

Written evidence submitted by Professor Richard Ekins, Head of Policy Exchange’s Judicial Power Project and Professor of Law and Constitutional Government, University of Oxford (FTP0007)

Summary

1. This submission is made on behalf of Policy Exchange’s Judicial Power Project. It is intended to complement my colleague Sir Stephen Laws’s oral evidence to this committee on 10 December 2020 and to the Public Administration and Constitutional Affairs Committee on 24 April 2020. In a number of papers, Policy Exchange has recommended legislation to repeal and replace the Fixed-term Parliaments Act 2011 (FtPA), restoring Her Majesty’s prerogative power to dissolve Parliament, and to prevent judicial review of dissolution.¹ This submission focuses on clause 3 of the Fixed-term Parliaments Act 2011 (Repeal) Bill, which aims to forbid political litigation challenging decisions about dissolution.
2. It is reasonable for Parliament to legislate to restore Her Majesty’s prerogative powers in relation to the dissolution of Parliament and calling a new Parliament. But Parliament cannot effectively restore the law as it stood immediately before the FtPA in 2011 without addressing the strong risk of litigation challenging a future dissolution. That is, if Parliament is to restore the 2011 legal position it must enact clause 3 or a clause to similar effect. The Supreme Court’s prorogation judgment makes it likely that a future dissolution will be challenged by way of judicial review proceedings. Such litigation would be politically damaging and constitutionally improper. It could result in courts quashing a dissolution of Parliament, halting an election or even, in extremis, quashing an election that has been held and reinstating an old Parliament. In repealing the FtPA, Parliament should make clear that such litigation is not legally possible. Parliament is constitutionally entitled to make this decision and to prohibit judicial review in this context. In so doing it would restore the legal and constitutional status quo ante and avoid highly damaging, and needless, political litigation. It would not introduce new risks to the rule of law.
3. The intent of clause 3 is clear and the courts should uphold it. The clause does no more than to restate the long settled and constitutionally unimpeachable position that the courts have no jurisdiction to question or quash a dissolution of Parliament, a position put in doubt by the Supreme Court’s recent prorogation judgment. However, legislating to exclude the jurisdiction of the courts is a technical challenge and Parliament should consider amending the Bill to make crystal clear that it prohibits judicial review of ministerial advice to Her Majesty, to extend the

¹ Richard Ekins, *The Case for Reforming Judicial Review* (Policy Exchange, 27 December 2020), [21], [48]-[49]; Sir Stephen Laws, *The Future for Constitutional Reform: Lessons from the process of leaving the EU* (Policy Exchange, 27 January 2020), 12-14; Richard Ekins, *Protecting the Constitution: How and why Parliament should limit judicial power* (Policy Exchange, 28 December 2019), 13-14, 18; *The First Hundred Days: How the Government can implement the pledges in its 2019 election manifesto* (Policy Exchange, 15 December 2019), 26-27; Sir Stephen Laws, “Post-election, the Government must act to restore the balance of the constitution”, *Conservative Home*, 7 November 2019; Richard Ekins, “Judicial power and the election. Can the next Parliament reverse the rise of political litigation?” *Conservative Home*, 5 November 2019

protection of Article 9 of the Bill of Rights to dissolution, and to make clear that the Supreme Court's prorogation judgment is for the future not authoritative.

