

Professor Timothy Endicott | 1 December 2016

# Parliament and the Prerogative: From the *Case of Proclamations* to *Miller*

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## Parliament and the Prerogative: From the *Case of Proclamations* to *Miller*

The Government's argument in the *Miller* case is that triggering Article 50 lies within the power of the Crown to make and unmake international treaties - a power the leading litigant, Gina Miller, has termed 'this ancient, secretive Royal Prerogative'. The legitimacy of the use of the prerogative is questioned by critics, who view its proposed use to trigger Article 50 as an unconstitutional scheme to bypass Parliament. This paper argues that there are positive reasons of constitutional principle for an efficient, unified and democratic executive. We can only understand the extent of the executive power, and how it ought to be constrained, if we understand what it is for. Acting to initiate a withdrawal from the European Union is within the proper constitutional role of the executive. Using the royal prerogative in this way is entirely consistent with the sovereignty of Parliament and the rule of law.

I will tell you something curious about our constitution's long history of brilliant and disastrous reflection and action. There is a gap. Nine hundred and fifty years of thought and practice since the Conquest have yielded no articulate account of the principle or principles that explain and justify the executive power in our constitution.

I will not try to prove this negative hypothesis: that no one has ever given a decent theory of the executive. But I can show you some scenes from the historical pageant that will persuade you that it may be true. These amazing scenes would be comic if they did not involve the violence and terror of a long struggle against abuse of the executive power. If by an effort of imaginative reconstruction, we distilled a theory from the things people say, it would be that the executive power of the Crown is a stubborn stain that we have only partly succeeded in washing out of the fabric of our constitution.

And then I will make an argument: the 'stubborn stain' theory is deficient and really damaging. There is a constitutional rationale for the power of the executive in the 21<sup>st</sup> century. If we do not know what it is there for, we cannot understand the fetters that ought to constrain and do constrain the dangerous branch of government – the branch with the guns. And then, we cannot understand the proper relation between Parliament and the prerogative.

And yet, I am not accusing our forebears in legal and political practice and theory of a failure in constitutionalism. The gap is understandable. The lack of any organized account of the constitutional basis for executive power is partly explained by a mere accident of our constitutional history- albeit a deep structural and massively important accident: the power of the executive has evolved negatively, by subtraction, through progressive shifts of particular powers: first away from the monarch in person, and lately away from her ministers in their exercise of the prerogative in her name. That process of subtraction has quite reasonably captivated our collective constitutional imagination, and has given the stubborn stain theory some plausibility.

And there are also reasons for the gap in theorizing that are of general importance for understanding executive functions in any constitution. One is, I think, that the essential points are too obvious. They have largely gone without saying. And another reason is that the power that the executive ought to have cannot be specified very generally, as it depends on conditions of politics and of culture in a particular country at a particular time, and on the country's strengths and weaknesses and

opportunities and threats, and ought to be open-ended, and does not lend itself to theorizing.<sup>1</sup>

I will argue that even though we have inherited no theory justifying executive power, we can actually find in our heritage of constitutional thinking some small and simple hints that are of great practical import. Those simple elements explain why the executive has a legitimate function that is justifiable in constitutional principle. And they show that the rule of law and Parliamentary sovereignty are not the only principles of our constitution.

## *Miller*

Let me say why this lecture – the scenes from the pageant, and then the argument in favour of executive power – are inspired by an instant classic of constitutional law, the Divisional Court’s decision in the *Miller* case. I agree with an account that Lord Millett has recently given in the UK Supreme Court Yearbook of the claimants’ main argument in the case:

‘All the rights on which the claimants relied ...in *Miller* have been imported into domestic law in the terms in which they were granted by the Treaties, and all are inherently dependent on the maintenance of an existing relationship between the UK and the EU. Any change in that relationship is a classic example of something which may be effected by the exercise of the Royal Prerogative without the need for legislation...’<sup>2</sup>

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<sup>1</sup> While the proper range of executive power does not lend itself to general theorizing, I am not at all saying that there is no role for constitutional and political theory in justifying and critiquing particular executive roles- in war, in law enforcement, in public health policy, in cyberwarfare, etc. Far from it; but the theories that might be helpful need to be specific to particular conditions and to particular problems.

<sup>2</sup> Lord Millett, ‘Prerogative Power and Article 50 of the Lisbon Treaty’ (2016) 7 UK Supreme Court Yearbook 190–194 at 194.

For reasons that Lord Millett and John Finnis<sup>3</sup> have explained, it is a fallacy to say that, if Parliament has enacted a statute giving effect to rights arising under a treaty, the Government<sup>4</sup> cannot take action that would terminate those rights.

But still, there would be a ground for the judges to uphold Mrs Miller's claim, if it were constitutionally intolerable for the executive branch of government to be taking this dramatic step – a step in managing the UK's relationship with the EU and our fellow Member States that will presumably result in the end of our membership in the EU.

