HOUSE OF COMMONS

Joint Committee on the Fixed-term Parliaments Act

Oral evidence: Review of the Fixed-term Parliaments Act, HC 1046

Thursday 17 December 2020

Ordered by the House of Commons to be published on Thursday 17 December 2020.

Watch the meeting

Members present: Lord McLoughlin (Chair); Lord Beith; Aaron Bell; Chris Bryant; Jackie Doyle-Price; Ms Angela Eagle; Maria Eagle; Peter Gibson; Robert Goodwill; Lord Grocott; Lord Jay of Ewelme; Baroness Lawrence of Clarendon; Alan Mak; Lord Mancroft; Maria Miller; John Spellar; Alexander Stafford; Mr Shailesh Vara; Craig Whittaker..

Questions 37 - 75

Witnesses: **Sir Malcolm Jack KCB**, former Clerk of the House of Commons (2006 to 2011), and **Lord Lisvane**, former Clerk of the House of Commons (2011 to 2014), gave evidence.

> **Chair:** This is a Joint Committee on the Fixed-term Parliaments Act. We are very pleased to welcome Sir Malcolm Jack, who was Clerk of the House of Commons from 2006 to 2011, and Lord Lisvane, who was Clerk of the House from 2011 to 2014. Between the two of them, they have huge experience of the way in which the Commons operates, to which part of this is obviously very important. I will ask Maria Eagle to start with the first question.

Q37 **Maria Eagle:** Can I add my welcome to Lord Lisvane and Sir Malcolm Jack? What is your understanding of how the law and conventions on dissolution operated prior to the Fixed-term Parliaments Act? That sounds like a short question, but no doubt the answer is quite complex.

Sir Malcolm Jack: Thank you for the invitation to this Committee. It is rather a tortuous web we are about to go into, partly because some of the matters that Alison Young mentioned last week are not transparent. We do not actually know how parts of the prerogative work. To try to answer the question, before the Act, matters were settled by the royal prerogative, and at least one convention was pretty clear, which is that Prime Ministers resigned if they were defeated on a motion of no confidence in the House.

The Fixed-term Parliaments Act changed various practices, as we will discuss in this session, and one of the most significant ones is in sections 2, 3 and 5 of the Act, whereby the no-confidence motion could be reversed by a confidence motion. This is absolutely setting aside previous practice, and it is something that I personally found objectionable in the Act, because I think it gives the Government far too clear an advantage. I will not deal with this now, because I think we will come on to it later, but if one applied that to 1979—you have

been a Whip, Chairman—14 days to reverse a vote of one would certainly have been possible. Should I go on to since 2011?

> **Chair:** We will perhaps come on to that a bit later. Robert, do you want to add anything to that?

Lord Lisvane: Broadly, I agree with Malcolm. The answer to the exam question was and had been for many years that, in order to form an Administration, a Prime Minister or a Government had to be able to command a majority in the House of Commons such that, after an election, a Sovereign would feel justified in asking the person leading that party to form an Administration. We might come on to talk about conventions, because the specificity of the Fixed-term Parliaments Act changed the conventions really quite substantially, as we saw over the last two or three years. If the confidence of the House is lost, the Prime Minister can ask for a dissolution, but the Sovereign is not required to grant it, and here we come to the Lascelles principles.

This is more likely to happen after a close election result. It could have happened in February 1974, but it did not. It could happen in the course of a Parliament where there is a substantial change of policy or a substantial change of declared allegiance. When those things happen, one of the three P's—party, policy or personnel—needs to be changed. It is worth also saying that the confidence has to be in the Government, not the First Minister, as in the devolved institutions. This was a point that Sir Stephen made when he and Professor Young gave evidence to you a short time ago.

Q38 **Maria Eagle:** Lord Lisvane has just said that he thinks that the Fixed-term Parliaments Act changed the constitutional conventions that surround dissolution; I wonder whether Sir Malcolm agrees. Can either or both of you say something briefly about whether or not the conventions on elections and Government formation, as you understand them, have been complied with since 2011 when the Act came into force?

Sir Malcolm Jack: I agree with Robert that the Act has certainly changed conventions, as I said, in particular on reversing the no-confidence motion. The other thing it introduced, of course, was the two-thirds majority for the House to call an election. That was certainly a new convention—not a convention; a statutory provision—in the Act.

Since 2011, I think we do come into a large area of change, the most dramatic and significant of which, of course, was the Supreme Court ruling of 2019. The Supreme Court ruled that the prorogation—which had gone through the proper prerogative process, i.e. the Prime Minister going to the Monarch and so on—was in fact illegal and had never taken place. The courts have never gone as far as that into the whole business of prorogation, the conventions, etc. So, I think that was an extremely significant change since 2011.

There have been other changes, which are perhaps more difficult to pin down. I think that we will perhaps come on to one of them later—where the Government announced that they would not necessarily give time to the official Opposition on a confidence motion. That certainly breaks a convention. I think "Erskine May" uses the term "established convention"—that the official Opposition always got time for a motion of no confidence. It was announced by the Government that that would not necessarily be the case.

Then, the other area that I think is rather more difficult to pin down is how things are considered to be matters of confidence. Major Government policy matters no longer seem to be taken to be matters of confidence. Now, the history of this is, I think, hit and miss, but I will just give one example. I think that it was in 1993 that John Major made the Maastricht Bill process a matter of confidence—Government confidence—which was a vote that the Government won. So there is a major matter of Government policy that was made a matter of confidence.

Q39 **Chair:** I think that it was the social contract clause—wasn't it?— that got defeated; we came back on the Friday to debate it, if my memory is correct.

Lord Lisvane: That's right.

Q40 **Chair:** Robert, have you got anything you wish to add to that?

Lord Lisvane: A couple of things, Chair, if I may. I would certainly endorse what Malcolm says. I felt that the FTPA was deeply flawed. As Malcolm will remember very vividly, it was almost much more flawed, because the original draft of the Bill simply referred to a motion of confidence.

Malcolm and I were extremely worried about that, because we felt that that was a fairly subjective concept—you know, would it be a motion of confidence, for example, if it had a condition attached to it? And we could see those propositions heading for the courts incredibly fast and in highly contentious circumstances. I am glad to say that reason prevailed and we ended up with a specific set of words that had to be agreed to by the House of Commons.

The other flaw, of course, was the 14 days. The 14 days—the assuaging motion—had to be for confidence in Her Majesty's Government, and of course by that stage there actually had to be a Government put together by somebody invited by the Sovereign. So that further constrained the time and it made, I think, the potential position of the Sovereign much more difficult.

