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INTRODUCTION

1. In this submission I make four recommendations which I hope will bolster the overall efficacy of the bill being proposed. I come to this question with the eye of a constitutional historian and scholar of comparative constitutional law. Firstly, the bill should make clear (perhaps in a preamble or note) that Parliament itself understands that the prerogative of dissolution is a power held at the absolute pleasure of the Crown. Secondly, it should deny any jurisdiction to any court in the land to even hear or entertain any challenge to the legality of any dissolution, whether purported or otherwise – the bill should be an absolutely clear and explicit jurisdiction stripping statute. Thirdly, the bill should insert a privity clause which immunises advice proffered by the Prime Minister, including any process leading up thereto, from potentially being challenged in the courts. Fourthly, the bill should deny standing to anyone to even challenge any proposed dissolution. In particular, the third and fourth recommendations are designed to fill in a potential loophole. As the bill currently stands nothing prevents a litigant from marching into court and asking for a declaration that the process leading up to any advice given to the Queen was tainted with some illicit partisan motive or otherwise with some procedural irregularity (e.g. due to a lack of consultation with Parliament or Cabinet). I now turn to examine these four recommendations, along with any relevant authorities, foreign or domestic, which might be relevant.

Recommendation 1: Insert an Appendix / or Preamble / or Historical Note To The Bill

2. One striking aspect of the recent *Miller No 2* decision is that it eschewed a long line of case law requiring the Supreme Court to examine centuries worth of history in order ascertain the true scope of a given prerogative power (on the important role of history in this area, see the discussion by Lord Bingham in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 at [69]-[72]). Had the Court done so it would have discovered that for over 700 years of English history the power to prorogue Parliament was always understood to be held at the unfettered pleasure of the Crown. Ditto with the dissolution of Parliament: with italics added see, eg, Helen Relf and Hartley Simpson (eds), *Commons Debates, 1621* (Volume 5, Yale University Press, 1935) 183 (29 May 1621) (per Sir Edward Coke)[1] ("The kinge maye call and *dissolve parliaments at his pleasure without rendringe anie reason to his subiects*" [sic]); Sir Robert Chambers, *A Course of Lectures on the English Law: Delivered at the University of Oxford 1767-1773* (Volume 1, 1986) 148 ("Parliament is dissolved either by the express command of the king which he may issue *at pleasure for whatever reason*, or by its legal determination at the end of seven years according to the act of 1 Geo 1, c. 38"); Joseph Story, *A Familiar Exposition of The Constitution of the United States* (Thomas Webb and Company, 1842) 92 §139 ("In England, *the King may prorogue or dissolve Parliament at his pleasure*, and, before the Revolution, the same power was generally exercised by the Governors in most of the American Colonies"); William Henry Pope Clement, *The Law of the Canadian Constitution* (Carswell, 1892) 165-66 ("It may be observed that the exercise of the power of summoning has been the subject of legislative regulation; the other two – of proroguing and dissolving – exist as at common law. The 'conventional'

[1] In these manuscripts, his name was sometime spelt "Cooke" and "Cook", consistent with the way it was actually pronounced.

limitations are many, *the legal right is absolute. For whatever reason, or with whatever want of reason, parliament is prorogued or dissolved, such prorogation or dissolution puts an end of the session*, of the parliament, as the case may be"); Abbott Lawrence Lowell, *The Government of England* (Volume 1, 1912) 19 ("Legally, every act requires the royal assent, *and, indeed, the Houses can transact business only during the pleasure of the Crown,* which summons and prorogues them, and *can at any moment dissolve the House of Commons*"). Rather than quoting numerous other authorities much to the same effect,[2] I simply quote the remarks of Sir Robert Berkeley in *R v Hampden* [1637] State Trials III 825 at p. 1101, whose views seem to me to be quite representative of all the leading authorities in this area:

> I confess that by the fundamental law of England, the parliament is *commune concilium regis et regni* [the common council of the king and of the kingdom], that is the greatest, the most honourable and supreme court in the kingdom; that no man ought to think any dishonourable thing of it; yet give me leave to say, that it is but a *Concilium*; to say so is no dishonour to it; **the king may call it, prorogue it, dissolve it, at his pleasure; and whatsoever the king doth therein, is always to be taken for just and necessary.**