The stubborn stain theory supports this view: that the court ought to take away from the British Government the power to terminate EU Membership, on urgent grounds of constitutional propriety – as Sir Edward Coke denied the King the power that he claimed to raise revenue by inventing his own town planning scheme for London, complete with expensive fees.

Gina Miller called the authority of the British government in international relations 'This ancient secretive royal prerogative', when she was interviewed on Radio 4 in the week before the hearing in her case.<sup>5</sup> And she referred to the *Case of Proclamations*,<sup>6</sup> to support her view that the government cannot deprive us of rights that Parliament gave effect to in the ECA 1972: 'This actually goes back to 1610, to Sir Edward Coke. It was ruled at that time that the executive cannot overrule Parliament and diminish rights.'

The Divisional Court in the *Miller* case accepted that approach to the *Case of Proclamations*. And in the judges' account of our constitution, all of its principles either *restrict* the authority of the Crown, or empower agencies *other than* the Crown (i.e., the courts and Parliament); there is no indication that any principle of the constitution justifies any executive power at all.

If the rule of law and Parliamentary sovereignty are our principles, it can seem as if the royal prerogative is an unprincipled remnant of arbitrary power, waiting to be

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<sup>3</sup> John Finnis, 'Terminating Treaty-based UK Rights', U.K. Const. L. Blog (26th Oct 2016) (available at <https://ukconstitutionallaw.org/>)

<sup>4</sup> I will use 'Government' with a capital 'G' for the Prime Minister and the other ministers of the Crown, and 'government' for all the agencies that govern (including courts and Parliament), as in 'the dangerous branch of government'.

<sup>5</sup> *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768.

<sup>6</sup> *Case of Proclamations* (1611) 12 Co Rep 74.

taken away in a case where, as in *Miller*, there is a matter of constitutional importance at stake. And then the Divisional Court's decision seems to take its place in a venerable history of the progressive transfer of power from the autocratic Crown, to the democratic Parliament and the independent courts. If there is no rationale for executive power in our constitution – if it is a regrettable residue of arbitrary medieval despotism – then, you may say, the judges ought to seize the moment to remove a prerogative that they have not had any earlier occasion to remove.

But I will argue that the stubborn stain theory is mistaken, that the picture of the prerogative that arises from the stubborn stain theory is askew, and that there is no constitutional ground for taking this power away from the executive. There is actually no *general* reason to take power away from the executive; the great historical successes in taking power away from the executive have been great for *particular* reasons, and it is equally important not to take away the powers that the executive really ought to have. What are those powers? Let us turn to the pageant of our constitutional history for an answer – only to be sorely disappointed, I assure you.<sup>7</sup>

## Magna Carta

The pageant is actually much older than 1215. It is older than King Cnut's Oxford Code of 1018. But let's start with the long list that the barons wrote up in the Runnymede charter of 1215, and that successive kings edited in successive Magna Cartas, of things that the King was *not* meant to do. Within weeks, the Pope adjudged that the Runnymede charter would have been voidable for the duress that the barons subjected him to, if it had not been void as an insult to the authority of the king. Those judgments would, I submit with respect, have been sound if the charter had not (by and large) set out the law as it was well understood to have been long before King John's coronation – the restrictions on his power, as established by the authoritative custom of the realm.

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<sup>7</sup> As they are not reliable guides to the constitution that we have actually inherited, let me omit the constitutional thinker Charles I, and the constitutional doer Oliver Cromwell (and Cromwell's Instrument of Government, in any case, took the nature of executive power for granted, as much as Coke did: 'the exercise of the chief magistracy and the administration of the government over the said countries and dominions, and the people thereof, shall be in the Lord Protector' (Article II).

The constitutional importance of the Runnymede charter is first in its illustration of the claim of the rich men of the country to legitimacy in constraining the king, and secondly in its nature as a list of things that the King could not do. The charter did not set out the legitimate scope of the king's authority. It has been a pattern for an 800-year tradition of presupposing the executive power of the Crown, and then identifying restrictions on it, and establishing techniques for constraining it.

## Fortescue

In 1471, John Fortescue, given time to think about things while in France after his patron was deposed in the Wars of the Roses, distinguished the purely regal authority of an absolute monarch from the regal and political authority of what we might call a constitutional monarch. Under purely regal authority, the King's pleasure has the force of law. Regal and political kingship, by contrast, is what England had, or was meant to have.<sup>8</sup> In that form of constitution, the king rules a people after their 'onynge' (their 'one-ing') of themselves into a realm, and he rules 'by suche lawes as thai all wolde assent vnto'.

Fortescue wrote that the French model of kingship was purely regal. The essential difference is that a purely regal king can raise revenue from the commons without their consent. That, he said, was the difference between England and France: in France, as a result of regal rule that was *not* 'political', the commoners were reduced to poverty:

Thai drinken water, thai eaten apples, with brede right browne made of rye; thai eyten no flesshe but yf it be right seldon a lytle larde, or of the entrales and heydes of bestis slayn for the nobles and marchauntes of the land. ...Lo this is the frute of his Jus regale.<sup>9</sup>

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<sup>8</sup> *The Difference between an Absolute and a Limited Monarchy* (c 1471) C Plummer ed (OUP 1885) p 112.