Restoring Her Majesty's prerogative powers

4. Parliament could choose to amend the FtPA rather than to repeal and replace it. However, repealing the Act and restoring the law as it stood before the FtPA came into force is a rational course of action. The FtPA is an object lesson in the dangers of legislating about the relationship between government and Parliament; legislation to unwind the Act should heed the lesson. There is thus good reason to aim to restore the law as it stood immediately before the FtPA came into force in 2011. Parliament clearly has authority to restore the law in this way. Clause 2 of the Bill provides that "[t]he powers relating to the dissolution of Parliament and the calling of a new Parliament that were exercisable by virtue of Her Majesty's prerogative... are exercisable again, as if the [FtPA] had never been enacted." Parliament's clear intention, in enacting this clause, will be to restore Her Majesty's legal powers in relation to dissolution and calling a new Parliament.
5. I agree with Sir Stephen that nothing turns on whether the FtPA abolished the prerogative or put the prerogative into abeyance. The relevant question is what Parliament intends in repealing the FtPA, and clause 2 makes this clear. So too do the Bill's consequential amendments to the Representation of the People Act 1983, which remove the changes made by the FtPA and restore the original text of the 1983 Act, which make the timing and process of holding an election turn on the exercise of Her Majesty's prerogative power to make a proclamation calling a new Parliament. The only practical question that I can imagine might ever turn on the abolition or abeyance distinction is what the legal effect might be of legislation that a future Parliament might enact to repeal the Fixed-term Parliaments Act 2011 (Repeal) Act,² as it would then be. Such legislation would not simply revive the FtPA. Whether it would (again) abolish the prerogative is an interesting question but would turn on the intention of Parliament at the time. It is very unlikely that a later Parliament would repeal the Act without addressing this question.
6. In paragraph 45 of its recent report,³ the Public Administration and Constitutional Affairs Committee (PACAC) quotes Professor Alison Young's argument that legislation expressly reviving the prerogative power of dissolution would be uncertain. She said:

Would you be reviving just the aspect of the Monarch being requested by the Prime Minister and then dissolving, or would there also be arguments as to whether you were potentially reviving an ability of the Monarch to force a dissolution in order to resolve a constitutional crisis? Again, that is an aspect of uncertainty that I do not think you really want to open.

² This would be an inelegant title for an Act of Parliament; I would recommend the Bill's title be changed, perhaps to the Duration of Parliament Bill.

³ Public Administration and Constitutional Affairs Committee, *The Fixed-term Parliaments Act 2011*, Sixth Report of Session 2019-21, HC 167, 15 September 2020

With respect, this analysis seems to confuse the scope of Her Majesty's legal power to dissolve Parliament with the question of when and whether Her Majesty should exercise this power. The latter question is the province of constitutional convention and political judgment, rather than of law and adjudication. In reviving the law as it stood immediately before the FtPA came into force, as Professor Young contemplated in her evidence to PACAC and as clause 2 provides, Parliament will be exercising its lawmaking authority to restore Her Majesty's legal power. Parliament will not be changing the pre-2011 constitutional position, as it would be if it sought to somehow give legal effect, or even statutory recognition, to the constitutional conventions as they stood in 2011. In restoring the pre-FtPA legal position, the Bill revives a role for the Prime Minister but does not legally empower him at all.

7. Clause 2 is a rational means to restore the pre-FtPA legal position. However, in view of the Supreme Court's judgment in *Cherry/Miller (No 2)*,⁴ it is not possible to restore the law as it stood until 2011 simply by reviving Her Majesty's prerogative power to dissolve Parliament. In her evidence to PACAC, also quoted in paragraph 45 of the Committee's report, Professor Young considers how the courts would interpret an Act purporting to revive the prerogative. She asks:

Would they see it as a valid way of saying we have returned the prerogative, or would the courts turn around and say, as we know very clearly from the recent prorogation case, it is their job to determine the scope of the common law and that prerogative powers are common law powers that also interact with the backdrop of legislation? It becomes a very arguable point before the Supreme Court as to whether putting in a piece of legislation "The prerogative power of dissolution is now revived," would suffice or not.

In view of the terms of clause 2, it would not be open to the courts to conclude that Her Majesty's prerogatives in relation to dissolution and the calling of a new Parliament had not been revived at all. However, it is true the Supreme Court might decide to determine for itself, and to change, the scope of Her Majesty's prerogatives. That is, the newly revived prerogative might be at the mercy of the Supreme Court, which might choose in future litigation to redefine the prerogative and to impose justiciable limits on it.

8. In paragraph 50 of its report, PACAC concludes:

It is clear that attempting to revive the prerogative would invite the courts to make the final decision on these issues. These are core political and constitutional questions that neither Parliament nor government should abrogate to the courts. Even if there is a desire to return to the old system for dissolution and calling elections, it would be better setting these arrangements in statute rather than engaging in an unnecessary attempt to

⁴ *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41

revive a prerogative which could have considerable unintended consequences.

