

## Public Administration and Constitutional Affairs Committee

### Oral evidence: [Prorogation and implications of the Supreme Court judgment, HC 2666](#)

Tuesday 8 October 2019

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Members present: Sir Bernard Jenkin (Chair); Ronnie Cowan; Mr Marcus Fysh; Dame Cheryl Gillan; Kelvin Hopkins; Dr Rupa Huq; Mr David Jones; Eleanor Smith.

Questions 1 - 87

#### Witnesses

I: Professor Anne Twomey, Professor of Constitutional Law, University of Sydney, Professor Richard Ekins, Head of Policy Exchange's Judicial Power Project and Professor of Law, University of Oxford, and Professor Paul Craig, Emeritus Professor of English Law, University of Oxford.

II: Rt Hon Lord Sumption, former Justice of the Supreme Court (2012-2018), and Professor Meg Russell, Director Constitution Unit, University College London.

Written evidence from witnesses:

– [Professor Richard Ekins](#)

## Examination of Witnesses

Witnesses: Professor Anne Twomey, Professor Richard Ekins, and Professor Paul Craig.

**Q1 Chair:** I welcome our first panel of witnesses in this session looking at the implications of the Supreme Court judgment in the Miller (No. 2) case. We have a lot of questions to get through and we are looking forward very much to hearing what you have to say. Do not feel confined to the question, but I may need to hurry you along if your answer is too long.

Could I ask each of you to identify yourselves for the record, please?

**Professor Ekins:** Richard Ekins, Professor of Law, University of Oxford, Head of Policy Exchange's Judicial Power Project.

**Professor Twomey:** Anne Twomey, Professor of Constitutional Law, University of Sydney.

**Professor Craig:** Paul Craig, Emeritus Professor, St John's College, Oxford.

**Q2 Chair:** Thank you all for being with us. May I declare an interest before we start the questions? I advised all the leadership candidates against messing around with Prorogation and obviously that advice was ignored, although I put myself in the bracket of those who regard what the Supreme Court decided as perhaps somewhat inevitable, but as a very significant development in the nature of our judiciary and our constitution, which is why I was very keen to have this session.

Starting from the top, Professor Twomey, could you describe for us, in order to improve our education, what Prorogation is and why it is necessary?

**Professor Twomey:** I am sure the Committee is very well aware, being parliamentarians, but Prorogation ends a session of Parliament and allows Parliament to commence a new session. In doing so, it terminates the sitting of Parliament until the new session begins. It ends the actions of parliamentary committees so they cannot sit during that period. It clears the Notice Paper of any notices that had been already there, any sessional orders that might exist, orders for production of documents and those sorts of things. It also potentially terminates Bills that have not completed passage in both Houses, although various Parliaments have ways of bringing Bills back with special Standing Orders and so on.

**Q3 Chair:** How does it differ from going into recess or a Dissolution?

**Professor Twomey:** Dissolution terminates the Parliament altogether so that an election can be held, but the main distinction, of course, is with what in Australia we would more commonly describe as adjournment. The Houses adjourn on a regular basis, not always sitting continuously. The practice in the United Kingdom has been to adjourn during party



conferences and the like. During that adjournment, although the Houses themselves do not sit, other parliamentary business, such as the business of this Committee and other committees, continues. Scrutiny of Government continues, items on the Notice Paper, for example, will not be wiped and Bills can still continue through their process and the like.

**Q4 Chair:** What are the relative merits and reasons for Prorogation compared with using other mechanisms that we see in other constitutions for ending and beginning legislative sessions, such as fixed calendar dates, as in the United States?

**Professor Twomey:** It is an interesting question because, from an Australian perspective, we have not commonly prorogued for some period of time. At the Commonwealth level, regular parliamentary Prorogation ceased around the early 1960s, so we would go for a full term of three years without any Prorogation. There is no need per se to end a session and start a new session.

Part of it here is tradition. You have the Queen's Speech and the crowns and carriages and all those sorts of things, and people might miss that tradition if you did not do it. But from a practical parliamentary point of view, the Government can always bring in new Bills; they are not confined to what they initially said in their first Queen's Speech, so a Parliament can continue for a full three years without Prorogation. It is not absolutely necessary in any substantive way. It seems to be more of a practice in the United Kingdom to do it annually, but it is not absolutely necessary.

An alternative might be to do it on a regular fixed basis. That has some advantages in that people know when Parliament is not going to be sitting so they can plan accordingly. That would help Members of Parliament and staff members plan when to take their holidays, for example, which is a useful thing to know and be able to plan in advance. It also helps the bureaucracy to plan in terms of knowing when to organise Bills so that they can be dealt with at a particular time. There is a lot to be said for fixed-term Prorogation and commencement. It would take some of the heat out of the use of Prorogation for other political purposes. The downside of it is the lack of flexibility.

From my point of view, my general preference is towards flexibility rather than codification, because there are exceptional circumstances that arise. It may be appropriate for a session to continue rather than to prorogue because there are particular time-sensitive issues and Parliament needs to be sitting. It depends where you place your emphasis: whether certainty is preferable to flexibility and, indeed, whether or not you need Prorogation at all.

**Q5 Eleanor Smith:** Is it necessary for Prorogation to be an Executive power? If so, for what reason?



**Professor Twomey:** That is also a really interesting question. It has traditionally been an Executive power, so it has been part of the tension between Executive, Government and Parliament. But it is always predicated, of course, on the basis that the Government are the Government because they hold the confidence of a majority in the Lower House, so to that extent Parliament and Government are working in tandem. When a Government that hold the confidence of a majority in the Lower House prorogue, they are doing so essentially with the support of a majority in the Lower House anyway, so that tension is missing. It tends to arise and be an issue only when you have a minority Government and a Parliament that wants to continue to sit. That is when you have a clash.

You could leave it as an Executive power, but one way around the problem and one thing that some other countries do, which might be something that the Committee wants to consider, is whether or not you include a mechanism for the House to bring itself back into operation early from a Prorogation if it sees the need to do so. For example, in some countries there would be a provision that says that if an absolute majority of Members of the Lower House petition the Speaker to bring the House back to sit, in those circumstances the Speaker can do so.

If you had that kind of thing, it would not matter if the Executive was proroguing for any kind of political or improper reason because the House itself would always have an ability to bring itself back if a majority so considered it necessary. That balances in some ways the ability of the Government, on the one hand, to prorogue when they see it as necessary or important to do so because of their management as the Government of the parliamentary agenda, but also, if you have a majority or an absolute majority—so 50% plus one in the House of Commons—that want to bring the Parliament back, that would give Parliament the freedom to do so.

It would also mean that the courts had no real role in the issue at all because, from the courts' point of view, it would be impossible to say that you were frustrating the ability of the House to sit if the House always had the ability by a majority to bring itself back to sit. That is one type of option that the Committee might want to consider.

Q6 **Chair:** I would like to bring in the other witnesses, but it is just worth reminding ourselves that so many unusual circumstances exist in the present political situation. We do not usually run with a minority Government. We have never run with a minority Government when the operation of a fixed-term Parliament has been frustrating a general election. We have some very unusual ingredients in the present situation.

Would the other witnesses like to come in on Eleanor Smith's question?

**Professor Ekins:** I would like to pick up on something that Professor Twomey said. It is a power to control parliamentary time and it is related to the Government's responsibility for the parliamentary agenda, so



political considerations are always going to be significant there. Some of those political considerations will be perfectly reasonable and sometimes even uncontroversial. Sometimes they will be highly controversial when numbers are tricky.

There is sense in our tradition and our history for this to be a Crown power, obviously exercised by a Government with the confidence of the House of Commons. The trouble one gets into and the controversy is if that confidence looks like it is in abeyance or might be withdrawn. In many of the controversies that arise, the question is whether Prorogation is being used to avoid confidence questions. That is the really burningly problematic instance. Otherwise, there is a range of situations in which Prorogation might be justifiable, but there will be an understandable political controversy at times.

**Professor Craig:** I will add a further thought on this. I do not want to repeat what Professor Twomey has said. She has covered the ground extremely well and I do not necessarily disagree with what Professor Ekins said in this respect. The only point I would make in addition to what has been said in relation to these first few questions about the relative merits of Prorogation as opposed to other methods of ending the session and whether this needs to be an Executive power is as follows.

Personally, I am of the mind that if it is not broken, do not fix it, and the normal methods by which we prorogue Parliament and the normal practice of Prorogation seems to me, in relative terms, unexceptionable, save for this very important qualification. It has become apparent that certain members of the present Executive feel that it is legitimate to prorogue Parliament to ensure that a recalcitrant Parliament does not impede the Executive in attaining objectives that the Executive believes to be justified. That, to my view, after 40 years as a constitutional lawyer, is an entire novelty. If that belief were to be shared, it would be deeply problematic for our constitutional order. Equally, if that belief is not shared, it is something that ought to be clarified and the issue should not just be left, as it were, to lie on the table in terms of the future, no matter how exceptional the present circumstances might be.

Q7 **Dame Cheryl Gillan:** It is quite interesting. The Chair and I were both here in 1997 when the then Prime Minister, John Major, prorogued Parliament. I am coming back to you, Professor Twomey. In your book, you highlighted that there had been few instances of Prorogation being used by Governments for a range of controversial political purposes in parliamentary systems both at national and at federal level, I presume. In your view, what have been the limits to the use of Prorogation?

**Professor Twomey:** It depends on what you mean by the limits—whether you mean legal limits or political limits.

**Dame Cheryl Gillan:** Both, in this instance, because we are exploring—



**Professor Twomey:** When I have looked at this, I have looked at this in the context of the reserve powers. At what point might the monarch or a viceregal officer interfere or intervene if Prorogation is being used inappropriately? That is always at the very extreme end. That is going to be in circumstances where you are breaching a fundamental constitutional principle like the principle of responsible government or, as the Supreme Court described it, parliamentary accountability.

In those circumstances, as we saw with the Harper Government when it sought to prorogue in Canada in 2008, I understand that the Governor General considered she had a reserve power to refuse to prorogue, but in those particular circumstances, where it looked like the coalition of opposition was not going to be sustainable, she thought that a Prorogation for a short period of time was appropriate and she prorogued anyway. But the general view taken in Canada was that that was a limit and that there was at least a discretion on the part of the Governor General to refuse to prorogue in those circumstances. Similarly, in cases in Tasmania, Western Australia and some other jurisdictions, where Prorogation is being used for the purposes of sustaining a government that appears likely to have lost confidence, those are circumstances for refusing it.

The other sorts of circumstances where it might be used in a way that is politically inappropriate would not necessarily be sufficiently serious to reject the advice of Government. Politically inappropriate uses would be trying to stop a parliamentary committee from inquiring into something that is very embarrassing to the Government prior to an election. That has happened quite a bit in Australia and indeed, allegedly, in the John Major instance. One circumstance was ending a pairing agreement so that a Government could push a controversial Bill through Parliament by having got rid of the pairing agreement that had been made only for the previous session. Again, that is pretty inappropriate.

In some countries where you have a rule that says you are disqualified if you do not attend two sessions of Parliament without the agreement of the presiding officers, if you had a couple of very quick Prorogations in order to disqualify people, it would also be very inappropriate. Whether it would be grounds for a viceregal representative of the Queen to refuse advice would be controversial and difficult to see.

Now we have this extra factor coming in of the Supreme Court saying, "We are going to look at what the actual scope of the power to prorogue is." That adds an extra dimension now that we need to look, potentially, at legal limits on the power as well as the sorts of political circumstances in which it might be inappropriate to use it.

**Q8 Dame Cheryl Gillan:** What are the implications of the Supreme Court judgment now on the limits and the future use of our Prorogation powers here, politically, on a political basis?



## HOUSE OF COMMONS

**Professor Ekins:** The Supreme Court's judgment creates a novel legal limit that is unknown in our history and in wider common law practice. There are legal limits that could be established by Act of Parliament and there are some requiring sittings of Parliament, but otherwise the power to prorogue is not in our history or our constitution subject to legal limits. The Supreme Court's judgment creates a legal limit and applies it, although doing its best to make it clear or to try to suggest it is not a novel creation. It clearly is. It has made new law in that judgment.

That has the effect of displacing the political controls that are otherwise the most significant restraint on abuse of the power to prorogue. I agree that there is likely reserve power in some cases for Her Majesty to refuse advice to prorogue, and it would be unconstitutional to prorogue in an attempt to govern without the confidence of the Houses of Parliament, but the main control on abuse of the power to prorogue has been political and practical. It is extremely hard to govern—to do anything new, at least—without regular sessions of Parliament. The court expressly says that that is "scant reassurance" and it creates a new limit, which is highly problematic and is certainly something new that needs to be considered.

**Professor Craig:** I take a different view from Professor Ekins. Of course, in a reductionist sense, the Supreme Court decision creates new law because we had not had a decision concerning Prorogation prior to the Miller (No. 2) decision. But that is reductionist in the following sense: courts decide cases only when someone brings a case to them and when the circumstances arise from which such a case would be brought. The idea that somehow the principles being elucidated in Miller (No. 2) are novel in the sense that they were created by the Supreme Court and had not existed hitherto would, I think, not stand examination.

Those principles flow from prior case law, as the Supreme Court itself said, and they flow from the application of constitutional principle, as the Supreme Court explained. I do not think the Supreme Court does not in any sense regard the judgment as overturning methods of political accountability; it sees it as supplementing or complementing political accountability in the matter in which the court elaborated in the judgment it gave.

**Professor Twomey:** Could I add to that? Putting on my hat as a former Government legal officer, if I were advising a Prime Minister or a Premier in relation to Prorogation—which indeed I have in the past, in New South Wales—after this decision, I would be advising them to be, first of all, careful when you decide to prorogue if you are going to prorogue for more than a relatively short period of time. One week, two weeks—if you are going anything further than that, you have to have some kind of a justifiable reason. You would need to think about it and work out what kind of reasonable justification you can give and whether you can show that you are doing it for a purpose other than simply to shut down and avoid parliamentary scrutiny or parliamentary action in relation to



legislation. You would need to be able to marshal those arguments and, if you cannot marshal them, you should not be doing it.

From a practical point of view, again if I was a legal adviser, even without a Supreme Court decision, I would be advising the Government that they should not be proroguing for purposes of simply shutting down Parliament, particularly if they do not have the support of a majority in Parliament, because that is consistent with constitutional principle. But from a practical point of view, if you are a Premier or Prime Minister now in the United Kingdom, you would certainly want to be careful before you prorogue to make sure that you had marshalled all the relevant arguments and you had evidence you could use to show to a court if it was challenged.

