difficulty of legislating for all possible contingencies. We were, however, not convinced by the Government's arguments against developing clearer political expectations through a resolution of the House of Commons. We therefore recommend that the House of Commons considers and approves a resolution setting out the principle of the convention …

15 The Commons Public Administration and Constitutional Affairs Committee included at the end of their report the detailed text of a draft resolution.[10] The government has not yet responded to the Committee's recommendations.

[Add this suggested by Paul Evans: Theresa May's partial repudiation of the war powers convention. It was in April 2018, during the Easter recess. On the day the House returned (16 April) there was a statement from the PM and an emergency debate led by Alison McGovern.

[9] G. Phillipson, ''Historic' Commons' Syria vote: the constitutional significance (Part 1)', UK Constitutional Law Association Blog, 19 September 2013, https://ukconstitutionallaw.org/2013/09/19/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-i/, accessed 2 June 2016. See also Part 2 (29 November 2013, https://ukconstitutionallaw.org/2013/11/29/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-ii-the-way-forward/, accessed 2 June 2016) and 'Voting on Military Action in Syria: A Reply' (2 December 2015, https://ukconstitutionallaw.org/2015/12/02/gavin-phillipson-voting-on-military-action-in-syria-a-reply/, accessed 2 June 2016).

[10] Commons Public Administration and Constitutional Affairs Committee, *The Role of Parliament in the UK Constitution: Authorising the Use of Military Force*, HC 1891, August 2019, para 134 and chapter 4.

On the same day another application for an emergency debate made by Jeremy Corbyn was accepted and it took place on the following day - it was this debate which focused very specifically on the convention and whether or not it had been breached.

PACAC also did an inquiry on the matter and their no doubt slightly hastily composed report was published in August 2019: see https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/1891/189102.htm.]

Scrutiny of public appointments

16 Gordon Brown's most important constitutional innovation is also the least known, but is likely to have the most enduring impact. It stems from his decision to give the House of Commons a greater role in senior public appointments, by making key appointments subject to a 'pre-appointment scrutiny hearing' with the relevant select committee:

> The hearing would be non-binding, but in the light of the report from the committee, Ministers would decide whether to proceed. The hearings would cover issues such as the candidate's suitability for the role, his or her key priorities, and the process used in selection.[11]

17 Following a process of bargaining in 2007-8 between the Cabinet Office and the select committees, brokered by the Commons Liaison Committee, they agreed upon a list of just over 50 appointments which would be subject to the new procedure. This is a tiny fraction of all public appointments (estimated to be over 20,000), but includes the major constitutional watchdogs, inspectors, regulators and ombudsmen, and high profile positions like the chairman of the BBC. Ministerial powers of patronage had already been restricted since the Nolan report in 1995 recommended creation of an independent Commissioner for Public Appointments. The Commissioner ensures that all public appointments are made following a process of fair and open competition, run by an independent panel which draws up a short list of candidates, selected on merit, from which ministers make the final choice. Select committees provide a further check on ministerial patronage, testing candidates for their independent mindedness and suitability for the role, as well as discussing their initial priorities, and parliament's expectations.

18 By the end of the 2015-17 Parliament, there had been almost 100 pre-appointment scrutiny hearings, involving almost every House of Commons departmental Select Committee. It might be thought pre-appointment hearings would prove a waste of time, since the committees have no power of veto. Indeed the majority of hearings resulted in a positive recommendation from the committee, leading to appointment of the candidate. But there were nine hearings which called appointments into question. In only three cases out of the nine did the appointment continue. In four cases the candidate decided to withdraw, or was withdrawn; while in a further two cases the candidate was forced to resign because of statements made at the pre-appointment hearing. So pre-appointment hearings do provide a further safeguard. More often than not, when a committee gives a candidate a hard time or issues a negative report, the appointment does not go ahead. And there is a wider deterrent effect: because pre-appointment scrutiny is rigorous, testing and in public, ministers are reluctant to put forward weak candidates who will not pass muster before the select committee.[12]

[11] *The Governance of Britain* (2007), para 76.

