HOUSE OF COMMONS

Joint Committee on the Fixed-term Parliaments Act

Oral evidence: Review of the Fixed-term Parliaments Act, HC 1046

Thursday 7 January 2021

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Watch the meeting

Members present: Lord McLoughlin (Chair); Lord Beith; Aaron Bell; Chris Bryant; Jackie Doyle-Price; Ms Angela Eagle; Maria Eagle; Peter Gibson; Mr Robert Goodwill; Lord Grocott; Lord Jay of Ewelme; Baroness Lawrence of Clarendon; David Linden; Alan Mak; Lord Mancroft; Maria Miller; John Spellar; Alexander Stafford; Mr Shailesh Vara; Craig Whittaker.

Questions 76 - 121

Witnesses: **Baroness Hale of Richmond,** President of the Supreme Court 2017-2020 and **Lord Sumption**, Justice of the Supreme Court 2011-2018, gave evidence.

> **Chair:** Welcome to the Joint Committee on the Fixed-Term Parliaments Act. I am delighted to have Lady Hale and Lord Sumption as our witnesses this morning. We have quite a lot of questions that we want to get through. Thank you both very much for participating. I have already heard you this morning, Lord Sumption, on Radio 4.

Lord Sumption: On a different subject.

> **Chair:** A very interesting interview it was as well. With everything else going on today, thank you for finding time to give evidence. I welcome the whole Committee to the first meeting of the new year. I wish everybody a contented new year, despite all the difficulties that are going on.

Q76 **Mr Vara:** A very good morning, Lady Hale and Lord Sumption. Both of you will be aware that there is a huge debate as to what the draft Bill can and cannot do. Do you believe that the current draft Bill, if it were enacted, would actually serve to revive the prerogative powers to dissolve Parliament and also to call a new one? Perhaps Baroness Hale could come in first, and then Lord Sumption.

Baroness Hale: There is, of course, a huge debate about whether the Fixed-Term Parliaments Act abolished both of those prerogative powers, or merely put them into abeyance. If it abolished them, what the Bill does is recreate them. If what it did was put them into abeyance, the Bill revives them. Whether that makes a difference in practice is a more difficult question. I do not feel qualified to offer an opinion as to which of those two it did. Certainly, the Fixed-Term Parliaments Act reads as if it abolishes the power to dissolve

Parliament. It is less clear on the calling of a new Parliament; it simply fixes the time for general elections. Of course, it is a question of statutory construction which of the two it did. I am not in a position to offer a definitive answer.

Q77 **Mr Vara:** For practical purposes, does it make a difference if a Government in the future, of either persuasion, were to actually use the powers as we see them written down? For practical purposes, does it make any difference whether it is abeyance, revival, abolish or anything like that?

Baroness Hale: Given the way the Bill is drafted, it does not look as if it makes a practical difference, but when we get to certain other questions down the list, the approach of the courts might be a bit different if it were a recreated statutory power in the same terms as the previous prerogative powers, or a revised prerogative power. I do not say it would be different, but I say that it could be different. That is the only practical difference I can see.

Lord Sumption: In view of Lady Hale's misgivings, I feel that I am rushing in where angels fear to tread. First of all, I think it is pretty clear that the Fixed-term Parliaments Act abolished the old common law prerogative. Secondly, it seems to me that the effect of the repeal Bill, if passed in this form, would be not to recreate it by statute but to revive the common law prerogative. The reason why I say that is that clause 2 requires the courts to act as if the Fixed-term Parliaments Act had never been enacted. This is a deeming provision: they are required to pretend that it never happened, and if it had never happened, the prerogative would still be there. Does it matter? I think, for the reason I have just given, that it does not matter. It might matter if it enabled one to say that the power to dissolve had become a statutory power instead of a prerogative power. That might matter, but I do not think that that is the case because of the way clause 2 is formulated.

Mr Vara: Thank you very much.

Q78 **Alan Mak:** Good morning, Lord Sumption and Baroness Hale. Lord Sumption, you just said that, in your opinion, the Fixed-term Parliaments Act abolished prerogative powers and the distinction does not matter, but there is some debate about whether the Act abolishes prerogative powers or merely puts them into abeyance. Could both of you elaborate on your thoughts on that—on whether you believe the distinction matters and on whether the approach taken by the Bill has wider constitutional implications?

Lord Sumption: There is often a lot of academic debate about things that do not matter that much, and this may be one example. It seems to me that if Parliament intervenes, as it did in passing the original Fixed-term Parliaments Act, to put what used to be a common law power on a statutory basis, the effect is that the common law power no longer exists; it is subsumed in the statute. I do not think you can have the two sources running by side. That is why I think it is pretty clear—this is a point that Lady Hale also made—that the original Fixed-term Parliaments Act did abolish it, but it does not matter, or rather, it will not matter if the Bill is passed in this form.

Baroness Hale: I have the same thought that I expressed earlier: it does not matter unless the effect of the Bill is to recreate the prerogative power, albeit in the same terms as the old prerogative, but as a statutory power. Then it might make a difference, as I think Lord Sumption agrees. Lord Sumption thinks that it is absolutely plain that the wording of the Bill

as it is—I understand entirely why he says this—revives the old prerogative power because the courts are required, or everybody is required, to behave as if the Fixed-term Parliaments Act had never been passed. As I say, I am not going to express a firm opinion on that because you never know—it might come up before some court or other of which Lord Sumption and I are no longer members.

