

## Ceding Power to the Executive; the Resurrection of Henry VIII

The Rt. Hon Lord Judge

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We shall shortly be taking part in a referendum which will decide whether we should remain in or depart from the European Union. When casting my vote I shall certainly be taking account of the sovereignty issue. However there is an earlier stage when the issue of sovereignty arises, and that is within the Parliamentary process itself. How has our Parliamentary process evolved, and how is it evolving? As a result of the Parliamentary processes themselves, are we ceding power to the executive which should be retained by Parliament? My thesis is that we have done so, and we have become habituated to it.

I am a member of the Constitution Committee of the House of Lords. I am not speaking as its representative. These are my personal thoughts. I am not, emphatically not, making any party political points during this lecture. We happen to have a Conservative administration. What I have to say has applied or would apply to a Labour government, or a Liberal government, or a Conservative government, or any coalition government. I am not questioning, not for one moment questioning or seeking to undermine in any way the ultimate supremacy of the House of Commons, or somehow trying to boost the authority of the unelected Lords. The issue is not between the Commons and the Lord, but between Parliament and the executive. It has been highlighted recently by votes in the Lords on Tax Credits which were adverse to the government. In response to the Strathclyde Review, set up to examine how the government might secure their business in Parliament, two powerful reports were published, one by the Constitution Committee, the other by the Delegated Powers and Regulatory Reform Committee. I have drawn heavily from them and also from the Hansard Society's impressive work on delegated legislation: *The Devil is in the Detail*. How many of you here who are not members of the Lords have read either of these impressive reports? They matter. They have not received the publicity they merit.

Some preliminary thoughts.

The principle of Parliamentary sovereignty is so elementary that we take it for granted. It is the foundation for our half written constitution. Democracy and the rule of law are intertwined with it. The democratic process, as a process, has an outing every four or

five years at the general election, but it is only by the operation of Parliamentary sovereignty that we remain a democracy on every other day of the year. But what Parliamentary sovereignty never has been is executive sovereignty, or ministerial or government sovereignty. Indeed Parliamentary sovereignty is the antithesis of executive sovereignty. The two concepts are mutually contradictory. The democratic process is not meant to give, and our constitutional arrangements were not intended to provide us with executive sovereignty. No Prime Minister is a monarch, or president, not even the head of state. The manifesto of the successful party at the general election is not a Parliamentary statute. In law it has no force. Indeed if it did every government that I can remember would have been acting unlawfully when, as they all do, it fails to implement, and sometimes acts in flagrant breach of a manifesto commitment. For these breaches they answer not in the Crown Court, but to the electorate, next time around.

The manifesto may be seen as the start of the process which sometimes culminates in a statute and the will of the majority in the Commons on a legislative measure must ultimately prevail. At most the House of Lords can delay the process, asking the Commons to think again.

When we speak of the sovereignty of Parliament nowadays we tend, perhaps inevitably, to think of the majority in the Commons having its way, of winning. Sovereign is a word which implies primacy, triumph. Fair enough. But surely we should remember that the sovereignty of Parliament has a less glamorous but no less crucial role in our constitution. At the heart of the development of our constitutional arrangements, Parliament is there to protect us from authoritarianism, from despotism, from an over mighty monarch, but also from an over mighty executive. That responsibility remains undiminished. Perhaps nowadays that principle has become a little difficult for the executive, with a majority in the Commons, to stomach. The executive in a hurry, and in the search for a daily headline all executives now seem to be in a hurry, hates to contemplate delay, or contradiction. We will be referred to the manifesto, as if the combination of manifesto and electoral success has the authority of and effectively replaces the need for a statute. But if between them the Commons and the Lords together, or separately, simply rubberstamp the legislative programme of the party with a majority in the Commons, when asked to do so, Parliamentary sovereignty would have degenerated into a mere cipher, a convenient

catchphrase. That is the concern behind the term 'Henry VIII' clauses, deriving from the Statute of Proclamations 1539 of which there have been and continue to be an alarming profusion. As mitigation for traversing ground covered by the recent reports to which I have just referred, may I be allowed to repeat what I have said publicly when addressing the Lord Mayor of London on behalf of the judiciary in 2010: in the last session of Parliament just over one hundred Henry VIII clauses had been enacted.