It is true and important that questions about dissolution and the calling of a new Parliament should not be left to the courts. However, with respect, it does not follow that Parliament should not legislate to revive the prerogative. Legislation that clearly expresses the intention to revive the prerogative promises to minimise legal uncertainty, provided the legislation also makes clear that this prerogative is non-justiciable, which was very much the settled legal understanding immediately before the FtPA came into force.

9. In short, legislation to restore the law as it stood before the FtPA came into force must address the new problem that the Supreme Court has licensed political litigation in relation to the exercise of prerogative powers that have always been held to be non-justiciable. Clause 3 of the Bill aims to prevent such litigation and a clause to this effect is unavoidable if Parliament wishes to restore the principled constitutional position as it stood in 2011. Professor Bogdanor, in written evidence to this committee,⁵ suggests that the Bill should simply restore Her Majesty's prerogative power to dissolve Parliament, which would be non-justiciable. With respect, this conclusion does not survive the Supreme Court's judgment in *Cherry/Miller*.⁶

The Supreme Court's prorogation judgment and the risks of future litigation

10. Lord Roskill in the landmark *GCHQ* case made clear that the exercise of certain prerogatives, including dissolution, could not be questioned in the courts.⁷ Those prerogatives were subject to political control, not to judicial control, per the political constitution. This was true also in relation to prorogation. Save when Parliament had enacted legislation specifying when Parliament must sit, the restraints on the exercise of the power to prorogue Parliament were practical and political. It was open to Her Majesty, in extremis, to refuse to prorogue Parliament, but the main discipline on the Government was political accountability for its exercise of prerogative power and the practical (and in the end legal) difficulties that any government would encounter in attempting to govern without parliamentary support.
11. The Supreme Court in *Cherry/Miller* dismissed these limits as inadequate and asserted that the courts have authority to decide whether the Prime Minister's advice to Her Majesty to prorogue Parliament is reasonable. If the court thinks the Prime Minister had good reason the prorogation is lawful, if not it is not. The

⁵ Published on 18 December 2020.

⁶ The same is true for Professor Hazell and Professor Russell, who say, in paragraph 13 of their written evidence, published on 7 January 2021: "In the Foreword to the draft bill the government confidently states: 'The long standing position is that dissolution is not reviewable by the Courts ...'. In which case, why is the ouster clause needed?" The simple answer, which the Foreword and Explanatory Notes to the Bill could usefully state more directly, is that the Supreme Court has put that long standing position in doubt.

⁷ *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9; [1985] AC 374

Supreme Court simply invented this test, rationalising its lawmaking act on the grounds that an unreasonable prorogation would flout the principles of parliamentary sovereignty and parliamentary accountability. The Court's reasoning is not convincing.⁸ More importantly, it can clearly be extended to dissolution as much as to prorogation, for both prevent Parliament from sitting. Further, a prorogation usually comes before a dissolution and judicial review of the former can impugn the latter.

12. In future litigation, the Supreme Court might reason that prorogation and dissolution are not analogous because a dissolution leads to an early election and electoral accountability. However, if judicial review proceedings are not ruled out, claimants would likely argue that a dissolution would cut short Parliament's opportunity to discharge its constitutional function and that the Government's reasons for an early election were not constitutionally proper and should be evaluated by the court. This line of reasoning closely echoes the Supreme Court's reasoning in *Cherry/Miller*. It would chime with and be amplified by the emerging narrative amongst some academic lawyers and constitutional commentators that in repealing the FtPA and restoring prerogative the Government is shamefully stripping away vital restraints on executive power.⁹ That is, the Supreme Court would be invited, again, to see itself as *the* guardian of the constitution and to intervene in high politics in order to compensate for imagined deficiencies in parliamentary accountability.

13. In evidence to this committee,¹⁰ Paul Evans, a former Clerk in the House of Commons, says:

The idea that the courts are going to interfere in a dissolution seems far-fetched. By the time they were able to reach any judgment the electorate would have spoken, so what would be the point of entertaining such a cause? Clause 3 looks like a futile piece of political ornamentation designed for declaratory rather than practical purposes.