<sup>9</sup> *Ib* pp 114-5.

Fortescue favoured the English regal and political model. His vivid constitutional imagination was focused on how the king is and ought to be constrained, and not on justifying the executive power.

## Coke

When Sir Edward Coke said in the *Case of Prohibitions* that the King could not sit in judgment in person in the law courts, King James was so infuriated that he threatened to strike Coke, who fell on his face in fear, and begged for pity. The vignette is an emblem of the reasons why Coke did not come up with a theory of executive power: that power was a matter of awe and fear, to be taken for granted by judges to whom it actually meant something to call the King 'his Majesty'. Coke said obsequious things about King James – 'that God had endowed His Majesty with excellent science, and great endowments of nature' – and he was careful to ascribe the King's disqualification from sitting as a judge to the fact that he had not studied law, rather than to its true and essential constitutional ground in the need for a separation of judicial power, to prevent abuse of power by the executive.

In the *Case of Proclamations*, the Lord Chancellor hinted at a view of the King's proper power, when he argued that if James could not conduct his get-rich-quick schemes, he 'would be no more than the Duke of Venice', who by that time was a figurehead for an oligarchy.<sup>10</sup> But Coke's holding as to the King's power was (almost purely<sup>11</sup>) negative, outlining what the law prohibited him from doing, and reconciling it with his dignity, but giving no positive account of his authority.

There was simply no call for Coke to explain or to justify the power of the King. It was presumed, unarticulated, and meant to be a mystery, and constitutional progress

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<sup>10</sup> '...he who had once been the pilot of the ship became little more than an animated figurehead, properly draped and garnished.' *Encyclopedia Britannica* 11<sup>th</sup> ed 1910, volume 8 sv 'Doge'.

<sup>11</sup> The only actual power he ascribed to the King was that 'for prevention of offences [he] may by proclamation admonish his subjects that they keep the laws, and do not offend them', and the proclamation may aggravate an offence. There is one other positive statement, seemingly relating to emergencies, but ungrammatical in the report: 'the King out of his province, and to prevent dangers, which it will be too late to prevent afterwards, he may prohibit them before, which will aggravate the offence if it be afterwards committed'.

was to be made by limiting it in particular ways, rather than by piercing the mystery with an account of its justification and extent.

## Locke

You would think that John Locke, at least, would give us a theory of the executive. And we do, in fact, get something really valuable and pertinent. But not a good theory of executive power. He said that the legislature's laws have lasting force, and therefore 'need a perpetual execution', and 'it is necessary there should be a power always in being, which should see to the execution of the laws that are made, and remain in force'.<sup>12</sup> Perhaps Locke, a man who was sensitively aware of the misleading charms of words, was misled by the word 'executive'. If we use the word 'executive' for a branch of government, it cannot be a branch that simply executes laws; executing laws is a crucial and complex responsibility that is only one fragment of what we need from the executive branch of government.

But very significantly for our purposes, Locke added another power alongside the legislative, judicial, and executive powers:

'...the power of war and peace, leagues and alliances, and all the transactions, with all persons and communities without the common-wealth ...may be called federative, if any one pleases. So the thing be understood, I am indifferent as to the name.'<sup>13</sup>

'And though this federative power in the well or ill management of it be of great moment to the common-wealth, yet it is much less capable to be directed by antecedent, standing, positive laws, than the executive; ...what is to be done in reference to foreigners, depending much upon their actions, and the variation of designs and interests, must be left in great part to the prudence of those, who

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<sup>12</sup> Locke, *The Second Treatise of Civil Government* 1690 Chapter XII, §144.

<sup>13</sup> *Ib* §146.

have this power committed to them, to be managed by the best of their skill, for the advantage of the common-wealth.<sup>14</sup>

Locke added that because the use of force on behalf of the community is necessary for both the 'executive' and the 'federative' functions, it makes sense to unify the two functions in one agency. Allocating authority over the use of force to different offices 'would be apt some time or other to cause disorder and ruin'.<sup>15</sup>

Here, then, are the lessons we can learn from Locke: that the 'federative' power is distinct from the legislative power, and that the power to execute laws is distinct too, and that responsibility for the state's use of force ought to be unified. And, finally and most importantly, that a real theory of executive power would have to account for aspects of government that, like the 'federative' power, depend much upon people's actions, and the variation of designs and interests, and 'must be left in great part to the prudence of those who have the power committed to them, to be managed by the best of their skill, for the advantage of the commonwealth.'

We have to add something crucial to these simple hints: domestic policy formation and policy implementation too, and not only relations with foreigners, involve 'people's actions, and the variation of designs and interests', and must be left 'in great part' to executive officials, subject to the carrying out of truly legislative and judicial functions by Parliament and the courts.

