

Of Crises, Constitutionalism and Irresponsible Advisers

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Abstract

Permanent private secretaries to the monarch are not elected, nor are they chosen on civil service criteria. They also have no formal legal training, despite the fact that their advice can be vital during constitutional crises. We test Ivor Jennings's claim that private secretaries serve as 'irresponsible advisers' to the Crown, who may have influence in political disputes, and whether that influence may serve political interests. Four case studies include the Home Rule crisis, 1910–14; Edward VIII's abdication; the election of 1950; and the dismissal of Australian Prime Minister Gough Whitlam in 1975.

Keywords: royal secretaries, permanent private secretaries, Irish Home Rule, British constitution, constitutional crisis, constitutional moment

Introduction

THIS ARTICLE FOCUSES on a set of constitutionally vital public servants, that is, principal private secretaries (PPS) to the monarch of the United Kingdom. They are not civil servants and hence not recruited through competitive examination by independent commission. They are not required to be legally qualified; nor do they appear to have constitutional lawyers on their staff, though they have all had extensive on-the-job training, and have usually served in the British armed forces. Many of them have been related by blood or marriage to predecessors in post. Some of them have been university graduates. They operate in the gaps of parliamentary sovereignty and hence they matter, particularly during constitutional crises. We study cases in the UK, Canada, and Australia (the UK monarch's PPS is relevant in the latter two countries because they are 'realms' in which the UK monarch is formally head of state, represented by a governor-general). Since the 1920s, the governors-general have been appointed by the sovereign on the advice of the Prime Minister of the realm. Although the governors-general of Canada and Australia have their own staffs, the UK PPS was involved in the Australian constitutional crisis of 1975.

Westminster democracies are generally characterised by the principle of parliamentary sovereignty or supremacy. In the UK this principle was established in 1688–89; in the realms, it dates from founding documents, including the British North America Act 1867 and the Commonwealth of Australia Constitution Act 1900.¹ Both of these, although effectively drafted in their respective territories, were formally acts of the UK Parliament and remained so until they were 'patriated' in the 1980s. The sovereignty of the Australian and Canadian federal parliaments is tempered by the federal structure of both states, but this is not relevant to our purpose.

Each of these defining Acts was adopted at what Bruce Ackerman has called a 'constitutional moment': a time of unusual sustained popular attention to constitutional questions of significance.² In 1688–89, after the flight of James II/VII, English and Scots conventions both invited William of Orange and his wife, Mary, to be their monarchs, on contractual

¹Bill of Rights 1688 c. 2 (Eng.); Claim of Right Act 1689 c. 28 (Scot.). British North America Act 1867, 30 & 31 Vict. c. 3 (UK); Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12 (UK).

²B. A. Ackerman, *We the People: Foundations*, Cambridge MA, Belknap Press of Harvard University Press, 1991.

conditions including the monarchs' recognition of parliamentary supremacy.³ They became monarchs of each country at the invitation of a self-convening 'Convention' Parliament.

Sovereignty of the UK Parliament ceased to apply in Australia or Canada under the Statute of Westminster 1931, except at the request of each.⁴ Patriation of those two constitutions, giving the former dominions complete autonomy respecting their domestic laws, occurred in 1982 (Canada) and 1986 (Australia).⁵

The UK suffered a long constitutional crisis between 1909 and 1914, with its first phase leading to the Parliament Act 1911.⁶ This Act eliminated the power of the House of Lords to reject money bills or legislation passed multiple times by the House of Commons. We consider a later phase of this case, as well as attempts to persuade George V to dismiss the elected UK government in 1913–14; the abdication of Edward VIII in 1936; the possibility of a request to dissolve the UK Parliament after the close election of 1950; and the Australian governor-general's dismissal of Prime Minister Gough Whitlam in 1975. We focus on the four individuals who occupied the role of principal private secretary during each of these crises (see Table 1 below). Let us be accused of selection on the dependent variable, these four cases present precisely the circumstance in which the role of the PPS matters. We also discuss, as background, the (effective) dismissal of the Canadian government in 1926 by the governor-general. The first of our four PPSs was in post in 1926, but we have not found evidence of direct palace intervention in that case.

Each of our cases put constitutional principles into question. For example, in 1913

³R. Mitchison, *Lordship to Patronage: Scotland, 1603–1745*, Edinburgh, Edinburgh University Press, 1983; Lois G. Schworer, *The Declaration of Rights, 1689*, London, Johns Hopkins University Press, 1981.

⁴Australia delayed adoption of the Statute of Westminster until 1942, effective from 1939. Statute of Westminster Adoption Act 1942 (Cth).

⁵Canada Act 1982, c. 11 (UK); Australia Act 1986 (Cth), Australia Act 1986, c. 2 (UK).

⁶Parliament Act 1911, 1 & 2 Geo. 5 c. 13 (UK), amended by Parliament Act 1949, 12 & 13 Geo. 6, c. 103 (UK).

Table 1: Some royal principal private secretaries

Name	Entered royal service	b	d	Time as PPS	School	Military	University	Notes	Constitutional moment
Arthur Bigge, Lord Stamfordham	1879	1849	1931	1895–1901; 1910–31	Rossall	Royal Artillery	none		Dec 1910 dissolution; 1913–14 govt. dismissal pressure
Alexander Hardinge	1920	1894	1960	1936–43	Harrow	Grenadier Guards	Cambridge	Trained under Stamfordham	1936 abdication
Alan 'Tommy' Lascelles	1920	1887	1981	1943–53	Marlborough	Bedfordshire Yeomanry	Oxford	Assistant to Hardinge	1950 dissolution question
Martin Charteris	1949	1913	1999	1972–77	Eton	60 th Rifles	none		1975 dismissal

Source: *Oxford Dictionary of National Biography*

George V, urged on by opponents of his UK government, considered dismissing a Prime Minister who retained the confidence of the House of Commons. In 1975 Sir John Kerr actually dismissed a Prime Minister who still had the confidence of the House of Representatives. If parliamentary supremacy means anything, it means that the democratic elements of government take precedence over the monarch's preferences.

