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Select Committee on the Constitution

4th Report of Session 2016–17

The invoking of Article 50

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CONTENTS

	<i>Page</i>
Chapter 1: Introduction	3
Chapter 2: Triggering Article 50	4
The referendum result	4
Article 50: the only viable option	4
Triggering Article 50 in line with the UK’s “constitutional requirements”	5
Revoking a notification under Article 50	5
Prerogative power?	6
Parliamentary sovereignty	7
Parliament’s role	9
Chapter 3: Legislation or a resolution	10
Legislation	10
A resolution	12
A motion of both Houses?	12
Legislation or resolution?	13
Chapter 4: The scope of the legislation or resolutions	14
Separating Article 50 from symbolic acceptance of the referendum result	14
Options for greater detail: a route map?	14
Chapter 5: Conclusion	16
Appendix: List of Members and declarations of interest	17

The invoking of Article 50

CHAPTER 1: INTRODUCTION

1. On 23 June 2016, the people of the United Kingdom voted in a referendum to leave the European Union. To keep its commitment to implement the referendum result, the UK Government must now negotiate a new relationship with Europe and formally withdraw from the EU. This will result in the most significant changes to the UK's constitution in a generation.
2. Constitutional change of such magnitude must be approached carefully and scrutinised appropriately, with the roles and responsibilities of both Government and Parliament set out clearly in advance.
3. In this report we consider in particular the roles that Government and Parliament should play in the triggering of Article 50 of the Treaty on European Union—the legal mechanism by which the UK will leave the EU. To aid our deliberations, we held a private seminar in July 2016. We were joined at that seminar by:
 - Dominic Grieve QC MP, former Attorney General
 - Lord Hope of Craighead, former Deputy President of the Supreme Court
 - Lord Lisvane, former Clerk of the House of Commons
 - Lord Mackay of Clashfern, former Lord Chancellor
 - Dr Alan Renwick, Deputy Director of the UCL Constitution Unit
 - Jack Straw, former Secretary of State for Justice and Lord Chancellor, Leader of the House of Commons and Foreign Secretary
4. The seminar was held under the Chatham House Rule. Material from it is cited and quoted in this report but is not attributed to any particular participant. We are grateful to all those participating in the seminar for taking the time to help us in our work.

CHAPTER 2: TRIGGERING ARTICLE 50

The referendum result

5. The 23 June referendum demonstrated the electorate's desire for the UK to withdraw from the European Union: 33,577,342 people voted in the referendum, of whom 17.4 million people (51.9 per cent) voted to leave and 16.1 million (48.1 per cent) voted to remain in the EU.¹ Yet neither the question put to the electorate, nor the provisions of the Act under which the referendum took place,² set out how or when withdrawal should take place in the event of a vote to leave. The absence of any prior provision for implementing the referendum result means that questions of how and when the process of withdrawal from the EU should proceed have become matters of significant national debate.
6. **The referendum result was clear. It will be the Government's task to determine how the will of the people, expressed in binary terms in the referendum, should be implemented, and where among the range of potential outcomes the final settlement by which the UK leaves the EU will be made.**

Article 50: the only viable option

7. Article 50 of the Treaty on European Union sets out how member states may withdraw from the European Union. It states that "Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements."³
8. The UK Government, in its Command Paper *The process for withdrawing from the European Union*, stated that "The rules for exit are set out in Article 50 of the Treaty on European Union. This is the only lawful route available to withdraw from the EU." Suggestions have been made that the UK could leave the EU by simply repealing the European Communities Act 1972. The Command Paper dismissed this proposal, noting that:

"It would be a breach of international and EU law to withdraw unilaterally from the EU (for example, by simply repealing the domestic legislation that gives the EU law effect in the UK). Such a breach would create a hostile environment in which to negotiate either a new relationship with the remaining EU member states, or new trade agreements with non-EU countries."⁴
9. In its report, *The process of withdrawing from the European Union*, the House of Lords European Union Committee concurred: "If a member state decides to withdraw from the EU, the process described in Article 50 is the only way of doing so consistent with EU and international law."⁵ **We agree with**

1 Electoral Commission, 'EU referendum results': <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> [accessed 8 September 2016]. The turnout was 72.2% of eligible electors.

2 The [European Union Referendum Act 2015](#)

3 [Article 50](#), Treaty on European Union.

