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Dear William,

Thank you for your letter further to my appearance before your Committee on 23 June to discuss the Dissolution and Calling of Parliaments Bill. I am grateful to the Committee for its sustained consideration of the Bill and its suggestions to further clarify the Government's position. I shall respond to each of your queries in turn.

<u>The source of the power to dissolve Parliament</u>

You have asked for the Government's view on what the source of the power to dissolve Parliament would be after the Bill is passed and for the legal basis and reasoning underlying the Government's view.

The Government considers that the source of the power to dissolve Parliament after the Bill has passed would be the prerogative. In the Government's view this prerogative power can be revived if express provision to this effect is made in the Bill. Such express provision is made by Clause 2 of the Bill which provides that the powers relating to the dissolution of Parliament and the calling of a new Parliament that were exercisable by the virtue of Her Majesty's prerogative immediately before the commencement of the Fixed-term Parliaments Act 2011 are exercisable again as if that Act had never been enacted.

I recognise that there is an academic debate about this issue. While you have cited witnesses to the Joint Committee on the Fixed-term Parliaments Act who disagree with the Government's position, there are others who support it. For example, in their evidence to the Joint Committee, Professor Mark Elliot, Professor of Public Law at the University of Cambridge has observed that:

"Given the scheme of the Bill, it is perfectly clear that the prerogative will be revived and that, from the entry into force of the Bill, the prerogative power of dissolution will once again be exercisable."[1]

[1] 'Repealing the Fixed-term Parliaments Act', Professor Mark Elliot, December 2020.

Lord Sumption expressed the view that:

"It seems to me that the effect of the repeal Bill, if passed in this form, would be not to recreate it by statute but to revive the common law prerogative. The reason why I say that is that clause 2 requires the courts to act as if the Fixed-term Parliaments Act had never been enacted. This is a deeming provision: they are required to pretend that it never happened, and if it had never happened, the prerogative would still be there."[2]

The Government believes there is a sound legal basis for its position. The courts have said that the revival of prerogative powers is possible. Bradley, Ewing and Knight[3] discuss the case law in this area as follows:

"*...where the statute restricting the prerogative is repealed, "the prerogative power would apparently re-emerge as it existed before the statute"*[4]*. This is subject to "words in the repealing statute which make it clear that the prerogative power is not intended by Parliament to be revived again or brought into use*"[5].

More recently in *Miller 1*[6] the Supreme Court took a slightly more cautious approach, stating that *"if prerogative powers are curtailed by legislation, they may sometimes be reinstated by the repeal of that legislation, depending on the construction of the statutes in question"*.

In the Government's view the Bill makes it very clear that in repealing the Fixed-term Parliaments Act (which curtailed the prerogative powers to dissolve Parliament), the intention of Parliament is to revive this prerogative. Even under the more cautious approach in *Miller 1* this will mean that the power is indeed reinstated.

Further support for the Government's position is provided by section 15 and section 16(1) of the Interpretation Act 1978. Although the general rule is that, *"where an Act repeals an enactment, the repeal does not…..revive anything not in force or existing at the time at which the repeal takes effect"*, this is subject to the appearance of a *"contrary intention"*. Not only is this position found in the Interpretation Act 1978, but it is also confirmed through common law.[7] The Government considers that Clause 2 provides very strong evidence of a contrary intention and so the Bill will revive something *"not in force or existing at the time"* of repeal, namely the prerogative power to dissolve Parliament.

You have asked *"[i]f the Government is not certain on what the source of the power to dissolve Parliament is, what considerations have been given to the legal and practical implications of this uncertainty"*. For the reasons I've set out, the Government does not consider that there will be uncertainty about the source of the power to dissolve Parliament. As stated, the Bill makes the position perfectly clear.

However, even if there were some uncertainty the implications of this would not be significant. The Government agrees with the former First Parliamentary Counsel Sir Stephen Laws who in his evidence to the Joint Committee expressed the view that the question of whether or not the prerogative powers can be revived is a "red herring":

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[2] Oral evidence given on Thursday 7 January 2021 in response to Question 77.
[3] *Constitutional & Administrative Law* (Pearson, 17th Edition), page 269.
[4] *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, Lord Pearce at page148.
[5] *R v Foreign Secretary, ex p CCSU* [1984] IRLR 309, at page 321 (Glidewell J).
[6] *R(on the Application of Miller and Another) v Secretary of State for Exiting the EU [*2017] UKSC 5, paragraph 112.
[7] *Kay v Goodwin* (1830) 6 Bing 576, 582. "I take the effect of repealing a statute to be to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed except for the purposes of those actions which were commenced, prosecuted and concluded whilst it was an existing law."