...proliferation of clauses like these will have the inevitable consequence of yet further damaging the sovereignty of Parliament, and increasing yet further the authority of the executive over the legislature... Henry VIII clauses should be confined to the dustbin of history.

That plea, like so many similar exhortations, if it was ever noticed at all, was simply chucked into the dustbin.

When we speak of Henry VIII clauses, we believe we are referring to the Parliament which enacted that statute and vested arbitrary and dictatorial powers to that terrifying monarch. In doing so, we insult the memory of many brave, but unknown, because this is all pre-Hansard, members of the Commons. I venture to suggest that they would have been appalled at the modern legislative habit of bestowing what we call Henry VIII powers on any old Secretary of State, and insulted that we dismiss them in this way.

Forget the idea that Henry VIII only became an ogre after he suffered a dangerous head injury while out jousting. When he came to the throne in 1509, for the sake of cheap popularity, he staged a mock trial of his father's loyal servants, Epsom and Dudley. After their executions he did not return to his subjects what had been unlawfully taken from them. He simply spent the money having extravagant fun. He gave, and betrayed his solemn royal oath given to Richard Aske that he would address the grievances of the participants in the Pilgrimage of Grace. As soon as the opportunity arose he ordered the Duke of Norfolk to deploy what we would call merciless state terrorism against them. As for his six wives, he confused conscience with concupiscence. Even if we cannot spare a moment sympathetic thought for Catherine of Aragon, cast aside for the sexually fascinating Ann Boleyn, should we not reflect on the hypocrisy which gave him an aching conscience about sleeping with his brother's widow, because their marriage had been consummated, but created no pangs about sleeping with the sister of a woman with whom he had already

fathered a child. Spare a tiny thought for Catherine Howard sharing a bed with that gross bloated smelling forty-nine year-old man who lusted after her. Or Catherine Parr, that remarkable educated woman, the first woman in England to be identified as the author of a printed book, the Lamentation of a Sinner, forced to marry him and only surviving when he turned against her by the most abject self-humiliation, knowing that if she appeared to Henry even to begin to question, let alone discuss religious issues she would have lost her life. Standing up to Henry VIII required enormous courage. No Prime Minister can begin to exert such unimaginable terror.

Yet, contrary to the popular perception, it was the Statute of Proclamations itself which demonstrated that in Tudor England there were at least perceived to be some limitations on royal power. The statutory programme of the Reformation Parliament changed England. Maybe it did give Henry VIII everything he wanted, but he needed Parliamentary consent. In the 1539 Parliament itself, the Act of Six Articles defined doctrinal matters as the king wished. Literally. His own handwriting covers the draft manuscript. In brief it was Catholicism, with the King replacing the Pope. And how did the Merrie Monarch, as Head of the Church, exercise his new powers? Shortly afterwards three Catholics were hanged drawn and quartered for treason: three Protestants were burnt alive for heresy. And they were dragged to their deaths, two by two along the filthy road; one martyr of each faith was carried on the hurdle side-by-side with the martyr of another.

Despite the absence of Hansard we know something of the history. It starts with what I shall describe as a manifesto from Thomas Cromwell. As early as 1535 he had argued for legislation that proclamations by the King should have 'as good effect as any law made by Parliament'. We do not have the original bill which was introduced in the Lords. Basing ourselves on a rather muddled letter written by the French ambassador it looks as though the idea may have been to allow the King some serious tax-raising powers by proclamation. If that is right, our constitutional history might have been very different. What would have happened to 'no taxation without representation?' But the ambassador may have been wrong, and we may have misinterpreted his letter. There is no mistaking the title. As we shall see, it suggests wide-ranging proposals to extend the Royal prerogative. It was taken to the Commons, arriving at Westminster Abbey where the Commons sat, on 13 June. The entire process in the Commons would have been expected to conclude in three consecutive

days: three readings on three sitting days. But far from rubberstamping the bill the Commons not only debated it, they amended it. A contemporary letter from Lord Lisle's agent, John Husee speaks of the Commons 'resting' on an act for proclamations, but the time lag speaks for itself. Although it arrived in the Commons on 13 June it was not returned until 24 June. More important still, the Commons returned a new bill. This, mark you, a House which lost its Speaker, Nicolas Hare, to the Tower for at least part of the 1539-40 session, until Easter 1540, apparently for infringing the Royal Prerogative, and as far as I have been able to check, without trial, by giving advice to John Skelton on how, in his will, to evade the Statute of Uses. Was that tax evasion or tax avoidance? We can imagine why it happened, but it is more important to notice that when it happened, the House did not claim any Parliamentary privilege. More important still this House included members from those parts of the North and East of England which had seen the butchery which followed the Pilgrimage of Grace. But they returned a new bill. Subject to minor amendments the Lords then consented to this new bill and expedited it. And so it was enacted. I repeat this was a different bill, and therefore a rather different statute. Was Cromwell's original manifesto fulfilled?

