Written evidence submitted by Robert Craig (FTP0019)

1. I give this evidence in my personal capacity. I am a Lecturer in Law at the University of Bristol. I have been teaching Public Law, especially Constitutional law, for more than 20 years and have been published in leading law journals on issues of current constitutional controversy. The sections of this submission that are emboldened summarise the core arguments.

2. I have previously submitted evidence to both the House of Lords Constitution Committee and the House of Commons Public Administration and Constitutional Affairs Committee on the subject of the Fixed-term Parliament Act 2011 ('FtPA'). I was quoted in both final reports. I am grateful to this Committee for their indication that they will take into account submissions on this topic previously made to those two Committees. My evidence in this submission will therefore endeavour to travel lightly over areas canvassed in my previous evidence.

3. Here are links to my three previous submissions to those Committees on this topic:

    - https://committees.parliament.uk/writtenevidence/470/html/ (HL Constitution Committee (October 2019)
    - https://committees.parliament.uk/writtenevidence/2287/html/ (PACAC April 2020)
    - https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/1813/181312.htm (PACAC October 2018)

    I have also written a full-length article published in the *Modern Law Review* on the FtPA.[1]

4. My evidence in this submission seeks to address the major recent interventions by the Government in relation to the FtPA. Primarily this relates to the draft Bill, the Fixed-term Parliaments (Repeal) Bill 2021 ('the FtPA Repeal Bill'). If approved by parliament, this would repeal the FtPA and restore the *status quo ante*. The accompanying Notes to the Bill as well as the Government's statement of 'Dissolution Principles' (published alongside the Bill) raise a few interesting issues.[2] The submission will focus on three key issues: a) reviving the prerogative power of dissolution and the sovereignty of parliament b) non-justiciability and the doctrine of confidence c) the ouster clause in the FtPA Repeal Bill.

EXECUTIVE SUMMARY

[1] Robert Craig, 'Restoring confidence: Replacing the Fixed-term Parliaments Act 2011' [2018] 81(3) *Modern Law Review* 480.

[2]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/940027/Draft-Fixed-term-Parliaments-Act-Repeal-Bill.pdf.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/940028/Dissolution-Principles.pdf.

5. **This submission suggests that the FtPA Repeal Bill, if passed as currently drafted, will successfully restore the tried-and-tested pre-FtPA constitutional system. This is because it is a core element of the sovereignty of parliament that it is possible to reverse all the effects of an Act of Parliament passed by a previous parliament. It will also be argued that reviving the old system will also restore the old rules relating to the doctrine of confidence which had been seriously and negatively impacted by the FtPA. Finally, it is suggested that the clause seeking to prevent judicial review of any exercise of the prerogative of dissolution is a predictable consequence of the recent explosive decision in *Miller II* in the Supreme Court.[3] The clause is likely to be effective in reinforcing the norm that the dissolution prerogative is non-justiciable as 'high policy' that is unsuitable for judicial enquiry. It is also a necessary precaution given recent constitutional events.**

6. **Each of the following sections has a summary in bold in the final paragraph.**

SOVEREIGNTY OF PARLIAMENT

7. Dicey laid down an almost unanimously accepted constitutional truism which is that parliament can 'make or unmake any law whatever'.[4] Interestingly, the power of this maxim is usually ascribed to the notion of 'making' law, but in truth it is the *second* part, the 'unmaking' that is where the real power lies. Since parliament is underpinned by the authority of a democratic mandate, there is no other plausible competitor for its legal authority; except, that is, *itself* - or rather, previous iterations of itself. In other words, what truly demonstrates the extraordinary, untrammelled and continuing power of the Crown-in-Parliament is its ability to override, reverse or 'unmake' any *previous* Act of Parliament.

8. If parliament can do anything, does that include stopping *itself* doing things in the future? The law is crystal clear on this point. Binding its successors is the one thing parliament cannot do. HLA Hart described this as the 'continuing' theory of parliamentary sovereignty because parliament has a continuing ability to make or unmake any law regardless of any previous statute.[5] The alternative 'self-embracing' theory, where parliament can permanently and irreversibly bind (or 'embrace') its future self, has never been accepted by any court or by parliament.[6]

9. The FtPA sought to replace the previous prerogative power to dissolve parliament with a statutory regime which put the prerogative power into abeyance. The FtPA Repeal Bill seeks to restore the *status quo ante*, in other words to 'unmake' the FtPA. Gavin Phillipson, in previous evidence to parliamentary committees and elsewhere,

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[3] *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41; [2019]; [2020] A.C. 373; 3 W.L.R. 589.