“[i]t is perfectly plain that the intention of the Act is to restore the situation to what it was before the 2011 Act, and therefore the law will then be indistinguishable from what it was before.”[8]

The words in Clause 2 will tell the courts to treat the powers to dissolve and call Parliament as if they were prerogative powers[9]. The Government believes this means the concern raised by Professor Alison Young falls away.

The non-justiciability or ‘ouster’ clause

As regards the Committee’s first point, the Government shares the Committee’s conclusion that *“it was the longstanding and widely understood position that the exercise of the prerogative power to dissolve Parliament was not reviewable by the courts”*. It is also agreed that prior to the 2011 Act there was no express statutory provision regarding the non-justiciability of that prerogative power.

However, the Government does not agree that its explanation of Clause 3 is “inaccurate”. The inclusion of this clause in the Bill does not necessarily mean that there is a change to the old arrangements. As explained in the Explanatory Notes[10] and the debate at Second Reading, the purpose of Clause 3 is to make clear (for the avoidance of doubt) and preserve the longstanding and widely understood position.

Support for this characterisation can be found in the Independent Review of Administrative Law which indicated that Clause 3 can be understood as a “*codifying clause that seeks to prevent the courts from in future declaring something to be justiciable that is currently understood to be non-justiciable*” [emphasis in original]. It concluded that it *“could be argued that Clause 3 ….simply restates the position that everyone understood obtained before the Fixed-term Parliaments Act 2011 was passed”*[11].

Your letter states that Clause 3 does something “new” in reaction to the *Miller-Cherry* case[12]. It goes on to say the Committee has some sympathy with this but it considers the Government’s concerns are “misdirected” and there is *“no read-across from prorogation to dissolution”*. Whilst the Government agrees with the Committee that this Bill is not about Miller-Cherry nor about prorogation, the Government’s view is that this does not properly reflect the effect of, and rationale for, Clause 3.

As the Explanatory Notes set out, since *Council of Civil Service Unions v Minister of State for Civil Service*[13] (the *GCHQ* case) some prerogative powers that were previously considered to be non-justiciable have been reviewed by the courts. For example, the prerogative powers to grant passports[14] and grant pardons[15], as well as the prerogative of mercy[16] have been held to be justiciable. The Independent Review of Administrative Law documents this *“decline in the importance of non-justiciability”*[17] in some detail. In particular it notes:

“....*the past 40 years or so have seen a steady retreat within the law on judicial review away from the view that exercises of certain public powers are by their very nature non-justiciable in*

[8] Paragraph 111.
[9] See also the evidence of Lord Sumption to the Joint Committee in response to Questions 77 and 78.
[10] Paragraph 21.
[11] Paragraphs 2.81 to 2.84.
[12] Miller v The Prime Minister, Cherry and Others v The Advocate General for Scotland [2019] UKSC 41.
[13] [1985] AC 374.
[14] *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] 1 QB 811.
[15] *R v Secretary of State for the Home Department, ex parte Bentley* [1994] QB 349.
[16] *Lewis v Attorney General of Jamaica* [2001] 2 AC 50.
[17] Paragraph 2.11.

favour of the view that the exercises of those powers are either justiciable or reviewable on some grounds but not others"[18]*.*

"Since the decision in GCHQ, the range of prerogative powers that are regarded as reviewable on one or more grounds has steadily expanded, so much so that the latest edition of De Smith's Principles of Judicial Review feels able to assert that "no power – whether statutory, common law or under the prerogative – is inherently unreviewable." To similar effect, the authors of a casebook on administrative law argue that it is "meaningless to classify particular powers...as non-justiciable" and that the principle of non-justiciability should be seen as focusing instead on whether "a given exercise of power raises an issue upon which courts are able to adjudicate".

As we will explain below, we think this view of the law overstates the position – at least so far as the common law of judicial review is concerned – in that there are still some powers that are non-reviewable on any ground. But the direction of travel in favour of regarding more and more prerogative powers as reviewable in principle is undeniable and has existed for many years."[19]

It is in the context of this direction of travel that the Government has chosen to include Clause 3 in the Bill. It is to make clear and preserve the "no-go" area[20] around the prerogative powers relating to the dissolution and calling of Parliament: the bottom line is that Clause 3 is all about returning to and protecting the status quo ante.

