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REFORMING THE PREROGATIVE

Professor Robert Hazell and Charlotte Sayers-Carter

The Constitution Unit

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The Constitution Unit
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Front cover image: New UK Prime Minister Rishi Sunak Takes Office by Aaron Chown - WPA Pool/Getty Images

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Preface

This report is being published as a summary of our book on the prerogative, *Executive Power: The Prerogative, Past, Present and Future* (Hart Publishing, 2022). The book was written with my co-author Tim Foot, and supported by our researcher Charlotte Sayers-Carter. The book has 19 chapters, and 140,000 words, with separate chapters on eleven of the main prerogative powers. To produce this report Charlotte and I have summarised the introduction and conclusion from the book, together with summaries of five chapters on individual prerogative powers. I hope this might tempt readers to want to read the full version, together with further chapters on appointing and dismissing ministers, royal assent to legislation, regulating the civil service, the prerogative of mercy, the grant of honours, and public inquiries, as well as comparative chapters on the equivalent of prerogative powers in other countries.

Tim Foot and Charlotte Sayers-Carter have both been research volunteers with the Constitution Unit; but both have gone way beyond that. They continued to work on the book despite going on to other occupations, and Charlotte has gone a further mile in helping me to produce this report. They have been dogged and meticulous researchers, and neither the book nor this report could possibly have happened without them. Their scholarship is superb, their stamina is inexhaustible, and I owe both of them a huge debt of gratitude.

Robert Hazell

November 2022

Executive Summary

This report summarises the key findings of our book *Executive Power: The Prerogative, Past, Present and Future*. That is a long book of 19 chapters, with detailed analysis of 11 different prerogative powers. This much shorter report selects five powers to analyse the scope for reform through codification in statute, soft law, or by clearer and stronger conventions.

The prerogative derives from the original executive powers of the Crown. Over the years these have been overlain and superseded by statute, and most powers have transferred to ministers. The monarch retains the power to summon, dissolve and prorogue parliament; to grant royal assent to bills passed by parliament; to appoint and dismiss ministers. The main prerogative powers in the hands of ministers are the power to make war and deploy the armed forces; to make and ratify treaties; to conduct diplomacy and foreign relations; to grant peerages and honours; to grant pardons; to issue and revoke passports.

The underlying issue regarding all prerogative powers is how much autonomy the executive should have to wield that power; with what degree of supervision from parliament or the courts; or (more rarely) from the monarch. Underlying competing concepts of executive autonomy are the Whitehall and Westminster views of government. Under the Westminster view, the government derives its democratic legitimacy, and authority, from parliament. Under the Whitehall view, the government derives its legitimacy from the people.

Dissolution and Prorogation. The Westminster and Whitehall views are exemplified in the debates about dissolving and proroguing parliament. Is it right for the executive to control the sittings of parliament; or should parliament decide when it should sit, and for how long? The Fixed-term Parliaments Act 2011 (FTPA) transferred the power of dissolution to the House of Commons; in the Dissolution and Calling of Parliament Act 2022 the Johnson government transferred the power back to the executive. This was a retrograde step: giving parliament control over dissolution would remove the risk of challenge in the courts, and protect the monarch from controversy. Likewise with prorogation: the UK parliament is one of only two amongst 26 European democracies to lack the power to insist on sitting against the wishes of the executive.

Treaties. Statutory codification of the Ponsonby Rule has done little to strengthen parliamentary scrutiny of treaties, which have become more important with trade agreements post-Brexit. Parliament should have a veto instead of a power to delay ratification; scrutiny should extend to all international agreements; parliament should be allowed longer than 21 days when required; and committees in both chambers should have power to refer treaties for a debate and vote on the floor of the House.

The War-making Power. The convention that parliament would be given a vote before British forces are deployed in armed conflict was first articulated by Tony Blair in 2003, and confirmed by David Cameron in the 2011 Cabinet Manual. But it has since been called into question by Theresa May flouting the convention in 2018, and by changes in modern warfare, such as drone strikes, and large scale military assistance to Ukraine. The convention should be codified in a resolution of the House of Commons, as recommended by the Public Administration and Constitutional Affairs Committee (PACAC) in 2019; but it requires the cooperation of government

to develop a shared vision of the respective roles of government and parliament in initiating and approving military intervention of all kinds.

Public Appointments. Prerogative powers confer wide discretion on ministers to appoint peers to the House of Lords, and a wide range of other public appointments. That patronage has become circumscribed by three new regulatory bodies: the House of Lords Appointments Commission (HoLAC), the Office of the Commissioner for Public Appointments (OCPA), and the Judicial Appointments Commission (JAC). But recent Prime Ministers have loosened the controls over public appointments generally, and in particular over the appointment of new peers. For regulation to be effective, and not subject to backsliding, HoLAC and OCPA would be better protected if enshrined in statute, with clear statutory powers and functions.

Passports. Passports are issued by the Crown under the prerogative. The criteria for their withdrawal are not governed by legislation, but set out in a parliamentary statement by the Home Secretary, most recently in 2013. Successive statements have relaxed the criteria. Instead there should be a statutory right to a passport, with codification of the criteria for withdrawing one. Ideally this should be in primary legislation. An alternative is Canada's solution of prerogative legislation (in the Canadian Passport Order 1981). There should also be independent scrutiny, by the Parliamentary Ombudsman or (in terrorism cases) the Independent Reviewer of Terrorism Legislation.

Conclusions. The narrative running through this report is of the prerogative gradually becoming more regulated: by the courts; by parliament; through codification into hard and soft law; and the creation of new constitutional watchdogs. In the courts as in parliament there has been ebb and flow, but the overall trend has been to make the prerogative more transparent, more accountable, and to reduce the breadth of executive discretion.

Further codification is nonetheless needed: to provide a statutory regime for the issue and withdrawal of passports; and to strengthen HoLAC and OCPA with a statutory foundation. But the prerogative is too sprawling and varied to be susceptible to one-size-fits-all solutions. War powers need to be regulated by a more flexible framework than statute can provide, such as a resolution of the House of Commons. Codification is not a panacea: it has done little to strengthen parliamentary scrutiny of treaties, because of the weakness of the statutory regime. Nor is codification necessarily more durable: the FTPA was repealed after 10 years. Consensus on the value and content of controls needs to be built if codification is to endure.

For day-to-day supervision of the prerogative we must look to parliament. But for parliament to be effective requires political will and institutional leadership, both in short supply. It also requires the right structures, and resources: such as the recent creation by the House of Lords of dedicated machinery to scrutinise treaties.

1. Why the Prerogative Matters

The royal prerogative has no place in a modern western democracy ... Ministers have been insufficiently accountable for their executive decisions as a result of their use of prerogative powers. By the same token, the monarchy has been scarcely accountable at all for its conduct of this crucial institution at the heart of our constitutional arrangements.

Jack Straw (1994)¹

The Prerogative and Brexit

In August 2019 the Queen held a meeting of the Privy Council at Balmoral. The main item of business was to order the prorogation of parliament, which was prorogued for five weeks. There followed a storm of protest against parliament being closed down for over a month, when it looked as though the Brexit negotiations might end with no deal. There also followed a dramatic court challenge, which led to the Supreme Court declaring that the order of prorogation was null, void and of no effect.² And there followed a lot of questioning about prorogation, and the prerogative powers. How is it in a modern democracy that parliament can be closed down by the monarch on the advice of the Prime Minister? What other prerogative powers does the monarch have, and the government? And in what ways can they be better controlled?

That is what this report is about: the royal prerogative, what the main prerogative powers are, and how they might be reformed. It is not a comprehensive account: for that readers must turn to our book *Executive Power: The Prerogative, Past, Present and Future* (Hart Publishing, 2022). That is a long book of 19 chapters and 140,000 words. We have tried to distil the key findings of the book in this much shorter report of seven chapters and 25,000 words.

Until Brexit the prerogative had seldom been the subject of much political attention. It has long been shrouded in mystery. Then Brexit came and shone a terrible spotlight on this dark and dusty corner of the constitution. Obscure powers suddenly became the talk of parliamentarians and newspaper leader writers. There was fierce debate over whether Article 50 (triggering the UK's withdrawal from the EU) could be authorised without an Act of Parliament, spilling over from parliament into the courts.³ This was followed by wild speculation that the Queen might be advised to withhold royal assent from the European Union (Withdrawal) Act 2019 (the Cooper-Letwin Act), passed against the government's wishes. Then there was speculation (which turned out to be less wild) that Boris Johnson might prorogue parliament to prevent it heading off a no deal Brexit. And finally, there were repeated votes as Johnson sought to find a way round the Fixed-term Parliaments Act 2011 to dissolve parliament and hold a general election.

All four controversies involved different aspects of the prerogative. They raised fundamental questions about the balance of power between parliament and the executive; and the role of the courts. How much power should parliament have to scrutinise and approve (or block) the

¹ J. Straw, 'Abolish the Royal Prerogative' in A. Barnett (ed), *Power and the Throne: The Monarchy Debate* (London: Vintage, 1994), 125-9.

² R (Miller) v The Prime Minister; Cherry v Advocate General [2019] UKSC 41.

³ R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5.

ratification of treaties, traditionally a prerogative of the executive? Is royal assent a legislative function, or an executive function? Is prorogation a discretionary power of the Crown; or is the Queen bound to follow the Prime Minister's advice? And who should decide when parliament is dissolved: the government, or parliament itself?

Campaigns to Reform the Prerogative

These episodes from the Brexit battles of 2019 were the first time in recent years that the prerogative became thrust centre stage, as successive governments sought every reserve power available to get their Brexit business through a divided and fractious parliament. Up until this time the prerogative had been a fringe interest, associated with constitutional reform groups like Charter 88, who targeted the prerogative as exemplifying everything that was wrong with the archaic, secretive, and centralised nature of power in the British constitution. But reform of the prerogative proved a difficult cause around which to muster support because of its diffuse and sprawling nature.

Pinning down the prerogative became the objective in the next stage of campaigning, which shifted to parliament under the leadership of Tony Wright, chair of the House of Commons Public Administration Select Committee (PASC). PASC's main interest was in the prerogative powers exercised by ministers. Finding the government unable to provide a comprehensive list, its first task was simply to enumerate them. In its 2004 report, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, the main powers were identified as follows:

- making and ratifying treaties;
- the conduct of diplomacy and foreign relations;
- deployment of the armed forces;
- the grant of peerages and honours;
- organisation of the civil service;
- the issue and revocation of passports;
- the grant of pardons.

These powers historically had belonged to the Crown, but over the years their exercise had gradually passed to the government, so that for all practical purposes they now lay in the hands of ministers.

Quite separate are the prerogative powers of the monarch, known as the monarch's personal prerogatives, or reserve powers. These powers were summarised by PASC as follows:

- the rights to advise, encourage and warn ministers in private;
- to appoint the Prime Minister and other Ministers;
- to assent to legislation;
- to prorogue or dissolve parliament;

- (in grave constitutional crisis) to act contrary to or without ministerial advice.⁴

In 2007 Gordon Brown picked up the challenge laid down by PASC. Within a week of becoming Prime Minister he published a wide ranging agenda for reforming the prerogative. His green paper *The Governance of Britain* stated that ‘in general the prerogative powers should be put on a statutory basis’, and outlined plans to reform ten prerogative powers.⁵ These included the war-making power, dissolution and recall of parliament, ratification of treaties, the rules for the issue of passports and granting of pardons, the appointment of bishops and judges, and the rules governing the civil service.⁶ But Brown’s bold plans for comprehensive reform of the prerogative ended in a whimper. The war powers resolution, legislation on passports, restricting the Prime Minister’s powers over the dissolution and recall of parliament, all were abandoned. Eventually just two reforms were passed in the Constitutional Reform and Governance Act 2010 (CRA), to put on a statutory footing regulation of the civil service and parliamentary scrutiny of treaties.⁷

The remaining phases in reform of the prerogative can be dealt with more briefly. The Conservative-Liberal Democrat coalition abolished the prerogative power of dissolution in the Fixed-term Parliaments Act 2011; the same year saw codification of the personal prerogatives of the sovereign, not in statute but in the Cabinet Manual. The parliamentary battles over Brexit from 2016-19 stress tested the prerogative powers over treaties, royal assent and prorogation, as described above. Those battles motivated the latest phase, with the Johnson government’s determination to remove the institutional and procedural obstacles to Brexit. In restoring the prerogative power of dissolution, and seeking to curb the jurisdiction of the courts, it showed that reform of the prerogative does not all run one way – executive power can expand as well as contract.

Prerogative Powers and Executive Autonomy

Our purpose in this report is first and foremost to demystify the prerogative, still a source of mystery to most observers: to explain its continuing relevance today. Second, it is to clarify the respective roles of government, parliament and the courts, in defining the extent of prerogative powers, and in regulating their use in specific cases. Third, it is to consider proposals for change: which powers should be codified in statute; which should be regulated by convention, or by specialist watchdogs; and which could be left at large.

The underlying issue in all the debates about the prerogative concerns power: how much autonomy the executive should have to wield that power; with what degree of supervision (if any) from parliament or the courts; or (more rarely) from the monarch. With the underlying issue being about a struggle for power, we do not need sophisticated theory to understand the tug-of-war for control of the prerogative. One way of understanding it is through David Howarth’s Whitehall versus

⁴ Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (Fourth Report of Session 2003-04) HC 422 2003-04 (London: House of Commons), para 5.

⁵ Ministry of Justice, *The Governance of Britain*, Cm 7170 (London: HM Government, 2007), para 24.

⁶ *ibid* at paras 204-12.

⁷ For the reasons why Brown’s ambitious plans failed, see R. Hazell and T. Foot, *Executive Power: The Prerogative, Past, Present and Future* (Oxford: Hart Publishing, 2022), ch 3.

Westminster views. Howarth posited these two different views of the constitution and the way the political system operates:

According to the Westminster view, Parliament, and especially the House of Commons, sits at the centre of the system ... The other view, the Whitehall view, posits that the Crown, now largely in the form of its ministers, is the centre of the system. Effective government requires ministers to be able to act quickly and authoritatively.⁸

These competing views are not merely about the centre of power, but from where that power derives its legitimacy, and to whom it is accountable. On the Westminster view, the government derives its democratic legitimacy, and authority, from parliament. The government is chosen by parliament and is accountable to parliament: this is the classic model of responsible government. In the Whitehall view, the government derives its democratic legitimacy from the people. Long before Brexit, Anthony Birch showed how the rise of mass political parties with the doctrine of an electoral mandate had endowed governments with a sense of legitimacy, independently of that derived from parliament: people feel they have a direct channel of communication to the government, and the government feels directly accountable to the people.⁹ This view was exemplified by Boris Johnson with his frequent references to the mandate from the 14 million people who had voted for him.¹⁰

Brexit served to throw these competing views into particularly sharp relief, with the 2016 referendum seen as a mandate from the people to the government, which had to respect the people's will. The contrast was vividly illustrated when Theresa May said at the Conservative Party conference that those who maintained the approval of parliament was necessary before initiating the process for leaving the EU were not standing up for democracy but trying to subvert it.¹¹ The Prime Minister relied on the referendum result as her democratic mandate, and the prerogative as the source of her unfettered executive power to withdraw from treaties as well as make them. In *R (Miller) v Secretary of State for Exiting the European Union (Miller 1)*, the Supreme Court ruled that she needed the approval of parliament before triggering Article 50 of the Treaty on European Union, thus upholding the Westminster view of the constitution.¹²

The Whitehall view, with the requirement for ministers to be able to act quickly and authoritatively, is the classic defence of prerogative power. Executive autonomy is another way to express this: the need for the executive to be able to act effectively and decisively, without interference from parliament or the courts. It may have particularly strong appeal in the UK, where a similar justification is given for the first past the post voting system – namely, that it delivers strong and

⁸ D. Howarth, 'Westminster versus Whitehall: Two Incompatible Views of the Constitution', UK Constitutional Law Association Blog, 10 April 2019, www.ukconstitutionallaw.org/2019/04/10/david-howarth-westminster-versus-whitehall-two-incompatible-views-of-the-constitution/. For a longer exegesis, see D. Howarth, 'Westminster versus Whitehall: What the Brexit Debate Revealed About an Unresolved Conflict at the Heart of the British Constitution' in O. Doyle, A. McHarg and J. Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom* (Cambridge: Cambridge University Press, 2021).

⁹ A.H. Birch, *Representative and Responsible Government: An Essay on the British Constitution* (London: Allen & Unwin, 1964).

