HOUSE OF COMMONS

Joint Committee on the Fixed-term Parliaments Act

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

Thursday 14 January 2021

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Watch the meeting

Members present: Lord McLoughlin (Chair); Lord Beith; Aaron Bell; Jackie Doyle-Price; Dame Angela Eagle; Maria Eagle; Peter Gibson; Mr 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; and Craig Whittaker..

Questions 122 - 179

Witnesses:

I: Rt Hon. Sir Oliver Letwin

II: Rt Hon. Lord Butler of Brockwell KG GCB CVO

Examination of witness

Witness: **Rt Hon. Sir Oliver Letwin**

Chair: Welcome to the Joint Committee on the Fixed-term Parliaments Act. This morning, we are taking evidence from Lord Butler and Sir Oliver Letwin. We are starting with Sir Oliver. Welcome, Oliver, and thank you very much for agreeing to come to the Committee at relatively short notice. I will ask Peter Gibson to start with the first question.

Q122 **Peter Gibson:** Good morning, Sir Oliver. Thank you for joining us. Will you outline to us the purpose of the Fixed-term Parliaments Act, and say whether you believe that the coalition deal could have been agreed without that or a similar Act of Parliament?

Sir Oliver Letwin: The purpose, as is widely known and as the second part of your question implies, was to enable the coalition to be formed. One of the principal demands of the Liberal Democrat side of the coalition, when we came to discuss the whole proposition, was that there should be no ability for the larger of the two parties—the Conservative party—within a coalition Government to spot the moment when it would be convenient to ditch the coalition by seeking a Dissolution. As the Prime Minister came from the larger of the two parties, that

would have been possible in the absence of a Fixed-term Parliaments Act or something very similar.

Do I think that the coalition could have been formed without that? Historically, no, I do not believe that our coalition partners would have agreed to a coalition without that provision. I suppose the deeper question implied by the second part of your question is: would a coalition have worked properly—smoothly—for the period of the Parliament if there had not been such an Act? I think the answer to that is less knowable, but it probably would not have worked as well. One of the things that made it work pretty smoothly as a Government was that everybody knew that neither side could easily crater the coalition and, in particular, the Prime Minister could not choose a moment to take advantage of any perceived gain on the part of the larger party, and any weakness on the part of the lesser party in the coalition, to hold an election.

My own guess is that if the present Parliament, as looks likely, legislates to return to the original position, and if, as is not at all impossible, a coalition has to be formed after the next election to provide a stable Government, it is very likely—this is one of the central ironies of our history—that a new Fixed-term Parliaments Act will have to be enacted.

Chair: Aaron Bell.

Q123 **Aaron Bell:** Thank you, Chair, and thank you, Sir Oliver, for your time. You have set out the political purposes of the Fixed-term Parliaments Act, the implications for party politics and the role of the Prime Minister as that affects things. What were the key constitutional issues you considered when you prepared the legislation?

Sir Oliver Letwin: There were many issues that arose. The ones that caused the greatest difficulty were the interactions between the Fixed-term Parliaments Act and the nature of a parliamentary or fused democracy, in which it has always been regarded as canonical that the Government must fall if they cease to command the confidence of the House of Commons. The biggest issue was how to knit together that principle with the principle of a fixed term. It is fairly easy if you have an American, French or German system of democracy, in which there is a clear separation between different parts of the machinery of the legislature and of the Executive, but there is this presumption that, at any time, the Government of the day must maintain the confidence of the House of Commons. It is quite complicated to reconcile that with a fixed term.

As you will all be aware, the resolution was a compromise in the introduction to the Fixed-term Parliaments Bill, as it was. There were provisions for no-confidence motions that could, under certain strictly defined circumstances, trigger Dissolution, and thereby sully the purity of the idea of a fixed-term Parliament. The truth is that the Fixed-term Parliaments Act was not a fixed-term Parliaments Act; it was a "presumption of a fixed term unless the following circumstances arise" Act.

Q124 **Aaron Bell:** This is obviously germane to our Committee, as we are reviewing the Act, but also scrutinising a proposed repeal Bill. Did you consider whether the Fixed-term Parliaments Act abolished the prerogative powers of Dissolution, or simply but them into abeyance as a matter of the constitutional law?