In relation to the Committee's second point, the Government rejects the contention in your letter that including Clause 3 in the Bill *"does not make sense"* and may unnecessarily generate conflict. It is accepted that one option when repealing the Fixed-term Parliaments Act 2011 and reviving the prerogative powers to dissolve and call Parliament would have been simply to rely on the longstanding and widely understood position that the exercise of these prerogative powers are not reviewable by the courts. However, given the judicial direction of travel described above [and that the prerogative powers are being revived by the Bill], the Government has [quite legitimately] concluded that the better option is to include Clause 3 in the Bill.

The Government appreciates that traditional ouster clauses are not without difficulty and that they are construed narrowly by the courts. However, the Government's position is that (a) this does not mean that Parliament is not entitled to seek to set out where the boundaries lie; (b) in any event, the dissolution and calling of Parliament is an area where the courts may be more likely to accept a non-justiciability clause than, for example, a case where individual rights or obligations are concerned; and (c) Cause 3 has been drafted with careful regard to the case law.

Point (a) is supported by the conclusions of the Joint Committee on the Fixed-term Parliaments Act as follows:

"*The majority of the Committee accepts that the general presumption is that Parliament does not intend to oust the jurisdiction of the courts. The Executive should be accountable to both the courts and Parliament. Nonetheless, in principle, the majority believes Parliament should be able to designate certain matters as ones which are to be resolved in the political rather than the judicial sphere, and Parliament should accordingly be able to restrict, and in rare cases, entirely to exclude, the jurisdiction of the courts. This position is not inherently incompatible with the rule of law, even if ousting the courts' jurisdiction will often be at tension with it so that a complete ouster will rarely be appropriate. In this case, when the power in question is to enable the electorate to determine who should hold power, they consider the ouster is acceptable."*[21]

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[18] Paragraph 2.6.
[19] Paragraphs 2.16 and 2.17.
[20] Independent Review of Administrative Law, paragraph 2.4.
[21] Paragraph 162.

"The majority of the Committee agrees it is unlikely the courts would intervene in cases related to the prerogative of dissolving and summoning Parliament, but it is clear that decisions which would formerly have been considered non-justiciable are now being questioned in the courts. There has been a change in the constitutional landscape since Lord Roskill made his observations in the GCHQ case. We consider there are many reasons for this, including the changed position of the Lord Chancellor as a source of advice to the Government and the creation of the Supreme Court. But that being so, it is appropriate for Parliament to make clear where it thinks the constitutional boundaries lie."

The Independent Review of Administrative Law has also stated "*[i]t is ultimately for Parliament to decide what the law in this area (as with every other area of law) should be, and it is for the courts to interpret what Parliament has said*."[22]

On point (b), the Independent Review of Administrative Law has suggested that because Clause 3 can be characterised as a "*codifying clause that seeks to prevent the courts from in future declaring something to be justiciable that is currently understood to be non-justiciable*" [emphasis in original] it may not be correct to regard it as being an ouster clause at all (because there is nothing to oust). Therefore Clause 3 *"may not face the kind of judicial pushback that normally attends attempts by Parliament to use "ouster clauses" to cut back on the ambit of judicial review"*. In the light of this the Review observed that *"it could be argued that there is nothing objectionable in Clause 3"*[23].

De Smith's *Judicial Review* notes that a court's willingness to review a decision despite an ouster clause depends partly on the subject matter concerned: "*[w]here exclusionary formulae were contained in statutes dealing with foreign relations or the working of the parliamentary system, there was a much stronger probability that the courts would give the prohibitive words a literal interpretation."*[24] It is noted that there is an ouster clause in section 4(7) of the Parliamentary Constituencies Act 1986 which seeks to prevent *"the validity of any Order in Council purporting to be made under this Act"* from being "*called in question in any legal proceedings whatsoever*". In *Harper v Home Secretary*[25] (which considered the predecessor legislation with a similar ouster clause[26] and preceded the *Anisminic*[27] and *Privacy International*[28] cases) the Applicant tried to prevent the Secretary of State from laying the allegedly defective boundary report before Parliament. The Court of Appeal decided it was a matter for Parliament to determine whether there was any defect and there was no room for the court to interfere.