In Locke's discussion of the prerogative itself, there is much wisdom, including a hint at this crucial point concerning the open-endedness of the executive responsibility in domestic as well as foreign affairs:

'Many things there are, which the law can by no means provide for; and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require...'<sup>16</sup>

But that discussion is clouded by an unpromising suggestion that this executive role arises because the legislature cannot act swiftly enough in cases of emergency, and that the executive ought to take action pending the legislature's action. Emergencies are a

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<sup>14</sup> *Ib* §147.

<sup>15</sup> *Ib* §148.

<sup>16</sup> *Ib* Chapter XIV §159.

nice example of the country's need for an executive, but they are not the only example of the diversity of needs that may or may not call for legislation, and that must be met on behalf of the community. What's more, where legislation is needed, the legislature will need (because the community will need) an executive decision as to what legislation is to be proposed.

## Blackstone

Even William Blackstone in his *Commentaries* in the 1760s took much of the proper extent of executive power for granted. He learned somewhat from Locke, yet he was still treating executive power as a high-falutin' mystery: 'those branches of the royal prerogative, which invest this our sovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers; in the exertion whereof consists the executive part of government'.<sup>17</sup> But we do get one essential practical detail – he may have learned it from Locke – concerning the constitutional allocation of executive power:

'This is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength and dispatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in a government: and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford.'<sup>18</sup>

His account of executive power is out of date.<sup>19</sup> And he exaggerated the necessity for unification in a single person; the monarch had for centuries been exercising executive power in council with ministers who not only advised him but acted for him. But Blackstone was entirely right about the value of unity, strength and dispatch in the executive function of government (and, in particular, in action on behalf of the UK in international relations). That is not only a value of a past age; it is essential in the 21<sup>st</sup>

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<sup>17</sup> William Blackstone, *Commentaries on the Laws of England* 1765-69, W Prest ed (OUP 2016), Book 1, p 162.

<sup>18</sup> *Ib*

<sup>19</sup> Blackstone took prerogative power to be absolute and unreviewable; today it is not absolute and it is subject to judicial review.

century, for example, in the working out of the prospect of departure from the EU. Blackstone's offhand remark is a currently salient reminder that we would not be better governed, if Parliament or the House of Commons were responsible for a negotiation with the European Union.

## Dicey

What about Albert Venn Dicey? Hopeless! To him we owe a large part of the discredit for the stubborn stain theory: he described the prerogative as '...the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown'.<sup>20</sup> We ought to do the famous constitutional lawyer justice, so we should immediately point out that Dicey did not actually hold the stubborn stain theory. By 'arbitrary', he probably meant only that the person who exercises the power (the Queen, or her ministers, as it may be) is the arbiter. And he gave characteristically careful and sensitive accounts of the role of the prerogative, of the role of convention in regulating its use, and of the relation between its exercise and the authority of the House of Commons.

But he ought to have known better. He ought to have foreseen that people would go on for generations citing 'Dicey' only for short phrases taken out of context, and that they would take from his sensitive account not a well-informed sense of the constitutional aptness and importance of the prerogative, but only two pejorative misconceptions: that it is a residue, and that it is arbitrary.

## Modern times

We can hurtle through the 20<sup>th</sup> and into the 21<sup>st</sup> century, witnessing the legacy, in which the executive power of the state is treated as something to be taken away, and not

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<sup>20</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* 8th ed (London: Macmillan, 1915) p 282.

something that calls for (and may have) a justification. It is all summed up in the *Miller* decision. The Divisional Court described the prerogative in Dicey's way, as '...the residue of legal authority left in the hands of the Crown' [24]. They cited Lord Reid in *Burmah Oil Co v Lord Advocate* [1965] AC 75, at 101: 'The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute' (*Miller* [24]). They quoted Lord Browne-Wilkinson's remark in *R v Home Secretary ex p Fire Brigades Union* [1995] 2 AC 513 at 552, that 'the constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body' (*Miller* [86]). They affirmed the principles of the rule of law and Parliamentary sovereignty. In their portrayal of our constitution, its success is the subordination of the prerogative power to Parliament and the courts. They cited the *Case of Proclamations* for both forms of subordination [27]. And there is no justification of the proposition that the Crown should have any power whatsoever.

This gap can be observed generally in political thought, and not only in judicial deliberation. The Labour Government in 2007 produced a Green Paper on the role of the executive, that supported the stubborn stain theory:

'For centuries the executive has, in certain areas, been able to exercise authority in the name of the Monarch without the people and their elected representatives in their Parliament being consulted. This is no longer appropriate in a modern democracy. ... the government continues to exercise a number of powers which were not granted to it by a written constitution, nor by Parliament, but are rather ancient prerogatives of the Crown. These powers derive from arrangements which preceded the 1689 Declaration of Rights and have been accumulated by the government without Parliament or the people having a say.'<sup>21</sup>

The Government's review of the situation led to some extraordinarily sensible decisions by Prime Minister Gordon Brown: that he should not be choosing Regius Professors in the Universities, or selecting Bishops for the Church of England. But notice the particularity of those healthy withdrawals of power from the Queen's Prime Minister: they are particular powers, and there are particular reasons for concluding that the

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<sup>21</sup> The Governance of Britain Cm 7170 (2007) pp 14-16:  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228834/7170.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228834/7170.pdf).

