Written evidence submitted by Professor Gavin Phillipson (University of Bristol) (FTP0020)

1. I am a Professor of Law, who has taught and written on the UK constitution for over 20 years. From October 2018-January 2019, I worked as an Academic Parliamentary Fellow in the Parliament and Constitution Unit of the House of Commons Library. I gave oral evidence by invitation to both the recent inquiries by the House of Lords Constitution Committee and the Public Administration and Constitutional Affairs Committee and try not to repeat points already made to those Committees.

Executive Summary

2. In this evidence I make three main arguments. First, seeking to 'revive' the royal prerogative could create needless legal uncertainty. Second, seeking to replace the House of Commons as a check upon Prime Ministerial power over dissolution with the decisions of a hereditary Monarch guided by uncertain and contested conventions would be a retrograde step. Third, the ouster clause is a needless and naked attack on the rule of law, likely to provoke conflict with the courts; there is a much simpler and surer way of keeping the judges away from dissolution decisions.

Why seek to revive the prerogative?

3. As other witnesses have argued[1], the attempt in clause 2 to 'revive' the former dissolution prerogative may lead the courts – if the matter were ever litigated – to find that in fact a new statutory power has been created, albeit with the same content as the former prerogative. I agree with Stephen Laws that the *intent* of cl 2 is clearly to revive the prerogative but that is not, in this case, the end of the matter. For example, Parliament could use the clearest possible words in legislation showing its intention to create new common law rights; but such intent could never be given effect by the courts. Parliament cannot, by definition, create common law; nor can it create prerogative powers.

4. Of course the idea is not to create anew, but to 'revive' the dissolution prerogative. One of the arguments made by witnesses who argue that this can be done is the notion that that prerogative was not abolished, but is merely 'in abeyance.' This means that the prerogative is, in a sense, still there, 'underneath' the Fixed-terms Parliament Act, like floorboards underneath a rug (to use Bennion's analogy). Hence, all Parliament needs to do is remove the 'rug' by repealing the statute, and there is the prerogative, still there all along. Clause 2 certainly makes the *intention* to bring back the prerogative very clear.

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

5. However, one of the few truly fundamental rules of the uncodified UK constitution is that statute is the highest form of law, and trumps both common law and prerogative. The notion that Parliament cannot permanently abolish a prerogative power but merely place it into abeyance, ready to 'spring back' if ever the statute that displaced the prerogative is itself repealed, seems to me to fail fully to respect Parliament's legislative supremacy. A sovereign parliament must be able actually to *abolish* – to 'unmake' - prerogative powers, not merely place them into temporary suspension.[2] Moreover it is fairly clear that Parliament intended to do just that when it passed the FTPA.[3]

6. If that is the case, then the prerogative of dissolution has ceased to exist. And if it no longer exists there is nothing to revive and any statute purporting to 'restore' such a former prerogative power can only in reality create a *new* power. Parliament can create any new powers, rights and liabilities it likes, but, by definition, those powers are statutory. If that analysis is correct, then this draft legislation, if passed, would create an unholy mess: an Act of Parliament that mistook the form of the power it was creating, dubbing it prerogative when in fact it was statutory and – odder still – creating a statutory power without a defined legal text.

7. I accept that the above analysis is contested by other constitutional lawyers.[4] I also accept that it is not clear beyond doubt that the FTPA *did* abolish the dissolution prerogative – though the Explanatory Notes are clear enough[5] – but that is my whole point. We don't know for sure whether the FTPA abolished the dissolution prerogative or merely placed it into abeyance and neither are we sure that Parliament can revive previously abolished prerogatives.

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[2] Phillipe Lagasse argued to the PACAC inquiry that 'When an act of Parliament abolishes a royal prerogative, the prerogative ceases to exist altogether as a source of legal authority. In the event that the statute that abolished the prerogative is repealed, the prerogative remains a nullity': https://committees.parliament.uk/writtenevidence/1440/html/

[3] As the House of Commons Library notes: 'Lord O'Donnell, a former Cabinet Secretary, Sir Stephen Laws, a former First Parliamentary Counsel, and Mark Harper, the Minister who had piloted the Bill through the House of Commons, confirmed that the intention had been to abolish the prerogative. Sir Stephen said: Section 3(2) says: "Parliament cannot otherwise be dissolved". That comes as close as I can see to abolishing it …' (Richard Kelly, Library Briefing Paper 6111, 'Fixed-term Parliaments Act 2011' (24 December 2020) 11-12.