¹⁰ S. Payne, 'Boris Johnson's Last Stand', *Financial Times*, 19 November 2022: 'Throughout the day, the prime minister had told aides that he owed the 14 million people who had voted for him in the 2019 election to deliver on their priorities'.

¹¹ BBC, 'Theresa May's Conservative Conference Speech: Key Quotes', BBC News, 2 October 2016, www.bbc.co.uk/news/uk-politics-37535527.

¹² *Miller 2*, above n2.

effective government. The Whitehall view was clearly espoused by the Johnson government, sensing that the Westminster view had been discredited by the travails of the Brexit parliament; it was the *leitmotif* underlying the constitutional reform proposals of the Conservative 2019 election manifesto, and the constitutional changes initiated by the Johnson government once in office.¹³

Executive autonomy is also the thread which runs through every chapter in this report: its justification, whether it can be constrained, by whom, and in what circumstances. We do not have space to discuss all the prerogative powers covered in our book, and so we have selected five to be representative of the wider whole: dissolution and prorogation, the war making power, ratification of treaties, making public appointments, and the grant and revocation of passports. These illustrate the extraordinary range of the different prerogative powers, from high policy to individual citizens' rights. In considering how the prerogative might be reformed, we analyse the scope in each case for codification in statute, in soft law, or by stronger and clearer conventions. Our conclusion is that complete codification is unachievable. Greater codification is certainly desirable; but it will never fully resolve tensions between government, parliament and the courts, because in any constitution and political system the balance of power is continually being adjusted and re-negotiated.

¹³ A. McHarg and A. Young, 'The Resilience of the (*Old*) British Constitution', UK Constitutional Law Association Blog, 8 September 2021, www.ukconstitutionallaw.org/2021/09/08/aileen-mcharg-and-alison-l-young-the-resilience-of-the-old-british-constitution/.

2. Dissolving and Proroguing Parliament

The constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body.

Lord Browne-Wilkinson (1995)¹⁴

Introduction

Historically, the monarch has controlled the sittings of the legislature through the prerogative power to summon, dissolve, and prorogue parliament. Dissolution brings a parliament to an end, leading to a general election. Prorogation brings a parliamentary session to an end, and normally lasts less than a week before the next parliamentary session begins. The summons is made by proclamation commanding a newly elected parliament to convene on an appointed day.

The prerogative powers are essential to the operation of parliament: if parliament is dissolved or prorogued, it cannot function. This enabled the Stuarts to rule without parliament for prolonged periods, leading to Article 13 of the Bill of Rights 1689 which called for frequent parliaments. Since that time, the prerogative power has become constrained by convention, by legislation, and most recently, by the courts following Boris Johnson's attempt in 2019 to prorogue parliament for five weeks. The power of dissolution was changed fundamentally by the Fixed-term Parliaments Act 2011 (FTPA), which transferred the power from the executive to parliament. But the Johnson government repealed the FTPA, and revived the prerogative power.

The fundamental question underlying debates about the power of dissolution and of prorogation is about the balance of power, and the respective roles of executive and legislature. Is it right for the executive to control the sittings of parliament, or should parliament decide for itself when it should sit, and for how long?

Dissolution of Parliament

Before the FTPA: the Prerogative Power of Dissolution

This being a reserve power, the monarch is not obliged to grant a dissolution. The draft Cabinet Manual published in December 2010 summarised the pre-FTPA understanding of the conventions as follows:

A Prime Minister may request that the Monarch dissolves Parliament so that an election takes place. The Monarch is not bound to accept such a request, although in practice it would only be in very limited circumstances that consideration is likely to be given to the

¹⁴ *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] UKHL 3, 552.

exercise of the reserve power to refuse it, including when such a request is made very soon after a previous dissolution. In those circumstances, the Monarch would normally wish to know before granting dissolution that those involved in the political process had ascertained that there was no potential government that would be likely to command the confidence of the House of Commons.¹⁵

So far as we know, in the UK no request for dissolution has been refused in modern times. But after the Labour government saw its majority slashed to just five seats in the 1950 election, there was speculation whether Clement Attlee might properly seek a second election. This prompted the Private Secretary to King George VI (Sir Alan Lascelles) to write a letter to *The Times* explaining that the monarch might justifiably refuse dissolution in three circumstances:

(1) the existing Parliament was still vital, viable, and capable of doing its job; (2) a General Election would be detrimental to the national economy; (3) he could rely on finding another Prime Minister who could carry on his Government ... with a working majority.¹⁶

The Lascelles principles came to the fore in the dying days of Johnson's premiership, with speculation that he might call a snap election to face down his backbench rebels. The Cabinet Secretary was quizzed by the Public Administration and Constitutional Affairs Committee (PACAC) about the principles, concluding that 'It would be quite wrong for the prime minister to put the sovereign in a difficult position constitutionally'.¹⁷ It was reported that the Queen might be unavailable if Johnson requested a dissolution, because all three of Lascelles' conditions – in particular the third – were met.¹⁸

The Prerogative Power is Called into Question

From the 1990s onwards, the unfairness of allowing the incumbent Prime Minister to choose the timing of the next election was increasingly called into question. Fixed-term parliaments were a prominent pledge for Labour in 1992, and in the Liberal Democrat manifesto for 1992 and 1997. Gordon Brown's 2007 green paper *The Governance of Britain* included a proposal that the Prime Minister should have to seek the approval of the House of Commons before asking the monarch to dissolve parliament.

Meanwhile, fixed terms were being successfully introduced elsewhere in the Westminster world, in Australia and Canada.¹⁹ Closer to home, the Labour government had introduced fixed terms for the devolved legislatures in Scotland, Wales and Northern Ireland in the devolution legislation passed in 1998.

The arguments for fixed terms were the same elsewhere in the world. Allowing the incumbent government to decide the timing of elections was unfair; it gave the executive too much power over parliament; fixed terms enabled better civil service planning and longer term thinking; they

¹⁵ Cabinet Office, *The Cabinet Manual – Draft* (London: HM Government, 2010), para 58.

¹⁶ Senex, 'Dissolution of Parliament: Factors in Crown's Choice', *The Times*, 2 May 1950.

¹⁷ S. Case, *Oral evidence to the Public Administration and Constitutional Affairs Committee* HC 212, 28 June 2022, QQ 210-217.

¹⁸ O. Wright, C. Smyth, M. Dathan, 'Tories fear snap election in Trumpian survival attempt', *The Times*, 7 July 2022; Payne, above n10.

¹⁹ R. Hazell, *Written evidence to the Joint Committee on the Fixed-Term Parliaments Act* HC 1046 HL 253 FTP0013, 21 January 2021.

also enabled better planning for political parties, for electoral administrators, and for regulating election spending.²⁰ In the 2010 election, the arguments returned to Westminster, with both the Liberal Democrats and Labour renewing pledges to introduce fixed term parliaments. The Conservatives did not make this specific commitment, but had a more general pledge ‘to make the Royal Prerogative subject to greater democratic control so that Parliament is directly involved’.²¹

The Fixed-term Parliaments Act 2011

When the Conservative-Liberal Democrat coalition was formed after the 2010 election, fixed term parliaments became one of the main items in its programme for government. A government bill was swiftly introduced, with ministers emphasising three explicit objectives:

- to limit the power of the executive, which was too dominant in relation to the legislature;
- to remove the right of a Prime Minister to choose the date of the next election for partisan advantage; and
- to increase certainty, and end debilitating speculation about the date of the next election.²²

The Fixed-term Parliaments Act 2011 transferred the power of dissolution from the executive to parliament, and in so doing abolished the prerogative power. There was provision for an early dissolution in section 2, but by statute not under the prerogative. Section 2 allowed for early dissolution in only two circumstances. The first was if two thirds of all MPs voted for an early general election. The second was if the House of Commons passed a formal no confidence motion ‘that this House has no confidence in Her Majesty’s Government’, and no alternative government which could command confidence was formed within 14 days.

After the 2010 parliament ran for a full fixed term, the Conservative Party in 2015 celebrated the achievement, stating that ‘We have also passed the Fixed Term Parliament Act [sic], an unprecedented transfer of Executive power’.²³ But all that was to change with the bitter struggles over Brexit in the parliaments which followed. Theresa May found herself unable to deliver her flagship policy because of the deep divisions within the Conservative Party, but Labour lacked the numbers to carry a formal no confidence motion. In April 2017, May persuaded the House of Commons to vote for an early dissolution by 522 votes to 13, but lost her majority in the subsequent election. To try to break the gridlock, May’s successor Boris Johnson also sought an early dissolution but on three occasions failed to obtain the requisite two-thirds majority. In desperation, he eventually sidestepped the FTPA with the Early Parliamentary General Election Act 2019. Passed by simple majority, it led to a second early election in December 2019.

Review of the Fixed-term Parliaments Act

These difficulties brought the FTPA into disrepute, leading both Labour and Conservatives to commit to its repeal. In its 2019 election manifesto, the Conservative Party pledged: ‘We will get

²⁰ For an eloquent account of the advantages of fixed term legislation, see A. Twomey, *Oral evidence to the Joint Committee on the Fixed-Term Parliaments Act* HC 1046 HL 253, 21 January 2021, Q 189.

²¹ Conservative Party, *Invitation to Join the Government of Britain* (2010), 67.

²² *Hansard*, HC Deb Vol 515, col 621 (13 September 2010) (Nick Clegg).

²³ Conservative Party, *Strong Leadership. A Clear Economic Plan. A Brighter, More Secure Future* (2015), 49.

rid of the Fixed Term Parliaments Act [sic] – it has led to paralysis when the country needed decisive action’.²⁴

The government published a Draft Fixed-term Parliaments Act 2011 (Repeal) Bill, scrutinised by a Joint Committee of both Houses. The bill sought to revert to the previous system and restore the prerogative power of dissolution. But it went beyond simple restoration, by adding an ouster clause to prevent any judicial oversight of the power, and a statement of Dissolution Principles enabling the Prime Minister to advise rather than request a dissolution. The committee was strongly critical of both.

Witnesses had argued that the ouster clause was unnecessary, and undesirable. Its extraordinary breadth might lead to it being ‘read down’ by the courts, and non-justiciability could equally be achieved by requiring a vote of the House of Commons for an early dissolution. The government’s statement of Dissolution Principles was also deemed to be seriously inadequate. Reflecting the Lascelles principles,²⁵ witnesses suggested that a dissolution could be refused if a Prime Minister, having lost their majority in an election, requested another election, when there was an alternative government which could be formed; or if an election might be damaging in the midst of an emergency such as a pandemic, war or economic crisis.

On several key issues the committee’s report went against the weight of evidence received. The main recommendation where this happened was on the central issue of whether dissolution should be decided by the executive or by parliament. As the committee acknowledged, ‘Retaining a role for the House of Commons commanded a great deal of support in evidence to this Committee as well as PACAC and the Constitution Committee’.²⁶ Retaining a vote for the House of Commons would resolve two other central concerns: it would protect the monarch from controversy; and it would help to ensure that the decision to dissolve was non-justiciable, obviating the need for any ouster clause.

The Dissolution and Calling of Parliament Act 2022

In May 2021, the government introduced its bill to repeal the FTPA, now re-named the Dissolution and Calling of Parliament Bill. The issues raised on second reading in July were the same as those rehearsed before the Joint Committee, and the bill passed its remaining Commons stages in a single day in September.²⁷

On second reading in the Lords, Lord (Nicholas) True explained the Government’s objectives as follows:

The Bill seeks to return to the tried and tested position of the past over many centuries, replacing the 2011 Act with arrangements more in keeping with our best constitutional practices: delivering stable and effective government; upholding proper parliamentary

²⁴ Conservative Party, *Get Brexit Done: Unleash Britain’s Potential* (2019), 48.

²⁵ See n16.

²⁶ Joint Committee on the Fixed-Term Parliaments Act, *Report HC 1046 HL 253 2019-22* (London: House of Commons and House of Lords), para 84.

²⁷ R. Kelly, *Dissolution and Calling of Parliament Act 2022: Progress through Parliament (9308)* (London: House of Commons Library, 2022), 16.

accountability and public confidence in our democratic arrangements; and, above all, placing the British people at the heart of the resolution of any great national crisis.²⁸

In the ensuing debate, most peers who spoke supported the repeal of the FTPA. But there was fierce criticism of the ouster clause from all sides, including from the Conservatives. Despite this, an amendment to remove the ouster clause was defeated at the report stage of the bill. But an additional amendment was inserted to require a vote in the House of Commons before parliament could be dissolved. Moving the amendment, Crossbencher Lord (Igor) Judge explained that its purpose was to ensure that the ultimate power of dissolution lay with parliament, and not the executive; and to avoid the need for the monarch or the courts to become involved. He invited the Commons to have second thoughts, while acknowledging that the view of the elected chamber must prevail.²⁹ The Commons rejected the amendment, and the bill became an act in March 2022. Four months later, concern was raised that Johnson might use the newly restored power to dissolve parliament rather than resign.³⁰

Prorogation

Before the committee stage of the 2021 bill in the Commons, Labour MP Chris Bryant tried to raise the issue of prorogation, even though it was not within the scope of the bill. Prorogation is usually a brief intermission, which brings a parliamentary session to an end before the next one begins. The effect of prorogation is to suspend parliamentary activity. MPs and peers cannot debate government policy and legislation, table motions or parliamentary questions, or scrutinise government activity through select committees. There is therefore a risk of abuse. Canada has a long history of controversial prorogations, from 1873 to 2020.³¹

Until 2019, prorogation in the UK had generally been exercised without the kind of controversy which has occurred in Canada. 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. Court challenges were mounted, in cases fast tracked on appeal to the Supreme Court. In *R (Miller) v The Prime Minister (Miller 2)*, a full court of 11 Justices ruled unanimously that the prerogative power was justiciable, and the prorogation unlawful. The court's President, Baroness (Brenda) Hale of Richmond, held that such a long prorogation significantly interfered with the fundamental constitutional principles of parliamentary sovereignty and parliamentary accountability:

The court is bound to conclude that the decision to advise Her Majesty to prorogue Parliament was unlawful, because it had the effect of frustrating or preventing the ability of Parliament to carry out its constitutional functions without reasonable justification. Accordingly the advice to prorogue for such a lengthy period was unlawful, and the prorogation order itself was null and void.³²

²⁸ *Hansard*, HC Deb Vol 704, col 1278 (30 November 2021).

²⁹ *Hansard*, HL Deb Vol 818, col 1585 (9 February 2022).

³⁰ B. Johnson, *Oral evidence to the Liaison Committee* HC 453, 7 July 2022, Q 213.

³¹ For a useful summary, see 'Prorogation in Canada', Wikipedia, 6 April 2021, www.en.wikipedia.org/wiki/Prorogation_in_Canada.

³² *Miller 2*, above n2; For commentary, see A. McHarg, 'The Supreme Court's Prorogation Judgment: Guardian of the Constitution or Architect of the Constitution?', *Edinburgh Law Review* 21(1), 2020, 88-95.

As a result of the court ruling, parliament immediately resumed sitting, and the subsequent prorogation to end the session in October was for just three sitting days. The Supreme Court confidently asserted that the case had arisen in circumstances which were unlikely ever to recur. But if in future a Prime Minister has the temerity to take a chance, the court laid down clear guidelines by which to judge any questionable request:

... the relevant limit on the power to prorogue is this: that a decision to prorogue (or advise the monarch to prorogue) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In judging any justification which might be put forward, the court must of course be sensitive to the responsibilities and experience of the Prime Minister and proceed with appropriate caution.³³

Those guidelines will apply as much to the monarch considering any future request for prorogation, as to a court adjudicating on that request. But in an ideal world the prerogative power of prorogation would not exist. The UK is already an outlier among European parliamentary democracies in allowing the executive to suspend parliament through prorogation. A study of 26 European countries found that in all other European democracies except Greece, parliament cannot be suspended against its will. Fleming and Schleiter concluded:

Overall, the comparison with international practice shows that the UK's prorogation rules sit far outside the European norm. In particular, the UK parliament, unusually, lacks the power to insist on sitting against the wishes of the executive, or to un-prorogue itself once suspended.³⁴

They are not alone in arguing that prorogation should require parliamentary consent. In 2020, the House of Lords Constitution Committee suggested, 'As part of the statutory review of the Fixed-term Parliaments Act 2011, parliament may wish to consider whether the prorogation of parliament should require its approval in the same way the Commons approves its recess dates'.³⁵ During the passage of the FTPA, an amendment to include prorogation and make it subject to decision by the House of Commons had been debated, but defeated.³⁶ Similar suggestions were made in evidence to the parliamentary Joint Committee reviewing the FTPA.³⁷ Had the committee risen to the challenge, two possible changes could have been considered. First, the power of prorogation could be given to parliament so that parliament itself would decide when it was suspended. Second, the power could remain with the executive, but parliament could have the power to veto prorogation or to un-prorogue itself. As with dissolution, giving parliament control over prorogation would have the advantage of removing the risk of challenge in the courts, because as a proceeding of parliament it would be shielded by Article 9 of the Bill of Rights 1689; and it

³³ *R (Miller) v The Prime Minister; Cherry v Advocate General*, UKSC Press Summary, 2.