So, to the title which begins the myth: *An Act that Proclamations made by the King shall be obeyed*. That is pretty stark, and I am sure that this was in the original bill. So, probably, was the preamble which confirms the myth. After castigating wilful and obstinate persons for disobeying:

What a King by his regal powers may do... the King's Highness... should make and set forth proclamations for the good order of his realm... be it therefore enacted that always the king for the time being, and with the advice of his Honourable Council, may set forth... by authority of this Act his Proclamations under such pains and penalties... as shall seem necessary... And the same shall be obeyed, observed and kept as though they were made by Act of Parliament for the time in them limited, unless the King's Highness dispense with them...

That's all very unequivocal. It reads as though the King was give power to legislate by proclamation. So we call them 'Henry VIII' clauses.

But you need to read on, and assuming that a myth can explode, this one does. Given the history of the legislative progress, this clause must have come from the Commons.

Providing always that the words, meaning and intent of this Act be not understood, interpreted, construed or extended, that by virtue of it any of the King's liege people... should have any of his or their inheritances. Lawful possessions, offices, liberties, privileges, franchises, goods or chattels taken from them...

(Nowadays we would call this a 'rights' clause, which leads on to yet more protection for the subject.)

...nor that by any proclamation to be made by virtue of this Act, any acts, common laws (standing at this present time in strength and force) nor yet any lawful or laudable customs of this realm...shall be infringed, broken or subverted: and specially all those acts standing this hour in force... but that every such person...shall stand and be in the same state and condition, to every respect and purpose as if this act...has never been made.

Act here meant statute. This proviso is equally unequivocal. I respectfully disagree with historians who treat the Statute of Proclamations as if it represented some pinnacle of regal power or Parliamentary subservience.

What it comes to is this. What we call Henry VIII clauses were no such thing. They were no more than a wish list. The King's proclamation could not change existing laws, in particular could not alter any Act of Parliament. I want to repeat and emphasise, not alter any Act of Parliament. Nor interfere with existing rights. Whatever the intention behind this Act, with the mastermind Cromwell advancing it, the Bill sent back from the Commons to the Lords simply had the effect of giving statutory force to those matters which fell within the ambit of the Royal prerogative, which consistently with the Act of Six Articles, included religion. For the first time Cromwell had failed to manage the commons. His future because very short. In 1540 he was executed.

Anyway, that is the notorious Statute of Proclamations. What would the Commons of 1539 have made of the Constitutional Reform and Governance Act 2010 (enacted under a Labour administration). It is a huge piece of constitutional legislation which now governs the Civil Service, the ratification of Treaties, Parliamentary Standards, and Freedom of Information. These are far from trivial matters, yet it enabled any Minister of the Crown, by

statutory instrument, to make such provision as he thought appropriate in relation to any provision of the Act, a constitutional Act. Such an order could:

- a) amend, repeal or revoke any existing statutory provision;
- b) include supplementary, incidental, transitional, transitory or saving provision

So, subject to approval by resolution of both Houses, we bestowed on any Minister powers through delegated legislation to regulate our constitutional affairs, in the words of the 1539 Act, to infringe, break or subvert statute. I shall shortly come to the realities of the approval process but just one more example of very many similar provisions, usually enacted against the strong advice of the relevant Parliamentary committees. These concerns are repeatedly expressed.

The Childcare Act 2016 (now a Conservative administration), is a skeletal act whose objective it to make provision for free childcare available to working parents. It says very little, but it creates huge ministerial powers. When it was a Bill, the Constitution Committee complained 'legislation of this type increases the power of the executive at the expense of Parliament.' It was described by the Delegated Powers Committee in unequivocal language.

In our view, the government's stated approach to delegation is flawed. While the Bill may contain a legislative framework, it contains virtually nothing of substance beyond the vague 'mission statement' in clause 1 (1).