[12] R. Hazell, M. Chalmers and M. Russell, 'Pre Appointment Scrutiny Hearings in the British House of Commons: All Bark, or some Bite?', *Journal of Legislative Studies* 18:2 (2012), pp. 222-241. L. Maer, *Pre-appointment*

The appointment of peers

19 The prerogative power to appoint peers officially rests with the monarch, but is in practice exercised only on the advice of the Prime Minister. In the past there has been no constraint on the numbers or the individuals whom the Prime Minister chose to appoint, and the practice of rewarding party donors with peerages goes back at least to the time of Lloyd George. There was a broad understanding that Prime Ministers would not simply pack their own side in the Lords, but no enforcement mechanism other than self-restraint. However in the last 20 years the power to award peerages has become more restricted in two ways: by the creation of the House of Lords Appointments Commission, and by commitments from all the main parties about the need for proportionality to regulate party balance in the Lords. Both developments appeared to offer real constraints, but both have been weakened under the premiership of David Cameron.

20 The House of Lords Appointments Commission (HoLAC) was created in 2000. Its first function is to make nominations to the independent Crossbenches. For these appointments HoLAC has effectively become the appointing body, because successive Prime Ministers have undertaken to pass on without amendment the Commission's recommendations, save in exceptional circumstances. During its first ten years the Commission nominated 53 people to the Crossbenches. But the Prime Minister still controls the numbers to be appointed. Since David Cameron became Prime Minister those numbers have been greatly reduced: in 2012 he asked the Commission in future to nominate only two individuals per year, and the 2010-15 parliament saw only eight nominations. At the same time Cameron has expanded his power to nominate in each parliament up to ten distinguished public servants to the Crossbenches on their retirement, by broadening it to a wider range of people, and not solely on their retirement.[13] Hence if the Commission is limited to two nominations per year, or ten per parliament, the Prime Minister can nominate up to half of all new Crossbenchers.

21 The Commission's second function is to vet for propriety all nominations to the House, including nominees from the political parties. The Commission plays no part in assessing the suitability of those nominated, which is a matter for the parties themselves. Its role is limited to assessing propriety.[14] The Commission's website states that 'the making of a donation or loan to a political party cannot of itself be a reason for a peerage'. The Commission does not have a right of veto; it can merely draw its concerns to the Prime Minister's attention. Nevertheless, the Commission's vetting function has proved effective in screening out some of the candidates put forward. During its first 15 years, it is said that ten peerages were screened out in this way.[15] HoLAC's 2013-15 report disclosed that it successfully queried a further seven nominations in 2015.[16]

22 The need for a clearer convention about party balance in the House of Lords arose from the Labour party's 1997 commitment to remove the hereditary peers. Once they were gone, the Prime Minister could in future determine the membership of the Lords (save for the bishops). So Labour's

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Hearings, House of Commons Library SN/PC/04387, February 2015. R. Hazell, 'Improving Parliamentary Scrutiny of Public Appointments', *Parliamentary Affairs*, (2019) 72, 223-244.

[13] Announced in the House of Commons Official Report, 26 June 2014, col. 37WS.

[14] Interpreted by the Commission as meaning that the individual should be in good standing in the community and with the public regulatory authorities; and that the past conduct of the nominee will not bring the House of Lords into disrepute.

[15] P. Dominiczak, S. Swinford and C. Hope, 'Revealed: seven peerages blocked after failing vetting process', *Daily Telegraph*, 26 August 2015, http://www.telegraph.co.uk/news/politics/11826722/Revealed-Seven-peerages-blocked-after-failing-vetting-process.html.

[16] House of Lords Appointments Commission, Annual Report 2013-15, para 36.

1997 manifesto stated 'Our objective will be to ensure that over time party appointees as life peers more accurately reflect the proportion of votes cast at the previous general election… No one political party should seek a majority in the House of Lords'. Tony Blair made large numbers of Labour and Liberal Democrat appointments, which greatly increased proportionality, but this principle was never rigidly adhered to.[17]

23 The coalition government formed in 2010 adopted a similar commitment, that 'Lords appointments will be made with the objective of creating a second chamber reflective of the share of the vote secured by the political parties in the last general election'.[18] But profligate appointments by David Cameron sent the size of the House spiralling upwards to over 800 members. This led the Lord Speaker in 2016 to set up a committee on the size of the House, chaired by Lord Burns, which proposed a scheme of voluntary retirement, shared across the parties, with the aim of gradually bringing the House back down to 600. The hope was that if the House showed restraint in persuading members to retire after 15 years, the Prime Minister might be more restrained in making new appointments. Theresa May showed more restraint than her predecessor, and the annual monitoring reports of the Burns committee show that the size of the House is slowly coming down.