4 Foreign and Commonwealth Office, *The process for withdrawing from the European Union*, Cm 9216, February 2016, pp 7 and 13: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/503908/54538_EU_Series_No2_Accessible.pdf [accessed 28 August 2016]

5 European Union Committee, *The process of withdrawing from the European Union*, (11th Report, Session 2015–16, HL Paper 138), para 14.

the position taken by the UK Government and the Lords European Union Committee that Article 50 is the only viable route for the UK to withdraw from the European Union.

Triggering Article 50 in line with the UK’s “constitutional requirements”

10. Article 50 goes on to state how withdrawal will be triggered: “A member state which decides to withdraw shall notify the European Council of its intention.” When the UK notifies the European Council of its intention to withdraw from the EU, a two year period commences in which arrangements must be negotiated for the UK’s withdrawal. Those arrangements must be agreed by the European Council, acting by qualified majority, and after obtaining the consent of the European Parliament. If no agreement is reached, the UK ceases to be a member of the EU at the end of the two year period unless all the member states of the EU (including the UK) agree to an extension. **The triggering of Article 50 is crucial. Whilst it is only one stage in a complicated and lengthy process, it is the moment at which the countdown starts and an initial deadline for the UK’s withdrawal from the EU is set.**

Revoking a notification under Article 50

11. It is unclear whether the UK could, after triggering Article 50, unilaterally choose to withdraw its notification of withdrawal from the EU (thereby stopping the two year countdown to withdrawal). The House of Lords European Union Committee concluded in 2015 that “There is nothing in Article 50 formally to prevent a Member State from reversing its decision to withdraw in the course of the withdrawal negotiations. The political consequences of such a change of mind would, though, be substantial.”⁶ Others argue that once triggered, Article 50 may not be unilaterally revoked by the member state concerned, although it could be reversed by the unanimous agreement of all EU member states.⁷
12. Participants at our seminar were also divided on this point. As one noted, “there is nothing in Article 50 itself one way or another; it does not say that you can retract or, once invoked, that you cannot retract. So it is left to the lawyers to have those enjoyable disputes to sort it out.”⁸ Should any attempt by the UK to unilaterally withdraw its notification under Article 50 be disputed by another member state, the matter would be decided by the European Court of Justice.
13. **It is unclear whether a notification under Article 50, once made, could be unilaterally withdrawn by the UK without the consent of other EU member states. In the light of the uncertainty that exists on this point, and given that the uncertainty would only ever be resolved after Article 50 had already been triggered, we consider that it would be prudent for Parliament to work on the assumption that the triggering of Article 50 is an action that the UK cannot unilaterally reverse.**

6 European Union Committee, *The process of withdrawing from the European Union*, para 15.

7 See, for example Jake Rylatt, ‘The Irrevocability of an Article 50 Notification: Lex Specialis and the Irrelevance of the Purported Customary Right to Unilaterally Revoke’ UK Constitutional Law Association Blog, 27 July 2016: <https://ukconstitutionallaw.org/2016/07/27/jake-rylatt-the-irrevocability-of-an-article-50-notification-lex-specialis-and-the-irrelevance-of-the-purported-customary-right-to-unilaterally-revoke/> [Accessed 30 August 2016]

8 Constitution Committee private seminar, July 2016

Prerogative power?

14. Given the uncodified nature of the UK's constitution, it is not entirely clear what the UK's "constitutional requirements" are for the purposes of Article 50. The Government's position is that it can invoke Article 50 as an act of royal prerogative, and that "there is no legal obligation to consult Parliament on triggering Article 50".⁹ Lord Keen of Elie QC, the Advocate General for Scotland, stated in the House of Lords that "the Executive has certain prerogative powers that it exercises in international legal matters, including the making and unmaking of treaties. That remains the position."¹⁰
15. Others have argued that, as a matter of domestic law, the Government is unable to trigger Article 50 without the consent of Parliament. A number of different reasons have been given for this. They include:
 - That invoking Article 50 would lead to the UK's withdrawal from the EU and hence to the repeal of the European Communities Act 1972 or its amendment such that it no longer fulfils its original purpose (providing for the application of EU laws and treaties in UK law). Since statute overrides prerogative powers, the latter cannot be used to begin a process that would effectively or actually repeal an Act of Parliament. In addition, the process would unavoidably affect citizens' statutory rights incorporated under the 1972 Act; this similarly requires statute rather than an exercise of prerogative power;¹¹
 - That the executive may not abrogate fundamental rights (including those protected by the EU Charter of Fundamental Rights) without an Act of Parliament having express words to that effect;¹²
 - That section 2(1) of the European Union Act 2011, which (among other matters) guarantees a role for Parliament in relation to the ratification of EU treaties, must be read as mandating a role for Parliament in relation to the invocation of Article 50.¹³
16. A legal challenge has been made to the Government's position that it may trigger Article 50 as an exercise of prerogative power. A full hearing at the

