Parliamentary Sovereignty and the Politics of Prorogation

Richard Ekins

Cover image: Prorogation marks the end of a parliamentary session. It is an announcement read by the Leader of the House of Lords, on behalf of the Queen, in the Lords chamber. It sets out major bills passed during the session and other measures taken by the government. MPs and House of Commons officials attend the Lords chamber to listen. Parliamentary copyright images are reproduced with the permission of Parliament. Photo Credit: Roger Harris

Parliamentary Sovereignty and the Politics of Prorogation

Richard Ekins

Policy Exchange

About the Author

Richard Ekins is Head of Policy Exchange's Judicial Power Project. He is Professor of Law in the University of Oxford and a Fellow of St John's College. He is a barrister and solicitor of the High Court of New Zealand (non-practising), where he has also served as a judge's clerk. His works include *The Nature of Legislative Intent* (OUP, 2012), and the edited collections *Judicial Power and the Balance of Our Constitution* (Policy Exchange, 2018), *Judicial Power and the Left* (Policy Exchange, 2017), *Lord Sumption and the Limits of the Law* (Hart Publishing, 2016), and *Modern Challenges to the Rule of Law* (LexisNexis, 2011). He has published articles in a range of leading journals, and his work has been relied upon by courts, legislators, and officials in New Zealand and the United Kingdom.

Published by
Policy Exchange, 8 – 10 Great George Street, Westminster, London SW1P 3AE

www.policyexchange.org.uk

ISBN: 978-1-910812-92-1

Contents

Executive summary

On Tuesday 17 September, the Supreme Court will hear argument about whether it should declare unlawful the Government's advice to Her Majesty to prorogue Parliament and whether, in consequence, to declare to be null and of no effect the prorogation that followed on 10 September. This is an important question, the answer to which turns on the nature of our constitution. The Supreme Court should uphold the judgment of the Divisional Court,[1] which rightly recognised that the prerogative power to prorogue is not subject to judicial control. It should reverse the judgment of the Inner House of the Court of Session,[2] which wrongly asserted a jurisdiction to control the exercise of the power on the grounds that the Government acted for an improper purpose. If the Supreme Court were to hold that the advice to Her Majesty was unlawful, it should nonetheless recognise that it has no authority to quash the prorogation of Parliament that has already taken place. This was a proceeding in Parliament and of Parliament which courts cannot lawfully question.

The prerogative power to prorogue Parliament is exercised by Her Majesty on the advice of the Government, which is accountable to the House of Commons. The power to prorogue is an important feature of the Westminster constitution, in the UK and in other related systems, and enables the Government to control the timing and length of parliamentary sessions, a power which it is free to use to manage parliamentary business. The Government is responsible to the Commons, and eventually to the electorate, for its use of this power. It is open to political criticism if it is seen to misuse the power, but unless and until confidence is withdrawn it is entitled to use it. The only circumstances in which it might be open to Her Majesty to refuse a prorogation would be where prorogation was sought to remain in office after a vote of no confidence had been lost.

The Westminster constitution is framed by constitutional convention and practice. The law recognises a sharp distinction between convention and law and forbids courts from adjudicating disputes about the former, as the Supreme Court itself recognised clearly in *Miller (No 1)*.[3] Judicial control of the prerogative to prorogue is not justified or required by the fundamental rule (or principle) of parliamentary sovereignty. Proroguing Parliament in no way flouts parliamentary sovereignty. Parliamentary sovereignty is not set aside during a prorogation any more than it is after a dissolution. It is wrong to think that this prorogation bypasses Parliament or turns the constitution on its head. The House of Commons had an opportunity to withdraw confidence before prorogation and did not act. If the constitution has been turned on its head in recent weeks, it is not by

1. *R (Miller) v Prime Minister* [2019] EWHC 2381 (QB), hereinafter Miller (No 2)
2. *Petition of Cherry and others* [2019] CSIH 49
3. *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61; the judgment that established that Article 50 could not be triggered without fresh legislation; hereinafter *Miller (No 1)*

virtue of this prorogation but by the procuring of legislation to force the Government to depart from its central policy and to apply for an Article 50 extension and by the refusal of the House of Commons to withdraw confidence in the Government or to permit an early election to be held.

The Court of Session reasoned that the Government acted for an 'improper purpose', seeking to "stymie" Parliament. However, the courts are not free, as a matter of our law, to apply the ordinary grounds of judicial review, including the rule that one cannot act for an 'improper purpose', to the prerogative power to prorogue or to advice about how the prerogative should be exercised. The courts are not well-placed to decide what is or is not a proper purpose for prorogation. The Court of Session wrongly took upon itself to decide that the Government illegitimately sought to avoid scrutiny rather than legitimately sought to manage parliamentary business and to improve the UK's negotiating position in relation to the EU. The question of how the power to prorogue Parliament should or should not be used is a political question over which the courts have no jurisdiction. The Court of Session in effect wrongly departed from the legal rule that courts should not enforce, or invite argument about, constitutional practice and convention. The Government was free to decide to prorogue Parliament and it is rightly answerable to the House of Commons and to the electorate for this decision. It should not be answerable to the courts for this action.

The Court of Session's judgment wrongly interferes in a proceeding of Parliament, first by declaring unlawful advice about how the prerogative was to be exercised and second by declaring that the prorogation that followed was null and of no effect. The Bill of Rights 1689 forbids judicial interference in parliamentary proceedings – and prorogation is a proceeding of Parliament, which brings to an end one session of Parliament and makes provision for the next to begin. The Supreme Court should reverse the Court of Session and uphold the Divisional Court, thereby helping to arrest a worrying trend of judicialising political questions and parliamentary processes.

Prorogation in constitutional context

The twin pillars of the UK constitution are (1) responsible government (in a specialized sense of that phrase) and (2) parliamentary sovereignty. As to (2): the Queen-in-Parliament may enact any law, save that it may not bind its successors. Acts of Parliament are always valid law and cannot be repealed or amended save by a later Act. As to (1), the government of the country is carried on by Her Majesty's ministers who constitute a Government that is formed by whoever is best placed to command the confidence of the House of Commons and the Government should stay in office for so long as it continues to command that confidence, but no longer. If it loses the confidence of the Commons, and a new government cannot be appointed that is able to govern, the solution has historically been an election. In this way, a general election determines who is in a position to form a government and the House of Commons is at the centre of democratic politics.