**Professor Ekins:** You now face legal risk in proroguing that you did not face before and you have to persuade a court that you have a good enough reason in the court's eyes to prorogue. Is this justification acceptable in the eyes of the court? That is a new thing in our arrangements and I think it is problematic. It does displace political accountability. There is a sense in which you can be politically criticised and taken to court by your political opponents. But political opponents of Prorogation will, predictably and understandably, take recourse to the courts. We can say that this has not happened before, which is true, partly because it was unthinkable. The divisional court's judgment at first instance dismissing the application was, in my judgment, the clear and right outcome I would otherwise have expected if the law had not been changed in a law-making Act.

Q9 **Chair:** Can I ask two very brief supplementaries? What do we think the court would have decided if the Prorogation had been four days shorter?

**Professor Craig:** With respect, the whole emphasis in the Government's arguments on the precise number of days of the Prorogation was a red herring. It was not the basis on which the court decided it and it was not the basis on which the court reasoned the decision either in the Supreme Court or in the Court of Session in Scotland.

What the court did in Miller (No. 2) when it applied its test was to do something absolutely unexceptional in a liberal democracy, which is to say that it is open to the Government to come to the court and make any argument that they so wish to justify their actions. The Government came to the court and said to the court, "We are proroguing Parliament for five weeks to pave the way for a new legislative session." The court simply did what courts do, which is to ask the Government what the connection was between the need for a Prorogation of five weeks and the beginning of a legislative session. The cupboard was entirely bare. The Government had all the time in the world to produce documentary evidence for any causal connection between the two propositions. They provided none because there was none—none that they put forward. For a court in a liberal democracy to merely accept the say-so of a



## HOUSE OF COMMONS

Government without evidentiary foundation seems to me not in accord with our constitutional traditions.

**Professor Ekins:** I would say that the court should have said, "This is not a question for us to answer. Therefore, we do not have to have an explanation from the Government."

**Chair:** Which is what the divisional court said.

**Professor Ekins:** Indeed. As to your question about four days, it is hard to say because the court's conclusion and its central proposition was that this Prorogation had an extreme effect on the fundamentals of our democracy. That is a political judgment. If you reduced the number of days, they may have been less likely to reach that conclusion, but I am speculating—I do not know.

Q10 **Chair:** My second supplementary is about the period in which Parliament sat during early September. Parliament sat in the full knowledge that Parliament was going to be prorogued in the week commencing 9 September. Parliament declined to express an opinion. Parliament did not take any action to prevent it. Parliament allowed the Government to continue in office. To what extent do we think the court has taken over the role of Parliament because of Parliament's failure to act in its own interests?

**Professor Twomey:** To start with, Parliament did act earlier. It acted with the Northern Ireland (Executive Formation) Act. That was an Act to force Parliament to come back from Prorogation if Prorogation occurred on particular dates.

Q11 **Chair:** It was an indirect means, was it not?

**Professor Twomey:** That in itself affected the Government's Prorogation dates because, otherwise, if the Government had—as they otherwise might have done and we do not know—decided to prorogue for the whole of September and October until the date of 31 October, which some people had suggested, they would have been forced by that particular Act to come back and to sit for five-day periods. That was factored into the relevant dates that the Prorogation covered so that we had the dates of sitting in September and the dates of sitting in October to reflect that. So Parliament had exercised its power to some extent.

I guess then the question is: when it did come back and sit in early September, should it have taken further action if it did not want to be prorogued? Members of Parliament will know better than I in relation to this, but I suspect that from a timing point of view the focus was really on the other piece of legislation that they wanted to enact, the Benn Act, rather than attempting to get agreement on some sort of law in relation to Prorogation, and that is where they placed their emphasis.

Should the court have taken this into account in relation to its decision? That is a hard question, partly because the Scottish proceedings



## HOUSE OF COMMONS

commenced before that period of parliamentary sitting so there is a question as to at what point you make your decision about the appropriateness of Prorogation. Do you have to take into account something that has happened after the decision to prorogue was made, which the Government did not know about at that time because they made their decision to prorogue, leaving Parliament to sit for a period of time first? Should the courts take that into account or not? That is a very difficult area. I do not know what the answer to that should be.

**Professor Craig:** I very much take the point of your question. My response rather tracks that of the Supreme Court, but the Supreme Court dealt with this only briefly, so let me amplify the proposition.

It is, of course, the case that if Parliament chooses at some stage to pass legislation dealing with Prorogation, that will become the foundation for any power or duty relating to Prorogation and would be duly taken account of by the courts in subsequent litigation. The courts cannot, however, forestall or abjure proper scrutiny of Executive action on the ground that some form of parliamentary or political form of accountability might have occurred or might take place. The very statement of that proposition reveals its inadequacy. That would be an impossible standard for the courts to work to.

It would also mean, if we took that proposition seriously, that a number of key legal judgments were wrong; for example, the seminal decision of the House of Lords in the GCHQ case, which said that the manner of exercise of prerogative power was reviewable by the courts subject to issues about justiciability, which I am sure we will come on to. But that basic proposition would be *per incuriam*—it would be wrongly decided—if we were to say that the courts should never review the exercise of prerogative power until or unless the Executive or political branch of the Government had had some chance of controlling that power. The problem with that proposition is that you could always say, “The courts should never review this exercise of prerogative power,” because it would always be open to the political branch of the Government either to pass legislation or to take some action that might in some way structure or confine that discretion.

**Professor Ekins:** I would say that the law of the land, until the Supreme Court’s judgment, was that there are no legal controls on Prorogation, and that the controls are political and practical, and perhaps constitutional by way of the Queen in extremis, so it is highly relevant that there is a capacity for the Houses of Parliament, the House of Commons in particular, to answer misuse or perceived misuse. It is especially relevant when there is an opportunity to do so in advance of the action by withdrawing confidence or by otherwise bringing about an early election.

It is certainly true that Parliament can legislate to impose legal controls. Parliament in the Fixed-term Parliaments Act chose not to undercut the



## HOUSE OF COMMONS

power to prorogue. Professor Twomey has mentioned the July legislation, the Northern Ireland Act. In a sense, that is Parliament legislating about Prorogation in the autumn. It is a code for the consequences of proroguing and bringing it short in certain circumstances. It is extraordinary that the court superimposes a novel legal constraint that goes beyond that which Parliament enacted in July this year with a view to this particular period of time. That is extraordinary.

**Q12 Dame Cheryl Gillan:** We were brought up on the sanctity of the separation of powers, which seems to be being challenged here. Do you see this as a step on the road towards the American system?

**Professor Ekins:** The American system is a particularly strange and old one and, obviously, the courts are very politically significant. I think it is a step towards the courts viewing themselves as the guardian of the constitution, rather than as having a particular responsibility for settled law. That is what one sees in the judgment, in a way running quite contrary to their Miller (No. 1) judgment, where they recognised that convention is not for courts to enforce. They were quite right to say that. Courts are neither the parents nor the guardians of constitutional convention, they say. It does not look like they hold to that position any longer, at least as I read how the judgment is rationalised. It looks to me like a judgment on the part of the court that the political controls are inadequate and that, whether in this case or some worse case, the political controls could not be relied upon, so the court will insert itself into the process here. It is part of the judicialisation of politics and lately a politicisation of the judicial process, by which I do not mean that the courts are biased. I simply mean that they are making a judgment on the basis of political considerations that are not for them to decide.

**Q13 Chair:** Yes. I would like to emphasise that any comments we make are absolutely not intended to impugn the integrity of the court as an institution or the individuals who are on the court. Professor Craig?

**Professor Craig:** You will not be surprised to hear that I do not agree with Professor Ekins in any of those respects. First, we have no authority whatsoever for the proposition that Prorogation was completely non-justiciable and outwith the power of the courts. We have no authority for that proposition at all. The only thing we had was a statement in a House of Lords decision that Dissolution, which is not Prorogation, was non-justiciable. It is not even clear that that would still be regarded as true today, but to some extent that has been overtaken by the Fixed-term Parliaments Act. We have no authority whatsoever for the proposition that Prorogation was untouchable by the courts and wholly non-justiciable.

Secondly, we are losing sight of the wood for the trees. The standard formula in relation to prerogative has always been that courts determine the existence of such power, the limits of such power and, prima facie, the manner of exercise, subject to any concerns about justiciability. That is the law. That is not new creation. That has been the law since the 17th



## HOUSE OF COMMONS

century as built upon by later case law. The idea that the court is creating some massively new control here simply does not withstand examination.

Of course, part of the reason why we believe that discretionary power exercised by the Executive pursuant to the prerogative should be controlled is that we exercise and take it as fundamental that we should exercise discretionary power when the Executive exercises it pursuant to statute. The whole driving rationale of the courts has been that you, the Executive, should not gain some special advantage merely because you happen to be exercising discretionary power pursuant to a prerogative power.

Indeed, in many ways, the argument could be taken the other way around. Legislation has the imprimatur and has the approval of having gone through the processes of Parliament. Parliament has considered it and has decided to accord a particular discretionary power to a Minister or Government agency or local authority. Prerogative power, by way of contrast, has no such imprimatur. It is there for historical reasons and I am not gainsaying it. I am merely pointing out that the driving force behind the courts has been to ensure that Executive discretionary power that happens fortuitously to be organised and run through the prerogative is subject to the same controls as statutory discretionary power. This is not new and it is not novel and it is not unconstitutional.

**Q14 Kelvin Hopkins:** Very briefly, there is an interesting difference of view among our witnesses, which I am pleased to see. Professor Ekins is suggesting that a fundamental constitutional change has really taken place. If the Supreme Court had never been established—and I for one was very uneasy about its establishment—would the Law Lords have taken such a decision? They were the highest part of our legal system.

**Professor Ekins:** It is hard to say because it has had 10 years of development and Lady Hale, President of the Court, was one of the Law Lords, so there is a continuity of personnel. It is hard to know how far the creation of a distinct institution with its paraphernalia and the term “supreme” changes the thinking. I have always tended to the view that it does not much. Maybe I am wrong about that.

It is significant that the court, as I see it, is understanding itself to be in a position, at least in this case, as the guardian of the constitution, having a role of developing the law and changing the law in order to supplement and replace parts of the political constitution. It may be that a committee of the House of Lords would have been less likely to view itself as having that position within the constitution simply because it would have been obvious to it that it did not have an overarching responsibility for the health of the constitution. The court and the courts traditionally have had, clearly, a responsibility for the law but not a responsibility for making new law to compensate for perceived defects in the political process. It may not make any difference but it is very hard to say.



## HOUSE OF COMMONS

**Professor Twomey:** I think I have been physically placed between the people on both sides because my position is somewhat in the middle of the two of them. Let me just put the middle-of-the-road position.

Yes, when it comes to separation of powers, separation of powers is not just about the judiciary exercising judicial power, the legislature exercising legislative power and the Executive exercising Executive power. It is also about checks and balances. It is about the various parts checking each other. One part of that is that the judges through the exercise of judicial power ensure that the rule of law is obeyed. That includes determining the extent of the power in relation to the prerogative and it also includes that the Executive power, when it is exercised, is executed in a way that is consistent with the requirements of law such as procedural fairness and so on. From that point of view, it is not a breach of separation of powers at all.

However, on the other side, where things have moved a little bit is that this notion of the guardian of the constitution was previously one attached to the monarch. It was previously expected that if the political system went astray, if people moved outside the conventions, if they moved outside the constitutional principle, it was the monarch who would act. I think what is really happening here is that there has been a shift from the role of the monarch to the courts.

I am not quite clear exactly how or why that is happening. One of the real problems in all of this is that the secrecy rules concerning the monarch and what the monarch does mean that we have very little information as to how the monarch sees her constitutional role and whether she is exercising it behind the scenes, as indeed one ordinarily would, through advising and warning and those sorts of things. It may well be that the Queen did take such action in relation to Prorogation, Royal Assent and all sorts of other things. We cannot know.

In the absence of that knowledge, what is happening is that the courts are beginning to fulfil a role so that it allows the Queen not to. When it comes to reserve powers, if there are issues in relation to legality and constitutionality, the Queen does not need to act if the matter is justiciable and it can be determined by a court. What the court is doing is fulfilling that role by making it justiciable. That means that the Queen has no obligation to act and fulfil the role. Therefore, the court might be seeing that it is doing this as a way of protecting the Queen from having to behave in a way that may be seen as controversial.

So, from the bigger political question, that is the real shift that is happening there. Whether or not that is an appropriate shift is another matter.

**Chair:** This is all incredibly interesting, but we are taking much too long. If we can shorten our interventions and have shorter answers, I would be very grateful if you can make it crisper and quicker. You can always submit something in writing afterwards if you feel that something has



been left unsaid. Mr Jones, briefly.

- Q15 **Mr David Jones:** I have not opened my mouth so far, Chair. As Professor Craig predicted, we move to the issue of justiciability and, of course, one of the central issues that was considered by the Supreme Court in its judgment was the question whether the exercise of the power to prorogue was justiciable. Could you outline briefly how the court dealt with that? Perhaps each of you could also give your views as to the implications of that.

**Professor Craig:** Indeed. Thank you very much. The way the Supreme Court approached the matter was in two stages. First, it made clear that the mere fact that an issue has a political dimension does not render it non-justiciable. Secondly, the way it approached the prerogative was to say that the court was dealing with the case in terms of defining the limits of this particular prerogative power of Prorogation. That was important in conceptual terms because it has been accepted that courts can define the limits of prerogative power ever since the 17th century and it defined those limits through two constitutional principles, one being parliamentary sovereignty and the other being parliamentary accountability. Then it applied the limits as it had defined them to the facts of the case.

I understand the need for brevity because of exigencies of time, so let me merely make the following two very brief points.

First, if one believes that the issue should have been regarded as wholly non-justiciable, two consequences inexorably follow. One consequence is that it would have been open to the Government to go to court and simply say nothing and provide no reason at all for their behaviour on the ground that their behaviour was simply non-justiciable and not open to judicial scrutiny at all or, alternatively, to have gone to the court and said to the court—perhaps it might have done this—“We are proroguing Parliament because we believe that we wish to get a deal or no deal done by Hallowe’en and that this is the best way to achieve it by removing a recalcitrant Parliament.” If one believes that Prorogation is wholly non-justiciable, it would have been open to the Government to make that argument to the court and there would have been no legal redress. That is the first consequence.