Prime Minister is not best placed to exercise them for the public good. The mistake in the background to the Brown government's review, and woven into its final report,<sup>22</sup> was to generalize: as if the holding by the Prime Minister of a power not conferred on him by Parliament were generally disreputable and illegitimate.

And that impulse to generalize – the gist of the stubborn stain theory – is a popular impulse today, at least with regard to those powers that wear the irresponsible-sounding label 'prerogative'. Consider, for example, the work of Dr Andrew Blick and Richard Gordon QC, who wrote in the aftermath of the referendum on EU membership that 'statute is generally a preferable power source to the royal prerogative'.<sup>23</sup> They speculated that

'It may be that a new constitutional norm is emerging whereby the prerogative should not be the power source for important governmental activities, including the implementation of significant constitutional (or other) change and that, instead, Parliament should provide the basis.'<sup>24</sup>

That approach to prerogative is supported, as you will have seen from what I have said, by much of the trend and rhetoric of our constitutional history. Is it encouraged by the word 'royal', the word 'prerogative', and the phrase 'the Crown'? No doubt for some of our colleagues who pursue it, that approach is actuated by a republican urge, which finds it offensive that real power today should have its theoretical and historical source in a regal heritage (even if it has always been, – since Brutus came here in the aftermath of the Trojan War, according to Fortescue – both regal and political).

But that approach is prone to discount or to ignore two points of huge constitutional importance: the first is the permanent value – the sheer constitutional necessity – of an efficient and unified executive branch of government. The second is the possibility – and it is a reality in the British constitution – that the executive branch

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<sup>22</sup> 'The Governance of Britain: Review of the Executive Royal Prerogative Powers: Final Report' (Ministry of Justice 2009):

<http://webarchive.nationalarchives.gov.uk/20110310111923/http://www.justice.gov.uk/publications/docs/royal-prerogative.pdf>

<sup>23</sup> Dr Andrew Blick and Richard Gordon QC 'Using the Prerogative for Major Constitutional Change: The United Kingdom Constitution and Article 50 of the Treaty on European Union' The Constitution Society, 19 July 2016, p 17. <http://consoc.org.uk/wp-content/uploads/2016/10/Royal-Prerogative-paper-Andrew-Blick-Richard-Gordon-PDF.pdf>

<sup>24</sup> *Ib* pp 3-4.

of government can be a responsible branch of government rather than an arbitrary or despotic branch.

First, though, please let me pause to insist that I am not here as an apologist for the executive, or any particular Government, any more or less than for the legislature or the judiciary. In fact, I think the constitutional theorist's best attitude is a thoroughgoing, dogged skepticism about all of our rulers. Not those in this room personally, of course, but all of them, impersonally. What a blessing to be able to take this attitude, and to live in England in a day when judges – like the rest of us – are not on their hands and knees in front of the monarch. Let's extend the skepticism – a deep doubtfulness as to the wisdom, the understanding of public affairs, and even the good will of our rulers – to the voters, exerting power as our rulers in an election or a referendum. Let's extend it very liberally to the executive, to both houses of Parliament, to local councils, to the European Council, to the United Nations, to the governments of other countries, and to our voters and theirs. A people's governance should be arranged to make room for greatness on the part of rulers, and also to deliver responsible government in the face of stupidity and worse on the part of rulers. It is not a great elegy to the British Government when I say that we should only apply the same dogged skepticism to them as to other rulers. The stubborn stain theory of our constitution risks idolizing the judges and Parliament. That naivety – it should be needless to say – may be preferable to the naivety of forgetting the distinctive and massively effective capacity of the executive branch of government, to abuse power. But let's not be naïve at all.

With that proviso, here are the two constitutional principles that justify executive power.

## **1. The executive is necessary for the public good**

In every constitution, the executive is the primary, general branch of government. The functions of the executive are open-ended, while the core judicial function (passing judgment on legal claims), and the core legislative functions (passing judgment on proposals for legislation) are specific governmental functions, taking specific forms. The courts and the legislature can close for vacations, but the executive cannot. The executive does not manage the country (no one does). But the executive manages the police and the military. It is the executive that gives effect to the decisions of the courts

and the legislature. So it is the executive that is chiefly responsible for the rule of law. In Britain, Parliament can change the constitution, and the courts can determine the law of the constitution, but it is the Government that must uphold the constitution.