The Crown summons Parliaments to help it govern. But it is, in my view, a mistake to think that government is sharply separate from Parliament or in a standing state of conflict with it. On the contrary, the Government is nested within, supported by, and accountable to the Houses of Parliament, especially the Commons. It must of course comply with the law, including Acts of Parliament. The government of the country is carried out in the name of the Queen by ministers who are responsible to the Houses of Parliament. Parliamentary sovereignty is a fundamental legal rule about the legal standing of Acts of Parliament and about the plenary (unlimited) lawmaking authority of the Queen-in-Parliament.[4] This rule is constitutional bedrock but it does not encompass the whole of the constitution; it does not entail that the House of Commons, which is part of the Queen-in-Parliament, should itself govern.

Instead, it is the Government that governs, subject always to the risk that the Commons will withdraw confidence, and needing always to work, more or less closely, with the Houses of Parliament. The Government enjoys – and bears the responsibility of taking – the initiative in policy making and action, but the Houses of Parliament enjoy considerable influence in the formation and development of policy, especially, but not only, when policy requires the enactment of primary legislation and thus the agreement of each House.[5] The standing orders and practices of the Houses of Parliament have long put the Government in the driving seat, reflecting the need for parliamentary political leadership, which is open to

4. R Ekins, "Legislative Freedom in the United Kingdom" (2017) 133 *Law Quarterly Review* 582
5. M Russell and D Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law* (Oxford, Oxford University Press, 2017)

question and challenge in Parliament.

Ministers exercise a range of statutory powers for which they are accountable to the Houses of Parliament. They are responsible also for exercising or advising the Sovereign to exercise "prerogative powers": a wide range of responsibilities for decision-making for the public good, executive functions and powers the exercise of which has not been subjected to detailed regulation by legislation. Prerogative powers which relate to Parliament itself and on which the Government is responsible for advising the Sovereign, include most obviously prorogation – which brings one session of Parliament to an end – and, until 2011, dissolution – which ends the term of one Parliament and leads to the election of a new House of Commons and perhaps the formation of a new government. The Government is and was responsible to the House of Commons for the use of these powers, although for a dissolution it was primarily for the electorate, in the election that followed, to hold the Government to account if it misused this power. In this way, the Government is and was accountable to Parliament and the electorate. The Fixed-term Parliaments Act 2011 removed the prerogative power to dissolve Parliament on the advice of the Prime Minister, but left open various means by which the government could secure the holding of an early election and the dissolution that is its essential precursor. It also, in express terms, left the prerogative in respect of prorogation untouched: "This Act does not affect Her Majesty's power to prorogue Parliament".[6]

The Government's responsibilities include the management of the business of the House, not only in terms of framing the legislative agenda, but also in deciding on the timing and length of parliamentary sessions. The Leader of the House of Commons is a Government minister. The Meeting of Parliament Act 1797 empowers the Crown to recall Parliament during a prorogation and other statutes impose duties to exercise that power in certain circumstances; the provisions in these statutes take for granted, or say expressly, that the prerogative to prorogue remains intact. The power to prorogue is a familiar feature of the parliamentary constitutions on the Westminster model. In some jurisdictions, it has been dealt with expressly in the formal Constitution, but typically on terms that maintain the Government's responsibility to decide when parliamentary sessions should end and how long Parliament should be prorogued. These Constitutions may, for example, require that Parliament not be prorogued for more than a certain period, say six or twelve months.

Perhaps it would be better if the prerogative power in the UK were formalised in statutory form. However, the Fixed-term Parliaments Act is a cautionary tale so far as that sort of codification is concerned. Meanwhile, things remain for now as they have always been and the Government is entitled and required to advise on and take responsibility for the exercise of the power to prorogue, as one tool in its armoury of good governance in a political constitution – a constitution which continues to be grounded in maintaining the confidence of the House of Commons and remaining in the good graces of the electorate.

6. Section 6(1)

There is nothing unconstitutional about the Government proroguing Parliament for its own advantage in the management of parliamentary business; it has done so on numerous occasions. Parliament is arranged in sessions. They are brought to an end and a new session begun by prorogation, the timing and duration of which is in the Government's control. Typically this arrangement is designed to give political advantage to the Government: (a) the Government expects to benefit from the, usually annual, political theatre of a Queen's Speech, (b) the sessional cycle kills off unwanted business that has not been finished during the session, notably Private Members' Bills which the Government does not support; (c) the sessional deadline provides a time constraint on passing government bills which, in practice if not entirely logically, incentivises settling outstanding disputes on them before time runs out; and (d) the Government can only use the Parliament Acts to overcome opposition in the House of Lords if the same bill can be passed in two different sessions.

The reason why the House of Commons typically uses adjournment recesses instead of longer prorogations is because, if a recall were needed for an emergency, a recall from a recess is easier than a recall from a prorogation – the latter involves Her Majesty the Queen. In both cases, however, recall is not possible if the Government does not initiate it – a situation that is consistent with the fact that the Crown summons Parliaments, that the Government is responsible for the timing of when Parliament meets after an election and, by virtue of the usual rules and practice, has the initiative in the management of parliamentary business in the House of Commons and is afforded a right to priority for its business in the Lords.

When might prorogation be unconstitutional?[7] It is impossible to see legitimate constitutional justifications for a prorogation used by the Government to avoid a vote of no confidence being called and perhaps lost or, especially, to enable a government to remain in office after confidence is withdrawn without an election. Prorogation in those circumstances would be lawful but Her Majesty might be entitled to refuse advice to prorogue, or (as in Canada in 2009) to insist that any prorogation must be for a very limited period.

Even so, the point is not straightforward, for there are a range of situations in which prorogation in such circumstances might nonetheless be granted and thought appropriate. Professor Anne Twomey, in an important work,[8] has reviewed the constitutional experience in Westminster parliamentary systems and outlined the range, which include: prorogation when dissolution and an election would be undesirable; prorogation where no other responsible government can be formed; prorogation where there is a temporary loss of confidence; prorogation where the alternative government is likely to be short-lived; prorogation where a motion of no-confidence is not yet before the House. A recurring note in Twomey's study is that prorogation for tactical advantage is no ground on which to withhold prorogation, but prorogation to remain in office when confidence has been, or is about to be, withdrawn would be an

7. B Miller, "Proroguing Parliament: A Matter of Convention" (2009) 20 Public Law Review 100

8. A Twomey, Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems (Cambridge, Cambridge University Press, 2018), 584-615

abuse, provided that a stable alternative government could be formed or a dissolution could occur that would result in an election.

This comparative experience elsewhere in the Commonwealth in Westminster systems, and these constitutional principles, should inform any evaluation of the advice to prorogue, and the prorogation that followed, which is now before our courts.