³⁴ T. Fleming and P. Schleiter, 'Prorogation: Comparative Context and Reform', *Parliamentary Affairs* 74(4), 2021, 964-78.

³⁵ Constitution Committee, *A Question of Confidence? The Fixed-term Parliaments Act 2011* (Twelfth Report of Session 2019-21) HL 121 2019-21 (London: House of Lords), para 144.

³⁶ *Hansard*, HC Deb Vol 521, cols 733-777 (18 January 2011).

³⁷ R. Hazell and M. Russell, *Written evidence to the Joint Committee on the Fixed-Term Parliaments Act* HC 1046 HL 253 FTP0003, 7 January 2021, paras 31-2.

would remove the risk of the monarch being drawn into political controversy, avoiding a repeat of what happened in 2019.

Conclusion

This chapter has been about the prerogative power to dissolve and prorogue parliament. Underlying it are fundamental differences of view about where the power lies, where it should lie, and how it should be exercised. The evidence submitted to the Joint Committee on the Fixed-Term Parliaments Act disclosed two broad camps: those who maintain that the power should rest with the executive, and those who believe it should be transferred to parliament, or at least be subject to some form of parliamentary control. These views can be represented as the Whitehall view and the Westminster view, with the majority of the evidence supporting the Westminster view. Historically the two views derive from different ideas about where authority ultimately lies in the British constitution, in the Crown-in-parliament (now largely represented by ministers), or in the sovereignty of parliament (now mainly represented by the House of Commons).³⁸

This binary divide is an over-simplification in two respects: it leaves out the courts, and it leaves out the Crown as an independent actor. But that is what the government has proposed in the Dissolution and Calling of Parliament Act. The courts are excluded by the ouster clause, and it was clear that in the government's mind the Crown would be expected always to follow the advice of ministers. We might describe this as an extreme Whitehall view, leaving the executive in complete control of when parliament should sit. It is also an extreme view in comparative terms. As Fleming and Schleier have shown, it leaves Westminster as almost the only parliament in Europe unable to control its own sittings.

Those who reject the extreme Whitehall view may nevertheless feel uncomfortable about involving the Crown or the courts as a check on untrammelled executive power because of the risk of dragging them into political controversy. But, as several witnesses argued to the Joint Committee, and as the committee later acknowledged in its report, there is an alternative solution: to leave the decision on dissolution (and prorogation) with the House of Commons. This would obviate the need for the monarch to act as constitutional umpire; and as a proceeding in parliament, it would exclude the jurisdiction of the courts.

Defenders of the Whitehall view point to the risk of a zombie government, unable to govern, in a parliament unable or unwilling to put it out of its misery, as happened in 2017-19. The argument then becomes one about the balance of risks. How likely is it that such a toxic combination of circumstances might recur, with a minority government unable to deliver its flagship policy when bound by a referendum result; compared with the risk that future Prime Ministers allowed to choose the election date will use this to avoid appropriate parliamentary scrutiny? And if fixed terms are brought into the equation, it becomes an argument about potential benefits as well as risks. Fixed terms bring multiple benefits, to the civil service, to business, to political parties and electoral administrators. It is harder to compile an equivalent list of benefits from restoring the royal prerogative. The arguments of principle, cogently laid out by the Supreme Court in *Miller 2*, tend to favour the Westminster view. And so do the arguments about the balance of risk.

³⁸ Howarth, above n8.

3. The War-Making Power

If there be a prerogative of the Crown which no one has ever challenged, it is the prerogative of the Crown to declare peace or war without the interference of Parliament, by her Majesty alone, under the advice of her responsible Ministers.

Benjamin Disraeli (1864)³⁹

Introduction

The prerogative powers of waging war are some of the most potent the government possesses. Although the King is formally Commander-in-Chief of the armed forces, ultimate decision-making rests with the Prime Minister. In former times the approval of parliament was required to provide supply (i.e. money) for wars, but that approval has since been reduced to a matter of routine. In the last 20 years a more forensic mechanism has emerged: a convention that the government will put military deployments to a vote before they are begun.⁴⁰ This convention was first articulated by Tony Blair in 2003, and later affirmed by David Cameron in 2011; but subsequently undermined by Theresa May in 2018. Whether it still exists in any meaningful sense is now questionable.

This chapter takes the form of a narrative, to explain the rise and fall of the convention. It concludes with observations on the current position, which is constantly changing. Those changes are driven not just by changing relations between government and parliament, but by changes in the nature of modern warfare. The biggest threat to European security in 2022 is the war in Ukraine, in which the UK is heavily engaged as the second largest supplier of military aid after the US. The UK has committed £2.3bn in military assistance since February 2022, and has pledged to match or exceed that assistance in 2023. Most of that spending is authorised under the prerogative, and so far has provided over 10,000 anti-tank missiles, six air defence systems, 200 armoured fighting vehicles, 2,600 anti-structure munitions, 3 million rounds of ammunition. Yet none of this engagement is caught by the convention, which applies only to the deployment of British troops overseas. British troops are involved, in a major training programme for the Ukrainian armed forces, with the potential to train up to 10,000 Ukrainian soldiers every 120 days; but because that training takes place in the UK, it is not covered by the convention.

Birth of the Convention

Since the Second World War, it has been customary for the Commons to be given an opportunity to express its view on military engagements after the event, although most commonly through debates on motions to adjourn rather than substantive motions. For example, in 1950, Clement Attlee came to the Commons to seek approval for UK involvement in the UN-approved mission in Korea.⁴¹ In support of the motion, Winston Churchill noted the importance of a vote to avoid

³⁹ *Hansard*, HC Deb Vol 173, cols 97-8 (4 February 1864).

⁴⁰ We use the term ‘convention’ because the rule is described as such in the Cabinet Manual. However, as we set out below, it is questionable what the content of the convention currently is and to what extent the government believes that it is bound by it.

⁴¹ *Hansard*, HC Deb Vol 477, col 485 (5 July 1950).

‘false impressions’ abroad that the Commons did not support the government’s action.⁴² A 2019 parliamentary report asserted that after the war there arose ‘a convention... that the Government will consult the House of Commons to ensure that the Government’s policy on armed conflict reflects the will of the House of Commons’.⁴³ However, while the aim of that report was to stress continuity in its proposed approach to prospective parliamentary control, all of the parliamentary debates before 2003 were retrospective and few ever culminated in a vote.⁴⁴

That changed in 2003. On 18 March, after a long debate, the House of Commons approved a motion supporting military action in Iraq. The motion noted the House’s previous endorsement of UN Security Council Resolution 1441, recognised that Iraq posed ‘a threat to international peace and security’, and supported the government’s decision that ‘the United Kingdom should use all means necessary to ensure the disarmament of Iraq’s weapons of mass destruction’.⁴⁵ In his opening speech, Tony Blair stated that it was right that the Commons should have a say: ‘that is the democracy that is our right, but that others struggle for in vain’.⁴⁶ It was also, of course, politically convenient: the Commons vote gave the deployment a legitimacy it had failed to achieve through the UN. Nonetheless, no previous decision to go to war in modern times had been backed by *prior* parliamentary approval on a *substantive motion*. Ever since, it has stood as a precedent for the consultation of parliament before the deployment of military forces.

Blair’s statement was immediately seized on by the Commons Public Administration Select Committee (PASC) in its report, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*.⁴⁷ PASC suggested ‘that any decision to engage in armed conflict should be approved by Parliament, if not before military action then as soon as possible afterwards’.⁴⁸ Furthermore, the committee advocated legislation to enforce this practice.⁴⁹

In 2006, the Lords Constitution Committee published its own report, *Waging War: Parliament’s role and responsibility*.⁵⁰ In contrast to PASC, *Waging War* engaged in detail with the technical issues surrounding increased parliamentary involvement. Convinced that parliamentary approval afforded combat decisions ‘legitimacy’, but mindful of the difficulties of legislating, the committee recommended formalising the convention in a parliamentary resolution.⁵¹ However, the Blair administration was unconvinced by the need to codify the matter further.⁵²

⁴² *Hansard*, HC Deb Vol 477, col 495 (5 July 1950).

⁴³ Public Administration and Constitutional Affairs Committee, *The Role of Parliament in the UK Constitution: Authorising Military Force* (Twentieth Report of Session 2017-19) HC 1891 2017-19 (London: House of Commons), para 41.

⁴⁴ *ibid* at paras 36-8.

⁴⁵ *Hansard*, HC Deb Vol 401, cols 760-858 (18 March 2003).

⁴⁶ *ibid*.

⁴⁷ Public Administration Select Committee, above n4.

⁴⁸ *ibid* at para 57.

⁴⁹ *ibid* at para 56.

⁵⁰ Constitution Committee, *Waging War: Parliament’s role and responsibility* (Fifteenth Report of Session 2005-06) HL 236-I 2005-06 (London: House of Lords).

⁵¹ *ibid* at para 108.

⁵² Department for Constitutional Affairs, *Government Response to the House of Lords Constitution Committee’s Fifteenth Report of Session 2005-06: Waging War: Parliament’s role and responsibility* Cm 6923 (London: HM Government, 2006).

The Brown Government and *The Governance of Britain*

When Gordon Brown became Prime Minister in 2007, the nascent war powers convention had one precedent (Iraq in 2003) and scant support in government statements. However, Brown took a much more proactive attitude towards reform of the prerogative than Blair. On 3 July 2007, the newly appointed Prime Minister announced that ‘the Government will now consult on a resolution to guarantee that on the grave issue of peace and war it is ultimately this House of Commons that will make the decision’.⁵³

These consultations began in the *Governance of Britain* green paper, supplemented by a separate paper on *War Powers and Treaties*, and culminated in the *Constitutional Renewal* white paper in 2008 and a *Final Report* in 2009.⁵⁴ On war powers, the government concluded that the problems associated with legislation – the changing nature of military warfare, the risk of exposing the power to judicial review – were too great to overcome, and suggested ‘that a detailed resolution is the best way forward’.⁵⁵ A draft resolution was drawn up which required the approval of the Commons for a ‘conflict decision’ except in three circumstances:

- ‘The emergency condition’ – when there is not sufficient time for prior parliamentary approval.
- ‘The security condition’ – where public disclosure of information about the decision could prejudice the effectiveness of the decision, or the safety of troops.
- Where the decision covered special forces.⁵⁶

The draft resolution was never finished. Time and other priorities overtook it, and the Brown government lost office in 2010. The content of the resolution remained controversial, and the drafting difficult. Many suggestions were mooted for defining ‘armed conflict’. Another unresolved issue was the use of secret information (the ‘security condition’).

The Cameron Government

Libya and the Cabinet Manual (2011)

In 2011, the Arab Spring brought the prospect of UK military engagement once again to the fore. When asked for a guarantee of a parliamentary vote before engagements in Libya, Sir George Young, then Leader of the House of Commons, replied:

⁵³ *Hansard*, HC Deb Vol 462, col 816 (3 July 2007).

⁵⁴ Ministry of Justice, above n5; Ministry of Defence and Foreign & Commonwealth Office, *War Powers and Treaties: Limiting Executive Powers*, Cm 7239 (London: HM Government, 2007); Ministry of Justice, *The Governance of Britain – Constitutional Renewal*, Cm 7342 (London: HM Government, 2008); Ministry of Justice, *Review of the Executive Royal Prerogative Powers: Final Report* (London: HM Government, 2009).

⁵⁵ Ministry of Justice, *The Governance of Britain – Constitutional Renewal*, *ibid* at para 215.

⁵⁶ *ibid* at 53-6 (Annex A).

A convention has developed in the House that *before troops are committed*, the House should have an opportunity to debate the matter. We propose to observe that convention except when there is an emergency and such action would not be appropriate.⁵⁷

Just over one week later the government ordered a missile strike on Colonel Gaddafi's forces. On the Monday after the strike the Prime Minister sought the Commons' approval.⁵⁸ The motion won a sweeping majority of 557 to 13 votes. The vote – particularly in the context of Sir George Young's statement – was suggestive of a shift in attitude in government. Parliamentary approval was now an expectation.

As in 2003, parliamentary actors leapt upon these government statements. In May 2011, the House of Commons Political and Constitutional Reform Committee (PCRC) published a short report, *Parliament's role in conflict decisions*, calling 'on the current Government urgently to bring forward a text for parliamentary decision' given the lack of progress since 2007.⁵⁹ When the Cabinet Manual was published later in the year, it stated that: 'In 2011, the government acknowledged that a convention had developed in Parliament that before troops were committed the House of Commons should have an opportunity to debate'.⁶⁰ This reflected the careful terms used by Young, and remains the most authoritative (although not the most complete) statement of the new convention to date.⁶¹

Syria (2013)

The most potent precedent for a war powers convention came in mid-2013. On 11 July 2013, the House of Commons Backbench Business Committee enabled the tabling of a motion 'That this House believes no lethal support should be provided to anti-government forces in Syria without the explicit prior consent of Parliament.' It passed by 114 votes to 1.⁶² The Lords Constitution Committee placed heavy emphasis on this Commons resolution in concluding that 'the existing convention ... provides the best framework for the House of Commons to exercise political control over, and confer legitimacy upon, such decisions'.⁶³

By August tensions with Damascus were running high and President Assad had reportedly used chemical weapons on his own people. The Prime Minister came to the Commons and proposed a motion:

That this House... Agrees that a strong humanitarian response is required from the international community and that this may, if necessary, require military action ...⁶⁴

⁵⁷ *Hansard*, HC Deb Vol 524, col 1066 (10 March 2011) (emphasis added).

⁵⁸ *Hansard*, HC Deb Vol 525, col 700 (21 March 2011).

⁵⁹ Political and Constitutional Reform Committee, *Parliament's role in conflict decisions* (Eighth Report of Session 2010-12) HC 923 2010-12 (London: House of Commons), 3.

⁶⁰ Cabinet Office, *Cabinet Manual*, 1st edn (London: HM Government, 2011), para 5.38.

⁶¹ *ibid* at para 5.36.

⁶² *Hansard*, HC Deb Vol 566, cols 627-8 (11 July 2013).

⁶³ Constitution Committee, *Constitutional arrangements for the use of armed force* (Second Report of Session 2013-14) HL 46 2013-14 (London: House of Lords), para 64.

⁶⁴ *Hansard*, HC Deb Vol 566, col 1425-6 (29 August 2013).

The motion did not seek to give final Commons approval to troop deployments, which would be subject to a further vote. Despite this, the motion was defeated by 272 to 285. The Prime Minister was forced to drop his plans.

The force – both real and symbolic – of that August 2013 vote was substantial. Not only did it stop the government in its tracks in deploying military forces; it was also hailed as the moment at which the convention of prior parliamentary approval gained its teeth. As one commentator immediately put it, ‘it is now hard to see how any UK Government could undertake significant military action without the support of Parliament, or indeed of the wider public’.⁶⁵

Post 2013: Syria, Iraq and Targeted Killings

On 26 September 2014, David Cameron once again consulted the Commons, this time for air strikes against ISIS in Iraq. The motion explicitly ruled out the deployment of ground troops in combat operations as well as any air strikes in Syria without approval of the House.⁶⁶ It was carried by a landslide of 542 to 43.⁶⁷

However, in August 2015, the UK and US carried out drone strikes in Syria as targeted killings of two ISIS organisers,⁶⁸ without a further vote in the Commons and therefore apparently against the September 2014 resolution. Later in 2015, the government did approach the Commons for its blessing to extend military action in Syria. Once again, the Prime Minister set out the arguments and this time the House approved the motion, which notably ruled out explicitly any deployment of troops on the ground.⁶⁹

The May Government

By the time Theresa May entered Downing Street in 2016, the war powers convention was firmly lodged in the political consciousness, chiefly because of the 2013 Syria vote. However, during her years as Prime Minister, May oversaw the undermining of the convention.⁷⁰ In part, this was due to developing circumstances. ISIS had still not been contained, the internal war in Syria continued, and the UK’s military contributions had shifted away from troop deployments towards drone-operated and other airstrikes.