The second consequence is that if you believe that Prorogation is indeed wholly non-justiciable, what it means going forward—and certainly not going backward—is that Parliament remains sovereign and has no boundaries, procedural or substantive, to its omnipotence; however, it sits at the grace and favour of the Executive, and that grace and favour and that Executive discretionary power is wholly uncontrollable outside the walls of Westminster. That would be a new constitutional proposition. There is no authority that Parliament’s sovereignty has been bounded in that way. There is no case. There is no text. There is no article or essay in the voluminous literature on sovereignty that attests to limits of that kind.



## HOUSE OF COMMONS

I believe that the court was right to find that it was justiciable and I believe that its application in the circumstances of the case was correct as well..

**Professor Twomey:** I will just do the middle bit, then, because I know what Professor Ekins is going to say.

Just to be brief, the interesting part of the decision is not the fact that they said, "We are the court and we can decide the extent of the power." It has always had the power to do that and that is uncontroversial. What is controversial, though, is the way that they did that and whether that trespasses into other areas, which no doubt Professor Ekins will look at.

What is interesting from it, however, is that it did leave open the issue of whether you could deal with this under administrative law mechanisms such as improper purpose. The court very cleverly in this particular case avoided all that, saying that it was just going to look at the scope of the power and because it fell on that basis it did not need to go to the other side. It will be interesting to see whether in future the court does so it leaves open the expansion of this into areas of justiciability.

This traces back to the CCSU case in 1985. I would accept that Prorogation did fall into the same category as Dissolution, being those areas that were regarded as non-justiciable in terms of subject matter, but since then we have had many developments in the courts where those areas previously described as non-justiciable—like the prerogative of mercy, for example—have in subsequent cases been looked at in relation to not the discretion involved in the granting of mercy but the means by which it is done, whether it is done for an improper purpose and so on. I suspect that that kind of reasoning might trickle through in the future, so that is something to look at.

**Professor Ekins:** I will be as brief as I can. The court says it is looking at scope and existence and not at the manner of exercise and that its account of scope and existence takes over the manner of exercise. It turns out, as the court's judgment makes it the case as a matter of law, that the scope of the power to prorogue is a power to prorogue only so long as one does not interfere with constitutional principles, which the court notes, and so long as one does not prorogue for too long in a way that the court does not think has an adequate justification. There is a real problem there of collapsing the distinction the court is drawing to justify intruding in this matter to get around the Divisional Court's judgment on justiciability. The distinction it draws collapses and that is a serious problem.

The court calls in aid two constitutional principles. Professor Craig has spoken about one of them, parliamentary sovereignty. The court adopts for the purposes of its argument a very surprising and novel account of parliamentary sovereignty. The divisional court said this same account. This is a—



**Chair:** We will come to this subject later.

**Professor Ekins:** Okay, forgive me. On Professor Craig's two implications, I think it would have been open to the Government—and should have been under the law—simply to provide no reason to the court and for there to be no legal recourse. Of course, the Government have to provide an account to the Houses of Parliament and to the public. They do not have to provide one to the court. The ability to prorogue does not make it the case that parliamentary sovereignty is somehow an illusion or has always had this hidden qualification. Parliament is still sovereign. Parliamentary sovereignty is not in violation when Parliament is dissolved or in recess or during Prorogation.

Q16 **Chair:** Professor Craig, you said that the Government could have made the case that Prorogation was in the national interest because of the need to negotiate with the European Union, but was the court not under an obligation to consider that anyway? Why did the Government need to make that case? It was quite obvious. The court certainly did not address that question.

**Professor Craig:** I agree, but then courts address arguments that are put to them. It was open to the Government to put any argument that they wished and, to my knowledge, that argument was not put in terms to the court.

Q17 **Chair:** My point is that the court considered a lot of things that were not put to it in this judgment.

**Professor Craig:** No, with respect, I do not think that is so. The fact that courts sometimes on some occasions consider matters of their own volition does not, with respect, translate into a general obligation on courts to put arguments that litigants should be putting themselves if they wish to do so.

Q18 **Mr Marcus Fysh:** Following the judgment, how is a person exercising a prerogative power supposed to make a judgment as to what a reasonable justification might be, especially when you have terms mentioned in the judgment such as "extreme effect on the fundamentals of democracy"? I am interested in your view on that. It seems to be pretty unclear to me. Whatever evidence might have been marshalled for a particular point of view, how on earth can they judge whether that is sufficient?

**Professor Twomey:** What you have to do is to give a reason above and beyond just wanting to stop Parliament from exercising its legislative scrutiny powers.

For example, in Tasmania, there was an attempt to prorogue for a long period when it looked like the Government might have lost confidence. This was a very controversial issue about building a dam in Tasmania, which was opposed by environmentalists. In that particular case, we have seen a copy of the advice and the advice to the Governor gave reasons about why they needed to prorogue for this period of time. They said,



"We need to prorogue for a period of time to consider the results of a referendum that had been held and to address certain policy issues and to deal with certain financial issues. That is why we are proroguing". Even in those circumstances, the Governor negotiated them down to a smaller period of time for Prorogation.

If you have good justifications—a budgetary measure that needs to be dealt with at a particular time or certain policy ramifications from an event have to be considered—then that is fine. If your only reason for proroguing is because you cannot control the Parliament and you do not want it to act against your will, that is going to be the problematic one because that is going to be the one that breaches constitutional principle. If you can find proper reasons that are not that, you are probably okay.

Q19 **Mr Marcus Fysh:** What is your opinion, Professor Ekins?

**Professor Ekins:** In a way, Prime Ministers going forward will have good reason to be very cautious in their use of the power to prorogue and will be very reluctant to use the power in controversial contexts. That might not be the end of the world. It might be a good state of affairs if the power is not used in provocative or controversial ways. I would rather, if that were the state of affairs, it came about because Parliament had decided that there should be limits on the power rather than the shadow of legal risk, but I think there would be a shadow of legal risk. There are—Professor Twomey's book traces it—contexts that we see across the common law world and history where the use of the power to prorogue is controversial, may well be constitutional and might be justified if it is a matter of political controversy. Now you would be well advised to be very slow unless you want to risk a legal battle, and maybe sometimes that is a calculation that is made.

Q20 **Mr Marcus Fysh:** Anything to add to that?

**Professor Craig:** I do not have very much to add to it at all. I agree very much with Professor Twomey's general account of how this operates. The only thing I would add is the following.

The idea that the court is going to be, as it were, jumping in right, left and centre to control the power of Prorogation is wholly mistaken. The court made very clear explicitly in its judgment that its review would take into account fully the Prime Minister's discretion and the need that the Prime Minister has to balance a whole set of conflicting variables about when and whether Prorogation takes place. Professor Twomey has it exactly right in the sense that if there is a legal action, if the Prime Minister or the Government's legal representative came to the court and said, "We did it for reasons X, Y and Z," and they make prima facie sense, I do not think the court is going to interfere. The idea that we are having a court that is jumping in and recalibrating our political order in all circumstances is not the consequence of this judgment.

Q21 **Dr Rupa Huq:** One of the traditional prerogative powers, the one of



## HOUSE OF COMMONS

Dissolution, went with the Fixed-term Parliaments Act. There was an attempt to put it in there—there was an amendment—but the Government said that the conventions are strong enough. We have seen what has happened since. Is there any guidance from the judgment about this?

**Professor Craig:** I do not think there is any guidance. The court makes clear at a number of points that it is open to Parliament to legislate about Prorogation if it wishes and, in the same way as it has done, about the length of sittings of Parliament. Parliament has legislated about those matters since the 18th century onwards, so it makes that clear.

It does not deal as such or see it as the court trespassing on a constitutional convention. What you have is a power in terms of Prorogation that is normally wholly unexceptionable. The reason why it created a problem in this instance and the reason why the case ended up in court is that the power was used in a way that was not normal. It was very abnormal and there seemed to be a disjunction between the reason given for its usage and the actual reality of what was going on. That was why the court was involved, but I do not think that the court regarded itself as trespassing on a constitutional convention or turning a constitutional convention into law.

**Professor Ekins:** The court does refer to practical restraints on the misuse of the power to prorogue. It says that those “offer scant reassurance”. To me, that reads like more has to be done and the court will make it so that the law fills the void. The court does, I should add, refer to the principle of parliamentary sovereignty there, but in doing so it says that the power to prorogue must be subject to legal restraint and it then recites some Acts of Parliament that impose some legal restraint. There is no quarrel from me. If an Act of Parliament imposes restraint, I have no problem. An Act of Parliament, as we have talked about already, did impose restraints for the autumn—that is the Northern Ireland (Executive Formation) Act. What the court does is to add further restraints on top.

The heart of the court’s judgment is this idea that this Prorogation had an extreme effect on the fundamentals of our democracy. That is a political evaluation and characterisation and a contestable one. It begs the question of whether this was obviously unconstitutional Prorogation. It was certainly an unusual one and certainly a politically extremely controversial one, but one can see through the common law practice elsewhere much lengthier Prorogations and Prorogations in contexts where confidence is more in doubt.

If there is a constitutional restriction on Prorogation, it would be not to misuse to remain in office when you do not have the confidence of the Commons. That was not the case here, as I see it, especially given the point of time left before Prorogation came into force. It might be politically controversial and it might be imprudent and wrong, but it is not the responsibility of the court to evaluate that or to give an answer to the



## HOUSE OF COMMONS

question of whether this should have been done. That does not turn on an Act of Parliament that imposes a limit.

**Professor Twomey:** I want to add an international perspective. The view has always been taken that convention is very strong in the United Kingdom and that is one of the strengths of its constitution. Here, something is unconstitutional if you are breaching convention, whereas in Australia or other countries with written constitutions it is unconstitutional if you are breaching the terms of the written constitution.

The problem with this entire situation is that convention has basically been thrown under the Brexit bus. That is really bad from an international point of view. If the Supreme Court had not ruled as it had, there would be lots of other countries, particularly in the South Pacific and the Caribbean, where you had leaders who had lost confidence but wanted to keep going on and running Parliament without confidence, who would just be saying, "It happened in the United Kingdom. You can prorogue for a long period of time, and by the way, it's non-justiciable. A court cannot deal with it. I'm going to sit here for a year governing until such time as my supply runs out and no one can stop me." From that point of view, the UK Supreme Court's decision was really useful in terms of an example to other countries who use this system, but I am hoping that after the Brexit controversy is over the United Kingdom moves back to its position of being very strong on convention because it is a good example to the rest of the Westminster world.

Q22 **Dr Rupa Huq:** I know the Chair said that he advised against it. There is a letter doing the rounds on Twitter that Matt Hancock wrote saying exactly the same thing: that we should not do this because it will send a terrible message to the rest of the world about what a tin-pot dictatorship can do.

**Professor Twomey:** Indeed it does, yes.

**Dr Rupa Huq:** Now that it has happened, would you favour some sort of clarity with these rules and practices for Prorogation in particular being codified and enshrined in an Act of Parliament? At the moment, yes, convention is obviously not strong enough if the courts have to step in with this Government with a very majoritarian mindset that has no majority.

**Professor Twomey:** I have to say that my prejudice has always been against codification. One of the problems is that once you codify things or put them into statute, you can have circumstances arise that you have not predicted and are not able to be dealt with properly by the statute and the rules that you are in. Constitutions that are not flexible become brittle and they can break. We have seen that in a lot of countries where they do not have such strong conventions and, therefore, they do have very prescriptive constitutions and you do end up with problems when



## HOUSE OF COMMONS

you end up in a position of unconstitutionality and you cannot get yourself out of it.

As a general principle, I would say that convention is preferable because it is flexible, but the one thing I would go back to is what I said earlier on in the piece. Perhaps, if you have a mechanism by which Members themselves by majority can bring back Parliament during a Prorogation, that would solve the problem without having to be any more prescriptive in relation to rules about Prorogation. The Government can prorogue as and when they wish, but if a majority of the House wants to bring the Parliament back early, it can petition the Speaker to do so. Just having that measure of flexibility would solve the problems without being overly prescriptive.

**Professor Ekins:** If there are legal limits on the power to prorogue, I think they should be legal limits that have been chosen by Parliament, having taken its time to think through what they should be, not legal limits that, with respect to the court, are devised in an unclear and somewhat haphazard way in the course of litigation.

In addition, if the position is there was a convention that somehow was breached by this Prorogation and the court has taken over the convention with a new rule of law, I think that is problematic from a rule of law perspective, not least since the Supreme Court told us very clearly a few years ago that conventions are not enforceable, even if they are given statutory force and recognition, as the Sewel convention is in the Scotland Act.

I should say in addition—obviously this was a wildly controversial Prorogation—it is not clear to me that it breached constitutional convention. It was obviously politically controversial and might have been politically irresponsible, especially in view of the Brexit timetable, which I think is the variable here, but the limits on constitutional Prorogation are focused on an absence of confidence, so trying to remain in office when you have lost confidence or doing your best to avoid ever losing it. That was not the situation here as I see it, so it is not so obvious. This understanding may be quite significant to the court's position because it concludes there is a very serious problem here, which justifies what is a novel action in my mind.

Q23 **Dr Rupa Huq:** Professor Craig, anything else?

**Professor Craig:** If you need me to.

**Dr Rupa Huq:** You do not have to.

**Professor Craig:** I will forbear on this.

Q24 **Dr Rupa Huq:** Would you say that constitutional conventions more generally now need to be converted into statute? We have had a whole load of matters arising from this: the instruction from Parliament to publish all the associated documents and communications not being



## HOUSE OF COMMONS

complied with; the overreaching of special advisers, even this morning, giving these very sternly worded anonymous briefings; and the sidelining of Cabinet Government, which is again a sacrosanct principle, I thought, of our constitution when I learned it at school in A-level politics.

**Professor Ekins:** For my part, no, I do not think we should overhaul constitutional convention at large. There may be particular instances where a convention has broken down, which are not satisfactory, and we do progressively introduce new rules of law when conventions fail. I think the Fixed-term Parliaments Act is something of a cautionary tale: it is not replacing convention but it is codification that gives rise to unpredicted consequences. In a way, I think much of what we see now is arising because of that impasse. We have a state of affairs where it is very difficult to get the election that is needed to reset the arrangements between the Houses of Parliament and Her Majesty's Government.

**Professor Twomey:** I think the Fixed-term Parliaments Act is exactly the example of what you should not do. At least, if you are going to do it, you need to do it a lot more carefully than it was done at the time. My understanding—

Q25 **Dr Rupa Huq:** You can only have one election on that timetable. If there is one this year, that would be one every other year for me. It is my first term, and it is not even finished yet.

**Professor Twomey:** The problem with the Act is I think it was dealing with a particular political situation at the time of a coalition Government and wanting to ensure that the Government continued for the full term. There was insufficient consideration given to issues in it.