Those amply justified expressions of concern made no difference to the Act. The government is not bound by them. To discharge this mere 'mission statement' power has been given to the Secretary of State to legislate by regulation. It includes eleven specific regulation making powers, including regulations to confer powers on Revenue and Customs, regulations to create criminal offences, regulations to impose financial penalties, and indeed identifies the relevant level of sentence. Over and above all this regulations may:

- a) confer a discretion on any person;
- b) make different provision for different purposes;

- c) make consequential, incidental, supplemental, transitional or saving provision;
- d) amend, repeal or revoke any provision made by or under an Act (whenever passed or made.)

No notice whatsoever can have been taken of the powerful comments by the Committees vested with responsibility for overseeing our constitutional arrangements. A discretion given to 'any' person: I emphasise, 'any' person, presumably someone identified by, and agreeable to, the executive: power to repeal any existing, or indeed any statute even one not yet enacted. What on earth do you think the Commons of 1539 would have called such a provision? I think their language would have been unprintable, and the Speaker might have wondered why he had risked incarceration in the tower.

In 1539 the Act attracted virtually no notice. Contemporaries did not give it the status ascribed to it by later historians. The Lisle Letters offer us a clue. There is constant reference to the Act of Six Articles, and John Husee informs Lord Lisle of statutes relating to vagabonds and sturdy beggars, and fishing, and hawks eggs. No more about the 'resting' act. Within ten years it was repealed. The history of the next one hundred and fifty years makes clear our national antipathy for government by diktat. By 1556 it was declared by the judges that 'no proclamation in itself may make a law which was not law before; for a proclamation is only to confirm and ratify a law or statute, nor could change the law or make new law'. When James I attempted to resuscitate government by proclamation, the Commons petitioned him explaining their

...indubitable rights not to be made subject to any punishment that shall extend to their lives, lands, bodies or goods, other than such as are ordained by the common laws of this land and all the statutes made by common consent in Parliament.

And, of course, the whole purpose of the 1688 Revolution was to eradicate the pretended power of the king to suspend or dispense with Statute.

1688 and the years since have provided us with simple constitutional principles. Forgive me trying to spell out two sentences what could occupy a very large tome. It is the exclusive responsibility of Parliament to make, or amend or repeal, the laws which govern



the country. It is the responsibility of the executive to govern the country in accordance with those laws. For today's purposes I need not add the responsibility of the judiciary to ensure that all those exercising power exercise it lawfully. All this is simple enough until, exercising its legislative sovereignty, Parliament delegates part of the law-making responsibility to the executive, and when it does so retains very little more than, in reality, nominal control. That is where the crunch is found, and my concern arises.

This is not an attack on delegated legislation. Delegated legislation is essential. Call it secondary or subsidiary legislation, the legislative process would collapse if questions of administration, like, for example, the height of the pavements in the street, or the correct design for the speed limits on the roads were to be the subject of primary legislation. In the *New Despotism*, written in 1929, by one of my less garlanded predecessors, Lord Hewart, written incidentally when he was in office, withering scorn was directed at delegated legislation. Unlike the Statute of Proclamations the title actually said it all. Looking at the work as a whole his concern was directed to the increase of bureaucratic, departmental authority over the citizen. In different ways concern about this form of law-making has continued ever since. Indeed over the years Parliament itself has recognised the dangers and introduced reforms designed to address the problems of delegated legislation and Henry VIII clauses. By not naming any individual among many of great distinction, I mean no disrespect to them or the many committees and working parties which have sought to address it.

It has been addressed by statute, beginning with the Statutory Instruments Act 1946. A more recent example is the Legislative and Regulatory Reform Act 2006, with the super affirmative procedure. Parliament itself, through working parties and Inquiries and committees like the Secondary Legislation Scrutiny Committee, the Delegated Powers and Regulatory Reform Committee and the Constitution Committee in the Lords – which are not replicated in the Commons – as well as the Joint Committee on Statutory Instruments has sought to exercise some control, perhaps better put, a restraining hand on government, offering measured and forceful observations as and when the need arises. On occasions the concerns expressed by one or other Committee are accepted and legislative proposals amended. From time to time, criticism of Henry VIII clauses in a draft bill is so powerful that the government backs off and removes the offending clause. But not always, not by any

means always. When it does so, one can legitimately question why Henry VIII powers were ever included in the Bill in the first place. Nevertheless Departments continue to insert them. Perhaps they are included in every Department's computer. The Childcare Act provides a powerful example of the too frequent occasions when the government simply ignores the Committees. And it is a constitutional principle that Parliament is entitled to reject the advice of any of its Committee.