Q79 **Chair**: We are seeking your guidance so that it does not come up before a court of which yourself and Lord Sumption are no longer members. We are trying to get a situation of legislation that would meet and stop any challenges, and be legal. Is there anything you can help us with on that? Is there anything that we are missing?

Lord Sumption: For my part, I do not think there is anything that any of us has missed. We have canvassed all the issues. The only difference is that I take a firm view on a point on which I detect that Lady Hale is inclined to agree with me, but less firmly.

Baroness Hale: That is a position in which I have been in the past.

Lord Sumption: Indeed.

Chair: Gosh, I would not like to play poker with you. Can we move on to Aaron Bell?

Q80 **Aaron Bell:** Thank you, Chair, and thank you, Lady Hale and Lord Sumption, for your time today. The Committee heard a spirited academic debate, in the terms that you described, Lord Sumption, between Sir Stephen Laws and Professor Alison Young, and I want to put what Alison Young said to both of you. She said that, because this may be a statutory power now, in that we are proposing to put the revival into this statute, by definition, legislation is not there when you are dealing with a prerogative power. That means that, for example, the principle of legality may apply slightly differently, and there is also case law to suggest that judicial review, when looking at fettering of discretion, for example, applies differently, because there is no legislation when we are looking at a pure prerogative. It seems from what you have said that you think it does not really matter, but I wonder if you might comment on what Professor Young said when she appeared before us.

Baroness Hale: Well, I think that both of us agree that if it is a statutory power, there are various principles that might be different from if it is a revived prerogative power. That would include the question whether the courts would be interested in a certain amount of judicial review, or whether they would not be. That would be the main difference. The principle of legality, of course, is a principle of statutory construction. It is quite hard to see how it fits into this particular context, but, yes, there are some principles that would be different. So there would be.

Q81 **Aaron Bell:** So it does matter whether these are seen as prerogative or statutory powers then, or it could do?

Baroness Hale: Yes, it does matter. It does matter, but I think we both incline to the view—Lord Sumption more firmly than I—that the way in which the clause is worded makes it pretty clear that it is a revival of the prerogative.

Aaron Bell: Lord Sumption?

Lord Sumption: Yes, I agree. I think for that reason, it is a revival of the prerogative. If I were wrong about that, it would matter. If I am right, it does not.

Aaron Bell: Thank you very much.

Q82 **Lord Beith:** I am very tempted to invite Lord Sumption to consider the philosophical question of whether you can ever be in the situation where you appear to believe that something that has happened has not happened—or you ought to conduct yourself as if has not happened. I think that is very questionable. However, one of the things that the Bill cannot do, if it can revive the constitutional law, is to revive the constitutional conventions by which the law operated. It can neither revive them nor do anything in particular with them. Does the Government's "Dissolution Principles" document accurately and exhaustively describe what those conventions were, and what will be the situation if you revive the constitutional law, but do not do anything about the conventions?

Lord Sumption: The conventions have never been either part of the prerogative power or part of this proposed statute—or of the Fixed-term Parliaments Act for that matter. The difficulty is that a convention is, in principle, unless it coincides with a rule of law, non-justiciable. That was what was decided, among other things, in Miller 1, although there is also earlier authority for it.

A convention is essentially a rule of practice that is enforceable in the sense that the political costs of breaking it would be high. That in turn depends on a shared political culture, which is a great deal less potent now than it was even five years ago, let alone 20 years ago. This is not something that is easy for a statute to deal with, unless it dispenses with the convention and replaces it with a rule.

On your question about the Government's summary, I regard the Government's summary as rather unsatisfactory, mainly because it suggests that the justification for the power of Dissolution is the support that the Prime Minister has—his command of a majority in the House of Commons—but the classic situation in which there must be a Dissolution is when there is a vote of no confidence passed against the Government. By definition, that is a situation in which the Prime Minister does not command a majority of the House of Commons. For that reason, I do not regard the document as terribly satisfactory, no.

Baroness Hale: I would have made exactly the latter point, in that the document does acknowledge that there are two circumstances in which Her Majesty might be advised to dissolve Parliament, one of which is when the Prime Minister, who has the confidence of the House of Commons, wants to do it. That's fair enough. The other is when the Prime Minister does not have the confidence of the House of Commons. In that situation, the document does not say whether the Monarch has any discretion in the matter. Classically, the Monarch has had discretion in the matter. The Monarch could ask somebody else to form a new Government rather than have a general election. That is why the document is not exhaustive of all the various things that might happen.

Lord Beith: Thank you both very much.

Q83 **Chair:** Lord Sumption, what would you regard as a matter of confidence?

Lord Sumption: Either a motion that this House has no confidence in Her Majesty's Government, or a situation that is equivalent to that—occasionally, the Government of the day may make it clear that it treats a vote on a particular issue as being one of confidence. That is effectively a statement that if the Government loses, it will either invite Her Majesty to dissolve Parliament or resign.

Chair: Lady Hale, do you agree with that?

Baroness Hale: Yes.

Q84 **Chair:** Because there have been occasions in the past where the Government have said something is a matter of confidence and have not carried the House but have put it to one side.

Lord Sumption: There have been, but not that often. In that case, what the Government will have done is effectively push its MPs into voting for something that they might otherwise not have voted for on a misrepresentation about its intentions. The political cost of that might be high, too.

Chair: Thank you. Let's go to Chris Bryant.

