

## Prerogative Powers of the Crown

### Summary

This briefing provides an overview of prerogative powers in the UK. It includes a discussion of powers reserved to the monarch, and examples of how they have been used.

- Prerogative powers are executive powers that can be exercised by the monarch or his or her representatives without the need for legislation.
- Prerogative powers derive from the historical power of the monarch, therefore new ones cannot be created. However, prerogative powers can be repealed by legislation.
- Most prerogative powers are either exercised by ministers or by the sovereign on the basis of constitutionally binding advice given by ministers.
- Powers the monarch exercises not on the basis of constitutionally binding advice are called reserve powers.
- In practice, reserve powers are often governed by constitutional convention. For example, there are strong conventions governing the appointment of a prime minister.
- Reserve powers can exist in some circumstances but not others. For example, the prorogation of Parliament is not usually a reserve power, but most constitutional experts agree that the monarch can refuse a prorogation if the government has lost or is about to lose the confidence of the House of Commons.

Emily Haves | 13 December 2019

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## I. What Are Prerogative Powers?

The UK is a constitutional monarchy, in which the sovereign reigns but does not rule.<sup>1</sup> Parliament and government make and carry out policy, while the sovereign carries out certain constitutional, ceremonial and representative functions.<sup>2</sup> Some of the constitutional functions of the monarch are exercised through what are known as prerogative powers.

Anne Twomey, Professor of Constitutional Law, provides the following definition of prerogative powers:

Prerogative powers are the discretionary powers of the crown that have been inherited from medieval times and have not been abrogated by legislation. They are ordinarily executive powers which may be exercised by the sovereign or his or her representatives without the need for legislative authorisation.<sup>3</sup>

Prerogative powers in the UK include the power to:<sup>4</sup>

- appoint a prime minister;
- summon or prorogue Parliament;
- give or refuse royal assent to bills;
- legislate by prerogative orders in council or by letters patent;
- exercise the prerogative of mercy, eg to pardon convicted offenders;
- make treaties;
- wage war by any means and to make peace;
- recognise states;
- issue passports and to provide consular services;
- confer honours, decorations and peerages; and
- make certain appointments, including royal commissions.

This list is not exhaustive; there is no definitive list of the prerogative powers.<sup>5</sup> Prerogative powers derive from powers exercised historically by the monarch, therefore new ones cannot be created.

While these powers formally belong to the sovereign, many are not exercised by the monarch personally but either on the advice of ministers or by ministers themselves.<sup>6</sup>

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<sup>1</sup> Vernon Bogdanor, *The Monarchy and the Constitution*, 1995, p 1.

<sup>2</sup> *ibid*, pp 61–2.

<sup>3</sup> Anne Twomey, *The Veiled Sceptre*, 2018, pp 4–5.

<sup>4</sup> *ibid*, p 5.

<sup>5</sup> House of Commons Political and Constitutional Reform Committee, [\*Role and Powers of the Prime Minister\*](#), 24 June 2014, HC 351 of session 2014–15, p 7.

<sup>6</sup> Vernon Bogdanor, *The Monarchy and the Constitution*, 1995, p 66.

## 2. Advice

A “crucial requirement” of constitutional monarchy is that the monarch be politically impartial, enabling him or her to function as a unifying head of state.<sup>7</sup> This political impartiality is achieved “through the principle that almost all the public acts of the sovereign are taken on the advice of his or her ministers”.<sup>8</sup> This includes the use of most prerogative powers.

The advice that ministers give the monarch is not the same as advice in the everyday meaning of the word. Professor of Politics and Government Vernon Bogdanor explains that “when ministers offer advice to the sovereign, that advice is binding and the sovereign has normally no option but to accept it”.<sup>9</sup> The responsibility for the sovereign’s actions based on that advice rests with the minister who gave it, and that minister is accountable to Parliament.<sup>10</sup>

Ministers are not the only bodies or people who can give constitutionally binding advice. It has been argued that the granting of royal assent to bills can be considered to be the sovereign acting on the advice of the Houses of Parliament.<sup>11</sup>

## 3. Reserve Powers

Powers the monarch can exercise personally, without or contrary to the advice of ministers, are called reserve powers, or personal prerogatives of the monarch.<sup>12</sup> Very few reserve powers remain in the UK; Professor Bogdanor has estimated the proportion of prerogative powers exercised by the monarch personally at fewer than five percent.<sup>13</sup>