With respect, this analysis is mistaken. Our courts have made clear that they can and will move quickly in the context of political litigation, as *Cherry/Miller* confirms. Litigation might be initiated in anticipation of a dissolution and a court might well enjoin the Prime Minister not to seek a dissolution or might stay the effect of a (purported) dissolution pending argument, or resolution of an appeal. It is true that

⁸ See for example: John Finnis, *The Law of the Constitution Before the Court: Supplementary Notes on The unconstitutionality of the Supreme Court's prorogation judgment* (Policy Exchange, 8 February 2020); Martin Loughlin, *The Case of Prorogation* (Policy Exchange, 15 October 2019).

⁹ I note that Professor Hazell and Professor Russell term the Bill an "executive overreach". They reason, in paragraphs 12-16 of their written evidence, that "the government seeks to go further than the old prerogative" in two respects. First, in including an ouster clause; second, in the Government's statement of draft dissolution principles. For the reasons set out in this submission, clause 3 is necessary precisely to restate the long-standing legal position. I make no comment on the statement of draft principles save to say (1) that the statement clearly does not establish that the Bill itself is a departure from "the old prerogative" and (2) that as an attempt to outline relevant constitutional conventions, on which parliamentary comment is expressly invited, the statement is obviously not authoritative, much less legally enforceable.

¹⁰ Published on 7 January 2021.

litigation would introduce delay, which would itself be highly damaging, but it is a mistake to assume that the prospect of delay would lead the courts to conclude they should not hear otherwise arguable claims.

14. Judicial intervention in dissolution is, alas, not far-fetched and clause 3 serves a very important practical purpose. Before the Supreme Court's recent judgment, it was unimaginable that the Supreme Court would quash a prorogation that had already taken place within the Houses of Parliament. After that judgment, it is now unfortunately necessary to envisage the Supreme Court quashing a dissolution and calling off an election otherwise underway. It is harder to imagine the Supreme Court quashing the results of an election that had already been held and ruling that the old Parliament had never lawfully been dissolved and thus continued to exist, but in strict legal logic if a dissolution can be ruled unlawful, the calling of a new Parliament and the election that follows could be quashed too. The Court might attempt to sever the dissolution from the calling of a new Parliament, but a legal challenge to the former logically relates to the latter. The alternative would be that two Parliaments existed at one time, which would be incoherent.
15. If clause 3, or some alternative clause to similar effect, is not enacted, it is very likely that the courts will be invited – and at least will be open to being invited – to quash a dissolution on *Cherry/Miller* grounds. Parliamentarians opposed to an early election, or other political litigants (repeat players in high-profile litigation), could argue that in seeking a dissolution of Parliament before its full term has expired the Prime Minister is undermining the principles of parliamentary sovereignty and/or parliamentary accountability. The argument would be that it is for the court – rather than Her Majesty or the electorate – to determine whether the Prime Minister has, or had, a good reason for seeking a dissolution and in particular whether this dissolution, and related prorogation, would somehow prevent Parliament enacting legislation it might otherwise enact or would cut short parliamentary inquiries or similar. As a dissolution will always cut short some parliamentary business, the Prime Minister's political opponents would have an arguable case to make before the court that dissolution is unlawful. Importantly, in *Cherry/Miller*, the Supreme Court effectively accepted that Parliament needed to be allowed extra time to undo its past decisions,¹¹ and this is an argument that will standardly apply *whenever* Parliament's time is cut short. The Prime Minister's political opponents would argue, further, that the Prime Minister has timed a dissolution for political advantage and that this cannot be a lawful ground for cutting short parliamentary time and thus parliamentary accountability. These arguments ought, of course, to fail, for Lord Roskill's position in *GCHQ* remains intellectually robust; the point of repealing the FtPA is to restore the old law, and to secure that they do fail. Litigation is extremely likely unless Parliament makes clear that litigation is forbidden.
16. There are very good reasons to think that the Supreme Court would extend its *Cherry/Miller* ruling to take over questions about whether a dissolution (and related