[4] One argument against it is that this amounts to Parliament binding its successors. This is misconceived. The 'continuing' theory of Parliamentary sovereignty is about keeping each Parliament legally free to achieve any policy ends it wishes. Restrictions on this would be an undemocratic fetter from the past. But what I am arguing for leaves Parliament free to create any power it likes for the Queen – or PM – to dissolve Parliament. It constrains only the legal form in which that can be done. And Parliament is *already* constrained in relation to legal form – it cannot create common law or prerogative powers. Parliament's continuing sovereignty, in short, means its freedom to do create any statutory policy it likes. My argument leaves that power wholly untouched and hence does nothing to fetter future Parliaments.

[5] Phillipe Lagasse in his evidence to PACAC (note 2 above), argued that 'the wording of the FTPA'…weighs in favour of abeyance over abolition' and hence the prerogative can be revived. His main reason for this is that the Explanatory Notes are 'murkier' than the text and don't clearly evince an intention to abolish the prerogative; he however doesn't cite Explanatory Note 16, which says expressly: 'This prerogative power was abolished by this Act' Fixed-term Parliaments Act 2011 - Explanatory Notes (legislation.gov.uk)

8. All of which leads to the question: why on earth invite all this legal uncertainty by trying? Why not create a simple, modern legislative scheme? Why would a 21st century democratic Parliament tread the uncertain path of seeking to revive an ancient royal prerogative, governed by uncertain and disputed conventions, instead of creating a clear and modern statutory framework?

9. I suspect one answer to this question is that the Government wants a belt-and-braces approach to trying to keep the courts out of dissolution decisions: not content with its explosive ouster clause (considered below) it thinks that making the power 'prerogative' will make it harder for the courts to intervene. The other is that it wants to keep the Commons out of the matter, drawing the (in my view) wrong lesson from the constitutional and political shenanigans of the Brexit era.[6] But keeping Commons rather than Crown as a check on Prime Ministerial power would not only befit a modern democracy; it also is a far more simple and elegant way of keeping the courts out of dissolution decisions than the incendiary 'ouster' in clause 3.

Checking Prime Ministerial Power – House of Commons or Hereditary Monarch?

10. The Act seeks to revive the 'old' position under which dissolution was a personal prerogative of the Queen, exercised on the advice of the Prime Minister. The PM was normally expected to request a dissolution following a successful vote of no confidence in the Government. But the power was also routinely used by PMs to choose a date of the next General Election that was thought to be politically favourable to their party. One of the uncertainties under the old system was whether the Monarch had the power – or duty – to refuse a dissolution in some circumstances.

11. The matter was governed by the wonderfully vague so-called 'Lascelles Principles', named after a letter written by Sir Alan Lascelles, Private Secretary to King George VI, under the pseudonym "Senex" to The Times, in 1950. Hence a rather important part of the British Constitution appeared to be a 1950s letter in a newspaper. Lascelles argued that the Sovereign could refuse a dissolution request from the Prime Minister if three conditions were met:

    - the existing Parliament was still "vital, viable, and capable of doing its job";
    - a general election would be "detrimental to the national economy";

[6] The Commons' repeated refusals of attempts by Boris Johnson to secure an early General Election in Autumn 2019 were, as PACAC found, likely caused by a flaw in the FTPA (s 2(7)) that allows the PM alone to set the date of the next General Election (HC 167 2019-21, paras 64—67), something Johnson was not trusted to do, given the Article 50 deadline. Earlier, Theresa May *could* have chosen to break the Brexit deadlock in Parliament by treating the 'meaningful votes' on her Brexit deal as a confidence matter. She could have announced that, if she lost that vote, she would take her deal to the country, by laying a motion for an early General Election. With both front benches whipping for it, such a motion would have got the necessary 2/3rds majority. Hence this would have been an effective threat to put pressure on her own backbenchers. May chose not to: but this was a political decision, not a choice wholly removed from her by the FTPA, as often argued.