Q85 **Chris Bryant:** Can I just follow on from the Chair's question? You would not include voting for an amendment to the Queen's Speech, which has traditionally been seen as a motion of confidence—whether the Government regards it as such or not—as a motion of confidence?

Lord Sumption: I think it is implicit that when the Government puts forward a Queen's Speech setting out its programme, it must accept that if that is significantly amended, that is an issue of confidence. I would regard that as one of those occasions where an expressed statement—we regard this as a vote of confidence—is hardly necessary. If the Government cannot get its programme through the House of Commons, it cannot be said to command the confidence of the House of Commons.

Q86 **Chris Bryant:** And a Finance Bill?

Lord Sumption: The same would apply. Indeed, there is a precedent for that—a very famous one—in Australia.

Baroness Hale: Yes, all of that.

Q87 **Chris Bryant:** And what about when Government makes it explicit—for instance, Neville Chamberlain declaring halfway through the debate on the Adjournment in August 1939 that he was relying on his friends. Does that count?

Lord Sumption: I think that is not clear enough.

Q88 **Chris Bryant:** Sending troops to war?

Lord Sumption: If a resolution was passed saying that they were not to be sent, do you mean?

Chris Bryant: If a Government tabled a motion or a Bill or sought supply to fund sending troops to war, for instance. The most famous example was in 1784 when the Government lost and had to change because it had lost a motion on the war aims.

Lord Sumption: If the Government cannot get supply, it cannot say that it has the confidence of the House of Commons. There have been much more recent examples of cases where the Government's plans to deploy armed forces were frustrated by an adverse resolution in the House of Commons and the Government did not regard it as an issue of confidence—to my mind, perfectly justifiably. Obviously, David Cameron's motion on intervention in Syria is the best recent example of that.

Q89 **Chris Bryant:** What account do you think courts do take or should take of constitutional conventions? I note what you have just said about how conventions are non-justiciable, but why are they non-justiciable?

Lord Sumption: They are non-justiciable because they are not rules of law; they are rules of political practice that carry a political cost, or should carry a political cost, if they are disregarded. It does not mean that the courts ignore them. The courts are always prepared to take notice of political conventions as facts, and they may sometimes be relevant facts, but they will not enforce a political convention and they will not judicially review a political convention unless it corresponds, as some conventions do, to a rule of law.

Q90 **Chris Bryant:** Let me give you one political convention: statutory instruments that are prayed against by the Leader of the Opposition shall be given time and a vote on the Floor of the House of Commons. That has regularly been abused for the last 10 years. Would the courts ever look behind that?

Lord Sumption: No, but that is for a different reason, which is that section 9 of the Bill of Rights forbids the courts to question proceedings in Parliament, and that would undoubtedly be a proceeding in Parliament. The courts have advanced in many ways the scope of judicial review, but they have always respected section 9.

Baroness Hale: Yes, I agree with all of that. In fact, the answer that Lord Sumption gave to your question about taking account of conventions and so on is exactly the answer that I had written down to give to you.

Q91 **Chris Bryant:** I think you have been comparing notes beforehand and you are cheating.

Chair: Order, Chris! Withdraw! *[Laughter.]*

Chris Bryant: I withdraw, I withdraw. But just to be clear, the same applies to the Standing Orders of the House of Commons and resolutions of the House?

Lord Sumption: Yes.

Baroness Hale: They can be important contexts to a question that the courts have to decide. Sometimes in a question of construction they can be important facts, but they are not things that can be called into question.

Q92 **Chris Bryant:** Or impeached in a court of law or in any other place, to quote the Bill of Rights, which of course itself is statute. We agree that the Bill of Rights is statute?

Lord Sumption: We do.

Chris Bryant: Okay, thank you.

Q93 **Baroness Lawrence:** Good morning, Lady Hale and Lord Sumption. Confidence is coming across as a key aspect in our discussion this morning. How can we as parliamentarians ensure that there is a shared understanding in the convention on Dissolution, the calling of Parliaments, and of Government formation? How can we ensure that conventions are observed? Is it possible to enforce them?

Baroness Hale: It is not possible to enforce conventions, for the reasons that Lord Sumption and I have been giving. The question of whether parliamentarians can try and achieve a clearer understanding of what the conventions should be is one, in fact, that I think parliamentarians should be answering, rather than Lord Sumption and I—who are here as, I think, lawyers and former judges.

There may be things that can be done that would make it clearer what the understanding was, and thus increase the political cost of ignoring that understanding. There may be things that Parliament can do. They can of course try and insert a convention into legislation, as happened with the Sewel convention, which was inserted into the Scotland Act 2016; but it contained the very famous word: won't "normally" do this.

So the Supreme Court decided that that was simply voicing a convention in the statute that was not enforceable by the court, but it does of course give it a political force, which it would not necessarily otherwise have. It lessens the room for argument about what the convention is. So maybe there are things that you can do, if you feel so inclined.

Lord Sumption: I agree with all of that. I think that the problem with trying to formalise conventions not in statute but by some kind of expressed understanding is that conventions are necessarily flexible. They do change over time. There are plenty of conventions that would have been regarded as sacrosanct by Victorian Parliaments that would not be regarded in that way now. One should be careful not to start codifying conventions, because their practical value is that they represent experience and practice. They represent the way in which Parliament can be made efficiently to work, and what is required to make Parliament work is not necessarily the same today as it was half a century ago.

Baroness Lawrence: Thank you.