¹¹ The relevant decisions were the European Union (Notification of Withdrawal) Act 2017 and the European Union (Withdrawal) Act 2018, which made provision for Article 50 to be triggered and for the European Communities Act 1972 to be repealed, thus enabling the UK to leave the EU, by default without a deal.

prorogation, if any) is reasonable. Again, the litigation that is likely to unfold, unless clause 3 is enacted, *ought* to fail. Parliamentary sovereignty does not require that Parliament itself must decide when Parliament shall sit, although of course any legislation to this effect settles the point. Likewise, the principle of parliamentary accountability is not and never has been a ground for courts to intervene to quash the exercise of Her Majesty's prerogatives in relation to when Parliament sits.¹² But the *Cherry/Miller* judgment overturns these propositions and it is likely that the same dubious logic would be extended in relation to dissolution.

Parliament's legitimate authority to legislate in this field

17. Whatever view one takes about *Cherry/Miller*, let alone about the merits of the September 2019 prorogation itself, it is clearly legitimate for the Government and Parliament now to take the view that the law should not permit judicial review of dissolution. That is, it is entirely open to and proper for the Government to propose and Parliament to enact legislation that would restore the law as it had long stood and as Lord Roskill affirmed in *GCHQ*. The Supreme Court made new law in *Cherry/Miller*. Parliament is entitled to consider the merits of that new law, of a regime in which a dissolution of Parliament (and thus the timing of an election) is open to legal challenge, and to reject it. That is, Parliament can prefer the view taken by a strong Divisional Court (featuring the Lord Chief Justice of England and Wales, the Master of the Rolls, and the President of the Queen's Bench Division) that prorogation, and by extension dissolution, is a matter of high policy and is not to be subject to challenge in the courts.¹³ It is clearly and properly open to Parliament to legislate to make this view once again the law of the land.
18. These points are important to make because some constitutional commentators suggest that it is illegitimate in principle for Parliament to enact legislation restoring the old law, under which the prerogative of dissolution was clearly not subject to judicial supervision.¹⁴ For these commentators, clause 3 must be illegitimate simply because it is an ouster clause and legislative restrictions on judicial review are always constitutionally suspect. However, while the common law tradition is sceptical about clauses that seem to oust the jurisdiction of the courts, this tradition goes hand in hand with recognition of the limits of judicial review, as Lord Roskill's speech in *GCHQ* and the Divisional Court's judgment in *Miller (No 2)* make clear. If or when courts flout their own limits and extend the law of judicial review into new ground, putting in doubt the integrity of the political constitution, it is not the least improper for Parliament to respond with legislation restoring traditional limits.

¹² See further my [written evidence](#), on behalf of Policy Exchange's Judicial Power Project, to the Public Administration and Constitutional Affairs Committee, published on 8 October 2019.

¹³ *R (Miller) v Prime Minister* [2019] EWHC 2381 (QB)

¹⁴ See for example: Alex Dean, "Is parliament really sovereign?", *Prospect Magazine*, 17 December 2020 (relaying the views of, inter alia, Lord Wilson [recently retired from the Supreme Court], an unnamed "former law officer", and Helen Mountfield QC); Gina Miller, "Repealing the Fixed-term Parliaments Act is about revenge not reform", *The House Magazine*, 5 December 2020; Alison Young, "The Draft Fixed-term Parliaments Act 2011 (Repeal) Bill: Turning Back the Clock?", *UK Constitutional Law Blog*, 4 December 2020; and Mark Elliott, "Repealing the Fixed-term Parliaments Act", *Public Law for Everyone*, 2 December 2020.