In April 2018, the UK, France and the United States executed coordinated airstrikes on Syria’s chemical weapons facilities. As with the Libyan airstrikes in 2011, the government lacked prior authorisation from the Commons. The Prime Minister said that it would have been impossible to recall the House (which was in recess) because ‘the speed with which we acted was essential in co-

⁶⁵ M. Chalmers, ‘Parliament’s decision on Syria: pulling our punches’, Royal United Services Institute, 30 August 2013 www.rusi.org/explore-our-research/publications/commentary/parliaments-decision-syria-pulling-our-punches.

⁶⁶ Note that UK troops had been deployed to Iraq for humanitarian operations in August.

⁶⁷ *Hansard*, HC Deb Vol 585, col 1360 (26 September 2014).

⁶⁸ See Intelligence and Security Committee of Parliament, *UK Lethal Drone Strikes in Syria* HC 1152, 26 April 2017 (London: House of Commons), paras 28-30.

⁶⁹ *Hansard*, HC Deb Vol 603, cols 323-499 (2 December 2015).

⁷⁰ J. Strong, ‘Did Theresa May kill the War Powers Convention? Comparing Parliamentary Debates on UK Intervention in Syria in 2013 and 2018’, *Parliamentary Affairs* 75(2), 2021, 400-19.

operating with our partners to alleviate further humanitarian suffering and to maintain the vital security of our operations’.⁷¹

However, May went further. She suggested that prior authorisation would not have been desirable because of a need to keep ‘intelligence and information’ sources secret; these ‘could not be shared with Parliament’.⁷² In such circumstances retrospective scrutiny was sufficient. The Labour leader, Jeremy Corbyn, disagreed. In his short response, he said that it was now necessary to bring forward a ‘war powers Act ... to transform a now broken convention into a legal obligation’.⁷³

The 2018 debate was clearly a departure from the convention. Not only was the debate after the deployment (unlike with the Syria airstrikes in 2014); it did not even end in a vote (unlike with the Libya airstrikes in 2011). The only opportunity for MPs to vote came in a subsequent emergency debate on Syria, called by opposition members.⁷⁴ The Prime Minister tried to reshape the scope of the convention in her speech. She argued that ‘the assumption that the convention means that no decision can be taken without parliamentary approval is incorrect—it is the wrong interpretation of the convention’.⁷⁵ There was a distinction, she said, between military deployments in which action was taken over a few weeks and those where it was decided and effected in a couple of days.⁷⁶ She thus asserted a novel exception to the convention, in which the ‘nature and scale’ of the conflict will preclude parliamentary involvement.⁷⁷

The Convention in 2022

The most recent parliamentary report into the war powers convention was published by the Commons Public Administration and Constitutional Affairs Committee (PACAC) in July 2019, a year after Theresa May’s Syria deployment.⁷⁸ The report made two crucial points. First, it recognised that the content of the convention was fundamentally in the hands of the government and was seriously unstable.⁷⁹ Second, it suggested that in a democratic society, the legitimacy of the government’s use of the war-making power stems from maintaining the confidence of the House.⁸⁰ PACAC concluded that the instability of the convention was undermining the government’s accountability to parliament, and recommended that a resolution be put to the Commons to update codification of the convention.

PACAC’s draft resolution read in part as follows:

a convention has become established that Her Majesty’s Government has a duty to inform and consult the House in relation to the deployment of the UK’s armed forces

⁷¹ *Hansard*, HC Deb Vol 639, col 42 (16 April 2018).

⁷² *ibid*.

⁷³ *Hansard*, HC Deb Vol 639, col 44 (16 April 2018).

⁷⁴ *Hansard*, HC Deb Vol 639, col 105 (16 April 2018).

⁷⁵ *Hansard*, HC Deb Vol 639, col 201 (17 April 2018).

⁷⁶ *Hansard*, HC Deb Vol 639, col 203 (17 April 2018).

⁷⁷ V. Fikfak and H.J. Hooper, ‘Whither the War Powers Convention? What Next for Parliamentary Control of Armed Conflict after Syria?’, UK Constitutional Law Association Blog, 20 April 2018 www.ukconstitutionallaw.org/2018/04/20/veronika-fikfak-and-hayley-j-hooper-whither-the-war-powers-convention-what-next-for-parliamentary-control-of-armed-conflict-after-syria.

⁷⁸ Public Administration and Constitutional Affairs Committee, above n43.

⁷⁹ *ibid* at para 63.

⁸⁰ *ibid* at para 81.

in armed conflict, and to consult and seek prior authorisation from the House before engaging in military conflict, except in the following circumstances ...

The exceptions included compromising the effectiveness of UK operations, and the safety of British servicemen, the UK's sources of secret intelligence, or the security or effectiveness of the UK's operational partners. Given the alternative, of specifying a long list of exceptions based on past precedents (such as drone strikes), it is understandable that the committee resorted to more principle based drafting. But the risk of such an open textured approach is that the government can pray in aid one or more of the exceptions in almost any situation.

The Future of the Convention

We close with four observations. First, it is notable that PACAC did not favour statutory constraints, wary of placing too rigid a shackle on government action and of the possibility of increased judicial review.⁸¹ The difficulties of drafting legislation are even greater than with a parliamentary resolution, which can be more open textured.

Second, development of the convention has arisen as much from policy as practice. It originated in a declaration of principle in 2003, evolved through governmental and parliamentary reports (especially under Gordon Brown) and was recognised in the Cabinet Manual in 2011. For so long as the convention remains as much a matter of government policy as of precedent, it will be vulnerable to change in that policy. Successive governments' concerns for flexibility and executive autonomy have hindered the emergence of a predictable convention. Contrast the Johnson government's attitude to the prerogative, and the thrust of its initial reforms, which have been the polar opposite of those under Gordon Brown, seeking to defend executive power rather than place more controls upon it.

Third, the convention risks being dislocated from the actual practice of going to war. Each time the question arises, warfare has progressed a little further. For example, the emergence of drone warfare appears to have created a further exception to the convention.⁸² That is supported by the lack of a parliamentary vote on the targeted killings in August 2015.

The further progression of warfare is well illustrated by the war in Ukraine. With the massive assistance being supplied, it could be said that the UK is already engaging in military conflict, albeit at one remove; and the UK's armed forces are already deployed, albeit in support and training roles in the UK rather than on the ground in Ukraine. What if the war escalates, and the UK's engagement with it? What if Russia uses a dirty bomb, or chemical weapons? And the UK then engages in cyberwarfare, or deploys troops to provide training in Ukraine rather than in the UK? Past precedents give little guidance whether the convention would necessarily be engaged.

A fourth and final observation is that although the convention has depended on the pronouncements and attitudes of successive governments, leading to a wide range of 'exceptions', parliament and its committees have also played a decisive role. At every stage, parliamentarians have seized on government statements and pushed ahead to the next step. Through PACAC's

⁸¹ *ibid* at para 81.

⁸² V. Fikfak and H.J. Hooper, *Parliament's Secret War* (Oxford: Hart Publishing, 2018), 95-100.

latest report, parliament continues to play that role. However, it is the weaker partner, unable to bring about greater codification on its own.

The process of codification would be better effected by parliament and government together. The Cabinet Manual should reflect the expectations parliament has of ministers, but cannot stand alone. At the very least, parliament will require its own guidance as to what role its committees (including the Defence Committee, the Intelligence and Security Committee and the Joint Committee on National Security Strategy) are to play in performing detailed scrutiny, or how (select) parliamentarians might be allowed to examine sensitive material. While this does not necessarily require a resolution of the Commons, that is by far the cleanest solution, ensuring that the codified convention is commonly understood by both parliamentarians and ministers. PACAC's 2019 report demonstrates a cooperative attitude by parliamentarians, open to making accommodations for the government's need to keep some matters secret and options flexible. Although the government was unwilling to engage, it is to be hoped that a future government might be more cooperative in developing a shared vision of their respective roles in initiating and approving military intervention of all kinds.

4. Treaties

Treaties are quite as important as most law, and to require the elaborate assent of representative assemblies to every word of the law, and not to consult them even as to the essence of the treaty, is *prima facie* ludicrous.

Walter Bagehot (1872)⁸³

Introduction

The conclusion of treaties is a prerogative power of the Crown. The UK signs a wide variety of international instruments under this power, including unilateral and bilateral treaties, agreements requiring ratification and those that do not, legally binding documents and non-binding understandings. International instruments also range across a wide field of subject areas. Following Brexit, attention has recently been focussed on trade agreements; but the UK is a signatory to over 14,000 treaties, including international human rights instruments, environmental pledges and data-sharing arrangements.

However, the treaty-making power cannot change obligations or rights in domestic law, even if it places the UK under obligations in international law.⁸⁴ Where a treaty obligation requires a change in UK domestic law, the executive must turn to parliament for primary legislation or make the necessary changes through secondary legislation.⁸⁵ Where such a treaty requires ratification, it is government practice not to ratify the treaty before the domestic legislation is in place.⁸⁶

Parliamentary scrutiny is largely restricted to treaties that require ratification. Furthermore, it has traditionally been restricted to the post-negotiation, pre-ratification period. The last twenty years and more have seen consistent calls from parliamentary committees and others to strengthen this scrutiny, to expand its scope to other types of agreements, and to different stages of the treaty-making process. For the past few decades, some further scrutiny was afforded through the structures of the European Union (EU). Its ability to conclude trade agreements relieved the negotiating burden on the UK while the UK was a member state. Furthermore, the European parliament has significant powers of treaty scrutiny, with a veto power, a power to propose amendments to treaties, and the right to information and consultation during negotiations.⁸⁷ The UK's exit from the EU means that these democratic scrutiny mechanisms no longer apply. This shift has unleashed a renewed parliamentary interest in reforming our own domestic provisions, which are weaker than those in Europe.⁸⁸

⁸³ W. Bagehot, *The English Constitution*, 2nd edn (London: H.S. King, 1872), xxxix.

⁸⁴ *Walker v Baird* [1892] AC 491. For the limited lawful effects of treaties on domestic law, see A. Twomey, 'Miller and the Prerogative' in M. Elliott, J. Williams and A. Young (eds), *The UK Constitution After Miller: Brexit and Beyond* (Oxford: Hart Publishing, 2017), 76-80.

⁸⁵ *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418.

⁸⁶ HM Government, *Government Response to the Constitution Committee Report: Parliamentary Scrutiny of Treaties* (London: HM Government, 2019), 8; *Reference on the Continuity Bill* [2018] UKSC 64, [29].

⁸⁷ Treaty on the Functioning of the European Union, art 218(6).

⁸⁸ E.g. Exiting the European Union Committee, *Parliamentary scrutiny and approval of the Withdrawal Agreement and negotiations on a future relationship* (Sixth Report of Session 2017-19) HC 1240 2017-19 (London: House of

From Ponsonby to CRAG

The Ponsonby Rule

Prior to 2010, parliament's role in scrutinising treaties was governed by the Ponsonby Rule, a constitutional convention set out by Parliamentary Under-Secretary for Foreign Affairs, Arthur Ponsonby, in 1924. During a debate on the Treaty of Peace (Turkey) Bill, Ponsonby stated it was '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'. This policy applied only to treaties that required ratification, as a later Foreign Secretary (Selwyn Lloyd) reiterated in 1957.⁸⁹ However, the Ponsonby Rule was only ever a 'negative resolution' procedure in that the 'absence of disapproval [would] be accepted as sanction'.⁹⁰ Despite initial rejection by the subsequent Baldwin administration, the Ponsonby Rule became the benchmark for parliamentary scrutiny of treaties from its reassertion in 1929.

The Ponsonby Rule was followed almost invariably from 1929 to 2009.⁹¹ although a modification was made in 1981 to exclude double taxation treaties.⁹² In 1997, the convention expanded to include the provision of explanatory memoranda to parliament upon the presentation of a treaty.⁹³

Constitutional Reform and Governance Act 2010

Calls for the codification of the Ponsonby Rule in statute⁹⁴ were eventually adopted by Gordon Brown as Prime Minister, as part of his wide-ranging review of prerogative powers (see chapter 1). Following his reforms, the principal mechanism of parliamentary treaty scrutiny is the Constitutional Reform and Governance Act 2010 (CRAG). Under Part 2 of CRAG, the government is under a statutory duty to lay before parliament any treaty that is subject to ratification.⁹⁵ Further, an explanatory memorandum must be included, covering the financial implications of the treaty and the means required to implement it, among other matters.⁹⁶ The government cannot usually ratify a treaty for 21 sitting days after it was laid before parliament.⁹⁷

Commons); Joint Committee on Human Rights, *Human Rights Protections in International Agreements* (Seventeenth Report of Session 2017-19) HC 1833 HL 310 2017-19 (London: House of Commons); Constitution Committee, *Parliamentary Scrutiny of Treaties* (Twentieth Report of Session 2017-19) HL 345 2017-19 (London: House of Lords); European Union Committee, *Treaty scrutiny: working practices* (Eleventh Report of Session 2019-21) HL 97 2019-21 (London: House of Lords), paras 19-29.

⁸⁹ *Hansard*, HC Deb Vol 171, col 2005 (1 Apr 1924); *Hansard*, HC Deb Vol 579, col 370 (4 Dec 1957).

⁹⁰ *Hansard*, HC Deb Vol 171, cols 1999-2005 (1 April 1924).

⁹¹ Despite some exceptions: *Hansard*, HC Deb Vol 651, cols 942-3 (18 Dec 1961).

⁹² *Hansard*, HC Deb Vol 4, col 82W (6 May 1981).

⁹³ *Hansard*, HC Deb Vol 287, col 430W (16 December 1996); *Hansard*, HL Deb Vol 576, col WA101 (16 December 1996).

⁹⁴ The Treaties (Parliamentary Approval) Bill [HL] 1996; Executive Powers and Civil Service Bill [HL] 2003; Constitutional Reform (Prerogative Powers and Civil Service etc.) Bill [HL] 2006; see Ministry of Justice, *The Governance of Britain - War powers and treaties: Limiting Executive Powers*, Cm 7239, (London: HM Government, 2007), 74-7. Conservative Democracy Task Force, *Power to the People: Rebuilding Parliament* (2007), 8.

⁹⁵ Constitutional Reform and Governance Act 2010, s 20.

⁹⁶ *ibid* at s 24.

⁹⁷ A treaty may be ratified earlier in 'exceptional' cases: *ibid* at s 22.

However, while section 20(4) of the act outlined the ‘negative resolution’ model articulated by Ponsonby, it only grants parliament the power to *delay* ratification, not to veto it.⁹⁸ If the Commons resolves against ratification, this delay may continue indefinitely but, if the Lords do so, then the government may continue to ratify the agreement once an explanatory statement for doing so has been laid before the House. CRAG did not, therefore, add very much meat to the bones of the pre-existing convention. Indeed, it did not entirely codify the convention, because the definition of ‘treaties’ contained in section 25 of CRAG is narrower than Ponsonby’s.⁹⁹

Nor did CRAG add any new mechanisms for scrutiny. Despite a Foreign Office undertaking to give them relevant information,¹⁰⁰ Commons departmental select committees have played only a limited role. However, Brexit has stimulated a more proactive approach elsewhere. Initially constituted as a sub-committee of the House of Lords European Union Committee,¹⁰¹ the International Agreements Committee (IAC) became a full sessional committee of the House of Lords in January 2021. Its terms of reference are ‘To consider matters relating to the negotiation, conclusion and implementation of international agreements, and to report on treaties laid before parliament in accordance with Part 2 of the Constitutional Reform and Governance Act 2010.’¹⁰²

Should Parliament Have an Enhanced Role?

Despite these recent changes, parliamentary scrutiny of treaties under CRAG is still rudimentary. It is worth re-stating the reasons why parliament needs to have greater input in future, and then to explore possible routes for reform.

First and foremost, treaties are of great importance to the determination of the rights, freedoms and practices of all citizens. No longer are treaties confined to matters of war and peace, but range across the entire spectrum of governmental policy, with profound consequence for UK citizens and residents.

Secondly, when parliament is presented with the implementing legislation for a treaty that has been agreed, albeit not ratified, it has no real choice but to acquiesce. In many cases, it will not even be able to amend the legislation because of the terms already agreed by the government.

Third, the status quo threatens parliament’s ability to scrutinise government policy. Governments bind themselves and future governments (at least in international law) to particular policy positions in international treaties over the content of which parliament gets little say.

Fourth, giving greater voice to parliament in shaping and scrutinising the formation of foreign policy – particularly when it comes to the making of binding treaties – is both constitutionally and practically prudent. While a negotiating position may be weakened by being shackled to an unworkable mandate, it may equally suffer from a lack of domestic consensus.

⁹⁸ See Hazell and Foot, above n7 at 105.