⁹ HL Deb, 18 July 2016, [col 430](#)

¹⁰ HL Deb, 18 July 2016, [col 432](#). See also Mark Elliott, 'Brexit: On why, as a matter of law, triggering Article 50 does not require Parliament to legislate' Public Law for Everyone Blog, 30 June 2016: <https://publiclawforeveryone.com/2016/06/30/brexit-on-why-as-a-matter-of-law-triggering-article-50-does-not-require-parliament-to-legislate/> [Accessed 31 Aug 2016]; Kenneth Armstrong, 'Push Me, Pull You: Whose Hand on the Article 50 Trigger?' UK Constitutional Law Association Blog, 27 June 2016: <https://ukconstitutionalallaw.org/2016/06/27/kenneth-armstrong-push-me-pull-you-whos-hand-on-the-article-50-trigger/> [accessed 31 Aug 2016]

¹¹ Nick Barber, Tom Hickman and Jeff King, 'Pulling the Article 50 "Trigger": Parliament's Indispensable Role', UK Constitutional Law Association Blog, 27 Jun 2016: <https://ukconstitutionalallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/> [Accessed 30 Aug 2016]

¹² John Adenitire, 'The Executive Cannot Abrogate Fundamental Rights without Specific Parliamentary Mandate: The Implications of the EU Charter of Fundamental Rights for Triggering Art 50', UK Constitutional Law Association Blog, 21 July 2016: <https://ukconstitutionalallaw.org/2016/07/21/john-adenitire-the-executive-cannot-abrogate-fundamental-rights-without-specific-parliamentary-mandate-the-implications-of-the-eu-charter-of-fundamental-rights-for-triggering-art-50/> [Accessed 30 Aug 2016]

¹³ T.T. Arvind, Richard Kirkham, and Lindsay Stirton, 'Article 50 and the European Union Act 2011: Why Parliamentary Consent is Still Necessary' UK Constitutional Law Association Blog, 1 July 2016: <https://ukconstitutionalallaw.org/2016/07/01/t-t-arvind-richard-kirkham-and-lindsay-stirtonarticle-50-and-the-european-union-act-2011-why-parliamentary-consent-is-still-necessary/> [Accessed 30 Aug 2016]

High Court is expected to take place in October 2016. We do not intend therefore to express a view as to the merits or otherwise of the differing legal arguments set out above. Rather we consider whether, and if so how, it would be constitutionally appropriate for Parliament to be involved, irrespective of whether the courts decide that parliamentary involvement is a legal requirement.

Parliamentary sovereignty

17. Parliamentary sovereignty is a core principle of the UK constitution. The referendum enabled the will of the UK people to be expressed, but it was, in strict legal terms, an advisory referendum only. As we observed in our 2010 report on referendums,¹⁴ Parliament can provide, in the legislation enabling a referendum, that a referendum result will automatically bring about certain legal consequences (although, being sovereign, Parliament can later amend or repeal such a provision), or it can expressly instruct the Government to bring forward legislation to implement the result.¹⁵ The 2016 referendum on membership of the EU does not technically fall into either category: the European Union Referendum Act 2015 contains no provision legally requiring the Government to act in a specific way, nor does it explicitly provide that the result is binding.
18. **The legislation that enabled the EU referendum did not set out how the result would be implemented. This has caused uncertainty and confusion in the aftermath of the referendum, particularly given the uncertainty over whether statutory authorisation is now required to trigger Article 50. Parliament may wish, in future, to ensure that detailed consideration is given to how the result of any referendum will be implemented in advance of the vote itself occurring, and to whether explicit provision should be made in the enabling legislation either to implement the outcome automatically or to instruct the Government to act on the result.**
19. Although the referendum was not legally binding, it was accompanied and preceded by clear political commitments from the UK Government to act on the referendum result.¹⁶ Indeed, the referendum was the result of a general election manifesto commitment by the Conservative Party which stated that “We will honour the result of the referendum, whatever the outcome”.¹⁷ Given that commitment, the question that follows is what role Parliament should play in taking forward that result.
20. One participant argued at our seminar that: “Parliament has not approved leaving the EU; we have simply gone towards a pure ‘direct democracy’ view of how the decision might be taken, which is a very big shift away from our