Q94 **Chair:** Lord Sumption, I think I am right in saying that when I first entered Parliament it used to be the view that what was said in Parliament was not taken into account by the courts—just what was in the legislation. That has now changed, I think, to a degree: the court can pay more attention to what the Minister was saying at the time of passing the legislation, as to what the legislation was intended to be. Is that the case? How much of what a Minister says is now viewed as what a court may take into account?

Lord Sumption: If that question is addressed to me, my answer is that we are not here in the realm of political conventions, because the question whether account can be taken of ministerial statements as an aid to interpreting legislation is essentially a legal question, on which the law was undoubtedly changed by a decision of the House of Lords.

Opinions differ as to whether that change was wise. In practice, after an initial period when, presented with this new toy, the courts were quite enthusiastic about using it, in fact the number of occasions when ministerial statements are relied on is quite small, and the number of occasions when it is regarded as decisive is negligible.

Q95 **Chair:** Baroness Hale, would you agree with that?

Baroness Hale: I agree that it is a question of law as to what account the courts will take of what is said in Parliament. There used to be a rule that they would take no account of it, and there is now a rule that if the Minister promoting legislation gets up and unequivocally says to Parliament, "This is what it means" and then that Minister or the Government change their mind about what it means and represent something different towards the courts, the court will certainly take that into account. Whether they will agree with the first or the second is another matter, but they will certainly take it into account. But that is the only situation, and, as Lord Sumption says, it has hardly ever happened.

Chair: Thank you very much.

Q96 **Lord Mancroft:** May we turn to the subject of the need to keep the monarch out of party politics and the advice that the monarch might receive? May I ask this particularly of Lord Sumption?

The Government's policy is essentially to leave only the monarch as a constitutional safeguard against abuses of the powers to dissolve a Parliament and to call a new one. However, there is also a constitutional convention against drawing the monarch into matters of political controversy. What might be done to strengthen or supplement those safeguards against abuse without drawing the monarch into politics?

If one was to go down the route of having some form of council, how would the composition of that council not itself be a matter of controversy, and how would you counter the argument that the electorate has itself decided—for the time being, at any rate—who should be the monarch's principal adviser?

Lord Sumption: There are a number of questions there. Clearly, the principle that the monarch should not be drawn into politics is of considerable importance. While some of the current monarch's predecessors played not a decisive but certainly an active role in determining what was constitutionally proper and what was not, I think that today it would be agreed by everyone—including, I imagine, Her Majesty—that this was not a sensible thing to do.

What this means is that we have a choice: either the monarch must do whatever the Prime Minister wants, however improper, which would be unsatisfactory for reasons I need hardly expand on, or else there has to be some other source of advice—some neutral source of advice—other than the Prime Minister.

In a system where the Head of State is an elected officer, as is the case in republics, this is not a problem. The President of Italy, for example, has a very prominent and valuable role in the formation of Governments, but because the President of Italy is elected for a limited term, that is regarded as perfectly acceptable.

The way it is done in the only other monarchy with lessons from which we can learn—the Netherlands—is quite interesting. Practice in the Netherlands is that the monarch appoints a commissioner—it could be a number of commissioners, but it is usually one—to perform this function for her or him, and then the convention is that the monarch accepts the commissioner's advice unless there is a clear parliamentary resolution to some different effect.

I have previously suggested to PACAC that one way in which this might be resolved is to have a constitutional committee of the Privy Council. You asked two questions about that: what would its membership be, and how would they be chosen in a non-controversial fashion? I am not suggesting that it should consist entirely of lawyers, although I think there is a place for some lawyers on it. I would propose that they should be chosen by the kind of non-political committee that currently chooses judges, including judges of the Supreme Court.

As to your question about the electorate, I entirely see the force of that point, but to my mind—we have not quite come to this point yet; it is covered in later questions—there is no convention that prevents the Prime Minister from advising the monarch whether to have a Dissolution, and I do not envisage that a body whose function was not to invent conventions but to advise the monarch on what they were would devise such a convention, so I do not regard that as a problem.

I regard the decision to dissolve Parliament—as I suspect from your question you do—as being an appeal to the electorate, and I do not think that there is any convention that rules such a thing out.

Lord Mancroft: Thank you. May I add a further short question to that?

Q97 **Chair:** Does Lady Hale wish to add anything? She has not come in on that yet.

Baroness Hale: The only thing I would like to add is that, in answer to the last bit of the question, I agree entirely that the whole point of having a Dissolution is to seek the views of the electorate as to who should have the ear of Her Majesty, so to speak, so that is not a problem. But it is also reinforced by the fact that we have the two situations: one where the Prime Minister does have the confidence of the House of Commons and wishes, none the less, to dissolve Parliament because they think they will get a bigger majority in the general election; and the other, where the Prime Minister has lost the confidence of the House of Commons. In that situation, of course, no longer do they have the mandate from the electorate that they previously had. That is an additional point to the one that Lord Sumption made.

Chair: Lord Mancroft, you wanted to come back.

Q98 **Lord Mancroft:** Thank you, Chairman. In the event that the Prime Minister has lost the confidence of the House of Commons, there is obviously a period of time—a few days—during which it has been suggested that the monarch need not necessarily accept the advice of a Prime Minister who has lost the confidence of the House of Commons. First, do you think that is the case? If so, from whom else should the monarch take advice?