The limits on the power of the monarch are defined not by statute in any of the three states, but by dicta of the nineteenth century journalist Walter Bagehot: '[T]he sovereign has, under a constitutional monarchy such as ours, three rights—the right to be consulted, the right to encourage, the right to warn. And a king of great sense and sagacity would want no others.'⁷ Those whose knowledge of Bagehot is confined to the first sentence above may be surprised that he is generally very rude about monarchs, pointing out that on average they may not have great sense and sagacity. Bagehot believed that: 'A colonial governor is a super-parliamentary **authority**, animated by a wisdom which is probably in quantity considerable, and is different from that of the local parliament, even if not above it.'⁸

At the time, however, the British North America Act was creating a federal Canadian constitution. While the Act retains the executive power of the Crown in section 9, it fails to specify how the Crown's representative is to be appointed or recalled. As in analogous constitutional situations, '[I]t was considered wiser to leave every possible "i" undotted and every possible "t" uncrossed'⁹ The constitution of Australia is clearer: 'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth' (section 61). 'The governor-general is appointed by the Queen, since 1929 exclusively on the advice of her Australian government, and exercises those powers at her pleasure (that is,

subject to recall at any time) and according to the constitution' (section 2).

For over a century, Scottish, Canadian and Australian commentators have been parsing these provisions. The most prolific early twentieth century commentator was a Scot, Arthur Berriedale Keith, a non-practising lawyer and professor of Sanskrit.¹⁰ The Canadian commentator Eugene Forsey wrote a book on the reserve powers of the Crown to dissolve, or refuse to dissolve, Commonwealth parliaments, which attacks Keith over 400-odd pages.¹¹ Forsey was a politician, but not a lawyer. His Australian equivalent was H. C. Evatt who was by turns Labor politician twice (leader 1951–60), constitutional lawyer, and High Court judge.¹² Forsey thought it was constitutional for Canada's governor-general to refuse a dissolution to his Prime Minister in 1926; Evatt thought it was not.¹³

In this contested territory move royal PPS's, brutally labelled 'irresponsible advisers' by Ivor Jennings.¹⁴ George VI's official biographer wrote, 'He [the PPS] must owe loyalty to none but the Sovereign, whose complete confidence he must enjoy. Never must he be a Civil Servant in forced allegiance to the government of the day. His complete independence of view must inspire confidence in the Opposition Party, which will show a good return when this party comes into power.'¹⁵ This encomium is strange. Civil servants must also inspire

¹⁰R. F. Shinn, *Arthur Berriedale Keith (1879–1944): The Chief Ornament of Scottish Learning*, Aberdeen, Aberdeen University Press, 1990.

¹¹E. A. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth*, Toronto, Oxford University Press, 1943.

¹²H. V. Evatt, *The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions*, London, Oxford University Press, 1936; B. Galligan, 'Evatt, Herbert Vere (1894–1965), Politician and Judge', *Oxford Dictionary of National Biography*, Oxford: Oxford University Press, 2004; <https://ezproxy-prd.bodleian.ox.ac.uk:2102/10.1093/ref:odnb/33046> (accessed 28 December 2020).

¹³G. Winterton, ed., *Evatt and Forsey on the Reserve Powers*, Sydney, Legal Books, 1990.

¹⁴I. Jennings, *The Law and the Constitution*, 5th ed., London, University of London Press, 1959, pp. 343–51.

¹⁵J. W. Wheeler-Bennett, *King George VI: His Life and Reign*, London, Macmillan, 1965, p. 820.

⁷W. Bagehot, *The English Constitution*, Oxford, Oxford University Press, [1867] 2001, p. 60.

⁸*Ibid.*, p. 158.

⁹H. G. Nicolson, *King George the Fifth: His Life and Reign*, London, Constable, 1952, p. 477.

confidence in the opposition party at a change of government. Moreover, private secretaries come from class and family backgrounds which may skew their judgment.¹⁶ We test whether Jennings's warning was justified in any of our cases.

Table 1 summarises those backgrounds. Of those in our study, all four attended an English public school and served in the UK armed forces. Two of the four were university graduates. All spent significant time in royal service before becoming the principal secretary, and that service was the source of their beliefs about the constitution they were guarding. None was a civil servant recruited through Northcote-Trevelyan principles. Indeed, Martin Charteris, secretary to the queen in 1975, had successfully appealed to her when the Lord Chamberlain proposed to appoint a civil servant instead of promoting him into the position.¹⁷ In the recent Netflix series *The Crown*, Charteris is portrayed by Harry Haddon-Paton in season 1 and by Charles Edwards in seasons 3 and 4. Lascelles is portrayed by Pip Torrens in season 1.

Can the monarch dismiss a government? Bagehot writes, 'The king too possesses a power, according to theory, for extreme use on a critical occasion, but which he can in law use on any occasion. He can dissolve; he can say to his minister ... This parliament sent you here, but I will see if I cannot get another parliament to send someone else here'.¹⁸ Bagehot and H. H. Asquith believed that the power was obsolete; others, including George V, Andrew Bonar Law, Eugene Forsey and Sir John Kerr, disagreed. Although the power of dissolution is now regulated by statute in the UK, in the past it was exercised by the monarch at the request of the head of government.¹⁹ A difficult problem arose when a Prime Minister requested a dissolution but was refused one, and no other member of the legislature enjoyed the confidence of the house. Refusal of a dissolution ordinarily led

to the minister's resignation, and if no other minister could serve, then a dissolution was necessary. In effect, refusal of a well-founded request for dissolution operated as a dismissal and could create the appearance that the sovereign favoured the opposing party.