14 Constitution Committee, *Referendums in the United Kingdom* (12th Report, Session 2009–10; HL Paper 99) para 194.

15 Automatic implementation was, for example, set out in the [Parliamentary Voting System and Constituencies Act 2011](#) which contained amendments to electoral law to introduce the Alternative Vote electoral system if its adoption was approved by in the May 2011 referendum. Meanwhile, [section 1](#) of the Northern Ireland Act 1998 instructs the Government to act on the result of a referendum, stating that if a referendum result favours Northern Ireland becoming “part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty’s Government in the United Kingdom and the Government of Ireland”.

16 See Speech by the Prime Minister on Europe at Chatham House, 10 November 2015: <https://www.gov.uk/government/speeches/prime-ministers-speech-on-europe> [Accessed 2 September 2016]

17 The Conservative Party, *Conservative Manifesto 2015*, p 73: <https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf> [accessed 9 September 2016]

traditional constitution.” Parliament should not, they told us, be excluded from the process by which the UK leaves the EU simply because that course of action was decided by a referendum.¹⁸ Another stated that, “Even if it is a Royal Prerogative issue, the convention seems to me to be crystal clear, and that is, that you cannot make a major treaty change without getting Parliament’s prior approval, particularly when it has a clear knock-on consequence on domestic law that will follow on it.”¹⁹

21. One analogy often cited at our seminar and by other commentators is the use of the royal prerogative power to go to war, or to deploy the UK’s armed forces. We explored the issues around this prerogative power in two inquiries in 2006 and 2013 and concluded that there was now a convention that “save in exceptional circumstances, the House of Commons is given the opportunity to debate and vote on the deployment of armed force overseas”.²⁰ We added that:

“The Government have recognised that the need for Commons approval of deployment decisions is now a constitutional convention, and therefore politically binding on them ... The current arrangements are such that it is inconceivable that the Prime Minister would either refuse to allow a Commons debate and vote on a deployment decision, or would refuse to follow the view of the Commons as expressed by a vote.”²¹

22. Referendums are rarely held in the United Kingdom. Referendums which have the potential to affect such a significant change in the UK’s constitution are rarer still. There has thus been no opportunity for a convention to have formed to govern how Parliament should be involved in enacting and ratifying the result of a referendum. Nonetheless, we consider that there is a strong argument that enacting the result of a referendum of this magnitude should require at least the same level of parliamentary involvement as a decision to authorise a military deployment.
23. In addition, we note that whatever agreement is reached, Parliament will have to legislate to implement the UK’s new relationship with the EU. It seems only appropriate that the Executive ensures it has proper parliamentary approval for a process that will, eventually, require legislation to implement.
24. **It would be constitutionally inappropriate, not to mention setting a disturbing precedent, for the Executive to act on an advisory referendum without explicit parliamentary approval—particularly one with such significant long-term consequences. The Government should not trigger Article 50 without consulting Parliament.**

18 Constitution Committee private seminar, July 2016

19 *Ibid.*

20 Constitution Committee, *Constitutional arrangements for the use of armed force* (2nd Report, Session 2013–14; HL Paper 46) para 64. In the report, we rejected calls for legislation setting out the process of parliamentary approval. See also Constitution Committee, *Waging war: Parliament’s role and responsibility* (15th Report, Session 2005–06; HL Paper 236)

21 Constitution Committee, *Constitutional arrangements for the use of armed force*, paras 63–63.

Parliament's role

25. Parliament and the Government should discuss and agree the role each will play in the withdrawal process as a whole.²² The formal withdrawal process can be broken down into three stages, and we consider that some form of parliamentary approval or oversight will be required for each. The first stage is the triggering of Article 50. As we note above (see paragraphs 11–13), once Article 50 is triggered an initial deadline for the UK's withdrawal from the EU is set and the UK should act on the assumption that it could no longer unilaterally affect the timetable for withdrawal. Getting the timing and circumstances of the start of the formal negotiation process right is therefore vitally important. It should not be rushed.
26. The second stage is the negotiation process itself, while the third stage will be the point at which the negotiated outcome is agreed and adopted. There may, in addition, be some elements of the UK's on-going relationship with the EU which will require continued parliamentary scrutiny and oversight. The House of Lords European Union Committee recently published a report, *Scrutinising Brexit: the role of Parliament*, which addressed some of the questions as to how Parliament should be involved in the negotiation process, focusing in particular on the second of these stages.²³ We consider that thought should also be given at an early stage as to how the negotiated withdrawal package will be agreed and implemented by Parliament.
27. **In our representative democracy, it is constitutionally appropriate that Parliament should take the decision to act following the referendum. This means that Parliament should play a central role in the decision to trigger the Article 50 process, in the subsequent negotiation process, and in approving or otherwise the final terms under which the UK leaves the EU.**
28. In this report we focus mainly on the manner in which Parliament should approve the triggering of Article 50. Yet the issue of parliamentary involvement in the negotiation process as a whole must also be tackled sooner rather than later. In Chapter 4 of this report we set out some of the issues that Parliament may wish to consider should it choose to address Parliament's wider role in the negotiation process at the same time as considering the narrower issue of the triggering of Article 50.