19. Parliament is not obliged to leave to the courts the decision about whether the law should permit judicial review of quintessentially political decisions, including about the timing of elections. There are no legal standards that can be applied to this question, and as *Cherry/Miller* confirms, when courts intervene in this type of question they end up simply taking it upon themselves to decide whether some political choice is reasonable. It would be politically damaging, for the courts as well as for the country, if parliamentarians or others who opposed an early election were able to secure their political aims in court, persuading judges (a) to denounce the Prime Minister for somehow acting unlawfully in seeking an early election and thus (b) to delay, or otherwise frustrate, electoral accountability.
20. The danger of courts preventing an early election was noted by the Constitution Committee of the House of Lords in its report on the Fixed-term Parliaments Bill 2010-2011. Quoting evidence from the Clerk of the House, Malcolm Jack, the report says “Were the courts indeed to intervene to prevent Parliament from being dissolved early, ‘the impact, politically and constitutionally, would be very great.’”¹⁵ (The Clerk had recommended changes to clause 2 of the Bill to avoid reference to the Speaker’s certificate, changes reflected in the resulting Act.) The committee went on to conclude “The risk that the courts may intervene in any early dissolution of Parliament by questioning the Speaker’s certificate is very small. Although the political and constitutional consequences of any such intervention would be very significant, we do not consider the risk to be sufficient to warrant a rejection of clause 2 of the Bill.”¹⁶ The committee rightly took for granted that judicial intervention to stop an early dissolution of Parliament would be momentous and ought not to happen. In repealing the FtPA, Parliament should rule out any such intervention.
21. When legislation seems to prevent the courts from considering the lawfulness of government action, putting someone’s rights or interests in doubt, it is to be expected that courts will construe such legislation narrowly. This is a reasonable presumption provided that courts do not depart from what Parliament truly intends. However, clause 3 is nothing like a provision that forbids the courts from protecting anyone’s legal rights. It aims to prevent political litigation about the timing of elections, litigation that no one should welcome and which has no direct effect on the rights and interests of any individual citizen. Whether the Prime Minister acts reasonably in asking Her Majesty to dissolve Parliament should not be for the courts to decide. Permitting courts to address this question will politicise litigation and juridify politics. It would arm parliamentarians anxious to avoid facing the electorate, or political actors outside Parliament who fear the outcome of an early election, to seek the aid of the courts in frustrating electoral accountability. If or when such litigation is initiated, let alone if it were to culminate in a court order that a dissolution is unlawful and thus that an election is not now to be held, the courts would be viewed simply as another political forum. Parliament should protect the courts from this plight. Whether it is reasonable to call an early election should not

¹⁵ Constitution Committee, *Fixed-term Parliaments Bill*, Eighth Report, 1 December 2010, at [150]

¹⁶ *Ibid* at [157]

be for courts to decide. In providing that judges may not decide this question, clause 3 will help to vindicate the political constitution.

The illusory risks of ousting judicial review in this context

22. Some commentators denounce clause 3 because they think that there may well be exceptional cases in which judicial review of a dissolution might be justified and/or because they think that clause 3 may inadvertently introduce arbitrary government. Professors Mark Elliott and Alison Young have each argued that there are cases in which judicial review of a dissolution might well be justified, which means the ouster clause is unreasonable and should be (and they predict may well be) circumvented by the courts.
23. Professor Young imagines circumstances in which the Prime Minister seeks a dissolution because of a personal threat made to him or his family or where the Prime Minister attempts to use the prerogative to deport all MPs and then dissolve Parliament. Professor Elliott entertains the mass deportation of "all immigrants", absurdly declared by the Prime Minister to be a "dissolution of Parliament", and argues that of course the courts must determine the limits of the power and of its exercise and "purported exercise", even if the clause asserts otherwise. He uses this scenario as a jumping-off point for a further argument: a suitably bold court could properly hold that since the "grounds of judicial review" of administrative or ministerial action are implications of the rule of law itself, exercises of prerogative powers such as dissolution, if "contrary to the grounds of judicial review", could be struck down by the courts without violating the Bill's ouster clause.
24. Such argumentation by conjuring up a parade of horrors seeks to justify courts breaking new ground, shrugging off long-established legal and constitutional limits, lest by respecting those limits they be unable address (imagined) grossly problematic cases further down the line. The tactic was in play in *Cherry/Miller*. The Supreme Court asserted a wholly novel jurisdiction to quash prorogation, not just because of the September prorogation (which at five weeks was scarcely outrageous in length) but also, or even primarily, so as to be in a position to quash some other, far more abusive prorogation that might later arise (say a prorogation procured, somehow, after losing a vote of confidence, or to prevent a vote of no confidence from being held and lost, or for a much longer period). The answer to the tactic is to point out that in a few kinds of matter, of high political significance and involving the interrelations of the highest organs of the state, the constitution confers powers on the Government and on Parliament subject to limits that are practical and political but not legal (except where Parliament itself has expressly made them legal by enacting them). In relying on these non-justiciable limits – within a zone demarcated by statutory requirements and the justiciable legal limits on taxing and spending and the like – our constitution, like others modelled on it, has for centuries proved well able to avoid extremities of the kind imagined by those who want the courts now to be able to set aside the settlement of 1689 and police even high politics.