⁹⁹ European Union Committee, above n88 at para 105.

¹⁰⁰ *Hansard*, HL Deb Vol 707, col 796 (31 January 2008).

¹⁰¹ Procedure Committee, *Terms of reference of the European Union Committee* (First Report of Session 2019-21) HL 29 2019-22 (London: House of Lords), 6-7.

¹⁰² Liaison Committee, *Review of investigative and scrutiny committees: strengthening the thematic structure through the appointment of new committees* (Fifth Report of Session 2019-21) HL 193 2019-21 (London: House of Lords), 15-7.

A final reason why parliament should have greater powers to scrutinise treaties is that the courts do not generally have jurisdiction over how the government exercises the treaty-making power.¹⁰³ In *Miller 1*, the Supreme Court went to great lengths to emphasise the unique circumstances that led it to intervene.¹⁰⁴ The courts only have authority to rule on domestic law and, unlike parliament, cannot provide effective scrutiny of treaty-making or treaty-keeping.

Reform

Despite this strong case for greater parliamentary involvement, and renewed interest following Brexit, very little has changed since 1929. There are two broad areas in which reforms are now needed: in scrutiny during the negotiation of treaties; and in scrutiny after negotiations but before ratification. In each, it will be necessary to consider whether there is the political will, the capacity and the institutional competence to succeed.

Scrutiny During Negotiations

There is an obvious need for secrecy and flexibility during negotiations. However, this must be balanced by ongoing scrutiny if parliament is to be presented with any real choice in approving the content of concluded treaties and any implementing legislation.

The most obvious way in which parliament can balance the need for secrecy with the transparency required for scrutiny is through committees. Each House already has some capacity for pre-ratification scrutiny by committees. For example, the IAC has received evidence in private and had access to confidential briefings on the progress of certain trade negotiations.¹⁰⁵ Unsurprisingly, given the context of Brexit, most progress has been made on trade negotiations. In 2019, the Department for International Trade set out the processes that would enable scrutiny of future free trade agreements, which include the provision of sensitive information to committees during the course of negotiations on a confidential basis.¹⁰⁶ In May 2022, the government pledged to undertake a public consultation on new FTAs and publish its negotiation objectives, after which the IAC in the Lords or the International Trade Committee (ITC) in the Commons could request a debate and publish regular updates and give evidence (both publicly and privately) to the relevant committee.¹⁰⁷

At present, treaty scrutiny is fragmented, dealt with separately by each House and further split across the departmental select committees in the Commons. In its 2008 report, the Joint Committee on the Draft Constitutional Renewal Bill recommended the formation of a joint committee of both Houses to scrutinise treaties.¹⁰⁸ This suggestion has recently been taken up again, and the House of Commons Liaison Committee noted in its 2019 report the need to work

¹⁰³ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 417-418. An (exceptional) contrary view was given by Lord (Tom) Denning in *Laker Airways Ltd v Department of Trade* [1997] QB 643.

¹⁰⁴ *Miller 1*, above n3.

¹⁰⁵ International Agreements Committee, *Working Practices: One Year On* (Seventh Report of Session 2021-22) HL 75 2021-22 (London: House of Lords), para 46.

¹⁰⁶ Department for International Trade, *Processes for making free trade agreements after the United Kingdom has left the European Union*, CP 63 (London: HM Government, 2019).

¹⁰⁷ Letter from Lord (Gerry) Grimstone to Baroness (Dianne) Hayter, 19 May 2022.

¹⁰⁸ Joint Committee on the Draft Constitutional Renewal Bill, *Report* HL 166 HC 551 2007-08 (London: House of Lords and House of Commons), para 238.

closely with its House of Lords counterpart to discuss future options, including a joint committee.¹⁰⁹ A joint committee would address the current discrepancy between the predominant weight of actual scrutiny being performed by the Lords and the predominant strength of the powers under CRAG resting in the Commons. Furthermore, it might well be better resourced, like the Joint Committee on Human Rights.

Pre-ratification Scrutiny

The House of Lords Constitution Committee and IAC have both suggested that the current provisions of CRAG for scrutiny between the conclusion of negotiations and ratification are deficient.¹¹⁰

First, the CRAG rules produce an extremely short timetable of just 21 sitting days for the relevant committee to scrutinise the treaty and produce a report.¹¹¹ If a debate is to take place as well, time is under even greater pressure. Ministers already possess the power, under section 21 of CRAG, to extend the period, and the Lords Constitution and International Agreements Committees have repeatedly invited the government to commit to extensions to allow for proper scrutiny.¹¹² Notably, the government refused to extend this period in order to allow the ITC to conclude its inquiry and publish a report on the Australia FTA.¹¹³

Second, the negative resolution model means that only some treaties are debated on the floor of the House, and few parliamentarians are truly involved in scrutiny. One possible reform is to shift to an ‘affirmative resolution’ model.¹¹⁴ However, parliamentary capacity is extremely limited and there would need to be a filter to select the most important treaties for consideration. A better solution would be to retain the current negative resolution model, but to change the provisions of CRAG to give powers to the committees to recommend debates on particular treaties.¹¹⁵ The IAC already has power to draw particular treaties to the attention of the House, but not all of these are debated in the chamber.¹¹⁶ At present, however, the government appears wary of losing control of the parliamentary agenda.¹¹⁷ Despite noting that it ‘does not envisage a new FTA proceeding to ratification without a debate first having taken place on it, should one have been requested’, the government was unable to find available parliamentary time to debate the Australia FTA.¹¹⁸

Third, CRAG only gives the House of Commons the power to delay ratification, not to veto it. There is therefore a mismatch between treaties that require implementing legislation, which parliamentary opposition may stymie, and other treaties falling under CRAG. Moreover, the

¹⁰⁹ Liaison Committee, *The Effectiveness and Influence of the Select Committee System* (Fourth Report of Session 2017-19) HC 1860 2017-19 (London: House of Commons), para 84.

¹¹⁰ Constitution Committee, above n88 at para 33; International Agreements Committee, above n105.

¹¹¹ Constitutional Reform and Governance Act 2010, s 20.

¹¹² Constitution Committee, above n88 at para 116; International Agreements Committee, above n105 at 33

¹¹³ International Trade Committee, *UK trade negotiations: Scrutiny of agreement with Australia* (First Report of Session 2022-23) HC 444 2022-23 (London: House of Commons), para 18.

¹¹⁴ A. Lang, *Parliament's Role in Ratifying Treaties* (5855) (London: House of Commons Library, 2017), 16.

¹¹⁵ Constitution Committee, above n88 at para 104.

¹¹⁶ International Agreements Committee, above n105 at para 16.

¹¹⁷ HM Government, *Government Response to the Constitution Committee Report: Parliamentary Scrutiny of Treaties* (London: HM Government, 2019), 9.

¹¹⁸ Letter from Lord (Gerry) Grimstone to Baroness (Dianne) Hayter, 19 May 2022.

Commons' delaying power is theoretical: so long as government controls parliamentary time, it will remain difficult to hold one vote, let alone multiple votes every 21 sitting days.

Fourth, CRAG does not apply to any 'regulation, rule, measure, decision or similar instrument made under a treaty', nor to any international agreement that is not binding under international law.¹¹⁹ In April 2022, the government signed the UK-Rwanda MoU on the relocation of asylum seekers. Then, in May, the government signed bilateral security assurances with Sweden and Finland, which provided that the UK would assist either country in the event of an attack.¹²⁰ Neither agreement was subject to parliamentary scrutiny. That is contrary to Ponsonby's 1924 promise to draw to parliament's attention

other agreements, commitments and understandings which may in any way bind the nation to specific action in certain circumstances and which may involve international obligations of a serious character, although no signed sealed document may exist.¹²¹

Conclusion

It is now high time for parliament to resume the vigorous approach to the scrutiny of treaty-making that it once had. In doing so, it will of course have to make robust decisions about how best to employ its limited resources, because of the volume of treaties now being signed. This chapter has not been a comprehensive review, but we suggest that the most important reform should be greater cooperation between government and parliament *during negotiations*.

When it comes to pre-ratification scrutiny (under the CRAG processes), the Commons and Lords have a chance now to work together to close the gaps in their previously rather fragmented coverage. It is to be hoped that the government will join in that cooperation by giving time for proper reporting to be carried out. Such cooperation may be aided by the expertise of a joint treaties committee, but current arrangements – a cross-hatching of subject specialism in the Commons and overall oversight in the Lords – deserve a fair trial. However, there is one other important reform to be made here: parliament's scrutiny committees and/or parliamentarians generally should be given power to raise particular treaties for debate and a vote. The current government dominance of parliamentary time weakens even further the powers parliament has under CRAG.

Finally, we recommend that the power of the Commons under CRAG be revisited. When Ponsonby stood at the despatch box in 1924, he envisaged the Commons having the final word on treaty-making. CRAG does not give it that power – only a power to delay ratification. Were the House of Commons' power to be fortified – given teeth, with a power of veto – it would act as an incentive to government not only to take democratically justifiable decisions, but also to explain those decisions to parliament at an early stage, at which parliament can still make a useful contribution.

¹¹⁹ Constitutional Reform and Governance Act 2010, s 25.

¹²⁰ D. Natzler and C. Sayers-Carter, 'Parliamentary scrutiny of international agreements should not be limited to legally binding treaties', Constitution Unit Blog, 12 July 2022. www.constitution-unit.com/2022/07/12/parliamentary-scrutiny-of-international-agreements-should-not-be-limited-to-treaties/.

¹²¹ European Union Committee, above n88 at para 105.

5. Public Appointments

... patronage runs especially deep in Britain because of our history as a constitutional monarchy, with the royal prerogative allowing Ministers to exercise wide, diverse and often ancient powers of patronage.

House of Commons Public Administration Select Committee (2003)¹²²

Introduction

Large numbers of public appointments are made under the prerogative. No one knows how many, and there is no official list. Whenever the government wishes to appoint someone to a role for which there is no statutory authority, it does so using the prerogative. Examples include appointments to the House of Lords; to permanent non-statutory bodies such as the chair and board members of the BBC, or the Committee on Standards in Public Life; or *ad hoc* positions such as the appointment of Kate Bingham as head of the UK Vaccine Taskforce. Non-statutory inquiries have been established under the prerogative, such as the Iraq Inquiry chaired by John Chilcot. And important constitutional watchdogs operate under the prerogative, including two which regulate public appointments: the Commissioner for Public Appointments, and the House of Lords Appointments Commission.

Until recently, the use of prerogative powers conferred a wide discretion on ministers to appoint whoever they liked. But, in the last 25 years, that discretion has become significantly restricted. The Commissioner for Public Appointments, established in 1995, ensures that almost all public appointments to arm's length public bodies are made following fair and open competition. Since 2007, the top 50 or so public appointments have been subject to a further safeguard: pre-appointment scrutiny hearings by parliamentary committees. Judicial appointments are now regulated by the statutory Judicial Appointments Commission (JAC), established in 2006. And, since 2000, appointments to the House of Lords have been regulated by the House of Lords Appointments Commission (HoLAC), which nominates some of the Crossbench peers and scrutinises political nominees for propriety. As a result of the work of these different bodies, the patronage wielded by ministers has become circumscribed: lightly in the case of HoLAC; severely in the case of the JAC; significantly in the case of the Commissioner for Public Appointments, but less so recently as the Commissioner's powers have been curtailed.

House of Lords Appointments

After the power to appoint ministers, the most important patronage in the hands of the Prime Minister is the power to grant peerages that confer a seat in the House of Lords. The prerogative power officially rests with the monarch, but is in practice exercised only on the advice of the Prime Minister. Legislation imposes no constraint on the numbers or the individuals whom the Prime Minister may choose to appoint. There has been a broad understanding that Prime Ministers

¹²² Public Administration Select Committee, *Opening up the Patronage State* (Fourth Report of Session 2002-03) HC 165 2002-03 (London: House of Commons), para 1.

should not simply pack their own side in the Lords, but there is no enforcement mechanism other than self-restraint. However, in the last 25 years, the power to award peerages has become slightly more restricted by the creation of the House of Lords Appointments Commission.

HoLAC is an advisory, non-departmental public body which was created under the prerogative in 2000. Its first function is to nominate individuals to serve as independent Crossbenchers. Successive Prime Ministers have undertaken to approve without amendment the commission's recommendations, and during its first ten years the commission nominated 53 Crossbench peers. But the Prime Minister still controls the numbers. Under David Cameron those 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 expanded his power to nominate in each parliament up to ten distinguished public servants.¹²³ Under Boris Johnson, the number nominated by the commission has shrunk even further: he invited no nominations from the commission for almost three years, between June 2018 and February 2021, when two more Crossbenchers were appointed.¹²⁴ At the same time, Johnson appointed eight non-affiliated peers, four times the number HoLAC had appointed to as Crossbenchers.¹²⁵

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 strictly limited to assessing propriety.¹²⁶ The commission does not have a right of veto and can merely draw its concerns to the Prime Minister's attention. It can also ask for further information about a nomination, as requested when screening Evgeny Lebedev's appointment in 2020.¹²⁷ 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.¹²⁸ HoLAC's 2013-15 report disclosed that it successfully queried a further seven nominations in 2015.¹²⁹ But, in 2020, Boris Johnson went against the advice of HoLAC in appointing Peter Cruddas, a former Conservative Party Treasurer who had donated over £3m to the party. This was the first time a Prime Minister had ignored the advice of HoLAC.¹³⁰

Prime ministerial use of the prerogative to make appointments to the Lords thus remains essentially unregulated, save for the limited control by the HoLAC. Under Cameron, May, and Johnson, there have been occasional suggestions that they might 'pack' the Lords with

¹²³ *Hansard*, HC Deb Vol 583, col 37W (26 June 2014).

¹²⁴ House of Lords Appointment Commission, 'Two new non-party-political peers' (24 February 2021).

¹²⁵ T. Burns, 'The House of Lords is too large: party leaders must put aside short-term interests and agree plans to reduce its numbers', Constitution Unit Blog, 25 June 2021 www.constitution-unit.com/2021/06/25/the-house-of-lords-is-too-large-party-leaders-must-put-aside-short-term-interests-and-agree-plans-to-reduce-its-numbers/.

¹²⁶ This has been interpreted by the Commission as meaning that the nominee should be in good standing in the community and with the public regulatory authorities, and that their past conduct will not bring the House of Lords into disrepute.

¹²⁷ P. Bew, *Oral evidence to the House of Commons Public Administrative and Constitutional Affairs Committee* HC 1238 2021-22, Q 59.

¹²⁸ P. Dominiczak, S. Swinford and C. Hope, 'Revealed: seven peerages blocked after failing vetting process', *Daily Telegraph*, 6 August 2015 www.telegraph.co.uk/news/politics/11826722/Revealed-Seven-peerages-blocked-after-failing-vetting-process.html.

¹²⁹ House of Lords Appointment Commission, *Annual Report 2013-2015* (2015), para 36.

¹³⁰ Letter from Boris Johnson to Lord (Paul) Bew (21 December 2020).

Conservative peers in order to get government legislation through.¹³¹ The last time any such move was attempted explicitly was immediately before the passage of the Parliament Act 1911, when the monarch was still considered to have some discretion. Asquith's request was refused by King George V, at least until a general election had been held. 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 Commons Public Administration Select Committee (PASC), and its successor the Public Administration and Constitutional Affairs Committee (PACAC), have proposed tighter regulation of this prerogative power.¹³²

Given the backsliding in recent years, effective regulation can come about only through statute. The original intention, shared by Labour and the Conservatives, was that HoLAC should be a statutory body, as recommended by the Wakeham Royal Commission on reform of the House of Lords.¹³³ If it were a statutory body, its role and responsibilities would be clearer, for example in relation to the number of crossbenchers who could be appointed, and whether nomination by HoLAC was the sole route to the crossbenches. A much bigger question is whether the size of the House of Lords should also be limited by statute, given the failure of voluntary efforts to do so. The chair of the Lord Speaker's Committee on the Size of the House, Lord (Terry) Burns, has said that 'Prime Ministerial patronage and the ability to appoint an unlimited number of members, who are entitled to a seat for life, is the root cause of the persistent increase in the size of the House'.¹³⁴ The incontinence of recent Prime Ministers, coupled with their undermining of HoLAC, has led Meg Russell to conclude that:

... in an environment where those at the heart of the government machine have become dismissive of constitutional convention and constraint, the only sure way to control the size of the Lords is to legislate to remove the Prime Minister's unfettered power.¹³⁵

The Commissioner for Public Appointments

The Office of the Commissioner for Public Appointments (OCPA) owes its origins to the very first report of the Committee on Standards in Public Life (CSPL), chaired by Lord Nolan. Nolan was concerned at 'the lack of checks and balances on the exercise of Ministers' considerable powers of patronage', and recommended that an independent Public Appointments Commissioner should

¹³¹ J. Watts, 'Speaker of House of Lords warns Theresa May against appointing new peers to get Brexit bills passed', *The Independent*, 6 January 2017 www.independent.co.uk/news/uk/politics/speaker-house-of-lords-theresa-may-lord-fowler-create-new-tory-peers-brexit-legislation-lloyd-george-a7512496.html; N. Morris, 'Boris Johnson intends to pack House of Lords with Brexiteers to correct pro-Remain bias', *iNews*, 26 August 2019 www.inews.co.uk/news/brexit/boris-johnson-brexit-latest-house-of-lords-brexiteers-pro-remain-bias-330739.