On 28 August, Her Majesty made an Order in Council to the effect that Parliament was to be prorogued on a day no earlier than Monday 9 September and no later than Thursday 12 September until Monday 14 October. Litigation was already underway in the Scottish courts, challenging the lawfulness of a prorogation in the autumn, and litigation was also immediately initiated in the English courts. Parliament was duly prorogued in the early hours of Tuesday 10 September. The prorogation spans the party conference recess period (when the House of Commons would not normally have been expected to sit) and the number of sitting days that were otherwise lost is low. Of course Parliament might have voted against the recess. The prorogation brings to an end the absurdly long session of Parliament which began in June 2017. It is clear that the outstanding business in the Commons would be better carried over or begun again in a new session alongside any new business. Brexit apart, a prorogation and the start of new session in October would have been a normal and expected thing. The Government had been rightly subject to political criticism, not least from the shadow Leader of the House, for having failed earlier to bring the long session to an end. Its decision to prorogue Parliament from 9-12 September to 14 October was also subjected to political criticism, of which there has been no shortage.

It is obvious, though, that this prorogation could not be thought to come close to circumstances in which Her Majesty could have been thought entitled to refuse to agree to ministerial advice. Whatever the merits of the prorogation in question, on which more below, it was not sought after the Government had lost a vote of no confidence. And it was obviously not designed or timed to avoid such a vote being called. Finally, there was a period of ten days between announcement and prorogation when a vote of no confidence could have been brought in an attempt to produce a new government and to stop prorogation. True, the Government has lost a succession of votes in the House of Commons, votes that might well be said to be matters of confidence. But again the prorogation was not sought after a vote of confidence was lost nor was it timed to avoid such a vote being held and lost and, importantly, confidence has not formally been withdrawn.

Political questions and the jurisdiction of the courts

Much of the inner workings of our constitution, which make parliamentary democracy possible, are functions of constitutional convention rather than constitutional *law*: the Queen's responsibility to appoint as Her Prime Minister the person best placed to form a government that commands the confidence of the Commons; the requirement for members of cabinet not to depart from collective decisions or to breach the confidentiality of cabinet proceedings; the cardinal convention that the Queen acts on the advice of Her responsible minsters; the accountability of those minsters to the Houses of Parliament; not to mention the more recent conventions that structure the relationship between Westminster and devolved authorities. The law recognises that these rules are not legal rules and so are not amenable to legal argument or authoritative judicial pronouncement in or enforcement by way of proceedings, *even* when a convention is recognised in statutory form, as is the case with the Sewel convention. As the Supreme Court put it in *Miller (No 1)*, the courts "are neither the parents nor the guardians of constitutional convention".[9]

In our constitution, many important rules about who exercises power and the restraints on the abuse of this power are settled by non-legal standards and political processes over which the courts have no jurisdiction. Our constitution is not only a political constitution. But especially when it comes to the relationship between the Queen, Her Ministers and the Houses of Parliament, there are many rules that are not for courts. The Westminster constitution relies on constitutional convention and on the political dynamics in which conventions are nested and which they help frame and facilitate. Importantly, the distinction between conventions and law is itself part of our law. The rule that conventions are not enforceable in our courts is likewise part of our law and courts uphold the rule of law precisely by refusing to go beyond the law and to address political questions. Courts, like the Divisional Court, that observe this discipline are following rules of law developed by common law engagement with and understanding of the principles of our highly legalised version (the Westminster system exportable and oft-exported as a Westminster system) of constitutional government, one of the legal rules of which, exemplified by Article 9 of the Bill of Rights, is that some of the rules of the constitution (and the principles underlying those rules) are not enforceable in the courts but by the political actors and the people.

9. *Miller (No 1)* at [146]

It is not clear whether there are any particular limits on the prerogative power to prorogue that could be characterised as required by convention.[10] But there must be a strong argument that any use of that power to undermine ministerial accountability, or to head off withdrawal of the confidence of the Commons, would, for the reasons mentioned above, be unconstitutional. Nonetheless, it is only in the most extreme cases that Her Majesty might have a reserve power to refuse a prorogation and in no case should advice to prorogue be subject to legal action, any more than should a refusal by a minster to resign or the decision of the Queen-in-Parliament to legislate in breach of the Sewel convention. In our constitution, none of these matters are for courts to consider or for the common law to control. They are left instead, by the very nature of the distinction between constitutional law and constitutional convention, to parliamentary control, to political processes and to electoral accountability. The remedy for abuse of the prerogative power to seek a dissolution of Parliament, in the years before the 2011 Act, was never legal action, but defeat at the ballot box. The remedy for abuse of the prerogative power to prorogue is political criticism and, ultimately, withdrawal of the confidence of the House of Commons and then, possibly, defeat at the ballot box. There is no room here for courts.

Counsel for the Advocate General before the Court of Session conceded in argument that the Court might properly declare unlawful a prorogation of Parliament for two years.[11] With respect, this was a concession that ought not to have been made. The Queen would almost certainly reject a prorogation for this length, not least since the inference would be unavoidable that the Government was seeking to avoid the House of Commons having an opportunity to withdraw confidence. The Queen might insist that any prorogation of this length, or perhaps even any unusual period of time, whether five weeks spanning the conference season or two years, should not come into force unless and until the House of Commons had an opportunity to withdraw confidence. But more importantly, this horrible prospect, which would be unconstitutional and unconscionable, would founder on political realities immediately and legal realities shortly thereafter. If the Government were to attempt this then its political support would collapse, within the party and across the country. And it would very quickly be unable to govern, for modern governments need regular legislation from Parliament to make spending, taxation and other policy possible. The hypothetical does not warrant the conclusion that the prerogative is open to judicial review.

10. But see Miller, "Proroguing Parliament: A Matter of Convention"

11. *Cherry* at [103]

Parliamentary sovereignty and judicial control of prerogative powers

In argument before the Divisional Court, Lord Pannick for the claimant, Gina Miller (with former Prime Minister John Major, and devolved governments, intervening in support) argued that the court should declare that the Government's advice to Her Majesty to prorogue Parliament was unlawful on the grounds that the advice, and the prorogation, were inconsistent with the constitutional principle of parliamentary sovereignty.[12] The Divisional Court firmly rejected this argument, reasoning that Lord Pannick had fashioned an expanded understanding of parliamentary sovereignty in order "to invite the judicial arm of the state to exercise hitherto unidentified power over the Executive branch of the state in its dealings with Parliament" [13]

The Court concluded that parliamentary sovereignty did not require or permit judicial review of the Prime Minister's advice to Her Majesty the Queen as to how to exercise the prerogative to prorogue, and that it was not for the Court to evaluate the propriety of the purpose for which Parliament had been prorogued. These were not questions for courts to decide.