22 For ease of reference, we use the term 'withdrawal process' to cover both negotiations over the terms of the UK's exit from the EU and the negotiation of the new relationship between the two, as identified by the Lords EU Committee. While they could take place consecutively, we consider them to be parts of a single withdrawal process.

23 European Union Committee, *Scrutinising Brexit: the role of Parliament*, (1st Report, Session 2016–17, HL Paper 33)

CHAPTER 3: LEGISLATION OR A RESOLUTION

29. If Parliament is to approve the triggering of Article 50, it could do so either by means of legislation, or through a resolution (either of the Commons, or of both Houses). As we note above (see paragraph 16), the courts may rule later this year on whether legislation is legally required for the Government to trigger Article 50 in accordance with the UK's constitutional requirements. Whatever the outcome of that court case, we consider that proceeding without parliamentary involvement, whether by means of a resolution or legislation, would be unwise. In this Chapter, we set out the advantages and disadvantages of the alternative mechanisms for parliamentary involvement.

Legislation

30. One of the main benefits of using primary legislation²⁴ is that it would provide legal certainty for the triggering of Article 50 (both in domestic courts and in the European Court of Justice). As one of our seminar participants noted: “If you are going to initiate [a] procedure that inevitably, unless further action is taken, will lead to the repeal of an Act of Parliament, the safest possible course is to introduce a Bill that enacts the authority to the Government to trigger Article 50.”²⁵ Other participants agreed, with one stating that:
- “lots of very serious things can be done by resolution of the House of Commons—Governments can be thrown out of office and similar matters. ... But I am very taken by ... [the] argument that you will have to put things beyond doubt. If it is possible to say that the authority of an Act is greater in the hierarchy than a resolution, then for safety first I would go for that”.²⁶
31. To this end, an Act could make clear that Parliament had given its authority to the Government to start a process that might well lead to existing legislation being repealed or substantially amended. Legislation of this nature would address any constitutional uncertainties that might otherwise arise (see for example paragraph 15) about the legitimacy of displacing existing primary legislation through the use of a prerogative power in this area.
32. Given the nature of the UK's constitution, resting as it does on Acts of Parliament, convention and common law, the contents of any legislation would become part of the UK's “constitutional requirements” for the purposes of Article 50. This means that Parliament could choose to set out requirements that would allow it to take control of the process by which Article 50 was to be triggered. For example, an Act could state that Parliament authorised the UK Government to trigger Article 50 if—and only if—the Government had first presented for parliamentary approval its proposal for the UK's new relationship with the EU on the basis of which it intended to negotiate. We note in addition that if Parliament required the Government to meet certain prerequisites before Article 50 could be triggered, it would strengthen the Government's position against those in the EU who argue that no negotiations, even informal, should take place before Article 50 has been invoked.

24 Although it has been argued that there is scope within [section 2\(2\)](#) of the European Communities Act 1972 for secondary legislation (in the form of an Order in Council) to be used, we consider that primary legislation would be more suitable in providing the advantages set out in this chapter.