3. This view was by no means eccentric. Indeed, like Berkeley, Sir Edward Coke – often portrayed as the poster boy supporting a much narrower view of prerogative power – also classified the dissolution of Parliament as being an absolute prerogative of the Crown. Recall that during the 1500s and early 1600s there were two main species of prerogative power: the *absolute* prerogative and the *ordinary* prerogative. The absolute prerogative touched on high matters of state and was held at the undeniable and legally unfettered pleasure of the Crown and were therefore deemed non-justiciable, while the ordinary prerogative, which typically granted special privileges and imposed liabilities on the subject, was deemed to be controllable by the courts. An absolute prerogative therefore fell within the sole and exclusive jurisdiction of the Sovereign. Within its relevant sphere of action, the exercise of any such power remained legally unfettered: the particular act to which the adjective applied signified that the King had a free discretion as to the question whether he will do the act at all, or, if he wished to do it, as to how he will do it (cf. Rocco Giurato, "The Language of Constitutionalism and the Royal Prerogative in the English Parliament of 1593" (2018) 37 *Parliamentary History* 327, 341-42 ("In the Tudor constitution, the absolute prerogative (meaning unbound by the law), being an extraordinary power, ensured that the monarch through decision making could always respond to political contingencies, unpredictable by their very nature")). The following extracts from the writings of Lord Coke all serve to highlight the sweeping nature of any absolute prerogative of the Crown:

   - "The king has 2 manners of prerogatives, the one absolute and the other ordinary; absolute it is thus called because it is not examinable or determinable by any course of justice but only by the king himself, as proclaiming war or making truces";

[2] Remarkably, *none* of the authorities cited in this submission were quoted in the government submissions during the *Miller 2* litigation. In a lengthy forthcoming paper, I also collect well over 100 authorities recognising the fact the power to prorogue Parliament was held at the pleasure of the Crown. It may well have been the case that in the rush of litigation the judges were simply unaware what centuries worth of authority required in this area. For this reason alone, *Miller No 2* strikes me as a clearly erroneous decision.

- "Because the queen had 2 manners of prerogative, the one absolute and the other ordinary. In the first the commandment of the king is to be obeyed without disputation *principis placitum legis vigorem* [the pleasure of the prince has the vigour of law] and *epistola Regis vim habet legis* [the letter of the King has the force of law], the other is ordinary and that is able to be disputed because it is to be decided by the laws of the realm";

- "These belong to the absolute prerogative of the king, which no subject ought to dispute and these high matters of state are not to be directed by the ordinary rule of the common law, but in these the commandment of the queen ought to be obeyed";

- "Note that the king has 2 manners of prerogatives, one absolute and no one ought concerning this to argue or dispute, such as declaring war…The other manner of prerogative is ordinary and this ought to be determined by the law and by the judges".

4. The above extracts can be found in Sir John Baker, *The Reinvention of Magna Carta 1216–1616* (CUP, 2017) 144-7, but see also p. 183, 322-23; David Chan-Smith, *Sir Edward Coke and The Reformation of the Laws* (CUP, 2014) 257-59; Jacob Corre, "The Argument, Decision, and Reports of *Darcy v. Allen*" (1996) 45 *Emory Law Journal* 1261 at 1297 and Appendix A5; see also James Hart, *The Rule of Law, 1603-1660: Crowns, Courts and Judges* (Longmann, 2014) 96; Sir John Baker, *English Law Under Two Elizabeths* (CUP, 2021) at pp. 46, 79-80.

5. In his 1594 notebook, an extract which has kindly been provided to be by Sir John Baker, Coke identified the following 9 prerogatives as being absolute (with special emphasis added):

   Roy ad absolute prerogatives, 1, voice negative al ascun statut destre fait, 2, dispensation ove penall ley, 3, a faire judges et justices, 4, a pardoner offences, 5, coinage, 6, a imposer value al coine, 7, a faire leagues ou guerre, **8 a sommoner parlement et dissolver ceo**, 9, a faire denizens.

   Absolute royal prerogatives, 1, a negative voice in relation to statutes, 2, dispensation with penal laws, 3, appointing judges and justices, 4, pardoning offenders; 5, coinage, 6, to imposing the value of coins, 7, affairs relating to treaties or war, **8 summoning Parliament and dissolving the same**, 9, to make denizens.[3]

6. This list is by no means anachronistic. It still closely tracks what most of us would have regarded, prior to *Miller No 2,* as being non-justiciable prerogative powers: see, eg, *R v Secretary of State for Foreign and Commonwealth Affairs; Ex P Everett* (1989) QB 811, 820 (per Taylor LJ) ("At the top of the scale of executive functions under the prerogative are matters of high policy (such as) making treaties, making war, dissolving Parliament, mobilising the armed forces. Clearly those matters, and no doubt a number of others, are not justiciable"); *CCSU v Minister for the Civil Service* [1985] AC 374, 418 (per Lord

[3] A virtually identical list was compiled by Sir Robert Berkeley in *R v Hampden* [1637] State Trials III 825 at pp. 1098-99 and 1101. Members of the American Founding Generation also listed the prorogation, dissolution, and summoning of Parliament as being absolute prerogatives of the Crown: John Brown Cutting to William Short (13 December 1787) reprinted in John Kaminski and Gaspare Saladino (eds), *The Documentary History of the Ratification of the Constitution* (Volume 2, State Historical Society of Wisconsin, 1983) 487.