However, in terms of the violence done to the conventions—Malcolm touched on this, and I absolutely agree—once you start saying, "These are matters of confidence and they're in the FTPA, and this is what triggers a general election", then all the ones that we've grown up with, as it were, in our parliamentary careers expecting to be matters of confidence, such as losing the Queen's Speech, losing the Second Reading of a Finance Bill—look at the majorities against Theresa May the three times she tried to get her deal agreed.

If that wasn't a major plank of Government policy, I don't know what was. But of course it did not fit within the constraints of the Fixed-term Parliaments Act, so it was not dealt with as a matter of confidence. One of the challenges, once the FTPA is no longer there, will be to re-establish what the House of Commons regards as being a matter of confidence, and I do not think that that will be straightforward.

Q41 **Chris Bryant:** You have half answered what my question was going to be. I remember drafting the amendment that led to the no confidence definition in the Act. The only thing I would add to the list of what has previously been considered a motion of no confidence is refusing the Government's supply to go to war or to engage troops in action. I note that that went, obviously, with the Syria vote when

nobody resigned after losing that.

Going back to the point that Malcolm made about how a motion of no confidence ends up being voted on, if the convention has now gone that it is guaranteed that the next day a motion of no confidence tabled by the Opposition is voted on, do we have to put this in the Act or not?

Lord Lisvane: I am always very cautious about regulating parliamentary proceedings through the statute, because I think that nine times out of 10 it ends in tears, and in a sense the FTPA is an example of that. It is very difficult if the Prime Minister of the day is not going to find time for a no-confidence motion, as occurred with Mrs May.

Certainly there has always been the expectation that if the Leader of the Opposition puts down a no-confidence motion, first appearing, as you will recall, traditionally as an early-day motion, then time will be found for it in the next prime-time day—perhaps, for example, not on a Friday—or as soon as may be arranged. If it is not in the name of the Leader of the Opposition, I think the theology is that only the Leader of the Opposition is in a position to bring together a coalition of Opposition Members that could be successful. So there is no point in giving time to, as it were, a small-scale private enterprise. As to how you ensure it, that is a real exam question.

Q42 **Chris Bryant:** If I might just come back to you. In theory, if the Leader of the Opposition prays against a statutory instrument, the expectation is that there will end up being a vote on the Floor of the House, but some 50% of these now no longer come to the Floor of the House. Long parliamentary Sessions mean that the Opposition isn't even guaranteed its 35 days under Standing Orders, and there is no means of enforcing that. Isn't there a danger that the Government will just take more and more power into their own hands through this process?

Lord Lisvane: Yes. That is the short answer. How you sidestep that of course is a rather different matter. You could have a Standing Order provision. Because it is so central to parliamentary proceedings, I wouldn't necessarily argue against that. It sidesteps the statutory problem that we were talking about a moment ago.

Q43 **Alan Mak:** Thank you, Lord Chairman, and good morning, Lord Lisvane and Sir Malcolm. We have started talking about some specific constitutional conventions, particularly in regard to dissolution, but I hope we can zoom out a little bit into constitutional conventions generally. Could you explain to the Committee how fixed constitutional conventions are and how they have been evolving over recent years?

Sir Malcolm Jack: I am going to quote a former colleague of ours, Jacqy Sharpe, who has written an excellent paper on conventions for the Constitution Society, which I had something to do with. The Clerks should get hold of this document. She defines a convention as "any long-standing practice or rule which is accepted, and observed, by those to whom it is directed." It is long-standing, and it is accepted—these are the two things in her definition. However, if we go back to one of your predecessor Joint Committees a long time ago, the Joint Committee on Conventions in 2005—I am not sure whether any Members present were on it—that Joint Committee declared that conventions were changeable and unenforceable.

How do we put these two things together? We have long-standing and accepted practices, which apparently are changeable and unenforceable. This is a real conundrum. I am sure this

theme will come out more during this session. I am much less at ease about going back to the so-called conventional set-up prior to 2011 without some other reference, whether statutory or internal to the House. I can fill that in a little bit more—we are partly in the House of Lords in the Joint Committee.

The Salisbury-Addison convention has changed over the decades. When it was first introduced, it applied only to a certain restraint by the House of Lords in dealing with manifesto Bills introduced in the Commons. Later, it was applied to Bills also introduced in the Lords. That is just a little example of how conventions change. Robert will know that various financial conventions have changed in the House of Commons over the years.

The Government have now announced another change in a convention. They will not necessarily bring forward a money resolution for a private Member's Bill. That used to be a fairly definite convention in my time. If private Members had a Bill that needed money, the Government always produced a money resolution. The Government have now said that this is not necessarily the case.

Conventions are a difficult area. I will end by saying that we do not even know how the prerogative conventions operate, because some of these matters are discussed only between the actors—that is, the Monarch and the Prime Minister.

Lord Lisvane: Malcolm is being much too modest. As I recall, he was the Commons Clerk to the Joint Committee on Conventions in 2005 and 2006. His mention of the Salisbury-Addison or Addison-Salisbury convention is right on the button, because it was put together for very specific circumstances following the general election in 1945. There is an awful lot of chuntering these days about Addison-Salisbury and how it limits the House of Lords in this way or that way. I do not really buy that, because the political landscape has changed so fundamentally.

Let us look back at the Labour manifesto for one of the active legislating Administrations of modern times. It was seven pages long. These days, deciding what is a manifesto commitment is much more difficult, because manifestos tend to be semi-philosophical tracts spreading over a hundred or more pages. All those things have changed. Something that you might think about—this is a hospital pass, if ever there was one—is having a draft set of principles attached to your eventual report, which might be something to which the House of Commons, primarily, could agree.

The money resolution point is an interesting one. I am aware of it, and it always operated like this. Malcolm and I were successively Clerks of legislation. The logic was always that if a private Member's Bill received the authority of the House through the House deciding to give it a Second Reading, the Government were more or less obliged to provide the money cover, or to deal with it in some different way in Committee, but they were not to prevent it from going to Committee by not having a money resolution.

The answer is as Malcolm has described it: on the one hand, they are powerful and long-standing; on the other hand, they are not immutable.

Q44 **Mr Vara:** I want to look very briefly at, and would welcome your thoughts on, the issue of bringing back a convention. I have two thoughts and would welcome your comments on them. First, Parliament makes laws, and if it makes a law to scrap a

particular convention, the law is supreme. If Parliament then introduces another law to bring back the convention, on the basis that the law is supreme, what is there to bring back that convention?

Secondly, with reference to some of the comments that Sir Malcolm Jack made about conventions being long-standing, changeable, enforceable and so on, just because a convention has not been reintroduced in the past, that does not mean that this cannot be a first occasion to do something. If we relied exclusively on what has happened in the past, there would be no progress.

I would welcome your thoughts on these two issues: first, that Parliament is supreme and can make laws to reintroduce a convention; and secondly, that the fact that it has not been done before should not be a reason why it cannot happen now. Over to you.

Chair: Who is coming in first on that?