Sir Oliver Letwin: I certainly didn't; I cannot speak for the Government lawyers, who would give their own account of that. I very much agree with what you heard from Lord Sumption and Lady Hale in the previous evidence session, namely that this is a distinction without a difference. I do not think it makes any difference whether something ceases to exist or goes into abeyance when the abeyance is indefinite. Had I considered that issue, I would have ceased considering it rather rapidly.

Q125 **Aaron Bell:** As we are considering the operation of the Act, how would you assess its operation post coalition, from 2015 through to 2019?

Sir Oliver Letwin: Here I hold what is probably now very much a minority view. My own view is that it did not cause any significant difficulty. I do not believe the present Government's view that it was the cause of crisis, stasis, inflexibility or whatever. What happened was that there were some very unusual circumstances—much more unusual than coalition. For the first time in modern British history—in fact, the first time in what is effectively parliamentary British history—the Government of the day had a majority and the confidence of the House for everything except for its flagship legislation, or flagship policy. That is a very unusual circumstance. I do not pretend to be an omnicompetent parliamentary historian, but I do not think there has ever been a case like that before, and I wonder whether there will ever be one in the future. Apart from those circumstances, it worked pretty well. For example, when both Mrs May and Mr Corbyn wanted to have an election in 2017, there was one.

Aaron Bell: With respect, obviously it has not happened before, because if a Government had lost confidence in their flagship policy in the past, whether that be a Budget, or a vote like Maastricht, which the Government nearly lost, there would have been a Dissolution. Presumably that is the case that people have made against it. I will leave it there, unless you want to comment on that.

Q126 **Chair:** Oliver, you have been on the political scene for a very long time. Would you say that one of the disadvantages of a fixed-term Parliament—and, indeed, of five-year Parliaments—is that the last six months of Parliament becomes almost wasted space, because everybody is waiting for that general election? If you think back to when Mrs Thatcher was Prime Minister and you were in the policy unit, after four years, although the Parliament could have gone on for five years, an election was held. In recent times, five-year Parliaments have been rather odd: they were '92, and at the end of the Brown-Blair era. What would your view be on that, and is it fair to say that those last six months—October '14 to May '15—was not a time when Parliament was very much engaged?

Sir Oliver Letwin: It is true, as you say, that as you approach the foreseen end of a Parliament, a certain degree of languor sets in and everybody is waiting for the new Parliament before doing anything very exciting, unless there are some very unusual external circumstances. But I think that is true regardless; you quoted the case, for example, of the later stages of the coalition period, but there were also the later stages of the other cases you quoted, of Mrs Thatcher's various Parliaments. Knowing that an election was likely to occur was enough to create the kind of torpor that you are describing.

I don't think it matters terribly whether there is a fixed term; as soon as we get to the point where the newspapers are saying that there is likely to be an election, for whichever reason—

either because you are approaching the five-year point, or because you are approaching a four-year point and everyone assumes that the Prime Minister will want to go as soon as the runes are read in a way that suggests the Prime Minister might win the election—that torpor will set in. It is a disadvantage of democratic life, but I don't think it is one that depends on whether there is a Fixed-term Parliaments Act.

Q127 **Lord Beith:** Oliver, I think you would recognise that there had been some debate about the merits of a Fixed-term Parliaments Act, and about whether the House of Commons should be involved in the decision to call a general election. In the preceding years, the Brown Government had published a White Paper that said that the Prime Minister should be required to seek the approval of the Commons before asking the monarch for a Dissolution, and the Conservative party's 2010 manifesto talked about "making the use of the Royal Prerogative"— of which this was an example—"subject to greater democratic control so that Parliament is properly involved in all big national decisions".

What did that latter Conservative party commitment mean, and was it in some way implemented in the Fixed-term Parliaments Act? Do you recognise that the matter was the subject of general debate beyond the immediate requirements of the coalition?

Sir Oliver Letwin: The answer to your second question about the meaning of the phrase in the manifesto is that it was intended more as a reference to things such as going to war. You may recall that Ken Clarke and others—I am not actually sure, Lord Beith, that you were not part of that movement—were very keen, and rightly, in my view, to enshrine the nascent convention that the country should not go to war without some form of parliamentary approval.