Roskill) ("Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another"), all quoted approvingly as recently as in *Re Judicial Review McCord* [2016] NIQB 85 at [131]-[133] (per Maguire J); see also *R v Secretary of State for the Home Department ex p. Bentley* [1993] EWHC Admin 2; *R (Bancoult) v Secretary of State for the Foreign & Commonwealth Affairs)* [2007] EWCA Civ 498 at [44]-[46] (Sedley LJ); Ibid. [88] (Waller J); see also *R (Thomson) v The Minister of State for Children* [2005] EWHC 1378 at [114] (Munby J); *R (Abbasi) v Secretary of State for Foreign & Commonwealth Affairs & Secretary of State for the Home Department* [2002] EWCA Civ 1598 at [85] (Phillips MR, Waller and Carnwath LJ*)*; *R (Miller) v PM* [2019] EWHC 2381 (QB) at [38]-[39] (Maldon CJ, with whom Etherton MR and Sharp P agreed). As Lord Bingham noted in *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 at [12]: "It would no doubt be possible, in theory at least, to devise a constitution in which all political contingencies would be the subject of predetermined mechanistic rules to be applied as and when the particular contingency arose. But such an approach would not be consistent with ordinary constitutional practice in Britain…Matters of potentially great importance are left to the judgment either of political leaders (whether and when to seek a dissolution, for instance) or, even if to a diminished extent, of the Crown (whether to grant a dissolution)". **The proposed ouster clause clearly seeks to vindicate this traditional legal position. It is against this common law background that any wise and candid judge would construe the proposed ouster clause.**

7. I note authorities from other foreign jurisdictions are also much to the same effect: with special emphasis added see, eg, *Engel v Alberta (Executive Council)* 2019 ABQB 490 at [79] (Mandziuk J) ("I agree that the exercise of Crown Prerogative over **the dissolution of the Legislature and the calling of an election is not amenable to judicial review**"), affirmed in *Engel v Prentice*, 2020 ABCA 462 at [27] (Slatter, Schutz and Hughes JJA) ("That begs the question of who is to decide when an early election is called for. In 2015, the Premier concluded that the precipitous state of [Albertian] public accounts required an early election. **That was a quintessentially political decision based on prerogative powers, not one that is justiciable**"); *L v South Australia* [2017] SASCFC 133 at [112] (per Kourakis CJ, with whom Parker and Doyle JJ agreed) ("The prerogative powers to commission or to remove ministers and ministries, **to prorogue or dissolve Parliament are even more obviously immune from judicial review**"); *Bowyer v De Jersey* [2017] QSC 34 at [12]-[13] (per Lyons J) ("I accept the submission that it is difficult to see what legal constraint there could be upon the exercise of the power or by what legal standard a decision by the Governor to dissolve the Legislative Assembly could be reviewed, particularly given the convention is its exercise on the advice of the Ministers...**The dissolution of the Legislative Assembly and the issuing of the writs are not justiciable decisions**"); *Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak, Yang di-Pertua Negeri Sabah* [1995] 1 MLJ 169, 181 (Abdul Kadir Sulaiman J) (High Court, Malaysia); *Datuk Nizar Jamaluddin v Datuk Seri Zambry Abdul Kadir* [2010] 2

MLJ 285, 302 [34] (The Federal Court of Malaysia) ("In this regard we would, however, add that the power to dissolve the LA is vested in HRH by Art. XXXVI(2) **no matter in what circumstances it was made**…It is important to note that in all cases, the decision whether or not to dissolve the LA is in **the absolute discretion of HRH**"); *Francois v Attorney-General* [2002] 5 LRC 696 at [11] (High Court, St Lucia, per Byron CJ and Redhead and Georges JJA) ("It is lawful for General elections to be held at any time during the five-year period"); *SR Bommai v India*, AIR 1994 SC 1918 at [209] (per Ramaswamy J, with whom Ahmadi J largely agreed) ("Similarly **prorogation of Parliament or dissolution of Parliament done under Article 85 is not liable to judicial review**. The accountability is of the Prime Minister to the people, though the President acts in his discretionary power, with the aid and advice of the Prime Minister"); *State of Rajasthan v Union of India* AIR 1977 SC 1361 at [220] (per Fazal Ali J) (a Presidential preference for dissolution over a prorogation, or a prorogation over dissolution, is a political decision, and thus, non-justiciable); *Victoria v Commonwealth* (1975) 134 CLR 81, 156 (per Gibbs J) ("The Governor-General is given power by ss. 5 and 28 of the Constitution to dissolve the House of Representatives and **that power appears to be unconditional and unrestricted** [legal position], although since the Constitution is founded on the principles of responsible government it may be assumed that His Excellency will exercise that power in accordance with those principles [conventional position]"). **This bill is merely endorsing and give legal effect to such a widespread worldwide orthodoxy.**