In 1926, the Canadian Liberal Prime Minister, Mackenzie King, had governed for nine months with the support of the Progressive Party.²⁰ When he advised a dissolution, the governor-general, Lord Byng of Vimy, refused, despite King's warning that the Conservative leader, Arthur Meighen, could not command the confidence of the House of Commons. Byng called on Meighen to form a government, but in a matter of days Meighen was defeated on a no confidence motion. Byng then granted Meighen the dissolution denied to King, and in the general election Meighen lost twenty-four seats, including his own. King gained sixteen seats and formed a minority government that lasted until the next general election in 1930. After his final conversation with Byng, King wrote: 'His view of the constitution is of something that circles around the King; the kernel of the whole thing is the divine right of Kings. That the power comes from the people and is conferred back from the people to the Sovereign, I do not think enters his mind.'²¹

The cases discussed below should be compared to this benchmark. The imperial conference of 1926, which followed shortly after, eliminated any link between governors-general and the British government, although not the Crown. To emphasise the change, the UK government then named its first high commissioners to Canada and Australia, rather than have the governor-general do two jobs. It also concluded that governors-general hold 'in all essential respects the same position in relation to the administration of public affairs in the Dominions as is held by His Majesty the King in Great Britain'.²² It did not clarify the scope of the reserve powers, however, in either context.

¹⁶Jennings, *The Law and the Constitution*, p. 344.

¹⁷J. Ure, 'Charteris, Martin Michael Charles, Baron Charteris of Amisfield (1913–1999), Courtier', *Oxford Dictionary of National Biography*, Oxford: Oxford University Press, 2004; <https://ezproxy-prd.bodleian.ox.ac.uk:2102/10.1093/ref:odnb/73454> (accessed 28 December 2020).

¹⁸Bagehot, *The English Constitution*, p. 62.

¹⁹Fixed Term Parliaments Act 2011, c. 14.

²⁰Evatt, *The King and His Dominion Governors*, p. 64; A. B. Keith, *Responsible Government in the Dominions*, 2nd edn., Oxford, Clarendon Press, 1928, p. 106 n. 1; but see Forsey, *The Royal Power of Dissolution*.

²¹King Diaries, Library and Archives of Canada, 21 September 1926, f. 10117.

²²A. Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems*, Cambridge, Cambridge University Press, 2018, p. 395.

Cases

George V, Asquith and Stamfordham

Arthur Bigge, created Lord Stamfordham in 1911, entered royal service in 1879. He became principal private secretary in 1895. On Victoria's death in 1901, her son Edward VII retained his own secretary, Francis Knollys. Bigge became private secretary and tutor in constitutional conventions to the new Prince of Wales, the future George V. When George acceded in 1910, Bigge became his joint PPS with Knollys until 1913, when the King dismissed Knollys. Stamfordham remained PPS until his death in 1931. A Liberal minister (and former Governor of New South Wales), the Marquess of Lincolnshire, described Stamfordham in c.1912 as a 'very strong Tory [who] does not hesitate to show his colours. He seems to me to be developing into a public danger.'²³ His grandson, Michael Adeane, later became PPS to Queen Elizabeth II, immediately preceding Charteris. Adeane's son, in turn, became PPS to Elizabeth's son Charles (respectively portrayed in *The Crown* by Will Keen and Richard Goulding).

The UK's biggest constitutional moment since 1689 began with the House of Lords' rejection of the budget of 1909. The consequent forced dissolution and general election in January 1910 reduced the Liberals to a minority government supported by the Irish Party. The new government passed the 1909 budget in April 1910.²⁴ They then drafted legislation that would ensure the House of Lords could not veto supply and would also remove the Lords' power to reject bills passed three times by the House of Commons. As the Lords would not agree to such measures, H. H. Asquith, the Prime Minister, began discussing guarantees that the King would flood it with new peers who would vote for the Parliament Bill. However, in May 1910 Edward died unexpectedly and was succeeded by George V, assisted by both Knollys and Bigge. George was reluctant to give such guarantees, even contingent upon the Liberals winning a

majority in a second election, and Asquith put the question to one side during the summer when the parties attempted to compromise.²⁵ However, that effort collapsed in November. After their next meeting with Asquith, both the King and Bigge believed that he had not asked for any guarantee.²⁶ When the Cabinet persisted, Bigge was furious: 'The King's position is: he cannot give contingent guarantees. For by so doing he becomes a Partisan & is placing a powerful weapon in the hands of the Irish and Socialists'.²⁷ However, if he refused to give a contingent guarantee he would be placing a powerful weapon in the hands of the unionists. Their leader, A. J. Balfour, had said in Knollys' presence that he would form a government to prevent the King from having to create peers.²⁸ However, unlike Bigge, Knollys recognised the risks inherent in not giving a guarantee. He concealed what Balfour had said from the King, and urged the King to give a guarantee, which the King reluctantly did. Knollys thus saved the monarchy from the mistake that Lord Byng would make in 1926. In 1913, when George V found out what Knollys had done, he sacked him.²⁹ The ensuing election produced, in aggregate, the identical result to that of January, thereby moving the crisis into a new phase.³⁰ The Liberals continued in government with the support of the Irish Party and the Parliament Bill was duly enacted in August 1911, after Asquith had warned the opposition about the King's promise to create peers. No peers were actually created.

The Parliament Act 1911 provided that any bill to be enacted without Lords' consent must pass the Commons in identical terms in three

²⁵J. D. Fair, *British Interparty Conference: A Study of the Procedure of Conciliation in British Politics, 1867–1921*, Oxford, Clarendon Press, 1980.

²⁶Jenkins, *Mr. Balfour's Poodle*, p. 174.

²⁷Bigge to George V, 15 November 1910, Nicolson, *King George V*, p. 137.

²⁸Jenkins, *Mr. Balfour's Poodle*, p. 177.