It is obviously a subtle and difficult issue, because one has to preserve the flexibility to respond immediately to a military emergency and so on, but it was bearing all that in mind that a phrase was produced that gestured gently in the direction of trying to shore up the convention that Parliament should be involved in that kind of very major national decision. It was not a hidden attempt to suggest that the Conservative party, going into that election, had in mind a fixed-term Parliament arrangement; that was a product entirely of the coalition discussions.

However, I do agree with the implication of the first part of your question, which is that there were anyway reasons for the existing state of affairs, which, if this repeal goes through, will be the new state of affairs again, namely the Prime Minister of the day can choose, without reference to the rest of the Parliament, to have an election at a moment when he or she judges that they are most likely to win an election. That had always seemed, to many of us, a slightly bizarre arrangement that favours incumbency.

Of course, if you happen to be the incumbent, it looks nice; if you happen not to be the incumbent, it looks nasty. You could say, "Well, it's swings and roundabouts," but I accept that it is an argument for not simply reverting to the original position before the Fixed-term Parliaments Act.

Q128 **Lord Beith:** It is an argument that is persuasive in many other countries, and was persuasive when we set up the devolved Parliaments in Scotland and Wales.

Sir Oliver Letwin: Yes. It is the general pattern in democracies. I still believe that, in general, that is a better method. It causes a particular kind of problem in a fused parliamentary system, but not one that is impossible to manage.

Q129 **Jackie Doyle-Price:** Really, the heart of this debate is: where should the power to call a general election lie? Should it be with the Prime Minister or the House of Commons? We are seeing this very much through the prism of what happened last October, which makes it easy for the Government to say, "Right, let's just repeal this Act and go back to what there was before."

Returning the power to call an election to the monarch is a slightly less than honest position, isn't it? In practice, it goes to the Prime Minister. What would your views be about being more explicit about the role of the House of Commons and the role of the Prime Minister in calling a general election? What are your observations on that?

Sir Oliver Letwin: First of all, I completely agree with you. Putting the monarch in here is unfortunate. It is a fact of our history that the royal prerogative is royal, and that the Prime Minister was merely the monarch's first Minister. But that is history. Nobody now imagines that the Queen is suddenly going to zoom out of Buckingham Palace and select somebody as Prime Minister for fun, so to speak, on Tuesday.

The Prime Minister is chosen by a process of democracy of which we are all aware. It is clearly the Prime Minister who actually makes the decision. Therefore, the straightforward way to proceed if there is to be a repeal, which I don't personally welcome, is to say the truth, which is that the Prime Minister does this. When we come on later to a discussion about the ouster clause and things of that sort, that becomes quite relevant.

Then we come to the question of whether the Prime Minister should have the untrammelled right, unusual in democracies, to choose the moment of an election to suit themselves. If so, they don't have a very perfect record of knowing what the right moment is. It is a game of chance here, to some degree. Nevertheless, it gives this slightly bizarre power to one person to choose a moment when they think it is to their advantage to have an election. If you were sitting on Mars, and didn't know anything about the Brexit farrago and everything else, and you asked yourself that question, would you design a system in which the incumbent Prime Minister could choose the moment at which the electorate would get the chance, if they hadn't reached five years, to elect or not elect them again? I don't think you would have any grounds for thinking that was a sensible thing to do.

If the Fixed-term Parliaments Act is to be repealed, it would be advantageous if the House of Commons were given some degree, at least, of ability to check this, in a way that the present draft Bill certainly does not.

Q130 **Jackie Doyle-Price:** It is important that whatever we implement does not have the effect of dragging the monarchy into potential political controversy. We need to have sufficient checks and balances to prevent that from happening. By inference, would you say that the House of Commons should have that reserve power, rather than relying on the monarchy as a sufficient constitutional check?

Sir Oliver Letwin: There are two separate things. First of all, I agree with you wholeheartedly that keeping the monarch out of this would be a good thing. I cannot see any advantage that accrues by having the monarch in there, and I can see lots of potential disadvantages under

various circumstances. As somebody who thinks the monarchy is worth preserving, and that it will only be preserved by keeping it ruthlessly out of politics, I think it is far better to say this is a prime ministerial power, even if it were untrammelled.

