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BLOG POST

# Constitutional chaos in Britain, viewed from America

September 3, 2019 | by Lyle Denniston

An idea with centuries of British tradition behind it (but one that never had a chance of catching on in post-Revolutionary America) is central to what the United Kingdom calls its “constitution” (although the United Kingdom does not have a Constitution in the U.S. sense).

The tradition is that Parliament holds sovereign power – the ultimate power and control of government – not the people (as in America). Even the British Crown, for centuries, has not posed a genuine threat to the national legislature’s eminence and authority.

As one British politician put it last week: “Parliamentary sovereignty remains the foremost and over-arching principle of our constitution.” (The British constitution is

unwritten, at least in the sense of a single document. Rather, it is a huge compendium of traditions and court rulings that, together, establish the equivalent of a working constitution.)

Now, however, that central idea of Parliament's sovereignty is under siege, one of a multitude of the effects of "Brexit," the intensely debated but still unsettled plan to leave the European Union on October 31. The British public narrowly voted three years ago for Brexit, 51.9 to 48.1 percent.

In an ironic twist, Britain may have to depend upon its courts – though subordinated to Parliament – to rescue the "mother of all parliaments" from Her Majesty's government, and in particular, from the new Prime Minister, Boris Johnson.

With Parliament due to return this Tuesday as a summer recess ends, and with only nine weeks to go before "Exit Day" is to happen, the Prime Minister made his move last week to take control and to set the stage for his plan to carry out Brexit, "do or die," at the end of next month.

He asked Queen Elizabeth II (who had little choice but to comply) to order Parliament to interrupt its new sitting for five weeks this month (the longest such suspension, or "prorogation," since 1945).

The suspension has caused a political uproar across Britain. There have been protest rallies across the nation, with angry messages such as "Stop the Coup." There also was an audacious march on Buckingham Palace itself. Politicians have been denouncing "constitutional chaos." The colorful and no-nonsense Speaker of the House of Commons, John Bercow, labeled the maneuver a "constitutional outrage."

Scary headlines are appearing in the media. *Prospect Magazine* had an opinion article proclaiming: "The fight is now against something even more horrifying than Brexit." A smaller headline read: "We must stop this descent into demagoguery before it is too late."

The opposition Labor Party and its leader, Jeremy Corbyn, have talked darkly of forcing a vote of no-confidence in the Prime Minister, and various politicians and

public figures are calling either for a new public referendum on Brexit, or a general election to choose a new House of Commons.

In a few circles, there has even been talk (probably unrealistic) of giving up the hereditary monarchy for an elected head of state. The Queen, who is supposed to be kept above the political fray and relies on her government to do that for her, is now taking some of the heat.

Last weekend, Lewis Goodall, a political correspondent for Britain's *SkyNews*, lamented the politicization of the Queen, as he called it in a tweet. He added ruefully: "Now, not one of our political institutions remains untouched or undiminished by Brexit."

The expressions of gloom have grown so intense that the Parliament's formal name – the "Union Parliament" – might not continue to be descriptive because of the prospect that Scotland (deeply upset over Brexit and already chafing under close oversight from London) might try to secede from the Union that has existed since 1707. (Northern Ireland's stay in the Union is also sometimes doubted; Wales might remain as England's only sibling.)

Prime Minister Johnson has insisted that he asked the Queen to "prorogue" Parliament simply because he is new to the job and needs more time to develop his own policy agenda. But critics have charged that he is trying to "run out the clock," to keep Parliament from passing laws to stop what seems like inevitable turmoil surrounding Brexit.

There is no agreed plan on what to do on "Exit Day." The former Prime Minister, Theresa May, herself a political casualty of Brexit, had a plan worked out with the European Union, but it has been voted down three times in Parliament this year (suggesting to some critics that its wounds are self-inflicted).