These observations may seem banal, but they show the mistake in the seemingly-attractive idea that prerogative power ought generally to be taken away from the government. Instead, the constitutional imperatives are – and have been for a thousand years – to make the executive democratic and responsible, and to take away specifically legislative and adjudicative powers that the Crown cannot responsibly discharge. Responsible government needs an effective agency for making clear, open, prospective, stable, general rules for the community. Responsible government needs an independent and effective agency to resolve disputes over the rules. The *Case of Proclamations* and the *Case of Prohibitions del Roy* were not great achievements because they took away power from the King; they were great achievements because they took away specific powers that the constitution could not responsibly allocate to the King. The success of our constitutional separation of powers is not that the executive is less powerful than it was in Fortescue's day. The success is much more specific than that: it is the separation of the power of judging and the power of legislation (preeminently, legislation to impose taxes) from the executive.

Legislation is the making of clear, open, prospective, general and stable laws for the regulation of those aspects of the life of the community that ought to be regulated by law. Take taxation as the paradigm. Tax collecting is an executive function. But there is no better example of an aspect of the life of the community that ought to be regulated by clear, open, prospective, general and stable laws. And the power to make those rules had better be separated from the say-so of the tax collectors. This happens to be a driver of our constitutional history: think of Magna Carta, Fortescue's work, and the *Case of Proclamations*: in each case the problem was how to constrain the king's power to raise taxes for wars in France.

The executive function, by contrast, is to get stuff done. To get problems solved. The executive can only really be defined, in fact, as those elements of government that are not the judiciary or the legislature. There are two quite specific reasons for the separation of powers. The reason is not to share out power at random so that no one has too much; it is to remove the specifically judicial power from the executive, and to remove the specifically legislative power from the executive.

Parliament, in our constitution, is not just a legislature. Its lower house is an assembly that carries out the limited but crucial and fundamentally executive function of appointing the Prime Minister (although it may seem strange to call this an appointment or an *executive* function, when it results from the MPs of a party simply being there, in numbers enabling their party leader to command a majority). And then the Commons have the responsibility of discharging the government if appropriate – a fundamentally executive role, in fact an executioner's role. Here is an instance of the massive variety of executive functions: contrast the executive decision whether Theresa May ought to be Prime Minister, with the executive task of negotiating Britain's departure from the EU. We do about as well as we could do, in my view, by allocating the first of those two executive functions to the House of Commons under the constitution. Imagine allocating negotiation of Brexit to the House of Commons! It doesn't bear thinking about, unless you change the House of Commons into a different sort of body, with an internal separation of powers that would enable someone (the Speaker?!) to act for it with unanimity, strength and dispatch.

Walter Bagehot, the terrific journalist of our constitution, thought that's what we already have: in the 1860s he described the Cabinet as a 'committee' of the House of Commons.<sup>25</sup> I think that is a misleading description. But you can see his point. If responsibility for negotiations with other countries were allocated to the House of Commons, the House of Commons would need to invent something like what we already have.

The variety of the affairs that may be involved in adjudication or legislation are unlimited, but the form of action is specific and particular: passage of judgment on a proposal for legislation, and determination of a dispute as to legal rights and duties. But the forms of executive action are diverse (they include a great deal of legislation, and it is just as important to see the usefulness of this 'secondary legislation', as to see the dangers of it). The functions of the executive branch are so various that it needs a variety of separations of power within it: the independence of prosecutors is perhaps the most obviously important instance; crucial aspects of independence for civil servants, and other aspects of independence for central bankers, and separate legal capacities for

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<sup>25</sup> Walter Bagehot, *The English Constitution* (originally published 1867; Fontana Press 1993) p 68. Dicey was more accurate when he said simply that it is 'indirectly appointed by Parliament'. *Introduction to the Study of the Law of the Constitution*, p 285.

executive action by local authorities and school boards are others, and there are many more.

Most importantly, the function of initiating legislation is an executive function. A large assembly can say yes or no to a proposal for legislation (or require amendments...), and we have two such assemblies. But a large assembly would be poor at deciding on an open-ended horizon of the possibilities for public policy, what is to be proposed. The essential legislative question is whether a proposal for legislation is to be approved. The essential executive question is, 'what is to be done?' (to which the right answer may be, 'propose legislation...'). In our constitution, the executive function of initiating legislation is largely allocated to the Government – not through the prerogative, but through the rules and practices of the House of Commons and the House of Lords. Imagine a constitution designed to separate the legislative power from the executive more categorically than ours. The legislature would have to develop its own executive. And the executive officers and bodies of the legislature would need to cooperate somehow with the other executive (the one in charge of the departments of government), or you would have constitutional gridlock. In any Westminster constitution, the executive initiates legislation. Think of any problem that government needs to deal with in the 21<sup>st</sup> century: whether to ban psychoactive substances with exceptions, say, to take action against harms called by legal highs. Now imagine a legislature that had no contact with the police, the Home Office, the National Health Service, the government's scientific advisers. Such a legislature could still do the job, but only if it developed institutions and facilities of its own that are surrogates of the Home Office and the National Health Service; and even then it would need to coordinate with the real Home Office and the real National Health Service.