25. Parliament's lawmaking authority is an obvious example of a power whose limits are practical and political, not legal. Many exercises of the prerogative powers of foreign policy and military action are likewise such that the restraint on their abuse is political and practical. In such cases, controversies about whether some exercise of the power is an abuse, or can be justified, are to be determined in the political realm, by parliamentarians and in the end by the electorate, not by judges in the course of litigation. A parade of horrible hypotheticals has no proper place in this discussion, any more than hypothetical misconduct by the Supreme Court itself. But assertions by senior academics confirm the existence of a powerful desire (going well beyond academia) to circumvent legitimate exercise of parliamentary sovereignty, by resort to any and every argument.
26. Clause 3 is framed in strong terms because recent case-law shows it needs to be if it is to be effective at all. It applies to "purported decisions" as well as to "decisions" in order to address the technique pioneered in *Anisminic*, whereby an ouster clause is avoided by saying that the impugned decision was not a proper use of the power and hence was only a "purported decision". (Analogously, *Cherry/Miller* held that the prerogation was merely purported, as if the Lords Commissioners were purporting to read it out from "a blank sheet of paper".) However, clause 3 is not a licence for lawless government. It effectively permits the Prime Minister to seek a dissolution, and Her Majesty to exercise the power to dissolve Parliament, without liability to challenge in judicial review proceedings. It has no bearing on fantasies in which grossly unlawful acts of deportation of MP's or expulsion of immigrants would be pronounced (ludicrously) to be something of a wholly different kind: dissolution of Parliament by Her Majesty.
27. Consider Professor Young's speculation about a case in which the Prime Minister goes mad and attempts to order the deportation of all other MPs (or Professor Elliott's even more sweeping deportation of all immigrants), while mouthing the words "this is an exercise of Her Majesty's prerogative power to dissolve Parliament." It is not to be supposed that Her Majesty could be induced to defy common law and statute by ordering deportation of parliamentarians (or anyone else), let alone under the farcical guise of dissolving Parliament. There are obvious political restraints on any such act of madness, just as there are on Parliament dispensing with elections. And no attempt to deport all MPs (or immigrants) would count as a purported dissolution – an act of Her Majesty dissolving Parliament. What clause 3 *would* prevent is the courts concluding, per *Cherry/Miller*, that a dissolution of Parliament that the court thinks is unreasonable is no dissolution at all.
28. The exercise of Her Majesty's prerogatives in relation to dissolution of Parliament and the calling of a new Parliament bring one Parliament to an end and make provision, especially by setting in motion the timetable for an early election, for a new Parliament. There is no need for judicial supervision of these powers. For centuries, across the common law world, the Sovereign has granted dissolutions and called new Parliaments without disputes coming before the courts. In preventing argument coming before the courts, argument made likely by *Cherry/Miller*, clause 3 does not somehow permit lawless government. Clause 3 will not block litigation to

vindicate any person's rights or freedoms or indeed to challenge any perceived misuse of ministerial power, save in the context of dissolution and calling a new Parliament, where the restraint on abuse is to remain political. Parliament does not need help from the courts to recognise when it has been dissolved and elections are simply set in motion when Her Majesty calls for a new Parliament. There is no need for litigation in this context and ruling out litigation does not somehow put legal order at risk.