¹³² Public Administration Select Committee, *Propriety and peerages* (Second Report of Session 2007-08) HC 153 2007-08 (London: House of Commons), para 135; Public Administration and Constitutional Affairs Committee, *The Strathclyde Review: Statutory Instruments and the power of the House of Lords* (Eighth Report of Session 2015-16) HC 752 (2015-16) (London: House of Commons), paras 36-8.

¹³³ *Hansard*, HL Deb Vol 612, cols 1131-1132 (4 May 2000); Royal Commission on Reform of the House of Lords, *A House for the Future*, Cm 4534 (2000).

¹³⁴ Burns, above n125.

¹³⁵ M. Russell, 'Boris Johnson's 36 new peerages make the need to constrain prime ministerial appointments to the House of Lords clearer than ever', *Constitution Unit Blog*, 31 July 2020 www.constitution-unit.com/2020/07/31/boris-johnsons-36-new-peerages-make-the-need-to-constrain-prime-ministerial-appointments-to-the-house-of-lords-clearer-than-ever/.

be appointed.¹³⁶ Within months John Major's government had introduced a Public Appointments Order in Council and appointed the First Commissioner, Len Peach. This swift action illustrates the advantages of operating under the prerogative: the Commissioner has never been a creature of statute, and subsequent changes to OCPA's powers and functions have been made by issuing fresh Orders in Council.

The Commissioner's prime task is to ensure that the selection of candidates follows a process of open and fair competition. Ministers make the final decision, but the Commissioner helps to ensure that they select from a short list of appointable candidates, chosen from a strong and diverse field. The Commissioner regulates public appointments by issuing additional guidance, investigating complaints, and conducting regular audits.

The system has been subject to occasional reviews. In 2015, David Cameron asked Gerry Grimstone to conduct a review, with a view to streamlining the system, but also to reassert ministerial control. Grimstone obliged, proposing a Governance Code agreed by ministers in place of OCPA's Code of Practice, and assessment panels set up by the department in place of OCPA's independent assessors. Having been a central player in helping to organise appointment competitions, the Commissioner was reduced to being a referee.

The government warmly welcomed the Grimstone report, but the outgoing Commissioner, Sir David Normington, protested at the diminution of the Commissioner's role:

Taken together, Grimstone's proposals would enable ministers to set their own rules; override those rules whenever they want; appoint their own selection panels; get preferential treatment for favoured candidates; ignore the panel's advice if they don't like it; and appoint someone considered by the panel as not up to the job.¹³⁷

The new system was introduced under the Public Appointments Order in Council 2016. Under the new Code the relevant minister agrees the composition of the Assessment Panel, which should include an independent member and a departmental official. For 'significant appointments' a Senior Independent Panel Member (SIPM) is required. The Commissioner should be consulted about the selection of SIPMs, but has no veto.

In his last year in office, the next Commissioner Peter Riddell (2016-21) reported some worrying signs. Ministers had rejected some strong candidates, and had attempted to appoint people as SIPMs with clear party affiliations. In a few cases, they had sought to pack the interview panel with their allies. An additional concern was the growth of unregulated appointments, such as non-executive members of departmental boards, where people with business expertise had been partly replaced by political allies of ministers.¹³⁸

In September 2021, William Shawcross was appointed as the new Commissioner for Public Appointments. Looking over his shoulder will be not only PACAC but the CSPL. It commented in June that the system 'is highly dependent on both the willingness of ministers to act with

¹³⁶ Committee on Standards in Public Life, *Standards in Public Life*, Cm 2850-I, (London: HM Government, 1995).

¹³⁷ D. Normington, 'The five reasons I'm concerned about plans to overhaul the public appointments process', Civil Service World, 21 March 2016 www.civilserviceworld.com/news/article/sir-david-normington-the-five-reasons-im-concerned-about-plans-to-overhaul-the-public-appointments-process.

¹³⁸ Letter from Peter Riddell to Lord (Jonathan) Evans of Weardale (7 October 2020).

restraint and the preparedness of the Commissioner to speak out against breaches of the letter or the spirit of the Code'.¹³⁹

In November, CSPL went further, recommending that the Commissioner needed to be put on a statutory basis: 'regulators which exist solely as the creation of the executive are potentially liable to be abolished or compromised with ease'.¹⁴⁰ The committee cited evidence from Sir David Normington, who spoke from his experience as First Civil Service Commissioner as well as Commissioner for Public Appointments:

... the Civil Service legislation, that gave me absolute clarity of my powers, and I knew that those powers ... could not be changed, except by going back to Parliament. In contrast, my powers as Public Appointments Commissioner were in an Order in Council which I knew could be changed by a stroke of the pen and a nod of the Privy Council. And that did mean I suddenly felt very vulnerable ... it was perfectly within the government's power, with very little public debate and accountability to Parliament, to change the rules.¹⁴¹

Judicial Appointments

The appointment of judges is the sphere in which the prerogative power of appointment has most effectively been curbed. A once cosy and informal system presided over by the Lord Chancellor, with few checks and balances, has been transformed into a statutory system where the Lord Chancellor is left with no discretion. Formally, High Court judges and above are still appointed by the monarch, acting under the prerogative. In selecting judges for appointment, old-style Lord Chancellors exercised considerable discretion, aided by a handful of officials, and limited chiefly by a convention to consult the senior judges via secret soundings.

By the late twentieth century, the system for appointing judges began to be criticised for its informality, secrecy and dependence on old-boy networks. Secret soundings gave the senior judges considerable sway; judicial self-replication meant those appointed were almost invariably successful male barristers, with private school and Oxbridge backgrounds.¹⁴²

The lack of diversity was one of the main driving forces for change. Independent reviewers recommended creating a new process centred around an independent appointments body. The Lord Chancellor, Lord (Derry) Irvine of Lairg, resisted, which was one of the reasons for his abrupt dismissal in 2003. Following intense negotiations between the new Lord Chancellor, Lord (Charlie) Falconer of Thoroton, and the Lord Chief Justice Lord (Harry) Woolf, the framework was laid for a wholly new system of judicial appointments built around an independent Judicial Appointments Commission (JAC).¹⁴³

¹³⁹ Committee on Standards in Public Life, *Standards Matter 2: Committee Findings* (London: HM Government, 2021), para 83.

¹⁴⁰ Committee on Standards in Public Life, *Upholding Standards in Public Life* (London: HM Government, 2021), para 2.26.

¹⁴¹ *ibid.*

¹⁴² G. Gee, R. Hazell, K. Malleson and P. O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge: Cambridge University Press, 2015), 161.

¹⁴³ Department for Constitutional Affairs, *The Lord Chancellor's Judiciary Related Functions: Proposals (the Concordat)* (London: HM Government, 2004).

Created by Part 4 of the Constitutional Reform Act 2005, the JAC completely changed the appointment process. In place of secret soundings and taps on the shoulder, all judicial vacancies are now advertised, from the highest to the lowest. There is then a formalised selection process involving short listing, interviews, and for some posts, presentations or role-playing. The JAC was created as a recommending body, but in identifying a single name for each vacancy, it effectively functions as an appointing body. The Lord Chancellor could accept or reject this recommendation, or request its reconsideration. In practice, Lord Chancellors have nearly always accepted the recommendation, with only five occasions from nearly 3,500 recommendations between 2006-13 when this was not so.¹⁴⁴

The scope for ministerial discretion is extremely limited. By the time Jack Straw was appointed Lord Chancellor in 2007, frustration was growing at the JAC's failure to increase diversity, and at the slow and cumbersome nature of the JAC's processes. Straw's frustration that the Lord Chancellor had no real choice reached its nadir when he tried to question the proposed appointment of Sir Nicholas Wall as President of the Family Division in 2010, but the panel re-submitted the same name. Straw's doubts were subsequently confirmed when Sir Nicholas was forced to retire early on health grounds.¹⁴⁵ Straw's successor Kenneth Clarke concluded that the Lord Chancellor's power to refuse the JAC's recommendations was in effect unusable, which is why he was relaxed about passing the final say over lower level appointments to the senior judges in the Crime and Courts Act 2013.

It remains to be seen for how long governments will tolerate being responsible for a system from which the Lord Chancellor is largely excluded. Two forces might drive change. One is the slow progress in diversifying the judiciary. The second driver is concern at the lack of democratic legitimacy in the face of growing judicial power. This concern crystallised in 2021 with a Policy Exchange paper that argued:

Ministerial input into the appointments system provides one of the few channels for ensuring that senior judges enjoy an appropriate measure of democratic legitimacy ... a wrong turn was taken in 2005 when the judicial appointments system was overhauled, with the Lord Chancellor marginalised from senior selection decisions. There is a strong case to make for enlarging the role of the Lord Chancellor.¹⁴⁶

Robert Buckland (Lord Chancellor 2019-21) indicated his wish to review the role of the Lord Chancellor, but this may not be shared by his successor Dominic Raab, who was appointed in September 2021 (to be dismissed by Liz Truss a year later, but re-appointed by Rishi Sunak in October 2022). If the Lord Chancellor seeks greater discretion over senior judicial appointments, the judges can be expected to protest that this will undermine judicial independence. But, so long as the Lord Chancellor is invited to choose from a list of those deemed appointable by the selection panel, there is no real threat, because all the short-listed candidates will have been independently judged to be capable of holding high judicial office.

¹⁴⁴ Gee, Hazell, Malleson and O'Brien, above n142 at 163. Note that the rejections of appointments on these five occasions were on relatively minor procedural grounds, rather than substantive disagreement.

¹⁴⁵ J. Straw, *Aspects of Law Reform: An Insider's Perspective (The Hamlyn Lectures)* (Cambridge: Cambridge University Press, 2013), 58-9.

¹⁴⁶ R. Ekins and G. Gee, *Reforming the Lord Chancellor's Role in Senior Judicial Appointments* (London: Policy Exchange, 2021), 10. See also R. Ekins, *The Limits of Judicial Power* (London: Policy Exchange, 2022), 21.

Conclusion

In the last 25 years, the patronage wielded by ministers in making public appointments has become significantly circumscribed thanks to the creation of three new regulatory bodies (OCPA, JAC, and HoLAC). But the power of these bodies varies greatly, and in recent years Prime Ministers have loosened the controls over public appointments generally, and in particular, over the power to appoint new peers. For regulation to be effective, and not subject to backsliding, the three regulatory bodies would be better protected if they were enshrined in statute, with clear statutory powers and functions.

The difference can be illustrated by the history of the JAC, which operates on a secure statutory foundation. If it were not a creature of statute, the Ministry of Justice might have been tempted to abolish it in 2009-10.¹⁴⁷ By contrast, it was not difficult for David Cameron to reduce the role of OCPA, and for both Cameron and Johnson to sideline HoLAC in order to extend their powers of patronage. OCPA's role was easily changed by Order in Council, and HoLAC's role was easily undermined because its powers and functions were only loosely defined.

Conventions have proved insufficient to check the temptation for Prime Ministers to pack their own side in the House of Lords, leading to an upwards spiral in its size. Given the failure of voluntary restraint, the only effective remedy would appear to be statutory controls; including putting HoLAC on a statutory basis. The CSPL felt unable to make such a recommendation, because 'a statutory HOLAC should be considered as part of a broader House of Lords reform agenda'.¹⁴⁸ But it did recommend that the Commissioner for Public Appointments should be given a statutory foundation.¹⁴⁹

A statutory foundation would help to guard against eroding the Commissioner's powers, as happened in 2016; or *in extremis*, to protect the office from abolition. There is also the psychological factor which applies to all non-statutory bodies, to CSPL and HoLAC as much as to OCPA, that without the security of a statutory foundation they may be inclined to pull their punches.

For the JAC, our critique is the reverse: that it has too much power, leaving ministers effectively with no discretion. Although nominally advisory, it has become *de facto* an appointing body, and one controlled by the judges. To restore to ministers some real choice, the JAC and selection panels for the most senior appointments should be required to submit a short list of appointable candidates rather than a single name. That should not be a threat to judicial independence, because the candidates will have been judged appointable; and it should enable faster progress on diversity.

¹⁴⁷ Gee, Hazell, Malleson and O'Brien, above n142 at 168.

¹⁴⁸ Committee on Standards in Public Life, above n140 at para 2.37.

¹⁴⁹ *ibid* at para 2.32.

6. Passports

Passports are an administrative device, and in this country there is virtually no law about them.

Governments have always insisted that passports are granted, withheld or revoked under the royal prerogative – that is to say at the discretion of ministers; that no one has a legal right to a passport; that reasons for refusal of revocation will not be given; and that the passport itself remains government property.

H.W.R. Wade (1968)¹⁵⁰

Introduction

A passport is an administrative document, issued by a state to its citizens to facilitate their travel to other states by proving their citizenship. It is important to distinguish passports from citizenship. Whilst one must be a British national to obtain a British passport, it is not necessary that all British nationals should have a British passport. Similarly, British citizenship brings certain rights; but the right to a passport is not one of them.

At least since the First World War, the ‘ready issue of a passport is a normal expectation of every citizen’.¹⁵¹ Unlike in many other countries, passports in the UK are issued by the Crown under the royal prerogative and the policy criteria for their withdrawal under the prerogative are not governed by any piece of legislation.¹⁵² Rather, the responsible minister (since 2011, the Home Secretary) sets out the policy to parliament from time to time, most recently in 2013.¹⁵³ This is highly unusual. Even in Canada, where passports are also issued under the prerogative, the criteria have been codified in prerogative legislation (the Canadian Passport Order 1981).

The Prerogative in Practice

Although the criteria for the issue and withdrawal of a passport are not addressed in any piece of legislation, the Crown has from time to time published its policy. This practice began with Viscount Palmerston, then Foreign Secretary, who ordered in 1846 that regulations be published as to the criteria for the issuing of a passport.¹⁵⁴ At that stage, passports were still something of a sporadic requirement, although the need for identification documents for travel became more widespread in the later nineteenth century.¹⁵⁵ However, at the end of the First World War, ‘temporary’

¹⁵⁰ H.W.R. Wade, ‘Passports and the individual’s right to travel’, *The Times*, 7 August 1968.

¹⁵¹ *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] QB 811, 820 (Taylor LJ). For the history of the modern passport, see: K. Diplock, ‘Passports and Protection in International Law’, *Transactions of the Grotius Society* 32, 1946, 42-59; N.W. Sibley, ‘The Passport System’, *Journal of the Society of Comparative Legislation* 7, 1906, 32; and D.W. Williams, ‘British Passports and the Right to Travel’, *International & Comparative Law Quarterly*, 1974, 642.

¹⁵² P. Scott, ‘Passports, the Right to Travel, and National Security in the Commonwealth’ *International & Comparative Law Quarterly* 69, 2020, 365-95.

¹⁵³ *Hansard*, HC Deb Vol 561, cols 68WS-70WS (25 April 2013).

¹⁵⁴ P. Scott, ‘Citizenship’ in *The National Security Constitution* (Oxford: Hart Publishing, 2018), 172.