Without some scheme for coping with the separation, the nation may face shortages of food and medicine, legal rights probably will be impaired, travel and transport probably will be snarled, and there is even a threat that the past violence along the border between Northern Ireland and the independent republic of Ireland could erupt

again. (The violence ended in 1998 with the so-called “Good Friday Agreement,” successfully brokered by an American, George J. Mitchell, then a Democratic Senator from Maine.)

Adding to the uncertainty, U.S. House Speaker, Nancy Pelosi, vowed on a visit to London that Congress would approve no new trade deal with Britain if peace along the Irish border were truly threatened. However, President Trump – an admirer of Brexit and a strong supporter of Boris Johnson – has promised to work out a new deal on his own.

If all of this tumult were unfolding in America, the courts surely would be the place to look for a way out – something either to delay “Exit Day” or thwart Johnson directly. (Actually, if a U.S. President attempted to send Congress home for a period, the U.S. Constitution would forbid it.)

Now, though it is uncomfortable for many traditionalists in Britain, a move into the courts is, in fact, happening across the UK.

This week, the uproar over the suspension moves into the sober realm of the courts, with tribunals in London, Edinburgh, and Belfast – the centers of three of the four “countries” in the Union – holding hearings on pleas to cancel the suspension of Parliament.

One of the main legal claims in the challenges is that Her Majesty’s government has violated the “Claim of Right” – a document from 1689 in Scotland, when the Scottish Crown was handed to William and Mary but under terms of a limited monarchy, bound by the nation’s laws. (That document is a part of the UK constitution.)

In what is not at all a coincidence, the turn to the courts to rescue Parliament from the Queen’s government ministers comes at a time when there is a lively debate, in legal and academic circles in Britain, over whether the nation’s courts are assuming too much power, and actually distorting the constitutional hierarchy of authority.

Americans, an ocean away from the Brexit drama but fascinated to some degree by it, can see the vivid contrasts in the basic governing arrangements of the two nations.

The lower rank of the British courts (even including its Supreme Court, a 10-year-old institution split off from the House of Lords) are not like the American federal courts, made constitutionally equal to the other branches of the federal government and guaranteed a sturdy independence, which they use – sometimes boldly – to strike down actions of the other branches.

Part of the vigorous new debate in Britain over the role of the courts, a debate that focuses some of the time on whether the nation's constitution is a political or a legal document, arises out of a decision early last year by the UK Supreme Court.

When ministers in the May government took the position that it was up to them to initiate the move to actually declare the exit from the European Union, a high-profile lawsuit led to a Supreme Court decision that only Parliament had the authority to do that, by explicitly passing a law. Critics, including some retired judges, saw that as an unseemly grab for power, intervening rather than leaving it to the political institutions to work out.

To a degree, the fondness of Americans for suing their government over a grievance is making a return appearance in the Mother Country, which invented the idea of judicial power to strike down government actions. The famous jurist, Edward Coke, in *Dr. Bonham's Case* (1610) argued that the King's Council could not be sued.

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The new lawsuits will not be aimed at the Queen; she cannot be sued. A prominent London barrister, Lord David Pannick, who was one of the attorneys who won the Supreme Court case last year and is handling one of the new cases against Johnson, told *The Times of London* last week: “The courts would not entertain a challenge to a personal decision by the Queen, because she, the head of the UK's constitutional structure, is immune from legal process.”

He argued, though, that the advice her ministers gave to her about suspending Parliament is a proper subject for review by the courts.

As Americans watch the Brexit drama (it is being covered closely by U.S. media), they could see how very different the two countries are, constitutionally speaking.

One of the most basic differences is that Parliament, if it wished, could do something that Congress would never dare: it could totally ignore the peoples' vote for Brexit three years ago and remain a part of Europe. Such a vote is not a sovereign mandate, either to the national legislature or even to the Crown's ministers drawn from the benches at Westminster.

And, if there were actually to be a breakup of the UK, that is something that would be out of the question in the United States. The Civil War settled that more than 150 years ago.

*Lyle Denniston has been writing about the Supreme Court since 1958. His work has appeared here since mid-2011.*

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