What do we mean by parliamentary scrutiny of Brexit?
A view from the House of Commons

Louise Thompson (University of Manchester) & Ben Yong (University of Hull)

Abstract

The United Kingdom's withdrawal from the European Union has already resulted in three significant pieces of legislation for the UK Parliament to scrutinize: the European Union (Notification of Withdrawal) Bill in the 2016-17 session; the European Union (Withdrawal) Bill; and the Taxation (Cross Border Trade) Bill in the 2017-19 session, all three of which went on to receive Royal Assent. We explore here the type and quality of parliamentary scrutiny of the first of these bills. Scrutiny is an ambiguous concept, contingent upon a legislatures' constitutional and procedural rules, but it is also contingent on the stances of particular actors – including government, opposition, parliamentary committees and outside observers. We explore here the perspectives of key actors during the House of Commons' scrutiny of the European Union (Notification of Withdrawal) Bill. Our analysis finds that the quality of parliament's scrutiny of the bill shifts, depending on who is asking the question, their objectives, the object of their scrutiny and the forum in which the question is being asked. In short, the meanings attributed to scrutiny of EU withdrawal in the UK broadly correspond to the various constitutional, procedural and party-political dimensions in play.

Introduction

The referendum of June 2016 had provided a slim mandate for the United Kingdom's withdrawal from the European Union, but legislation was needed to provide the legal authority for the UK to leave. The European Union (Notification of Withdrawal) Bill (hereafter referred to as the EUNOW Bill) was introduced following the UK Supreme Court's (UKSC) judgement in *R (Miller) v Secretary of State for Exiting the European Union* on 24th January 2017. This stated that the Government could not trigger Article 50 of the Treaty on the European Union via its prerogative powers. The requirements set out in Article 50 and the impact of leaving the EU on domestic rights meant that only Parliament could initiate the withdrawal process via primary legislation.

As the name suggests, the aim of the EUNOW Bill was not to set out the detail of the terms of UK withdrawal. Rather, it would give legal effect to the referendum result, conferring on the UK Government the authority to give official notice to the European Council by triggering the Article 50 process. David Davis confirmed this as he introduced the second reading debate for the EUNOW Bill:

> 'it is not a Bill about whether the UK should leave the European Union, or, indeed, about how it should do so; it is simply about Parliament empowering the Government to implement a decision already made' (HC Debates, 31st January 2017).

The long title of the Bill also confirmed this:

> *"A Bill to confer power on the Prime Minister to notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU"* (European Union (Notification of Withdrawal), HC Bill 132 (2016-17))

Indeed, the House of Commons had already supported a motion to trigger Article 50 by the end of March 2017, just six weeks prior to this (HC Debates, 7 December 2016). On paper, then, the bill was simply a means of legislating for something which Parliament had already consented to. In theory, this should have been a straightforward piece of legislation.

The EUNOW bill was introduced in the House of Commons on 26th January 2017, and had its second reading debate the following week (31st January). It was a very short piece of legislation, comprising only two clauses and just 137 words. From the government's perspective, it was 'the most straightforward possible Bill' (David Davis, HC Debates, 31st January 2017). But for others, the bill was highly controversial. Media reports stressed that the short design of the legislation was a deliberate action by the government in order to make the bill 'bombproof' and not susceptible to amendment (e.g. Merrick 2016; Reuters 2016). The government however, insisted otherwise (See, for example, David Lidington, HC Debates 1 December 2016, c1674). Parliamentarians had mixed feelings about the importance of the EUNOW legislation. Some MPs spoke of the possibility of a 'constitutional crisis' if it were not passed by Parliament (HC Debates, 1 February 2017, c1034) while others saw it as an opportunity to ensure that 'Parliament has a say' over the entire withdrawal process (ibid, c1042).

As a result of its importance to MPs and to the wider issue of negotiating the process of Brexit, the EUNOW bill was scrutinised as a bill of constitutional significance, and received its detailed line-by-line scrutiny on the floor of the Commons in a Committee of the Whole House. From a procedural perspective, this meant that rather than being scrutinised by a small group of MPs in a public bill committee, it would be given a more prominent and visible committee stage in which any MP could speak and table amendments on the floor of the House of Commons chamber. However, despite many hours of debate and a high volume of amendments from MPs, the bill left the Commons completely unscathed. No amendments at all were made..

As Julie Smith discusses in chapter x, the EUNOW bill was challenged again by the House of Lords, before receiving Royal Assent in March 2017. This initial piece of legislation was followed by a much longer and more complex European Union (Withdrawal) Bill in the 2017-19 session, which provided for the repeal of the European Communities Act 1972 (the core enabling legislation for the UK's accession to the European Communities) and established the process by which existing EU legislation would be retained or modified by government ministers. Further legislation dealing with the complexities of Brexit followed, beginning with the Taxation (Cross Border Trade) Bill which made its way through Parliament during 2018.