[4] AV Dicey, *An Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan: 1915), 3.

[5] HLA Hart, *The Concept of Law*, (1961: Oxford, OUP), 149-50.

[6] *Ellen Street Estates, Limited v Minister of Health* [1934] 1 K.B. 590. *R v Secretary of State for Transport, Ex parte Factortame Ltd. and Others (No. 2)* [1991] 1 A.C. 603. *Thoburn v Sunderland City Council* [2003] Q.B. 151; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583. See also s 18 European Union Act 2011.

has argued that the effect of the FtPA was to impliedly *abolish* the prerogative and that it 'probably cannot be revived'.[7] This must be wrong. The reason that it must be wrong is because if the prerogative cannot be revived then the 2011 parliament will have successfully and permanently *legally* limited the power of the current parliament to *reverse* the FtPA. The fundamental and orthodox principle that a current parliament can completely unmake a previous Act of Parliament is therefore directly at stake. If the prerogative cannot be revived, that could set an unwelcome precedent for some future parliament to bind its successors.

10. The text of the FtPA Repeal Bill could not be clearer as to its intended effect. The headline of clause 2 states 'Revival of prerogative powers to dissolve Parliament' and clause 2(1) states 'The powers relating to the dissolution of Parliament… that were exercisable by virtue of Her Majesty's prerogative… are exercisable again, *as if the Fixed-term Parliaments Act 2011 had never been enacted*' (emphasis added). When considering the terms of this provision, it is worth asking what more a drafter could possibly have done to achieve the restoration of the previous system and reverse the effects of the previous statute. The terms are unequivocal. The plain meaning of the Act is explicit, unambiguous and indisputable.

11. The concept of a prerogative going into 'abeyance', mentioned earlier, may be usefully illustrated by an analogy with land. Royal prerogative was historically connected to land, specifically the fact that the monarch was the feudal lord of the realm. One way to understand the relationship between statute and prerogative is to visualise statutes as *buildings* on the land. The buildings supersede the bare land, which disappears from view. If the building is removed, however, the land is visible again, untouched and unaffected. *Bennion*, the leading work on statutory interpretation, employs a similar analogy when it talks of statutes being like rugs on floorboards.[8] If the rug is removed, the original floorboards are revealed.

12. If these analogies are accepted, it is clear that the abeyance principle represents the *default* position when statutes supersede prerogative. It is also worth recalling that s 16 Interpretation Act 1978 ('IA1978') states that when a statute is repealed, the repealing statutes must express a clear *intention to revive* any common law legal rules otherwise they disappear. Logically, and this is an admittedly complicated point/analogy, the statutory rule in s 16 IA1978 must have been passed to *replace* the default common law rule. This means the *default* common law assumption must have been that the common law historically *would* have revived when a statute was repealed, in the same way as prerogative. Therefore, as a matter of history, the default position for common law and prerogative is that both go into *temporary* 'abeyance' if statute supersedes them. Revival is the standard default position.

13. It is worth mentioning, perhaps, that the Interpretation Act 1978 also deals with the hypothetical problem pointed out by Professor Twomey (Q197) that maybe

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[7] Gavin Phillipson, 'A Dive into Deep Constitutional Waters: Article 50, the Prerogative and Parliament' (2016) *Modern Law Review* 1064, 1073.
https://committees.parliament.uk/publications/2335/documents/24130/default/ Phillipson is quoted at [35].
[8] Oliver Jones, *Bennion on Statutory Interpretation*, (Reed Elsevier: 2013).

prerogative powers could unexpectedly reappear if statutes were repealed in future ('hey presto, it pops up again'). She was of course talking about Commonwealth situations so I make no comment on that - but for the UK, that kind of random revival simply cannot happen. Indeed, that is why the draft Bill is so careful to be explicit as to restoring the status quo ante.