This was and is a forceful argument. Parliamentary sovereignty does not require Parliament to be in continual session. It requires Acts of Parliament ("statutes") to be treated as law and forbids any institution from invalidating or defying statute. Parliamentary sovereignty is not somehow in abeyance after a dissolution of Parliament and during a general election. And again, parliamentary sovereignty does not mean that the Houses of Parliament govern the country, though of course the House of Commons is indispensable, first and foremost because it is the body whose confidence must be retained if the Government is to remain in office and from which, for the most part, the Government is formed, but also because its agreement is necessary for Bills to become Acts.

Proroguing Parliament – bringing to an end one session of Parliament and beginning another – in no way defies, qualifies or departs from parliamentary sovereignty. This remains the case even if a particular prorogation of Parliament is unreasonably lengthy, or motivated by the desire to avoid difficult questions being asked in the Houses of Parliament, or to terminate the passage of a Bill through the Houses of Parliament, or to facilitate the passage of a Bill despite opposition to it in the House of Lords.

12. *Miller (No 2)* at [25-26] and [58]
13. *Miller (No 2)* at [63]

It bears repeating that clearing away Private Members' Bills disfavoured by the Government is a standard purpose of prorogation, that is, a standard political motivation for selecting the timing of it. The Government cannot govern without the continuing support of the House of Commons. It is not necessary for accountability for prorogation to be immediate. In due course, Parliament will resume and the Government can then be held to account.

My distinguished colleague, Paul Craig, argues to the contrary that parliamentary sovereignty justifies and requires the courts to quash the Government's advice to Her Majesty the Queen to prorogue Parliament.[14] His argument was raised before the Divisional Court and the Court of Session. He reasons that the important restraints on prerogative power that one finds in the *Case of Proclamations*,[15] *De Keyser*,[16] and in *Miller (No 1)* are all about protecting parliamentary sovereignty. The executive cannot change the law by fiat (*Proclamations*), it cannot bypass statute by way of the prerogative (*De Keyser*) and it cannot render a statute devoid of effect, or frustrate its purpose, by way of exercise of the prerogative (*Miller*). To that argument, a reply can begin by observing that if *Proclamations* vindicates parliamentary sovereignty, the vindication is indirect for it rules out executive lawmaking in general, and does not address the royal power to suspend or dispense from statutes, which the Bill of Rights 1689 terminates. However, it is true that one very important consequence of the decision was that to secure changes in domestic law, the Crown had to secure the assent of the Houses of Parliament to a Bill, and it is true that that is a vital element in the sovereignty of Parliament – Queen, Lords and Commons. *De Keyser* is a simple recognition of Parliament's intent in legislating to cover the field, viz. it ousts the prerogative. *Miller* is, in my view, mistaken,[17] and is best understood as either (as the Divisional Court says in *Miller (No 2)*[18]) an interpretation of the European Communities Act 1972, or as concerned with fundamental constitutional changes, including changes which directly or indirectly subordinate Parliament and qualify rather than exemplify Parliamentary sovereignty. In any case, its nominal rationalisation is limited to the context of European law.

None of these cases is authority for the idea that judicially enforceable limits on prerogative power are, or tend to be, required by or supportive of parliamentary sovereignty. And note that the latter two cases concern how an Act of Parliament bears on the prerogative. In those cases, there is certainly a legal question for the courts to resolve, namely what the Act requires. How is this at all analogous to proroguing Parliament? It is not. However, Craig argues that prorogation is even more glaringly inconsistent with parliamentary sovereignty than the cases noted above. He says that:

> *…the rationale for intervention to protect parliamentary sovereignty is even stronger than in the preceding cases. Consider the following two propositions. Parliament has enacted a statute, the executive seeks to circumvent it by recourse to the prerogative, and the court intervenes to protect parliamentary sovereignty via the* De Keyser *principle. Parliament wishes to exercise its legitimate*

14. P Craig, 'Prorogation: Constitutional Principle and Law, Fact and Causation', U.K. Const. L. Blog (2 Sep 2019) (available at https://ukconstitutionallaw.org/))
15. (1611) 12 Co Rep 74
16. *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508
17. R Ekins, "Constitutional Practice and Principle in the Article 50 Litigation" (2017) 133 *Law Quarterly Review 347*
18. *Miller (No 2)* at [67]

> *authority through enactment of a statute, or in some other way, the executive precludes this through prorogation, and the court is said to be powerless to intervene.*
>
> *…the latter abuse of discretionary power is more far-reaching and significant than the former. The former impacts only on a particular statute. The latter constitutes a pre-emptive strike that takes Parliament out of the entire game for the crucial period during which it is prorogued. It affects not merely one piece of legislation, but its capacity to exercise the totality of its legislative authority, thereby severely curtailing the opportunity for parliamentary voice on an issue that, whatsoever one's views about Brexit, is of major importance for the UK's future.*

This analysis is not persuasive. It confuses parliamentary sovereignty, which means the legal standing of Acts of Parliament, with the hypothetical and yet to be expressed wishes of the Houses of Parliament.[19] The premise of his analysis is that "Parliament wishes to exercise its legitimate authority through enactment of a statute, or in some other way…". But parliamentary sovereignty concerns the lawmaking authority of the Queen-in-Parliament and the legal validity of statutes that have been enacted. It entails that any later Queen-in-Parliament is competent to enact any statute, but it does not concern the exercise of Parliament's legitimate authority in some other way. If by "some other way" Craig means motions of the House of Commons, including motions of no confidence in Her Majesty's Government, then his argument fails again, for such motions, while important to responsible government, form no part of parliamentary sovereignty.[20]

In cutting short the time in which a majority in one or both Houses of Parliament may be formed to assent to a Bill, the Government does not undertake an act that is the normative (let alone the legal) equivalent to defiance of an Act of Parliament. Craig simply assumes that the Houses of Parliament are entitled to have their will executed without discussing the significance of the institution of Government, a significance clearly recognised in parliamentary practice. The Commons can of course topple the Government, and can influence it in far-reaching ways, but no part of our constitution requires that the Houses of Parliament have, singly or together, plenary authority to have their will enforced other than by way of statute, or that legislation can necessarily, or straightforwardly, be secured against the wishes of the Government in which the Commons retains confidence.