Given the relative constitutional significance of the EUNOW bill, the opportunity for all MPs to engage actively in its scrutiny and the widespread discussion of it both within and outside Parliament, it presents an interesting opportunity to explore different perceptions of parliamentary scrutiny. The EUNOW Bill is thus used here as a case study to explore the

different qualitative understandings of scrutiny from a constitutional, procedural and party-political perspective, and to begin a more comprehensive assessment of parliament's scrutiny of the bill, and of the opinions of different actors about how well Parliament carried out its scrutiny role.

If we want to assess how well Parliament carried out its scrutiny role, however, we should ask a prior question: what do we mean by parliamentary scrutiny? The answer to that is far from clear. The aim of this chapter is to explore this question, through an examination of views of different parliamentary and extra-parliamentary actors in the period leading up to, during and following the enactment of the EUNOW bill.

Framing parliamentary scrutiny

Parliamentary scrutiny would seem to be—to paraphrase Mark Bovens—'one of those golden concepts that no one can be against' (Bovens 2007, pp. 447-8). Certainly, there was a consensus about parliamentary scrutiny in relation to the EUNOW bill: that it was generally a Good Thing.[1] Thus, Helen Goodman MP, a Labour backbencher said during the committee stage of the Bill that the quantity of amendments tabled by MPs showed why 'debate on parliamentary scrutiny is so important' (HC Debates, 6 February 2017, c103). But at the same time, MPs from all parties questioned the scrutiny work being performed in the Commons throughout the passage of the bill, with many considering it to be lacking. The suggested reasons for the weakness of parliamentary scrutiny included executive dominance; the limited capacities of Parliament and parliamentarians; limited time and resources.

We suggest that parliamentary scrutiny has a number of aspects or components, some of which are more contentious than others. These properties illuminate and complicate three of the four dimensions set out in this book's introduction: the *constitutional*, *procedural* and *party-political*.

First, scrutiny is shorthand for a range of activities and objects to be scrutinised. It may involve examining legislation, executive action, the work of bodies outside Parliament and the executive (such as EU bodies), or a mixture. These activities may differ in substance—and purpose. Thus, although the EUNOW bill was being scrutinised by the UK Parliament, Parliament had also been scrutinising the process of EU withdrawal through a number of other scrutiny mechanisms, such as oral and written questions to ministers, select committee scrutiny of the impact of Brexit on policy and through debating mechanisms such as opposition day debates. Indeed, as chapter [LYNCH ET AL] illustrates, MPs were creative in their use of procedural devices to try to influence the government's Brexit policy. Put differently, we should be as clear as possible about what activity is being labelled as 'parliamentary scrutiny'. Different activities can entail different approaches, requirements and standards.

[1] See the comments of David Davis, in response to the House of Lords European Union Committee report on parliamentary scrutiny of Brexit (European Union Committee 2016b, para 8).

Second, the objective—or objectives—of parliamentary scrutiny matter. The objective determines how scrutiny is carried out, and what the measure of 'effective' or 'good' scrutiny is. Crucially, the objective may differ according to who the scrutineer is, and what is being scrutinised. If we take the parliamentary scrutiny of legislation, some will argue that is ultimately about keeping the government in check; others may think the objective is apolitical—to improve the effectiveness of legislation; and others again may argue that scrutiny is less about improving the technical quality of legislation, and more about providing political legitimacy and/or informing the public. These objectives are quite different,[2] and so the measures of success or 'impact' may also differ. In terms of scrutinising the EUNOW Bill, then, what we see is differing views of what scrutiny should involve: discussion, 'technical' amendment and general criticism of the bill.

Third, there are competing views on the role of politics in the scrutiny process. Much activity which constitutes parliamentary scrutiny is adversarial or partisan—partisan in the sense of scoring party or 'political' points, or having some 'ulterior' motive. But there is a subset of activities which are seen as perhaps more 'ideal', where means and ends are separated. This set of activities involves dispassionate, systematic action, whose measures are 'objective', non-political and consensual. This links back to the second aspect of scrutiny. Those who viewed scrutiny as a mostly apolitical activity were more likely to focus on the process issues of the EUNOW bill; while for those who viewed scrutiny as an inherently political activity, the EUNOW bill was an opportunity for partisan gain and criticism of the government's policy towards Brexit.