14. **Dicey made clear that parliament can 'make or unmake any law whatever'. It is a core aspect of the continuing ability of parliament to legislate entirely freely that it be able to reverse any previous Act of Parliament entirely. The FtPA superseded the prerogative of dissolution and that prerogative went into abeyance. The terms of the FtPA Repeal Bill are unequivocal in their insistence on reviving the prerogative and restoring the *status quo ante*. Any attempt to cast doubt on the power of parliament to reverse a statute passed by a previous parliament could set an unwelcome precedent. If parliament wishes to revive the prerogative of dissolution by entirely reversing the FtPA, its power to do so should not be questioned.**

NON-JUSTICIABILITY AND THE DOCTRINE OF CONFIDENCE

15. One immediate and tangible benefit of a return to the old system would be the restoration of long-established and effective rules surrounding the doctrine of confidence. This is important because confidence is umbilically linked to the dissolution prerogative. If a Prime Minister loses the confidence of the House, he is entitled to seek the confidence of the people directly instead by asking the monarch for a dissolution.

Keeping the monarch out of the political arena under all circumstances

16. The author respectfully suggests that in a modern democracy a hereditary monarch should not refuse *any* request from a prime minister who has, or appears to have, the confidence of the Commons and the support of his party or coalition, or who has lost that confidence and wishes to seek a mandate directly from the electorate. As we saw last year with prorogation, no possible criticism could ever be levelled at the monarch for following formal advice on the exercise of any prerogative. It is also perhaps worth noting that in the dissolution context, the electorate will immediately hold the decision to account. There is no more direct democratic accountability than that. This would apply even to situations such as a dissolution shortly after a previous election which is sometimes suggested to be where a refusal by the monarch could occur. The author submits that voters like Brenda from Bristol would be the real deterrent but if such a request was actually made, there is no alternative to the electorate giving their verdict.

17. Furthermore, the author respectfully disagrees with Professor Twomey's claim that it is important that the monarch retains some real constitutional power or risk being 'very vulnerable in your political system, because it leaves her as a tourist attraction' (Q185). It is *precisely* because the current monarch has never appeared to be involved in any political crisis that the monarchy has survived constitutionally

unscathed so far. We have been incredibly lucky that no crisis has ever dragged the monarch into the political arena. The pressure to keep the monarch out of the maelstrom are exponentially greater than other similar Westminster systems because, bluntly, Governor-Generals and their ilk can be replaced. The monarchy cannot.

18. My own view, and I agree on this issue with Sir Robin Butler (unless I have misunderstood his views), is that it is now for the elected politicians to sort out these kinds of issues in *all* circumstances. That is just the democratic reality in the modern era. In my view, and this may well be controversial, in reality no residual discretion is, or I should perhaps say 'should be', retained personally by the monarch on anything relating to: dissolution (once revived if the Bill is passed); appointment of the Prime Minister; royal assent; and prorogation. The democratically acceptable approach should now be clear on these matters. Any problems must be sorted out by the politicians, any decisions must be held to account at the despatch box and any final verdict must be delivered by the electorate. This would incidentally protect the monarchy indefinitely. The fastest way to lose the monarchy, *pace* Professor Twomey, would be if, one day, a mistake was made. The risk is not worth it.

The importance of the doctrine of confidence

19. The executive and the legislature used to be able to precipitate a general election: MPs through a vote of no confidence and the Prime Minister through seeking a dissolution. This balance was constitutionally healthy and reflected the fused nature of executive and legislature and the fact that General Elections choose who will occupy *both* branches. Elections do not just choose MPs, they endorse party manifestos because the party with the most votes tends to win the election overall and the executive slate then forms the government.

20. The FtPA seriously damaged the doctrine of confidence. It removed the power of the Prime Minister to threaten a general election. This removal, in the author's view, materially contributed to the chaos of the Brexit process. Theresa May did not have the option of attempting to clear the logjam by making a vote on her deal a confidence issue and potentially replicating the knife-edge vote on the Maastricht treaty that happened under John Major.

21. Furthermore, it is sometimes argued that the inability to call an election in early Autumn 2019 vindicated the passing of the FtPA. On the contrary, it is suggested that matters were only able to drift for so many months as deadlines came and went precisely because the FtPA stopped matters being brought to a head much earlier as discussed above. There then emerged a strange kind of 'wildcat' or 'shadow' executive controlling an alternative parliamentary majority.[9] This grouping piloted delaying bills through parliament without bringing down the government and subjecting its own leadership to the scrutiny of the despatch box. This was another deeply unfortunate side effect of the paralysis, in large part caused by the FtPA.

[9] https://www.conservativehome.com/thetorydiary/2019/02/letwins-wildcat-executive-would-reduce-ministers-to-marionettes.html

Space precludes further analysis of the negative effects of the FtPA but, in short, its demise is hugely welcome.