The prerogative power to prorogue Parliament does not threaten parliamentary sovereignty. Craig's analysis does not attend closely to the constitutional relationship between Government and Parliament, which leads him to misstate the relationship between parliamentary sovereignty and prorogation, as the following passage reveals:

> *The* De Keyser *scenario represents a challenge to sovereignty, since the executive seeks to bypass an existing statute, through recourse to the prerogative. It was for this very reason that the House of Lords intervened to prevent this.*

19. R Craig, 'Judicial Review of Advice to Prorogue Parliament', U.K. Const. L. Blog (12 Jul 2019) (available at https://ukconstitutionallaw.org/)
20. *Miller (No 1)* at [123]

> *The prorogation scenario is more far-reaching in its impact on sovereignty. The reason is not hard to divine. The political discussion of prorogation by the present government was predicated on the assumption that it could be legitimate for the Prime Minister to make use of this power intentionally to bypass what was felt to be a recalcitrant Parliament. This is not and cannot be constitutionally correct. To subscribe to such reasoning per se diminishes parliamentary sovereignty as a foundational principle, and transforms the UK constitutional order such that the cards become stacked in the executive's favour.*

Craig here argues that (this) prorogation constitutes more of an intrusion on parliamentary sovereignty than does evading a statute. But the judicial intervention in *De Keyser* was justified by the terms of the statute, which by implication or necessary entailment ousted the prerogative. The Government in that case was acting in a way that an Act of Parliament did not permit. In limiting the time in which Parliament is to meet, the Government neither breaches any statute nor acts inconsistently with the principle that the Queen-in-Parliament may enact any law.

Bypassing Parliament? Turning the constitution on its head

The Court of Session concluded that the Government's advice to Her Majesty to prorogue Parliament was an unconstitutional (and hence unlawful) attempt to *stymie* Parliament.[21] The Court seems to have adopted the narrative advanced by a number of learned commentators, including Paul Craig (whom the Court cites),[22] namely that this prorogation turned the constitution on its head by sweeping Parliament aside. The parties before the Court of Session, as in the Divisional Court, relied on Craig's argument, which I suggest wrongly conflates the (inchoate) wishes of a majority in the House of Commons, which may not even have culminated in passing a Bill, with Acts of the Queen-in-Parliament. Note that Craig posits and then rejects the argument (not an argument made by the Government) that prorogation might be justified to execute the will of the people:

> *Nor can such reasoning be defended on the ground that the Prime Minister believes that this use of prorogation would be justified in order to fulfil the will of the people. Let us leave aside the fact that the Prime Minister presently has the slender legitimacy that comes from a vote of 92,000 Conservative members; let us leave aside also the fact the divination of the will of the people in terms of being content with a no-deal Brexit is fraught with difficulty. The root problem with this reasoning is more serious, and betrays a deeper lack of understanding of our constitutional order. The sovereignty principle inheres in Parliament and the totality of members thereof at any one point in time. The very idea that Parliament can be swept aside because its view does not cohere with the executive is to stand principle on its head. We are constitutionally impoverished if we regard this as the new constitutional norm.*

This is misconceived. The Prime Minister's legitimacy does not come from his election by the Conservative Party but from his appointment by the Queen on the grounds that he was best placed to command the confidence of the House of Commons. Prorogation does not sweep Parliament aside, such that the Government governs without the confidence of the Commons or without need for the support of the Houses of Parliament in legislation and taxation. It cuts short parliamentary time, which may cut short likewise the capacity for MPs and peers to challenge in Parliament the actions of the Government and/or to attempt to legislate. It is a controversial course of action for which the Government is rightly responsible to the Houses of Parliament and the electorate.

21. *Cherry* at [54], see also [91] and [123-124]
22. *Cherry* at [37] and [89]

Is the Government required by the law of our constitution to maximise the time in which Parliament meets and, especially, to facilitate enactment by its opponents in Parliament of new legislation that requires it to act in violation of its central policy? Even while those opponents are refusing to undertake the responsibility of replacing that Government, and refusing to submit their actions to the judgment of the electorate? No. The Government has lawful authority, by virtue of the prerogative to prorogue Parliament, to cut short this time. Whether it *should* exercise this power is a different matter. It may be politically outrageous for it to act thus, although historical and comparative Westminster perspective suggests (confirms) that prorogation for advantage in the management of parliamentary business is not obviously out of line with Westminster constitutional practice. If this is an outrage, the proper course of action is for the Houses of Parliament to hold the Government to account for so doing and for the Opposition to persuade the electorate that the Government is acting, or has acted, wrongly. It is not to invite the courts to deny the Government its lawful power or to seek to undo its exercise.

This was and is a longer than normal prorogation, although it spans the usual conference recess period and so does not produce many fewer sitting days than might have been expected in a normal year. The practice until 2010 was for Parliament not to meet in September. All this is relevant to the political defensibility of the prorogation, which the Government clearly took into account in deciding to prorogue. Again, this defence might fail to persuade and the public might conclude that this was an outrageous decision, in which case the Government will be punished electorally, as well as held to account by the Commons.

Craig works up to the bold conclusion that the long-established prerogative to prorogue Parliament must, unless judicially controlled, amount to an abandonment of parliamentary sovereignty:

> *If we accept such an argument then we recast the boundaries of Parliamentary sovereignty as traditionally conceived. Parliament remains omnipotent, in the sense that there are no bounds to its legislative authority, but the executive can determine when Parliament exercises that legislative authority. It can choose to prorogue Parliament whenever it so wishes, including in order to prevent Parliament exercising its voice, though legislation or otherwise, merely because the executive believes that what Parliament might do is undesirable. The executive's decision in this respect is legally unchallengeable, irrespective of the ground on which the prorogation decision is based. If this represents the law then every text book, article and essay on constitutional law has missed this crucial qualification to the sovereignty of Parliament.*

No, there is no recasting of boundaries, and the books do not need rewriting (not on this score anyway). In many constitutions drafted in Whitehall to confer Westminster democracy (responsible government and parliamentary sovereignty) on newly independent states, the power of prorogation was explicitly preserved from the scrutiny of the courts (in Craig's phrase made "legally unchallengeable"). Craig's argument cannot

even begin to work if the House of Commons is not being prevented by any such prorogation from withdrawing confidence. And even then the electorate would eventually have the opportunity to make its judgement. Again, no modern prorogation can last very long because Government needs Parliament's co-operation to operate the levers of power.[23] The confidence principle is built on that basic practical fact.

Prior to 2011, would dissolution of Parliament to block passage of legislation the Government opposed somehow have flouted parliamentary sovereignty? Absolutely not. It may or may not have been a prudent tactic, but the sole judge of its legitimacy would have been the electorate. The Government would not have breached constitutional principle, let alone constitutional law, in advising Her Majesty to dissolve Parliament to head off what it thought was bad legislation.