Sir Malcolm Jack: Shall I dive in?

No, of course not—the law can introduce entirely new provisions. I am afraid the matter is not that simple, though. You are almost suggesting that we have the law on the one hand and conventions on the other; in fact, in this country we have a muddle of law and convention. They are not separate matters, even in respect of the so-called conventions surrounding the prerogative.

There are Acts to deal with prorogation; the Victorian Act from 1867—I think it is still in place—covers what goes on during prorogation. The idea that we have the law and conventions as separate things is simply not the case. But of course you can change things by law, and that is exactly what is being proposed at the moment.

Mr Vara: May I come back in very briefly, Mr Chairman?

Chair: Let Robert come in first.

Lord Lisvane: I will try to be brief, Shailesh.

I agree with Malcolm. Of course you can change a convention, or you can couch a convention in different terms, because you can say, "This is not sufficiently resilient against challenge so needs to be put into firmer, or more armoured terms," but in terms of supremacy—your question started to touch on that—you will want to look very closely at clause 3 of the repeal Bill. Clause 3 contains the purported—I use that word very carefully—ouster. The relationship between the parts of the state that that might imply, particularly after Miller 2, is something that you will no doubt be thinking very carefully about.

Q45 **Mr Vara:** I see the interlink between law and convention, but I am simply saying that the law is used to reintroduce a convention, and then the law drops out and leaves it to conventional practice, rather than the two operating together, which is perhaps the way it came across. The one is used to reactivate the other.

I just make that comment to clarify my position, but I am mindful, Mr Chairman, that there are lots of other questioners, so I will leave it at that. Thank you, Sir Malcolm and Lord Lisvane.

Lord Lisvane: I am slightly uneasy about the crossover between law and convention. Once you put it in law and statute, it has to be so firmly and precisely described that its conventional character disappears, because you cannot then say, "This is in statute." But, actually, you can interpret it in all sorts of ways that follow a convention, rather than the statute. At that point, I think you are required to make your choice.

Q46 **Chair:** May I just interject with one question? Can either of our two witnesses give us other examples of where the House of Commons only specifies a fixed majority as opposed to a simple majority in legislation? Is there any other case?

What is going through my mind is that I remember the early stages of the Blair Government, when the Government changed Standing Orders because they had a very substantial majority in the House. At that stage, I felt that it was fairly unfair that they could do that with a simple majority without involving the Opposition, so to speak. I just wonder if there are any other examples that either of our witnesses can think of where you need other than a simple majority in the House of Commons to change something.

Lord Lisvane: There are a number of requirements in quite a few places in the Standing Orders—40 Members standing to support a request for an urgent debate, for example. Malcolm may be ahead of me on this, but I cannot think of one in statute, and I would be quite surprised to find one.

I always advocated the use of super-majorities in Standing Orders because I felt that that actually started to redress the balance between the Opposition and the Government—that the Government had to win by a lot more than one in order to suspend the particular Standing Order that might have been to the disadvantage of a minority. But I do not know whether Malcolm has clearer recollection than I.

Sir Malcolm Jack: No, I completely agree with Robert on that. Certainly his example in the Standing Orders is the one that came straight into my mind. I cannot think of anything in legislation. It sounds more like something you might find in one of the Commonwealth jurisdictions. By the way, can I just throw another spade into the mix? That is just to say now—but we can return to this later—that Standing Orders, of course, have no statutory or legal status.

Chair: I am slightly worried that we are taking longer than we ought to be and we are not making the progress that we should; could people bear that in mind, both in questions and answers? I will also try to bear it in mind as Chair: I realise that I have just thrown in a ball that was not planned. Alan, can we come to your questions?

Q47 **Lord Beith:** I hope that both our witnesses have had the opportunity to look at the Government's one-page statement, "Dissolution Principles", and I am interested in their view about it. It is a statement that does not invoke, either explicitly or implicitly, the Lascelles principles to any significant extent. It makes some presumptions about how the Monarch would behave when asked to agree to dissolution. I wonder what the witnesses' view of the adequacy of this statement is—or, indeed, what its status might be.

Sir Malcolm Jack: I think we can be pretty brief about this. It is very brief and very general. I think we have to tackle this business about what was or what is the status quo ante. It sort of assumes that there is a clear and well-known status quo ante, and I am not sure that there is. It is not a clear document.

By the way, I am very taken with Robert's idea, which he mentioned a couple of answers ago, about a draft set of principles in your report. That seems to me to be a good idea. Perhaps this is where they should have been—in the Government principles. I think it is vague.

Lord Lisvane: My reaction to the highly economical one-pager was, "Is that all?" There are two things. It is a "draft statement", we are asked to believe, of the "non-legislative constitutional principles that apply to Dissolution". Well, for a display of brevity, that takes an awful lot of beating. Of course, there are so many elements of light and shade—indeed, as we have been exploring this morning—that demonstrate that it is not a draft statement of the constitutional principles.

There is one oddity about it in the penultimate line, where we have "So long as the Government appears to have the confidence of the House." I find that very odd, because we have been talking about occasions when the Government loses the confidence of the House, and that loss of confidence is reflected in a vote. That is not "appears"; that is an objective measure. I am afraid overall it is a bit GCSE.

Chair: We will not ask you what grade, Robert. Alan, do you want to come back?

Q48 **Lord Beith:** Indeed, a further weakness is that it does not really deal with a situation in which it might be apparent that there is a Government, such as Churchill's Government, which might be formed on the basis that the existing Prime Minister does not command the confidence of the House but somebody else most certainly would, in those particular circumstances. Its determination to restore the status quo ante, which is in the preceding line, is really defying Heraclitus's principle that no one can dip twice into the same river, because it is no longer the same river.

Lord Lisvane: On your Churchill recollection, certainly that fits the party or policies or personnel test that I was referring to earlier on. Of course, in 1923 there was not a general election—the King simply sent for Ramsay MacDonald. So, yes, I think there is scope for a lot more exploration of what those constitutional principles are.

Q49 **Lord Grocott:** The bald question is in what circumstances, if any, should the Monarch be entitled to refuse a request for dissolution. In our little rider to that, in the light of what Sir Malcolm said about a definition of a convention—that it is long-standing and observed—could I ask our two experts to give their thoughts?

De facto, at least since 1945, up until the passing of the Fixed-term Parliaments Act, isn't it the case that the Monarch has always acceded to a request for a dissolution? How long does a practice have to continue before it is regarded as a convention that is pretty well binding?

Sir Malcolm Jack: I think it would be easier to answer that question if we knew what the request was that was made to the Monarch on all these occasions. We simply do not. I think we are now talking about the Lascelles principles. They are that apparently the Monarch has

some residual authority not to accept the dissolution request if she, the Queen, believes that there are national interest reasons—I think that is one of the points in the Lascelles principles—that this should not happen or, and I think this is rather more important, that somebody else might be able to command the confidence of the House by having a majority.

