

# The Next Few Days Will Reveal where the Heart of Power Lies in the British Constitution

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On 18 July, I [wrote](#) that [prorogation](#) was a [paper tiger](#) – a false threat masking politicking – but that any effort to prevent it would take time which the Parliament doesn't have. On 28 August, Boris Johnson advised the Queen to exercise her prerogative power to prorogue Parliament. She did so on the same day.

## There is little time for any alternative to a no-deal Brexit

There are eight weeks left until the UK's (revised) scheduled departure from the EU. Parliament is to be prorogued for five of those weeks. The UK will leave on no-deal Brexit terms on 31 October unless Parliament legislates for an alternative among: [revocation](#), a request for extension, or ratification of the current Withdrawal Agreement. After the last EU Council Summit before Brexit on 17-18 October, only the option of revocation will remain until 31 October and this is also the only option which does not require either the unanimous consent (extension) or a qualified majority (an agreement) of the European Council. Barring an emergency summit (which has [precedence](#)), it is misleading to argue that it is possible to agree an alternative arrangement without Parliament or in time for, or even after the final European Council summit.

## Can prorogation be prevented?

On 3 September, Parliament returns from summer recess and will have only days before it is prorogued until 14 October 2019. Within the week, three cases will be heard in [Belfast](#), [Edinburgh](#), and [London](#) seeking judicial review of Government's advice to the Queen, and a finding that such advice was illegal obligating the Queen to withdraw her order to prorogue.

The petitioners argue that the advice was '[unlawful, unwarranted and unconstitutional](#)'. The response of government turns on the separation of powers, and the argument that prorogation as a prerogative power is not a justiciable matter to be determined by the courts. Either as the exercise of a sovereign power, or as a matter of politics, the court is unsuited by nature and constitution to adjudicate, and that '[\[i\]f Parliament had a problem with it, it was for Parliament to sort it out](#)'. But this argument seems paradoxical: how can Parliament sort it out, if it is suspended?

Paul Craig has [set out](#) arguments of the limitations on the use of prerogative power to prorogue as a matter of both constitutional principle and law. The precedents he sets out in Proclamations, De Keyser and Miller all, directly or indirectly, protect the sovereignty of parliament and not the executive. In a searing passage:

“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.”

To repeat from my last post, prorogation in the current context would be undemocratic as it would suspend parliamentary debate to ensure with near certainty an outcome without democratic mandate; and unconstitutional, because it would make parliamentary power merely contingent on government, and not sovereign apart from it.

While these precedents will appeal to the courts, the real limitation to the relevant impact of these cases will be time: any injunction granted (if it is granted) would be referred to the Supreme Court which would likely have only days to deliver judgment. However, the legislative efforts in Parliament to either avert a no-deal Brexit or to prevent prorogation are just, if not more, as time limited.

## Is this a constitutional crisis?

In [the July post](#), I said that the litmus test for constitutional crisis is where one institution (be it Parliament, the courts, the government or even the Crown) does not recognise the legitimate power of another, causing an ongoing and critical state of legal uncertainty. Such recognition of mutual authority is an aspect of the separation of powers which is at the core of a state based on the rule of law. Were government to ignore a Supreme Court judgment finding the advice to prorogue illegal, or even refuse to recognise an [Act of Parliament](#) directing action to prevent a no-deal Brexit, this would be a constitutional crisis. This will bring all institutions into conflict – most immediately the crown, which may be obligated (one way or another) to make an extremely polarising political choice.

To an external eye, such distinction may appear artificial: either the crown has a choice to exercise power or doesn't. But the latest developments have laid bare some apparent paradoxes at the heart of the British constitution: the crown has exercised a legal power but was politically limited to do so on the advice of government. The government argues that this power is a sovereign power and so beyond the review of the courts, despite it being upon their advice. Precedent for protection of parliamentary sovereignty is found in and by the courts. Parliament is sovereign, but parliamentary time is dictated, [almost exclusively](#), by the government.

Beyond these paradoxes, we are witnessing the politicisation of the courts and the crown, in equal measure to the legalisation of the government and the Parliament as the courts are called in with a second Miller litigation. There are few who could say

with any certainty what the next few days will bring, beyond the conviction that they will reveal the very nature of power at the centre of British constitution.

*This post was previously posted on the [LSE Brexit](#) blog and is reposted here with kind permission by the author.*

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