8. However, in my view, two short contextual notes or footers of a historical character should be added (either in clause 2 or clause 3) highlighting all of this, lest the court find some novel way to read down, or even ignore, the ouster clause. At the very least, some of the judges might be less inclined to completely ignore 700 years of history and any pertinent authorities in the area (as it did in *Miller No 2*) if the relevant authorities are literally staring back at them in the legislation they are construing. Such a note would also make quite clear what Parliament itself understood the *status quo ante* to be. The legislative note might read something like this:

   Note 1: The prerogative to dissolve Parliament has historically been regarded as an absolute prerogative of the Crown, one held at the unfettered pleasure of the Sovereign: *R v Hampden* [1637] State Trials III 825 at 1101 (per Sir Robert Berkeley); Robert Chambers, *A Course of Lectures on the English Law: Delivered at the University of Oxford 1767-1773* (Volume 1, 1986) 148; William Holdsworth, *A History of English Law* (Volume 6, 1924) 113; *Datuk Nizar Jamaluddin v Datuk Seri Zambry Abdul Kadir* [2010] 2 MLJ 285, 302 [34] (per The Federal Court of Malaysia). This Act gives effect to this understanding.

   Note 2 This Act ratifies the conventional view that the power to dissolve Parliament has always been regarded as a nonjusticiable political prerogative of the Crown: see, eg, *CCSU v Minister for the Civil Service* [1985] AC 374, 418 (per Lord Roskill); *R v Secretary of State for Foreign and Commonwealth Affairs Ex P Everett (*1989) QB 811, 820B (per Taylor LJ); *SR Bommai v India*, AIR 1994 SC 1918 at [209] (per Ramaswamy J, with whom Ahmadi J largely agreed); *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 at [12] (per Lord Bingham); *Bowyer v De Jersey* [2017] QSC 34

at [12]-[14] (per Lyons LA); *L v South Australia* [2017] SASCFC 133 at [112] (per Kourakis CJ); *Engel v Prentice*, 2020 ABCA 462 at [27] (The Court). This Act gives statutory effect to this long line of case law.

9. Alternatively, the bill might seek to insert an appendix listing all the relevant authorities, or perhaps even better, the bill may choose to explicitly deem the cases I have listed above to be the Supreme Law of the Land – essentially an express statement of intent clause. The use of a short, sharp, and punchy preamble might also be another way to communicate the same point. Something to the following effect comes to mind:

Recognising that the power to dissolve Parliament has always been understood to be an absolute (nonjusticiable) prerogative, held at the wholly unfettered pleasure of the Crown, we do hereby enact:

Recommendation 2: Explicitly Deny All Courts Jurisdiction To Even Hear or Entertain Any Legal Challenge

10. In light of *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, the repeal bill should leave no stone unturned and therefore should adopt an explicit jurisdiction-stripping provision denying any Court the authority to even hear a challenge against the legality of any dissolution, purported or otherwise. The bill should make clear that any decision relating to dissolution, made by Her Majesty, shall be deemed final and conclusive. Such a provision might read something like this:

● "No court shall have any authority or jurisdiction whatsoever to even hear, let alone decide, any case or controversy relating to the legality any decision to dissolve Parliament, purported or otherwise. The Court have any jurisdiction whatsoever to enquire into the existence, scope, nature, or manner of exercise of the royal power of dissolution, purported or otherwise".

● "The prerogative power to dissolve Parliament is hereby revived and shall thereby once again continue to be retained at the exclusive and absolutely unfettered pleasure of the Sovereign. No Court shall have any jurisdiction whatsoever to entertain any challenge against the legality of any decision to grant or refuse to grant a dissolution, purported or otherwise".[4]

● "Each and every Court in the land is hereby be denied any authority, jurisdiction, or power whatsoever to even hear any case or controversy over, or relating to, the legality of granting, making, ordering, or issuing any putative dissolution of Parliament, whether purported or otherwise".

● "A dissolution or prorogation of Parliament shall be deemed a proceeding in Parliament for purposes of Article 9 of the Bill of Rights".

[4] One may even add a note here recognising that the power is explicitly intended to be held *Quod principi placuit, legis habet vigorem* [the pleasure of the prince has the vigour of law] and *epistola Regis vim habet legis* [the letter of the King has the force of law].

11. The mere legislative recognition that the power to dissolve Parliament is exclusively vested in the Crown should hardly be controversial. By definition, all prerogatives are monopolistic powers lodged exclusively in the Crown, in contradistinction to the subject. I should note that recognising the exclusive vesting of such powers in the Sovereign in the way I have suggested above is entirely consistent with the views of the judges assembled in Parliament in 1566 when they declared that (with special emphasis added):

> For the summons, **the prorogation, and the finishing the parliament**, and also the order and directions of the proceedings, treaties and speeches of and in the same, **apperteyn specially and principally to the pleasure and arbitrement of the prince, as to the chiefe and head of that body**.