25 Constitution Committee private seminar, July 2016

26 *Ibid.*

33. Legislation would require the assent of both Houses of Parliament, and would afford members of both Houses the opportunity to debate fully the issues at hand. The legislative process also provides a mechanism for reconciling differences between the two Houses (ping-pong), which would not be available should the Government seek a resolution of both Houses (see paragraph 42 below).
34. Legislation would clearly take some time to pass through both Houses of Parliament. The time taken, and the difficulty of a Bill's passage, would depend to some extent on the content and purpose of the legislation. Yet, given how controversial the subject matter will be, keeping the scope of a Bill contained during its passage through Parliament might well present significant challenges to the business managers of both Houses. It is possible—even likely—that a narrow Bill focused on the issue of the triggering of Article 50 might find itself the focal point of wider debates about the role Parliament should play in the negotiation process more generally. Some may regard this as a good thing, others a disadvantage, but we note that the likely result is that it could be difficult for a Bill to pass through both Houses in a relatively short timeframe.
35. Political difficulties may arise should the devolved legislatures choose to vote on legislative consent motions relating to a Bill. We do not consider that a Bill relating to Article 50 would require legislative consent from the devolved nations—and particularly not if the Government put forward a tightly drawn Bill that focused solely on the issue of triggering Article 50. Triggering Article 50 is not a devolved matter nor does it alter devolved powers. There is also an argument that the Sewel convention²⁷ would not apply in respect of any legislation relating to withdrawal from the European Union following a UK-wide referendum, since these circumstances are not 'normal' within the meaning of the convention. It is of course possible that the devolved legislatures would become involved in the passage of legislation by choosing to vote on legislative consent motions in any case.²⁸ In that event, it is clear that the UK Parliament could legally pass such legislation even if legislative consent were withheld by any of the devolved legislatures.²⁹ Nonetheless, this issue would not arise should parliamentary involvement take the form of a resolution, rather than legislation, and in either case the position taken by the devolved legislatures would be a political rather than a legal constraint on the UK Parliament.

27 The Sewel Convention, also set out in the Scotland Act 2016, states that the UK Parliament will “not normally legislate with regard to devolved matters” without the consent of the relevant devolved legislature. Consent is also sought in respect of UK legislation affecting the extent of devolved powers (see Devolution Guidance Note 10: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60985/post-devolution-primary-scotland.pdf [accessed 3 August 2016]). Consent may therefore be required for amendments to the Scotland Act 1998, Northern Ireland Act 1998 and Government of Wales Act 2006 at the point of withdrawal from the EU, alongside the repeal or amendment of the European Communities Act 1972.

28 Devolved administrations are able to bring forward Legislative Consent Motions (LCMs) on matters that they consider to be within devolved competence, irrespective of whether the UK Government agrees that the matters require an LCM. A devolved administration may also advise their legislature not to support an LCM.

29 When we asked the Government to clarify whether the relevant section of the Scotland Act 2016 ([section 2](#)) was intended to give legal force to the Sewel Convention, the UK Government told us that the Convention remained a convention. See Constitution Committee, *Scotland Bill* (6th Report, Session 2015–16; HL Paper 59), paras 37–41, and the Government response to that report: <http://www.parliament.uk/documents/lords-committees/constitution/Scrutiny/Scotland-Bill-Government-response-110116.pdf> [accessed 9 September 2016]

A resolution

36. A resolution stating Parliament's approval for the triggering of Article 50 could be agreed by the Commons or both Houses far more swiftly than the passage of a Bill to the same effect. This would remove any uncertainty about Parliament's acceptance of the referendum result, but would not necessarily provide a water-tight legal authority for triggering Article 50 against challenges in either the domestic or European courts. If the Government decide to proceed with triggering Article 50 as an exercise of the royal prerogative, however, then a resolution of one or both Houses may provide an appropriate vehicle for parliamentary involvement in the process.
37. Any resolution could be narrow in scope (simply granting parliamentary approval for the Government to trigger Article 50 at a time of their choosing), or address a range of broader questions—for example, setting out conditions for the triggering of Article 50 or laying down the mechanisms for parliamentary oversight of the withdrawal process. Any conditions set out in a resolution would not be legally binding on the Government, however difficult they might be for the Government to disregard in political terms.
38. In addition, a wide ranging resolution would be unwieldy to construct and relatively awkward to amend and debate. It is likely therefore that a resolution would be focused fairly narrowly on the triggering of Article 50. It would be harder for such a resolution to become a vehicle for a wider debate about parliamentary involvement in the negotiation process as a whole. A resolution would offer far less scope for amendment or debate than primary legislation.

A motion of both Houses?