I made a submission to the House of Lords Committee at the time that was looking into it in relation to things like, for example, Prorogation. I pointed out that one of the key things you need to do when you have that kind of legislation—because we had the same in New South Wales, and I think the UK partly followed the New South Wales legislation—is have a specific provision in there making sure that you cannot prorogue in the 14-day period after a vote of no confidence. That was not fixed. It does need to be fixed.

I also said in that submission that you need to be clear about what can happen in that 14 days—whether or not the Government can be changed and on what basis, and what happens if you have a vote where the Parliament says it has confidence in someone else. All those issues I raised back in 2010, whenever it was, when that legislation was going through. They were not addressed. There are faults in that legislation.

My one plea if you are going to try to put conventions into law, is please do it a lot better. Think through the issues first. That legislation is very poor and it does need fixing.

Q26 **Ronnie Cowan:** You have just answered my question, which is very good of you. In this place, this has all come about not because we have



## HOUSE OF COMMONS

been prorogued. We are being prorogued all the time. We will be prorogued today, and nobody will bat an eyelid about it. It is the length of time of the Prorogation and therefore why we were prorogued, which brought all this to the forefront.

In this Committee, we continually are up against conventions and principles, and the conventions are open to conjecture, and some people do not have any principles. What do we do in this situation to protect conventions and principles, which we have said are so important? What can we do, short of making them laws, which we have said are sometimes too stringent and, therefore, cannot be interpreted? I am looking at the three of you because clearly we do not have any answers.

**Professor Twomey:** Sometimes what is helpful is to try to explore and discuss and explain convention and how it should operate. Parliamentary committees have a really important role in that. In looking at these issues in the past, I have looked back to reports of parliamentary committees on things like constitutional reform; I was looking at one recently about parliamentary privilege. The work of committees in exploring these issues, getting evidence and considering what the conventions are is very important.

In fact, I was also looking recently—this is about the Article 9 stuff, which we will come to—at cases in the UK Supreme Court where it referred to what a parliamentary committee was saying about parliamentary privilege. I would, apart from anything else, encourage parliamentary committees to explore the conventions and how they should operate, because their reports in that regard are valuable and are even used by courts and others in developing and discussing those conventions.

The other possible place for dealing with these things is the Cabinet Manual. That is another form of dealing with things in a manner that is not legally binding, that is flexible. The other side of it, in the face of incredulity, is that the Cabinet Manual will always represent the views of the Government of the day, not necessarily views that are consistent with a constitutional principle that does not advantage the Government. Cabinet Manuals are controversial in that way because they will always have a view of the world that gives extra power to Governments that others will not necessarily do, but they do have the benefits of at least trying to set out basic principles in a way that remains flexible and not part of law.

**Professor Craig:** I only want to make two brief points in this regard. One is that in general terms I agree with Professor Ekins in terms of having the same starting point, which is that I have no basis for believing that constitutional convention should generally be converted into law. There are all sorts of good reasons why particularly some constitutional conventions would be almost impossible to convert into meaningful legal rules and, in so far as we could do so, the downside of doing so would far exceed any benefit of doing so. In that sense, I am on the same page.



## HOUSE OF COMMONS

The only other point I would want to make about the Fixed-term Parliaments Act and matters of that kind is to distinguish between two points that I think are related but distinct. One is: is the Act a good Act in itself? I entirely accept that there are deficiencies in the Act. The related point, however, is: do we think there should be some statutory controls on Dissolution? My own view on that is, yes, there should. I see absolutely no normative or political reason why it should simply be open to the Government of the day by virtue of being the Government that it can have an unfettered power to call an election whenever it wishes. That is not the norm in most countries of the world, and I see no particular reason why it should be so here. I repeat, that does not mean the FTPA is perfect—it clearly is not, but that is a different point.

**Professor Ekins:** I will be brief. I think political criticism is a powerful sanction that supports convention. It may be hard to see the fruits of it at times, but a breach of convention, especially if it is clear, is a reason to invite and cultivate and build up public opposition to a course of action to a wider Government programme.

As we have said, there are reasons for caution in legislation. It is very true. Some narrowly cast legislation aimed like Prorogation, might avoid some of the risks of the Fixed-term Parliaments Act. The Fixed-term Parliaments Act is going to the heart of the relationship between Government, the House of Commons and the confidence principle. It is easy to make a mess there, and a mess was made, I think. You could impose simply an upper limit on how long Parliament may be prorogued for. That might be quite clear and simple. If the worry is—as the worry for the Supreme Court seems to be, in part—the extreme hypothetical of very lengthy Prorogation, which I think is an unreal worry but it is one people have, you could deal with that by legislating to make Prorogation for a certain period of time simply unlawful, as constitutions elsewhere do. Often it is quite high level. You might want to make it long.

Q27 **Ronnie Cowan:** Or having the ability, as was pointed out by Professor Twomey earlier, to have a House of Commons vote to end the Prorogation and bring everybody back.

**Professor Ekins:** True, although then there is a trade-off there, I think. Is it advantageous in the scheme of our parliamentary Government, as it is developed across time, to have a Crown power to control parliamentary times such that there is a fixed point of maybe 30 days or something that can be without parliamentary discussion? In a historical perspective, that might be thought quite valuable.

Q28 **Ronnie Cowan:** With the Fixed-term Term Parliaments Act, as it was being debated in 2010 and maybe into 2011, it was challenged then and there that prerogative power still existed. The Government's response was that such proposals to put Prorogation on a statutory footing were unwise and unnecessary. Were they wrong in saying that, yes or no?



## HOUSE OF COMMONS

**Professor Ekins:** I think there was some good sense in saying that—no. It was not wrong in saying that.

Q29 **Ronnie Cowan:** It was not wrong in saying that? It was wrong to say that?

**Professor Ekins:** Can I make it clear? As a standing matter, it is unwise to legislate about this matter, so there was good sense in their caution on that point.

**Professor Twomey:** In ordinary times it would be unnecessary, but perhaps we are not in ordinary times.

Q30 **Ronnie Cowan:** Can I just finish this point? Is what we should be doing going back to the Fixed-term Parliaments Act and amending that Act to control aspects of Prorogation so it cannot be used as a political weapon?

**Professor Craig:** My one-word answer would be yes.

**Professor Ekins:** No.

**Professor Twomey:** I have to say maybe.

Q31 **Chair:** The important thing about the Fixed-term Parliaments Act is that it has completely changed the nature of our constitution, as it completely changes the relationship between the Executive and Parliament.

**Professor Twomey:** Without sufficient thought. I think a lot more thought needs to be given to the dynamics of it and how it operates.

Q32 **Mr Marcus Fysh:** In that context and in the context of what the judgment says about the Supreme Court's willingness, even obligation, to uphold values and principles and make them effective, and effectively to make judgments on political questions, should the Supreme Court get involved in judging whether a Prime Minister is right to advise the Queen in convention on who to call for to be the Prime Minister, or in fact to not give such advice?

**Professor Twomey:** I have to say that the point I would make there is that the Prime Minister has no power to give binding advice to the Queen on who should be his or her successor. Although customarily sometimes they are asked and give that advice, that advice is not constitutionally binding because the Prime Minister is no longer responsible to Parliament for that advice. That is why it is a reserve power of the monarch to choose whoever the Prime Minister is, but that reserved power is governed by the convention that the person chosen is the person who is most likely to command the majority in the Lower House. I do not think in those circumstances that the Prime Minister has any power to give binding advice to the Queen.

**Chair:** That is slightly trespassing on Rupa's question.

Q33 **Dr Rupa Huq:** Long before the judgment, even when it was being rumoured, on the Sunday *The Observer* was leaking all over the place



## HOUSE OF COMMONS

and it was being denied it would happen. We always knew that this would be politically controversial to have a prolonged Prorogation. It is a longstanding convention for politicians and the civil service to keep the Queen out of it, keep the Queen out of politics, and not get sucked into, in the words of the late Lord Heywood, any sort of political controversy. Those were words he said to our predecessor committee.

To what extent do you think that this role and position of the sovereign in our constitutional arrangements has been undermined by this? I imagine she is not amused.

**Chair:** I think, Professor Twomey, you have already answered that question in your earlier answer, but maybe we can hear from the other two witnesses.

**Professor Ekins:** I would not have thought the position of the Queen had been undermined. Her responsibility is to act on the advice of her Ministers, who are accountable to the Houses of Parliament, especially the House of Commons. There is a reserve power, at least arguably and properly—

Q34 **Dr Rupa Huq:** When the party of law and order has scant regard for the rule of law, does not that put her in a very difficult position?

**Professor Ekins:** I deny the premise there, I am afraid. If you are arguing from the fact that the court held it to be unlawful, therefore, the Prime Minister, when he set out, or the Government, to advise the Queen, knew they were embarking on an unlawful action—I think the court has retrospectively made the action unlawful in a way that was not predictable, even if it was a risk. The court, in my view, as we have discussed already, made new law in deciding to create new legal controls that it was devising on Prorogation.

I can see why it is used as a ground for criticism, but I think it is wrong to say the Prime Minister unlawfully advised the Queen and that is the wrong he committed. It might be that the Prorogation is outrageous and should not have been done and so on, but it is not because of a decision to embroil Her Majesty in unlawful conduct. I think that is a misleading frame of analysis.

**Professor Craig:** This is very delicate territory, but I think that it is necessary nonetheless to disaggregate two different senses in which there might have been some impropriety. I agree that the very fact that a court decision after the event found that the Prorogation was unlawful does not in and of itself mean that the Prime Minister was wrong to go to the Queen in the terms that he did. I agree with Professor Ekins in that respect.

There is, however, and there has always been another dimension to this. The other dimension to this is we do not know, because we were not privy, precisely what advice the Prime Minister gave to the Queen as to the reasons for the Prorogation when he went to see Her Majesty.



Q35 **Dr Rupa Huq:** Apparently it had nothing to do with Brexit. That is what we all read, that it had nothing to do with that. It was for an exciting programme.

**Professor Craig:** Exactly. Just to press this, then, whether there would have been a duty incumbent upon the Prime Minister to make it clear that the period for which he was seeking a Prorogation was very excessive in terms of the norm, and whether he would need to explain to Her Majesty that, notwithstanding that, he wished for the Prorogation of that length for some other reason or for some reason that was not apparent on the face of it is, I think, a very delicate matter. Certainly, it seems to me that any Prime Minister, in advising the Queen, would obviously have a duty of full disclosure.

Q36 **Mr Marcus Fysh:** Is this relevant to my point? There is a conflict between the convention that says that the advice to the Queen should be a matter between the Prime Minister and the Queen, for example, and the potential interference of the Supreme Court in demanding evidence of what that advice is in order to judge whether it was the right thing to do. How could the Supreme Court possibly get involved in such circumstances?

**Professor Craig:** The Supreme Court in its judgment does not arrogate to itself any power to ask for details of the conversation between the Prime Minister and Her Majesty. At no stage in the judgment does the Supreme Court do that. We need to dispel that idea—that is illusory. It did not do that.

What it did was simply to ask the Government, in the same way I have made the point already and Professor Twomey has made the point. It simply said to the Government, "This clearly is going to have a marked impact on the two constitutional principles of parliamentary sovereignty and accountability that we have identified, and it is particularly going to have that impact given the circumstances of what is happening and the time period up until Brexit, until Hallowe'en." The court simply said to the Government, repeatedly, "Tell us what the reason is why we need a five-week Prorogation." I repeat what I said earlier: that seems to me an absolute minimum of what is required in a liberal democracy for governmental justification of its actions.

**Mr Marcus Fysh:** Yes. I was asking about other cases, not Prorogation, but other Executive actions.

Q37 **Dr Rupa Huq:** The Queen's Speech, again. He is just saying that a 93 year-old woman would be dragged into doing a party-political broadcast for a very thinly veiled election that we have had every day of August campaigning for. That is another example of how her role is being undermined for party political reasons.

**Professor Twomey:** Two things here. Just for your interest, when these things happen in Australia, frequently the advice to the viceregal officer is in writing and is published. The controversial Prorogation in 2016, where



the Turnbull Government prorogued Parliament, this time for the purposes of bringing Parliament back—they did not control the Senate, but they wanted the Senate to sit to discuss a controversial Bill, so they prorogued. Because they were conscious of the fact that the Governor-General had a power to reject it, they set out in great detail in writing what the reasons for that were.

Equally, in Tasmania, at the time of the controversial Prorogation, you had the advice in writing, and it is the Government that chooses then, with the agreement of the viceregal officer, to make that evidence public. It might be in future that you do that in some kind of a formal way.

When it comes to the Queen's Speech, by the way, she is not completely and utterly powerless in relation to what is included in it. There was a marvellous circumstance in Australia where she was asked to read the Speech from the Throne when opening Parliament, and a private secretary, when seeing the draft of the speech, wrote back to the Australian Government and said, "For reasons of truth, I do not think we can say that." They forced the Australian Government to change the Queen's Speech. How often she might do that in relation to the United Kingdom, who knows, but she is not completely powerless in relation to these things.

**Ronnie Cowan:** For reasons of truth, it could be a very short Queen's Speech.

**Chair:** We are dropping a couple of questions that we think we have covered. We have David Jones and then Cheryl Gillan before we move to the next panel. I am very grateful for the patience of the next panel.

Q38 **Mr David Jones:** Professor Ekins, before the judgment you argued that Prorogation was a proceeding in Parliament for the purposes of Article 9 of the Bill of Rights. That was a point that was addressed directly by the court in its judgment, where it said, "It is not a decision of either House of Parliament. Quite the contrary; it is something which is imposed on them from outside." Can you explain why you contend that the use of prerogative power to prorogue is a proceeding in Parliament? Perhaps you and the other members of the panel could explain the implications of the finding of the court that it was not.

**Professor Ekins:** As is traditional, we are going to have different views across the panel, but I took the view before the judgment that it was a proceeding in Parliament and that even if the court were to find it was justiciable—Prorogation—and even if it would find that it had acted unlawfully, nonetheless there was no remedy that could be given because Article 9 protects it. I thought that because it seemed to me, in a sense, the Prorogation is obviously a proceeding in Parliament. It is literally carried out as such. It is recorded in the Houses' journals. It is understood as part of the proceedings, namely the part that brings the proceedings to a halt and makes provision for proceedings to begin again.