12. Here the word "specifically" has been translated as meaning "especially" while the phrase "arbitrement" has been translated to mean the arbitrary "whim" of the Sovereign: see Sir John Baker, *Reports from the Lost Notebooks of Sir James Dyer* (Selden Society, 1994) 125. This view seems to be shared by Joseph Chitty in *A Treatise on the Law of the Prerogatives of the Crown* (J. Butterworth and Son, 1820) who notes at p. 6 (special emphasis added): "With regard to the Houses of Parliament, the right to assemble, prorogue, and dissolve them**, belongs exclusively to the King as the supreme executive magistrate**". I could cite numerous authorities the same effect, but I shall not belabour the point. Historically, it is quite clear that the power to dissolve and prorogue Parliament was a personal political prerogative of the Sovereign. The Glorious Revolution certainly did not interfere with these prerogatives. Quite the contrary. As Lord Justice Campbell noted in *Lives of the Lord Chancellors and Keepers of the Great Seal of England, From the Earliest Times till the Reign of King George IV* (Blanchard and Lea, Volume IV, 1851) at p. 102 (with special emphasis added and *contra* the attitude adopted at paragraph [43] in *Miller No 2*):

> The "Declaration of Rights", prepared by another committee, under the management of [Lord] Somers, was wisely confined to the declaratory part of the Report, and, being agreed by the Lords, was made the basis on which the Crown was tendered to, and was accepted by William and Mary. Most of the other articles in the Report were embraced in the Act of Settlement and other constitutional statutes which followed, but the obligation to serve in the militia continued as a necessary evil; **and it has always been thought that it would be dangerous to limit the prerogative of the Crown to prorogue or dissolve Parliament at pleasure, the constant necessity for votes of supply abundantly securing the summoning and sitting of legislative assemblies .**

13. Frankly, I do not see any real reason why courts should have any jurisdiction to hear any dispute over the dissolution of Parliament. Given the lack of opportunity for the British people to directly call referenda during any five-year Parliamentary term, dissolution essentially provides the people with the primary opportunity to give their binding approval or opprobrium as to how the government is generally performing. But for the Court to void a proposed dissolution would merely serve to further deny the people their already limited say in their government – after already putting the country through

additional delay, suspense, and partisan bickering for who knows what reason, as is currently the case in Nepal where the recent grant of dissolution is now being challenged through the courts, generating much political instability as well as grave constitutional uncertainty.

14. Here it is important to note that the absolute prerogatives of the Crown, like dissolution and prorogation, do not, of themselves, directly impact individual rights or property interests of the subject. As Kourakis CJ noted in *L v South Australia* [2017] SASCFC 133 at [113]: "I observe here incidentally that exercises of the true prerogative such as those mentioned do not affect individual rights or interests or at least do not affect them any more than they affect every other member of the polity". This is quite consistent with the role of courts of defenders of individual rights. As Chief Justice Marshall noted in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 at 170 (1803) in relation to the high quasi-prerogatives vested in the US President by virtue of the U.S. Constitution: "The province of the Court is solely to decide on the rights of individuals, not to inquire how the Executive or Executive officers perform duties in which they have a discretion. Questions, in their nature political or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court". Previously, the great Chief Justice noted at pp. 165-67, in language erringly reminiscent of the language occasionally used to describe the absolute prerogative of the Crown, that the President is accountable only to his own moral conscience and to the political judgment of the nation. Whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and, being entrusted to the Executive, the decision of the Executive is conclusive.

15. Moreover, the Sovereign, as numerous authorities have long recognised, can freely refuse a request for a dissolution if such a dissolution is being used purely or avowedly to obtain a partisan advantage (see, eg, William Hearn, *The Government of England* (Longmans, 1867) 156; Sir John Kerr, "The Governor-Generalship in Australia" (1975) 17 *Journal of the Indian Law Institute* 1, 3-5; Paul Hasluck, *The Office of Governor-General* (Melbourne University Press, 1979) 16), or if an election has occurred only very recently, typically in the last 6-12 months. Certainly, no Prime Minister who just lost an election can seriously expect the Sovereign would let him rerun the election again: David Butler, *Governing Without A Majority* (Macmillan Press, 2nd ed, 1983) 126 ("No one suggests that a Prime Minister defeated at an election could expect the sovereign to grant a new dissolution and an immediate rerun of an election"); Vernon Bogdanor, *The Coalition and The Constitution* (Hart Publishing, 2011) 20-21 ("The Sovereign will be expected to use her prerogative power only in those very rare situations when politicians fail to behave with constitutional propriety. If, for example, after failing to win an overall majority, Gordon Brown had sought an immediate second dissolution before meeting Parliament, the Queen would have been entitled to refuse this request. In these circumstances, the Queen is a kind of constitutional long-stop, an ultimate guardian of the constitutional proprieties"). There is no doubt the Crown possesses in such *in extremis* situations a reserve power to refuse a dissolution (for these and other points see, eg, Anne Twomey, *The Veiled Sceptre* (CUP, 2018) Ch 5; see also Ken Clarke, *Kind of Blue* (Macmillan, 2016) 312 (describing a situation where Sir John Major reportedly