I think that is what happened in the case of Gordon Brown, when Gordon Brown resigned and went to see the Queen and she then summoned Cameron who, in the meantime, as we all know, had formed a pact with the Lib Dems. In that case there was no dissolution, presumably. Exactly what Gordon Brown said to the Monarch and what she said to him we just do not know.

This just brings me into another area, which I just thought I would mention, and really echo your witness last week, Professor Alison Young: there is a tremendous lack of transparency in all this business. We just do not know, in some respects, how the prerogative operates.

The other thing I would like to say is that—and I think at least the Government principles document does say it—the Monarch is not drawn into party politics, but the Monarch is certainly drawn into politics. These decisions, under the Lascelles principles, are matters of politics, and so the Monarch is drawn into politics but not into party politics. So I think that is another thing that we need to think about.

It illustrates to me how this whole area at the moment is very unclear.

Lord Lisvane: Bruce has put forward an absolutely unarguable proposition when these things happen. It is a bit like the Government saying, from time to time, when it is in a tussle with the House of Commons and it takes a decision, "This is not a precedent." Well, of course it is a precedent, because it has happened. All these individual things may not build up to a picture of conventional consistency, but you can draw lessons from individual ones. The difficulty is that the exact circumstances are never quite replicated, so you cannot necessarily easily draw lessons from one to the other.

Q50 **Lord Grocott:** Sir Stephen mentioned that we do not know what the Prime Minister says to the Monarch. It is not exaggerating to suggest that had any Prime Minister since the war asked the Monarch for a dissolution, and the Monarch had said no, we would have got to know about that at some stage. It is difficult to imagine that we would not. If that is the case—I am repeating myself here—forgetting about letters to *The Times* and Cabinet manuals, which all examine theoretical circumstances, if, as a matter of practice in most of our lifetimes, the Monarch has without question accepted the Prime Minister's advice in respect of a dissolution, surely that is as good as any convention—or, I would say, it is a convention.

Chair: I do not think there is any disagreement with you there, Bruce, unless you are trying to become a script writer for "The Crown". Shall we move on to Lord Jay?

Q51 **Lord Jay of Ewelme:** It is a slightly historical question that goes back to one or two of the questions that have already been asked. The Government talks of returning to a tried and tested system, but proposals to reform that system and bring the prerogative under democratic control were made by all three major parties, I think, in 2010. So the system was evolving quite markedly back then. Is there a tried and tested system to which we can return? Or is the Government trying to return to something that is

already under way?

Chair: Robert, do you want to come in on that first?

Lord Lisvane: I was hoping Malcolm would first, actually.

Chair: I have been trying to share it out, so I take different people first or second.

Lord Lisvane: It lies in the eye of the beholder. One person's tried and tested system is another person's constitutional chaos. As Bruce's question implied, we have had lots of occasions over the years where you can point to what happened and say, "Yes, that's tried and tested."

The difficulty, and here we go back to the possibility of a dissolution being refused, is in unforeseeable but describable circumstances that have not arisen in recent history. I think "tried and tested" is a splendid strapline; it does not really convince me, I must say. All this is highly pragmatic.

Sir Malcolm Jack: I rather agree with what Robert has just said. This links us back again to the business about what conventions have changed since 2010, because clearly the tried and tested system is a different system if, for example, the Supreme Court decides to intervene yet again in prorogation matters.

Q52 **Chair:** Who is the custodian of this? Is it the Speaker of the House of Commons or the Leader of the House of Commons?

Sir Malcolm Jack: Custodian in what—

Chair: The custodian of conventions. Chris Bryant was asking earlier about when a motion of confidence can be tabled and whether the Government could say, "We are not giving you time." Who would be the natural arbiter as to whether something should have priority on the Floor of the House?

Sir Malcolm Jack: The Government control time on the Floor of the House, and the Standing Orders set out a whole lot of provisions about that, but of course the Speaker is concerned with maintaining what we call the exclusive cognisance—this terrible phrase—within the House, so he is the guardian of that. I was just coming back to the point that we have had all these changes since 2010, so what is the status quo ante?

The other thing to add to what Robert said earlier on the Fixed-term Parliaments Bill—the Committee ought to remember this—is that it was introduced without any draft Bill. This was a major piece of constitutional legislation and there was no draft Bill, so Parliament had no opportunity to consider this matter in any detail. We know why that was the case—the political imperative to get backing for the coalition Government—but there was no draft Bill.

Chair: Michael, does that cover your points?

Lord Jay: That is fine. I am happy to move on.

Q53 **Ms Angela Eagle:** Beginning with Lord Lisvane—you are up to bat again—what are the most worrying parts of the draft Bill? Does the Bill restore the status quo ante?

Lord Lisvane: You had a splendid joust between Stephen Laws and Alison Young a few days ago, with Chris Bryant intervening, as the lawyers might say. I think on the issue of replacing the prerogative power in the form that it would have been in had the Fixed-term Parliaments Act not been enacted, the Bill does that. For me, the question of moving from common law and convention to statute is not that important. I think what is much more important is whether the purported ouster in clause 3 is actually going to work.

Anisminic came up in your previous evidence, and that is absolutely on the button, because the use of "purported" in clause 3(a), I would suggest, is a probably doomed attempt to sidestep the Anisminic principle: you say that even if the result has been reached in a flawed way, it is still ousted. I am not sure that a court would take that view. Interestingly, I looked at the Privacy International case where Lord Carnwath said, "it is ultimately for the courts, not the legislature, to determine the limits set by the rule of law to the power to exclude review." So I think clause 3 is perhaps not quite as certain as the Government present it as being.

There is also the issue of whether this is a bridge to some form of statutory control of prorogation. Clause 3(b) talks about a "decision…relating to those powers". Now, if I can put to you a scenario where the Prime Minister of the day says, "I am going to ask Her Majesty for a dissolution for a general election to take place on date x, but I am also going to seek prorogation of Parliament for a period of 50 days before date x," is that a decision relating to those powers? I think quite a few of these things are not as simple as they are made out to be on the face of the Bill.

Sir Malcolm Jack: I completely agree with Robert on this. If I can throw more things into the cocktail, there is a myth that we have a separation of powers in this country. It was the 18th century French philosopher Montesquieu who used the unfortunate phrase, "séparation des pouvoirs." What we have is a separation of the organs of governance, but they are entirely intertwined; they have never been separate. I am absolutely convinced that Robert is right—the courts will themselves interpret clause 3 of the draft Bill. They will not be stopped doing that.