Then we come to a separate question, which is whether Parliament should have some real ability to impose a constraint on the decision to hold an election. Let me give you what may be an extreme hypothetical, but again, when we come to the ouster clause, you will perhaps see why it is not so fanciful as it might appear. A Prime Minister could decide to hold an election very regularly. Say we had a Prime Minister who, for some reason or other, had mobilised a degree of support in the country and was trying to use it for some nefarious purpose and wanted to have a series of elections—moving back to the untrammelled dissolving power lying with the Prime Minister, or even with the façade of the monarch—there is nothing to stop the Prime Minister holding an election every time they arrive back in the House of Commons from the last election.

I am not saying that you would expect this to happen on frequent occasions—of course you would not—but the way to think about constitutions is to try to design them so that in the event that you have extraordinary circumstances, as we have just witnessed in Washington, for example, it is robust in dealing with those circumstances. Therefore, having some form of parliamentary constraint on the Prime Minister simply going off and holding an election because it appears to be to the advantage of the Prime Minister would be a good thing.

Q131 **Jackie Doyle-Price:** One alternative—there are probably a number of alternatives—to having that reserve power of the House of Commons is to have some other kind of constitutional arrangement. We were reminded last week that prior to the establishment of the Supreme Court, the Lord Chancellor would sit at the apex of the constitution and be that link between the judiciary, Parliament and the monarch. In a way, that was a backstop to advise a Prime Minister if anything might be done that might be improper. That seems to be missing from our constitutional arrangements at the moment. Have you any observations on that?

Sir Oliver Letwin: I did notice that Lady Hale had raised that point, and I think it has some real force. I think it has more force even than she gave it, in the sense that it is not just that there is not, in the same sense that there was some years back, a Lord Chancellor, although there is somebody who still has the title; it is also that I think that the office of the Attorney General has become very ambiguous. It has always been a pretty tricky question: is the Attorney General a politician or is the Attorney General the legal adviser of the Government? I fear that it has become increasingly accepted that the Attorney General is first a politician and only secondly a legal adviser to the Government. If that is the case, we are getting perilously close to the point where politics overrides legal considerations.

I come back to the point that we will probably be dealing with later, which is the ouster clause. If you have the ouster clause and you do not have within Government any strong source of legal advice that is regarded as sacrosanct, you face circumstances that might under various future scenarios be very worrying.

Chair: Jackie, we were going to move on to the ouster clause now, but I think Maria Eagle also wanted to cover the particular point you have just raised, Sir Oliver. Maria, do you want to come in now, and then I will come to Craig after your question?

Maria Eagle: I do not, but my sister Angela does.

Chair: Sorry, Angela.

Q132 **Dame Angela Eagle:** No problem; it has been happening for 59 years, and it will continue to happen for many, many years to come. Sir Oliver, I was very interested in your observation, following up on Lady Hale's observation last week, that politics is now increasingly overriding legal questions in the form of the Attorney General. Do you think that in that circumstance, there is some kind of change that can reinstate the old legal power of the Attorney General as it used to be, or do you think that we ought to give up the ghost and accept that, in certain circumstances, the courts will have a say?

Sir Oliver Letwin: I think the latter, rather than the former. I wish that I believed that some of the old conventions—Lord Butler will be able to provide much greater testimony about them than I can, as his experience reaches far deeper into the history of this—which regarded the post of Attorney General as a very special one, which led the holder of the post to almost move out of the sphere of politics for the period of holding the post, could be somehow reinstated.

Reinstating conventions and reinventing traditions is a very difficult thing to do. I think we are on a much firmer footing if we rely on an institution that has still utter independence and clear public consent, which is the courts.

Q133 **Dame Angela Eagle:** It is an interesting issue. We have always had a fused parliamentary system, as you called it in your evidence earlier. Do you think that somehow we are creeping into a de facto situation where we are seeing a separation of powers, and the Attorney General has become more political, while the courts and the Supreme Court have moved out of the House of Lords—the position of the chief Law Officer has effectively evolved to be more political than legal? Is that really a kind of evolution towards a separation of powers, and should we accept that in the way we deal with these constitutional issues now?