¹⁵⁵ J. Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press, 2000), 93-111.

requirements across Europe for aliens to hold passports became permanent.¹⁵⁶ By the middle of the twentieth century, the policy focus had turned to the withdrawal of a passport rather than its issue. In 1958, the Earl of Gosford outlined the government's policy on the matter:

The Foreign Secretary has the power to withhold or withdraw a passport at his discretion, although in practice such power is exercised only very rarely and in very exceptional cases. First, in the case of minors suspected of being taken illegally out of the jurisdiction; secondly, persons believed on good evidence to be fleeing the country to avoid prosecution for a criminal offence; thirdly, persons whose activities are so notoriously undesirable or dangerous that Parliament would be expected to support the action of the Foreign Secretary in refusing them a passport or withdrawing a passport already issued in order to prevent their leaving the United Kingdom; and fourthly, persons who have been repatriated to the United Kingdom at public expense and have not repaid the expenditure incurred on their behalf.¹⁵⁷

The scope of the government's policy on passport withdrawal has expanded over time. The present policy was set out by Theresa May in 2013, when she stated that a passport would be withdrawn for:

1. A minor whose journey was known to be contrary to a court order, to the wishes of a parent or other person or authority in whose favour a residence or care order had been made or who had been awarded custody; or care and control.
2. A person for whose arrest a warrant had been issued in the United Kingdom, or a person who was wanted by the United Kingdom police on suspicion of a serious crime.
3. A person who is the subject of:
 - a. a court order, made by a court in the United Kingdom, or any other order made pursuant to a statutory power, which imposes travel restrictions or restrictions on the possession of a valid United Kingdom passport;
 - b. bail conditions, imposed by a police officer or a court in the United Kingdom, which include travel restrictions or restrictions on the possession of a valid United Kingdom passport;
 - c. an order issued by the European Union or the United Nations which prevents a person travelling or entering a country other than the country in which they hold citizenship;
 - d. a declaration made under section 15 of the Mental Capacity Act 2005.
4. A person may be prevented from benefitting from the possession of a passport if the Home Secretary is satisfied that it is in the public interest to do so. This may be the case where:

¹⁵⁶ *ibid* at 116-7.

¹⁵⁷ *Hansard*, HL Deb Vol 209, cols 860-1 (16 June 1968).

- a. a person has been repatriated from abroad at public expense and their debt has not yet been repaid. This is because the passport fee supports the provision of consular services for British citizens overseas; or
- b. a person whose past, present or proposed activities, actual or suspected, are believed by the Home Secretary to be so undesirable that the grant or continued enjoyment of passport facilities is contrary to the public interest.¹⁵⁸

Notably, the public interest category (4b in particular) has gradually widened.¹⁵⁹ Long gone is the high threshold of 1958 – ‘activities...so notoriously undesirable or dangerous that Parliament would be expected to support the action of the Foreign Secretary’ – and even the 1974 formulation of ‘so demonstrably undesirable’ has been replaced by the perception of the Home Secretary.

Prerogative and Statute

In recent years, particular focus has been placed on the use of the prerogative to withdraw passports for national security reasons. In this field, the prerogative operates alongside legislative powers introduced by the Terrorism Prevention and Investigation Measures Act 2011 (TPIM), under which the Secretary of State may apply to the High Court for a TPIM notice, which may impose a selection of a range of requirements, including the surrender of a passport.¹⁶⁰ As a result, the relationship between prerogative and statute in this area is unavoidably complex.

In *R (XH and AI) v Secretary of State for the Home Department*, two British nationals sought judicial review of the decision of the Home Secretary to cancel their passports because of suspected terrorism-related activity. While the Home Secretary had purported to act under the prerogative, the appellants claimed that the withdrawal of passports was a statutory power under the TPIM Act. Although the act did not expressly deal with the refusal and cancellation of a passport, Schedule 1 had permitted the Secretary of State to impose ‘a requirement to surrender any travel document’ including an ‘individual’s passport’ within the meaning of the Immigration Act 1971. The appellants thus suggested that, as withdrawal and surrender had the same aim and achieved the same practical result, the TPIM Act must have abrogated the prerogative in accordance with *Attorney General v De Keyser’s Royal Hotel*.¹⁶¹ However, the Court of Appeal noted that the *De Keyser* principle ‘depends on establishing a necessary implication in the TPIM Act that the prerogative powers of refusal to issue and cancellation were abridged or put into abeyance by the statutory scheme’, and that the test for doing so ‘is a strict one’.¹⁶²

Justiciability and Judicial Review

Since *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett*, it has been clear that decisions to withdraw a passport are subject to the standard tools of judicial review, including on

¹⁵⁸ *Hansard*, HC Deb Vol 561, cols 69WS-70WS (25 April 2013).

¹⁵⁹ Scott, above n154 at 175-6; The phenomenon was first noted by Lord (Ian) Orr-Ewing in 1976: *Hansard*, HL Deb Vol 370, cols 699-700 (6 May 1976).

¹⁶⁰ Terrorism Prevention and Investigation Measures Act 2011, sch 1, paras 2(3)(c), (d), 2(4)-(5).

¹⁶¹ *Attorney General v De Keyser’s Royal Hotel* [1920] UKHL 1.

¹⁶² *R (XH and AI) v Secretary of State for the Home Department* [2017] EWCA Civ 41, [89].

grounds of legality, rationality, and procedural impropriety.¹⁶³ Applying the reasoning of the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service (GCHQ)*,¹⁶⁴ the court in *Everett* held that the justiciability of a prerogative power depended on whether or not its subject matter was ‘high policy’.¹⁶⁵ The court saw it as ‘common sense’ that the Crown’s powers over passports ‘fell into an entirely different category’ to foreign affairs and other non-justiciable areas.¹⁶⁶ In his case-note on *GCHQ*, Ewing had stated some years previously that ‘the issuing of passports is one of only a few such [justiciable] powers which leap from the pages of the textbooks with arms extended’.¹⁶⁷ Unlike issues of ‘high policy’, the withdrawal of a passport was ‘a matter of administrative decision’.¹⁶⁸

Reform

The time for imposing controls on the passport powers is long overdue. In 2009, the government accepted in principle the need for ‘comprehensive legislation on the procedures for issuing passports’.¹⁶⁹ No such legislation has been forthcoming.

Three broad avenues lie open for reform. The first is the ratification of Protocol 4 of the European Convention on Human Rights, which protects the right of everyone in the state to liberty of movement and the freedom ‘to leave any country, including his own’, save as provided by restrictions

such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.¹⁷⁰

While this would give an additional tool to the courts in assessing the use of the passport powers by placing proportionality at the forefront of the inquiry, concerns have been raised that ratification might ‘confer rights in relation to passports and right of abode on categories of British nationals who do not currently have that right’,¹⁷¹ for example British Nationals (Overseas), and be ‘incompatible... with Armed Forces discipline’. Nonetheless, in 2005, the Joint Committee on Human Rights suggested that the government might ratify the Protocol with appropriate reservations in order to overcome these specific issues.¹⁷² In 2009, the government acceded that

¹⁶³ *ex parte Everett*, above n151.

¹⁶⁴ *GCHQ*, above n103.

¹⁶⁵ *ex parte Everett*, above n151 at 820.

¹⁶⁶ *ibid* at 817.

¹⁶⁷ K.D. Ewing, ‘Prerogative, Judicial Review and National Security’, *Cambridge Law Journal* 44, (1985), 2.

¹⁶⁸ *ex parte Everett*, above n151 at 820.

¹⁶⁹ Ministry of Justice, *Governance of Britain: Review of the Executive Royal Prerogative Powers: Final Report*, above n54 at para 38.

¹⁷⁰ This echoes the provisions of Article 27 of the Citizen’s Directive (2004/38/EC), by which the UK was bound from 2004.

¹⁷¹ Department for Constitutional Affairs, *Report on the UK Government’s Inter-Departmental Review of the UK’s Position under various International Human Rights Instruments* (July 2004) quoted in Joint Committee on Human Rights, *Review of International Human Rights Instruments* (Seventeenth Report of Session 2004-05) HL 99 HC 264 2004-05 (London: House of Lords and House of Commons), para 38.

¹⁷² *ibid*.

this might be possible.¹⁷³ However, the scope of and policy for use of the prerogative would remain within the control of the government, and expanding the courts' capacity to review its exercise on human rights grounds would not prevent future Home Secretaries expanding their stated criteria even further.

The second avenue is the implementation of a statutory right to a passport. In many countries, the right to a passport and the processes of issuance and cancellation are set out in law.¹⁷⁴ New Zealanders have had a statutory right to a passport since the Passports Act 1980.¹⁷⁵ Even before this, the power to grant passports had been rendered statutory (although with an apparently wide discretion) by the Passports Act 1946. In Australia, the right to a passport is relatively recent,¹⁷⁶ but the power to cancel a passport appears to have been made statutory by the wide-ranging section 6 of the Passports Act 1920. As for Canada, although passports are still managed under the prerogative, the Canadian Passport Order 1981 governs the criteria for cancellation. There have been occasional calls for a statutory right to a passport in the UK, including private members' bills in the House of Commons, but these have been largely sidelined.¹⁷⁷

A statutory right to a passport would most naturally be accompanied by codification of the criteria for cancelling a passport. Codification brings a degree of stability, predictability and transparency. Some flexibility brings benefits, of course. It is not always possible to anticipate novel situations in this area. However, at least in the realm of national security, the government has wide-ranging statutory powers such as TPIMs, which mitigate against this risk. Codification would still be possible without statute, but statute is by far the preferable route. On the other hand, we recognise that a statutory right to a passport would be a large step, and note that Canada's solution of using prerogative legislation goes some way towards codifying the use of passport powers while preserving the executive's ability to change the criteria for cancellation with relative ease. Even that small step would be in the right direction.

The third route for reform lies in additional extra-curial scrutiny. The Home Affairs Select Committee recommended in 2015 that the Independent Reviewer of Terrorism Legislation (IRTL) should be allowed to review the exercise of the prerogative passport powers alongside TPIMs, and that the Home Secretary should report to the House of Commons quarterly (again, alongside TPIMs).¹⁷⁸ In 2016, the Independent Review stressed that this omission from the scope of independent review creates a patchy coverage of counter-terrorism measures, and also gives rise to an impression that the unreviewed powers including the passport prerogative will be used for the purposes of doing the government's 'dirty work'.¹⁷⁹ The Home Secretary flatly rejected this recommendation in July 2017:

¹⁷³ Hansard, HL Deb Vol 708, col 50WA (24 February 2009).

¹⁷⁴ E.g. Passgesetz 1986 (Germany), ss 6-8; Passport Act 1856, Passport Act 1926 (USA); cf P. Lansing, 'Freedom to Travel: Is the Issuance of a Passport an Individual Right or a Governmental Prerogative', *Denver Journal of International Law & Policy* 11, 1981, 15-35.

¹⁷⁵ Passports Act 1980 (NZ), ss 3-4. Now Passports Act 1992 (NZ), ss 3-4.

¹⁷⁶ Australian Passports Act 2005, s 7.

¹⁷⁷ HC Bill 177 (Session 1967-68); HC Bill 78 (Session 1975-76).

¹⁷⁸ Home Affairs Select Committee, *Counter-terrorism: Foreign Fighters* (Nineteenth Report of Session 2014-15) HC 993 2014-15 (London: House of Commons), para 8.

¹⁷⁹ Independent Reviewer of Terrorism Legislation, *The Terrorism Acts in 2013* (2014), 103-4; Independent Reviewer of Terrorism Legislation, *The Terrorism Acts in 2015* (2016), 7-8.

I consider that including non-statutory powers within the Independent Reviewer's remit would again risk diluting the clarity of that remit, and may set an unhelpful precedent given that Prerogative powers are also used in a range of other contexts across Government. Furthermore, not all refusals of passports under these criteria may necessarily be on the grounds of terrorism-related activity, risking uncertainty as to which cases should be considered by the Independent Reviewer and which should not.¹⁸⁰

Each of these reasons is inadequate. First, there is no reason why including a clearly defined power within the IRTL's remit would dilute clarity just because the source of that power was not statute. Second, there are ample precedents for independent review of the exercise of prerogative powers, such as the House of Lords Appointments Commission, or the Commissioner for Public Appointments. There is even a precedent in relation to the passport power: the advisory committee established in the 1960s with twin terms of reference to scrutinise the withdrawal of passports connected to South Rhodesian Unilateral Declaration of Independence, and to re-examine those instances of withdrawal that had been referred to the committee by the Commonwealth Secretary. Third, the Crown exercises the prerogative according to a set of policy criteria. In doing so, it should determine which criterion for disqualification applies in each case. Those connected to national security could be overseen by the IRTL, while others might better be policed by bringing them under the jurisdiction of another body, such as the Parliamentary Ombudsman.¹⁸¹

Conclusion

A passport is an administrative document, issued by a state to its citizens to facilitate their travel to other states by proving their citizenship. It is not guaranteed by citizenship, and it does not grant rights or status, but it does perform a function. That function is to enable the *utilisation* of rights. As the importance of international travel and of being able to prove one's citizenship has increased, passports have at the same time become more routine, administrative documents and more fundamental to the individual citizen.

Predictability, stability and non-arbitrariness in the application of rules are central pillars of the rule of law and the freedom of the individual. For too long, the criteria for cancelling passports have expanded entirely at the behest of the executive. Although judicial review mitigates some of the impact of the status quo, it is insufficient to provide stability and predictability in the rules themselves. It is time to codify those criteria with greater firmness, whether by statute or prerogative legislation, and it would also be desirable to impose greater institutional scrutiny on the use of the passport powers, to avoid the government using the prerogative power for its 'dirty work' and avoiding the rigours of the controls that parliament has already sought to impose.

¹⁸⁰ HM Government, *The Government Response to the Annual Report on the Operation of the Terrorism Acts in 2015 by the Independent Reviewer of Terrorism Legislation*, Cm 9489, (London: HM Government, 2017), 4.

¹⁸¹ This would require amendment of the Parliamentary Commissioner Act 1967, sch 3, para 5.

7. Conclusions

Prerogative, Past, Present and Future

This report has focused on evolution of the prerogative in the last 30-40 years. These have seen huge changes, with tighter regulation of the prerogative by the courts, and by parliament, alongside a process of greater codification. That applies to the personal prerogatives of the monarch as well as to prerogative powers of the executive, and this process of tighter regulation is the main theme running through this final chapter. But it has been an incremental process, in fits and starts, with two steps forward, one step back: reactive as much as proactive, driven by external events as much as changing constitutional norms.

The Role of Conventions

Traditionally, the prerogative has been regulated by convention, not law. Dicey described conventions as ‘rules intended to regulate the exercise of the whole of the remaining discretionary powers of the Crown, whether these powers are exercised by the King himself or by the Ministry’.¹⁸² Conventions are unwritten rules of governmental morality. Their strength is that they can evolve and adapt to changing circumstances; their weakness is that they are unenforceable – they work only so long as political actors consider them to be binding.

This report contains examples of apparent conventions which ultimately lacked that binding quality: the proportionality principle in appointments to the House of Lords, violated by David Cameron and Boris Johnson (chapter 5); the requirement to consult the House of Commons before engaging in military action overseas, ignored by Theresa May (chapter 3). One reason for proposing stronger measures, typically through codification in soft law or hard law, is that conventions are flouted. But codification may also be proposed simply for greater transparency: the Cabinet Manual was not initially compiled to prevent abuse, but to explain the rules on government formation – including the continuity convention, the caretaker convention, and the confidence convention.¹⁸³

Even when incorporated in a code, conventions remain largely unenforceable save in the political realm.¹⁸⁴ There is a simplistic spectrum, in terms of rising enforceability and durability, of convention to soft law to hard law. It is true that unwritten conventions are the most easily flouted; and soft law codes like the Ministerial Code can be – and have been – changed by a new Prime Minister.¹⁸⁵ But codification in statute is not always more durable: the provisions in the

¹⁸² A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 9th edn (London: Macmillan, 1939), 426.

¹⁸³ Hazell and Foot, above n7 at 42-4.

¹⁸⁴ On the enforceability of conventions, see F. Ahmed, R. Albert and A. Perry, ‘Judging constitutional conventions’, *International Journal of Constitutional Law* 17, 2019, 787-806; In *FDA v The Prime Minister* [2021] EWHC 3279 (Admin), the court recognised that several of the more political conventions in the Ministerial Code were not justiciable, but ruled that the Code itself was justiciable.

¹⁸⁵ In 2015, David Cameron omitted the duty on ministers to comply with international law and treaty obligations: J. Halliday, ‘Ministerial code: No 10 showing contempt for international law’, *The Guardian*, 26 October 2015. A list of subsequent changes made by successive Prime Ministers can be found in H. Armstrong and C. Rhodes,

Constitutional Reform and Governance Act 2010 (CRAG) for ratifying treaties failed the stress test of Brexit, and the Fixed-term Parliaments Act 2011 (FTPA) has proved transitory. So ultimately whether a convention or practice continues to be observed depends on continuing political consensus about its value: something we return to below.