22. The effective operation of the confidence doctrine is bolstered by the non-justiciability of the dissolution prerogative. If it were ever to be established that a decision to call an election could be litigated, this could have important political impacts. The threat of litigation could be made in the House and in the media. The ripple effects of this could not only muddy established modes of political accountability, but it would also result in open speculation as the potential outcome of any mooted judicial decision, with the judiciary being used as a political weapon. This could blur the boundaries of law and politics inappropriately. It could also call into doubt whether an early election was even possible, which could also have damaging political side effects.

The Miller II case

23. The Notes to the FtPA Repeal Bill quote Lord Roskill in the famous *GCHQ* case who listed dissolution as one prerogative that was clearly non-justiciable - but this list, which is not binding, has in any event been whittled down by subsequent case law.[10] The elephant in the room, of course, is the explosive recent UK Supreme Court decision in *Miller II*. This held that an exercise of the prorogation prerogative was unlawful because it breached the 'limits' of the power.[11] Lord Roskill did not mention prorogation on his list, as it happens, but the prorogation power is closely connected to dissolution. It is worth noting that the Divisional Court, comprising the Lord Chief Justice, the Master of the Rolls and the President of the Queen's Bench Division unanimously and thunderously dismissed Miller's argument because the exercise of the prorogation power was a matter of 'high policy'.

24. The high policy test has stood unquestioned for decades and was held by the Divisional Court to be binding on them.[12] They held that the exercise of the prerogative was 'not justiciable' because it was 'inherently political in nature' and involved decisions where 'there are no legal standards against which to judge their legitimacy'.[13]

> it is impossible for the court to make a legal assessment of whether the duration of the prorogation was excessive by reference to any measure. There is no legal measure of the length of time between Parliamentary sessions. There is not even a constitutional convention which governs the matter[14]

[10] *Civil Service Unions v Minister of State for Civil Service* [1985] AC 374. *R v Secretary of State for the Home Department, ex parte Bentley* [1993] 4 All 442.
[11] *Miller II*, n 3, [52].
[12] *R (Miller) v The Prime Minister* [2019] EWHC 2381 (QB), [40].
[13] *Ibid*, [68], [42], [51].
[14] *Ibid*, [54].

The issue at stake was the fractious battle between Government and MPs over the Brexit process. This was of course the subject of significant political, media and general public interest on a daily basis.

25. The Supreme Court circumvented the 'high policy' test applied by the Divisional Court, barely mentioning the relevant case law. Instead, they invented a novel 'limit' to the power which they held was breached in this case. On one view, the fact that the Supreme Court expressly said its decision was a 'one-off' might lead some observers to conclude that the case was to be treated as decided on its particular facts, but this pious hope may be in vain.[15] Prorogation is intimately connected to dissolution because the latter customarily happens in conjunction with the former (but not always). It is therefore entirely understandable that the drafter of the FtPA Repeal Bill appears to be reflecting serious concern as to the potential for judicial interference in a future dissolution, not just a prorogation.

26. If the Supreme Court was prepared to get involved in *Miller II*, then clearly the historical restraint shown by the courts in relation to highly controversial political decisions has, at a minimum, been somewhat cast into doubt as a fundamental constitutional imperative. On one view, the decision to prorogue was a tactical political decision by a democratically elected and accountable government to put pressure on their political opponents and signal aggressive intentions to the EU on by far the most contentious political issue of the day. It will be recalled that parliament had in any event legislated such that Houses were required to sit at various points that Autumn.

27. The announcement of the prorogation preceded it coming into effect by a number of days which was sufficient time for a vote of no confidence, had the Leader of Her Majesty's Opposition been so minded. Unlike other political controversies, perhaps, the vote of confidence remedy was a meaningful option in this case due to the centrality and salience of the issue. Indeed, the very grouping that passed a Bill mandating the seeking of an extension could conceivably have formed an alternative, but probably short-lived, administration to secure a long extension by more orthodox means followed by an election. It is worth repeating that the drift and delay that led to this logjam would arguably have been more likely to be brought to a head, and resolved, much earlier under the old system.

28. If there had been a successful vote of no confidence, that would have fatally undermined any advice to the monarch to prorogue. The Government has made clear in the Dissolution Principles document that it takes the view that advice to the monarch can only be made where confidence is maintained.[16]

> The Sovereign, by convention, is informed by and acts upon the advice of the Prime Minister so long as the Government appears to have the confidence of

[15] *Miller II*, n 3, [1].