The executive ought to be constrained (and is constrained) by the rule of law and Parliamentary sovereignty, and by the forms of constituent power that the courts and Parliament get from our constitution: the courts' power to determine the extent of executive power, and Parliament's power to change it. As to those constituent powers, the historical pageant yields a clear and definite theory and doctrine. And a due appreciation of the constitutional importance of those constraints may seem to support the stubborn stain view of executive power. But instead, particular powers should be taken away from the Crown (as the powers of judging, of levying taxes, and of appointing professors and bishops have been taken away), and not power in general. It is well justified in point of constitutional principle that the Government should have very roughly the range of executive power that it has now, and in particular the powers that

it has under the royal prerogative. There is no general reason to take powers away from the Crown. At least, as long as we have a framework for their responsible exercise.

## 2. The executive in our constitution is responsible

It was a great constitutional accomplishment to take particular legislative and judicial powers away from the Crown. Making the executive itself into a constitutionally responsible agency (while keeping it unified and effective) was every bit as great an accomplishment.

In Blackstone's time, the House of Commons' control over revenue was already generating a political necessity for the monarch to have ministers who could command the confidence of the House of Commons. By Bagehot's time in the 1860s, we had Cabinet government. In our constitution in 2016, the Government – the agency responsible for the executive branch of government – is itself democratic. In several respects:

1. The Prime Minister is appointed (and can only be reappointed after the next election) through a democratic process.
2. Very importantly, she does not govern alone but as the chair of a Cabinet – an arrangement that enhances democracy by requiring the Prime Minister to achieve cooperation from a group of the senior leadership of her party. Bagehot pointed out the importance of the Cabinet as the crucial, efficient element in the constitution, and pointed out the constraint it places on executive power.<sup>26</sup> One aspect of the constraint is that a Prime Minister is never free to choose ministers willy nilly:

‘Between the compulsory list whom he must take, and the impossible list whom he cannot take, a Prime Minister's independent choice in the

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<sup>26</sup> Walter Bagehot, *The English Constitution* (originally published 1867; Fontana Press 1993) p 68-9.

formation of a Cabinet is not very large; it extends rather to the division of the offices than to the choice of Cabinet Ministers.’<sup>27</sup>

3. The Prime Minister and her Cabinet are accountable to their party. This is a crucial aspect of the practical limit on choice of ministers. And it is a serious constraint – magnified by the fact that it concerns the Cabinet, not just the Prime Minister – on a ministry that might otherwise not be concerned about future elections.
4. She and the rest of the Cabinet are accountable to the democratic chamber of Parliament (through its procedures, and also through their absolute need for its confidence). And they are also accountable in different ways to the House of Lords.
5. They are subject to the legislative sovereignty of Parliament, and to the orders of the courts.
6. Uniquely, the Government has an opposition! The judges and the legislature have none. We can criticize the judges and Parliament, but no one has the institutionalized constitutional responsibility to stand against their policies.

In 2016, the need for a unified and effective executive, combined with those democratic features of our government, justifies the authority of the British Government in its leadership of the executive in general, and in managing international relations in particular. The executive is not generally democratic; but the Government really is. The Cabinet is more democratic than Parliament – a thousand times more democratic – and that is not simply because Parliament includes the House of Lords. This is very plainly obvious, and it baffles me that people talk as if Parliament were more democratic, and as if subjection – any form of subjection – of the Government to Parliament makes governance more democratic. The Cabinet is from one party – Parliament is not. The Government faces an opposition – Parliament does not. The Cabinet is radically and vulnerably exposed to the pressure of electoral prospects, to fear of the next election. Not even the Conservative Party is as vulnerable to the wishes of the people: if the Party

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<sup>27</sup> *Ib* p 68-9.

loses its majority in the next election, many Conservative MPs may retain their seats. But the Cabinet will be out. The Prime Minister will not be Prime Minister.

This comparison of the democratic credentials of the Government and Parliament may seem flippant, and it is certainly not essential for my purposes; perhaps we can agree that the Government and the House of Commons share democratic credentials. As Dicey said with great acuity, ‘conferring as it does wide discretion on the Cabinet’, the prerogative ‘immensely increases the authority of the House of Commons, and ultimately of the constituencies by which that House is returned. Ministers must in the exercise of all discretionary powers inevitably obey the predominant authority in the State.’<sup>28</sup>

It is, I think, misleading and damaging to think of the British Government as something other than the people’s representatives. The danger is dilution of the Government’s responsibility for executive action. If you view the second Iraq war as a mistake, you should be wary of the propensity for a Government to sail into something like that with a sense of accountability and propriety and constitutionality garnered from approval from the assembly. That war, offered by some to show the importance of approval by Parliament for the exercise of the power to go to war<sup>29</sup> shows the potential uselessness of approval by an assembly for the exercise of the power to go to war. It may conceivably be better to have a Government that knows that it will in the future be on the hook for executive decisions for which it may be punished by the Commons or the electors, who may judge the Government after the fact, with the savage wisdom of hindsight. I say ‘conceivably’, because I want to emphasise that there is no general theoretical answer to these questions, and there can be various arrangements for the making of such decisions, and for the holding-to-account of the decision makers. But that variety shows that there is no general principle of constitutionalism, that an executive branch of government should have less rather than more power under the constitution.