Lord Sumption: On your second question, my own view is that the impossibility of finding someone else makes it inevitable that the monarch in practice will take advice from the current Prime Minister. The monarch could in theory dismiss the current Prime Minister, but I think that if one is trying to ensure that she is not involved in politics, that is something she would be extraordinarily loth to do. But the current principle for all practical purposes is that the monarch must accept the advice of the current Prime Minister whether they have the confidence of the House of Commons or not.

Now, suppose that the Commons were to pass a vote of no confidence in the Government and the Government were to refuse to resign. I do not think one would have to wait until the Finance Bill failed to pass; it seems to me that there would be a very serious political crisis in that event and the only way out of it probably would be for the monarch to dismiss the Prime Minister.

Q99 **Chair**: Lady Hale, do you have any points on that?

Baroness Hale: The only point I would make is that I had thought there was a convention that in certain circumstances nothing very controversial would be done, and one of those circumstances would be where the Prime Minister did not have the confidence of the House of Commons. So although routine advice on things that were not politically controversial could continue, more controversial things ought not to continue, but that is only a convention.

Chair: Thank you. Does that cover the points you wanted to delve into, Lord Mancroft?

Lord Mancroft: It does, but it leaves an area of controversy that the Bill does not cover.

Chair: All right. Can we move on to Lord Jay?

Lord Jay: The question I was going to ask has been asked, so I am happy to move on.

Chair: Thank you.

Q100 **Mr Goodwill:** Lord Sumption, why do you think no one has ever involved the courts in the Dissolution or calling of Parliaments before?

Lord Sumption: I do not think the thought would have occurred to them until the remarkable events that led to the decision in Miller No. 2, but there is an additional factor here which I think is of considerable importance. A decision to ask for a Dissolution has always been regarded not just as a prerogative of the Prime Minister but as an appeal to a new Parliament.

Walter Bagehot, in his classic work in the 1860s on the constitution, described it as an appeal by the Executive from one Parliament to the next—an appeal that, of course, may fail. He also described it as an essential escape mechanism from what would otherwise be a totally immobile Parliament. I think that remains the constitutional principle.

Q101 **Mr Goodwill:** Is it possibly also the case that, because things tend to move very quickly at these times, the political horse may have bolted before the legal stable door could even be moved, let alone shut?

Lord Sumption: If it is justiciable, the courts can act very fast indeed.

Q102 **Mr Goodwill:** Lady Hale, have you any observations on that point?

Baroness Hale: No, I don't have any observations on that point. There is one thing that I would like to introduce, however, which slightly affects the eighth question that you set us—I think you have moved on to the ninth. I wonder whether there has actually been a change in the constitutional landscape since Lord Roskill made his observations in the GCHQ case, given the changed position of the Lord Chancellor.

The point has been made to me by a constitutional expert that in the olden days the Lord Chancellor was a senior lawyer, the head of the judiciary and a very senior member of the Cabinet, and was in a position to check, or at least very strongly advise the Prime Minister, if the Prime Minister was proposing to do something unconstitutional or otherwise improper. That operated as an ex ante check on what the Prime Minister did and advised Her Majesty to do.

Once the Lord Chancellor has become a very different sort of person—they may not even be a lawyer, they are no longer the head of the judiciary and they are not in a position, in effect, to tell the Prime Minister that he or she cannot do something because it would be improper—that rather changes the constitutional landscape and leaves something of a vacuum that may have to be filled in other ways. I merely make that point. I think it is a change from how things were in the 1980s and 1990s.

Q103 **Mr Goodwill:** So might that be the committee of Privy Counsellors that Lord Sumption referred to? Maybe it is the role that was previously carried out by the Queen's private secretary, which is quite a burden of responsibility for one individual.

Baroness Hale: Yes, indeed. It could very well be some such body. For the reasons that Lord Sumption has given, it is not something that the courts would want to do, but of course if there is nobody else to do it, they may feel that they have no option—unless, of course, they are told that they can't.

Q104 **Mr Goodwill:** It may be argued that the reason the courts have not been involved in the past is that there has not been an egregious use of this power by the Prime Minister. Can you think of circumstances where it may well be seen, maybe widely in the country or by those in a position to influence Her Majesty, that this could be used in a way that would not be seen as either constitutional or—dare I say it—even cricket, if you see what I mean?

For example, maybe the Leader of the Opposition was involved in some terrible scandal and had to resign, the whole Opposition was in disarray, and the Prime Minister of the day chose that opportunity to steal a bit of an advantage and call an election for that one reason.

Baroness Hale: That does not seem to me to be an egregious use of the power that would attract legal attention. A rather more problematic example would be if powerful forces outside Parliament bribed the Prime Minister to advise Her Majesty to dissolve Parliament. Bribery has obviously always been regarded as a paradigm instance of bad faith. That is a more troubling example, I think, than the one that you give, which is a purely political one. Calling elections for political reasons has always been acceptable.

Q105 **Mr Goodwill:** Lord Sumption, have you any observations about what might be seen as the egregious use of this power to call an election?

Lord Sumption: No. I think Lady Hale's example, about bribery, is possibly the most difficult thing to predict, partly because it is very rare to be able to show that a major political decision like the Dissolution of Parliament had just one motive behind it. There would be strong arguments both ways in that—I hope, rather unlikely—event.