[Update with Johnson's appointments in 2020, with link to MR blog, showing restraint has been abandoned and the size is going up again]

24 Prime Ministerial use of the prerogative to make appointments to the Lords remain essentially unregulated, save for the limited control by the House of Lords Appointments Commission. Under Cameron, May and Johnson there have been occasional suggestions that they might 'pack' the Lords with Conservative peers in order to get government legislation through.[19] This could place the monarch in a very awkward position. The last time any such move was attempted explicitly was immediately before the passage of the 1911 Parliament Act, when the monarch was still considered to have some discretion and the request from Prime Minister Asquith was refused – at least until a general election had been held to test public opinion on the policy matter under dispute. Should such a request be made today it is not clear whether the Monarch would be able to resist it. For this and other reasons the Public Administration Committee, and its successor the Public Administration and Constitutional Affairs Committee, have proposed tighter regulation of this prerogative power.[20]

The appointment of Judges

25 Formally appointments to the High Court are made by the Queen, on the advice of the Lord Chancellor, and appointments to the Court of Appeal and Supreme Court are made by the Queen on the advice of the Prime Minister. Although political appointments died out during the first half of

[17] For party balance across appointments per Prime Minister since 1958 see M. Russell and T. Semlyen, *Enough is Enough: Regulating Prime Ministerial Appointments to the Lords* (The Constitution Unit, UCL, 2015); for party balance across the chamber and in appointments per year since 1999 see M. Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived* (Oxford: Oxford University Press, 2013), p. 75.

[18] HM Government, *The Coalition: our programme for government*, May 2010, p. 27.

[19] Joe Watts, 'Speaker of House of Lords warns Theresa May against appointing new peers to get Brexit bills passed', Independent 6 January 2017. Nigel Morris, 'Boris Johnson intends to pack House of Lords with Brexiteers to correct pro-Remain bias', iNews 26 August 2019.

[20] Public Administration Select Committee*, Propriety and peerages*, HC 153 2007-08, December 2007; Public Administration and Constitutional Affairs Committee. *The Strathclyde Review: Statutory Instruments and the power of the House of Lords*, HC 752 2015-16, May 2016.

the twentieth century, judicial appointments continued to be based on 'secret soundings' and a tap on the shoulder right through to the end of the century. The process was criticised for its secrecy and dependence on old boy networks, but Lord Irvine, Tony Blair's first Lord Chancellor, resisted growing pressure to open up the system. Following an independent review, a new scrutinising body, the Commission for Judicial Appointments, was established in 2001. It identified chronic problems with the self-replicating nature of the process, with those appointed being invariably successful white, male barristers, often privately educated, and it recommended creating a new process centred around an independent appointments body.

26 This was created by the Constitutional Reform Act 2005, which established an independent Judicial Appointments Commission, responsible for all judicial appointments save to the Supreme Court. In place of secret soundings there are advertisements, job descriptions, selection criteria, application forms and formal interviews. Similar processes of open competition apply for the Supreme Court, save that a selection commission is created for each vacancy. Formally the Judicial Appointments Commission is a recommending body, with appointments made by the Lord Chancellor (or the Queen on the advice of the Lord Chancellor), but in practice it is effectively an appointing body, because the Lord Chancellor is left with very little discretion. And although formally the judges on the Commission are outnumbered (just) by the lay members, in practice the judges have disproportionate influence, and critics argue that the Commission has formalised the old self-replicating process, with the judges appointing their own successors. It is certainly the case that any element of political choice has been driven out of the system: the Lord Chancellor is presented with a single name, and has almost always accepted the Commission's recommendation, with only five occasions from nearly 3,500 recommendations between 2006 and 2013 when this was not so.[21]

Review of all the prerogative powers

27 The final contribution of the Brown government was to publish a comprehensive review of all the executive prerogative powers.[22] The review was the result of an exhaustive two year exercise which included a survey of all government departments and agencies to identify prerogative powers still in use, which were listed in an appendix to the report. Although the original aspiration had been to codify all the prerogative powers, the review concluded that this would not be practicable, nor desirable. In some areas, like the armed forces, it was very difficult to disentangle prerogative from statutory powers; in others the prerogative provided flexibility in dealing with exceptional circumstances not covered by statute. The review concluded:

> The changes now in train will deal with the most serious concerns about the remaining … prerogative powers. The Government has concluded that it is unnecessary, and would be inappropriate, to propose further major reform at present. Our constitution has developed organically over many centuries and change should not be proposed for change's sake … any further reforms in this area should be considered on a case-by-case basis.[23]

PART 2: The reduction of the monarch's reserve powers

[21] The appointments queried by the Lord Chancellor were low level, and on grounds of process rather than merit. G. Gee, R. Hazell, K. Malleson and P. O'Brien, *The Politics of Judicial Independence*, Cambridge University Press 2015, chapter 7.
[22] Ministry of Justice, *The Governance of Britain – Review of the Executive Royal Prerogative Powers: Final Report*, October 2009.
[23] *Ibid*., para 112.

28 The Queen still exercises some prerogative powers herself, known variously as her reserve powers, constitutional powers, or the personal prerogatives (a term first coined by Sir Ivor Jennings). The most important powers are:

- to appoint and dismiss ministers, in particular the Prime Minister
- to summon, prorogue and dissolve parliament
- to give royal assent to bills passed by parliament.

The appointment of the Prime Minister

29 The appointment and dismissal of ministers is made on the advice of the Prime Minister. The last time a Prime Minister was dismissed was in 1834: few would maintain that the power might be exercised today.[24] But on 6 October 2019 the Sunday Times had the histrionic headline, " 'Sack me if you dare', Boris Johnson will tell the Queen".[25] As the Cabinet Manual records, 'Historically, the Sovereign has made use of reserve powers to dismiss a Prime Minister or to make a personal choice of successor, although this was last used in 1834 and was regarded as having undermined the Sovereign' (the episode was William IV's dismissal of Lord Melbourne and replacement by Sir Robert Peel).[26]

30 The power to appoint a Prime Minister retained a discretionary element for longer, but that too is now gone. King George V persuaded Ramsay MacDonald not to resign in 1931, when his Labour government broke up, but to head a National government dominated by the Conservatives. A small discretionary element remained in the case of a mid-term change of Prime Minister (such as Churchill being succeeded by Eden in 1955, or Macmillan by Douglas-Home in 1963), with the monarch taking advice from the outgoing Prime Minister and party grandees, in the days when Conservative party leaders were anointed rather than elected. But that ended when the political parties introduced elections for the party leader: the Conservatives introduced election of the leader by the parliamentary party in 1965, and the Conservative and Labour party have since extended voting rights to all party members.[27]

31 When a party wins an overall majority in a general election the result is clear and the Queen appoints the party's leader as Prime Minister. When the result is unclear because no party has an overall majority, the convention is that the Queen will appoint that person who is most likely to command the confidence of the House of Commons. In the run up to the 2010 election, when a hung parliament was expected, the Cabinet Secretary published guidance in the form of an advance chapter of a wider Cabinet Manual. The guidance made it clear that it was for the political parties first to negotiate to determine who could command confidence in the event of a hung parliament, and the Queen would then appoint that person. A full draft of the Cabinet Manual was published

[24] Save as a deep reserve power. Robert Blackburn, in an article aimed at restricting any discretionary use of the monarch's personal prerogatives, suggested that 'A monarch is duty bound to reject prime ministerial advice, and dismiss the Prime Minister from office, when the Prime Minister is acting in manifest breach of convention'. The example he gave was if a Prime Minister, after a successful no confidence motion, refused to resign or call a general election. R. Blackburn, 'Monarchy and the Personal Prerogatives', *Public Law* (Autumn 2004), p. 551.

[25] Tim Shipman and Caroline Wheeler, Sunday Times 6 October 2019. The story quoted an unnamed senior Cabinet Minister as saying, "Our opponents have flouted convention and there is nothing in the Fixed-term Parliaments Act that says you have to resign. The Queen is not going to fire the prime minister. She would dissolve parliament and let the people decide."

[26] HM Government, *The Cabinet Manual* (London: Cabinet Office, 2011), p. 14.

[27] The Labour Party introduced one member one vote in 1993. In 1998 the Conservative party introduced a postal ballot of all party members (who must have been paid up members for three months), after an initial selection of two candidates by the parliamentary party.

after the election, and after minor revision following scrutiny by three parliamentary committees, the first edition of the Cabinet Manual was published in October 2011. It follows quite closely the New Zealand Cabinet Manual, which is now in its fifth edition.