I will give you a couple of examples of this. One is in my own particular area of speciality, parliamentary privilege, where despite the words in the Bill of rights of 1689, the courts have constantly interfered in parliamentary privilege, throughout the 19th century and into the 20th century. We had Pepper *v.* Hart. In 2009, the then Attorney General made a very important statement on this, saying that the courts had every right to look at the parameters of privilege, but would not go into exclusive cognisance—what actually went on in the Chamber. That is one example of the courts coming in.

Another example is the Parliament Act 1911. There is an exclusion of the Speaker's certification. By the way, one thing that Rob and I managed to remove from the Fixed-term Parliaments Bill was the involvement of the Speaker, which would have been horrendous, in section 2. I just mention that as an aside, as I am suddenly reminded of it. The 1911 Act, apparently, the courts could have nothing to do with.

In the case of the Hunting Bill, the courts heard a case about the Parliament Act 1949, on the grounds that it interfered with rights under the convention of human rights. Eventually, it came to the conclusion that this was a non-justiciable business, but the court heard it. My

point is that I entirely agree that I don't think that this clause 3 will in any way stop the courts looking at these matters.

Q54 **Ms Angela Eagle**: Sir Malcolm, you used a phrase that struck me very much a bit earlier in your evidence. You said that you are much less at ease about going back to pre-2011 with what were then established as tried and tested conventions. We've had some interesting and relevant discussion about that. You said that you would be much less at ease about going back there without some reference either to the House or to law. Can you say a little bit more about what was on your mind and what you think might make you more at ease?

Sir Malcolm Jack: I will be very frank with the Committee. These things go round and round in your mind, and I think both of us, Robert and I, said that to-ing and fro-ing between statute and convention. But I would like the Committee to at least grasp something of the principles that lie behind prorogation of the Commons etc. and put that it into its report. At the moment that's about as far as I'd go, but I do feel uneasy about this, yes.

Chair: Lord Mancroft, you wanted to come in on this area and explore some more areas.

Q55 **Lord Mancroft:** The Government's proposal at the moment would leave only the Monarch as a formal safeguard against the misuse of prerogative powers on dissolution and on the calling of Parliament, which are two slightly different things. Is that appropriate? If it isn't appropriate, what's the alternative?

Lord Lisvane: We have what we have. If it were the courts, I can imagine a very vocal and substantial contrary view as to that being part of the mechanism. I think it is very difficult for Parliament to do it, and here, of course, we are really talking about the House of Commons, because the matter that is at issue is an essentially political one. In these circumstances, it not just political; it is party political.

There is one suggestion that I have seen in recent days which I think is worth exploring, at least. That is, one of the people who is most exposed in the circumstances we have been talking about is the Sovereign's Private Secretary. There has been a succession of extraordinarily distinguished and able occupants of that post, and the current occupant is absolutely no exception to that, but it is a very isolated and exposed point, even if the Cabinet Secretary is also there as somebody to provide advice and provide the political dimension.

It has been suggested to me, and I do have a certain amount of time for this, that without going for something like a conseil d'état, there might be room to have a body of, let's say, seven or eight people—not politicians, although I think there would need to be a political dimension to it, but senior and highly experienced people in the relevant field—from which the Queen's Private Secretary could take advice, or try things out on. I would not in any way see that as a decision-making body; I would see it as essentially shadowy. If it were not shadowy, it would not be doing its job, but it might be that you could add that additional dimension, which could give a little bit more resilience and safety in the circumstances we have been talking about.

Chair: Does that answer your question, Lord Mancroft?

Q56 **Lord Mancroft:** Yes, but could I just go a little further? Two things: first of all, does that cover the problem that was raised by Lord Butler of Brockwell in his advice that, following the resignation of a Prime Minister and perhaps a dissolution, the Sovereign should not take the advice of the Prime Minister on who or what comes next? Secondly, at the end of your last comment, you said that some shadowy body of alternate advice could be constituted. How would that be constituted unless it was by statute?

Lord Lisvane: Well, it would not have to be by statute. Lord Butler and I gave evidence to the Constitution Committee on these issues. The Queen's Government has to be carried on, so the Cabinet manual makes this absolutely clear: the Prime Minister remains Prime Minister until replaced by somebody else summoned by the Sovereign. However, until the Prime Minister is replaced, the Prime Minister is the Sovereign's principal advisor. I am not sure I can go much further than that.

Q57 **Chair:** Malcolm, do you want to add anything?

Sir Malcolm Jack: It is more or less covered, as far as I can see.

Q58 **Jackie Doyle-Price:** Obviously, we are looking at all these issues through the prism of what happened last autumn, which frankly would have tested any constitutional setup. However, could I just ask you two quick questions? First, should a Prime Minister be able to call a general election when, even if by a majority vote in the House of Commons, MPs have made clear that they oppose it? Perhaps Robert first.

Lord Lisvane: First into the hospital pass. I think it depends on the terms in which a majority in the House of Commons have made clear that they oppose it. If it is a straightforward proposition that there shall be an election, and it is defeated by a majority or even a significant majority, it is very hard to imagine a Prime Minister nevertheless ignoring that and going to the Sovereign, because you know what the first question would be, and it would be quite a difficult question for the Prime Minister to answer.

If it is some other sort of motion—it is quite difficult to concoct one on the spur of the moment—it would depend on its terms. I think "have made clear" was the phrase you used, and that is pretty subjective. That could be what the political editors think that a majority of Members of the House of Commons think. If you are going to make it a basis for action, then it must be on properly objective terms, and that is probably the House of Commons taking a view on something that is put in front of it.

Q59 **Jackie Doyle-Price:** Turning that on its head, you mentioned earlier that many of the defeats that Mrs May's Government experienced would perhaps have been votes of confidence under the previous settlement. Is there, conversely, a risk of paralysis if the House of Commons could trigger a general election through a simple majority vote, in those converse circumstances?

Lord Lisvane: Through a simple majority vote? Of course, here you get the interaction of proceedings, or at least the absence of statute, because you no longer have the FTPA. This is a very difficult area, and it is one in which recent developments have not been welcome. I think it came about originally from—or at least it was exacerbated by—the introduction of Backbench Business motions and when the House of Commons comes to an absolutely clear decision on them. The first I can remember is that there should be a second battalion of the

Royal Regiment of Fusiliers, and that was agreed by an overwhelming majority, and the Government said, "Absolutely not—get lost." There is now an increasing tenuousness between what the House of Commons says should happen and what the Government say they will do. I think you have to project all these problems on to that changing philosophy and culture.

Q60 **Jackie Doyle-Price:** Malcolm Jack, in adding anything to that, is it not the truth of the matter that, whatever the rules are, Prime Ministers and MPs will behave differently according to them?

Sir Malcolm Jack: As Robert just said, you would have to have it absolutely clearly stated what this meant, because the House of Commons "coming to a view" is a very vague proposition. It would have to be a very clear motion, like a no-confidence motion, in effect.

