Written evidence submitted by Sir David Natzler KCB, former Clerk of the House of Commons (2014-2019)

Introduction

1. I am submitting this memorandum in response to an invitation from the Chair of the Joint Committee, drawing in particular on my experience as Clerk of the House between 2014 and 2019, including the 2015 and 2017 General Elections. I have benefited from reading the transcripts of oral evidence of 10 and 17 December 2020 and 7 January 2021.

Comments on the 2011 Act

2. There seems little or no point now in replaying in detail the principal points of controversy during the passage of the 2011 Bill into statute, nor in suggesting how the 2011 Act could be improved, since it is evidently about to be repealed. In my period as Clerk of the House operating under the terms of the Act it did raise a number of troubling uncertainties in my mind and the minds of others. These included how the 14 day cooling off period was supposed to work in practice, and the risk of legal challenge on the statutory interpretation of several parts of the Act. So its impending repeal may well come as a relief to those expected to give advice on its operation.

Can the conventions under the previous prerogative regime be revived?

3. I suspect that the conventions were already changing before the FTPA, in respect of what was held to be a sufficiently serious adverse vote for a Prime Minister to resign. But in my view the past decade of politicians and officials and lawyers living under the regime of section 2 statutory no confidence motions has inevitably and possibly irretrievably changed perceptions. The shift will have been magnified by the frequent Government defeats on major Brexit votes since January 2019. There used to be a record kept of major votes lost which were *not* regarded as denoting a loss of confidence: I imagine it must now be a very long list. It seems to become ever likelier that a Prime Minister could lose second Reading of a programme Bill, even conceivably a Finance Bill, and rather than resign either challenge the Opposition to table a formal no confidence motion, or table their own positive confidence motion. To that extent it is my impression that even when the section 2 motions are repealed they will be found to cast a long shadow. Add to that the UKSC judgment of 2019. As Lord Sumption indicated, nobody until now would have thought of a legal challenge to a dissolution. There is now and will be an assumption or hope that serious constitutional conflict may best be resolved in the highest courts, as it is on the continent. These two factors together make it very hard to imagine that we can just go back to 2011 as if nothing had changed.

Nature of the new regime

4. The issue explored by the Committee as to whether the draft Bill (a) introduces a statutory regime, explicitly replicating a former prerogative power now extinguished, but no longer itself a prerogative regime – a facsimile of the prerogative regime of yore - or (b) fully revives a prerogative power which has merely been in abeyance under the blanket of the 2011 Act is a question for lawyers and not for Clerks or even former Clerks. But it does seem to me of more than academic interest because it will affect the approach of a court, if court proceedings are not ruled out by the Clause 3 ouster clause.

Is the ouster clause necessary?

5. The Government seems to be asserting that the answer to the question posed in para 4 above is (b): not least by the title given to Clause 3. The material published with the draft Bill refers to the "long standing position" and "settled law" that under the old regime dissolution was not reviewable in the court. It does not however require great legal expertise to detect at least some uncertainty in the wake of the 2019 UKSC judgement as to how far Lord Roskill list of "no-go" areas from 35 years ago as "no-go" areas still apply.[1] But if the assertions that both (i) the prerogative regime has been restored as if nothing had happened, and (ii) dissolution is agreed to be judicially non-reviewable are correct, the ouster clause seems pointless if harmless: unless of course it has unintended consequences of sweeping up matters beyond dissolution itself.
6. If the answer is (a) the ouster clause is a politically understandable attempt to prevent judicial review of the exercise of a power given or restored by statute. If the 2019 UKSC decision had been foreseen the Government might presumably have sought a similar statutory ouster on prorogation. As it stands, the result of the draft Bill if passed with the ouster seems to be that the prerogative power of prorogation remains subject to questioning by a court, as was established in 2019, but that the prerogative power of dissolution whose legal status is much less certain is not so subject. I am concerned that this is a recipe for confusion.

Where might a challenge arise?

7. Is it in any event conceivable that there could be a dissolution or matters closely connected to a dissolution which would in the absence of an ouster be likely to be open to legal challenge? The Sovereign, guided by the Lascelles principles, and with the knowledge of Commonwealth parallels, would surely refuse an improper request were one to be made. From experience there are however two possible areas where I would be concerned at the effects of the ouster.

Writs

[1] This applies not just to dissolution but the other prerogative powers. Some eg mercy have I believe been the subject of judicial review, and others eg treaty making or war powers have raised such controversy in recent years as to make it at least conceivable that a court would be willing to review their use. I also note Lady Hale's reference to other changes since Roskill: Q102

8. The ouster applies to the exercise or purported exercise of powers referred to in clause 2. These powers include under 2 (2) (b) the issue of writs for parliamentary elections. From my limited experience I wonder if it is right that there should be no conceivable questioning in a court of those parts of the business of issuing writs which depend on the prerogative, especially when so much of the rest of electoral machinery is governed by statute, notably in Schedule 1 to the RoPA. Preserving from judicial intervention the general prerogative of dissolution is surely rather different from similarly sheltering all the subsidiary machinery.