Q106 **Mr Goodwill:** Thank you. If I may move on. In theory, the Prime Minister could advise the monarch to dissolve Parliament and then to delay the issue of the summons for a new Parliament for some considerable time. Obviously, we have touched on the limits to that—that the Government would run out of money—but one might think that in that situation the courts would intervene, if there was a gap between the proclamation on Dissolution and the proclamation summoning Parliament. Indeed, would that be seen as two separate processes in which the ouster clause would not apply to the first bit, or as we saw when the Prime Minister tried to prorogue Parliament for some considerable time and that was challenged? Or would this all be part of the process under the Bill, which would have an ouster clause to prevent the courts becoming involved?

Lord Sumption: This is one of the problematical aspects of the Bill as drafted. Clause 3—the ouster clause—renders non-justiciable the powers referred to in clause 2, which includes the issue of writs for parliamentary elections. That would not matter a great deal if the time limit for the issue of a writ for parliamentary elections were specified in the Bill, as it was in the Fixed-term Parliaments Act. It seems to me desirable, if you are going to have an ouster clause, that there should be a time limit on the moving of writs for parliamentary elections, precisely to prevent that kind of abuse.

If no such time limit was introduced, it seems to me that then the question would depend on whether the non-justiciability of the issue of writs of summons also applied to the non-issue of writs of summons. I suspect that if the Prime Minister was effectively attempting to rule without Parliament by simply failing to issue writs of summons, the courts might well intervene for precisely the same reasons that they intervened in the case of the prorogation, which is that it is one thing for the Prime Minister to appeal to a new Parliament and another thing simply to rule without being answerable to anyone. So, I think it quite likely that the reasoning in Miller No. 2 would be applied to that situation. But, because this is a very undesirable state of affairs, I would very strongly urge you to introduce into the Bill a provision with a time limit.

Baroness Hale: I think that is a very, very sensible suggestion, that Lord Sumption has just made, because none of us wants to be involved in this sort of litigation. It is not something that we seek but, for the reasons he said, where the Government attempt to do without Parliament, the courts are much more inclined than they would otherwise be to act in support of Parliament. That is what we spend most of our time doing—that is what judicial review is all about and what the interpretation of statutes is all about. I agree that that would come closer to the sort of situation that we had in Miller 2, but there is an easy solution, as Lord Sumption points out.

Q107 **Chair:** Can we just clarify that that is a time limit on how long to the election, or on how long after the election Parliament is reassembled?

Lord Sumption: The Representation of the People Act, I think I am right in saying, already provides for a time limit between the issue of the writ for parliamentary elections and the subsequent election. The Fixed-term Parliaments Act had a provision that limited the time within which writs for parliamentary elections could be moved, and it is the latter that I think you would be wise to introduce into this Bill.

Chair: Thank you.

Q108 **Lord Grocott:** I am pleased that Lord Sumption mentioned the dreaded word "prorogation". I acknowledge that there are significant differences between Parliament not sitting during prorogation and Parliament not sitting during Dissolution, but I just wonder whether there is any read-across that is relevant to this discussion, in that one of the crucial arguments in the prorogation case was that, in layman's terms, you can't have parliamentary democracy if you haven't got a Parliament functioning. Could the same argument not apply to a Dissolution that went on too long? On the basis of the Supreme Court's decision in respect of prorogation, there would be a read-across that it had been too long without Parliament sitting.

Baroness Hale: I think that both Lord Sumption and I have said that attempting to do without Parliament is one of the situations in which the courts might—I only say "might" because of their general reluctance to interfere in this sort of thing—be prepared to say that it was unlawful and something would have to be done. Something could be done if the Bill provided for it. It could provide a timetable between the Dissolution and the issue of the writ. The time between the issue of the writ and the holding of a general election is covered already, but there could also be legislation that dealt with the holding of the general election and the reconvening of Parliament—the issue of writs of summons to attend Parliament. All of that could be dealt with by a timetable, which would be a good idea.

Lord Sumption: I agree with that. I am sceptical about the suggestion that in any other circumstances there would be a read-across from prorogation to Dissolution. The critical difference between the two things is that in the prorogation case in the Supreme Court, the basic problem was that if the Government had prevailed, a public power, which is what the power of prorogation is, would have been available to the Prime Minister without being responsible to anyone at all—not to the monarch, because he is exercising for practical purposes the monarch's power, not to Parliament, because it has been prorogued, and not to the electorate, because they only sit once every five years.

I think the common law has always been reluctant to accept that a public power can be exercised in a manner that makes the Executive answerable to nobody at all. That is why it was held that they might in certain circumstances be answerable to the courts. A Dissolution is completely different, because a Dissolution does not create the constitutional void of answerability and authority that was implicit in the way that the Government wished to use prorogation last year. It is, as Bagehot said, an appeal to a new Parliament.

Q109 **Lord Grocott:** Yes, but the electorate is obviously sovereign at that point. I know in a sense you have answered this by saying that probably in law we should establish this period, but as things stand at present, if the new Parliament cannot sit, I am afraid that the electorate's decision is not of much value, is it?

Lord Sumption: That is why I agree with what Baroness Hale has said about the desirability of a statutory timetable.

Q110 **Lord Grocott:** May I just make one further observation about the two sets of circumstances, Prorogation and Dissolution? It is a matter of fact that the period as far as Dissolution is concerned that really matters—between the date when the end of Parliament A occurs and the first sitting of Parliament B—has increased quite substantially in my lifetime in politics. I have looked it up and checked it. At the first election I fought, there were 31 days between the two. That is incidentally much longer than the period that was deemed too long in respect to the Prorogation period, which I know is different.