Fourth, parliamentary scrutiny involves change or impact, but the nature of this impact depends largely on the objective of the scrutineer. Influence or impact can range from simply informing relevant parties (Parliament, parliamentarians, third parties, the media and the public) to causing a shift in position by another actor—usually, a change in government policy, or the acceptance of a non-government amendment to a bill. In terms of EU withdrawal, discussion of impact in the lead up to Parliament's scrutiny of the bill was frequently about the possibility of the Commons saying 'no' to the bill entirely and thus preventing its passage. Discussion of the amending the content of the bill came later.

These are 'ideal' properties of scrutiny. No one parliamentary actor will conform entirely to one particular view of scrutiny—they will more likely hold different approaches in balance, prioritising, depending on the context. But we can see why there is dissatisfaction with the adequacy of parliamentary scrutiny: people may be talking about different activities, which have different objectives, and therefore different measures of 'effectiveness'.

So parliamentarians engage in different kinds of scrutiny, and employ different standards of success, depending on the circumstances. In terms of the *constitutional*, *procedural* and *party-political* dimensions, this means that we should be careful how we interpret claims that the legislature is marginalised by the executive; that the legislature is not making use of its formal, constitutional powers; or that the legislature is not having an 'impact'. We have to look more closely at who is doing what, when, and to whom. 'The legislature'—or

[2] Of course, arguments could be made (and have been) that a constrained government is a more 'effective' government, but this turns on what 'effective' means.

legislative actors (individual members, parties)—may have chosen to engage in a particular kind of scrutiny appropriate to the subject matter or appropriate at the particular time.

Our examination of scrutiny here primarily covers a core forum heavily involved in scrutiny of the EUNOW Bill: the House of Commons Chamber. In order to gather the views of individual MPs, the Hansard transcripts of the Commons debate on the EUNOW Bill were analysed. This included the second reading, committee stage, report and third reading of the bill (31st January – 8th February 2017). A content analysis was used to highlight the scrutiny being undertaken. This included top level codes such as expectations, time and scrutiny outcomes. All amendments moved or discussed during the Commons Committee and Report Stage (6th -8th February 2017) were also coded. Here, the coding included measures of success or failure (accepted/rejected) as well as ministerial concessions (e.g. to meet, to reconsider, to amend at a later stage). This enabled us to present some descriptive statistics in order to better understand the qualitative comments made in the debate on the bill.

But in order to see the particularity of scrutiny in the Chamber forum, we juxtapose this with another forum—select committees—and media perceptions of scrutiny taking place in the Chamber. We looked at a number of select committees—the Exiting the European Union Committee, the House of Commons European Union Scrutiny Committee, the House of Lords European Union Committee and the House of Lords Committee on the Constitution—for discussions on parliamentary scrutiny in the period prior to and shortly after the EUNOW Bill. In practice, however, select committees try not to replicate the work of the others. Thus, the Commons EU Scrutiny Committee has continued to focus on the work of the EU, rather than the UK's exit from the EU; the Brexit committee was established only as the EUNOW bill was passing through the Houses; and the Lords Constitution Committee, which did scrutinise the EUNOW Bill, did not reflect upon what it, or other constituent parts, were doing (Committee on the Constitution 2017). Hence, we focused on the work of the Lords EU committee, who published two reports specifically on the matter of parliamentary scrutiny (European Union Committee 2016a; 2016b). This was effectively the only parliamentary body to publish a formal opinion on what the scrutiny of Brexit should look like.

Our analysis of the media's perspective on scrutiny required an analysis of newspaper coverage of the EUNOW Bill. Lexis Nexis was used to search for relevant articles. The time period used began on the day before the bill was debated in the Commons (30th January) and ended the day after the bill's third reading (9th February 2017), with the search terms 'Brexit OR withdrawal OR Europe OR EU' being used. This search returned a total sample of 335 articles, all of which were coded using the same coding frame used for MP contributions.

The Select Committee

We start first with the 'committee' forum. It is important to note the institutional context here. At Westminster, select committees are cross-party bodies which primarily scrutinise executive action, and on occasion legislation. They are composed of parliamentarians from different parties or groups, and so achieving consensus can be difficult: often, compromises must be made.

Following the 2016 referendum, and prior to the EUNOW Bill, the House of Lords European Union Committee ('the Lords EU Committee') explicitly addressed parliamentary scrutiny in two separate reports (European Union Committee 2016a; 2016b). The first report was broad, discussing the aims of parliamentary scrutiny over Brexit generally. The second report focused more on details, partly as a reaction to the government's response to the first report. They reveal how parliamentary scrutiny is understood in one particular legislative forum.