In the meantime, what was once a small stream of delegated legislation in 1929 has become an inundation. And as the committees have noted, now focus on policy issues as well as administration. Since 1950, sixty-five years, some one hundred and seventy thousand statutory instruments, prepared not by Parliamentary Counsel but by government departments, exercising powers granted by legislation, have been laid before Parliament. In that time seventeen, not seventy, have been rejected by one or other house. Even I can do the maths. It is one in ten-thousand, 0.01%. Since 1997 there have been twenty-three thousand such instruments, with a further eight thousand in Scotland, and nearly four thousand in Northern Ireland since 2007. Five, now six, have failed in the Lords. Let me break this down further. In the five years from 2005 until 2009, in every single year, between eleven thousand and thirteen thousand pages of statutory instruments have come into force. 2009 is the last year when figures are available, perhaps because even a modern computer cannot keep up with the numbers. These pages dwarf primary legislation, of which there is too much anyway. In passing, I congratulate my former judicial colleagues on the general public assumption that they know all the law. More seriously, spare a thought for the District and Circuit Judges up and down the country, so often deciding cases without a lawyer on either side.

Some statutory instruments do not require parliamentary scrutiny; many are not laid before Parliament, and some of those which are laid before Parliament come into force before they are laid. Concentrating on the Commons, as that is where power must lie, between six and ten statutory instruments are laid before the relevant committee daily when it is in session, with even more each day during the last session. The sittings of the relevant committee do not often last longer than ninety minutes. Statutory instruments are very rarely debated in the House itself. From the executive's point of view, of course, this has the advantage that there is very little, if any, public interest in statutory instruments. Unlike

primary legislation they rarely attract public debate. And only those of us who have had to try and understand what a statutory instrument actually means can recognise, as I certainly do, that it is difficult to become passionate about a piece of delegated legislation. It is remarkably boring. Moreover, the burden of responsibility on the Commons means that if they worked twenty-four hours a day for every day of the year there would still not be enough time. Nevertheless the stark reality is that the last time the Commons – the elected chamber – rejected a statutory instrument was in 1979, over thirty-five years ago. As the House of Lords, between 1968 and today, it has rejected six such instruments, and what a kerfuffle the most recent occasion last autumn caused.

Perhaps I should declare that I voted with the government on the basis that this was a finance matter. There was a perfectly respectable argument the other way that that principle did not apply. The result of the adverse vote was the setting up of the Strathclyde Review. Apparently this vote placed democracy under threat. All the issues are examined in the reports of the Committees to which I referred at the beginning of the lecture. For today's purposes I want to make a distinct point. This was legislation about £ 4 ½ billion (by savings or cuts - take your political pick) with unenviable consequences for many, proceeding by way of regulation under the Tax Credits Act 2002, not primary legislation. It is not unreasonable to wonder whether those members of the Commons who voted in favour of the 2002 Act ever envisaged a proposal involving such sums affecting so many people proceeding by the regulatory power created by section 66 of the Act. Yet they did. And the attempt to deal with Tax Credits in this way, whatever criticism may be made, was lawful. And the response of the Lords was constitutionally appropriate.

Beyond and apart from rejection on the rarest of occasions, however not one page, not one single page, of gazillions of pages of statutory instruments has been amended. That is not as bad, or is just as bad as it seems. There is no power of amendment. Subject to a tiny limited category, when an instrument is laid before Parliament, whichever House is considering it must take it or leave it. The only way to amend the single obnoxious provision in what would otherwise be an entirely satisfactory instrument would be to defeat the entire instrument. At least in theory parliamentary control is secure. There are no less than sixteen different procedures by which statutory instruments may pass into law, of which eleven are very specific and apply in unusual situations. Generally, Parliamentary

scrutiny can be exercised either through two varieties of negative procedure and annulment, and three different versions of the affirmative procedure. The parent Act defines which process should be followed. But with only seventeen instruments rejected in sixty-five years, and none in the Commons since 1979, it is difficult to avoid the conclusion that the Parliamentary processes are virtually habituated to approve them. Henry VIII himself might have settled for that.