39. If parliamentary involvement were to take the form of a resolution, then consideration would need to be given to what type of motion should be put forward, and to whether the assent of both Houses would be needed. The European Union Act 2011 may offer a useful precedent. It sets out two different procedures by which Parliament may authorise the Government to move forward with decisions at an EU level, short of Treaty changes that require a referendum.³⁰ In certain specified cases, an Act of Parliament is required. In others, a motion is put before both Houses of Parliament, along with a draft of the decision to which assent is being sought, and both Houses are invited to pass the motion without amendment. In either case, the consent of both Houses is required.
40. There are other precedents for motions relating to the exercise of the royal prerogative that place parliamentary approval solely in the hands of the House of Commons. As we noted above, the approval of the House of Commons is required, by convention, before the deployment of the UK's armed forces for active service.³¹ The process involves an approval motion being put before the House of Commons only, while an unamendable motion to "take note" of the issue is debated by the House of Lords. There is also the example offered by the Constitutional Reform and Governance Act 2010 in respect of ratifying treaties.³² Under that Act, the Government must lay a copy of a treaty before Parliament prior to ratification, and either House has 21 days to resolve that it should not be ratified. While a resolution of the House

30 [European Union Act 2011](#)

31 Constitution Committee, *Constitutional arrangements for the use of armed force*

32 Constitutional Reform and Governance Act, [Part 2: Ratification of Treaties](#)

of Lords can be overridden by the Government, the Government cannot proceed in the event the House of Commons opposes ratification.

41. Given the political and constitutional significance of decisions relating to the UK's membership of the EU, participants at our seminar generally felt that both Houses should be involved in approving the Government's decision to move forward with Article 50. One participant noted that "it is much better that it should be by both Houses. Quite apart from anything else, one of the political issues around this is fixing Parliament collectively with responsibility for taking this process forward."³³
42. It should be noted that if the assent of both Houses were sought by resolution, it would have to be by way of separate approval motions laid in each House. Such motions are always amendable. There is a risk that one or other House could amend its approval motion, leading to the two Houses passing differently worded resolutions. Unlike the process by which the two Houses pass primary legislation, there is no mechanism by which the two Houses can attempt to reconcile and agree a common wording for resolutions of this nature—although it would clearly be highly desirable for the main parties to reach an agreement on the precise wording of any such resolutions.

Legislation or resolution?

43. **We consider it constitutionally appropriate that the assent of both Houses be sought for the triggering of Article 50.**
44. **An Act of Parliament would ensure that any constitutional uncertainties are avoided, and make certain that Parliament has the opportunity properly to debate the issues at hand and define in law the "constitutional requirements" that must be met before Article 50 is triggered. Resolutions would allow Parliament swiftly to demonstrate its position on the triggering of Article 50, while—in the case of a motion simply setting out that position—keeping that issue separate from wider debates about Parliament's proper role in the negotiation process.**
45. **We consider that either mechanism would be a constitutionally appropriate means for the Government to secure parliamentary approval for the triggering of Article 50.**

CHAPTER 4: THE SCOPE OF THE LEGISLATION OR RESOLUTIONS

46. We do not intend to set out in this report the detail of what any legislation or resolution put before Parliament should contain. If primary legislation is used, there will be greater scope for Parliament to address matters beyond the relatively narrow confines of the triggering of Article 50, as well as wider opportunities for members of both Houses to debate the issues. A resolution would most likely be more limited—or focused—in scope, and members would be limited by the procedures of both Houses in the extent to which detailed amendment and debate could take place. In either case, the Government will be responsible for introducing a draft text for Parliament to consider.
47. **Parliament and the Government will need to choose whether to focus at this early stage solely on the issue of the triggering of Article 50 (and on whether any specified prerequisites should form part of the UK’s “constitutional requirements” for that purpose), or whether to take the opportunity to discuss more broadly how Parliament and the Government expect to take forward the withdrawal process as a whole.**

Separating Article 50 from symbolic acceptance of the referendum result

48. The triggering of Article 50 has become, in many people’s eyes, a symbol of Government and Parliament’s decision to accept the referendum result. This is unfortunate. The triggering of Article 50 will set an initial deadline for the UK’s withdrawal, and we do not believe it is in the UK’s interest to trigger Article 50 precipitately.
49. A delay in triggering Article 50 in order to allow time for informal negotiations, or to allow Parliament and Government an opportunity to discuss and agree a vision of the UK’s new relationship with the EU, should not be mistaken as an attempt to reject the result of the referendum. Public perception is important, however. It may therefore be helpful for Parliament as a whole to acknowledge the referendum result in any legislation or resolution and to instruct the Government to start making the necessary arrangements for the withdrawal of the UK from the EU—whilst making it clear that Article 50 is an intermediate stage in that process, and not the start point.
50. **We recommend that any legislation or resolution should clearly set out Parliament’s recognition and acceptance of the referendum result, but should seek to make clear the distinction between that acceptance and the decision as to when Article 50 should be triggered. Article 50 should be triggered only when it is in the UK’s best interests to begin the formal two-year negotiation process.**

Options for greater detail: a route map?