[16] The exception that proves this rule, of course, is that the Prime Minister is entitled to seek the confidence of the electorate directly, if the confidence of the House is lost.

> the House, and the Prime Minister maintains support as the leader of that Government.[17]

Since no vote of no confidence was brought, despite there being an opportunity to do so, the decision by the court to take such an enormous step into the democratic sphere in order to quash the exercise of the prorogation prerogative was, to put it mildly, somewhat surprising.

If prorogation is reviewable, the risks increase of judicial intervention on dissolution

29. If the decision to prorogue in such circumstances can be the subject of judicial supervision, it is difficult to imagine what could ever be deemed to raise issues where there are 'no legal standards' enabling the courts to intervene. This must include the dissolution prerogative, at least in theory. This is troubling.

30. It might also be noted that Lord Sales raised a question for Counsel during oral argument about whether the court could be a more appropriate supervisory body than the monarch.

> If there are constitutional principles that require to be policed, in our constitution, isn't it more appropriate for the court to do it rather than for the Queen to have to be sucked into what may be decisions with political ramifications?[18]

Little or nothing can be read into mere questions during oral argument, but it is perhaps not too implausible to speculate that some in the Supreme Court seem prepared at least to *consider* a greater role for the judiciary in generally policing decisions taken under prerogative in future. Of course, the actual outcome in *Miller II* is the strongest *direct* evidence for the latter hypothesis.

31. There is also senior academic support for the potential for judicial intervention in a decision to dissolve parliament and call a general election. Alison Young, who gave oral evidence to this Committee, has articulated a couple of hypothetical examples which she argues justifies general judicial supervision of the dissolution prerogative.[19]

> What if the Prime Minister deported all elected MPs, and then said Parliament was dissolved? What if he dissolved Parliament because his family had been kidnapped and there was a realistic threat that their lives would be in danger if he did not dissolve Parliament?

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[17] Dissolution Principles, n 2, above.

[18] https://www.supremecourt.uk/watch/uksc-2019-0192/180919-am.html Video of the Morning Session, Day 2, at 58.27-58.50. See also http://ukscblog.com/live-blog-day-2-r-miller-v-prime-minister-cherry-ors-v-advocate-general-for-scotland/ at 1129 'Lord Sales enquiring whether it is more appropriate for the Court to take decisions rather than the Queen taking a decision where there are political ramifications?'.

[19] https://ukconstitutionallaw.org/2020/12/04/alison-l-young-the-draft-fixed-term-parliaments-act-2011-repeal-bill-turning-back-the-clock/.

Young argues that such examples mean that a court should treat the dissolution prerogative as in principle justiciable. This would mean the dissolution prerogative would be supervised by the courts similarly to the prorogation prerogative in *Miller II*.

32. Mark Elliott has also argued that judicial supervision of dissolution is in principle desirable, suggesting that while 'unlikely to do so, the dissolution prerogative can generate justiciable questions'.[20] This approach is a long way from the approach of a previous generation of constitutional scholars, including Sir William Wade, who argued that even where 'the Crown grants a peerage on the advice of the prime minister as the result of a bribe', or where 'it could be shown that a royal pardon had been corruptly obtained', the courts would still not intervene.[21]

33. **The mooted return of the 'full-fat' version of the confidence doctrine on the repeal of the FtPA is excellent. It would restore the old balance between government and MPs which has functioned effectively for a very long time. The FtPA materially and negatively impacted on the Brexit process. The return of the dissolution prerogative, which is closely connected to the confidence doctrine, must raise concerns about judicial intervention following the hugely politically controversial decision in *Miller II*. The judicial review of the prorogation prerogative in that case, plus some academic comment, suggests that it can no longer be taken for granted that the courts would instantly refuse to hear an application challenging the dissolution of parliament. This is troubling.**

THE OUSTER CLAUSE

34. The FtPA Repeal Bill put forward by the Government seeks to address the potential for a court to intervene in the dissolution of parliament and the calling of a general election by the insertion of an ouster clause in Clause 3 of the Bill. Such clauses seek to restrict the jurisdiction of the ordinary courts over executive, and sometimes judicial, bodies and their powers.

> **3 Non-justiciability of revived prerogative powers**
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> A court of law may not question—
>
> (a) the exercise or purported exercise of the powers referred to in section 2,
>
> (b) any decision or purported decision relating to those powers, or
>
> (c) the limits or extent of those powers.

