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Ministers also have rights – balancing executive prerogatives and executive scrutiny

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1. I am delighted to have been asked to deliver an inaugural lecture as an Honorary Professor at the Constitution Unit of UCL—an organisation I have long admired and with whom I am now working on a report on constitutional watchdogs and ethical regulation. And I am pleased that the response will come from Jack Straw, who has thought extensively about these issues and was closely involved in the constitutional changes of the late 1990s and early 2000s. I have considered the main themes over a long time - initially as a journalist seeing scrutiny at first hand, then successively as chair of the Hansard Society, director of the Institute for Government, Commissioner for Public Appointments and now at the Constitution Unit.
2. The title of my lecture might seem to be unfashionably contrarian since ministers are now widely seen as the main usurpers—disrupters perhaps - of established constitutional conventions and standards in public life. This debate is one aspect of what might be described as culture wars between, on the one hand, the

executive and, on the other hand, parliament and regulators seeking to sustain checks and balances on the actions of government. Boris Johnson and his defenders liked to invoke his mandate from the December 2019 general election in almost presidential terms to brush aside those questioning his government's actions. On the other side, a wide range of political, legal and academic critics accuse ministers of an unprecedented violation of long-established principles, conventions and norms—in some cases even the rule of law.

3. In this lecture I will discuss the significance of recent developments, assess how exceptional they are, and examine what can be done. This is only partly a matter of laws or formal codes and as much a question of norms and conventions. These are essentially matters of political accountability and only partly of enforceable legal rights, though the two, of course, overlap. I don't share some ministers' claims that judges have gone too far. There is no real evidence that judicial review is being abused in the judgements of courts, nor has that been shown in various studies of the issue. This is a sensitive area where language and tone matter both among politicians and judges. However, I do have concerns that some campaigning bodies see the courts as a way of pursuing essentially political objectives by muddling what they dislike with what is against the law. I am also not going to discuss scrutiny of the efficiency and effectiveness of government -

a massive and important subject in its own right. I will focus rather on the political and constitutional mechanisms for scrutiny of everything captured by the term standards in public life.

4. We have, of course, been here many times before. There is nothing new in complaints about an overbearing executive usurping its powers and its exercise of patronage. This was a central theme of 17th century history and opposition to the 'Old Corruption' was the rallying cry of reformers such as Cobbett in the late 18th and early 19th century against the highly paid offices, sinecures and pensions enjoyed by the aristocracy until they were largely abolished in the 1830s and 1840s.
5. There have been recurrent cycles of complaint about the misuse of power and patronage leading to demands for new institutional checks and balances- generally after one party has been in office for a long time. That was seen in the early 1960s (the heyday of Penguin's What's Wrong With books); the mid-to-late 1970s (then directed at both main parties with talk of a crisis of governability and an elective dictatorship); the mid-1990s (over cash for questions); in the late 2000s (over loans for peerages and MPs expenses); and since 2019 (over everything from prorogation, via partygate to ignoring parliament and international law to personal patronage).
6. On each earlier occasion, new rules or regulators have been introduced— notably following the establishment of the

Committee on Standards in Public Life (the Nolan committee) in 1994 and the acceptance by Sir John Major the following year of the thrust of most of its wide ranging recommendations - in what Sir Humphrey Appleby would have described as a bold even courageous decision which didn't do him much good with either Conservative MPs or the public. Indeed, it was Sir John Major who overruled some officials and insisted that that the CSPL should be a permanent body. The original Nolan report was a very British exercise conducted by eminent figures in public life based on hearing the views of other eminent people without any detailed research. As the late Professor Anthony King told me, the much discussed Nolan principles were drawn up on the back of an envelope- and perhaps none the worse for that. The principles – selflessness, integrity, objectivity, accountability, openness, honesty and leadership - are fine as general aspirations but they are harder to translate into operational guidelines and codes. The Committee has proved its worth since the mid-1990s with a series of reports addressing these dilemmas and new problems - not least because it has focussed on its oversight role rather than try to duplicate the role of individual regulators and investigate specific complaints and abuses. Public life would be much better if most of its recommendations had been accepted and fully implemented. I am glad that I played a small part in ensuring its survival when I conducted a review of the Committee for the

Cabinet Office just over a decade ago when powerful forces in Whitehall favoured either its abolition or the equally unacceptable solution of putting the committee into hibernation unless needed.