spoke to Robert (now Lord) Fellowes, the Private Personal Secretary to Queen Elizabeth II, who in turn had hinted to him that if the Queen was asked for a dissolution, she would refuse any such request)).[5] Indeed, unlike the judicial process, which is a highly salient public act, the royal refusal of a request for dissolution will typically made public (if at all) long after the refusal itself occurs, since private deliberations with the Sovereign are meant to be confidential, and no Prime Minister would presumably want to readily make public the fact he was some loser who has been flatly rebuffed by the Queen. Furthermore, the Queen is legally entitled to dissolve Parliament whenever she thinks fit (see paragraphs [2], [5] and [7] above). As noted in Sheldon Amos, *A Primer of The English Constitution and Government* (Longmans, Green, and Company, 1883) at p. 10:

> The Sovereign can dissolve Parliament whenever he pleases. He occasionally dissolves Parliament on the advice of his Ministers when it appears that they no longer possess the confidence of the House of Commons, and it seems probable that by "appealing to the people" a new House may be returned more favourable to them, or at the least, that they may be secure in the belief that the judgment inside the House is fully supported by that outside it.

16. Now, one would naturally presume that if any opposition member challenged a proposed dissolution they would be painted as being afraid of losing the next election and facing their voters. Perhaps this is why some commentators have asked us to imagine a more extreme hypothetical situation. In particular, it has been questioned whether the ouster clause, as written, deprives the Courts the authority to examine, and therefore quash, a decision by the PM to deport all MPs. Put to one side why the Queen would ever accede to such a request in the first place, by a Prime Minister who seems to have gone completely mad. But let me disabuse the committee of a supposition so extravagant for another reason**.** Dissolution has always been understood to relate to Parliament, or more precisely, the House of Commons as a whole, and not any specific individuals or subset thereof. They are two necessarily distinct and separate, indeed unrelated, acts. We are really talking about something *other* than dissolution, purported or otherwise. Such an absurd deeming provision would not in any sense involve a dissolution as understood in ordinary everyday language, and indeed, such a power has never existed at common law: see, eg, Sir William Holdsworth, *A History of English Law* (Vol X, 1937) 393 ("The Crown has never had a prerogative power to prevent its subjects from entering the kingdom*,* or to expel them from it*"*); Sir William Blackstone, *Commentaries on the Laws of England, Volume 1* (15th ed, 1809) 137 ("But no power on earth, except the authority of Parliament, can send any subject of England out of the land against his will**;** no, not even a criminal"), affirmed in *Pham v Secretary of State for the Home Department* [2015] UKSC 19 at [97]-[98] (Lord Mance, with whom Lord Neuberger, Lady Hale and Lord Wilson agreed). Only if the MPs were so meek and sheep-like as to voluntarily vote for legislation to deport themselves could their deportation be legally effective. The ouster clause, if it seriously had such an effect, would also probably be read down via §3 of the *Human Rights Act* for violating the right

[5] Incidentally, I note the bill currently seems fixated on the act of dissolution itself rather than refusal to dissolve. However, it might want to make clear any decision relating to dissolution can include a refusal to dissolve Parliament on part of the Sovereign, which would also be nonjusticiable.

to private family life. So, while anything that looks like a purported *dissolution* of the Westminster Parliament could not be reviewed by the Court, the *deportation* of MPs certainly could be – irrespective of any deeming provision the executive might dream up which thereby does grotesque violence to the English language. In short, any Prime Minister that seriously claimed dissolution covered the deportation of any sitting MPs would be speaking gibberish, not English.

17. Even if the power to dissolve Parliament seems like it is being abused in the eyes of some members of the public, in retrospect this might turn out to be of no great consequence. Most, perhaps all, requests for a dissolution have *some* degree of political motivation behind them and numerous examples can be cited where a dissolution is requested and granted in the pollyannish belief they will secure the office holder an electoral advantage, only for the calculation to backfire politically. Such has been the system for many centuries. But the sky has not fallen. And that is precisely the point. General elections make the general public, not the Courts, the ultimate arbiter as to how their government is doing and, if necessary, the people themselves can always opine on the propriety of any dissolution. As Johnson J noted for a unanimous Court in *Anderson v. Dunn*, 19 U.S. 204 at 226 (1821):