In the reports, the EU Committee set out a number of justifications for parliamentary scrutiny of Brexit. First, the Committee insisted it was "the right and duty of Parliament to ensure that the negotiations are scrutinised effectively at every stage." (European Union Committee 2016a, para 5). This view of scrutiny followed from the separation of powers: scrutiny was just something Parliament did, because it was the legislature. Alternatively, it might be that scrutiny was a good in itself. David Davis MP, the then Secretary of State for Exiting the EU, endorsed this view (although he equated scrutiny with accountability):

> I have read your report. … parliamentary accountability … is a good in its own right and does not need justification by our saying that it will make this or that process better. The simple fact of parliamentary accountability is a good thing (European Union Committee 2016b, para 8).

Second, scrutiny could improve government effectiveness. It could do so in two ways: through questioning and testing, mistakes could be rectified, or a particular position strengthened (European Union Committee 2016b, para 15); or scrutiny could increase the legitimacy of the government's actions—parliamentary engagement in the process could encourage acceptance of the result by parliamentarians and the public. Thus, the Committee argued that scrutiny would "ultimately assist the Government itself, as well as being in the public interest" (European Union Committee 2016a, para 6).

Third, parliamentary scrutiny would ensure accountability. What this meant was mostly implicit. It was partly linked to transparency—the Committee stated that "effective parliamentary scrutiny will help to ensure that there is an 'audit trail' for future generations" (European Union Committee 2016a, para 21). For David Davis, however, parliamentary scrutiny would aid in electoral accountability, by making clear who did what, and why—hence his view of scrutiny as meaning "accountability after the event" (European Union Committee 2016b, para 9). But the Committee rejected Davis' elision of scrutiny and accountability as incomplete. Scrutiny had the potential for influence in real time (ibid, paras 18-19).

Both reports suggested that scrutiny might take different forms and intensities. So, for instance, the Lords' EU Committee made clear in its first report that some aspects of the negotiations would not be served by complete transparency: there had to be a balance between transparency and ensuring the UK's position was not undermined. This meant that the intensity of scrutiny would differ (European Union Committee 2016a, para 22). In the second report, the Lords' EU Committee noted the different ways in which Parliament could scrutinize executive action in the different stages of withdrawal from the EU—preparation,

formal negotiations, ratification and implementation (European Union Committee 2016b, paras 20-81).

There are two points to emphasise here. The first is that discussions about scrutiny took place within the committee forum. That is, there was pressure to ensure relative cross-party consensus over recommendations—hence, the variety of objectives, which were far from in harmony with each other. The politics of scrutiny were largely suppressed. The Committee remained mostly coy on the question of influence or impact of scrutiny, only becoming more explicit in the face of David Davis' views of accountability after the fact—and then, only to insist that what mattered was strengthening the Government's position. We should contrast this with the legislative debates over the EUNOW bill, where comments about scrutiny and the importance of impact tended to divide along party lines.

The second point is that the Committee discussed parliamentary scrutiny in relation to the process of Brexit as a whole—not just notification. Both reports were published well before the outcome of the *Miller* case was known: at the time of the reports' publication, it was still unclear if the Government could invoke the start of the exit process under Article 50 of the Treaty on European Union via prerogative action without the consent of Parliament, or if the consent of Parliament via domestic legislation (ie., what became the EUNOW bill) was needed. That meant that discussion of parliamentary scrutiny took place in abstract: there was no need to connect ends to the means. There was no need to reach agreement—to prioritise a particular end. That said, the Committee acknowledged that there were several stages to Brexit, which might require different kinds and levels of scrutiny. Legislation was just one of a number of objects which could (and would) be scrutinized by parliamentarians across the period of EU withdrawal.

So we see here acknowledgement that the objectives, intensity, approaches and outcomes of parliamentary scrutiny are context-dependent. There is no 'set' standard of scrutiny: it depends on what 'Parliament' thinks is important—and this can depend on all manner of things.

The Chamber: Government and Opposition expectations of scrutiny

The floor of the House of Commons is a useful place to uncover what 'Parliament' thought was important when scrutinizing the EUNOW bill. MPs offered suggestions as to how the bill's scrutiny should proceed, and identified what in their view were the main objectives of this scrutiny. These remarks came in the form of questions to the Prime Minister and to Brexit Minister David Davis, and continued once the parliamentary debate on the bill got underway. It is important to remember here, though, that the House of Commons is not a unified actor. Rather at this time it consisted of ten political parties,[3] one of whom (the Conservative Party) was in government and nine of whom were in opposition. What we see is a strong division between the government and opposition parties as to what the objective of scrutiny should be.

[3] This figure excludes the four Sinn Fein MPs who did not take their seats in the Commons. The DUP are counted here as an opposition party, though it should be noted that in the 2017 Parliament they are supporting the minority Conservative Government's legislative agenda on a case by case basis.