²⁹R. R. McLean, 'Knollys, Francis, First Viscount Knollys (1837–1924), Courtier', *Oxford Dictionary of National Biography*, Oxford, Oxford University Press, 2010; <https://ezproxy-prd.bodleian.ox.ac.uk:2102/10.1093/ref:odnb/34351> (accessed 28 December 2020).

³⁰N. Blewett, *The Peers, the Parties and the People: The General Elections of 1910*, London: Macmillan, 1972, p. 198.

²³K. Rose, *King George V*, London, Weidenfeld and Nicolson, 1983, p. 141.

²⁴R. Jenkins, *Mr. Balfour's Poodle: An Account of the Struggle between the House of Lords and the Government of Mr. Asquith*, London, Collins, 1968, p. 134.

successive sessions. The Irish Party, holding the balance of power, insisted that a Home Rule Bill must come first. It was introduced in 1912, in order to be enacted in 1914. The prospect of Irish Home Rule drove unionists of all sorts—soldiers, constitutional experts, Ulstermen, the King, and the King's private secretary—into a rage.³¹ Stamfordham had not forgiven Asquith: 'Two years ago tomorrow Asquith commenced his policy of intimidation and dragooning: he put a pistol to the King's head ... He is going to reap his own reward'.³²

The flashpoint had become north-eastern Ulster, where representatives (some self-appointed) of the local Protestant majority were becoming more and more militant in their refusal to accept Home Rule. They were encouraged by the new unionist leader, Andrew Bonar Law, who said in a speech at Blenheim Palace on 29 July 1912 that he 'could imagine no length of resistance to which Ulster can go in which I would not be prepared to support them'.³³ Law and other unionist leaders encouraged the King to try all sorts of devices to stop Home Rule, including the nuclear option of dismissing his ministers and asking Law to form a government.

George V had many Irish unionist friends, but no Irish nationalist friends. When he pressed the Liberal government on these questions, Asquith responded:

The Sovereign undoubtedly has the power of changing his advisers, but it is relevant to point out that there has been, during the last 130 years, one occasion only on which the King has dismissed the Ministry which still possessed the confidence of the House of Commons. This was in 1834, when William IV (one of the least wise of British monarchs) called upon Lord Melbourne to resign. The dissolution which followed left Sir R. Peel in a minority, and Lord Melbourne and his friends in a few months returned to power, which they held for the next six years. The authority of the Crown was disparaged

(Asquith to King George V, 11 September 1913).³⁴

Asquith followed Bagehot. Meanwhile, on 22 March 1914 Stamfordham gave some interesting advice to Law: 'If the Govt will not have referendum on the liberal terms you offered—could you not press for exclusion of 6 counties without referendum—(by these means you wd avoid certain zones) and for an unlimited period—and increase the subsidy from the English treasury to say 5 millions. Worth the money!'.³⁵ Later, Stamfordham became more cautious in relation to British politics, but not in relation to the dominions. In 1930 the Australian government wished to nominate Sir Isaac Isaacs, Chief Justice of the High Court of Australia, to be the first Australian-born governor-general. Stamfordham objected vigorously despite the 1926 agreement to keep UK ministers out of it: 'The King feels that ... more than ever His Majesty should be consulted in the selection of candidates, and indeed, subject to the concurrence of the British Prime Minister, be left to make the choice himself'.³⁶ Nevertheless, Australian Prime Minister James Scullin persisted, and George V agreed to the appointment with bad grace, complaining that he did not know Isaacs.³⁷

Edward VIII, Baldwin and Hardinge

Alexander 'Alec' Hardinge entered royal service as an assistant to Stamfordham in 1920.³⁸ In 1936 he became PPS to Edward VIII when other candidates for the position refused it.³⁹ The facts of the abdication crisis are well known. Edward met Wallis Simpson when she was married to her second husband,

³⁴Ibid., p. 275.

³⁵Ibid., p. 146 gives context.

³⁶Quoted in D. Smith, *Head of State: The Governor-General, the Monarchy, the Republic and the Dismissal*, Paddington NSW, Macleay Press, 2005, p. 24.

³⁷Ibid., pp. 25–6.

³⁸H. Vickers, 'Hardinge, Alexander Henry Louis, Second Baron Hardinge of Penshurst (1894–1960), Private Secretary to Edward VIII and George VI', *Oxford Dictionary of National Biography*, Oxford, Oxford University Press, 2011; <https://ezproxy-prd.bodleian.ox.ac.uk:2102/10.1093/refodnb/33702> (accessed 28 December 2020).

³⁹P. Ziegler, *King Edward VIII: The Official Biography*, London, Collins, 1990, p. 257.

³¹I. McLean, *What's Wrong with the British Constitution?*, Oxford, Oxford University Press, 2012.

³²Stamfordham memo, 15 November 1912; Rose, *King George V*, p. 141.

³³McLean, *What's Wrong with the British Constitution?*, p. 104.

Ernest, in 1931, and vacationed with her in the summers of 1935 and 1936. He acceded to the throne in January 1936, and began introducing her socially to his private staff, including Hardinge, as well as to the Conservative Prime Minister, Stanley Baldwin. News stories about his romance appeared outside the UK, although not in the UK press. However, once Mrs. Simpson initiated divorce proceedings in October, belief spread that Edward intended to marry her. After a series of audiences between Edward and Baldwin in October–December 1936, the UK press began to write openly about the relationship on 2 December. Edward abdicated on 10 December.

The advantage of a hereditary monarchy is that there is little opportunity for disagreement over who succeeds to the throne.⁴⁰ However, as Bagehot recognised, this comes at the cost that the oldest son of a monarch is probably not the most qualified person in the land for the job. Occasionally a monarch is sufficiently unacceptable to so many that the hereditary principle must be sacrificed. This had last happened in 1688, and again in 1714 when Parliament initiated a new Protestant succession.