As regards point (c), Clause 3 has been drafted with careful regard to the case law. For example, the reference to the "purported" exercise of power and "purported" decisions is aimed at the decision in the *Anisminic* case that a decision vitiated by an error of law is not a decision at all. Those drafting the Bill found it informative that Lord Lloyd-Jones in the *Privacy International* case remarked that it was a striking feature that the ouster in that case did not mention purported decisions given that the drafter must have been aware of *Anisminic*[29]. As pointed out in the Explanatory Notes[30], paragraph (c) of Clause 3 addresses the distinction

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[22] Paragraph 2.10.
[23] Paragraphs 2.81 to 2.84.
[24] De Smith's Judicial Review (8th Edition). Paragraph 4-031.
[25] [1955] Ch. 238.
[26] Section 3(7) of the House of Commons (Redistribution of Seats) Act 1949.
[27] *Anisminic Ltd v Foreign Compensation Commissions* [1968] UKHL 6.
[28] *R. (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22.
[29] See also Lord Sumption's evidence to the Joint Committee in response to Question 111: "*In Privacy International, at paragraph 111, Lord Carnworth, delivering the leading speech, when dealing with the interpretation of ouster clauses, pointed out that a reference to the purported exercise of a power might be sufficient to make the courts accept that that was what Parliament intended to do."*
[30] Paragraph 23.

drawn by the Supreme Court in the *Miller-Cherry* case as regards the court's role in reviewing the scope of a prerogative power, as opposed to its exercise.

On the third point of your letter, for the reasons already set out in detail above, the Government rejects the Committee's view that Clause 3 is "*a "solution" to a problem that does not exist and that may never arise*". Your letter distinguishes between "normal times" and "extreme situations": Clause 3 is intended to apply generally and it is of course accepted that it will fall to the courts to interpret Clause 3.

As regards "extreme situations", it is of note that in their evidence to the Joint Committee, Lord Sumption and Lady Hale expressed concern about Clause 3 primarily in relation to the possibility that existed under the draft Bill that Parliament could be dissolved without triggering the timetable leading to a general election (including the issue of the writ for parliamentary elections) and without summoning a new Parliament[31]. In response to a recommendation of the Joint Committee[32], the Government has closed off the possibility of dissolution without an ensuing election; the amendments made by the Bill to rule 1 of the Parliamentary Elections Rules in Schedule 1 to the Representation of the People Act 1983 mean that the election timetable will be triggered automatically on the dissolution of Parliament[33].

The Government has not gone so far in amending the Bill as to mandate when the proclamation summoning the new Parliament should be issued or to regulate the period between polling day and the first meeting of Parliament because it does not consider this would be proportionate or helpful. The Government noted in its response to the Joint Committee that *"[a]ny Government would not wish to delay the first meeting of Parliament but would want to commence its legislative programme at the earliest opportunity"*[34]. As mentioned in the Explanatory Notes, the longstanding practice before the Fixed-term Parliaments Act (and which will apply after the Bill has passed) was that the proclamation dissolving Parliament also summoned the new Parliament. It would be very clear to the electorate (irrespective of whether the election was triggered following a request for a dissolution or automatic dissolution) that the Government had not put in place the arrangements for the first meeting of the new Parliament.

The Joint Committee has also recognised the existence of safeguards against the Executive using the prerogative powers inappropriately. The first was its recommendation which relates to our understanding of the dissolution process; the Government accepts the Committee's view that the Prime Minister should only have the power to request a dissolution and the Monarch should have the power to decline to grant that request in exceptional circumstances.

"The second is that no Government can continue without supply—the authorisation of the Commons to spend money—or legislative authority to levy taxes. The legislation allowing collection of income and corporation tax is passed on an annual basis. While Charles I could manage without money voted by Parliament for eleven years, a modern administration could manage months at best. A Government which sought to prevent Parliament from meeting through strategic dissolutions would face extreme difficulties when the Commons reconvened. And a Government which tried to dissolve Parliament repeatedly would face difficulties in securing both the supply it needed over an election period and authorisation for the taxation necessary to run a modern Government. In cases like this, it is important that judges should not, as Dame Margaret Beckett said, second guess what Parliament ought to do, as "Parliament is sovereign, not the courts."

The Government is grateful for the suggestion in the fourth point of your letter that the principle of non-justiciability could be included in the dissolution principles paper. On reflection, we do not

[31] For example, see Lord Sumption's evidence to the Joint Committee in response to Question 106 and Lady Hale's evidence in response to Question 117.
[32] Recommendation 26.
[33] Paragraph 8 of the Schedule to the Bill.
[34] Page 13.

think this would be the right place for it as non-justiciability is not a convention or practice; it is a matter of law.

As regards the fifth point, I have already set out the reasons why the Government believes Clause 3 offers the best solution. The change of language to recognise that the Prime Minister requests a dissolution of Parliament, rather than advises the Monarch, does not change the Government's view.