32 Chapter two of the Cabinet Manual, on elections and government formation, codifies the constitutional conventions about the appointment of the Prime Minister. The key paragraphs about a hung parliament are as follows:

> **Parliaments with no overall majority in the House of Commons**
>
> 2.12 Where an election does not result in an overall majority for a single party, the incumbent government remains in office unless and until the Prime Minister tenders his or her resignation and the Government's resignation to the Sovereign. An incumbent government is entitled to wait until the new Parliament has met to see if it can command the confidence of the House of Commons, but is expected to resign if it becomes clear that it is unlikely to be able to command that confidence and there is a clear alternative.
>
> 2.13 Where a range of different administrations could potentially be formed, political parties may wish to hold discussions to establish who is best able to command the confidence of the House of Commons and should form the next government. The Sovereign would not expect to become involved in any negotiations, although there are responsibilities on those involved in the process to keep the Palace informed …

33 The Cabinet Manual goes on to describe what happens if the Prime Minister resigns mid-term, stating that it is for the party or parties in government to identify who can be chosen as the successor (para 2.18). So the monarch is left with no discretion in any circumstances in which she may be required to appoint a Prime Minister, whether post-election or mid-term. Indeed the Cabinet Manual makes clear that the whole purpose is to remove any residual discretion:

> In modern times the convention has been that the Sovereign should not be drawn into party politics, and if there is doubt it is the responsibility of those involved in the political process, and in particular the parties represented in Parliament, to seek to determine and communicate clearly to the Sovereign who is best placed to be able to command the confidence of the House of Commons (para 2.9).

34 One further reform advocated by the Institute for Government and the Commons Political and Constitutional Reform Committee, as well as the Constitution Unit, would be to hold a vote on the floor of the House of Commons as the first piece of business after an election, to determine who commands the confidence of the new parliament.[28] This is the practice followed in Scotland and Wales,[29] and would help clearly to distance the monarch from the political process; but it has not yet found favour with the government at Westminster.[30]

The power to summon and dissolve parliament

[28] Political and Constitutional Reform Committee, *Government Formation Post-Election*, HC 1023 2014-15, March 2015, paras 62-3. Written evidence by the Institute for Government, para 16; and by R. Hazell, paras 10-12.

[29] Scotland Act 1998, section 46; Government of Wales Act 2006, section 47.

[30] P. Schleiter, V. Belu and R. Hazell, *Forming a government in the event of a hung parliament: The UK's recognition rules in comparative context* (London: The Constitution Unit, UCL, May 2016).

35 The summoning and dissolution of parliament has also been done by the personal prerogative. By convention, it has been the constitutional right of the Prime Minister to determine the timing of a dissolution and hence of the next election, and to advise the monarch accordingly. The majority view amongst constitutional experts has been that the monarch could refuse an untimely request for dissolution, even though there has been no refusal in modern times.[31] But any doubt or dispute is now academic, because the prerogative power of dissolution has been abolished by the Fixed Term Parliaments Act 2011. Unlike Canada's Bill C-16 in 2007, which expressly preserved the prerogative power of the Governor General to dissolve Parliament, dissolution in the UK is now regulated by statute not the prerogative; and it is a matter for parliament, not the executive.

36 The Fixed Term Parliaments Act 2011 provides for five year parliaments, with polling on the first Thursday in May five years after the previous general election; and automatic dissolution 17 working days before the election. Section 3(2) states baldly, 'Parliament cannot otherwise be dissolved'. There is provision for mid-term dissolution in section 2, but again by statute not under the prerogative. Section 2 allows for a mid term dissolution in only two circumstances: if two thirds of all MPs vote for an early general election; or if the House passes a formal no confidence motion 'that this House has no confidence in Her Majesty's Government', and no alternative government which can command confidence is formed within 14 days. The only tiny element of discretion which remains is the timing of an election following a mid-term dissolution: section 2(7) provides that 'the polling day … is the day appointed by Her Majesty by proclamation on the recommendation of the Prime Minister'. The election would normally be held within about five weeks.