Sir Oliver Letwin: Yes, I think this is part of a very big subject, which I am sure you won't want me to dilate on at length. I think that there was, for centuries and certainly for many decades, a pretty strong idea, embodied both in the person of the Attorney General and in the person of the Lord Chancellor, that rather than a complete disjunction between an independent judiciary and Government, the two were somehow connected by those two posts and the Government would never consider doing anything, much less do anything, that was even close to the limits of the law, let alone clearly beyond the limits of the law.

That was probably one of the most important safeguards of our freedom that could possibly exist and I think it has been gradually and rather imperceptibly eroded, not because people have tried to erode it, but because people have been slightly careless about how things develop. I think the change that occurred when the Lord Chancellor ceased to be the old-fashioned Lord Chancellor; the creation of the Supreme Court; the gradual increase of administrative law and judicial review, as the courts came to feel that they needed to be more the guardians of propriety in the defence of the law against ministerial overreach; and a whole series of other things that have happened in our recent history have meant that we are

now in a position where Government feels increasingly empowered—maybe even to have the duty—to press the limits of the law in pursuit of legitimate policy aims, and the courts see themselves as the defenders of the law and of the rights of the citizen over and against ministerial power.

I think we just have to recognise that is where we now are. I think it is incredibly important that we should view a constitutional change like the repeal of this Fixed-term Parliaments Act, should it occur, in that light, and not imagine that we are in circumstances in which Governments will continue to act as was the norm 50 or 100 years ago.

Q134 **Dame Angela Eagle:** In other words, it is not possible, even if one announces it, to go back to the status quo ante?

Sir Oliver Letwin: I think it is very difficult. I think there was a school where, at one point, the headmaster ordained that from tomorrow there would be a tradition that you do not cross the court. It is a set of words, but it has no meaning. Traditions and conventions arise very gradually, and once lost they are very difficult to create by willpower. As I say, you do better, if useful conventions are lost, to resort instead to clear law and settled institutions.

Q135 **Dame Angela Eagle:** Finally, I was intrigued by your comment at the beginning of your evidence that you thought that another Fixed-term Parliaments Act would have to be created if there was a coalition in future. How can the potential for a future coalition—we do have more fragmented politics now—be maintained if the Fixed-term Parliaments Act is repealed? In your view, is there something that could be put in this draft Bill that might maintain the potential to do that without having to switch between repealed Fixed-term Parliaments Act A and repealed Fixed-term Parliaments Act B as future coalitions happen? Clearly, trying to change constitutional law as it was changed, as a result of very rapid coalition making and agreement after a general election, is not exactly the best way to deal with constitutional change.

Sir Oliver Letwin: I agree that it certainly seems a bit odd as a way of proceeding. I think the only thing that could be done in the context of this draft Bill that would lessen the chance of needing a Fixed-term Parliaments Act all over again if there was a coalition next time, the time after or whatever, would be if there was an explicit parliamentary constraint on the use of the Dissolution power. That would have the same effect.

Q136 **Dame Angela Eagle:** How would that constraint work, in your view?

Sir Oliver Letwin: It might work in any number of ways. If, in principle, the calling of an election could occur only with a parliamentary majority behind it, however constructed, that might provide a sufficient constraint to enable a coalition to be formed on a stable basis, without needing to have a Fixed-term Parliaments Act.

Chair: Craig, now we move on to the question that Oliver has been anticipating for a little while.

Q137 **Craig Whittaker:** Thank you, Chair, and nice to see you again, Sir Oliver. A sledgehammer, for the avoidance of any doubt, is what the Government has said about the inclusion of the ouster clause. Do you agree, and what are your views on the inclusion of that clause?

Sir Oliver Letwin: This, I think, is the most important clause in the Bill by quite a long way, and I think that the part of it that really matters is clause 3(c), which Lady Hale and Lord Sumption also spoke about.

I quite understand the Government's point that the Miller cases brought to light the importance of the question of scope in determining whether the courts will regard the exercise of the prerogative as legitimate or otherwise. Their logic is impeccable, and that logic carries them to the view that in order to make sure that their sledgehammer works—that it is a sledgehammer and not just a little old-fashioned hammer—they want to prevent the courts from looking even at the limit or extent, or scope, of the use of this power of Dissolution. I can see that logic.