Between 1688 and 1936, only two reigning monarchs had married: George III and Victoria. There were no settled conventions on how, or whether, a government should approve a royal marriage. In order to get around this, in 1936 the government relied upon the fact that Mrs Simpson had been married twice before; her former husbands were alive; and the doctrine of the Church of England, of which Edward would become the Supreme Governor, rejected divorce.⁴¹ However, this doctrine is not shared with the established Church of Scotland, and the Anglican churches in Canada and Australia were non-established and self-governing.⁴² Prohibiting the marriage had more to do with social acceptability than with Christian morality. It had little or nothing to do with Edward's supposedly pro-Nazi views, which arose from his

anti-Communism and were not unusual at the time.⁴³

Hardinge tried to end the relationship between Edward and Mrs Simpson. In late October 1936, Hardinge joined Sir Warren Fisher, head of the civil service, and Sir Horace Wilson, Baldwin's personal advisor, in asking Mrs Simpson's solicitor to prevail upon her to withdraw her divorce petition, drop any idea of marrying the King and leave the country.⁴⁴ The solicitor refused. After that, in a 'purely private' approach to Fisher, Hardinge proposed a letter, which Fisher sent on to Neville Chamberlain, Chancellor of the Exchequer, threatening government resignation if Edward did not end his association with Mrs Simpson.⁴⁵ Hardinge himself told Edward, with Baldwin's knowledge, that the UK press were about to break their silence on his relationship with Mrs Simpson; the government was meeting to decide what action to take; if the government resigned Edward would have to find another one—something that was unlikely given that Baldwin's 'National Government' held an enormous Commons majority; and that the only remaining alternative was to dissolve Parliament and call a general election, 'in which Your Majesty's personal affairs would be the chief issue'.⁴⁶ Hardinge proposed that Mrs Simpson leave the country. The letter both ended Hardinge's ability to communicate with the government on Edward's behalf and triggered the King's audience with Baldwin on 16 November, when Edward announced his irrevocable intention to marry Mrs Simpson.

Baldwin's success in the crisis arose in part from his control over information. After Edward received Hardinge's letter, he called Hardinge and asked to meet with Baldwin and other ministers. Baldwin refused to include others in his meetings.⁴⁷ Concerning communications from the dominions, Baldwin was 'less than candid with Edward', and with

⁴⁰M. Olson, *Power and Prosperity*, New York, Basic Books, 2000, p. 28.

⁴¹V. Bogdanor, *The Monarchy and the Constitution*, Oxford, Clarendon Press, 1995, p. 138.

⁴²*Long v Bishop of Cape Town* (1863) 15 Eng. Rep. 756 (Privy Council).

⁴³A. Phillips, *The King Who Had to Go: Edward VIII, Mrs Simpson and the Hidden Politics of the Abdication*, London, Biteback Publishing, 2016, p. 318; Ziegler, *Edward VIII*, p. 206.

⁴⁴Phillips, *The King Who Had to Go*, p. 83.

⁴⁵UK National Archives PREM 1/463, f. 100, Fisher to Chamberlain, 7 November 1936.

⁴⁶Wheeler-Bennett, *King George VI*, p. 280.

⁴⁷H. M. Hardinge, *Loyal to Three Kings*, London, Kimber, 1967, p. 138.

his own Cabinet.⁴⁸ He emphasised to Cabinet the adverse reaction of Australia, while at the same time playing down the response of New Zealand, whose Prime Minister generally favoured a morganatic marriage, although the governor-general there intervened to argue that the proposal presented 'insuperable difficulties'.⁴⁹ Edward later wrote in his memoirs, 'The Sovereign must have the unswerving loyalty of his Private Secretary'.⁵⁰ It has been argued that Hardinge was loyal to the office, not its holder.⁵¹ Nevertheless, the conflicts of interest here are rife. In addition to cooperating with civil servants, Hardinge also attempted to get Mackenzie King, once again Prime Minister of Canada, to encourage the King not to be seen with Mrs Simpson in public. King refused: 'I do not wish to be put in the position of having to pull other people's chestnuts out of the fire—this was peculiarly a problem for the people of England.' Similarly, Hardinge encouraged Lord Tweedsmuir (John Buchan), Canada's governor-general, to write a letter, which Hardinge could show to others, expressing his opinion that the Canadian people would not approve of the relationship.⁵² King chastised Tweedsmuir for complying with the request, pointing out that it put Tweedsmuir in a position adverse to the monarch he served.⁵³ Most important, Hardinge cooperated with the government rather than acting as the King's agent. He collaborated with a group of Conservatives who pressured Baldwin to intervene in the matter in November.⁵⁴ He also told Baldwin when the press magnate Lord Beaverbrook visited Edward. In no sense was Hardinge loyal to his principal.

The abdication was a constitutional moment. For the first time since 1714 the succession was changed.⁵⁵ It involved unusually

high levels of sustained popular attention to a question of constitutional significance.⁵⁶ And it realigned power in the dominions, as Canada used it as an opportunity to reinforce the direct relationship between the monarch and Canada, and Ireland eliminated the monarch from its constitution entirely.⁵⁷

George VI, Attlee and Lascelles

Alan 'Tommy' Lascelles initially served as an assistant secretary to Edward VIII when Edward was Prince of Wales. Lascelles was introduced to the royal household by Lady Violet Manners, the mother of Martin Charteris.⁵⁸ He resigned as secretary in 1928 after falling out with Edward, to become private secretary to Canada's governor-general.⁵⁹ He returned as an assistant secretary to George V in 1935 and in 1943 he forced Hardinge out.⁶⁰

The general election of 1950 returned Labour to power, but with a majority of only five seats. The great and the good started writing letters to the *Times* on whether the King could refuse a request from Prime Minister Attlee for a dissolution. John Simon, a Liberal former attorney general, argued that there would not necessarily have to be an election if the government was defeated; the King was not required to comply with a demand for dissolution.⁶¹ The historian and Labour politician Roy Jenkins pointed out that 'the Crown would be placed in the intolerable and dangerous position of granting to a minority Prime Minister what it had recently refused to a majority Prime Minister'.⁶²

The exchange reached its climax with an anonymous letter, signed 'Senex' ('old man'),

⁵⁶A. S. Williams, *The People's King: The True Story of the Abdication*, London, Allen Lane, 2003.