The constitutional problem that the UK now faces is first and foremost that a cross-party coalition is willing to ride roughshod over the Standing Orders of the Houses of Parliament, to legislate to take over the prerogative of foreign policy, forcing the Government to act contrary to its central policy, yet refuses either to withdraw confidence from the Government or otherwise to permit an early election to be held.[24] This is intolerable. It is this state of affairs that is turning the constitution on its head.

One might argue that this state of affairs is partly a reaction to the prorogation. However, it is not. It is only the continuation in a more pernicious form of the Cooper-Letwin debacle earlier in the year and the Government must have expected to face an attempt to legislate in this way, while refusing to withdraw confidence. Attempting to limit the time in which such legislation could be procured for political reasons in response to these machinations is not unconstitutional, let alone unlawful. It may have been politically unwise or imprudent, but that is not the same. In any case, even if the Government had misused its prerogative powers to manage the parliamentary timetable, the proper judge of this misuse is the House of Commons itself and thence the electorate – not the court.

The decision to prorogue on 28 August did not result in prorogation until 10 September, leaving open, by design, parliamentary time in which the House of Commons might have opposed prorogation or otherwise acted, including to withdraw confidence from the Government. Moreover, in that time Parliament enacted the European Union (Withdrawal) (No. 2) Act 2019, which requires the Prime Minister on or before 19 October to apply for an Article 50 extension. Parliament did not even attempt to enact legislation to rule out prorogation in the week beginning 9 September.

The gap between the Order in Council and prorogation is highly relevant to the propriety of the course of action and indeed it seems likely that the Government calibrated this prorogation with an eye on political defensibility, which confirms that political consequences and dynamics are an important restraint. The House of Commons had ample opportunity to withdraw confidence in the Government and chose not to. It did not take up the opportunity; it also did not attempt to legislate to prevent prorogation. Strikingly, Parliament had in fact already legislated

23. Cf. the spectre of a two-year prorogation, discussed in the Court of Session; see note 11 above.

24. R Ekins and S Laws, *Securing Electoral Accountability* (Policy Exchange, September 2019)

about prorogation, not only in the Fixed-term Parliaments Act (where it preserved the prerogative) but also and more importantly in the Northern Ireland (Executive Formation etc.) Act 2019, which in late July made detailed provision for Parliament to be recalled if it were prorogued in the autumn. The Government acted within the scope of this Act. The prorogation appears to have been timed to secure compliance with the restraint on prorogation which it can be inferred was the purpose of that Act. This Act was the relevant exercise of parliamentary sovereignty. The Court of Session discounts this by saying that the Act was concerned solely with Northern Ireland developments.[25] This is an artificial analysis. While they may not meet the Pepper v Hart test, parliamentarians made clear in their remarks inside and outside Parliament that the Act was intended to provide a means to keep Parliament in session in the autumn to stand ready to prevent a no-deal exit. The court should not declare unlawful prorogation that is consistent with its terms. Nor should they think it the function of the court to attempt to improve on the Act's terms.

25. *Cherry* at [56] and [115]

Improper purposes in judicial review

The Divisional Court concluded that parliamentary sovereignty did not justify judicial review of the prerogative to prorogue. The question of the purpose for which the power was exercised, and the propriety of that purpose, was not for the courts to judge. The Court of Session took a different view, concluding that the Government had acted for an improper purpose, namely to stymie Parliament. This, the Court reasoned, was to flout the principles of good government, democracy and the rule of law. But this is seriously mistaken. The courts do not have a roving jurisdiction to enforce principles pitched at this level of generality. On the contrary, they apply settled propositions of law and in this way uphold the rule of law and perhaps also contribute to democratic good government.

Mark Elliott argues that the Divisional Court is out of line with the modern trend in which justiciabilty is very narrowly confined and all prerogative powers are subject to review.[26] The distinction between constitutional principle and constitutional law is porous, he maintains, and the question for the court is not the difficult question of how long would be too long in terms of prorogation but the narrower question of whether stymieing Parliament is a lawful purpose. Here, he argues, the relevant principle is representative democracy. It is uncontroversial, he continues, that representative democracy sets its face against any unlimited power to suspend Parliament to avoid scrutiny, and the truth of these propositions undermines the argument that the propriety of the purpose is non-justiciable.

But, I say, the line between constitutional law and constitutional convention is far from porous, and if constitutional conventions are not justiciable, still less so is a principle as porous and vague as representative democracy. For it is a principle of our constitution that the courts cannot apply to the operations of the highest organs of government – the Crown and the Houses of Parliament and still less the Queen-in-Parliament – the same principles and the same modes of intervention as it applies to other persons, bodies and decisions affecting the rights of others. The Bill of Rights 1689, in clarifying major elements of parliamentary sovereignty, explicitly excluded not only executive limitation of parliamentary Acts (suspending or dispensing statute) but also judicial action and even litigious questioning of Parliament's proceedings, even when those proceedings involve what would otherwise be justiciable as abuses of legal power.[27] The remedy for such abuses lies, under our constitution as so established,

26. M Elliott, "Prorogation and justiciability: Some thoughts ahead of the Cherry/Miller (No 2) case in the Supreme Court", Public Law for Everyone (12 Sep 2019) (available at https://publiclawforevery-one.com)

27. The principle of not questioning proceedings in Parliament is a fundamental principle of the UK Parliament, asserting that Parliament's ancient and current privileges. That principle is not dependent on the 1689 Act but is evidenced by it. Questions may be raised about whether it should be recognised in Scottish courts but it is worth noting that it was used in *Miller (No 1)* at [145] as a basis for holding that section 28(8) of the Scotland Act 1998, which gave statutory recognition to the Sewel convention, was not justiciable.

within Parliament, and in the relation between both Government and Parliament and the electorate.

The courts are not well-placed to determine which actions are or are not proscribed by a principle of the form of "representative democracy", and a court's adjudication would inevitably, and almost by open admission, be to evaluate political practice and judgment, not by law but by a political proceeding transacted in court. This would be adjudication of a "political question" about the propriety of the Government's actions, about the extent to which it adequately balanced competing considerations, which are of the highest political sensitivity and turn on perceptions of and predictions about political dynamics and the national interest. The court cannot intervene to settle such questions, which includes whether this prorogation was properly motivated, without leaving law far behind. The Government was entitled to act on the settled legal position that it was free to advise Her Majesty to prorogue Parliament and that prorogation would be legally effective. Its exercise of this power may or may not be politically outrageous, or sharp practice, or part of an intelligent strategic set of policy choices designed to achieve its clearly stated political goals. The courts cannot evaluate this, or sort virtue from vice, without becoming embroiled in political controversy, even if they were able to see the relevant considerations clearly, which is highly doubtful.