> Public security against the abuse of such discretion must rest on responsibility and stated appeals to public approbation. Where all power is derived from the people, and public functionaries, at short intervals, deposit it at the feet of the people, to be resumed again only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger.[6]

Recommendation 3: Deny The Judiciary the Power To Examine What Advice, if Any, Was Given To Her Majesty As Well as the Process, if any, Leading Up to The Proffering of Such Advice

18. On 14 December 2020, *Miller No 2* was summarily distinguished by the Alberta Court of Appeals in the context of holding that the dissolution of a provincial legislature was a quintessentially political decision, and thus, one which is clearly nonjusticiable: *Engel v Prentice*, 2020 ABCA 462 at [25]-[27] (Slatter, Schutz and Hughes JJA) ("The facts of the British case are distinguishable from the facts before us and therefore, we do not find it to be of assistance"). Be that as it may, *Miller No 2* was never binding law in Canada to begin with and I fully agree with the submission made by Professor Ekins that *Miller No 2* makes dissolution more likely to be liable to judicial review in the UK. If prorogation must be reviewed under an effervescent and vague reasonableness standard, why not dissolution too? And if the Court can ignore 700 years of history relating to the sweeping scope of the power to prorogue Parliament, again why not with dissolution as well? Indeed, at common law, prorogation and dissolution were always regarded as broadly analogous powers: cf. Charles Runnington (ed), *History of the Common Law of England* (6th ed, 1820) 77 ("Because prorogation and dissolution were the same in law").

[6] In my view, several commentators seem to have an exceedingly romantic view of the Courts. For how courts can actually exacerbate partisan antidemocratic pathologies in the system see David Landau and Rosalind Dixon, "Abusive Judicial Review: Courts Against Democracy" (2019) 53 *UC Davis Law Review* 1313-1387.

19. Indeed, one potentially revolutionary implication of *Miller No 2* is that any advice formulated earlier in time by the Prime Minister (or his or her advisers) can now be impeached by the courts. The Court purported not to inquire what may or may not have been said to Her Majesty personally ([15]), but found the reasoning process offered in the material leading up to the advice given to be entirely wanting ([55]-[61]). **Thus, one potential loophole in the existing bill is nothing prevents a litigant from marching into Court and saying that the advice the Prime Minister tendered to Her Majesty was unlawful due to some alleged defect in the process leading up to the final advice which is given. For example, one might successfully argue the Prime Minister failed to adequately consult Parliament or Cabinet beforehand, *contra* certain made-up constitutional principles. The Court might declare the Prime Minister had sinister partisan aspirations, such as dissolving Parliament with intent to stymie the work of a parliamentary committee that could have exposed some politically nefarious act, thereby frustrating the curial constitutional function of the legislature itself. A litigant can then in turn seek a declaration to that effect.** After all, a dissolution, as Blackstone observed, represents the civil death of Parliament itself – what more could frustrate the constitutional functions of Parliament than that? So, while the dissolution itself might not be able to be quashed by virtue of the ouster clause (assuming it to be effective) it is possible that the entire process leading up to the request for a dissolution could still be declared unlawful. As things stand, a litigant could march into court and say that the advice that was proffered, at least the process leading thereto, was contrary to any vague constitutional principles. **Any election could therefore start off with a bang, if not a distraction – a declaration by the Court that the Prime Minister had given unlawful or constitutionally improper advice to Her Majesty due to any one the aforementioned reasons.**

20. To be safe, the Courts must also be deprived of the authority of enquiring[7] into and examining, and indeed impeaching in any way (including even the legality) of the advice proffered to Her Majesty by the Prime Minister or reasons or processes (if any) leading thereto**.** Such a privity clause is absolutely essential. "Advice" here should include not only what the actual advice, if any, tendered to the Queen was, but also includes any process, or factors which were or were not considered at any time, in lead up to giving any final advice to the Sovereign (again, if any). **The ouster clause currently does not deny the Courts the power to say that the Prime Minister had supposedly unconstitutional urgings at some earlier point in time, which in turn infected the advice ultimately proffered to the Sovereign. It is still possible a Court could make a judicial declaration to that effect.**

21. In short, the proposed bill has come one step closer to help take us away from government by judiciary, but it has not quite gotten us there yet. The bill, as it stands, does not prevent courts from casting aspersions on the executive in relation to the exercise of the royal power of dissolution.

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[7] As a historical curiosity, the following constitutional provisions might also be worth reflecting on: Constitution of Barbados, s32(5); Constitution of Belize, s34(4)-(5); Constitution of Sri Lanka, s154F; Constitution of India, Art. 74(2), 85, 163(3); Jamaica Constitution, s30(2) and 32(4)-(5).