7. I do not have time this evening to discuss the specific allegations or each of the new initiatives: rather, I want to examine the overall pattern, drawing in particular on my experience of five and half years as Public Appointments Commissioner. So while I will not be saying much in detail about the legal system and the courts or Parliament, I don't mean in any way to underrate their importance as checks on the executive. What we have seen over 40 years has been a gradual codification of British public life in response to scandals affecting the behaviour of MPs, of political parties and of ministers. I dislike references to a 'good chaps' view of the past when leaders allegedly knew how to behave partly because I am instinctively suspicious of golden ageism. Past ministers, MPs and officials - though almost all were male 'chaps'- were not conspicuously or invariably good, hence the need for greater regulation. Underlying these pressures – and more general demands for constitutional reform - was what Douglas Hurd in a lecture in 1998 called the Whig view of the constitution - 'the belief that the main purpose of Parliament is to limit government because if it is not strenuously limited it will return in one way or another to the wicked ways of the Stuarts' - that is it will reassert by prerogative against the interests of the people. Lord Hurd

contrasted this with the Tory view that the Government must be carried on and that Parliament exists to create and sustain the government and not merely to scrutinise it. Boris Johnson is unquestionably in the Stuart—and now perhaps Jacobite – tradition - the world king over the water.

8. To what extent are recent events merely another episode in a long cycle of excess by a long serving government and the pressures for a rebalancing shown by the shift between Whig and Tory views of government and accountability? Recent challenges to long-recognised conventions are greater than previously. It is not just the many examples of where ministers, and in particular Boris Johnson, flouted the accepted norms of public life as embodied in the Nolan principles. In the words of William Hague in summer 2022, Johnson had displayed 'disloyalty to the conventions of government and institutions of government and to the massed ranks of colleagues who did their best to support him but ultimately quit in disgust or told him to go'. And Mr Hague was not alone among former Conservative leaders in taking that view. As significant was the essentially presidential approach of Mr Johnson and his allies that as Prime Minister who led his party to a big victory at the 2019 election, he enjoyed a personal mandate embodying 'the will of the people' distinct from both parliament and independent regulators. As Simon Case, the Cabinet Secretary, told the Public Administration and Constitutional Affairs

Committee of the Commons in what turned out to be the final phase of the Johnson administration, the Government of the day believes it has ‘a mandate to test established boundaries. They take a robust view of the national interest and how the government should protect and focus very much on accountability to people in Parliament- not on the unelected advisory structures’. The Johnson approach has amounted to a rejection of long-established checks and balances - not just by ‘unelected advisory structures’ but also through by-passing Parliament by the use of skeleton bills and Henry V111 clauses to avoid detailed scrutiny. Moreover, trumpeting accountability to the ‘people’ via the Commons can be deceptive since there is a distinction between the form and substance of accountability. It is no good saying that MPs and voters should have the final say—as indeed they should- if they don’t know what is happening. The essential role of regulators and constitutional watchdogs is to investigate alleged abuses and to advise.

9. It is, of course, possible to argue that the 2019-2022 period was an aberration and that there has been a correction since Rishi Sunak became Prime Minister. After all, he did appoint an Independent Adviser on Ministerial interests when there had been speculation in the final Johnson phase that Lord Geidt would not be replaced after he had been the second Advisor to resign in less than two years. Mr Sunak also responded quickly to Sir Laurie Magnus’s

robust report into the tax affairs of Nadhim Zahawi. But we still await the long promised responses of the Government to the Committee on Standards in Public Life report of November 2021 and of the parallel PACAC report of December 2022, both covering the standards landscape and the role and powers of regulators. Some ministers have also displayed worrying attitudes towards breaking international law and criticising the legal system. Moreover, Dominic Raab's departure has raised questions not only about complaints procedures within Whitehall, but has also highlighted long-running tensions, and worse, in ministerial/civil service relations.

10. We cannot pretend that recent excesses were just a one-off. The fact that the Ministerial Code could be bent and breached; patronage abused and adequate parliamentary scrutiny by-passed cannot be brushed off. They are part of a broader polarisation of politics linked to the political upheavals associated with Brexit but not solely caused by it. This has been reinforced by a more partisan and fragmented media, especially since the growth of social media- which has added a more instant, and often less considered, form of scrutiny of the executive. A populist revolt against established parties and politicians is common to most representative democracies leading to what Steven Levitsky and Daniel Ziblatt describe in their 2018 book 'How Democracies Die' as threats to the norms of mutual toleration and institutional

forbearance. They define mutual toleration as an acceptance by one party that their rivals have a right to exist, to compete for power and to govern. They are rivals, not enemies or traitors. Institutional forbearance means acceptance of restraints on the exercise of power. Of course, Donald Trump and his Republican allies have been, and are, the most outrageous breakers of these norms in their rejection of the 2020 presidential election result and in their efforts to make governing unworkable. But a similar winner-takes all approach has been seen here too.

11. There is an overwhelming case for strengthening current safeguards and no shortage of proposals for institutional and regulatory changes. We are at the familiar pre-election stage where the reformers, the Whigs, are both frustrated and full of ideas. We don't have a formal separation of powers, but there is a need for checks and balances through the courts to tackle unlawful action by the executive and by parliament and various watchdogs. But these are checks, not replacements for ministers. Therefore, while I am sympathetic to the intentions behind many of the reform proposals, I am concerned that some ignore and underplay the legitimate rights of an elected government.