In relation to point 6 of your letter and the convention that the Prime Minister draws his or her authority on the basis of his ability to command the confidence of the House (which the Government recognises as a core constitutional convention), the Government is not persuaded that our constitution would be well served by establishing as a 'convention' that an election would only be called following a resolution of the House of Commons. The Government's firm view is that flexibility is one of the core tenets of our constitutional arrangements. To establish a convention that a resolution of the House must proceed an early dissolution would not be compatible with a return to the tried and tested arrangements for calling an election. Indeed, to create such an expectation would potentially only lead to a repeat of the circumstances of 2019 which this Bill seeks to avoid in repealing the 2011 Act and reviving the dissolution prerogative.

Conventions, Principles and Practices

The Government agrees with this Committee that it is vital that the conventions and principles which relate to the exercise of the dissolution prerogative are carefully scrutinised and debated in Parliament. It is for this reason that we published the dissolution principles paper and responded in full to the Joint Committee's report with a more detailed exposition of the conventions underlying confidence, the dissolving and calling of parliaments and government formation.

The matter of the repeal of the 2011 Act is one that has been given consideration by your Committee, the Lords Constitution Committee, the Joint Committee that conducted pre-legislative scrutiny of the draft Bill and of course the whole House at second reading.

The Lords Constitution Committee report (which was published in September 2020) recognised that it was a "cardinal principle that the Monarch should not be drawn into the political debate regarding who should govern" and suggested that "a process for MPs to demonstrate who is best placed to command a majority in the House of Commons in order to signal to the Sovereign to the Monarch who should be invited to form a government". Whilst the Government did not agree it would be right to legislate and introduce prescriptive constraints into the Bill, it is a fundamental constitutional principle that is by virtue of their ability to command the confidence of the House of Commons that the Prime Minister governs.

The Government previously gave careful consideration to PACAC's report on the 2011 Act and shares its assessment that in our constitutional system, whilst it is imperative that the Sovereign is protected from politics, there is a role for the Sovereign to serve as the constitutional backstop in relation to the exercise of the prerogative powers. That is why the Government accepts the Joint Committee's assessment that in exceptional circumstances the Sovereign should have the power to decline a dissolution request.

The Government believes that the right place for this dialogue to continue is on the floor of the House as part of the passage of the Bill, building on the good debate of the conventions that took place at Second Reading in July which demonstrated an understanding that it was incumbent on those involved in the political process to not place the Sovereign in the position of having to refuse a dissolution. During the debate, it was asserted that the Bill does not revive the dissolution prerogative and therefore the associated conventions would not be revived. Some argued that the Sovereign would not be able to deny a dissolution request and that the power of the Prime Minister was no longer constrained by convention. As I observed during the debate, there remains a role for the Sovereign in exceptional circumstances to refuse a

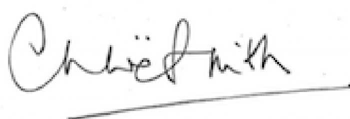
Dissolution request. This Bill returns us to the status quo ante both in terms of the prerogative powers and the underlying convention that the Sovereign is the constitutional backstop.

There was also a good discussion of the operation of confidence motions and what would constitute a motion of no confidence which, if lost, would lead to an election. When the 2011 Act is repealed, there will remain a crucial role for the House of Commons in indicating that it does or does not have confidence in the Government. By moving from a statutory role for the House of Commons to one which is based on convention, we shall restore arrangements that place the electorate at the centre of the Government formation process. By providing a powerful role for the House of Commons we will undo the damage of the 2011 Act which sought to codify confidence motions and in doing so led to paralysis.

Flexibility is an intrinsic part of our constitutional arrangements and by their very nature, constitutional conventions will continue to evolve over time in response to political circumstances. For this reason, it is not possible nor desirable to attempt to cover every scenario in which the constitutional conventions that underpin the exercise of the prerogative powers relating to the dissolution of one Parliament and the calling of another cannot cover every scenario, shall operate.

Once the Fixed-term Parliaments Act has been repealed, the Government will in due course revisit the relevant sections of the Cabinet Manual as the first edition which was published in 2011 reflects how the dissolution of Parliament worked under the Act. In its recent report on the Cabinet Manual, the Lords Constitution Committee recommends that the Cabinet Manual needs to be updated. We are reflecting on that report and will respond in due course.

I look forward to the Committee's continued engagement on this topic and the debate on the Bill and the conventions at Committee stage in September.



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