In the most recent general election, there were 41 days. That is a substantial increase. It has crept up. In the light of the Prorogation judgment by the Supreme Court, that seems to me to be a position where you could easily find the Supreme Court making judgments. Or am I wrong?

Lord Sumption: It would only make those judgments if the inference and the circumstances suggested that this was an attempt to do without Parliament. I don't know what the reasons for the increasing period of time between those two things are, but I suspect that a significant factor has been the growing complexity and the growing number of statutes in most Governments' programmes, which mean that the preparation of the Queen's Speech is a more laborious undertaking now than it has sometimes been in the past.

Chair: Does that cover the point you made, Bruce?

Lord Grocott: I could go on, but I will not go on any further. That will do me. Thank you.

Chair: Some of the reasons for the lengthening are what the Electoral Commission has required in terms of allowing longer for postal votes to be registered and so on, and now later registration. I do not think it is just slow. Certainly, most people want to get the election over relatively quickly.

Maria Eagle, do you want to come in?

Q111 **Maria Eagle:** Welcome, Lady Hale and Lord Sumption. Could I move on to the issue of the ouster clause? Politicians often think of ways of trying to stop judges having their say on things and ouster clauses is one such way. Judges, perhaps not unreasonably, do not like their jurisdiction limited. They like to be the arbiter of the jurisdiction based on the statute they are interpreting, rather than being told what they can and cannot do by politicians. The ouster clause is an interesting example. We have been told what the Government's aim is. Would clause 3 render matters that were justiciable in early 2011 non-justiciable now? Might I ask Lady Hale to come in on that one?

Baroness Hale: That all depends upon what was and was not justiciable in 2011, which we have already decided is not necessarily as clear as some people think it is—that is always the case with a legal question, as you know. It may not be intended to do anything other than restore the situation as it was before the 2011 Act.

One of the things that it does do, which perhaps was not clear before, is that it ousts the jurisdiction of a court of law in relation both to the exercise and the extent of a prerogative power. One of the things that we drew a very clear distinction about in the second Miller case—the Miller/Cherry case—is that it has always been within the jurisdiction of the courts to rule on the existence and extent of a prerogative power, whereas the courts have been much less inclined to interfere with the exercise of a prerogative power.

We were talking about the extent of the prorogation power in the Miller/Cherry case. If that distinction applied in 2011, also to the Dissolution power, as to which I am not expressing an opinion, then clause 3(c) takes that away, so that would be a change. Does that all make sense?

Maria Eagle: Yes, it does make sense. Lord Sumption?

Lord Sumption: I would have given exactly the same answer. There is a measure of uncertainty about the extent to which ouster clauses can be given effect to, as a result of the Supreme Court's decision last year in Privacy International. This is an issue on which Lady Hale and I find ourselves on opposite sides of the argument; I dissented.

In that case, it was certainly suggested that it was legally impossible for Parliament to oust the jurisdiction of the courts, but that was a view that I think did not command the support of more than three out of the seven judges. It is an area of the case that was obiter—i.e. not a binding precedent.

So, it is not easy to say anything about this with enormous confidence. However, I would point out—and I think this implicit in what Lady Hale has just said—that this deals with the exercise or the purported exercise of the powers. In Privacy International, at paragraph 111, Lord Carnworth, delivering the leading speech, when dealing with the interpretation of ouster clauses, pointed out that a reference to the purported exercise of a power might be sufficient to make the courts accept that that was what Parliament intended to do.

There are two issues—first, has Parliament made its intention clear enough and secondly, assuming it has, is it capable of ousting the jurisdiction of the courts? My answer to the second question is yes, if it expresses its view sufficiently clearly, but I acknowledge a certain uncertainty about that. There are judges who take a different view. My answer to the first question, about if this sufficiently makes it clear that it is intended to oust the jurisdiction of the court, is yes, I think it does.

Q112 **Maria Eagle:** In practical terms, there is always a way around ouster clauses, is there not?

Lord Sumption: If the courts are sufficiently desperate, there is always a way around anything, but they do try to do the right thing.

Q113 **Maria Eagle:** I totally accept they tried to do the right thing. Lady Hale, do you have any view about whether there is always a way around ouster clauses?

Baroness Hale: There has been up till now, but whether there would be in the future in the face of all ouster clauses—the question that I was answering, which you asked me, was whether this ouster clause does something different from what the position was in 2011. I

wasn't answering the question that Lord Sumption has been answering, which is whether this clause is effective.

He will forgive me, and you will forgive me, if I do not wish to express a firm opinion on that. I completely understand his view that the use of the words "or purported" rather look as if it is saying, "Well, even if what we did was not within the power that you have been given by the statute, the courts can't do anything about it."

If that is the case, the courts would be very worried about that, because it would mean that the Government—the Prime Minister—had done something that was, at least arguably, not within its powers. Can a Parliament be happy about giving the Executive the power to do something that is not within its powers? That seems to me to be something that Parliament should be very worried about doing. The courts are not primarily the people who should be worried about this. Parliament, as the representatives of the people and the law, should be worried about it.

Lord Sumption: In principle, I agree with what Lady Hale has just said, but a lot depends on the nature of the power which is being rendered non-justiciable, and I think that the fact that the power in question is to appeal to a democratic electorate makes a very big difference.

Chair: Chris Bryant, you wanted to clear up something from the Bruce Grocott question earlier. Do you want to come in to see if we can clear that point up?