12. The initial problem is to define what is acceptable and unacceptable behaviour. There is a spectrum from outright corruption, via breaches of governance codes of an administrative character to decisions with which someone disagrees - but the

distinctions can often be blurred. At one extreme, it is clear—taking bribes in return for favours is illegal as well as unethical. Lying to the House of Commons has similarly been seen as wrong. But as the current Privileges Committee inquiry shows, we are quickly into grey areas of whether making a statement containing misleading information was intentional or not. I am sceptical about the practicality of calls to make lying by politicians illegal or to give powers to the Speaker of the Commons or to a select committee to monitor political statements for their truth. The key is to require ministers publicly to correct misleading or false statements.

13. To take another example from the area of public appointments, should people who have made large donations to a political party be barred from holding public appointments? The correlation between the two is often widely portrayed as corruption. But the current rule is that for all but a few constitutional watchdogs, significant political activity—making a registerable donation, being a candidate or speaking on behalf of a party - should neither be a qualification for nor a bar to appointment. We don't want to demonise party activity or support—it is an important public service. Indeed, there have been many party donors who have also performed important public services. Acceptance of party activity by public appointees can, however, be abused—with donors in practice being given favoured access to obtaining

government contracts, such as the VIP lane for PPE supplies during Covid, or effectively buying peerages and then not playing any real part in the work of the Lords.

14. That has fuelled demands to depoliticise the process - calling for all appointments to be made on merit. But what does this mean? The phrase appointment on merit is deceptive—it sounds virtuous like passing an exam. It is a tempting thought that if you want to chair the BBC, Ofcom or the British Museum you should sit a competitive exam – say on the content of the Archers, or your knowledge of Greek statues. But we are not in Imperial China. Public appointments could never work that way since there is no absolute measure of merit to assess candidates - it is bound to be relative to what is appropriate at the time and for the role. Moreover, someone has to agree the criteria. There is what I have called a system of constrained patronage which is often misunderstood. Ever since the post-Nolan report there has been a two tier system even though the details have changed over the years. The first tier is open competition based on public advertisement of vacancies and the job and person criteria, with a panel picking candidates assessed as appointable, or above the line, with no preference being expressed between them. The second tier is the choice by ministers among those judged as appointable. So it is not really selection by merit since the final choice is entirely political. Ministers can also suggest names and

comment on the short list. The first tier of open competition has been seen as a fig leaf for unrestrained ministerial patronage. But that is wrong. The sifts and interviews don't always produce a list of appointable candidates whom ministers wanted in the first place. Some favoured candidates are judged unappointable—I can mention Paul Dacre because he outed himself as having been rejected. But there have been many other, inevitably confidential, examples of similarly preferred candidates - even former ministers - being regarded as unacceptable. And I am glad to say that in my time as Commissioner – and I gather so far under my successor- ministers did not exercise their power under the Governance Code to appoint someone assessed as unappointable - perhaps they feared the adverse publicity - though there were a number of close shaves.

15. This process is at one level inherently biased in favour of ministers. But a central role for ministers was envisaged in the original Nolan report of 1995. After all, these appointments are within the public sector for which ministers are accountable to parliament. And ministers of all governments have wanted to avoid appointing people who will be critics of their policies. There is fine line between this and appointing allies as a reward for past support or because they will be loyal. It is a question of balance. In most of the thousands of public appointments made there is no problem—the choices are uncontroversial. And even where an

appointee does have a political background that does not automatically make them subservient to the government. Far from it. It is a mistake to focus too narrowly on political ties.

16. Nonetheless, the excesses of recent years have led to calls for both a more independent system of appointment and more independent appointees. Independence is another slippery term—it depends on the eye of the beholder. In the eyes of some on the right, independence means being part of the metropolitan centre, the liberal elite, the blob, the establishment – whatever other cliché you like. It is possible to reach approximate definitions of not being involved in significant political activity and being separate from a department. But as Charles Moore has often argued, independence is widely assumed to be an unquestioned good when it is also a form of selection and, he argues, independent appointers and appointees are often drawn from former civil servants, quangocrats and the like. The process can be too cosy with like selecting like—which is why I believe ministers have to be involved.

17. The key distinction is to ring fence those institutions whose function and credibility depend on being separate from the executive—such as those dealing with the civil service, ethics and integrity in government and public appointments. Unlike appointments to executive bodies implementing government policy, which should continue broadly as at present, appointments

to constitutional watchdogs should be subject to more safeguards than many now are. Only the Civil Service Commission and the lobbyists registrar are established in primary legislation. The rest are entirely subject to prerogative powers and the Independent Adviser on Ministerial Interests is not even appointed by open competition. Moreover, despite some changes last year, the Independent Adviser still has to obtain the consent of the Prime Minister to launch an inquiry.