[Update with 2019 manifesto commitments to repeal the FTPA, draft Repeal bill, papers of FTPA Joint Committee]

37 So the prerogative power of dissolution has gone. What about the power to summon parliament, and determine the date of first meeting of the new parliament? This is done by proclamation issued by the monarch, but on the advice of the Prime Minister. So the outgoing Prime Minister determines the date when the new parliament will meet. This used to be six days after the election; but in 2007 the Modernisation Committee of the House of Commons recommended an interval of 12 days, to allow more time for induction of new MPs.[32] This was the practice followed in 2010, 2015 and 2017. [and 2019?]

The power to prorogue and recall parliament

38 The prerogative power to prorogue parliament remains. Prorogation happens at the end of a parliamentary session (normally each year); dissolution happens at the end of a parliament, to dissolve parliament before an election. The Cabinet Manual explains prorogation as follows:

> 2.24 … Prorogation brings a parliamentary session to an end. It is the Sovereign who prorogues Parliament on the advice of his or her ministers. The normal procedure is for commissioners appointed by the Sovereign to prorogue Parliament in accordance with an Order in Council. The commissioners also declare Royal Assent to the Bills that have passed

[31] Robert Blackburn disagrees, in 'Monarchy and the Personal Prerogatives', pp. 554-561. For a rejoinder, see R. Brazier, '"Monarchy and the Personal Prerogatives" - A personal response to Professor Blackburn', *Public Law* (Spring 2005), pp. 45-47.

[32] Select Committee on Modernisation of the House of Commons, *Revitalising the Chamber: the role of the back bench Member*, HC 337 2006-07, June 2007, paras 36-39.

both Houses, so that they become Acts, and then they announce the prorogation to both Houses in the House of Lords.

39 Until 2019 prorogation had generally been exercised without the kind of controversy which has occurred in Canada.[33] That changed dramatically when in August 2019 the new Prime Minister Boris Johnson advised the Queen to prorogue Parliament for five weeks, leading to accusations that he was closing down Parliament in order to avoid scrutiny of his Brexit plans. A successful court challenge led the Supreme Court to declare not merely that the advice to prorogue for such a lengthy period was unlawful, but that the prorogation order itself was null and void.[34] The subsequent prorogation to end the session in October was for just three sitting days. In future prime ministers who wish to prorogue parliament for more than a few days will have to provide good reasons which may be tested in court. But post-Brexit, legislation may be introduced to require parliamentary consent to prorogation, or to remove the power from the prime minister and hand it to the House of Commons – as has happened with the power of dissolution. [update with more detail of how this might be done; or whether prorogation might be abolished altogether – as in NZ]

40 The power to recall Parliament is not a prerogative power, but is worth mentioning briefly here. Parliament has been recalled 29 times during the recess since 1948. Under the standing orders of the House (SO 13), the House of Commons is recalled during a recess only when the government proposes a recall, and the Speaker agrees.[35] So the initiative lies with the government. Gordon Brown as Prime Minister proposed that a majority of MPs should also have the right to request a recall.[36] The proposal was referred to the Commons Modernisation Committee, and the committee initiated but did not complete an inquiry, so the proposal was not implemented. In a Hansard Society lecture in October 2017 the Commons Speaker John Bercow revived the idea that Parliament should be able to propose a recall as well as the government: it would require a minimum number of MPs to request a recall, and perhaps a minimum number from different parties.[37] [update with any requests for recall to approve Covid Regs, or Brexit deal in 2020]

The power to give royal assent to bills

41 Royal assent to a bill was last refused in 1708, when Queen Anne, on the advice of her ministers, withheld royal assent to a bill to arm the Scottish militia. King George V came close to withholding Royal assent to the Irish Home Rule Bill in 1914, but was persuaded not to by his ministers. It is hard to conceive that the monarch would withhold royal assent today, save on the advice of ministers. Debate about the circumstances in which the monarch might justifiably refuse royal assent had been largely hypothetical, until Brexit thrust the issue centre stage.[38] With a minority government in power which could not prevent the passage of unwelcome legislation by the

[33] P. Russell and L. Sossin (eds), *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009).
[34] R (on the application of *Miller*) (Appellant) *v* The *Prime Minister* (Respondent). [2019] *UKSC* 41.
[35] The House has been recalled 28 times since SO 13 was introduced in 1948. See R. Kelly and L. Maer, *Recall of Parliament*, House of Commons Library Briefing Paper 1186, March 2016.
[36] Secretary of State for Justice and Lord Chancellor, *The Governance of Britain*, Cm 7170, July 2007, paras 37-39.
[37] Richard Kelly, *Recall of Parliament*, House of Commons Library Briefing Paper 1186, August 2019 chapter 3.
[38] For the hypothetical debate, see Blackburn (2004), p. 554; Brazier (2005), 45-7. For a detailed account of the process of royal assent, see R. Brazier, 'Royal Assent to Legislation', *Law Quarterly Review* 129:2 (2013), pp. 184-204. Mike Bartlett's play *King Charles III* (2014) is predicated on the new King Charles refusing royal assent to a bill restricting the freedom of the press.

opposition majority, withholding royal assent seemed to offer a last ditch means of preventing such bills becoming law.