May I just mention one thing that the Committee might like to get the Clerks to follow up? I know we may come on to other jurisdictions, but the South African constitution contains a provision for a vote in the Assembly, the lower House, to lead to an election, so there is such a provision in the South African constitution. It is the only one I know of. That, as it were, qualifies the President's power to prorogue that Parliament; in other words, if that motion is carried in the South African Assembly, there is a general election.

Whether that has actually ever happened, I do not know—the Clerks could find that out by contacting our colleagues over there—but it is an interesting example of exactly what we are talking about.

Chair: Doreen, that comes on to your question in a way; this is the area that you want to dig into a bit more, as well.

Q61 **Baroness Lawrence:** Yes, exactly. I am finding the whole explanation of prorogation and the Fixed-term Parliaments Act very interesting, as somebody who was not an MP coming in to this. As we try to make sense of what we are asked to consider in the Committee, which is what Sir Malcom wanted to talk about, what can we learn from other parliamentary systems? Are there viable alternative models for election and Government formation that might work better?

Sir Malcolm Jack: Golly. Shall I dive in, and then Robert can follow? One thing that is very interesting for the Committee to bear in mind, of course, is the situation in the Commonwealth—that is, Canada and Australia. That is complicated by the fact that both those countries have written constitutions, which we do not.

Some of the matters that I am about to mention are in the constitution. By the way, the Committee may be shocked to discover that I am not myself averse to the idea of a written constitution in due course.

Q62 **Chair:** When you say, "in due course", do you have a timescale for that?

Sir Malcolm Jack: It would be a very long one, Chair. In terms of the inquiry that you are doing, you will know that the royal prerogative in Canada and Australia is separated from its operation in this country. The dissolution prerogative has remained in both the Commonwealth countries—both in Australia and in Canada. The governors-general still prorogue. The Fixed-term Parliaments Act provisions obviously did not apply to the

Commonwealth, but as I say they are within a constitution context, with fixed terms within the constitution. I am not sure that that sheds a great deal of light on the change of conventions in our system.

I have some familiarity with various Commonwealth Parliaments, obviously. In the South African example there is that particular provision that always caught my eye. I found it a very interesting provision. In most Commonwealth countries, for example in India, the Head of State has the absolute prerogative to dissolve Parliament—in India it is the President. So it is in almost all of the Commonwealth countries, but as I say the difficulty is that they are all operating within terms of written constitutions, which, rather ironically, were for the large part drafted in this country.

Lord Lisvane: Malcolm will not be surprised to hear that he and I do not see entirely eye to eye on a written constitution, but I was much relieved to hear him use the phrase "in due course". I think Sir Humphrey Appleby also used the phrases "when the time is right" and "at the appropriate juncture", so we may be saved from that for a few years yet.

Malcolm's parallels are extremely interesting, but they also bring out, as it were, the health warning. It is sometimes very attractive to see what happens in another jurisdiction and to think that you can transplant it, but of course there are so many other givens and so many other inter-relationships with the operation of other parts of that foreign constitution that may make it very hard to do. We have a very good record in the House of Commons of nicking things from other legislatures. Westminster Hall proceedings, for example, are stolen from the Australian Main Committee. That was an idea that we adopted, I think to general benefit.

However, on more profound constitutional change I think it is, as I say, a health warning. One has to be quite careful about simply importing something from another jurisdiction, because it will come with all sorts of assumptions and—dare I say—conventions, which may not operate in our surroundings.

Sir Malcolm Jack: I quite agree with Robert, but I would add that one area in which we have always had great exchanges is in the area of parliamentary privilege with our Commonwealth Parliaments.

Chair: Doreen, does that answer your question?

Q63 **Baroness Lawrence:** Not quite, because I am still trying to figure out the main fact. Part of us wants to go back to what we had before fixed-term Parliaments, and part wants to move forward. Within the discussion here, I cannot make a decision on whether the Government are right to look to go back or should stick with what we have already. Can either of you help me with that?

Sir Malcolm Jack: I think the short answer is: move forward in what way? That is what we are discussing, isn't it? What is the status quo ante that the Government claim exists now, reflecting the situation in 2010? I think that this morning's discussion has shown that that is by no means clear.

Lord Lisvane: I agree. I don't think that the FTPA is actually fit for purpose, so I have no rooted objection to its repeal, but I think one thing that comes very clearly out of the discussion that we have had this morning is that reinstating exactly what went before is not going to be easy, because what constitutes an issue of confidence, which would trigger a

general election, was changed radically by the FTPA, and one now has to reintroduce not a statutorily defined set of circumstances, but merely an expectation of what will now operate.

Chair: Thank you both very much for that. Maria, you are going to move us on a bit.

Q64 **Mrs Miller:** I was going to ask a question to do with confidence motions, but I think that that has been covered in the initial discussions. Could I move us on a little—I hope I am not treading on Shailesh Vara's toes—by moving us on to the issue of convention? With only 149 out of 650 Members of Parliament in the current Parliament having been elected when the old conventions were in force, I am really interested in your views as to how easy it is to reinstate conventions among a group of people who do not have living memory of them and, in particular, in whether you have any advice for the Committee as to what support we could give Members of Parliament to better understand what those conventions might be. It has always struck me that, as parliamentarians, we come into Parliament with absolutely no training and really no understanding—many of us—of how Parliament works. We now have a group of parliamentarians of whom the vast majority do not have experience of what went before. Is there anything we could to support them on that? I am just interested in your views.

Lord Lisvane: Maria, I think the answer to your question is going to be absolutely crucial in making the new or replacement or reversionary arrangements—however you want to describe them—work. It is very difficult, because you do not have the embodied memory that you would have done had you done this on a shorter timescale, or had it been done on a shorter timescale.

Malcolm will speak for himself, but I think we are both in favour of your trying to distil some more helpful constitutional conventions, or criteria for the operation of those conventions, than the Government have so far favoured us with. I will also say that it is very often not effective to be too prescriptive, because these things will develop in a parliamentary dimension, a political dimension, which is not the same. Parliaments the world over are not organisations; they are organisms, and the distinction between the two is a very powerful one. A new House of Commons—this one or the next one, or the one whenever these things come to be decided—will take its own view, and that may not be the same as the view that might have been taken 10 years ago.

There is one thing, though. You have touched on the fact that Members do not come in as experts on this. Why should they? But I think that a key factor will be a lively understanding of what constitutes fair play; and there, I think, Members are actually very, very well equipped to make a judgment. I am not talking now about our friend Peter Hennessy's concept of a "Good Chaps" constitution, but the concept of fair play is one that will strike a chord with the electorate, with the citizenry, as a whole, and I think Members of Parliament are actually, by background and experience, pretty well qualified to make judgments on what constitutes fair play.