With respect to the Supreme Court, the account of Prorogation as something done from outside by a foreign body is a problematic frame. I think it is an act of the Crown in Parliament. Obviously, it is not an act of the Queen and Parliament, but the Crown participates in the proceedings of Parliament, including by way of Prorogation and various other modes of engagement as well. To classify this as not a proceeding because the Crown is an external body I think was a mistake and unpersuasive. To frame proceedings as though they must be decisions of the House or the Houses, which they are able to reverse, is to adopt a problematic understanding of a proceeding. This was part of the way in which the Houses of Parliament conducted themselves and how they brought their proceedings to an end, as you can tell by the official record kept, which is now being, I understand, expunged and retrospectively modified, which I think suggests an interference with a proceeding of Parliament, to my mind.

**Q39 Mr David Jones:** The implications of the court's findings?

**Professor Ekins:** The implications could be obviously opening Prorogation up to challenge, but maybe in ordinary times that will not be so significant. Professor Twomey has suggested the signification of Royal Assent might be open to challenge or at least be more likely the subject of litigation. Dissolution, if the Fixed-term Parliaments Act is modified. There would be various other acts of the Crown that bear on Parliament, so possibly the signification of Queen's consent, the giving or refusal of it, in the course of the legislative process. Maybe a refusal simply to table legislation in the first place could be viewed as somehow frustrating an unexpressed wish of a majority in the House of Commons to legislate. I am not sure any of these will come to pass, but I think these are all arguable implications.

It remains to be seen how far the judgment stretches, if you like. The opening paragraph of the judgment, as you may have noted, refers to this as a "one-off". I think that is problematic framing and I am not sure it is going to be true, but it may suggest something about the disposition of the court, namely that in subsequent cases there might be an attempt to cabin some of these implications. That partly turns on what the lower courts do. What does the next divisional court do with this judgment in relation to these sorts of challenges?

**Professor Craig:** It will come as no surprise that on this I disagree with Professor Ekins. Let me just put the other side or the other view. I believe that the Supreme Court was correct in its determination of what constituted a proceeding. I do not have time to go through the entirety of its argument. Suffice to say that the reliance on the Chaytor ruling of the House of Lords was convincing, and I think that its articulation of the meaning of the term was convincing.

What I would like to add is simply this, and I think it is reasonably important. It is axiomatic in law that when we look at the text of a statutory provision we do so in the light of the statute as a whole and the



purpose of the statute as a whole. To state the obvious, the Bill of Rights 1688-89 was passed for a number of reasons, the most important of which was to curtail unwarranted exercise of prerogative power. That is simply unarguable. A number of the provisions in the 1688-89 Bill of Rights speak to exactly that issue—no dispensing power, no suspending power, all of that kind of thing.

If I might suggest the following, imagine we transport ourselves back and we are reconfigured as a committee in 1688, just after the Bill of Rights has been enacted. We are rather proud to be in a Parliament in circumstances where we believe that we have circumscribed unwarranted Executive prerogative power. We are then told that Article 9 of the Bill of Rights enshrines protection against any use of the power of Prorogation by the Executive for any purposes whatsoever. Whereas we had thought we had enacted a statute, the terms and content and preface of which are all designed to curtail prerogative power, we are then told that a provision that by its terms protects only proceedings by the collectivity as a whole, or by individual Members when they are exercising their speech rights, is going to protect any exercise of Executive prerogative power, no matter what the circumstances are. That seems to me simply untenable as a matter of statutory interpretation if one takes the context, the letter and the purpose of the statute as a whole.

**Professor Twomey:** Can I just add that for the purposes of the Committee I have written an analysis of the various cases on the UK Constitutional Law Association's blog, which goes through the various cases? I take the view that Prorogation is not protected by Article 9, simply because Article 9 is not directed at protection of Executive actions. All the cases in the analysis are there for the Committee.

Q40 **Mr David Jones:** What about your point about the Royal Assent?

**Professor Twomey:** I think Royal Assent is different. I have thought about this a lot since, and I think Royal Assent is different because Royal Assent can occur only after the two Houses, or at least one of them, in all circumstances have taken action to pass the Bill. Royal Assent is the Queen acting as part of the Parliament on the advice of the two Houses, normally, and that is different from Prorogation because the Houses get no choice in relation to Prorogation. They do not get to approve it. They do not get to initiate it. It is not an action of the Houses and their choice, whereas the passage of legislation is. From that point of view, Royal Assent is in a different category.

Q41 **Dame Cheryl Gillan:** Finally, the court has identified a second fundamental constitutional principle, that of parliamentary accountability, which we have touched on a little bit before. There is a difference of opinion. Some people, such as Stephen Tierney, are very sceptical about the use of parliamentary accountability as a legal principle, whereas Professor Mark Elliott has suggested that the use made of parliamentary accountability was far less novel in this instance. I just wondered what you felt the significance and implications were of the court inking this



## HOUSE OF COMMONS

principle in the judgment. Shall we start with Professor Ekins? I do not suppose we will find a common view.

**Professor Ekins:** No, I am afraid not. There is disagreement between Professors Tierney and Elliott, and I agree with Professor Tierney on this point.

This is a very surprising judicialisation of the principle of parliamentary accountability—a principle that is a loose reference to a whole cluster of arrangements that go to the heart of our constitution, our political arrangements, our conventional understandings and connections, political dynamics. The courts, from time to time, rightly take note of this. They might have to understand what is going on, but more often they take note of it to make sure they stay away from it. It is a reason for judicial caution and reticence for not displacing or undermining the integrity of the political constitution. I think it is a very surprising use here as a way to impose new restrictions on the power that otherwise one would have said the law did not authorise restrictions.

In addition, I have said it before, but it is hard to square with that ringing statement of principle in *Miller* (No. 1) that conventions, even conventions given statutory recognition, are not for courts. I think the court was right then and it is wrong now.

**Professor Craig:** You will not be surprised that I take a different view. In terms of the difference of view between Mark Elliott and Stephen Tierney, I go with Mark Elliott.

The reasons I do so are twofold. First, it seems to me simply wrong to imagine or to suggest that the notion of parliamentary accountability has no legal salience. It clearly does have legal salience for the reasons that Professor Ekins put on the table but then dismissed. It has legal salience because it affects the standard of judicial review. If something affects the standard of judicial review, it is not affecting the standard of judicial review in some sort of interstitial, ancillary, minor way; it is actually shaping judicial review, and it is shaping judicial review in cases where the court thinks it is warranted, because it is saying there is parliamentary accountability, therefore, we should desist from intervention in the way that we might otherwise have done. To suggest that it is completely a political idea or constitutional convention with no legal normativity to it is, I think, just untenable.

Secondly, Professor Ekins suggested there is a difference here—that the courts, when they have used parliamentary accountability, used it to hold back, and in this instance they are using it to intervene. I think that is a short-sighted and mistaken conception of what is going on. In both instances what is being protected and respected is Parliament. It is Parliament. In the classic cases where they show judicial restraint, what is being protected and respected is Parliament, because the court avers that Parliament is exercising its review functions over topic X or topic Y. Therefore, the court should justifiably stand back.



In this instance what is happening is the court is also protecting Parliament. It is saying, "Parliament is being foreclosed from exercising the normal standard scrutiny and accountability role that it properly exercises in our constitution. When that happens in extremis, then that is a violation of constitutional principle, which the court can and should take cognisance of."

Q42 **Dame Cheryl Gillan:** Professor Twomey, is there a middle way?

**Professor Twomey:** What I was just going to tell you is the Australian way. First of all, the Australian courts have commonly recognised what we describe as the principle of responsible Government in constitutional interpretation, statutory interpretation and so on. The other point is that the Australian courts have also recognised that in developing the common law, you need to pay attention to constitutional principle.

What we are not talking about here—and I think the UK Supreme Court has taken the same point of view—is turning convention into law. What they are saying is that when the courts fulfil their normal role of developing the common law, they develop the common law in a manner that is consistent with constitutional principle, because it would be complete madness to develop the common law in a way that is inconsistent with your constitution. It is screamingly obvious that when you are interpreting the common law, you need to do so in a way that is consistent with the constitutional system under which you live. That is really all that the Supreme Court is saying here, that in terms of working out the common law constraints on Executive power, those common law constraints need to be interpreted in a manner that is consistent with your constitutional system and fundamental principles. That is not unusual when it comes to Australian law. The High Court said the same thing in the Lange case in 1997, and we have been working on the same basis ever since.

**Chair:** There are so many more things I would like to ask you about, but we must draw stumps. Thank you very much indeed for a most illuminating session, if frustrating for all of us we could not say more. Thank you very much indeed. Can we have our next panel, please?

## Examination of Witnesses

Witnesses: Rt Hon Lord Sumption OBE, and Professor Meg Russell.

Q43 **Chair:** We go straight on. Can I ask each of our two witnesses to identify themselves for the record, please?

**Professor Russell:** I am Professor Meg Russell, Director of the Constitution Unit at University College London.



## HOUSE OF COMMONS

**Lord Sumption:** I am Jonathan Sumption. I retired from the Supreme Court last December. I am currently a Visiting Fellow of All Souls College, Oxford.

Q44 **Chair:** It is a great pleasure to have you both here. Can I make an initial observation before we come to our first scheduled question? What is striking is that the judgment rests on a lot of case law, and particularly the case law around judicial review, which itself is to some extent invented law; it is not based on statute. Even the Case of Proclamations is used in a reverse way, because the Case of Proclamations was based on the prerogative not overturning statute, and there is no statute to rest upon in this judgment, so we have come a long way. To what extent do you think the judiciary is developing different juridical techniques, different understandings of its role, so that we have a different judiciary from what we had, say, before the 1960s and the invention of judicial review?

**Lord Sumption:** All common law is invented law in the sense in which you have described it, but the function of developing the common law has been exercised by the courts ever since the 16th century and arguably earlier.

The short answer to your question, "Are judges animated by different attitudes now than before the 1960s?" is yes, they are. They have exercised a much more intrusive role over the control of Government business. They have done that essentially because of the growing power of Governments and the growing importance, therefore, given the range of matters that Governments deal with, of having some reserve system of control over what they do.

**Professor Russell:** By way of disclaimer at the start, I should probably point out that I am the only non-lawyer that you are seeing today. I am not a court watcher, although I did find myself glued to sessions of the Supreme Court hearing in this case. I am a Parliament watcher, and I think that is probably why I am here.

I think it is well known that there have been a series of changes that affect the role of the judiciary in our system—things like the Human Rights Act and so on. We might come on to Jonathan Sumption's claims in his Reith Lectures about the rise of law and the decline of politics. We have already had something of an interesting conversation about why that has happened, and I think it is not necessarily to do with judicial overreach. Partly it is to do with politicians stepping into the background on difficult decisions, and partly it is the behaviour of civil society groups as well, who increasingly have taken to using the courts in order to get policy change that they are not succeeding in getting through the political process. I do not think there is necessarily fault here, but the ground is clearly shifting.

**Chair:** I am not suggesting there is any fault. I am merely inviting an observation.



Q45 **Eleanor Smith:** What do you think is a proper purpose or purposes for which Prorogation can be used?

**Professor Russell:** We heard this already to some extent from the previous panel. The typical Prorogation is a few days long, and it provides a dividing point between one session of Parliament and the next, or it provides a bit of breathing space before the Dissolution for a general election. That was not mentioned I think in the previous panel, but there is frequently a short Prorogation before the Dissolution, not least to allow the timing to work out, given the statutory period from Dissolution to an election, to make sure that the election happens on a Thursday. Those are the normal and perfectly proper uses of Prorogation.

It has been well covered that there have been various uses of Prorogation that could be seen as being more political. One of the ones that interest me is the case in 1948, when there was a Prorogation in order to bring on a short session in order to get a Bill through that the House of Lords had been resisting. As somebody who has studied the House of Lords that is of interest to me, not least because the Bill in question was the Parliament Bill, which became the 1949 Parliament Act.

People have argued that that was a political use of Prorogation, and it clearly was, but I think there is a big difference between that and some of the other cases that we have been discussing earlier today, because that was a Prorogation to facilitate what the House of Commons wanted to do. The House of Commons had passed the Act, and it was the House of Lords that was slowing it down. There is a distinction—and I think the Supreme Court made this distinction—between cases where Prorogation is to facilitate Parliament going about its ordinary business and Prorogation that is perhaps going to stymie the business of Parliament.

**Lord Sumption:** I do not think, with respect, that the question you have posed is capable of a definitive answer. It is easier to identify some things that are clearly outside the legitimate purposes of a Prorogation. I am a strong believer in the value of non-legal conventions in our public life, and I am sceptical of the value of judicial interventions, although I wholeheartedly approve of the most recent decision of the Supreme Court.

The social problem is that the Crown has enormous constitutional powers, which are exercisable by Ministers. The basis of that is that Ministers command the confidence of the House of Commons, so the use of those powers by Ministers of a minority Government to suppress parliamentary criticism is a very serious abuse of our constitution. Parliament is an instrument of Government in the sense that is not true of non-Westminster style constitutions. The Executive is part of Parliament. The House of Commons exists to criticise Government but also to support it, or else change it for another Government that it can support. Obstruction of criticism or obstruction of a motion of no confidence, in my view, seriously distorts the balance of our constitution.



**Professor Russell:** I might add, in agreement with some of the things that were said on the previous panel, there are of course questions as to whether Prorogation is necessary at all. It is part of our system, but we could move to a system of simply having five-year sessions between elections with recesses each year. There is not necessarily a need to prorogue. This has been debated in our system from time to time. It potentially would make the passage of legislation much easier if you did not want what Robin Cook, when he was Leader of the House of Commons, used to refer to as the "sessional cut-off" that led to, as he used to say, a "tidal wave of legislation" arriving at the beginning of the session and a rush to get it all through at the end of the session. We obviously have carry-over now, which does away with that a bit.

There are ways in which we could rethink the whole system to make the flow of legislation easier across the whole length of a Parliament, but that would have some significant implications. One of the biggest complications, ironically, would be with respect to the Parliament Act that I referred to before being pushed through in 1948-49, because under that Act the powers of the House of Lords to delay are based on a Bill being passed in two successive sessions. If you got rid of sessions, then you would have to do something else. You would have to rewrite bits of the Parliament Act to constrain the powers of the House of Lords, unless you wanted them to have a power of five years of delay.

It is interesting that, for example, the Scottish Parliament just sits in one session between elections. It does not use this process that we do, and it has been referred to that it is not universal overseas either. We could look at the whole thing.

Q46 **Eleanor Smith:** What do you think are the implications of the Supreme Court ruling for the continued use of power to prorogue Parliament? You have just said. Has the judgment clarified the existing rules, or do we need to legislate or make some changes that you have asked for, which you were just talking about, in practice?