I think that I would go further than Lady Hale went. It seems to me that if you have a prerogative power and the courts cannot question the scope of its implementation, you have in effect created an unlimited power. What are the limits? Well, the court cannot ask that question.

Suppose that the power is used in ways that are clearly intended to achieve an effect quite other than the effect that the Government, in drafting this Act, has in mind. We have unfortunately seen an example of this occurring when a very relevant case came about—namely, the use of the prerogative power for Prorogation. If a Government sought continuously to keep Parliament out of business by repeatedly dissolving it, as I understand it, this ouster clause—particularly clause 3(c)—would mean, and is certainly intended to mean, that the courts would not be able to rule that as beyond the powers of the Prime Minister in Dissolution. I cannot imagine that Parliament wants to sanction that kind of unlimited power on the part of the Executive.

Q138 **Craig Whittaker:** In that case, can you give any examples of where an Executive would want to continually prorogue Parliament in the way that you are suggesting? Do you not think that, although it is a sledgehammer, a spirit is meant by this inclusion?

***Sir Oliver Letwin*:** Just to be very clear, in this case, we are talking about Dissolution, not Prorogation, but of course, the effect would be the same. If every time Parliament reconvenes, it is dissolved, it does not have any capacity to check the Executive, which, during the period of Dissolution, is inevitably unchecked by Parliament.

There are conventions surrounding the actions of an Executive during the time when Parliament is dissolved. Everyone here who has been a Minister or a senior official will be fully aware of the amount of effort that is made to ensure that a Government, during the period of Dissolution, does not abuse the fact that it is not subject to parliamentary check. Of course, as things currently stand, I am sure that those same thoughts would prevail. That is purely in the realm of convention—it is not something in the realm of law—and those conventions get eroded.

My fear is that if you have a power that is untrammelled and which the courts specifically cannot look at the extent or abuse of under clause 3(c), and if there is a Government that wants not to have Parliament around for a sustained period, there is the temptation to abuse the Dissolution power to achieve that purpose. I do not know which particular reason a particular Government would have for not having Parliament around. If there is a purpose to

our constitution, it is essentially threefold: to make sure, first, that every five years at most, there is an election—obviously, a fair and free election is crucial; secondly, that Parliament is there in the interim to be a check on the Government; and thirdly, that we have independent courts to enforce the law. It seems to me that we are here eroding the second and third of those principles. That, I think, is very unfortunate.

Q139 **Craig Whittaker:** But what about the spirit of law? Every law passed has a spirit of what it is intended to do attached to it. Do you not think that this goes beyond, or is it within the spirit of what it is intended to do?

***Sir Oliver Letwin*:** I think that the spirit is that the Government do not want the courts anywhere near this. I think it is achieving that, and I do not think it should.

Chair: Thank you, Craig. Let us move on to Bruce Grocott.

Q140 **Lord Grocott:** It is very difficult, Chair, not to want to follow up on that discussion. If I may make this one observation on Sir Oliver's exchanges, if we as a Committee try to examine all the possible consequences of a piece of legislation, however fanciful, we will end up with an Act of Parliament as long as your arm, and no constitution can ultimately protect the citizen if there is no consensus or agreement as expressed in things such as conventions. Just as you say, a Government might constantly prorogue Parliament, or constantly dissolve Parliaments and hold general elections. That is true, of course; Governments might be able to do that. But, equally, if a Government wanted to—if this Government wanted to, it has got the parliamentary arithmetic to do so—it could declare the Labour party to be an illegal organisation. Personally, I am fairly paranoid, but I don't really thing that is likely to happen. Isn't it a matter of common sense that we don't try to legislate in a way that covers all possibilities, however ludicrous?

Sir Oliver Letwin: There are two things I would say in response. The first is that I agree with you; of course legislation cannot envisage all possibilities, and there will always have to be some assumption that reasonableness will be exercised. The reason we make that assumption is that we have the courts, and over the years the courts have increasingly used the power of judicial review to ensure that reasonableness does hold sway. So if there were not the ouster clause, and in particular if there were not clause 3(c) within the ouster clause, I would relax about those questions. But the ouster clause is a very remarkable piece of work, because 3(c) does something that we don't have in other contexts: it debars what is in effect our constitutional court from considering a crucial part of the constitution. Under those circumstances I don't think you can make the comforting assumption that reasonableness would hold sway.