Sir Malcolm Jack: I was going to say, Chairman, that I had better avoid being personal in answering this question. Some people have argued—I know that there are people on the Committee with a legal background—that the lessening numbers of Members with a legal background has had something to do with this loss of interest in constitutional matters. I am not sure I go along with that. Anyone can be interested in constitutional matters, whether they

have a legal background or not, but certainly there was a time, when I joined the House Service, when quite a large proportion of Members had a legal background.

The other thing we have to bear in mind—you are members of the Committee, after all—is that MPs have an awful lot on their plate now, much more than they ever did when I entered the House. There was plenty of time to take off in those days. I think that to expect deep interest in these matters may be a little unreasonable, but certainly the provision of information is a very good idea—I am sure that the Clerks will be very happy to hold sessions, and so on, on these matters.

What is really important is that, however small the band of Members interested in these matters, that voice should be heard. That is what you are doing in the proceedings of this Committee.

Q65 **Mrs Miller:** What constitutes fair play, as Lord Lisvane was talking about, is very interesting. Of course, that might be many things to many different people. That is the concern, speaking as a non-lawyer—although I am married to one. What constitutes fair play is quite a moveable feast. Perhaps it is right that it should reflect society and the way society evolves, but it is about trying to encourage people to explore that more, I suppose. Is there anything else you might add to how that might be done within the parliamentary setting?

Lord Lisvane: I would be the last person to advocate extensive training in constitutional principles. Like so many things in the political arena and so many things in Parliament, issues become the focus when they become the issue. If we are talking about dissolution, it was remarkable how many people focused on what was and what was not a matter of confidence during the May Government, for example. If we are talking about some of the things that might trigger a general election, you can be absolutely sure that Members of Parliament—why should I be telling you this?—will focus very fixedly upon them and take steps to find out what the background to them is. I would go for practice over theory.

Q66 **Mr Goodwill:** We have talked a lot about the conventions of the House, and it has just been mentioned that there are not too many constitutional lawyers on the Benches. As a simple tractor driver, I would probably tend to look to the Speaker to advise or guide the House to some extent in these situations. The Speaker has always had the benefit of very good advice available to him, although whether in every case Speakers have taken that advice is another matter for debate. Can our witnesses say a little bit about what the role of the Speaker would be in these situations?

Lord Lisvane: You have to be quite careful about putting the Speaker in a position of expectation that he is not able to fulfil. That is a starting point. The Chair of the Committee knows much more about this than I do—

Chair: But I am not a witness.

Lord Lisvane: Let me go back to the issue of tabling no-confidence motions. I think that, behind the scenes, the Speaker would be a major player in saying to the Government of the day, "For heaven's sake, come off it. Not the week after next. This has got to be on Tuesday." There are all sorts of unavowed—and much better kept unavowed and not explicit—ways in which the Speaker could operate. If the Speaker becomes a player, he needs the support of the

Standing Orders if he is going to exercise formal powers. Whether or not some of these things can be encapsulated in Standing Orders is, of course, a completely different set of questions, but I think he needs to have that safety net.

Sir Malcolm Jack: I would agree with that. I would just throw in that there are informal ways in which the Speaker can and does influence things, as Robert says, behind the scenes. On the possibility of more information and so on, the previous Speaker held a series of lectures in Speaker's House, to which Members of both Houses and outsiders were invited. Several of them touched on constitutional matters, and they were very well attended. There are informal mechanisms for disseminating more knowledge about these subjects.

Q67 **Mr Goodwill:** We have talked a lot about what might happen in the situation where the Prime Minister wants to call an election and he or she is determined to go to the Palace. We have talked about a possible committee of constitutional experts—a sort of SAGE committee—and I am sure our two witnesses would be automatic members of it. Of course, during the debates we have had on Europe, we have had a lot of lawyers arguing the legality of what is going to happen or not and the intervention of the Supreme Court, despite the fact that the ouster clause—clause 3—already seems to be not worth the paper it is written on.

In terms of the time available, is there any alternative to the Monarch making that decision based on the advice that they have been given? Indeed, in terms of the confidence of the country, would they think there was anybody better qualified or experienced to make that decision at that point? We are not going to have a month to discuss it and go to court; it is probably going to be a matter of an afternoon.

Sir Malcolm Jack: This brings us, doesn't it, to our well-known cultural tendency to get things sorted out quickly and get on with it. This doesn't happen in other countries; it can take months for these matters to be decided. I rather agree that, yes, if you want decisions made quickly, the system has to be fairly straightforward.

Lord Lisvane: I agree: one point of decision, with appropriate and high-quality advice.

Mr Goodwill: Thank you very much indeed.

Q68 **Aaron Bell:** I want to talk a little bit about forming Governments after elections. Can I go back to what Lord Lisvane said earlier about the Prime Minister carrying on in circumstances where they may have lost confidence? That seems to contrast with what the bottom paragraph of the dissolution principles says. You have said that the Queen's Government needs to carry on, and the Prime Minister remains her adviser in those circumstances, but the dissolution principles now say: "The Sovereign, by convention, is informed by and acts upon the advice of the Prime Minister so long as the Government appears to have the confidence of the House". Are you suggesting that there is a bit of a lacuna being created by the dissolution principles, Lord Lisvane?

Lord Lisvane: No, I think it is a drafting error.

Q69 **Aaron Bell:** Right. Perhaps that will be fixed at a later stage.

Looking at the other side of the election, we have talked a lot about dissolution, but we have come very close to having some deadlocked situations after elections in the last 50 years or so. What mechanisms are there where it isn't clear who can command confidence, whether it is a Government or who the individual should be? Could the Standing Orders of the House or other procedural mechanisms help MPs to enforce the traditional conventions on Government formation? I will start with you, Lord Lisvane.

Lord Lisvane: This is the classic question of whether there should be a vote on who is to be Prime Minister. On the plus side, of course, if the House has done that, it reassures the Sovereign that, particularly in unclear conditions, the person she is asking to form an Administration really can do that because that person can put together an Administration that can command the confidence of the House of Commons.

Of course, that would have to happen before the first Queen's Speech in a new Parliament, and although the devolved Administrations have shown that that works, because that is the way they do it, I think there are some questions about the way in which the House of Commons would do it. Do you limit it to a straightforward yes/no on whether X should become Prime Minister, or offer himself or herself to the Sovereign to form an Administration?

I think the one thing you must avoid is the possibility of conditions being attached to that, because I do not think you could be in a position of imposing conditions on the Sovereign to call for Mr or Mrs X to form an Administration. If the putative Prime Minister were to say, "I am absolutely prepared to do this, and I would like to do this, but I must have Genghis Khan as Home Secretary," that is not the sort of proposition that would go down terribly well. It would be immensely confusing as soon as you start to attach conditions.