The third interval: poll to first meeting

9. Robert Lisvane mentioned the issue of the timing of a prorogation prior to dissolution, discussed in evidence on 7 January. I have a related concern, to which Alison Young and Lady Hale both made some reference, on the period between the day of poll and the First Meeting: what Professor Blackburn in his 1990 book on The Meeting of Parliament called the third interval. As I understand it, the Proclamation dissolving a Parliament as a matter of practice[2] names the place and date of the first meeting of the new Parliament. It is open to the Privy Council to advise the Monarch to issue a proclamation delaying the day of first meeting named in the Dissolution Proclamation. Such a Proclamation could presumably be issued before or after the poll. The obvious scenario would be the desire in the event of a hung Parliament for additional time to sort out a Coalition. In 2010 that was not required. Nor of course was it required after the Conservative victory in 2015. In 2017 the Queen's Speech was delayed by two days for time to settle the agreement with the DUP.
10. In 2015 there was much informal discussion during the election period of scenarios were there to be a hung Parliament and no obvious outcome. I recall that a delayed first meeting was one theoretical possibility raised in discussion, and my personal unease at even the remote prospect of what might be seen as improper use by the incumbent administration of this power to delay the meeting of Parliament after an election. This would of course be a prorogation, which I imagine would be subject to judicial review, but the broad terms of the ouster might be seen as covering the prorogation of a meeting date so intimately linked to a dissolution: what Robert described as a "bridge to other prerogative matters"[3] .
11. It may seem absurd to be considering extreme scenarios where politicians stretch conventions beyond propriety. But writing this in the shadow of events since the US election, and the exposure there of the fragile rules regime around the Electoral College when unprecedented pressures are applied, suggests to me that it is unwise to imagine that conventions will always be punctiliously observed. A timetable for

[2] Although they are printed in the Journals as a single document it would seem that they can be two separate proclamations: Sir Stephen Laws suggested that one immediately followed the other. Sir Stephen also referred *en passant* to the effects of the Triennial Acts which require parliament to meet at least every 3 years, but that is rather less comfort than it may have been 350 years ago.

[3] Q74

these intervals, not susceptible to being over-ridden by executive action, would be a helpful safeguard. It interferes with the prerogative no more than the Triennial Acts.

Child's Guide

12. I have not found it easy immured in Dulwich and dependent on the internet to chase down the mechanical details of dissolution and prorogation. I am embarrassed as its most recent co-Editor to admit that Erskine May is not always a great help: for example in explaining the real meaning of the impenetrable Prorogation Act 1867. The committee could render a valuable service if it provided a full referenced account of the machinery of dissolution, summoning and prorogation so that Parliament can consider the Bill on the basis of an authoritative account.

The Gorton writ 2017

13. The draft Bill includes several provisions on electoral law which are unconnected to the revival of the prerogative power of dissolution. Other minor changes in electoral law may therefore be in scope. I wish to draw to the Committee's attention one matter which arose during my timer as Clerk as possibly meriting a change in the law. It is set out in brief in para 2.12 of Erskine May.
14. Sir Gerald Kaufman, then Father of the House, died on 26 February 2017. The writ for Manchester Gorton was issued on 28 March 2017, and the poll fixed for 4 May. On 18 April the Prime Minister announced that she would be asking the House to agree to an early election. On 19 April the House agreed to the FTPA early election motion. A dissolution date of 3 May was announced.
15. I held discussions with the Manchester and Privy Council authorities about how to stop what all were agreed would be the nonsense of a by-election on the day directly after a dissolution. There was some urgency as the local electoral machinery had to be set in motion very soon. The local authority had legal advice that they could not simply set aside a writ, as it seems happened in 1923 in a similar case in Warwick and Leamington. The Clerk of the Crown was understandably unwilling to issue a writ of *supersedeas* without some parliamentary authority, and the Speaker would need the authority of the House to interfere in a by-election. So on 19 April the Government tabled a motion ordering the Speaker to convey to the Clerk of the Crown its desire for a writ of *supersedeas*: the motion was duly agreed on 20 April.
16. I was not the only one involved in these rapid discussions who was surprised that this contingency was not covered in electoral law. It may not be simple to devise a rule for all circumstances. But statutory provision empowering either the local or central authorities to cancel writs for by- elections once the Prime Minister has publicly indicated the date of a future general election would in my view be desirable.

8 January 2021