**Professor Russell:** On the first part of that, I would defer to Lord Sumption, but it seems to me that it is now clear that there are some constraints on the power of Prorogation, but it is not clear where the limits are. We could keep going back and forth in a legal process and trying to work out where the limits are. My preferred approach would be to do something simpler and cleaner and say that, like the power to dissolve for a general election or the power to adjourn for a recess, assuming that you want to keep Prorogation at all, you give the decision whether to prorogue to Parliament. It might be a proposal from Government, but it would need parliamentary approval.

Alternatively, I thought the suggestion from Professor Twomey was interesting that the Executive retains the power to prorogue but that Parliament can petition the Speaker to be unprorogued. There would be an interesting parallel there with recall from recess, because the inability of Parliament to bring itself back from recess has been controversial at



## HOUSE OF COMMONS

various times in recent years. One of the ideas has been that MPs should be able to petition the Speaker to get a recall from recess. If you were doing it from Prorogation, you would want to look at recess as well. Rather than arguing over the boundaries of it, I think the easiest thing to do is to give the ultimate decision to Parliament itself.

Q47 **Chair:** This could be done procedurally, not necessarily legislatively?

**Professor Russell:** No.

**Lord Sumption:** In answer to that last point, I do not think it can be done procedurally because the royal prerogative is a question of law, and the law would have to be changed to abolish it, effectively. If the law is to be changed, I think that has to be done by statute. The simplest and cleanest way to do it—and I entirely agree with Professor Russell about this—would be to say that the Prorogation requires a resolution of the House of Commons.

I think there are problems about the current state of the law post the Supreme Court, and you have essentially touched on them. There are two parts of the Supreme Court's reasoning. One of them effectively says—this is not their language but it is my summary—that it is intolerable that a Government can disregard the conventions and simply leave a void in which Governments are subject to no relevant control at all, apart from political control, which, in a situation like the one we are in now, would probably come too late. There is a second aspect of this judgment that is much more problematical, namely the test that it has laid down for deciding when Parliament can be prorogued and when it cannot. The test is that there must be a reasonable justification for doing it. The Supreme Court did not have to decide whether there was one in this case because the Prime Minister did not put forward a justification. I think that was a serious misjudgement.

If ever the Government do put forward a justification for reasons other than ordinary business management, the criteria for deciding whether that justification is reasonable will almost invariably be political. Suppose that the Prime Minister had said, "I cannot be expected to negotiate with the EU with all this noise going on in the background undermining my negotiating position." People might or might not have agreed with that, but what is absolutely clear is that the only criteria by which you could decide whether that was a good enough reason would be political. There are no legal criteria for deciding what is a sufficiently good political reason justifying closing down Parliament. That is why it seems to me very important that before we get another case of this kind, the decision should be handed back to Parliament in the form of a statutory requirement that there should be a notice.

Although the Supreme Court said the circumstances will never arise again, I think one has to treat that with some caution. First of all, what is unexpected almost always does happen. Even if you do not know which



unexpected event is going to happen, something unexpected is going to happen.

Secondly, there is a long history, not in this country on the whole but in Australia and Canada, of political Prorogations. I think the consensus would be that the successive Prorogations of the Canadian Parliament—in particular the Prorogation by the Harper Government in 2008, when it lost its majority as a result of the departure of one member of its coalition—was an abuse and that probably the Governor General ought not to have agreed to it.

It does seem to me that we have a system in which the criteria, whether you agree with it or not, must be a matter for Parliament itself. You cannot leave it entirely to the Executive. I think it is undesirable in the interests of the court and the constitutional integrity of our system that it should be decided by judges. It has to be decided by Parliament.

**Q48 Chair:** What do you say to the argument that Parliament did decide it by default by failing to express an opinion on the matter and failing to remove the Government because it did not want Prorogation? The implication, if you leave a Government in office with confidence, is it has these powers and, therefore, it has the right to exercise these powers.

**Lord Sumption:** I find it very difficult to read that much into Parliament's inaction, bearing in mind that it reassembled on 3 September for a very short period. The only thing that it could have done, I would have thought, was pass a resolution, but the present Government and Mrs May's Government made it perfectly clear that they did not think they would necessarily be bound by resolutions short of statutes. They could have passed a statute. I think that what they decided was that in the short time available it was better to concentrate on passing the Benn Act. I would be very cautious before drawing too many positive conclusions from the mere negative.

**Professor Russell:** If I could add to that, I thought it was rather disingenuous of the Government lawyers to suggest that Parliament could have done something about this. It would have been very difficult for a number of reasons. In terms of when it should have done something, we have heard, going back to the slightly longer history, that there was an attempt to amend the Fixed-term Parliaments Bill when it was going through Parliament—a proposal from Chris Bryant that Prorogation ought to be limited. That was resisted by the Government for reasons that might be obvious, I suppose, because this is a constraint on their powers and they would always be inclined to resist if they can.

Before, in the run-up to this announcement to prorogue, of course, it was a very hot topic in the Conservative leadership contest. The Chair has already referred to this and his own views on it and the advice that he gave to candidates. Several members of the Cabinet had indicated that they did not think this would be the right way to act. Boris Johnson himself had said that he was not attracted to it. You could say that in a



sense parliamentarians had been led to believe it would not happen. Therefore, when it did happen, it was quite a shock. As Lord Sumption says, there were very few days when Parliament was sitting.

I am told that there was discussion among some of the so-called rebel alliance on whether to put aside the Benn Bill and have a Bill to prevent Prorogation, but there were three obvious problems with that. First, they did not have one ready because they had not been expecting this to happen. Secondly, if they had tried that and it had failed, they would have lost the only opportunity that they had to get the Benn Bill through. Thirdly, which is a rather finer point, it seemed very likely that any Bill to limit Prorogation—which, as Lord Sumption says, would be the only way of being sure to be able to constrain it because a resolution might not have been considered enough—so a Bill attempting to constrain the prerogative, would very likely have been judged to engage what is called Queen's consent. Therefore, there would have been an Executive veto on that Bill, so it very likely would have failed and the opportunity to pass the Benn Bill would have been lost.

The only other option they had, of course, was to pass a vote of no confidence in the Government in that time and replace it with a Government that would have asked for the Prorogation to be reversed. Again, you have a very short time period there not only to have a vote of no confidence but to get an alternative Government. If you did not manage to do it within the time, you would have triggered the Fixed-term Parliaments Act period, during which time, with Parliament prorogued, the Prime Minister would have been able to fix a general election date, and there were obviously fears that that general election date could be after 31 October. I think that Parliament's hands really were tied. I suspect—although I do not know, because this would be the subject of their internal discussions—that this may have been one of the things that influenced the court. It seemed perfectly clear to me.

**Lord Sumption:** I doubt whether it influenced the court, but I agree with every word that Professor Russell says.

Q49 **Mr Marcus Fysh:** Some have said that the issue of ultra vires within the judgment was something that was in effect because the Executive in the UK has never in fact had the authority to prorogue Parliament. I understand, Lord Sumption, that you might have a slightly different view. I wonder if you could explain where that opinion comes from and why you might take a different view.

**Lord Sumption:** Ultra vires is a subject on which the courts have got into a terrible muddle because they have never been able to make up their minds on any very satisfactory criteria—whether it means that the Government or the decision maker simply lacks the power to do it at all, so that the attempt to do it is just a non-event, or whether it is another word for abusing a power that unquestionably does exist. The term “ultra vires” has been used to describe both things, although they are obviously conceptually completely different. Without seeking to evade your



## HOUSE OF COMMONS

question, I think that life would be simpler and clearer if we did not use that particular expression.

The decision undoubtedly was that it was unlawful, and that was a decision that was radical in its reasoning but very conservative in its result. I agree with what Professor Craig has told you earlier today that this did not simply come out of a clear blue sky. The exercise of the royal prerogative by Ministers has been reviewable for 25 years since 1984, the decision in the GCHQ case. The law has always been careful that there are very few, if any, unlimited powers. The classic statement is that of Lord Diplock in a slightly earlier case, where he said that Ministers are responsible to the courts for the legality of their decisions and to Parliament alone for their policies and the efficiency with which they carry them out. The courts have never accepted at any time that Ministers can be responsible to absolutely nobody for what they do, and the problem about this Prorogation was that it created a period of five weeks when there would have been effective responsibility for nobody, and retrospective political sanctions of the kind suggested as appropriate by Professor Ekins would in all probability have come too late.

**Q50 Mr Marcus Fysh:** What are the implications for our understanding of Executive power when it comes to other types of things? We were discussing earlier the idea of the advice to the Queen on who to send for. That is a convention, it is not strictly an Executive power—i.e. it is the reserved power of the sovereign—but it clearly is analogous from one point of view. What are the implications? Is anything reviewable?

**Lord Sumption:** I do not think you can assume that the reasoning behind the decision on Prorogation can be transposed to that or many other contexts. Prorogation is in some ways a very self-contained and slightly eccentric island of the law and the reasoning of the Supreme Court is very specifically directed to Prorogation. I cannot see the court interfering in the process by which the Queen decides who to send for, and I think that, although famously Mr Macmillan did tender very forthright advice to the Queen about his own successor, the correct view is that the Queen is not bound by his advice in circumstances where he is an outgoing Minister.

The point that you raise does, I think, raise one very significant broader question. We have a hereditary Head of State. We have no constitutional referee in areas that are not necessarily covered by law because the Queen, by constitutional convention, is required to accept the advice of her Ministers. The result is that the monarch is incapable of performing the function of referee of last resort on constitutional issues that is performed by nearly every other non-executive Head of State in the world.

Now, one understands that her very delicate position as a hereditary monarch is the justification for that. However, for example, in the Netherlands, where they also have a hereditary monarchy, the Queen takes an active but not a personal role in the formation of Governments



by appointing a commissioner whose job it is to negotiate with the various interested parties until a consensus can be found to support a particular Government. It is important, in the longer term, that we should devise a system that enables the powers of the monarchy to be exercised and that frees the monarch from the exclusive dependence on the advice, often self-interested, that Ministers give her.

My own view about this, which I have expressed earlier, is that the Privy Council is the institution through which the royal prerogative is exercised. I think that there should be a constitutional committee of the Privy Council, which would have some lawyers but a minority of lawyers, that would be charged with giving the monarch independent advice on the constitutional propriety of things she is being asked to do by Ministers, especially in areas that are governed by convention and not by law.

**Professor Russell:** If I might just add something, these are very interesting ideas but I wanted to come back to your question from a couple of angles. First, I think it was established on the previous panel—I do not know whether we will come on and talk more about this later—that on the matter of appointing the Prime Minister, the Queen genuinely does act as a longstop. She does have discretion on that if a Prime Minister has lost the confidence of Parliament. I do not think the courts are needed as a longstop on that particular thing.

With respect to whether we are entering now some kind of free-for-all where all Government powers are up for judicial review and so on, as the court said and has already been referred to, they saw this judgment as a one-off.

Lord Sumption has referred to Prorogation being, I think, a funny little island. The point at the very core of this case is that the place where the courts usually ought to kick things that might be seen as not their business was not available to have the matter kicked to it. The matters on which the courts are usually criticised or can be criticised for meddling in things that are political and not their business are matters on which Parliament, as the sovereign body in our constitution, ought to be deciding. This was one thing that the courts could not refer to Parliament because Parliament clearly did not have the power to unprorogue itself.

In that respect, this is a one-off. It was precisely about the sovereign body in our constitution, the head of the political constitution, being shut down, and therefore the legal bit of the constitution having to step in to resurrect it. I am not sure if it is the start of something new. It might be, as the court says, a one-off. Having said that, of course I am not a court watcher and I am not a lawyer.

**Lord Sumption:** I broadly agree with that.

Q51 **Chair:** Can I ask one or two supplementaries? Presumably Her Majesty does privately take legal advice and if she thought she was being asked to do something illegal she would want to have a conversation—albeit



privately—with the Prime Minister about it, on the basis of that advice?

**Lord Sumption:** I am not sure that that is so. I do not know, from the inside. I would think that the Queen was certainly entitled to ask the Prime Minister to lay before her the view of the Attorney-General, but there would be serious problems about her taking legal advice outside the framework of Government altogether. I am not aware of any occasion where she has sought to do so.

Q52 **Chair:** Your mechanism is basically recommending that she should be able to do that, from this special constitutional committee of the Privy Council?

**Lord Sumption:** Yes. That would not simply exclusively be legal advice. I would envisage a committee of the Privy Council that would comprise elder statesmen with a minority of legal members.

Q53 **Chair:** Secondly, we are discussing, of course, what the sovereign's discretion is in the event that the Prime Minister has tendered his or her resignation. There has been a suggestion that in the 14-day period the Prime Minister would not seek to facilitate a handover to an alternative Administration on the basis of his belief that there would not be a Government that he could recommend to the sovereign that would command confidence. Would the court be minded to intervene in that process, if the sitting Prime Minister was seen to be frustrating the handover to a different Administration by refusing to resign?

**Professor Russell:** Essentially, it should not be seen as the job of the Prime Minister to choose the next Prime Minister. We may get into talking about minority government later. I think a lot of these things get confused in the context of minority government, which we are not very used to. It is fundamentally the position of Parliament to recommend to the Queen who ought to be recommended as an alternative Prime Minister.

One of the difficulties with the Fixed-term Parliaments Act is that it does not set out any specific mechanism for Parliament to do that. That is another gap that might need to be filled, but the reason for that gap is probably that what was envisaged when the Act was written was that you were talking about something like a coalition Government where one of the coalition partners decides to depart and join with the official Opposition to form an alternative majority. You have reliable voting blocs within the House of Commons and it is fairly clear, therefore, who the Queen ought to be appointing as an alternative Prime Minister. The difficulty in this Parliament, which is bringing all this to the fore, is that it is so fragmented, there is so much division within the major parties and so many little groups and people acting as independents, that it is not clear where the majority would come from.

Ultimately, in terms of the 14-day period, if we get into that situation, I think it is for Parliament to signal in some way to the Queen who ought to be appointed as an alternative who would enjoy the confidence. There are



## HOUSE OF COMMONS

various ways that you can imagine doing that. It could be anything from an early-day motion to a letter, a vote on the Floor of some kind or maybe a Humble Address to request that the Queen appoint a certain person. I think it is a mistake to see it as the Prime Minister's job to say who that should be.

- Q54 **Chair:** The Cabinet Manual describes it as the Prime Minister's job, in order to insulate the Sovereign from political controversy, that the Prime Minister must recommend to the Sovereign the name of a successor who is likely to command the confidence of the House of Commons. My question is different. Suppose the Prime Minister just does not want to do that, because he wants a general election, and so he does not resign.