The short answer to your question is that, yes, it could be done. I think you would probably need to do it by Standing Order. I would be pretty chary about doing it by statute. It could spin out the process a bit. If that motion were lost, you could be in something like the 14 days that the FTPA envisaged. There are ways of dealing with it.

Sir Malcolm Jack: I am more reluctant to get into the area of Standing Orders, frankly. As Robert says, what would this question be? I referred to the South African case, where it is a pretty straightforward thing—it just says a simple majority. Members of the House know jolly well all about amendments. Would this motion be amendable? What would its scope be? Would the Monarch be bound to take account of it if it was not clear what it purported? I think this is a minefield, frankly.

Lord Lisvane: I think Malcolm's doubts underline the points I was making: that if you have a procedure, it has to be absolutely clear. The idea of having amendments is utterly crazy. It would not, and could not, bind the Sovereign, but as I say, it would be a powerful reassurance to the Sovereign when deciding whom to send for.

Q70 **Aaron Bell:** Sir Malcolm, you were clerking in 2010. If the result had maybe been that the Conservatives had won 10 seats fewer and Labour had won 10 seats more, maybe Gordon Brown would not have resigned, and maybe it would not have been clear who could command the confidence of the House. If the House had met before anything had been agreed and Gordon Brown had still been Prime Minister, how

would you have advised the Speaker to proceed?

Sir Malcolm Jack: In that circumstance, nothing would have changed. There was no mechanism for anybody else resigning as Prime Minister.

Q71 **Aaron Bell:** Would we have begun with a Queen's Speech, with the assumption that it would be defeated?

Sir Malcolm Jack: Yes, I think so.

Chair: Even before that would have happened, the House would have had to have met to elect the Speaker, which would have been another interesting exchange, in terms of seeing and feeling the way the House felt. That would be the first thing. Angela, you wanted to come back on an issue?

Q72 **Ms Angela Eagle:** I am very conscious that we have before us two extremely distinguished Clerks of the House. Is there anything that you think ought to be in the Bill that is not in it at the moment, or any process that you think the House could adopt—if we are going back to status quo ante, in so much as we can—that the Committee should think about?

Sir Malcolm Jack: This raises all the matters that we have been discussing this morning, doesn't it? I think I would go back again to clause 3, which both Robert and I have mentioned. I am not sure that that is adequate in keeping the courts out of the whole business. I think, as I have been listening and thinking about this, that the notion of the Committee attempting to set out some of the principles in its report would be very helpful indeed. That is one thing to supplement the Act.

Rather like Robert, I am actually quite glad to see the Act being repealed—the Committee has probably got that fairly clearly from me—for various reasons, so I am not against that. But where we are at the moment, just with the draft Bill, is simply not clear. It simply is not clear what we are going back to, or what the situation is.

Q73 **Chair:** Following on from what you were saying—I will come back to you in a second, Angela—do you think that the system in the draft Bill at the moment would be sufficient, should we be in a position of having to form a coalition Government again? Do you think that there is enough flexibility, as far as the Bill goes, or do you think that the law would have to be changed again?

Sir Malcolm Jack: No, I think there would be flexibility for that, because you would be back to the old prerogative system, where the person who commanded the majority in the House could be the one who formed the Government.

Q74 **Ms Angela Eagle:** Does Lord Lisvane have any comments? This is the sort of sweeper-up question at the end, because there might be something that you are dying to say that the House of Commons ought to have more clarity about, but which you have not had the chance to get in yet.

Lord Lisvane: That is extremely kind of you. I think we have managed to insinuate most of our additional comments into earlier answers.

I would agree with Malcolm: you will want to look very carefully at clause 3, both the question of how effective the ouster is, and whether there is a bridge across to other

prerogative matters—I am thinking particularly of prorogation under "relating to those powers".

The main difficulty is that the Government clearly think that by enacting the Bill we will in every respect be back to where we were before the FTPA. I do not believe that we will. The issue of what constitutes an issue of confidence is of course one of the aspects. I would be very strongly in favour—Malcolm has just mentioned this—of your exploring some of those by exploring what the constitutional conventions now affected by the enactment of this repeal Bill would and should be. That would be a very great service, if I may say so.

Chair: Does anyone wish to make any other points before my concluding remarks?

Q75 **Lord Grocott:** Would it be fair to summarise what Robert and Sir Malcolm have said so far to this extent? It is almost impossible for this Committee or, indeed, an Act of Parliament to try to cover all the extreme possibilities and variations of circumstances that might arise in connection with conventions, including and particularly the convention of dissolution. All sorts of things could happen under our constitution, in this and in other areas, which are unthinkable and do not happen, but there is a danger that we might end up trying to cover all eventualities, however ludicrous.

Lord Lisvane: That is a highly appropriate warning. My father always used to quote as an argument of the dangers of overspecification what he the University of Heidelburg. Instead of having a general rule that a breach of common sense is a breach of a rule, it said that nobody shall tie anything, whether a nightwatchman or not a nightwatchman, to anything, whether a lightning conductor or not a lightning conductor, at any time, whether or not during a thunderstorm.

I think that your warning is one very well made, but I do not actually take it seriously. I do not think you need to go into the far recesses of what could conceivably happen. I think there is enough on the table in terms of possible options or possible events for you to be able to distil something that would be of huge use, and it would also underpin the debates that will take place on this Bill when it is formally introduced.

Sir Malcolm Jack: I would agree with that. I do not think either of us are thinking of a Magna Carta, if you like, of dissolution, but something that sets out, as the Committee understands it, the principles and the way in which matters to do with prorogation, dissolution and so on now operate. I think that would be extremely useful.

Lord Lisvane: If I could just add to that, I think it would be especially useful to have that done from a parliamentary perspective, because the Cabinet manual and the dissolution principles are both produced from a Government perspective. It may not produce a profound difference between the two perspectives, but it is an important point to take into account.

Chair: May I thank both of our witnesses today? Between the two of you, you have given more than 80 years of professional service to the House of Commons and seen the evolving of Governments from Wilson to Thatcher and Major and other Prime Ministers in between and after those. A very great thank you for spending the time this morning taking us through some of your knowledge. Your knowledge shone through with the various points you were able to make to us about how we should

address what is a very simple issue that becomes a bit more sophisticated and a bit more complicated than at first sight.

Thank you both, Sir Malcolm and Robert Rogers, for your evidence this morning. We may possibly need to come back to you again, but we will see how the inquiry evolves once we have seen the representatives of the Law Lords, which hopefully will be our next meeting. I thank you both for the evidence you have given.

To the rest of the Committee, thank you very much for your time this morning. At the moment, our anticipated next meeting is 7 January, but if that changes, we will be in touch. I wish all the Committee and all the staff of the Committee a contented Christmas, perhaps. See you all in January. Thank you very much indeed.