The Prerogative is Becoming More Regulated

The narrative running through this final chapter is one of the prerogative gradually becoming more regulated: by the courts, by parliament, by codification, and by specialist watchdogs. The direction of travel is not all one way: in the courts as in parliament there has been ebb and flow, but the overall trend over the last 30-40 years has been to make the prerogative more transparent, more accountable, and to reduce the breadth of executive discretion. That is the trend charted by the courts, in landmark cases like *GCHQ*, *Fire Brigades Union*, *Miller 1* and *Miller 2*.¹⁸⁶ And it is the trend charted by parliament in seeking greater control over war powers, treaties and public appointments. It is a trend visible in the gradual process of codification, into both soft law and hard law. And it is a trend visible in the creation of a whole new cadre of constitutional watchdogs, each designed to regulate a particular aspect of the prerogative.

Tighter Regulation by the Courts

There are four main ways in which the prerogative has become more tightly regulated, starting with the courts. The courts have always reserved the right to define the existence and scope of prerogative powers, going back to the *Case of Proclamations* in 1610.¹⁸⁷ But traditionally they had been reluctant to go further and rule on its exercise. That changed dramatically with the *GCHQ* case in 1985, and with the *Fire Brigades Union* case 10 years later. But the biggest shock came with the two Brexit cases brought by Gina Miller. In *Miller 1*, about triggering Article 50 of the Treaty on European Union, the Supreme Court asserted that the executive required parliamentary authorisation to make such a great constitutional change: it could not rely on the prerogative alone. In *Miller 2*, the court found that the prerogative power of prorogation could not be used to undermine the fundamental role of parliament, in scrutinising government and holding it to account.

Tighter Regulation by Parliament

Tighter regulation of the prerogative by parliament is a phenomenon just of the last 20 years. Interest in the House of Commons was sparked initially by the sustained campaign led by the House of Commons Public Administration Select Committee (PASC) to tame the prerogative, boosted by the support shown by Gordon Brown in 2007-10, and further boosted by the series of votes on military deployments under the 2010-15 coalition (chapter 3). But, despite the breadth of PASC's campaign, it is only in relation to war powers, treaties, and public appointments that parliament has made any impression; and some of those gains have been transitory. The convention that parliament would be consulted about military action, which appeared to

The Ministerial Code and the Independent Adviser on Ministerial Interests (03750) (London: House of Commons Library, 2021).

¹⁸⁶ *GCHQ*, above n103; *ex parte Fire Brigades Union*, above n14; *Miller 1*, above n3; *Miller 2*, above n2.

¹⁸⁷ *Case of Proclamations* (1610) 77 ER 1352.

consolidate under David Cameron, was considerably watered down by Theresa May in 2018. As for treaties, neither House has yet exercised the statutory power in CRAG to pass a resolution to delay ratification. Only pre-appointment scrutiny hearings can be regarded as a lasting success, a further small check against favouritism in public appointments.¹⁸⁸

There are several reasons why parliamentary control of the prerogative has not been more sustained or effective. One is simply lack of political will: politicians like PASC chair Tony Wright are rare exceptions. Another is lack of awareness: most parliamentarians were not aware of the importance of treaties – until Brexit. A third is the unreliability of shifting conventions, illustrated in parliament's attempts to regulate the war making power. A fourth is the complexity of the underlying issues, illustrated again by the war power, with the changing nature of modern warfare, and the difficulties of sharing sensitive intelligence.

A final factor is parliament's limited institutional capacity and lack of leadership. Unlike the executive, which is tightly organised, with clear collective decision-making procedures, parliament is the reverse, with multiple different sources of power and authority. It is hard to provide strategic leadership when the Leader of the House, the Speaker of the Commons, and the House of Commons Commission can all claim a share in the management of the institution; to say nothing of the need for coordination with the House of Lords.¹⁸⁹ Added to this is the problem of executive domination: the main priority of the Leader of the House is to advance the government's business rather than maximise parliamentary scrutiny. So it is no wonder that it has taken parliament a long time to develop the capacity to scrutinise treaties, in the new International Agreements Committee (chapter 4); and no surprise that it was the House of Lords, with no government majority, rather than the Commons which has done so.

Tighter Regulation Through Codification

The third way in which the prerogative has become more tightly regulated is through codification. This has taken a variety of different forms, with varying degrees of effectiveness. There is the obvious distinction between soft and hard law codification; but even when the prerogative is regulated in statute, regulation is not necessarily much tighter – it depends on the content of the regulatory regime. A good example is Part 2 of CRAG, which codified the Ponsonby Rule on the ratification of treaties. Codifying what had previously been a convention has made little difference: that partly reflects a weakness in the statutory regime, but partly a weakness in parliament itself in being slow to develop stronger scrutiny machinery (chapter 4).

The FTPA illustrates a different kind of weakness, namely vulnerability to political change. At the time the FTPA appeared to be a strong form of codification, abolishing the prerogative power of dissolution and replacing it with a statutory regime in which early dissolution could only be decided by a formal vote in the House of Commons. But the FTPA was rushed through in the first year of the coalition government, with no green or white paper, and no attempt to build cross-party

¹⁸⁸ Hazell and Foot, above n7 at 147-9.

¹⁸⁹ B. Yong, 'Exposing the hidden wiring of Parliament', UK Constitutional Law Association Blog, 10 January 2022 www.ukconstitutionallaw.org/2022/01/10/ben-yong-exposing-the-hidden-wiring-of-parliament/. See also B. Yong, 'The Governance of Parliament' in A. Horne and G. Drewry (eds), *Parliament and the Law* (Oxford: Hart Publishing, 2018); D. Judge and C. Leston-Bandeira, 'The Institutional Representation of Parliament', *Political Studies* 66, 2018, 154-72.

support: come the 2019 election, both Labour and the Conservatives were committed to its repeal, subsequently implemented in the Dissolution and Calling of Parliament Act 2022.

Codification needs to build consensus if it is to endure. That applies to codification in soft law as well as hard law. The drafting of the Cabinet Manual, which occurred at the same time as the FTPA, adopted a very different, consensus building approach. The Cabinet Office consulted constitutional experts about early drafts of key chapters, then a draft of the whole was published for wider consultation; it was then scrutinised by three parliamentary committees and their comments taken into account before the final version was published in October 2011.¹⁹⁰

The House of Lords Constitution Committee has recommended that a similar process be followed when the Cabinet Manual is revised and updated.¹⁹¹ That will provide an opportunity to try to broker a consensus draft of the war powers convention (codified at paras 5.36-38 of the 2011 Cabinet Manual), and a consensus draft of the Lascelles principles (codified at para 58 of the 2010 draft). It may not be possible to reach complete agreement. Ultimately, the Cabinet Office and Prime Minister will have to come to a conclusion: the Cabinet Manual is a statement by the executive of its understanding of how the conventions operate.

Tighter Regulation by Specialist Watchdogs

The fourth strand to tighter regulation is through the creation of specialist watchdogs. This is a novel development, not yet recognised in the literature. Five different prerogative powers are now regulated by specialist watchdogs, all created in the last 30 years. Their role and functions vary, some being supervisory, some advisory, and some decision making; but in different ways they all serve to restrict executive autonomy. The area which has become most closely regulated is public appointments, with the creation of the Office for the Commissioner for Public Appointments (OCPA) in 1995, the House of Lords Appointments Commission (HoLAC) in 2000, and the Judicial Appointments Commission (JAC) in 2005. The JAC is created by statute, and is much the most powerful of the three, because of the way its functions are defined in the Constitutional Reform Act 2005.¹⁹² By contrast, OCPA and HoLAC are purely advisory, and as related in chapter 5, their roles have been reduced. But both bodies have served to restrict executive discretion: in its first 15 years, HoLAC screened out 17 nominations; while OCPA remains a guardian of the principle of fair and open competition.

The other specialist watchdogs are not covered in this report, but deserve brief mention. Until 30 years ago the intelligence agencies operated under the prerogative. Since they were put on a statutory footing they have been supervised by specific watchdogs, since 2017 the Investigatory Powers Commissioner, together with Judicial Commissioners. The other prerogative powers regulated by specialist watchdogs are the grant of honours, the prerogative of mercy, and the dismissal of ministers. Following a review in 2005, honours are now awarded following the recommendations of 10 subject committees, reporting to the Main Honours Committee. The main historical roles of the royal prerogative of mercy have been gradually superseded by statutory

¹⁹⁰ For an account of the process, see the Preface to the Cabinet Manual: Cabinet Office, above n60 at iv-v. For the draft Cabinet Manual and comments received, see Cabinet Office, Cabinet Manual, HM Government, 14 December 2010 www.gov.uk/government/publications/cabinet-manual.

¹⁹¹ Constitution Committee, *Revision of the Cabinet Manual* (Sixth Report of Session 2021-22) HL 34 2021-22 (London: House of Lords).

¹⁹² Gee, Hazell, Malleson and O'Brien, above n142 at 159-93.

criminal appeals, and the creation in 1995 of the Criminal Cases Review Commission. The dismissal of ministers remains a matter for the Prime Minister, but since 2006 he or she has been advised by the Independent Adviser on Ministers' Interests.¹⁹³

There is continuing debate about the independence of these various watchdogs, with the Committee on Standards in Public Life (CSPL) pressing for some of them to be given greater security by being put on a statutory basis. In the final report of its *Standards Matter 2* review, the committee concluded:

... the degree of independence in the regulation of the Ministerial Code, public appointments, business appointments, and appointments to the House of Lords falls below what is necessary to ensure effective regulation and maintain public credibility. The Committee recommends that the government gives a statutory basis to the Independent Adviser on Ministers' Interests, the Public Appointments Commissioner ... as well as to the codes they regulate, through new primary legislation. The Committee believes a statutory House of Lords Appointments Commission should be considered as part of a broader House of Lords reform agenda ...¹⁹⁴

But Further Regulation is Required

Despite the tighter regulation described above, there remain important gaps where the prerogative remains unregulated, or insufficiently regulated. These range from serious gaps to minor ones, from gaps in the law to gaps in parliamentary procedure, to the need for stronger conventions. This illustrates the great variety of prerogative powers, and the need for tailored solutions rather than a one-size-fits-all approach. Previous chapters about the individual prerogative powers have identified suitably tailored proposals for reform, which are summarised in the table below.

Table 1: Recommendations for tighter regulation of the Prerogative

Chapter	Topic	Recommendations
2	Dissolution, Prorogation, and Recall of Parliament	By vote of House of Commons, not decision of Prime Minister alone.
3	War-Making power	Codification of convention by Resolution of House of Commons.
4	Treaties	Prevent parliament being presented with <i>faits accomplis</i> . Share information before and during negotiations. Give parliament control over time for debate.
5	Public Appointments	Put Commissioner for Public Appointments and House of Lords Appointments Commission on statutory basis.
6	Passports	Codify criteria for issue and withdrawal in statute. Appeals mechanism.

There is not space to discuss the nuance of each of these recommendations; readers are referred back to the individual chapters for the thinking which lies behind them. But it is worth drawing

¹⁹³ The Independent Adviser has conducted seven investigations, listed in Armstrong and Rhodes, above n185 at 30-7.

¹⁹⁴ Committee on Standards in Public Life, above n140 at 8.

out certain themes which run through all the recommendations. First is the Westminster versus Whitehall view of the constitution (see chapter 1). On dissolution and prorogation, the war making power, and the ratification of treaties, we come down firmly on the side of Westminster. Dissolution and prorogation should not be triggered solely by the executive, but subject to a parliamentary vote. The unstable convention about parliamentary approval of military deployment needs to be formalised in a resolution of the House of Commons. And parliament needs closer involvement in the negotiation and ratification of treaties.

The second connecting theme is the need for greater independence of some of the specialist watchdogs. As recommended by the CSPL, three watchdogs – the House of Lords Appointments Commission, the Commissioner for Public Appointments, and the Independent Adviser on Ministers’ Interests – all need to be put on a statutory basis.

A third theme is the need for greater transparency, and accountability, which runs through all the recommendations: from the negotiation of treaties, to the issue and withdrawal of passports.

A final theme is the need for further codification: for most of these recommendations to happen, it would require codification – in statute, in changes to parliamentary Standing Orders, in tightening of the Cabinet Manual and the Ministerial Code.

The Prerogative Can Never be Fully Codified

Although further codification is required, complete codification of the prerogative is unachievable. That was the clear lesson from the Brown government, which started with the ambition that ‘in general the prerogative powers should be put on a statutory basis’.¹⁹⁵ Two years later, after trawling Whitehall to compile a list of all the prerogative powers, the government concluded that complete codification was neither feasible nor desirable. In some cases this was because statutory and prerogative powers were so intertwined that it was impossible to disentangle them. In others, it was desirable to keep the prerogative for extreme emergencies where immediate action was required.¹⁹⁶

We have come to similar conclusions; as eventually did the House of Commons Public Administration and Constitutional Affairs Committee (PACAC).¹⁹⁷ The prerogative is too sprawling and varied to be susceptible to one-size-fits-all solutions. In this report we have not dealt with all the prerogative powers: our book has further chapters on appointing and dismissing ministers; royal assent to legislation; regulating the civil service; the prerogative of mercy; honours; and public inquiries.¹⁹⁸ Several of the prerogative powers would benefit from tighter regulation in statute; but others merely require changes in soft law codes, or in parliamentary procedure. And codification should not be seen as an end in itself: chapter 4 showed that codification of the Ponsonby Rule has not strengthened parliamentary scrutiny of treaties.

¹⁹⁵ *ibid* at para 24.

¹⁹⁶ Ministry of Justice, above n54.

¹⁹⁷ In 2004, PASC advocated legislation to control the war making power: Public Administration Select Committee, above n4 at para 56. In 2019, PACAC concluded that legislation was undesirable, recommending a resolution of the House instead: Public Administration and Constitutional Affairs Committee, above n43 at para 81.

¹⁹⁸ For a comprehensive list of prerogative powers, see Ministry of Justice, above n54 at 31-4.

Codification of an open-ended prerogative into an equally open-ended statutory power does little to reduce the fuzziness of the law. Statutes can also be open-ended, grant extensive discretion, or allow wide delegation: those who recommend codification need to think hard about the content of the new law – otherwise the risk is that codification merely replicates the fuzziness of the prerogative.¹⁹⁹

Conclusion: The Endless Tug of War Between Government, Parliament and the Courts

This final chapter has summarised how the last 30-40 years have seen gradually tighter regulation of the prerogative by parliament, by the courts, and by specialist watchdogs. On a Whig view of history it might be thought that process would steadily continue; but the Johnson government provided a stark reminder that reform of the prerogative is not all one way. In a vigorous reassertion of executive power, it reversed previous reforms such as the FTPA, pushed back against judicial review, and undermined constitutional watchdogs.

We said in chapter 1 that the underlying issue in all the debates about the prerogative is power: how much autonomy the executive should have to wield that power; with what degree of supervision (if any) from parliament or the courts; or (more rarely) from the monarch. If our conclusions in chapter 2 are accepted, the monarch would not be expected to exercise any real supervisory power, because dissolution and prorogation should be a matter for the House of Commons; but the monarch remains the ultimate guardian of the constitution, with deep reserve powers in the event of constitutional emergencies.

As for the courts, they also uphold the constitution *in extremis*, which is perhaps the best way of understanding their rulings in *Miller 1* and *Miller 2*, when they reminded the government of the importance of two fundamental constitutional principles: parliamentary sovereignty, and the executive's accountability to parliament. Such interventions by the courts are likely to be very rare, and for day-to-day supervision of the prerogative we must look to parliament. But for parliament to be effective requires political will and institutional leadership, both of which are in short supply. It also requires the right structures, and resources: an encouraging recent sign is the willingness of the House of Lords to create dedicated machinery to scrutinise treaties. But we have to be realistic in our expectations of Parliament, so long as it remains dominated by the executive.

Despite those difficulties, it is in parliament that the main tug-of-war over the prerogative will be played out. It is a tug-of-war endlessly fought in other countries between executive and legislature, as described in chapters 15 and 16 of our book. And even if in future the Whig (or Westminster) view prevails, and more prerogative powers are codified, the tug-of-war will still continue: the fascination of the prerogative, as of reserve powers in other systems, is that they never reach a steady state.

¹⁹⁹ M. Cohn, *A Theory of the Executive Branch: Tension and Legality* (Oxford: Oxford University Press, 2021).

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This report summarises the key findings of the book *Executive Power: The Prerogative, Past, Present and Future*. This report selects five powers to analyse the scope for reform through codification in statute, soft law, or by clearer and stronger conventions.

About the Constitution Unit

The Constitution Unit is a research centre based in the UCL Department of Political Science. We conduct timely, rigorous, independent research into constitutional change and the reform of political institutions. Since our foundation in 1995, the Unit's research had significant real-world impact, informing policy-makers engaged in such changes – both in the United Kingdom and around the world.

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