The effectiveness of clause 3 and suggestions for improvement

29. Enacting an effective ouster clause is a technical challenge. The committee should consider carefully whether clause 3 is likely to be effective or whether amendments are necessary for it to be fully effective. However, Parliament clearly has authority to limit judicial review. It should be cause for concern that distinguished constitutional commentators, such as Sir Malcolm Jack and Lord Lisvane in oral evidence to the committee, are pessimistic about the likely effectiveness of clause 3 and speculate that the courts would likely find a way to review a dissolution even in the face of legislation forbidding such. Lord Lisvane quoted Lord Carnwath's judgment in *Privacy International* for the proposition that it is for the courts rather than Parliament to decide on the limits of judicial review.¹⁷ That proposition is not the law of our constitution.¹⁸ It was not part of the majority judgment in the case and, taken at face value, it amounts to a bald (groundless) assertion of a novel power on the part of the court to strike down legislation, which parliamentary sovereignty flatly forbids.
30. Professor Elliott in his commentary on the bill speculates that courts might refuse to honour the ouster clause, noting the *Privacy International* dictum. Parliament should not accept that judges are free to invent limits on its lawmaking authority; the Supreme Court, for its part, ought to renounce Lord Carnwath's dictum at the earliest possible opportunity, lest it give the appearance of willingness to overthrow the foundational rule of our constitution, the sovereignty of Parliament. For the Court to attempt such an overthrow would be remarkable in any context, let alone in order to assert a novel jurisdiction to quash a decision to hold an early election. Happily, such an attempt remains most unlikely, and the Court went to some lengths in each *Miller* case to signal publicly its loyalty to parliamentary sovereignty. But unless Parliament makes its intentions very clear, it is likely that the courts will assert a novel jurisdiction to review the high politics of dissolution.
31. Clause 3 or something like it is indispensable if Parliament is to restore the law as it stood before the FtPA. But Parliament should consider alternative ways of framing this clause, and ways of supplementing it. The explanatory notes to the Bill provide that clause 3 covers the preliminary steps and any (purported) decisions leading to a

¹⁷ *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 at [144]

¹⁸ On *Privacy International*, see Richard Ekins, "Do our Supreme Court judges have too much power?", *Coffee House, The Spectator*, 15 May 2019; more generally, see Richard Ekins, "Legislative Freedom in the United Kingdom" (2017) 133 *Law Quarterly Review* 582; Tom Bingham, *The Rule of Law* (Penguin, 2010), 167, 196; and Jeffrey Goldsworthy, *The Sovereignty of Parliament* (Oxford University Press, 1999).

dissolution, including advice from the Prime Minister to the Queen.¹⁹ Clause 3 should be made more express on this point. It is likely that, as in *Cherry/Miller*, any litigation challenging a dissolution will target the steps leading up to Her Majesty's order, including ministerial advice. It would not be surprising to see political litigants argue, for this purpose at least, that ministerial advice is not a decision as such, and thus that the ouster clause may be evaded because the unreasonableness of the advice is such as to render it unlawful, which unravels the Crown's purported act (making it like "a blank sheet of paper", as *Cherry/Miller* says in making a move of this sort). Clause 3 should be reframed to specify that a court of law may not question (a) any act (or purported act) of the Crown relating to the dissolution of Parliament or the calling of a new Parliament or (b) any ministerial advice, or other procedural step, relating to such an act (or purported act) of the Crown.

32. The clause might also usefully be supplemented by providing – (a) that Art 9 of the Bill of Rights 1689 covers all acts of the Crown relating to prorogation and dissolution and all ministerial advice to Her Majesty in relation to such action; and (b) that, without prejudice to the disposition of those proceedings themselves, the Supreme Court's judgment in *Cherry/Miller* (and the judgment of the Inner House of the Court of Session) is of no authority and cannot be relied upon in any UK court of law. Each of these supplementations would assist in securing the restoration of the limits on justiciability that were upheld by the Divisional Court in England and the Lord Ordinary in Scotland, that have long been affirmed by common law courts, and that help protect the integrity of the political constitution.

11 January 2021

¹⁹ See paragraph 16 of the Explanatory Notes.