In practice, even those powers exercised without the advice of ministers are often governed by constitutional conventions. For example, the appointment of a prime minister is a reserve power, because the out-going prime minister could not be held accountable to Parliament for any advice he or she gave on this matter. However, by convention, when one party wins an overall majority in the House of Commons the monarch appoints the leader of that party as prime minister.<sup>14</sup>

Several constitutional scholars have argued that it is not possible to list powers that are reserved to the monarch in the UK. Professor of Law David Williams argues that if a power has not been used in a long time, or has been used behind closed doors, it is impossible to know if it still exists or has fallen into desuetude.<sup>15</sup> Furthermore, reserve powers can exist under certain conditions but not others. This paper discusses areas where the monarch has exercised reserve powers in section 3.1.

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<sup>7</sup> Vernon Bogdanor, *The Monarchy and the Constitution*, 1995, p 66.

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid.*

<sup>10</sup> Anne Twomey, *The Veiled Sceptre*, 2018, p 52.

<sup>11</sup> *ibid.*, p 54.

<sup>12</sup> Anne Twomey, *The Veiled Sceptre*, 2018, p 6.

<sup>13</sup> Vernon Bogdanor, *The Monarchy and the Constitution*, 1995, p 66.

<sup>14</sup> *ibid.*, p 84.

<sup>15</sup> David Williams, ‘Crown Prerogative: Reining in the Powers’ in Cris Shore and David Williams (eds), *The Shapeshifting Crown*, 2019, p 212.

### 3.1 Appointing a Prime Minister

The power to appoint a prime minister, and empower them to form a government, is a reserve power, which is generally governed by constitutional convention. This convention holds that the sovereign appoints the person who commands, or is most likely to command, the confidence of the House of Commons. Confidence does not have to mean a majority of seats, as opposition MPs may have sufficient confidence in a minority government to enable it to govern.<sup>16</sup>

However, it is not always clear who is most likely to command the confidence of the House of Commons. When this has occurred, there have been instances where the monarch exercised a certain amount of discretion in choosing a prime minister. For example, before 1965, leaders of the Conservative Party were not elected but were selected through discussions among senior party figures.<sup>17</sup> Following the resignations of Anthony Eden in 1957 and Harold Macmillan in 1963, there was more than one candidate for the premiership. On each occasion, the Queen chose a successor based on what was presented to her as the majority view amongst Conservative MPs and members of the House of Lords.<sup>18</sup> This method of selecting a prime minister was criticised at the time as being opaque and undemocratic, and the Conservative Party subsequently introduced elections for the party leadership.<sup>19</sup>

After a general election the sovereign cannot appoint a prime minister until the incumbent prime minister resigns. If no party wins an overall majority, the incumbent government is entitled to meet the House of Commons to see if it can secure its confidence. However, in practice an incumbent prime minister whose party did not win the largest share of votes has not tested the opinion of the House since 1885.<sup>20, 21</sup>

If the incumbent prime minister resigns and it is not clear who could command the confidence of the House of Commons, “a degree of discretion potentially arises” for the sovereign in appointing a prime minister.<sup>22</sup> Historically, in this situation the monarch would seek information about where parliamentary support lay for the different potential leaders before making a judgement about who was most likely to be able to command the confidence of the House.<sup>23</sup> However, guidance published by the then Labour Government ahead of the 2010 general election, and since updated, states that the political parties should decide who is best placed to form a government:

[...] it is the responsibility of those involved in the political process, and in particular the parties represented in Parliament, to seek to determine and communicate clearly to the sovereign who is best placed to be able to command the confidence of the House of Commons.

<sup>16</sup> Anne Twomey, *The Veiled Sceptre*, 2018, pp 116–7.

<sup>17</sup> House of Commons Library, [Leadership Elections: Conservative Party](#), 8 August 2019, p 7.

<sup>18</sup> Vernon Bogdanor, *The Monarchy and the Constitution*, 1995, pp 93–9. The extent to which Queen Elizabeth II chose Lord Home on the personal preference of the outgoing prime minister, Harold Macmillan, and herself, as opposed to on the views of the Conservative Party, is disputed. See Anne Twomey, *The Veiled Sceptre*, 2018, p 122.

<sup>19</sup> Vernon Bogdanor, *The Monarchy and the Constitution*, 1995, p 98.

<sup>20</sup> HM Government, [Cabinet Manual](#), October 2011, p 14.