- the Sovereign could "rely on finding another prime minister who could govern for a reasonable period with a working majority in the House of Commons".

12. However Lord Hennessy said in 1994 that the second of the three conditions had been "dropped from the canon".[7] Some, like Professor Blackburn have strongly defended the notion that the Queen not only could but *should* refuse a dissolution in certain circumstances, including if, following a General Election, a Government lost the vote on the Queen's Speech and wanted simply to 'roll the dice again' in another election.[8] Professor Markesenis said in 1972 that 'most constitutional lawyers seem to support the idea that in a divided House ... a minority Government – whether defeated or undefeated – is not entitled to a dissolution if an alternative Government is possible'.[9]

13. Others however consider that the Queen *cannot* now refused Prime Ministerial advice to dissolve Parliament;[10] Sir Robin Butler's evidence to this Committee doubted the continuing relevance of the Lascalles principles, arguing that:

> things have moved on…from the point of view of the Queen not having to become involved. I think the situation now is that if a Prime Minister lost support, but it became absolutely obvious that an alternative Government could be formed without a general election, it would not be necessary for the Queen to refuse a Dissolution. …politicians would get together and agree among themselves how an alternative Government that commanded the support of Parliament could be produced…
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> [Butler instances the Lib Dems following the 2010 election changing their minds and decided they wanted to form a Coalition with Labour instead. He argues that] In those circumstances, I think the Prime Minister of the day would have been obliged to accept that and to advise the Queen to send for the Leader of the Opposition, and an alternative coalition would have been formed. [Hence] My view is that the Lascelles principles really are no longer necessary.[11]

14. My view is that this is over-sanguine. Consider the following scenario: a Government of one of the two major parties is in Coalition with the Liberal Democrats; numbers in the Commons are such that whichever of the two parties the Lib Dems decide to back will have a majority in the Commons. About six months into the new

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[7] *The Economist*, 24 December 1994, page 32 (cited in C. Turpin and A. Tomkins, *British Government and the Constitution: Text and Materials*, (2007), p. 364.

[8] Robert Blackburn, "Monarchy and the Personal Prerogatives" (2004) Public Law 546, 557.

[9] [9] Markesinis, B.S., *The Theory and Practice of Dissolution of Parliament: a comparative study with special reference to the United Kingdom and Greek experience*, Cambridge University Press, 1972), pp 86-87.

[10] Robert Craig's evidence to this Committee 'suggests that in a modern democracy a hereditary monarch could 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.'

[11] https://committees.parliament.uk/oralevidence/1506/html/

Parliament, due to a serious policy difference arising from unforeseen circumstances,[12] the PM becomes convinced that the Lib Dems are about to pull out of the coalition, collapsing her Government and joining with the present Opposition to form a new Government. To avoid this, the PM decides instead to take her chances with the electorate and rushes to the Palace to request a dissolution. The PM at this point still formally has the confidence of the Commons, although she is about to lose it. Should the Queen grant his request? The answer is disputed: hence there would be controversy whichever way the Queen and her advisors decided. The Cabinet Manual says that 'The Prime Minister is expected to resign where it is clear that he or she does not have the confidence of the House of Commons and that an alternative government does have the confidence'[13] but supposing he or she does not: is the Queen is entitled to refuse a dissolution? No clear answer is available.

15. Now suppose that this Bill were amended so as to give the Queen a statutory power to dissolve Parliament but only where such a request was made in a motion passed by simple majority in the House of Commons.[14] The difficulties in the situation above disappear: in the debate on the motion for an early election the Lib Dems could announce that they would not support it at this time and wanted instead to explore whether a coalition could be formed with the Opposition. The Queen would be kept out of the controversy and the question of what happens next – dissolution or new Government formed from within the Commons – would indeed be made by the politicians.

16. As well as keeping the Queen out of controversy, requiring the assent of the Commons by statutory motion would have another crucial effect: it would keep the courts out of dissolution decisions. Such a motion would, incontrovertibly, be a 'proceeding in Parliament', and hence wholly immune from legal challenge by virtue of Article IX of the Bill of Rights 1689. This would obviate the necessity for the ouster clause, to which I now turn.