⁵⁷P. Lagassé, 'Royal succession and the constitutional politics of the Canadian Crown, 1936–2013', *The Round Table*, vol. 107, no. 4, 2018, pp. 451–62; D. K. Coffey, 'British, Commonwealth, and Irish responses to the abdication of King Edward VIII', *Irish Jurist*, vol. 44, 2009, pp. 95–122.

⁵⁸D. Hart-Davis, ed., *In Royal Service: The Letters and Journals of Sir Alan Lascelles 1920–1936, Volume II*, London, Hamish Hamilton, 1989.

⁵⁹Ziegler, *Edward VIII*, p. 193.

⁶⁰Vickers, 'Hardinge, Alexander Henry Louis'.

⁶¹J. Simon, *Times*, 24 April 1950, p. 5.

⁶²R. Jenkins, *Times*, 26 April 1950, p. 7.

⁴⁸Philip Murphy, *Monarchy and the End of Empire*, Oxford: Oxford University Press, 2013, p. 26.

⁴⁹Ziegler, *Edward VIII*, p. 307.

⁵⁰Edward Duke of Windsor, *A King's Story: The Memoirs of the Duke of Windsor*, New York, Cassell, 1951, p. 304.

⁵¹Bogdanor, *The Monarchy and the Constitution*, p. 207.

⁵²Ziegler, *Edward VIII*, p. 296.

⁵³Ziegler, p. 296 and n. 1.

⁵⁴Hardinge, *Loyal to Three Kings*, p. 117.

⁵⁵His Majesty's Declaration of Abdication Act 1936, 1 Edw. 8 and 1 Geo. 6, c. 3 (UK).

who was Lascelles.⁶³ He wrote that dissolution may only be denied when (1) the existing Parliament is capable of doing its job; (2) a general election would be detrimental to the national economy; and (3) another Prime Minister would be able to carry on the business of government for a reasonable period.⁶⁴ The letter is cryptic, and given its lack of attribution it is not clear why it should be authoritative. However, George VI's official biographer reprints Lascelles's lengthier appraisal of the situation, which is more Asquithian than the letter. Denying a dissolution, Lascelles argues, would do little more than 'postpone the inevitable general election for more than a few weeks', so that 'there does not seem to be sufficient reason here for the Sovereign to break the precedent followed by his predecessors for more than a century by refusing his Prime Minister a dissolution'. Although Lord Byng did, Lascelles points out, 'it is questionable if this refusal did anybody any good in the long run, and it undoubtedly left in certain quarters in Canada a considerable legacy of bitterness against the Crown'.⁶⁵

Cabinet had discussed the possibility of a defeat on the King's speech on 9 March 1950.⁶⁶ Alexander Johnston, assistant secretary to the Cabinet, was disturbed by the fact that these discussions relied on 'individual recollections of one kind or another'.⁶⁷ The response was to assemble as many precedents as possible for the proposition that a government is not required to resign based upon a single defeat in the House of Commons and to attempt to prescribe when a monarch may reject a request for a dissolution. Civil servants worked on this project over the following months, arriving at the conclusion:

[W]hile there is some divergence of view among the authorities on the question whether the King can refuse a dissolution to a Prime Minister who asks for it, the better opinion is that the power still exists but that the

prerogative could properly be exercised only in exceptional circumstances.

It is difficult to imagine circumstances in which the King could properly refuse a dissolution to a Prime Minister with a clear majority in the House of Commons over all other Parties; for, if he did so, the Prime Minister would presumably resign and the King would have to send for the Leader of the Opposition who, though he accepted office on the view that the House of Commons had not outlived its usefulness, would in fact be unable to form a stable Government and would soon be defeated in the Commons. The King could hardly grant a dissolution to the second Prime Minister after he had refused it to the first.⁶⁸

This paper was eventually disseminated to all governors-general in the dominions. We have not found evidence that Sir John Kerr was familiar with it. Unfortunately, Lascelles's published letter omitted the most important conclusion, that is, that Byng had been wrong.

Kerr, Whitlam and Charteris

On Armistice Day, 11 November 1975, Sir John Kerr, Australia's governor-general, dismissed the Labor government of Gough Whitlam, which enjoyed the confidence of the House of Representatives but not of the Senate. In a rerun of 1909, with a plot twist, the Senate had been blocking supply. Two state Premiers had broken convention by appointing non-Labor successors to departed Labor Senators, so the Senate was more hostile to Whitlam than it had been at the start of his term. The plot twist is that the Australian Senate is elected, albeit on a basis that privileges small states over large ones (which in 1975 disfavoured the Labor Party). Kerr appointed opposition leader Malcolm Fraser to form an interim minority government and have the Senate pass supply, which it did. Unlike in 'King-Byng', however, Fraser won the ensuing double-dissolution election, so that Kerr's intervention directly changed the governing party. Fraser stayed in office until 1983. The literature on the dismissal is voluminous and some points are still contested. This article focusses only on the constitutional issues and the role of Sir Martin Charteris. All players

⁶³Senex [Alan Lascelles], *Times*, 2 May 1950, p. 5.

⁶⁴McLean, *What's Wrong with the British Constitution?*, p. 17.

⁶⁵Wheeler-Bennett, *King George VI*, pp. 774–75.