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<sup>28</sup> p 282

<sup>29</sup> See e.g. Dr Andrew Blick and Richard Gordon QC above n 20, ‘Using the Prerogative for Major Constitutional Change’, p 14.

## Conclusion

In the 'onyng' of a people, as Fortescue called it – in their being a community – it tends to be essential to have independent judges, and to have a legislature that has some independence from the executive, with authority to bind the executive by legislation. These general truths are given form in the two famous British constitutional principles of the rule of law and the sovereignty of Parliament. And it may be good for the legislature, as an assembly on behalf of the people, to have executive authority to appoint and to dismiss the leadership of the executive, as it does in the United Kingdom.

The stubborn stain view, with its centuries-old tradition of indiscriminate suggestions that there is something generally wrong with constitutional executive power, is a big mistake because there are two further constitutional principles:

1. a unified and effective executive branch is necessary for the public good, and
2. the executive itself can be (and in our constitution, is) configured for responsible exercise of power.

If you are concerned that the principles are multiplying and getting out of hand, you could alternatively collect all of the above under one umbrella, for which we can again thank John Locke: 'all this only for the public good', as he said of all his reflections on what is to be done in governance.<sup>30</sup> The independence of judges and the legislative sovereignty of Parliament and the executive power of the House of Commons over the Cabinet are calculated to secure the public good. So is the constitutional authority of the British government (including what people call the prerogatives of the Crown). The executive has a function that is legitimate, and justifiable in constitutional principle. It is, of course, a function that needs scrutiny and constraint and limits.

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<sup>30</sup> Locke, above n 12, Chapter I §3. Cf Chapter XIV §163: '...the end of government being the good of the community.'

We can say all these things, I think, while holding tenaciously to our skepticism about rulers. That skepticism may incline you to think that the purpose of a constitution is to constrain power. But we are treating a fragment of the constitution as the whole, if we think that is the whole purpose. In fact, the purpose of a constitution is to empower and to constrain, as may best enable us to live as a community.

I think that the claimants' case in *Miller* depends on the stubborn stain theory. But I have argued, against that theory, that there is no general reason to take power, willy nilly, away from the Government. And there is no specific reason to take this particular constitutional power away from the executive, because the question in issue (whether to trigger Article 50) is so clearly and patently a matter of whether and how to instigate a negotiation, and since the process of legislation in Parliament has nothing to offer by way of making that decision more responsible. You see how different it is from the *Case of Proclamations*, which involved a scheme to raise revenue that King James could not get by grant of Parliament.

These are reasons for the same conclusion that Lord Millett reached by a swifter route: 'Any change in that relationship [between the UK and the EU] is a classic example of something which may be effected by the exercise of the Royal Prerogative without the need for legislation'.<sup>31</sup> Using the royal prerogative in this way would be entirely consistent with parliamentary sovereignty and with parliamentary democracy. Parliament has an actual and central role in the business of Brexit, and it is carrying it out through debate and scrutiny in both Houses in a variety of forms, and through the confidence of the Commons in Theresa May's Government. It takes no close familiarity with the political workings of the House of Commons to know that there is no prospect of success for a motion of no confidence, on grounds of her intention to use the prerogative to trigger Article 50, in present conditions. Ironically, some have suggested that the fact that Theresa May retains the confidence of the House of Commons, while proposing to trigger Article 50, shows that Parliament should have some other role than it already does have.<sup>32</sup>

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<sup>31</sup> Above n 2.

<sup>32</sup> See e.g. Dr Andrew Blick and Richard Gordon QC above n 20, 'Using the Prerogative for Major Constitutional Change': 'The Commons could also seek to bring down the government – a nuclear option that is unlikely in practice to happen.' p 18.

Fortescue on French food, Coke flat on his face, Dicey and everyone else talking about the crucial power of our Government as if some bleach in the wash would finally remove the residue: you will find poignant and absurd scenes in our constitutional history. Don't let them mislead you: if you write a constitution, for this country or any other, take my advice and put an executive branch into it. It is necessary. And as long as it is under control, it may work out tolerably well – even if the scope of its power is unspecified and undertheorized.

## About the Author

Timothy Endicott is Fellow in Law at Balliol College, University of Oxford, and has been Professor of Legal Philosophy since 2006. Professor Endicott writes on Jurisprudence and Constitutional and Administrative Law, with special interests in law and language and interpretation. He served as the Dean of the Faculty of Law from October 2007 to September 2015.

He is the author of *Vagueness in Law* (OUP 2000), and *Administrative Law*, 3rd ed (OUP 2015). After graduating with the AB in Classics and English, summa cum laude, from Harvard, he completed the MPhil in Comparative Philology in Oxford, studied Law at the University of Toronto, and practised as a litigation lawyer in Toronto. He completed the DPhil in Law in Oxford in 1998.