18. For these constitutional watchdogs the role of ministers should continue but be constrained. Several proposals have been made for strengthening the independent element in the advisory interview panels for appointments to this limited number of posts. At one extreme, you could even adopt the practice of the Judicial Appointments Commission where interview panels put forward one candidate for each vacancy with the Justice Secretary just having a veto rather than the choice which remains appropriate for most other cases. There will then be a lively debate about how wide this category should be - should it cover the chairs of the BBC, the Charity Commission, the Equality and Human Rights Commission, the sector regulators? That will be a test for Opposition politicians about how far they really want to depoliticise senior appointments. My hunch is not very much, despite what is being said now.

19. Parliament is the other formal element in this rebalancing, not in making appointments itself but via strengthened pre-appointment hearings and in more regular accountability for regulators appearing before select committees. There are various permutations here - from enhanced consultation to veto power - but the executive has to be willing to more open with the legislature, while MPs on select committees have to show a commitment to holding the executive to account- as some members are inconsistent in doing now, as shown by the sometimes poor attendance at pre-appointment hearings. Many watchdogs and regulators also have so far been reluctant to engage select committees as part of more open debate about their advice.

20. What I have discussed so far will be seen by many as tinkering and incrementalism though it would, I hope, produce a more robust system which inspires more public confidence alongside other changes in the effectiveness of parliament. I have been careful not to claim that improving public trust should be a target or objective of regulators since the polling and survey evidence suggests that trust in government is often more closely linked to personal well-being and the standard of living than to any measures to improve standards in public life. Others, such as the Labour Party, would go further with proposals to create a powerful Ethics and Integrity Commission, while others have suggested a

body with the specific brief of fighting corruption. But there are big questions here, not least of defining corruption. There are also differences between the independence of the courts and of any regulatory body—though being dubbed 'Enemies of the People' was uncomfortable enough for the senior judiciary six years ago. I am sceptical about whether either politicians or the public- let alone much of the media- would in practice welcome a single ethics regulator with greater powers who could easily overshadow parliament and be seen to challenge the principles of democratic accountability. There are advantages in separate regulators with different roles and functions, even though there is scope for closer co-ordination, as well as the continuing oversight role of CSPL.

21. Moreover, there are also wider issues about whether the constitutional watchdogs should follow the trend in the private sector towards a greater focus on compliance and prevention. One of the biggest, largely unnoticed changes in my time as Commissioner was the introduction - thanks to my senior advisers rather than me - of a system of annual compliance audits of the performance of departments. The emphasis was on improvement rather than finding fault, and the annual exercise was liked by departments and led to the sharing of best practice.

22. This lecture has been set within the existing constitutional structure and conventions of ministerial accountability. I have not discussed proposals for a more formal written constitution in

which parliamentary decisions would be subject to overrule by the courts- not, in my view, a likely or desirable prospect. Nor have I discussed federalism and devolution or the implications for executive prerogatives and the balance with the legislature of the fixed term parliament legislation and its repeal within a decade. If the act turned out to be seriously flawed, I believe it was wrong to return the power to call a general election before the five year limit exclusively to the Prime Minister rather than leave the final decision with MPs on a simple majority vote. But even what I have discussed would imply big changes. Much could be done now without either primary or secondary legislation—for instance, in the operation of the Advisory Committee on Business Appointments or in the role of the Independent Adviser on Ministerial Interests in handling complaints. Other changes in the regulation of public appointments or various codes would require Orders in Council. Putting the constitutional watchdogs on a statutory basis, as proposed by Lord Anderson of Ipswich's bill implementing the CSPL proposals, is in theory straightforward, but requires scarce parliamentary time. The Government has already shown its reluctance to accept checks on its prerogative powers in its coolness towards Lord Norton of Louth's widely supported bill to put the House of Lords Appointments Commission on a statutory basis and to give it a stronger vetting role. The Government's objections confuse an enhanced advisory role with

ultimate ministerial responsibility and accountability- the central theme of this evening's lecture.

23. The most important influences are not necessarily changes to institutions and codes which I have mainly discussed so far but behavioural. It is the attitudes and conduct of ministers that matter—going back to the themes of mutual toleration and institutional forbearance. None of what I have suggested will work unless those involved exercise self-restraint. During my period as Commissioner I was struck by the contrast between the May and Johnson premierships—both working within the same Governance Code but implementing it in different ways related largely to the personal approaches to power and patronage of the two prime ministers and their close allies. You cannot legislate for that but what you can do is to strengthen safeguards and to clarify and make more transparent the differing roles of advisers and ministers.

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