This government-opposition dynamic is clearly present during the scrutiny of all government legislation in the Commons. But the scrutiny of EUNOW was more complex than this: there were diverging views about *what* was being scrutinized. While the government saw the Commons' role as being nothing more than the scrutiny of a simple piece of legislation, some opposition MPs did not confine their scrutiny to that, viewing their role as one of scrutinizing UK withdrawal *as a whole*. There was thus a continued back and forth in the debates between scrutiny of the bill itself and broader scrutiny of Brexit. For instance, many MPs raised the issue of the negotiations following the triggering of Article 50, seeking information about the government's priorities, their plans to communicate progress to Parliament, and the possibility of parliamentary assent on a final deal (see for instance Matthew Pennycook, HC Debates, 8 February 2017, c58). This was something which the government felt to be 'illogical' (Mims Davies, HC Debates, 8 February 2017, NC) and not appropriate during the passage of a bill. From the government perspective, the EUNOW bill was about 'the triggering process only —nothing more than the triggering process' (David Davis, HC Debates, 24 January 2017, c176). Efforts by the opposition to portray the bill as 'more important than the Bills on the Lisbon treaty and the Maastricht treaty' (see for instance HC Debates, 24 January 2017, c176) therefore made little impact on the ministers responsible for taking the bill through the Commons.

The divergence in objectives and expectations between government and opposition MPs could also be seen in scrutiny of the legislation itself. For opposition members, 'good' scrutiny was typically equated with textual changes being made to the bill. For instance, before the EUNOW bill's committee stage (the first point at which the bill could be amended), MPs sought confirmation that the government would take a positive attitude towards opposition amendments. Labour MP Kate Hoey pressed David Davis to confirm that the government 'do perhaps want amendments that clarify' the withdrawal process (HC Debates, 24 January 2017, c168). When the committee stage commenced on the floor of the House of Commons, MPs spoke of their intentions to 'win with our amendments' (Jenny Chapman, HC Debates, 6 February 2017, c135) and to 'provide better legislation' as a result (Stephen Gethins, HC Debates, 6 February 2017, c79).

Thus scrutiny here was seen as adversarial; a battle between the two branches of government and parliament. Government resistance to amendments often frustrates MPs during the committee stage of all legislation (Thompson 2015, pp.66-67), but this frustration was exacerbated during the committee stage of the EUNOW bill, because the government's ownership of the legislation appeared more acute. Joanna Cherry summed this position up nicely, saying that the government 'tell us how fantastic this wonderful, sovereign mother of Parliaments is, but we are berated for having the effrontery to attempt to amend a Bill. It is preposterous' (HC Debates, 8 February 2017, c459). Scrutiny was viewed as a zero-sum game by opposition MPs during the debate, particularly from those on the Scottish National Party benches.

However, some MPs did articulate a more subtle, long term purpose to scrutiny – one which was more consensual and less immediate. Caroline Flint, for instance, noted that this is 'part of the purpose of having these [EUNOW bill] debates in the public arena', noting that 'looking again' may mean revisiting an issue over a longer time period, and that this may be up to 'two years and beyond' (HC Debates, 8 February 2017, c486). This was a minority view,

but fits more closely with a more iterative form of scrutiny with less partisan objectives (Giddings and Irwin, 2005).

By contrast, Government MPs rarely referred to the likelihood of amendments being accepted or rejected by government. This was not, for them, a measure of effective scrutiny. Rather, where it was discussed, amendments are seen to be in opposition to 'good' scrutiny – a device 'designed purely to waste time and to delay' rather than to improve the legislation (Kit Malthouse, HC Debates, 8 February 2017, c481). Even before the scrutiny of the bill commenced, Conservative MP Jacob Rees-Mogg commented that 'when they [the opposition] say scrutiny, they mean delay' (HC Debates, 24 January 2017, c176). Similarly, government MPs sought to play down opposition success in scrutinising the EUNOW bill. For instance, when the government appeared to have made a concession on New Clause 1 (the detail of the parliamentary vote on the outcome of Brexit negotiations), Ken Clarke warned Labour's Keir Starmer that 'instantly leaping on a concession may be a little unwise until we are quite clear what it amounts to?' (HC Debates, 7 February 2017, NC). Opposition MPs stressed quite forcefully that a concession on such a significant piece of legislation should justify an amendment from the government, as though the significance of the concession could only be shown through a physical change to the legislation itself. Alex Salmond for instance stated that 'if one makes a serious announcement in the course of the Committee stage of a Bill of this importance, it should be followed by an amendment (HC Debates, 7 February 2017). He came back to this issue later on, saying once again that 'it might be better to have something in writing in the Bill, rather than all these warm words, cups of tea and assurances' (HC Debates, 8 February 2017, c473). There was an implication here then that what scrutiny required was contingent on the status of the bill.