Q114 **Chris Bryant:** Thank you, Chair. Can you both confirm, in essence, that there is no requirement on a Government to summon a Parliament other than under the Septennial/Triennial Acts—so, within three years of the last sitting of a Parliament?

Baroness Hale: That was why we were suggesting that there should be a timetable in this Bill.

Q115 **Chris Bryant:** There is no legal requirement to have a Queen's Speech either, is there?

Baroness Hale: No.

Lord Sumption: No.

Q116 **Peter Gibson:** Continuing with the discussion regarding the ouster clauses, where the courts might not give full effect to an ouster clause, no matter how clearly it has been drafted, given that Parliament is sovereign, is it legitimate for the courts to decline to give full effect to Parliament's clear intentions?

Baroness Hale: I don't think it is legitimate for the courts to decline to give effect to Parliament's clear intentions. That is why the intentions have to be absolutely clear—which they have not usually been—but also why I expressed the concern that I did earlier, that Parliament should intend that the Government should be able, without any sort of check, to do something which Parliament had not let it do.

I completely take Lord Sumption's point that when what the Government are doing is a fresh appeal to the electorate, that is different. It may very well be that, depending on how it has been done and the circumstances, the courts would not intervene. We remain concerned about the timetable for calling a new Parliament after the appeal to the electorate, but nevertheless,

it seems to me that Parliament should be very concerned about giving the Government the power to do something which is not within their power without the possibility of challenge in the courts.

Lord Sumption: I agree with that, but, of course, it is quite difficult to differentiate between this question and the question of what the position was in 2011. Formally speaking, clearly, Lady Hale is right to say that this looks like excluding a judicial review, even where Parliament had made its position clear and even where the Prime Minister did not have power to do it. That is the way it is as a matter of form. If you look at the reality of this, what this ouster clause is really doing is establishing that the Prime Minister has an unfettered power to advise the monarch to dissolve Parliament—in other words, that there are not any circumstances in which it would be beyond his powers. That is the reality of what this is actually achieving, although I accept that in point of form, it would apply even if there was a limit to his powers, but I do not believe that there ever was.

Q117 **Ms Angela Eagle:** It seems that the Government think the ouster clause in the draft Bill only concerns Dissolution and the calling of new Parliaments, but when he gave evidence at our last session, Lord Lisvane suggested that the scope of clause 3 is much wider than it first appears. Both of you have suggested that a timetable might deal with that problem in terms of Prorogation and the executive's attempting to sit without Parliament for long periods. Lady Hale, do you think the timetable would solve that issue of the ouster clause, or do you think the clause should be more narrowly expressed if it is to ensure that the Executive is not given more power than intended?

Baroness Hale: For the reasons we discussed earlier, a timetable for the thing that is left unsaid, which is how soon the election should be and how soon after the election Parliament should meet again, would solve the most difficult gap left by the Bill as it currently stands, and therefore would mean that there would be nothing very much for the courts to be worried about, even though the ouster clause is as wide as it is. What Lord Lisvane may have had in mind is the practice of proroguing Parliament before dissolving it, and whether the ouster clause would also have an impact on the decision to prorogue Parliament before it was dissolved—thus, of course, lengthening the amount of time that the Executive would be governing without parliamentary accountability and without accountability to the electorate, as Lord Sumption has pointed out.

I do not myself think that that is the effect of clause 3, but there are always arguments that clever lawyers can devise to suggest that it might be the effect of clause 3. But it does say, "powers relating to the dissolution of Parliament", so is the pre-Dissolution Prorogation a "power relating"? Off the top of my head, and without of course having heard full argument, I think possibly not.

Q118 **Ms Angela Eagle**: I was just wondering whether there was some way that the clause might be narrowed to fit more with the Government's stated point, which is that it should only concern Dissolution and the calling of new Parliaments. Is there something that could perhaps be inserted into the Bill to make that a bit clearer, so that those clever arguments could not be made with any reasonableness?

Baroness Hale: I feel sure that there could be. I feel sure that there would be a drafting solution to that problem.

Q119 **Ms Angela Eagle**: So that is perhaps something we should look at. Lord Sumption?

Lord Sumption: I don't think it is necessary, and on the whole I think a principle of statutory drafting should be that the simpler the drafting, the better. I don't myself think that Lord Lisvane's problem is a real problem, and it seems to me anyway that it would be sufficiently dealt with by the kind of timetable that both Lady Hale and I have been talking about. If this contained an additional provision that set out such a timetable, that would be regarded as justiciable and enforceable, notwithstanding clause 3 in its current form.

Q120 **Ms Angela Eagle**: That is perhaps something we should look at. Lady Hale, do you think there is anything missing from the draft Bill that might cause you sleepless nights?

Baroness Hale: Other than that which we have already been talking about, at some considerable length now, I cannot think of anything, thank you.

Q121 **Ms Angela Eagle**: Good, I am glad you are not having sleepless nights. Lord Sumption?

Lord Sumption: I agree.

Ms Angela Eagle: Thank you very much, Chair.

Chair: I thank both Lady Hale and Lord Sumption for giving us their time this morning. I don't know whether there is anything that we have not questioned you on that you feel we have missed and need to be aware of. I think Angela has just given you that opportunity, so unless there is anything either of you wish to bring to our attention, may I thank you both very much indeed for giving us your time this morning, say that we will obviously bear in mind the points you have made this morning in our deliberations to come, and thank everybody for participating? Thank you very much indeed.