42 Brexit has led to an explosion of legal commentary on whether the Queen had any discretion, if she was advised by her government to withhold royal assent. Commentators divided in part on whether royal assent was seen as a legislative function, the Crown certifying that a law had been duly passed by Parliament, or an executive function, exercised by the Crown acting on ministerial advice.[39] Another distinction was made between representative and responsible government: MPs derive their legitimacy from being elected representatives, while the government derives its legitimacy from being responsible to Parliament.[40] But if Parliament passes an important law against the wishes of the government, can the government be said to command the confidence of Parliament, and so is it entitled to give binding advice?[41]

43 In the event, when MPs seized control of the Order paper and Parliament passed Hilary Benn's EU Withdrawal (no 2) Bill in just three days in early September, against strenuous opposition from the government, the bill was granted Royal assent on 9 September, the last day before prorogation. We do not know whether the government considered advising the Queen to withhold royal assent, nor what would have happened if they had. Anne Twomey's suggestion that the opposition majority could table a no confidence motion would not have been available in this case, because the next day Parliament stood prorogued.

44 Twomey's conclusion, after surveying the literature and Westminster experience around the world, is that the Sovereign must act on the advice of responsible ministers. But this leaves open the question, what if the ministers proffering that advice can no longer command the confidence of parliament? The safer course, even then, is for the Sovereign to follow the ministerial advice; while the Queen would be strongly criticised, and really trigger a constitutional crisis, if she declined to do so. So long as the Queen follows the advice of her government, then as with the unlawful prorogation, all criticism would be directed at the government which is accountable to Parliament, and whose constitutional role is to absorb such criticism instead of the monarch.

Royal consent to bills affecting the prerogative, and personal interests of the Crown

Quite separate from royal assent is the requirement for Queen's and Prince's consent to bills affecting the prerogative, and the hereditary revenues, property and personal interests of the Crown and the Duchy of Cornwall. This requirement applies at the start, for introduction of a bill, not as the final stage. And it applies only to bills affecting the interests of the Crown. It is a little known requirement, which gave rise to controversy in 2013 when its scope became known following a freedom of information request, and the *Guardian* newspaper criticised the wide range of bills (including tuition fees, identity cards, paternity pay and child maintenance) which were subject to the Queen's or Prince's consent.[42] The article reported that 39 bills had required royal consent, and

[39] Mark Elliott, 'Can the Government veto legislation by advising the Queen to withhold royal assent?', Public Law for Everyone, 21 January 2019. Michael Detmold, 'The Proper Denial of Royal Assent', UK Const Law Blog, 5 September 2019.
[40] Robert Craig, 'Could the Government Advise the Queen to Refuse Royal Assent to a Backbench Bill?', UK Const Law Blog, 22 January 2019.
[41] Anne Twomey, *The Veiled Sceptre*, at 646-7.
[42] R. Booth, 'Secret papers show extent of senior Royals' veto over bills', *The Guardian*, 14 January 2013, http://www.theguardian.com/uk/2013/jan/14/secret-papers-royals-veto-bills, accessed 2 June 2016.

quoted Andrew George MP saying that 'It shows the royals are playing an active role in the democratic process and we need greater transparency in parliament so we can be fully appraised of whether these powers of influence and veto are really appropriate'. Academic criticism followed, with Tom Adams saying on the UK Constitutional Law Blog:

> Quite apart from its scope it is worth emphasising that the content of the power is absolutely damning: it is not simply that the relevant bill fails to become law if consent is not given, although this is implied. It is that the bill cannot even be properly debated by our elected politicians.[43]