**Lord Sumption:** The assumption behind the 14-day provisions of the Fixed-term Parliaments Act seems to be that the Prime Minister will resign if it becomes clear that somebody else commands the confidence of the House. The problem about the Act is that the second resolution, that the House does have confidence in Her Majesty's Government, assumes that by then there is another Government in place in which it has confidence but without describing how that Government is to come into existence.

My own view is that the Prime Minister is entitled to squat in No. 10 Downing Street until it does become apparent—and a Loyal Address might be one way of doing it—that there is an alternative Government that would command a majority and that he is then bound to resign. My reason for thinking that is that the Fixed-term Parliaments Act simply cannot work in any other way, and the courts would have to say that.

- Q55 **Chair:** Would the court be likely to enforce that, if he squatted?

**Lord Sumption:** They would, because a statute is by definition justiciable in all its respects. The courts would have to decide what the 14-day provisions meant and they will not simply confine themselves to woodenly reading the language; they will say, "In order that this can work, it must have been intended that this or that should happen."

**Professor Russell:** You mentioned the Cabinet Manual. As it happens, I have taken a little fragment from paragraph 2.19 of the Cabinet Manual—please do not test me on any others; this is the only quotation I have. It says, "The Prime Minister is expected to resign where it is clear that he or she does not have the confidence of the House of Commons and that an alternative government does have the confidence." The comment in *The Sunday Times* this weekend from, supposedly, a senior Cabinet Minister, that, "There is nothing in the Fixed-term Parliaments Act that says you have to resign. The Queen is not going to fire the Prime Minister. She would dissolve Parliament and let the people decide," I think is a statement in contravention of the Cabinet Manual. The Cabinet Manual describes what should happen.

- Q56 **Chair:** The Cabinet Manual describes what should happen but it is also



## HOUSE OF COMMONS

correct that there is nothing in law.

**Professor Russell:** Of course. The Cabinet Manual is not law. But I am not sure what you would say—

Q57 **Chair:** From what Lord Sumption is saying, we might well find that there is a law.

**Lord Sumption:** I think it is a correct statement of what the Fixed-term Parliaments Act 14-day provisions must mean if they are to be workable at all.

**Professor Russell:** I am not sure whether the Queen would be guided by the Cabinet Manual.

**Lord Sumption:** The problem really is that I think that the Queen will wish to avoid any kind of intervention at all. It is true that in theory, as Professor Russell rightly says, the Queen does have a discretion in the formation of Government, but frankly I think that in current conditions she would do almost anything to avoid exercising that discretion. Somebody else has to do it. We have to amend the Fixed-term Parliaments Act to make it clear how that is going to happen.

**Chair:** We must move on. Ms Huq.

Q58 **Dr Rupa Huq:** Dr Huq. I have a PhD but I am not a professor like everyone else is.

**Lord Sumption:** I am not a professor either.

**Dr Rupa Huq:** That makes two of us. The Supreme Court found that the Government did not present any reason, let alone a good reason, for this prolonged Prorogation of five weeks, so they did not judge whether the Government had reasonable justification. That appears to hint that we might be opening the door for future reasonable justification assessments. Do you think those might become more commonplace?

**Lord Sumption:** This takes one back to the discussion that we had earlier. We do have a problem because I do not think that one can assume that political Prorogations are a thing of the past. What I think we can assume is that because of the Supreme Court judgment, any Government that wishes to engage in a political Prorogation will put forward a large number of supposedly plausible reasons for doing it. The court will then have to decide, first, whether those are the true reasons, and secondly, whether they are a reasonable justification. I have serious misgivings about courts engaging in that exercise, which is why I think this decision should be returned to Parliament by way of a motion in the House of Commons.

Q59 **Dr Rupa Huq:** If this Government had the thumping big majority it craves, none of this would apply?

**Lord Sumption:** It may well happen again. After all, there have been at least five political Prorogations in the history of Canada, all but one within



## HOUSE OF COMMONS

the last half-century. This is not a completely extraordinary event and I think that we must expect that, not necessarily soon but sometime, we will have to face this problem again. We should be forearmed.

**Professor Russell:** I agree with that. It goes back to what we were saying before about replacing the Prorogation power operating as it does now with one that gives the power to Parliament. Jonathan is maybe being a bit gloomy in saying that these things will happen again, but of course it is the case that once a taboo has been broken, habits can form. The court has squashed this particular Prorogation, but if people wanted to start gaming the system in future, playing around with shorter lengths of time and some reasons that might or might not be considered inadequate, maybe they could do so. It might be better just to knock the whole thing on the head and say that the House of Commons must decide whether it wants to be prorogued as it decides whether it wants to be adjourned or dissolved.

Q60 **Dr Rupa Huq:** Do you see a possibility of this reasonable justification assessment being performed by courts? You would rather it was Parliament, but could you foresee that happening?

**Lord Sumption:** It is undesirable that a decision that in almost all cases is going to be decided on purely political criteria should be made by the courts. It is undesirable on objective constitutional grounds and I think it would undermine the independence of the courts in a way that is undesirable in a much broader sense.

I think that Professor Craig was right to say to you, an hour or so ago, that in exercising this power to decide whether the justification was reasonable the courts would give a generous margin of discretion to the Prime Minister, but that in itself can be problematical. One must expect his generous margin of discretion to be exercised in his own political interest, and suppose that Parliament took a different view? I am not sure that the answer is to allow the courts to decide something that is as broad as that because that just aggravates the problem arising from the political nature of the question.

**Professor Russell:** It is worth going back again to say those words "minority Government". At times of majority party Government, or even majority coalition Government if you have a stable coalition, these kinds of tensions are very unlikely to occur. However, maybe we need to fix some of these things in anticipation of a future minority Government or unstable Government situation. Most of the time we would not need the provisions and it would be a pure formality that the House of Commons voted, because it would vote in line with what the Government wanted, because the Government and the majority of the House of Commons would be in agreement with each other.

**Lord Sumption:** We may well be heading for a period when there will be more minority Governments or more coalition Governments, and when



## HOUSE OF COMMONS

the stability that we have taken for granted for many years, until recently, will disappear.

- Q61 **Dr Rupa Huq:** Yes. All the polls are predicting we might have a Government with one-third of the vote or even less.

Does the reasoning used for justiciability open the possibility of using a prerogative power in a new or extended way that impinges on a constitutional principle or some other law, so long as reasonable justification can be provided?

**Lord Sumption:** As I have said and as I think Professor Russell has also said, I think this judgment does not open up that possibility because it is concerned with a specific and a rather special sort of power exercised in a most unusual situation. After all, major political changes such as that which will follow from our departure from the EU normally happen by positive decision. A lot of the problems in this area have arisen recently because a major change is liable to happen by virtue of nothing happening by the relevant cut-off date, therefore there is a premium on inaction. This is a combination of circumstances that I cannot imagine arising very often.

- Q62 **Dr Rupa Huq:** Any other safeguards you would recommend?

**Lord Sumption:** On Prorogation? There is Professor Twomey's idea that you can unprorogue yourself by vote of Parliament, and I have to say I find that rather clumsy. I think it is much cleaner, neater and administratively easier for Parliament to decide whether it wants to be prorogued or not.

- Q63 **Ronnie Cowan:** It is interesting that we would appear to be going into a period where there are going to be minority Governments and coalitions and yet this place is completely inadequate at working in that sort of set-up. We are going to have to learn how to work together across parties to achieve anything or it is going to be a downward spiral.

Looking at the judgment of the Supreme Court, it made clear that Prorogation, in this case five out of eight weeks leading up to a major constitutional change in leaving the European Union, impinged on fundamental constitutional principles of parliamentary sovereignty and parliamentary accountability. What are the implications of the weight given by the court to these principles for how we understand the UK's constitutional arrangements?

**Professor Russell:** I have said that at one level this judgment can be seen as a kind of earthquake but at another level it can be seen as absolutely obvious. I have referred to it as "Politics 101" because it is very surprising to see a situation where the courts have had to step in in this way and that the Prime Minister has been found to have acted unlawfully on such a sensitive issue as the advice that he gave to the Queen. To see the court resurrecting Parliament is a pretty extraordinary thing. However, the principles that they advocated and that they articulated in the judgment are absolutely uncontroversial central



## HOUSE OF COMMONS

principles. I say “British Politics 101” because they are literally in the first class that I teach my British politics students: that the British constitution is characterised by parliamentary sovereignty, that Parliament is the highest authority, and that the Government are accountable to Parliament and ultimately—in extremis—can be removed by Parliament. What the court did was emphasise those principles as the reasons underpinning its judgment. In doing so it just stated some very obvious things about the way that the system works, which I hope will help people in future to understand the system better.

If there was anything very unusual about what went on here, I think it was the fact that the Government acted in the way that it did, requiring the court to respond in the way that it did. I had a look at what some of the other commentators have said and a lot of them agreed with the sort of thing that I said in terms of this being both extraordinary and mundane. Professor Sionaidh Douglas-Scott from Queen Mary said that it was a remarkable ruling but an orthodox one, Professor Mark Elliott from Cambridge said it was “both rooted in orthodoxy and path-breaking”, and Professor Mike Gordon from Liverpool University suggested—and I think this is a key point—that the ruling “may not even be most significant constitutional event this month”. Probably what he was referring to there was the actions of the Government, but there have been quite a lot of big constitutional things going on and I am not quite sure what he had in mind.

**Lord Sumption:** The contrary view, which I do not share but mention because I think it comes close to what you are concerned about, is the one expressed by Professor Ekins, which I think can be fairly summarised this way. He says that, yes, Parliament is sovereign and that is a proposition of law. There is no source of law higher than parliamentary legislation. However, accountability, he would say, is not a proposition of law; it is a mere political fact.

Professor Craig had some very critical words to say about that theory and I agree with all of them. It seems to me that parliamentary accountability is the whole basis on which the courts draw lines as to what decisions they may interfere with and which decisions they cannot. It is also an essential underpinning of the separation of powers because it enables the courts to distinguish between those matters in respect of which Ministers are responsible to the courts and those in which they are responsible to Parliament. Parliamentary accountability is a very familiar concept in law and it is simply nonsense to say that it has no existence except as a political fact.

**Professor Russell:** I am not saying this was a factor in the court’s judgment but I commented, as many of you may have seen, when the Prorogation happened on what was extraordinary about the Prorogation—not only that it was the longest Prorogation for 90 years but that it came at a time when the Prime Minister had been in office while Parliament was sitting for only one day, that Parliament had just been subject to a five-



## HOUSE OF COMMONS

week recess in the run-up to a deadline to make a very serious decision by the end of October, and that across the summer there had been a lot of debate in the media about the potential for a no-confidence vote in the Government.

It seems to me that shutting down Parliament at a time when there was this deadline and also there was at the very least a question as to whether the Government's confidence was going to be maintained was very problematic. That was in contravention of the principle of Government accountability to Parliament and the fundamental that I referred to that ultimately Parliament can remove the Government from office. It scrutinises the Government, it holds the Government to account for its actions, and if it is not satisfied with what the Government are doing, ultimately it can remove the Government; but it cannot do any of that if it is prorogued.

**Q64 Kelvin Hopkins:** My first question was going to be to Professor Russell, but you have anticipated that in your quotes, which are very interesting. I have them written down here.

I will go on to Lord Sumption, if I may. In your Reith lectures you have raised concerns about the expanding empire of law, as you put it, and the decline of politics. To what extent do you think the Supreme Court's judgment on Prorogation is a continuation of these trends?

**Lord Sumption:** The reason for objecting as I do to the extent to which the courts have intervened in what I would classify as political matters is that it undermines the legitimacy of democratic decision making. I do not think this judgment has that effect. There is a world of difference between the courts arrogating to themselves a power that politically ought to belong to Ministers responsible to Parliament, on the one hand, and the courts simply saying, as they have done in their recent decision, that this is a matter on which Parliament must be enabled to make decisions. The difference is fundamental.

**Q65 Kelvin Hopkins:** Talking about the Fixed-term Parliaments Act, it occurs to me very simply that we could have had a general election had there not been the two-thirds majority required from the House. If the Government had said they wanted it, with 50% plus one, we would have had a general election. In the end, handing the power back to the people to make the decision in a general election would have been the solution, surely?

**Lord Sumption:** The problem was correctly identified, I think, by Professor Craig when he considered this area, which is that to hand to the Executive unfettered discretion as to the timing of an election so that they can use it to their own electoral advantage gives them a weapon which can be used manipulatively, and historically quite often has been used manipulatively, to get a popular endorsement that they would not necessarily have received at any other time. The principle of the Fixed-term Parliaments Act seems to me to be wholly acceptable. What is



problematical about it is the detailed mechanics and in particular the mechanics of the 14-day period of grace, which has not been properly thought through and has had the ironic effect of allowing Ministers to stay in power longer than they would have done under the previous system.

**Professor Russell:** Again, the looming deadline at the end of October is absolutely crucial here. It was relevant to the difficulties of the timing of the Prorogation—and even of the recess earlier in the summer, given the need to scrutinise the negotiations, the no-deal planning and so on—but it has also gotten tangled up with the operation of the Fixed-term Parliaments Act. If the deadline had not been hanging over us, perhaps the House of Commons would have voted for a general election. There is this fear of wasting time between now and the deadline, or potentially having a general election period that even spans the deadline. We are in a very peculiar period of politics here where we have the decision of the referendum hanging over us, we have the deadline and we have a minority Government. This is creating a very unhappy, almost purgatorial situation where we need to get beyond 31 October and do our best to put politics back on its feet.

Q66 **Mr Marcus Fysh:** Do you think that the arguable entry into the world of politics, in one sense, of this judgment means that it will extend into reviewing the Government's ability to make treaties?

**Lord Sumption:** No. I do not think that anybody is going to limit the Government's power to make treaties any more than they are already limited. The Government cannot, by making treaties, alter the law of England—or of the United Kingdom.

**Chair:** I am glad you slipped that in.

**Lord Sumption:** Yes. I am sorry about that.

It needs a statute to do that. Therefore, Parliament does get a look in there. The only areas where the Government can make treaties free of parliamentary interference are where the treaty has no impact on the internal law of the United Kingdom—for example a pure treaty of political alliance. Even in that context there is, of course, a convention that has always been observed since the 1920s when it was first formulated, the Ponsonby Convention, under which treaties are laid before ratification before both Houses of Parliament.