If opposition MPs espoused an amendment-driven definition of good scrutiny, government MPs instead stressed the view that scrutiny was primarily about open and transparent debate. So references to the *time* spent debating the EUNOW bill in the chamber were commonplace. Before the timetable for scrutiny had been released by the whips, David Davis told the House that he wanted 'as much time as we can possibly get for it to be discussed' (HC Debates, 24 January 2017, c176). Tellingly, he used the word 'discussed', rather than anything which suggested a more change-oriented notion of scrutiny. It complemented his comments to the Lords EU Committee that scrutiny did 'not need justification by our saying that it will make this or that process better' (European Union Committee 2016a, para 8). When the committee stage of the bill began, Mark Harper aligned himself with this view, noting that the House 'has spent a lot of time, as is appropriate' debating the bill (HC Debates, 6 February 2017, c64). Here, scrutiny is seen to be fulfilling a legitimation function.

There was also a clear difference between the attitude of government MPs and the attitude of the rest of the House. Government MPs suggested that time should be allocated in proportion to the size and length of the bill itself: thus former Chief Whip Mark Harper stated that three days of 'protected time' to debate the legislation in committee was 'if anything, an excess of generosity' for a two clause bill (HC Debates, 6 February 2017). There was also the view that legislation could be improved without any changes to its wording. Peter Bone for example, said that 'no Bill that goes through parliamentary scrutiny does not become, as a result, a better Act of Parliament' and urged David Davis to set aside

appropriate time for debate. Here, once again, the implied objective was legitimation via debate; it followed that there was no mention of textual amendment (linked to a more partisan-oriented objective).

Opposition MPs, on the other hand, saw time not as a legitimising feature of scrutiny, but as a facilitator of the real purpose of scrutiny - making better legislation through amendment. They spoke of government trying to 'gag Parliament' (Chris Leslie, HC Debates 6 February 2017, c96), accused them of 'muzzling Members' (Chris Leslie, HC Debates 6 February 2017, c96; see also Chuka Umunna, HC Debates, 26 January 2017, c464) and argued that it was 'totally farcical' that they were unable to speak to all of their proposed amendments and new clauses (Chris Leslie, HC Debates, 8 February 2017, c521). Keir Starmer argued that the lack of time for scrutiny was antithetical to what he described as 'the proper role of Parliament' (HC Debates, 24 January 2017, c163). In his conception, scrutiny should not be about 'minimising' the role of MPs, nor should it be about avoiding accepting amendments to legislation. He described it as 'a question of substance, not of process', suggesting that ineffective scrutiny processes did more than simply risk MPs' voices not being heard. They had a direct effect on the quality of the resulting legislation and perhaps, on the institution as a whole.

Where amendment was not seen to be forthcoming or desirable, opposition MPs moved to a less partisan scrutiny objective, one which emphasized the need for information, transparency, or explanation from government, such as Chris Leslie's request that the opposition 'want to know what they [the Government] plan to do' (HC Debates, 6 February 2017, c96). In some respects, time was still seen as the facilitator for this type of scrutiny, as MPs needed time to firstly understand the government's intentions before they could move on to improve the legislation. This was particularly pressing given the lack of clarity contained in the White Paper on leaving the EU, published after the Commons second reading debate on the EUNOW bill, and just two days before its committee stage began (HM Government 2017). The SNP's Patrick Grady felt that this meant there was 'nowhere near enough time to consider the massive implications of Brexit will actually mean', highlighting the hundreds of amendments put down by MPs to reinforce his claim (HC Debates, 7 February 2017, c370).

If we look back on all of the Commons stages of the EUNOW bill, we can see the key objectives of scrutiny privileged by parliamentarians–time and amendment success. In terms of amendments, a total of 73 amendments and 155 new clauses were put before the House for consideration over the three days of committee stage debate.[4] Four of these amendments and 12 new clauses were pushed to a division; all were defeated. The bill was reported 'without amendment' and, following a further division, passed its third reading. In the immediate aftermath, opposition MPs continued to interpret the lack of successful amendments as a sign of poor scrutiny, describing it as 'a sad day when the Government voted down all the amendments so that the Prime Minister could say that the Bill was unamended' (Valerie Vaz, HC Debates, 8 February 2017, No Col). They associated this with the 'breakneck speed' with which the bill passed through the Commons (Pete Wishart, HC

[4] This did not account for all of the amendments tabled. Some were simply not reached before the cut off for the end of committee stage.