51. Participants at our seminar generally agreed that Parliament ought to consider how it would be involved in the negotiation process as a whole now, rather than later. One noted that “we need to look a lot further into the future ... at what sort of problems will be presented. It is not just the early stage. How far can we ... get an indication of what the negotiations would be—a negotiating

route map, if you like? What will happen in the last quarter of the two years of Article 50?”³⁴ Another suggested that:

“From the perspective of good government and what people can expect in the months and years ahead, it would be very helpful if the legislation could set out a little more than just simply authorising the Executive to trigger Article 50. ... it could set out what the appropriate machinery for the next step or the step after that would be.”³⁵

52. If Parliament decides to use this opportunity to set out its role overseeing negotiations, it will need to tackle the difficult question of the appropriate balance between the benefits of parliamentary involvement in the negotiation process and the risk of being over-prescriptive and hobbling the Government’s ability to negotiate. As one participant in our seminar noted:

“If there is some detail in an authorising Bill, there will be a very difficult balance to strike. How do you put in enough detail so that people understand and have confidence in what is proposed? To what extent do you find that—like Gulliver—you are being tied down by myriad small ropes on things that you cannot do in the negotiation process? That will be quite difficult, but it will be important to have enough transparency that people can see the proposed machinery.”³⁶

53. **The following issues will need to be discussed, and consideration given to whether they should be addressed by any bill or resolution:**

- **Whether preconditions should be set for the triggering of Article 50—such as the presentation of specified information to Parliament for approval—which would then become the “constitutional requirements” that must be met before the formal negotiation period begins;**³⁷
- **Whether ministers should in principle be required to report back to Parliament at all, or at specified, stages of the negotiation process;**
- **How Parliament might be involved in the negotiation process;**
- **Whether and at which stages Parliament’s consent should be required for the negotiation process to progress; and**
- **How Parliament should ratify the withdrawal treaty.**

34 Constitution Committee private seminar, July 2016

35 *Ibid.*

36 *Ibid.*

37 See paragraph 31

CHAPTER 5: CONCLUSION

54. **The referendum result was clear. Parliament is now responsible for ensuring that the Government takes forward the complex process of negotiating the UK's withdrawal from the European Union in a manner that achieves the best possible outcome for the UK as a whole. The focus must now be on how Parliament and the Government will work together to that end.**
55. **That co-operation should start now. Parliament and the Government should, at this early stage, take the opportunity to establish their respective roles and how they will work together during the negotiation process. The constitutional roles of each—the Executive and the Legislature—must be respected, beginning with parliamentary involvement and assent for the invoking of Article 50.**

APPENDIX: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Lord Beith
 Lord Brennan
 Baroness Dean of Thornton Le Fylde
 Lord Hunt of Wirral
 Lord Judge
 Lord Lang of Monkton (Chairman)
 Lord Maclennan of Rogart
 Lord MacGregor of Pulham Market
 Lord Morgan
 Lord Norton of Louth
 Lord Pannick*
 Baroness Taylor of Bolton

*Lord Pannick recused himself from the inquiry because he is counsel for the Lead Claimant in the litigation mentioned in paragraph 16 of the report.

Declarations of interest

Lord Beith
No relevant interests
 Lord Brennan
No relevant interests
 Baroness Dean of Thornton-le-Fylde
No relevant interests
 Lord Hunt of Wirral
Partner, DAC Beachcroft LLP
Chair, British Insurance Brokers Association
Chair, Lending Standards Board
Chair, Credit Union Expansion Project
Chair, Global Risks
Chair, Society of Conservative Lawyers
Chair, Sir Edward Heath Charitable Foundation
 Lord Judge
No relevant interests
 Lord Lang of Monkton (Chairman)
No relevant interests
 Lord MacGregor of Pulham Market
No relevant interests
 Lord Maclennan of Rogart
No relevant interests
 Lord Morgan
No relevant interests
 Lord Norton of Louth
No relevant interests
 Baroness Taylor of Bolton
No relevant interests

A full list of members' interests can be found in the Register of Lords' Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

Professor Mark Elliott, Professor of Public Law at the University of Cambridge, and Professor Stephen Tierney, Professor of Constitutional Theory at the University of Edinburgh, acted as specialist advisers for the inquiry. They both declared no relevant interests.