Q67 **Mr Marcus Fysh:** One of the intriguing things about the judgment was that it was supported 11 to zero. As a layperson reading the judgment it seemed to me to be highly unlikely, given some of the language in it, which was arguably straying into the florid at times—words like “extreme” in the context of “extreme effect upon the fundamentals of our democracy”—to have potentially been a point of contention. I would be extremely surprised if 11 incredibly distinguished jurists would have agreed on such language. I am interested in your view on how it could possibly have come about that 11 such people could have agreed to use



## HOUSE OF COMMONS

such language.

**Lord Sumption:** I sat in the Supreme Court for seven years and I have to say that the court includes a large number of people whose arms are very untwistable. I do not buy the theory that I have heard from many quarters that there must have been some draconian manipulation or some command that people should jolly well get into line.

I suspect that the reason why they steer well clear of the question of what the Government's reasons really were and whether they were reasonably justifiable is that if they had entered upon that territory, there would not have been unanimity. It seems to me perfectly legitimate for a court to avoid an issue on which they are not agreed in order to decide the case on a ground on which they are, and I think that is probably what happened. I have no inside knowledge, I should say.

Q68 **Dr Rupa Huq:** I just wondered what you made of the Attorney General's suggestion in the statement last week that we should replace the Supreme Court judges with a more American-style political appointee version.

**Lord Sumption:** That suggestion assumes that the political views of judges influence their decisions on questions like this. In a confirmation hearing, how would you satisfy yourself that you were going to get judges that were or were not going to reach the sort of conclusion that the Supreme Court did in this case? Would you ask them whether they believed in Brexit or whether they were Remainers?

To my mind confirmation hearings are, first, constitutionally inappropriate because they undermine the judiciary by associating them with political positions, and secondly, useless, as they have been for many years in the United States. Ever since Robert Bork's confirmation hearing in the late 1970s, there has been a perfect routine for these confirmation hearings. Whenever you are asked as a candidate how you would decide, you say, "I would have to listen to all the submissions of either side before coming to a view; therefore, I decline to say." That is the right answer and it is an answer that leads nowhere.

Q69 **Chair:** A better solution is to make sure that the judges are not compelled to take political decisions.

**Lord Sumption:** That is true.

Q70 **Dr Rupa Huq:** Some of the American ones who were appointed as conservatives turned out to be unexpectedly liberal.

**Lord Sumption:** Oh, yes. The moment you let judges out of your sight, they engage in untutored thinking.

Q71 **Mr David Jones:** Lord Sumption, after the Supreme Court judgment you wrote an article in *The Times* in which you said, "Political conventions are a better, more flexible and more democratic alternative to law. But if we are to avoid a wholly legal constitution, we must honour them." Then you



## HOUSE OF COMMONS

referred later in the article to what you described as the “constitutional vandalism” of the Prime Minister and went on to say that the natural result of that was that, “conventions have hardened into law. That is the effect of the Supreme Court’s decision.” You say that was very regrettable.

**Lord Sumption:** Yes.

**Mr David Jones:** Do you believe that this judgment has generally protected or will act as a protection to conventions in the future?

**Lord Sumption:** I hope so, because I hope that Ministers and others will learn that if they deliberately play fast and loose with the conventions on which our system is founded, they will end up with a much harder set of rules, which would be very unfortunate. They would be less flexible, they would involve more judicial intervention, and I think it is a thousand pities that the Government put itself in a position where the Supreme Court had to do what it did.

Q72 **Mr David Jones:** This lack of flexibility is why you refer to the outcome of the judgment as being “infinitely regrettable”, I take it?

**Lord Sumption:** Yes. Legal rules tend to be rules that shut stable doors after the horse has bolted. They then have to be applied to all the jumpy horses that are in the stable next door, with results that are often very unpredictable. It is a less satisfactory way of dealing with these matters. Our constitution, as Walter Bagehot said 150 years ago, is famously flexible. That has been a tremendous advantage. It has enabled this country to retain the same basic constitutional framework for 300 years of very radical change. There is no other constitution in the world, even the constitution of the United States, that has survived unchanged in its essential respects or been capable of adapting to new challenges to quite the degree that the British constitution has. That is something that we should welcome and value.

Q73 **Mr David Jones:** What more can be done to protect conventions, or do you think anything further needs to be done? Do you just hope that the Government will learn from this experience?

**Lord Sumption:** It is a question of shared political culture. If you destroy the shared political culture then nothing can be done. I very much hope that one lesson that people will learn from this is that they should respect the political culture. The ends do not always justify the means.

**Professor Russell:** It is very difficult. Our system clearly rests more on convention than many other systems do and that requires people to respect the conventions—to use the flexibility when it is appropriate but not to abuse the conventions and the traditions and not to see the law as the only constraint upon them—but all constitutions depend to some degree on convention and all depend on people behaving reasonably and respecting the rules and traditions.



## HOUSE OF COMMONS

If you go back to the point we were talking about before about the potential of a Prime Minister refusing to leave Downing Street if an alternative Prime Minister could command the confidence of the House of Commons, that is not a problem that comes just from the conventional nature of our constitution. It is tantamount to a President of the United States refusing to leave the White House if an alternative President had been elected, and I think it is equally difficult to deal with in both systems. If you take it down to the level of ordinary people, it is like having an eviction notice served on you and refusing to leave your house. If you get to a stage where you are needing bailiffs, policemen and the National Guard to remove people, you have a society or a political system that basically is not functioning. We cannot function in that way.

**Q74 Chair:** If you are going to have a system where Parliament can impose laws on the Government that are contrary to its policy, all sorts of things are going to go wrong. In the United States the President has a veto power. This is not how our separation of powers operates because it assumes that the Government controls Parliament.

**Professor Russell:** This takes us back to the point of minority government. It is Politics 101, as I referred to before, which I think has been reinforced by the court case, that the senior partner in the British system is Parliament, not Government. The Government only is the Government because it has the confidence of Parliament and it relies on Parliament to get its legislation through. If Parliament legislates contrary to the will of the Government, that in itself is not a revolutionary act.

**Mr Marcus Fysh:** Except that—.

**Q75 Chair:** If I may: what do you do when you have a House of Commons that will wound but not kill? In reality, we know that this Government does not enjoy much confidence from this House of Commons but they do not have the guts to deal with it.

**Professor Russell:** That is the purgatory that I was referring to, and I think the answer ultimately is to get beyond 31 October. We are in this peculiar, unique situation—

**Q76 Mr Marcus Fysh:** Wait. My other point is that the very legitimacy of Parliament is undermined if you have a Speaker who is not acting by convention and is not honouring the conventions that are there within our constitution. It is a fundamental of our constitution that our Speaker is unbiased and that is arguably not the case in this instance, and that is affecting Parliament. Do you think, for example, that it is time to review the Bill of Rights to see whether proceedings of Parliament in certain circumstances can be reviewable by the Supreme Court? As it is the last bulwark against abuses of other parts of our convention, how can that not be a valid area for review as well?

**Professor Russell:** No, I do not. On the Speaker, I would say—obviously we are in very delicate water here and there is lots of controversy going on—that I think he would see himself as trying to facilitate the majority in



## HOUSE OF COMMONS

Parliament. The Speaker is subject to a very similar mechanism to the Prime Minister in that if the House of Commons does not have confidence in the Speaker, it can remove him. That is his accountability.

**Lord Sumption:** Also, it did not have to vote to take away the Government's control of the Order Paper as it did in May and again in September. There was a parliamentary majority for that.

Q77 **Chair:** Only by reinterpreting Standing Orders.

**Lord Sumption:** I think that the interpretation of SO24 was very questionable but the earlier ruling allowing MPs to take control of the Order Paper was based not on a Standing Order but on precedent. There, I think that the practice of Parliament must depend on what Parliament does.

Q78 **Chair:** No, there was no precedent on "forthwith".

**Lord Sumption:** The precedent was that you could not amend the business motion. The precedent was wholly in favour of the Government and it is perfectly true that the Speaker, with the support of the majority of Parliament, departed from that precedent. I find it hard to believe that any practice of Parliament can be like the laws of the Medes and Persians and incapable of alteration even with the consent of the majority of Parliament. I certainly think that in the case of SO24 it may well be that the proper approach would have been to amend the SO rather than simply to drive a coach and horses through it, but that is not a problem that arose in May.

**Chair:** The words of Humpty Dumpty come to mind.

**Ronnie Cowan:** Chair, I want to correct something you said about Opposition parties not having the guts to deal with this. I would interpret that as not being prepared to walk into a giant elephant trap. When the time is right, we will deal with this Government.

**Chair:** I accept that, but the House of Commons did have the option of having a general election before 31 October.

**Ronnie Cowan:** That is the elephant trap we are talking about, walking out of the EU with no deal.

**Chair:** No, if the election had taken place—well, I am not going into this.

Q79 **Dame Cheryl Gillan:** The gist of most of my questions in this section has been taken by colleagues. I just wanted to ask you: do you really think that that opening statement from the court is true, that this is going to be a one-off decision by the Supreme Court? Do you think that when the Supreme Court was put in position, this activity was envisaged to fall within its ambit?

**Lord Sumption:** If I may answer the first of your questions, I do not think one can count on this being a one-off because even in the context



## HOUSE OF COMMONS

of Prorogation there is too much of a history of it in other jurisdictions for one to be able to say that.

As to the status of the Supreme Court, I think there is a lot of misconception about this. The Supreme Court is simply the Judicial Committee of the House of Lords under another name, in another place, and with a much larger budget. That is the only change. The powers are the same, the procedures are the same, and the habits of thought are the same. There is nothing that the Supreme Court has done that the Judicial Committee would not have done before 2009.

**Professor Russell:** I am inclined to think this almost is a one-off. Any claims that we are moving to a situation where we are ruled by judges rather than ruled by Parliament I think is quite wrong. Our constitution retains its unique character: we do not have a written document that has a status above ordinary law; and Parliament can make or unmake laws. In those cases where the judges adjudicate and the legislature is weaker, we do not have that system. We have a system where Parliament remains sovereign, but Parliament cannot act if Parliament has been prorogued. That is the unique nature of this case.

It may not be entirely unique if, as Lord Sumption suggests, we have other arguments about Prorogation. The way to prevent that is to solve Prorogation as we referred to before, by handing that power to Parliament.

Q80 **Dame Cheryl Gillan:** I sit for the UK on the Council of Europe and, of course, have the responsibility of voting for the judges there. Lord Sumption, you raised concerns about the role of the European Court of Human Rights because it was inventing, in your view, additional rights that are quite contentious and far from fundamental. Do you see that any of the factors that we have developing in our own legal system here might lead to a UK court making decisions that have that consequence of inventing rights and laws?

**Lord Sumption:** There is a very radical difference, as I have said, between the courts intervening to preserve the powers and autonomy of Parliament and the court intervening to decide for itself matters that, on a traditional view, should be decided by Ministers answerable to Parliament.

However, I think your question is really getting at, "Are there signs that the UK courts may be taking over the mission creep that has affected the Strasbourg court for the last 30 or 40 years?" My answer is yes, there are not only signs of that but it has, in fact, been doing so for a good two and a half decades, if not longer. I explained in my Reith lectures why I thought that was not consistent with a democratic constitution save in respect of a very limited class of core rights—certainly a much more limited class than the British courts and the Strasbourg court have classified as justiciable rights. I share your concern.



Q81 **Chair:** To what extent is the sovereignty of Parliament now justiciable?

**Lord Sumption:** That is a hotly debated question. My own view is that the sovereignty of Parliament is not justiciable. It is not up for grabs. There are people who have suggested otherwise—judges, both in judgments and in extrajudicial statements. Personally, I deplore that. It seems to me that in an unwritten constitution we have only one sheet anchor and that is the sovereignty of Parliament. If you depart from that you create what amounts to an unamendable constitution that is wholly outside the control of anybody responsible ultimately to the electorate. I do not think that could possibly be justified. I think that on this, the late Tom Bingham got it absolutely right in his book on the rule of law and I deplore suggestions to the opposite effect.

Q82 **Chair:** By “the sovereignty of Parliament”, you mean in the Diceyan sense that Parliament has the power to make or unmake any law?

**Lord Sumption:** Exactly, and indeed that proposition was clearly reaffirmed in *Miller* (No. 1), reaffirmed by reference to the statement of Dicey itself.

Q83 **Chair:** The “Spider” letters case, the *Evans* case, seemed to overturn the provision of the Freedom of Information Act that explicitly allowed the Attorney-General to apply an exemption to the Freedom of Information Act. Was that not the court overturning statute?

**Lord Sumption:** Yes. I discuss this case in one of my Reith Lectures. In my view, it was a wholly impermissible act. It depended on the interpretation of the relevant statute but the Freedom of Information Act on this point—it is not clear on all points—seems to me to be abundantly clear, and I fear that the Supreme Court, and indeed the Court of Appeal before it, essentially took the view that they did because they disapproved of what Parliament had unquestionably done.

Q84 **Chair:** What should we do about that?

**Lord Sumption:** One solution, I suppose, would be to reinstate the thing in language that was even more emphatic, but ultimately if judges are not prepared to respect the meaning of Acts of Parliament there is very little that can be done about it. I very much hope that such a thing does not happen again. The courts have traditionally been very sensitive about any attempt to control the exercise of their own powers or displace their power of intervention. I think the courts ought to get used to the idea that there are some issues on which a Minister answerable to Parliament may be a better judge of the public interest than a judge.

Q85 **Dame Cheryl Gillan:** Is it a small step towards the consideration of electing judges as we do in Strasbourg, and in America?

**Lord Sumption:** The Strasbourg system is essentially a vetting system. The judge is nominated by the home Government and the council on which you sit decides whether they are suitable. It has to be said that



## HOUSE OF COMMONS

some of them—not, I have to say, from this jurisdiction—have proved to be remarkably unsuitable over the years.

Q86 **Dame Cheryl Gillan:** There are 47 members. Do you see it as a small step towards a more American-style system?

**Lord Sumption:** I hope not. The problem is that there is no European or Council of Europe system for nominating judges; it depends on the practice in the various member states of the Council of Europe. The starting point in this country, by comparison, is very different. We now have a non-political commission that nominates judges after taking extensive consultations, not from Ministers. We start from a situation where the factors that make it necessary for the Council of Europe to have a vetting committee just do not exist.

Q87 **Dame Cheryl Gillan:** If the court continue down that path, it starts to get more tempting.

**Lord Sumption:** I can see that you could extrapolate the practice of the Council of Europe and apply it in England. I hope that that will not happen and I do not think that the fact that the Council of Europe does it in rather different circumstances is likely to make it more likely here.

**Chair:** I would love to do an inquiry into how judges are appointed but I fear that might extend beyond the immediate remit of this Committee. We will draw stumps there but I would like to thank you both very much indeed for a very interesting session.