The clause 3 'ouster' – stoking a constitutional arms race.

17. Since the late 1960s, the courts and parliamentary drafters have been engaged in a kind of constitutional arms-race. When Parliament in 1969 legislated that that 'determinations' by the Foreign Compensation Commissioners 'shall not be called in question in any court of law',[15] the then House of Lords found that, by misconstruing the statute that governed their powers, the Commissioners had asked themselves a question they were not authorised to and hence exceeded their jurisdiction. This

[12] These might include, for example a global pandemic or a war such as Iraq (2003).
[13] Cabinet Office Manual, para 2.19: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf
[14] As under the FTPA the motion would be laid by the Prime Minister; unlike under the FTPA only a simple majority would be required to pass it.
[15] s 4(4) Foreign Compensation Act 1950.

rendered their decision not a 'determination' under the Act at all, but a mere 'purported determination', or nullity; hence the ouster clause did not protect it from challenge by way of judicial review. [16]

18. When Parliament wished to prevent judicial review of decisions of the Investigatory Powers Tribunal (which hears legal challenges to actions of the security and intelligence services) the drafters responded directly to the *Anisminic* decision by providing that:

> '…determinations, awards, orders and other decisions of the Tribunal *(including decisions as to whether they have jurisdiction)* shall not be subject to appeal or be liable to be questioned in any court'.[17]

19. The Supreme Court, however struck back, in their decision in *Privacy International.* The majority held that: 'a decision which is vitiated by error of law, whether "as to jurisdiction" or otherwise, is no decision at all.' [18] The court reasoned that it cannot have been Parliament's intention to create a tribunal with truly unlimited jurisdiction as the ouster clause, taken literally, would suggest. Such a tribunal would be able (e.g.) to decide on the unfair dismissal case of a teacher or a tenant's appeal against eviction and there would be no recourse to the ordinary courts to correct such an abuse. This, the Supreme Court reasoned, cannot possibly have been what Parliament intended.

> If Parliament on the true construction of an enactment has created a tribunal of legally limited jurisdiction, then it must have intended that those limits should have effect in law. The only way in which a proposition can have effect in law, is for it to be recognised and applied by the courts. Parliament's intention that there should be legal limits to the tribunal's jurisdiction is not therefore consistent with the courts lacking the capacity to enforce the limits. [Counsel], correctly to my mind, described this as giving effect to the sovereignty of Parliament, not limiting it.[19]

20. The Supreme Court held 4:3 that the ouster clause did not prevent judicial review of the tribunal's decision. Lord Carnwath for the majority suggested that if Parliament had really wanted to create a tribunal immune to review, it would surely have used 'more explicit wording' such as a formula '…excluding challenges to any determination or "purported" determination'.[20]

21. And now we see the drafter responding to the Supreme Court: both the 'exercise or purported exercise' or powers under the Act and 'decisions or purported decisions' are to be protected. One of the UK's leading public lawyers, however, in light of the

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[16] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, 169.
[17] Regulation of Investigatory Powers Act 2000, s67(8) (emphasis added).
[18] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [109].
[19] Ibid, [210].
[20] Ibid, [111].

court's record in insisting that Parliament must be taken to have intended to legislate so as to preserve, not flout the rule of law, concludes that whether even this clause succeeds in cutting off any possibility of judicial review is…debatable' and that 'a court determined to uphold judicial review in the face of the ouster clause would likely find a way of doing so'. [21] In other words this clause simply invites this arms race to continue.

22. The trouble with this extraordinary ouster is that the way it goes about responding directly to recent judicial decisions makes courts *more*, not less likely to read it down so as to allow judicial review after all. Clause 3(c) says that a court 'may not question…'(c) 'the limits or extent of those powers.' As the Explanatory Notes to the Bill make clear, this part of the 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'.[22] *Miller II*[23] sidestepped the question of whether challenges to the *exercise* of the prerogative of prorogation for abuse of discretion, by for example acting for an improper purpose[24], would be justiciable, by finding that the issue was the limits of the prorogation power. As the Supreme Court unanimously held:

> every prerogative power has its limits, and it is the function of the court[s] to determine, when necessary, where they lie…and to decide whether any exercise of power has transgressed those limits.[25]

And:

> …no question of justiciability, whether by reason of subject matter or otherwise, can arise in relation to whether the law recognises the existence of a prerogative power, or in relation to its legal limits. Those are by definition questions of law. Under the separation of powers, it is the function of the courts to determine them.[26]

23. These emphatic findings highlight the problem with this ouster clause. Read literally it is an absurdity. Clause 3(c) says that a court 'may not question…'(c) 'the limits or extent of those powers.' By enacting such a clause, Parliament would, on the face of it, be giving the Queen a power unlimited by law: it is the courts that determine 'the legal limits' of the powers of government and this clause expressly tells them that they cannot enforce *any* limits. Read literally, it would mean that if a PM advised the Queen to dissolve the Scottish Parliament, or Welsh Assembly under this legislation, the courts could not find such actions unlawful.

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[21] Prof Mark Elliott: https://publiclawforeveryone.com/2020/12/02/repealing-the-fixed-term-parliaments-act/.
[22] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/940027/Draft-Fixed-term-Parliaments-Act-Repeal-Bill.pdf, Explanatory Notes, [17].
[23] *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41; [2019]; [2020] A.C. 373.
[24] As the Scottish courts found: *Cherry v The Advocate General for Scotland* [2019] CSIH 49.
[25] Ibid, [39]
[26] Ibid [36].

24. The point here is *not* to try and argue that such powers might actually be used for terrible or ridiculous ends. Rather it is to show that, since a literal reading would be a nonsense in a country committed to limited government and the rule of law, it *could not* be adopted by the courts. And once a literal reading becomes impossible then the courts *must* find a non-literal one. And that may well be one that neither Parliament nor the Government likes. Hence passing statutes whose literal meaning is an absurdity hands the courts the tools to unpick Parliament's intent. The very extremity of the wording of the clause invites its judicial undoing.

25. Moreover such a course is not necessary. As the evidence of Tom Hickman QC to this Committee argues, it is highly unlikely that courts would ever review a dissolution decision. But if Parliament wants to ensure that they never do so, then I suggest above a simpler, more elegant surer way of doing it: require a statutory Commons motion to dissolve Parliament early.

26. There are two final points to make about clause 3. First, in *Privacy,* one reason why the court was so divided was that Lords Sumption and Reed argued that restricting review or appeal from the Tribunal, a senior judicial body, quite evidently posed a lesser threat to the rule of law than where an executive body is shielded from any legal challenge. The activities of the security and intelligence services would still be subject to challenge in an independent judicial body; hence there was no prospect of executive power being placed beyond the reach of the rule of law. This made the ouster clause less concerning. But that would not be the case here: the power clause 3 purports to protect from any all and all judicial challenge would be purely executive in nature. Hence one could expect an even stronger push back from the courts.

27. Finally, parliamentarians should be aware that the ouster clause considered in *Privacy International* came very close to provoking an outright show-down between the courts and Parliament. Three of the Supreme Court justices – one short of a majority - agreed with Lord Carnwarth when he said:

> I see a strong case for holding that, consistently with the rule of law, binding effect *cannot be given* to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law. In all cases, *regardless of the words used*, it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld..'[27]

[27] *Privacy* note 18 above, [144] (emphasis added).

In light of these comments, it is clear that passing an even more draconian ouster clause risks pushing Parliament into open conflict with our courts. This would be both unnecessary and irresponsible.

Conclusion

28. This evidence has argued that the draft Bill has three serious flaws. It would (1) create legal uncertainty about the status of the dissolution power, (2) substitute for parliamentary controls over dissolution the decisions of a heredity monarch guided by uncertain and contested conventions, and (3) invite a show-down with the courts through its incendiary ouster clause. Such a path evinces neither common, nor constitutional sense. Instead it has argued that dissolution of Parliament should require the consent of the Commons: MPs are a better and more democratic safeguard against abuse than a Monarch who should be kept completely out of political controversy. Finally, giving the Commons this role in dissolution decisions would simultaneously guarantee the courts were kept out of them – without reaching for the kind of constitutional hand-grenade seen in clause 3.

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