Alan Greene asserts that if the executive and legislature disagree, it is inevitable that the court must intervene.[28] On the contrary, the nature of the appropriate relationship between them is that they are supposed to sort out the difference between them maturely on their own – or ask the electorate. No one doubts that the Government has lawful authority to prorogue Parliament, the House of Commons has authority to remove confidence from the Government or trigger an early election, and the Government can be (and is being) held fully to account for its decision to prorogue. Judicial intervention would be necessary only if Parliament, not merely some MPs within each House, invited the courts to adjudicate on the lawfulness of an attempted prorogation, which might require amendment of the Bill of Rights 1689 or other legislation. And for good reason Parliament has not done this and never should. The Chief Justice of Australia correctly advised the Governor-General that his action in dissolving Parliament – on the advice of a Prime Minister not enjoying the confidence of the elected House, as a means of enabling the electorate to seek to resolve a disagreement between (in Greene's words) "the executive and the legislature" – was not an action in relation to which the court either "must" or could rightly intervene.

The Lord Ordinary and the Divisional Court concluded that advice to prorogue was non-justiciable because it involved questions of high policy and there were no legal standards to apply. Paul Craig argues that on the contrary prorogation does not involve high policy, for in most cases it is entirely mundane and unobjectionable.[29] The argument does not work. When prorogation is controversial that is because it involves high policy, in which the Government has to decide how to handle the business

28. A Greene, "*Miller 2*, Non-justiciability and the Danger of Legal Black Holes", U.K. Const. L. Blog (13 Sep 2019) (available at https://ukconstitutionallaw.org/)

29. P Craig, "Prorogation: Three Assumptions", U.K. Const. L. Blog (10 Sep 2019) (available at https://ukconstitutionallaw.org/)

of Parliament in a context where there may be difficulty maintaining parliamentary government or advancing parliamentary business in the national interest. The power to prorogue is an important prerogative power, which frames and informs the ongoing relationship between Government and Parliament, even if its exercise only seldom provokes controversy. The controversy arises in this case because of the particular political context, in which the Government remains in office, facing a seemingly intransigent Commons which nonetheless refuses to withdraw confidence. That a government enjoying full confidence would view prorogation as routine or unremarkable does not establish that its exercise is not politically fraught and a matter of high policy. The use of prorogation in 1831 and 1948 in the UK establishes this; so too other contentious exercises in other Westminster democracies. The Court of Session notes the 1948 episode but then asserts "What this case illustrates is that the examples where prorogation has been used for more than formal purposes are highly unusual, and cannot serve as a precedent for later use of the power."[30] On the contrary, the case proves, as does the wider Westminster practice, that prorogation is a politically significant, sometimes controversial power, the use of which requires political judgment.

Against the Divisional Court and the Lord Ordinary, one might pit Craig's argument that there is no need for a legal test determining the lawfulness of every possible prorogation for the court to conclude that this prorogation was unlawful.[31] The argument might appear superficially attractive, especially when taken with Mark Elliott's argument that the court needs only to evaluate the propriety of the purpose of stymieing Parliament rather than gauge for itself how long a prorogation legitimately may be. However, the court needs a ground in law on which to intervene, a ground that does not subsume constitutional convention and practice. The Court of Session's reliance on abstract principle is a tacit admission that it has no such grounds – and the principle of representative democracy is no better, for it begs every relevant question about how the Government should act. The best argument for judicial intervention is 'improper purpose'. But again the courts are not the institution that understands the proper purposes of prorogation or that have, before last week, ever been responsible for determining whether a prorogation was properly motivated. Without legal grounds on which to act the court's intervention exposes it to the risk of political criticism.

The Court of Session concluded that the real reason for this prorogation, in view of its length, was to stymie Parliament, which it seems to take to be a synonym for avoiding accountability or perhaps for preventing Parliament from legislating about Brexit. The two points are quite different: the conclusion that Parliament should not be in session is not tantamount to an attempt to hide from parliamentary accountability, as might be the case if a politically damaging report were otherwise to be tabled or, especially, if a no-confidence motion was about to be moved. It is not the case that the Government is required to facilitate enactment of legislation it opposes, which it believes is unconstitutional and damaging

30. *Cherry* at [108]
31. Craig, "Prorogation: Three Assumptions"

to the national interest, and which can only be procured by breach of the House's own procedural rules.

Further, it bears noting that a prorogation of some length was obviously legitimate and appropriate in circumstances in which a new Prime Minister had taken office and in which the previous session had run long over time. The Prime Minister clearly sought to balance what would be politically acceptable and justifiable given the party conferences, Parliament's desire to be involved, effect on negotiations with the EU, and need and practicability for Parliament to conduct business. It is wholly consistent with convention for the Government to use its capacity to manage parliamentary business in a way that assists the Government's political agenda. If that is an improper purpose, then the Government has a responsibility to be impartial in its dealings with the House of Commons, which is absurd. The Prime Minister may have misjudged the balance of these considerations but it was a political judgement for him to make. Those seeking to litigate are seeking to reinforce the political case that it was wrong by recruiting the opinion of the courts about what good constitutional practice requires. This is not for them to say. There is evidence that the Prime Minister did have regard to Parliament's needs, but in deciding on prorogation it is unreasonable to expect total exclusion of the interests of the Government. What is actually being challenged by way of these proceedings is the decision to prorogue Parliament for a longer period than usual instead of asking for a recess. This was a decision for the Government, not for the court.

The judicial assertion that the Government intends to stymie Parliament ignores the dynamic that has played out between Government and Commons and the peculiar context of recent months, and the past week, in which confidence has not been withdrawn, an early election has been blocked and legislation has been procured by a cross-party coalition by departing from the many procedural rules in the Standing Orders of both Houses that exist to protect the Government's initiative and responsibility to the electorate. None of this informs the Court of Session's analysis.

The Government is responsibly not only for the management of the parliamentary timetable, for which it is accountable to Parliament and the electorate, but also and relatedly for negotiations with the EU27, which it intends to culminate in a deal that will enjoy the support of Parliament. It is not in the least irrational for the Government to form the political view that the negotiations will go better, that the position of the UK will be that much better secured, if the next session of Parliament begins on 14 October, for this bears on how the EU27 engage with the UK. This is not a simple consideration, it is obviously not risk-free, and the Commons may not trust the Government for a minute. All of which are good reasons to oppose prorogation or withdraw confidence. But until confidence is withdrawn, the Government may reasonably think that it can improve the UK's negotiating position and increase the chances that the UK leaves the EU on 31 October with a deal, ending damaging political paralysis and restoring public trust, if Parliament is not in session for a number of weeks.