And so I am back to Henry VIII clauses, primary legislation which delegates the power to override or rewrite statute, now garlanded with their accreted fashion accessory, skeleton legislation, with the flesh to await ministerial decision. They take practical effect through delegated legislation. We have become so used to them that we rarely sit back and gasp, as the Commons in 1539 metaphorically would have done (it would not have been wise to draw attention to yourself by loud inhalation) Yet what is involved? By primary legislation authority is given to a minister using delegated legislation to dispense with or amend an existing statute created, debated and enacted by both Houses. The safeguard against the exercise of this delegated power is not an amending statute – there is no statute – but the affirmative resolution process. By the lesser process of approval primary legislation can be overridden: secondary authority overrules primary authority.

The question I pose is simple: why do we need Henry VIII clauses at all? Save for the incidental purpose of implementing primary legislation, (for example, to make allowances for inflation when primary legislation permits or requires it) (hardly a Henry VIII clause) or unless there is a national emergency, an imminent risk of catastrophe far beyond ministerial reliance on the weasel word ‘necessity’, what is the real justification for them? No doubt if anyone in government or in a government department bothers to read this lecture, explanations will pour out. But how well-founded will they be? Of course there are now precedents, a confetti storm of precedents. Well, they are bad precedents, invaluable to someone seeking arbitrary powers, like Henry VIII, and bad on that ground alone. It might be said that this enables the government to achieve its legislative programme, and fulfil its manifesto commitments. In other words once the relevant provisions is in force the Minister and the Department can set about lauding paper achievements which they did not have time to articulate in primary legislation. Sometimes they are included as a precaution against bad drafting of the statute, against the possibility that having achieved

the legislation, it will be found not to have the effect that the executive wanted. That is avoided by care in the legislative process. Sometimes it will be said that the provisions are intended to address situations which cannot be envisaged, but which would, if they had been envisaged, have fallen within the ambit of the statute. When such a situation arises, surely Parliament should address it by the necessary legislation.

You can be sure that there will always be some justification. There is one excuse which should be rejected out of hand. We shall be told, and I shall scornfully be told, that life is so hectic, that there is so much to be done, that there is no time for too much refinement. That is as may be. If it is true, an increase in executive influence is not the remedy. What would then be necessary would be reform of the parliamentary processes. As the world gets busier still, taken to its logical conclusion this dismissive argument would mean that parliamentary control of the executive would continue to dwindle away.

Perhaps one surprising feature about Henry VIII clauses is that they are enacted by the government with a Parliamentary majority without apparent recognition of the simple reality of political life, that the electoral wheel turns and power moves from one party to another, so that in due course the ministers of the opposition party, now in government, are themselves able to deploy the very same Henry VIII clauses to achieve their own contrary policies. Although not arising from a Henry VIII clause, the tax credit row provided a clear warning of how this could happen. Perhaps there would be fewer Henry VIII clauses if, as suggested by Lord Lisvane, the Minister of the relevant Department was required to give a public explanation to, say, the Joint Committee. Perhaps that would be answered by pointing out that the Minister would be much too busy. There may even be difficulties with the parliamentary timetables. Or perhaps, the Permanent Secretary could take the Minister's place. Perhaps, I respectfully suggest that the Commons should consider replicating the Committees of the Lords. But these issues – Henry VIII clauses, skeleton bills, delegated legislation – these linked issues surely require the urgent attention of a Joint Committee of both Houses. This is an issue that Parliament alone can resolve. But we surely cannot go on as we are, cementing Henry VIII clauses into the very structures of our constitution.

I end where I began. Unless strictly incidental to primary legislation, every Henry VIII clause, every vague skeleton bill, is a blow to the sovereignty of Parliament. And each

one is a self-inflicted blow, each one boosting the power of the executive. Is that what we want? Is that how our constitutional arrangements must continue to develop? Should we allow the powers of the executive to increase and the sovereignty of Parliament to be diminished? I believe that our Parliament should give the same answer that the 1539 Commons gave to Thomas Cromwell and Henry VIII. Not the one they are thought to have given but the one they actually gave. Save in a national emergency, only statute can repeal, suspend, amend or dispense with statute.