⁶⁶P. Hennessy, *The Hidden Wiring: Unearthing the British Constitution*, London, Victor Gollancz, 1995, p. 54.

⁶⁷Johnston to Norman Brook, 21 April 1950, CAB 21/3682.

⁶⁸*Ibid.*

were aware of the analogies of 1911, 1913, and 1926, discussed above. But the analogies were not exact. The UK Act of 1911 ensured that the unelected upper house could no longer block supply. The Australian constitution provides that only the House may originate a supply bill and that the Senate may not amend it.⁶⁹ It does not forbid the Senate from simply refusing to consider a government's supply bill, as happened in 1975, and legal opinion differed on whether the bar to amendment implied a bar to rejection. In 1913 the King was asked to dismiss a Prime Minister but did not. In 1926 the governor-general effectively dismissed the Prime Minister of Canada, but the latter won the next general election. In 1932 the Governor of New South Wales had dismissed the state premier, but that was a state, not a national, matter.⁷⁰

The Whitlam government had access to legal advice from its attorney general's department. Neither Kerr nor Charteris did. Kerr was a lawyer and former judge, but his expertise was in industrial law.⁷¹ His official secretary, David Smith, was a seconded civil servant who became Kerr's most vocal supporter. Smith insisted on adding the words 'God Save the Queen' to Kerr's proclamation dismissing Whitlam, a formula which the republican Whitlam had asked to be removed from previous declarations. However, Smith was not a lawyer. Kerr asked Whitlam for permission to consult the Chief Justice of the High [that is, supreme] Court of Australia as the constitutional crisis developed. Whitlam refused permission; Kerr consulted him anyhow, and on 10 November received his opinion that Kerr was justified in dismissing Whitlam.⁷² He

had received his advisors' opinion in a law officers' memorandum of 6 November, a draft of which was prepared by the attorney general's department on 10 October.⁷³ The latter documents follow Bagehot, Asquith, and Jennings in asserting that the governor-general has no power to dismiss a Prime Minister who retains the lower house's confidence:

What a Governor-General would do if a situation were to be reached in which the survival of orderly government was in real jeopardy as a result of the Senate refusing to grant monies for the services of government would be ... [a situation] of the breakdown of the processes of orderly government ... [S]hort of such a situation, the Governor-General would be entitled and indeed bound to act on advice from his Ministers that all the possibilities of parliamentary government should be exhausted.⁷⁴

On 6 November, Kerr's ministers advised him that all the possibilities of parliamentary government had not been exhausted.⁷⁵ However, by (at latest) 9 November, he decided to dismiss Whitlam.⁷⁶ As he told Charteris: 'I decided to take the step I took without informing the Palace in advance because under the Constitution the responsibility is mine and I was of the opinion that it was better for Her Majesty not to know in advance, though it is, of course, my duty to tell her immediately'.⁷⁷

Whom did Kerr consult when he was deciding to dismiss Whitlam? Not his government advisors, obviously. He was talking to Chief Justice Garfield Barwick in defiance of Whitlam, and also to another High Court justice, Sir Anthony Mason. Kerr was in constant touch with Charteris, often sending him several loquacious letters a week. The two most

⁶⁹Australian Constitution s.53: 'Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate ... The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.'

⁷⁰B. Nairn, 'Lang, John Thomas (Jack) (1876–1975)', *Australian Dictionary of Biography*, Canberra, National Centre of Biography, Australian National University, 1983; <http://adb.anu.edu.au/biography/lang-john-thomas-jack-7027> (accessed 28 December 2020).

⁷¹P. Edwards, 'Kerr, Sir John Robert (1914–1991)', *Australian Dictionary of Biography*; <http://adb.anu.edu.au/biography/kerr-sir-john-robert-23431> (accessed 28 December 2020).

⁷²Smith, *Head of State*, pp. 241–42; G. Whitlam, *The Truth of the Matter*, Harmondsworth, Penguin, 1979, p. 91.

⁷³Whitlam, *The Truth of the Matter*, p. 84.

⁷⁴National Archives of Australia, M4081 2/16, paras 17–18.

⁷⁵Smith, *Head of State*, p. 269 makes much of the fact that the advice was not signed by one of the Law Officers. It is hard to believe that it would have differed much if both had agreed on a version.

⁷⁶J. Kerr, *Matters for Judgment*, Melbourne, Macmillan, 1978, p. 308.

⁷⁷National Archives of Australia, Kerr to Charteris, 11 November 1975, NAA, AA1984/609, Part 2, Screen 288).

important exchanges occurred in July and September–October 1975. On 3 July, Kerr wrote to Charteris enclosing a leader from the *Canberra Times* recommending that he should dismiss Whitlam: ‘I have no intention of course of acting in the way suggested’.⁷⁸ Something caused Kerr to change his mind—what was it? ‘Events’ may be a sufficient answer. The game of chicken between Whitlam and Fraser grew more intense; each thought the other was bluffing. Whitlam thought that Fraser’s Liberal-National coalition would crumble first, and grant supply. Fraser thought that Whitlam would crumble as his increasingly fanciful schemes for financing the government payroll collapsed. Another possibility, however, is that subtle hints from Charteris might have helped to sway Kerr. Charteris frequently assured Kerr that the Queen and Prince Charles were paying close attention to the Australian crisis. On 24 September, in a letter written from Balmoral Castle, he told Kerr that Prince Charles, newly back from Australia and Papua New Guinea, would be briefing the Queen on the crisis. In a handwritten addendum, he wrote: ‘I suppose you know Eugene Forsey’s book “the Prerogative of the Dissolution”? [sic]. I believe he lays it down as a principal [sic] that if supply is refused that always makes it constitutionally proper to grant a dissolution.’⁷⁹ In his next letter, still from Balmoral, Charteris wrote:

To my untutored eye it does appear that section 53 of the Constitution leaves the Senate with the power to reject money Bills, if only because it is NOT stated that such power does not exist. Had the intention been to deny this power to the Senate it would surely have been stated in this section which is so specific about what the Senate may or may not do about money Bills? ... Prince Charles told me a good deal of his conversation with you and in particular that you had spoken of the possibility of the Prime Minister advising The Queen to terminate your commission with the object, presumably, of replacing you with somebody more amenable to his wishes. If such an

approach was made you may be sure that The Queen would take most unkindly to it. There would be considerable comings and goings but I think it is right that I should make the point that at the end of the road The Queen, as a Constitutional Sovereign, would have no option but to follow the advice of her Prime Minister.⁸⁰

As we parse it, Charteris is conveying three points:

- He draws attention to Forsey, the only recognised authority who thought that Byng was right to dismiss King;
- He opines that Fraser is right and Whitlam is wrong on whether the Senate could reject supply;
- He warns Kerr, writing from Balmoral, that if Whitlam seeks Kerr’s dismissal, the Queen would ‘take most unkindly’ to the request but would ultimately agree to it.

Since the Kerr-Charteris correspondence was released in July 2020, several commentators have said that it contains no smoking gun.⁸¹ A principal basis for the argument is Kerr’s statement that he had deliberately not told Charteris that he had decided to sack Whitlam, and Charteris’s thanks to Kerr for that. We see at least a wisp of smoke. It lingered. A month after the dismissal, the UK high commissioner in Canberra reported Kerr as having told him: ‘[I] thought it no bad thing that the public in Australia (and perhaps also those in other monarchical Commonwealth countries, not excluding Britain) should have been reminded that the Crown possessed reserve powers’.⁸² And in March 1976, Charteris wrote to Kerr that ‘my friend, Eugene Forsey [is a] stalwart upholder of the prerogative of

⁷⁸National Archives of Australia, Kerr to Charteris, 3 July 1975, NAA, AA1984/609, Part 1, Screen 66.

⁷⁹National Archives of Australia, Charteris to Kerr, 24 September 1975, in NAA, AA1984/609, Part 1, Screen 12.

⁸⁰National Archives of Australia, Charteris to Kerr 2 October 1975, NAA, AA1984/609, Part 1, Screens 6–7.

⁸¹A. Twomey, “Palace letters” show the Queen did not advise, or encourage, Kerr to sack Whitlam government’, *UCL Constitution Unit Blog*, 16 July 2020; <https://constitution-unit.com/2020/07/16/palace-letters-show-the-queen-did-not-advise-or-encourage-kerr-to-sack-whitlam-government/> (accessed 28 December 2020).

⁸²H. Kumarasingham, *Viceregalism: The Crown as Head of State in Political Crises in the Postwar Commonwealth*, Cham, Palgrave Macmillan, 2020, p. 19.

the Crown'.⁸³ In favour of the proposition that the monarch('s representative) may dismiss an administration that controls the lower house we thus have Dicey, Kerr, Charteris and Forsey. In the opposite camp we have Bagehot, Asquith, Jennings and Evatt. *Dicey v. Jennings* is a rather unsatisfactory place to leave the dispute.

Discussion

We have shown that three leading western democracies have had unclear rules about whether an unelected official may dismiss an elected government. In a fundamental area of constitutional law, statutes are incomplete, and conventions are contested. Many of those who announce, often with great confidence, opposing opinions on what the constitution requires appear to have no formal qualifications to do so.

In this article we have focussed on private secretaries to the UK monarch. We have shown that their training has been purely on-the-job. Our case studies were all of constitutional moments. Three of them cover the monarch's disputed prerogatives to (refuse to) create peers; dismiss governments that retain the confidence of the lower house; and grant or refuse dissolution requests. The fourth covers the first change to the order of royal succession since 1714, for the UK and all the 'realms' that shared the UK's monarch. The third and fourth cases postdate the Statute of Westminster, which purportedly recognised the full autonomy of Canada and Australia. As recently as 1975, Australia's governor-general was consulting a British public official rather than one in his own country.

In two, perhaps three, of the four cases the private secretary brought a clear political perspective to the job. Stamfordham is indeed revealed as a 'very strong Tory [who] does not hesitate to show his colours'. He advised George V to resist his Prime Minister's request for a guarantee to create peers. He advised the leader of the unionist opposition, in its full insurrectionary phase, how best to resist the elected government. He tried to block the appointment of an Australian as governor-general and wished UK ministers to be involved, after the agreement of 1926 that they

should not be. Hardinge was one of the leading players in the unseating of his principal, under the unconvincing façade of an argument about divorce and the Church of England. Charteris was more subtle. Nevertheless, we think that his praise of Forsey; his interpretation of the Australian constitution; and his warning that if asked to dismiss Kerr the Queen would reluctantly agree—jointly amount to a thumb, or two, on the scale.

The fault—if it was one—with Lascelles seems to be in the opposite direction. The background papers we have quoted contain a clear warning against the position of Dicey, Byng, and Forsey. But rather than say it out loud, it was circulated privately, where it seems not to have reached the desk of John Kerr. Maybe it had been mislaid in the intervening years. His letter to the *Times*, on the other hand, was anonymous, oblique, and confusing. It suggests that the monarch, or his private secretary, is a qualified judge of whether 'a general election would be detrimental to the national economy'.

None of the four PPSs in our case studies had legal support staff, so far as we can tell. After the dismissal, Kerr cut a lonely figure. At least Lord Byng of Vimy, a British soldier, could return to the UK without worrying about his reputation in Canada. Sir John Kerr did not have that option.

We conclude, in the light of the newly available papers, that Jennings was right to call PPSs 'irresponsible advisers'. Their advice is likely to be most crucial precisely at the times that their irresponsibility is most problematic.

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⁸³National Archives of Australia, Charteris to Kerr, 8 March 1976, NAA, AA1984/609, Part 3, Screen 530.