Recommendation 4: Deny Standing To Everyone

22. Finally, it is worth emphasising that prior to *Miller No 2* it was simply regarded as axiomatic that Parliament was a tricameral body. Neither a resolution in either the House of Commons or the Lords, or indeed in both Houses, ever amounted to a legally binding act of the Westminster Parliament (cf. Lord Denman CJ in *Stockdale v Hansard* (1839) 112 ER 1112 at 1153-54). In law, the supremacy of Parliament always meant the supremacy of Crown-in-Parliament – requiring the concurrence of all three estates. Thus, one perplexing thing about *Miller No 2* is how Ms Miller (who is not even an MP) or Ms Cherry (representing a mere vocal faction within Parliament) had the authority to vindicate an institutional interest affecting a tricameral body, one which the Queen-in-Parliament itself chose not to vindicate through legislation. *Miller No 2* seems to me a textbook example of a fallacy of composition in action – the preferences of a mere small and vocal part are suddenly treated as if it represented the whole, or at least, a majority within all three estates within Parliament itself. Yet, once upon a time even some members of the UK Supreme Court who joined *Miller No 2* rightly rejected such a radical, if not wholly unconstitutional, conception of Parliamentary sovereignty: *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [43] (Lord Neuberger, with whom Lady Hale and Lords Mance, Kerr, Clarke, Wilson, Sumption and Hodge agreed) ("Thus, Parliament, or more precisely the Crown in Parliament, lays down the law through statutes – or primary legislation as it is also known – and not in any other way"); Ibid. [122]-[123] ("A resolution of the House of Commons is not legislation"); Ibid. at [255] (Carnwarth LJ) ("Of course the House of Commons is not the same as the Queen in Parliament, whose will is represented exclusively by primary legislation"). If a sizeable supermajority within a 650 member House of Commons could not be said to speak for Parliament in 2017, how on earth can the mere voice of 78 MPs now suddenly be said to speak for Parliament in 2019? A mere 78 MPs – out of a House of Commons with 650 MPs, plus 805 sitting members in the House of Lords, plus a Sovereign as Head of that Parliament – is hardly the most natural or obvious group of candidates to assert the institutional interests of a unilateral body composed of 650 members, let alone any trinitarian body like the Westminster Parliament itself.

23. In the United States, individual members of Congress normally do not have the right to challenge an executive action which might affect the actions of Congress as a whole, absent statutory authorization: *United States v. Ballin*, 144 U. S. 1, 7 (1892) ("The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole"), as applied in *Raines v. Byrd*, 521 U.S. 811 especially at 829-830 and fn 10 (1997). In *Raines*, the *Line-Item Veto Act of 1996* allowed the US President to nullify certain provisions of appropriations laws, and disallowed the use of funds from cancelled provisions for offsetting deficit spending in other areas. Through executive fiat, the President could essentially nullify, by decree at some later point in time, what two Houses of Congress as a whole had enacted as a law. Yet, it was held six individual members of Congress did not have standing to challenge the law because of lack of a direct personal financial injury (as in *Miller No 2*), the abstract institutional injury was widely dispersed affecting all legislators alike (as in *Miller No 2*), the sheer lack of historical precedent in bring such a challenge (as in *Miller No 2*) and the

fact the legislators had no express statutory authorization to bring a lawsuit on behalf of the legislature (again, as in *Miller No 2*).[8]

24. The current rules relating to standing in the UK strike me as woefully lax. In my opinion, everyone in the country should be denied standing to challenge any putative dissolution of Parliament. A provision to the following effect might be able to do the trick:

> "No person shall have any standing whatsoever to challenge the legality of any grant, or refusal to grant, a dissolution of Parliament, purported or otherwise. Nor shall any person have standing to challenge the legality of the advice proffered to the Sovereign by the Prime Minister. Standing shall also be denied to any person seeking to challenge or impeach in any way whatsoever any of the acts, omissions, considerations, motives, views, processes, or procedures, if any, taken at any time in lead up to, or relation to, the advice finally proffered to the Sovereign to dissolve Parliament".[9]

25. "Person" should include any association, corporation, individual, MP, group of MPs, or any other entity or group of individuals whatsoever. This covers both any special interest group as well as any MP(s). As noted above, the denial of standing should probably include the denial to challenge any advice given leading up to a dissolution, since the bill as its currents stands does not prevent one from seeking a declaration that the advice proffered to the Sovereign, or any process or consultation leading thereto, was unlawful for violating abstract constitutional principles that the court could make up from whole cloth. **Broadly denying standing to any possible litigant is certainly one novel and alternative way to approach the entire constitutional question before you.**

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[8] Later the law was declared unconstitutional: *City of New York v Clinton*, 524 U.S. 417 (1998).
[9] Although very unlikely, s3 of the *Human Rights Act* might be used to read down this provision, but it might wise to make clear the *Human Rights Act* does not apply to this Act – lest someone argues they have been denied a right to access to the courts and an activist Court ends up buying the argument.