Debates, 8 February 2017, No Col). Although the bill clearly did not receive the same degree of unconstrained parliamentary time in the Commons as other major pieces of European Union legislation—the Maastricht Treaty, for instance, spent over 162 hours just in its committee stage (Miller 2015, p.7)—it still received over 39 hours of debate in the Chamber; just under 18 hours during the second reading debate, and just under 22 hours at its committee stage. It did not however, see any debate at report stage or at third reading. It is common for bills scrutinized in Committee of the Whole House to have no report stage if they are unamended, but the combination of this with no debate at third reading was unusual. Opposition MPs were unsurprisingly upset about the reduced opportunity for debate. Once again, they stressed the notion that the EUNOW bill was extraordinary, and more deserving of debate than ordinary legislation. Alex Salmond, for example, commented that 'for this to happen on any Bill would be an abuse; for it to happen on this Bill is an outrage' (HC Debates, 8 February 2017).

This brings us to a final scrutiny objective put forward by MPs during the consideration of the EUNOW bill: representation and legitimacy, via contributions from as many MPs as possible. This view was espoused heavily by the SNP, and stems from a combination of the result of the EU referendum (the difference in the Scottish vote), Commons procedures which seem to constrain the party from making contributions (Thompson 2017, p. 6-7) and a particular incident during the committee stage of the bill where the party's spokesperson Joanna Cherry's speech was cut off by the Speaker at the end of the debate. When the party held the floor for over an hour in the following day of committee debate, they were congratulated for making sure that 'the voice of Scotland has been heard loud and clear in scrutinising this bill' (Robin Walker, HC Debates, 7 February 2017, c390; see also Thompson 2017, p. 7). Government minister David Lidington praised the ingenious way in which 'about half the number of Scottish National Party Members' (HC Debates, 8 February 2017, No Col) had been able to contribute to the debate on the bill. The SNP objective for good scrutiny was thus also about making the voices of distinct national groups of MPs heard in the chamber. For them, the opportunity to scrutinize sat alongside the ability to make an impact on the text of the EUNOW legislation.

The MP 'view' is therefore not actually a unified view. In the chamber, it mimics the adversarial nature of the House of Commons, with different groups of actors (government and opposition) placing a different emphasis on key components of scrutiny. This was exacerbated during discussions of the EUNOW Bill. Although both conceived of scrutiny in a partisan sense, opposition MPs promoted a more change-orientated objective, focusing on textural amendment, while Government MPs emphasised debate as a legitimizing objective of the bill's scrutiny. The differing notions of the significance and scope of the bill between government and opposition/backbench MPs added a further level of complexity to this multifaceted view of scrutiny coming from within the House of Commons.

A View from the Outside: the Media

If parliamentarians were divided about their views on the purpose of scrutiny and the effectiveness of scrutiny in the case of the EUNOW Bill, there was much more consensus from written media outlets at each stage of the bill. There was a focus throughout the reporting on measurable / quantitative aspects of Parliament's work, such as the length of debates, the number of amendments and the outcomes of divisions. The phrases

'marathon', 'two day' debate were well used here (e.g. Bloom 2017; Miller 2017) and interpreted as a positive feature of the 'intense' scrutiny taking place by MPs (Thorp 2017a). Although the length of debating time allocated at second reading and committee stage is not unusual in the context of the consideration of government legislation in the Commons (see Thompson 2015), it was presented by the press as being particularly noteworthy.

Yet, while press reporting highlighted the length of time devoted to each individual stage of the bill in a positive manner, when the scrutiny process as a whole was discussed, the interpretation of it became more negative. Discussions of the many hours MPs spent debating the bill at second reading sat alongside discussions of the very same bill's 'breakneck timetable' (e.g. Blake 2017) and the 'limited amount of time to discuss amendments'. While seemingly content with the time devoted to scrutiny of the bill at each individual stage, there was also an impression that the legislation was 'being rushed through Parliament' (Walker 2017a). This was perhaps because the bill's consideration was compressed compared to the typical legislative timetable, with all of the Commons stages taking place within just 14 days. Of the 23 government bills which reached Royal Assent in the same parliamentary session, the average length of time for the Commons stages (from first reading to third reading) was 94 days[5]. The only bills with a shorter consideration related to supply and appropriations (in which there is no debate or amendments) and the Northern Ireland (Ministerial Appointments and Regional Rates) Bill in which no amendments were used. It was thus unusual that a bill which saw considerable debate and a high number of proposed amendments, saw its passage condensed into such as short amount of parliamentary time.