35. Ouster clauses normally relate to statutory powers. The courts have long been chary of ouster clauses that prevent judicial supervision precisely because it is their role to give effect to the intention of parliament and prevent the executive acting outside its powers. Matters are rather more tricky for prerogative powers because the claim that parliament intends the courts to regulate prerogative power is considerably

[20] https://publiclawforeveryone.com/2020/12/02/repealing-the-fixed-term-parliaments-act/.
[21] Sir William Wade 'Procedure and prerogative in public law', [1985] *Law Quarterly Review* 180, 197.

more tenuous. Be that as it may, there can be little doubt that parliament theoretically possesses the legal power to restrict the jurisdiction of the courts so as not to include a particular prerogative power such as dissolution.

36. The language of ouster clauses has grown more complex over time as the courts have sought to restrict their ambit by various linguistic devices and narrow interpretation. In one seminal case, *Anisminic*, an ouster clause was considered which stated that a 'determination' of the Commission 'shall not be called in question in any court of law'.[22] The court held that a determination that was outside the ambit of the conferred powers was only a 'purported' determination and since the ouster clause only applied to *valid* determinations, the ouster clause did not therefore bite on the determination being considered in that case.

37. The leading recent case on ouster clauses is *Privacy International*. In that case, a slightly more strongly worded ouster clause was similarly circumvented because parliament 'failed to make its intention sufficiently clear'.[23] Lord Carnwath for the majority expressly stated that 'one is entitled to ask why they did not use more explicit wording' hinting that a 'more explicit formula… excluding challenges to any determination or "purported" determination' might have been necessary.[24] It is therefore no coincidence that the drafter of clause 3 has inserted the words 'or purported' in 3(a) and 3(b). A 'belt-and-braces' approach has clearly been adopted.

38. The second important drafting point is that Clause 3(c) relates to the *Miller II* Supreme Court decision discussed earlier. This is confirmed in the Explanatory Notes to the Bill which state clearly that this clause is designed ''to address the distinction drawn by the Supreme Court in [Miller II] … as regards the court's role in reviewing the scope of a prerogative power, as opposed to its exercise'.[25] It will be recalled that *Miller II* was decided on the basis that the exercise of prerogative power in that case was outside some putative 'limit' to that power that was first identified in that decision. It is tolerably clear that this clause is an explicit attempt to prevent a future court identifying a novel 'limit' to the prerogative power of dissolution and thus circumventing this ouster clause.

Academic comment on the ouster clause

39. Some academic commentators have taken a dim view of the ouster clause. Young argues that the restriction on the court considering the limit of the dissolution prerogative could be circumvented by treating an impugned exercise of the dissolution prerogative as going to the very *existence* of the prerogative rather than its limit or extent.

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[22] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, 169 citing s 4(4) Foreign Compensation Act 1950.

[23] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [111].

[24] *Ibid*.

[25] Explanatory Notes, n 2, above, [17].

> Both of the examples given above could be regarded as questions as to the existence of the power to dissolve Parliament as opposed to its limits or extent… Such an interpretation would uphold the rule of law, preventing abuses of the power of dissolution either by a rogue Prime Minister, or a terrorist.[26]

40. Elliott also considers in detail how this clause could be circumvented, notwithstanding what might appear to be the clear intention of the drafter, claiming that 'whether it succeeds in cutting off any possibility of judicial review is, however, debatable'.[27] He postulates what might appear to be a somewhat unlikely scenario where the government attempts to use the dissolution prerogative to 'deport all immigrants'.[28] Elliott insists that such an attempt would be stopped by the courts.

41. Elliott also claims, controversially, that the 'rule of law' could justify a court overturning a decision to dissolve parliament, despite the ouster clause, 'since the grounds of judicial review derive from the rule of law' and

> the court… would not, in doing so, be *questioning* any relevant matter in respect of *the dissolution power*. Rather, the court would be observing and giving effect to the pre-existing legal boundaries of the power (emphasis in original).[29]

In truth, it is not easy to identify the difference between a decision that 'struck down an exercise of the dissolution power on any of the grounds of judicial review' and 'questioning…the dissolution power'. Indeed, the former would appear to be a paradigm example of the latter. Nonetheless, Elliott concludes that 'a court determined to uphold judicial review in the face of the ouster clause would likely find a way of doing so' but says it would require 'a bold court'.