<sup>21</sup> Vernon Bogdanor, *The Monarchy and the Constitution*, 1995, p 148.

<sup>22</sup> Anne Twomey, *The Veiled Sceptre*, 2018, p 139.

<sup>23</sup> *ibid.*

Since 2010 there has been an “attempt at creating a new convention” that the incumbent prime minister will continue in his or her position until it is clear who his or her successor should be.<sup>24</sup> The *Cabinet Manual* outlines this practice:

Recent examples suggest that previous prime ministers have not offered their resignations until there was a situation in which clear advice could be given to the sovereign on who should be asked to form a government. It remains to be seen whether or not these examples will be regarded in future as having established a constitutional convention.<sup>25</sup>

### 3.2 Is Prorogation a Reserve Power?

The monarch prorogues Parliament on the advice of his or her ministers.<sup>26</sup> However, there is considerable debate about whether, and under what circumstances, this advice is constitutionally binding. Under normal circumstances, the monarch does not have the power to refuse a prorogation. However, many constitutional scholars have argued that if a government has lost or is about to lose the confidence of the House of Commons, advice to prorogue would not be binding and the sovereign would have the right to refuse the prorogation.<sup>27</sup>

In *The Veiled Sceptre*, Professor Anne Twomey considers whether the monarch has a reserve power to refuse prorogation if the prorogation is being requested to prevent parliamentary scrutiny. She notes that a number of scholars have argued this would not be sufficient cause for the head of state to exercise a reserve power to refuse advice to prorogue.<sup>28</sup> However, she also argues that the right to refuse advice to prorogue might arise if the prorogation is being requested to terminate an inquiry that would pose a threat to the continuation of the government.<sup>29</sup> Professor Twomey contends:

Such a case might arise in circumstances where a matter is non-justiciable and only a parliamentary committee has the capacity to inquire into it and reveal evidence of a persistent and serious breach of the constitution or the law that might justify dismissal of the government.<sup>30</sup>

In September 2019, the Supreme Court ruled that the advice the Prime Minister, Boris Johnson, gave to the Queen to prorogue Parliament was unlawful because it had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account, and no reason was given to justify this.<sup>31</sup> The court did not examine whether the Queen would have been able to refuse to follow the prime minister’s advice to prorogue Parliament.

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<sup>24</sup> Anne Twomey, *The Veiled Sceptre*, 2018, p 125.

<sup>25</sup> HM Government, *Cabinet Manual*, October 2011, p 14.

<sup>26</sup> *ibid*, p 16.

<sup>27</sup> Anne Twomey, *The Veiled Sceptre*, 2018, pp 586–91; David Williams, ‘Crown Prerogative: Reining in the Powers’ in Cris Shore and David Williams (eds), *The Shapeshifting Crown*, 2019, p 211.

<sup>28</sup> Anne Twomey, *The Veiled Sceptre*, 2018, p 609.

<sup>29</sup> *ibid*, p 610.

<sup>30</sup> *ibid*.

<sup>31</sup> *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) and Cherry and Others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)* [2019] UKSC 41, paras 55–61

Discussing the constitutional implications of this judgment in evidence to the House of Commons Public Administration and Constitutional Affairs Committee, Professor Twomey argued that now that the court has ruled that the area is justiciable, the question of whether the Queen could refuse prorogation in a similar situation should not arise:

When it comes to reserve powers, if there are issues in relation to legality and constitutionality, the Queen does not need to act if the matter is justiciable and it can be determined by a court. What the court is doing is fulfilling that role by making it justiciable. That means that the Queen has no obligation to act and fulfil the role. Therefore, the court might be seeing that it is doing this as a way of protecting the Queen from having to behave in a way that may be seen as controversial.<sup>32</sup>

#### 4. Replacement by Statute

The limits of prerogative powers are defined and recognised by common law and they have the same status as common law.<sup>33</sup> As a result, prerogative powers can be abolished, restricted or replaced by legislation. For example, the Fixed-term Parliaments Act 2011 removed the monarch's power to dissolve Parliament. However, as prerogative powers derive from the historical power of the monarch, new powers cannot be created in legislation.

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<sup>32</sup> House of Commons Public Administration and Constitutional Affairs Committee, [Oral Evidence: Prorogation and the Implications of the Supreme Court Judgment. HC 2666](#), 8 October 2019, Q14.

<sup>33</sup> Anne Twomey, *The Veiled Sceptre*, 2018, p 7.