Why? Because this minimises the prospect, or so the argument might run, that the Government will be forced to accept any terms the EU offers. The point is moot in view of the European Union (Withdrawal) (No. 2) Act, but acting for this purpose would not have been irrational or improper. What would be improper is for the court to second-guess this purpose.

Judicial interference with parliamentary proceedings

The constitution of responsible parliamentary government – the framework of constitutional convention and practice that frames how Queen, Ministers, and the Houses of Parliament interact – is protected from judicial interference, not only by the disciplines of the common law, which recognise the difference between law and convention and recognise also the limits of judicial technique, but also, by the fundamental principle that, so far as England and Wales at least is concerned, is articulated in Article 9 of the Bill of Rights 1689.

The Government's advice to Her Majesty to exercise the prerogative to prorogue Parliament is not a power controlled by law. The courts do not have jurisdiction to quash that advice. Her Majesty might arguably refuse the advice in very unusual circumstances, including for example when prorogation is used after a vote of no confidence is lost or perhaps even to avoid a likely vote of no confidence (although, even in that case, circumstances might justify a short prorogation, as in Canada in 2009). But the courts should not invent justiciable limits on Her Majesty's power and thereby invite argument before the courts about how the power should be exercised.

The prorogation of Parliament is an act of the Sovereign and even if the courts were to conclude that advice to the Sovereign had been unlawful (because improperly motivated) this would not invalidate the act of prorogation itself. William IV prorogued Parliament in person in 1831. Would the courts have had authority to quash the ministerial advice to His Majesty to prorogue Parliament? Would this have had any legal effect on the prorogation which His Majesty carried out? No and no.

More importantly still, prorogation is a proceeding in Parliament by the Commissioners and a proceeding of Parliament, which is recorded in the journals of both Houses and is understood by the Houses to have brought to a close the session of Parliament which began in June 2017. The courts cannot reopen Parliament by court order for this would to be intervene into parliamentary proceedings in a way which settled constitutional law forbids. The courts have no jurisdiction here not because of parliamentary sovereignty, but because the integrity of parliamentary proceedings and the freedom of the political process would be gravely impugned by litigation. Article 9 states authoritatively that proceedings in Parliament are not to be questioned in any court. This litigation aims to invalidate the advice that results in a proceeding of Parliament and, almost by assumed

logical consequence, to invalidate a proceeding of Parliament and then to compel, by judicial order, the resumption of proceedings of Parliament more generally.

The mischief that Article 9 was concerned to prevent is evident in the present spate of lawsuits by disappointed parliamentarians, who pray the courts in aid of a political dispute about the propriety of the Government's actions, in a context where the Commons has not withdrawn confidence. And Article 9 protects the Queen's participation in the proceedings of Parliament from legal challenge just as much as it protects the actions and utterances of parliamentarians on the floor of the Houses. Article 9 may have been an Act of the English Parliament but the same prohibition must be understood to apply to the Parliament of the United Kingdom of Great Britain and Northern Ireland.

If the Supreme Court upholds the Court of Session's ruling that advice to Her Majesty was unlawful, it should not conclude that the prorogation itself was unlawful. The only remedy to a finding that the advice had been unlawful would be recall of Parliament by proclamation under the Meeting of Parliament Act 1797, and the courts cannot grant an injunction against the Crown compelling such a proclamation. The Government might feel politically and morally bound to exercise this power in response to declaratory relief from the Supreme Court, in favour of the litigants. But in doing so it would be condoning a departure from the principle that requires the non-justiciability of parliamentary proceedings. Note also that the power to recall Parliament may only be exercised if Parliament is not in session, which would entail that the prorogation was effective, even if procured, per hypothesis, by unlawful advice.

Part of the reason to prohibit judicial interference with parliamentary proceedings is that the courts will not understand the relevant considerations. Another part of the reason is that judicial interference will undermine the political balance for which constitutional convention and practice make provision. Relatedly, the courts will find themselves invited to intervene by parties to a political controversy, to lend the majesty of the common law to contestable claims about constitutional propriety and political calculation or statesmanship. Here it bears noting that many constitutional lawyers share a narrative in which the recent prorogation is an obvious and glaring outrage. Some also think that the advice to prorogue (and perhaps also the prorogation itself) was unlawful, although it is fair to say that most were surprised by the Court of Session's ruling.

One might say, as did some public commentators, that the prorogation was sharp political practice on the part of the Government, or a bold use of executive power, which might be imprudent or risky, but is not necessarily irrational or indefensible. The proper place for all of these arguments is in Parliament. In early September, the House of Commons had an opportunity, more than once, to withdraw confidence or to oppose prorogation by motion or legislation or to provide for an early election. It did not take up these opportunities. This was and is the proper forum.

In *Miller (No 1)*, Lord Reed rightly said "the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary".[32] This litigation wrongly invites the courts to legalise political issues. The Divisional Court and the Lord Ordinary refused the invitation; the Court of Session accepted it. When judges depart from settled law, reviewing established powers on novel and contestable grounds, in order to vindicate grand constitutional principle as they see it, they compromise the rule of law. The law does not authorise this judicial interference, indeed, insofar as it involves challenging an act of the Sovereign and the integrity of parliamentary procedure, the law forbids such interference. The litigation has involved questioning the motives and integrity of the Government and has been seized upon by political opponents as vindication. This is not a proper use of the judicial process and itself contributes to chipping away at the legitimacy of our institutions and the coarsening of public discourse.

This litigation, and the Court of Session's judgment, is not the first time in the last year in which courts have interfered with parliamentary proceedings.[33] And other lawsuits have been threatened, including in relation to the political dynamics that might follow in the wake of a no-confidence vote under the Fixed-term Parliaments Act. If the Supreme Court does not reverse the Court of Session, there will be a case for some future government to invite Parliament to enact legislation to more clearly exclude judicial review in this domain. This would be a partial vindication of the principle that informs Article 9 of the Bill of Rights. One might also legislate to overhaul the power to prorogue. Nothing in this paper assumes that the existing legal regime should not be reformed, but it is not for the courts to undertake such reform, at the behest of one side of an intense political controversy.

32. *Miller (No 1)* at [240]

33. S Laws, *Judicial Intervention in Parliamentary Proceedings: The question of the unilateral revocability of the UK's Article 50 notification* (Policy Exchange, November 2018)

£10.00
ISBN: 978-1-910812-92-1

Policy Exchange
8 – 10 Great George Street
Westminster
London SW1P 3AE

www.policyexchange.org.uk