The undesirability of judicial activism in the democratic sphere

42. It is tempting to disregard the unlikely examples of 'abuses of the power of dissolution either by a rogue Prime Minister or by a terrorist', or indeed the idea of the government using the dissolution prerogative to 'deport all immigrants' and simply observe that the possibility of litigation genuinely seeking to prevent a general election is fanciful in the first place. It is useful to recall the wise words of the Divisional Court in *Miller II*.

> 66. We do not believe that it is helpful to consider the arguments by reference to extreme hypothetical examples, not least because it is impossible to predict how the flexible constitutional arrangements of the United Kingdom, and Parliament itself, would react in such circumstances.[30]

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[26] Young n 19, above.
[27] Elliott n 20, above.
[28] *Ibid*.
[29] *Ibid*.
[30] *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) [2017] 1 C.M.L.R.

43. Recent events, however, may no doubt give rise to some concern, particularly following the eventual *Miller II* outcome in the Supreme Court. These types of 'extreme hypothetical examples' are frequently used as a battering ram to secure the concession of a point of principle which then results in judicial intervention in far more ordinary circumstances. This can be seen, for example, in the *Cherry* litigation, which ran parallel to the *Miller II* case, but in Scotland. Counsel for the Government was asked whether a two-year prorogation would be 'non-justiciable'.[31] Slightly unfortunately, Counsel conceded that the court could intervene in those circumstances, which was then treated by the Scottish Court as a concession of the principle that prorogation was justiciable in general terms.

44. In 1995, Lord Irvine of Lairg warned against the increasingly prevalent view that judges should be willing to enter the democratic sphere and intervene in response to an alleged 'assault' on the 'basic tenets of democracy'.

> The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved…. But, if there ever were such an assault, it would surely be on the political battlefield that the issue would be resolved.[32]

Elsewhere in his speech, Lord Irvine landed some heavy blows against the kind of 'extrajudicial romanticism' that results in overt and covert attempts to draw the judiciary into the democratic realm on such an unclear basis. He ended his speech by emphasising his theme that 'it is the constitutional imperative of judicial self-restraint which must inform judicial decision-making in public law'.[33]

45. The examples given by Young and Elliott epitomise the problem Irvine so persuasively identified. Their hypothetical scenarios have an ulterior purpose which is to establish that in principle the courts could supervise the dissolution prerogative in some vague and unclear but nominally extreme circumstances. It is then but a short step to the position where far more mundane usages could then be litigated. It is this concern that must surely have motivated the clear and comprehensive language of Clause 3. It is not that long since the idea of judicial review of the dissolution of parliament by the monarch on the advice of the prime minister in order to have a general election would have been unthinkable. Now it is being openly canvassed by very senior academics.

46. It follows, therefore, that those who might argue that the clause is unnecessary during the Bill's passage through parliament might usefully be warned about what happened in the *Cherry* litigation and it be made clear that any watering down of the

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34, [66].

[31] *Cherry v The Advocate General for Scotland* [2019] CSIH 49, [103].

[32] Lord Irvine of Lairg 'Judges and decision makers: the theory and practice of Wednesbury review' (1996) *Public Law* 59, 76-77 (giving the 1995 Administrative Law Bar Association lecture delivered on October 16, 1995 in Lincoln's Inn Old Hall).

[33] *Ibid*, 77-8.

ouster clause risks it being circumvented by the courts. The ouster clause is therefore not only wise, it is essential - not least to send a clear signal that continued attempts to draw the judiciary into the democratic arena should be resisted.

47. Notwithstanding the fact that the judiciary generally desire to stay firmly out of the democratic sphere, recent constitutional history means that an ouster clause of this form, or something very like it, is sadly unavoidable in the FtPA Repeal Bill 2021, in the author's view.

48. **The ouster clause in the FtPA Repeal Bill seeks to exclude any possibility of judicial intervention were parliament to be dissolved pending a general election. Such clauses are controversial and have been repeatedly read down by the courts so as not preclude judicial review. The use of 'purported' in the drafting indicates the clear intention of the drafter to remove judicial supervision of any dissolution. Furthermore, the use of the phrase 'limit or extent' is a clear attempt to avoid any repeat of the reasoning of the Supreme Court in *Miller II* that was used to circumvent the justiciability issue. Some recent academic comment has argued that a dissolution could one day be challenged in court. It is therefore suggested that this ouster clause, or something very like it, is essential in this Bill to make crystal clear that judicial intervention would be absolutely unacceptable.**

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