But it soon became clear that the Queen's or Prince's consent is only granted or refused on advice from ministers. Buckingham Palace quickly issued a statement to this effect. When the Political and Constitutional Reform Committee (PCRC) launched an inquiry, their main concern was to ascertain whether the consent requirement gave the Palace any influence over the content of legislation, and whether ministers ever used it as a means of blocking private member's bills. They found that private member's bills were occasionally blocked by refusing the Queen's consent, the worst case being the stifling of Tam Dalyell's 1999 Military Action against Iraq (Parliamentary Approval) Bill. But they did not find any evidence of undue Royal influence:

> When the Queen or the Prince of Wales grant their Consent to Bills, they do so on the advice of the Government. We have no evidence to suggest that legislation is ever altered as part of the Consent process. The fact that the Prince of Wales has in the past both granted his Consent to a Bill, in a constitutional capacity, and petitioned against it, in a personal capacity, indicates the formal nature of the process. However, the process of Consent is complex and arcane and its existence, and the way in which the process operates, undoubtedly do fuel speculation that the monarchy has an undue influence on the legislative process. The fact that Consent is sometimes characterised as a veto underlines this point. In reality, it is a veto that could be operated by the Government, rather than the monarchy.[44]

The main benefit of the FOI disclosures and PCRC inquiry was to shed light on an arcane aspect of the legislative process, and to force publication of the detailed internal guidance on the topic by the Office of Parliamentary Counsel.[45] For those who love the peculiarities of the British constitution, the 27 page guidance provides plenty of odd examples**.**

Executive Veto through the Rule of Crown initiative

Insert here material from Paul Evans about Money Resolutions, based on his 2020 CU report *Braking the Law*

Conceptually, do these sections about Royal Assent, Queen's Consent and Crown initiative belong in Part 1, as powers exercised by the government rather than the monarch?

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[43] T. Adams, 'Royal Consent and Hidden Power', UK Constitutional Law Association Blog, 26 January 2013, https://ukconstitutionallaw.org/2013/01/26/tom-adams-royal-consent-and-hidden-power/, accessed 2 June 2016.

[44] Political and Constitutional Reform Committee, *The Impact of Queen's and Prince's Consent on the Legislative Process,* HC 784 2013-14, March 2014, para 35.

[45] For the latest version see Office of Parliamentary Counsel, *Queen's or Prince's Consent,* July 2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448163/OP_Queen_s_and_Prince_s_Consent__July_2015_.pdf, accessed 2 June 2016.

The retention of a deep reserve power

45 So to conclude, the monarch's personal prerogative powers contain no real political power. The Queen has no effective discretion in deciding whom to appoint as Prime Minister; in deciding whether to summon, dissolve or prorogue parliament; or to grant royal assent to bills. It is true that the Monarch might, in very exceptional circumstances, still have to exercise a choice: for example if the Prime Minister were killed, or suddenly died. In that event, there would be no time to hold a vote of the party membership. An interim Prime Minister would need to be appointed until the party had elected a new leader; the Monarch would look to the cabinet to nominate the caretaker.[46] Other hypothetical examples are possible: if the Prime Minister refused to resign after a successful no confidence motion, even though the House of Commons had voted confidence in an alternative; or if the prime sought an unduly long prorogation, or a sudden prorogation in order to avoid a parliamentary vote of no confidence.[47] In such circumstances the Monarch retains a deep reserve power to dismiss the Prime Minister; or, strengthened by the judgement of the Supreme Court, to refuse an improper request for prorogation.

46 The Monarch is the ultimate constitutional longstop. In 2016 I wrote that 'in Britain's political culture, it is hard at present to see those longstop powers ever needing to be exercised'.[48] How wrong that judgement was. The fevered politics of Brexit have seen conventions being stretched to the limit, and beyond. Conventional wisdom is that reserve powers should remain in the background, never needing to be deployed because politicians will not wish to push the boundaries, and will certainly want to avoid dragging the Queen into politics. But Brexit has smashed that wisdom, and those certainties. It is a good thing that the Queen has deep reserves of wisdom and experience to draw upon, should the reserve powers ever need to be exercised.

[46] P. Norton, 'A temporary occupant of No 10? Prime Ministerial succession in the event of the death of the incumbent', *Public Law* (January 2016), pp. 18-34.
[47] Russell and Sossin (2009).
[48] R. Hazell and R.M. Morris, *The Queen at 90: The Changing Role of the Monarchy, and Future Challenges*, Constitution Unit 2016, at p. 9.