Similarly, the overall assessment of the Commons scrutiny of the bill was also presented as something of a failure. The definition of good scrutiny employed by the media seemed to be textual change—successful amendments at committee stage. Reports of the committee of the whole house emphasised the lack of amendments. We see discussion of the 'unamended Bill' (e.g, Kay 2017), 'defeated' amendments (e.g Walker 2017b). In the words of one report, MPs 'achieved precisely nothing' (Bloom & Williamson 2017). Commons scrutiny was presented as a personal battle between MPs and the Prime Minister, with reports that Theresa May had 'blocked' (Rodger 2017; Thorp 2017b) or steamrollered (Bloom & Williamson 2017) every proposed change to the bill. It is a clear interpretation of scrutiny as conflict between the two branches, and as either Parliament's failure to fulfil its constitutional role to act as a check on the executive, or of the executive inhibiting Parliament from carrying out this role. Either way, it reduces scrutiny to a single focus: a 'battle' (James et al 2017) or 'war' (Beattie 2017) in which Parliament has clearly lost. This clearly ignored that some parliamentarians—MPs and peers—at different stages and in different fora, were trying to achieve different things. As we have seen, some parliamentarians see scrutiny as an opportunity to express 'voice' in the chamber, or debate as a means of ensuring legitimation.

Conclusion

The debates leading up to and following the EUNOW Bill highlight in particular the contentious nature of the constitutional and political environment in which the Commons

[5] This is a calculation based on calendar dates, rather than sitting days.

was working. This resonates across all Brexit scrutiny, as evidence by chapters LYNCH et al and SMITH. It also illustrates the many meanings that actors—parliamentary and extra-parliamentary—impute to the activity of parliamentary scrutiny. These meanings do not necessarily map onto those of others. They shift, being dependent on who is asking the question, their objectives, the object of their scrutiny and the forum in which the question is being asked.

If we revisit our suggested components of scrutiny and apply them to the EUNOW bill debates, we can identify some patterns in terms of different actors' expectations and evaluations of parliamentary scrutiny of this first piece of Brexit legislation. The first component of scrutiny was that it is really shorthand for a mix of activities. This was recognised, for instance, by the Lords EU committee, when it delineated different approaches and intensities of scrutiny in relation to the Brexit process. It is also apparent on the floor of the House of Commons where there was disagreement among MPs as to what the focus of scrutiny was – the text of the EUNOW bill itself, the content of and procedure for the government's negotiations and 'final deal' for withdrawal, or the very notion of leaving the EU (or not) itself.

Second, we noted that there was a lack of consensus about the appropriate role of politics in parliamentary scrutiny. There was some agreement here in that for three of our four actors (government, opposition and the media) the scrutiny of EUNOW was intensely partisan. The manner in which the media presented the scrutiny of EUNOW as a 'battle' between government and Parliament epitomises the nature of Brexit scrutiny. Although this is common in media depictions of most high profile legislation, the adversarial nature of this process was intensified because the UKSC *Miller* decision placed the Article 50 notification process firmly back in Parliament's court. The select committee view is the only exception here, but this was more related to its institutional position, which prevented it from taking an overtly partisan view of scrutiny.

We deal with objectives of scrutiny and the expectation of change together. Scrutiny is expected to result in some sort of change or impact, but the nature of the impact depends on the objectives of the scrutineers. We saw this in the debate over the EUNOW Bill, where MPs debated the matter of time. Both government and opposition MPs were in agreement that time for scrutiny was important, but they differed over why this mattered: for the opposition this was about getting more time to put down amendments and press for textual change; for government MPs this was typically about ensuring the legitimation of the EUNOW Bill. The fact that the EUNOW bill left the Commons in an unamended state was problematic for both the press and for many non-government MPs, because of the alignment of their scrutiny objective (the constitutional role of Parliament in keeping the government in check) with the need for very visible or quantifiable change.

Our findings are also relevant to three of the four dimensions (the *constitutional*, *procedural* and *party-political*) set out in the introduction to this book. In terms of the *party-political dimension*, governing and opposition parties *have* approached scrutiny of Brexit differently, but this will depend on the specific arena or forum in which scrutiny takes place. In the chamber, opposition parties desire textual change and governing parties resist. But in a select committee setting, party-political differences may be set aside.

In terms of the *constitutional* and *procedural dimensions*, our findings suggest that we must pay far more attention to the particular circumstances in order to determine whether or not parliamentarians are exercising constitutional powers vis-à-vis the executive. Similarly, discussions of influence depend on context and specific intent. There is no fixed definition of scrutiny within the UK constitution or in Parliament's procedural rule books. If there is no fixed meaning for parliamentary scrutiny, and its process and substance are largely dependent on a contingent set of circumstances, then it becomes difficult to find a measure of 'good'—or 'bad'—scrutiny. That depends on the objectives of the scrutineers.

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