The second part of my answer to your point is that this is not as fanciful as it might have seemed a while back, because we had an example, just within the last 24 months, that a Government can take it into its head to seek to keep Parliament out of being for a period, in order to achieve a certain political effect. Whether or not that was lawful was in doubt at the time. The courts ruled that it was not lawful. Had a Government tried to use this Act to achieve a similar effect with this ouster clause, with 3(c) intact in it, the court would not have had that opportunity.

Lord Grocott: We could go on at great length—

Chair: We are running slightly short of time, Bruce.

Q141 **Lord Grocott:** Absolutely, so can I just ask the question that I was planning to ask? Again, Sir Oliver has partly answered this, because he already said that he basically thinks the Fixed-term Parliaments Act is okay and, to quote him, has not caused "any significant difficulty". I would just like him to speculate: if the old arrangements had been in existence during the Brexit issue—the old arrangements for Dissolution—would that have made any difference?

Sir Oliver Letwin: It is, as you say, a speculation, because we can't replay history and find out how the counterfactual would have operated. My guess is that it probably would not have been much smoother because the unusual circumstances were, as I mentioned earlier and as I think we all would recognise, whichever position we took on the matter, that at that moment there was a Government that had the confidence of the House in support of it being the Government, but did not have the confidence of the House in relation to one of its primary courses of action—namely, leaving the EU without a withdrawal agreement. Under those circumstances, had the Prime Minister had the ability to seek a Dissolution, it would have been open to that same majority to use very similar techniques to those that were used for the purpose of enforcing a withdrawal agreement on the Prime Minister, to enforce not having an illegal power to dissolve. A parliamentary majority is a parliamentary majority. It is a fact of political life, and as long as we live in a democracy it will be the determining factor.

The constitutional problem that arose as a result of the position we found ourselves in nationally towards the end of 2019 arose from the nature of the parliamentary majority and what it was a majority for. I don't think that the Fixed-Term Parliaments Act, which became a sort of whipping boy, actually caused the parliamentary problem; it was the nature of having a majority for one thing but not another.

Q142 **Lord Grocott:** I put at least two suggestions to you that would have been very difficult to have occurred prior to the passage of the Fixed-term Parliaments Act. No. 1, as you have already mentioned, the Government lost the central plank of their policy in relation to the withdrawal agreement—they did not just lose it but got thrashed on it. To me, it is inconceivable that, under the previous arrangements, that would not have resulted in a general election, with the Prime Minister saying, "I cannot carry through the central plank of my policy, and therefore the only justifiable or acceptable group of people who can resolve this problem is the electorate," which seems to me a perfectly reasonable and democratic thing to do.

The other occasion that I think would have been impossible to imagine prior to the Fixed-term Parliaments Act—I am not going into the rights and wrongs of this; I am just stating the facts—was when Parliament took control of the parliamentary timetable, preventing the Government from legislating, basically, or enacting a crucial part of their policies. Again, the resolution that would surely have occurred prior to the introduction of the Fixed-term Parliaments Act is that the Prime Minister would say, "I cannot govern the country or pass legislation, so there has to be a general election. Please, Your Majesty, would you allow for it?" I cannot conceive of anything happening there other than the Prime Minister doing that and the monarch saying yes.

Sir Oliver Letwin: It is certainly true, as you say, that if there had not been the Fixed-term Parliaments Act, the natural inclination of the Prime Minister at some of the points along that line— There were various different events and two different Prime Ministers involved, and it is difficult to know exactly who would have done what and when, but I feel confident that at least the second of the two Prime Ministers involved would have chosen to go for a Dissolution had there been no Fixed-term Parliaments Act. We can tell that because he said very clearly that he wanted a general election, so I agree with your point that that would have been sought.

My point is that, actually, it would have been open to Parliament to use the same techniques that were used to force that very same Prime Minister to have a withdrawal agreement before leaving the EU to take that same step before going for Dissolution. Once you have a situation in which—for right or wrong; that can obviously be debated at length—the House of Commons has found a means to use a majority to force, legislatively, the Prime Minister to do certain things, that majority could have been used in just the same way to prevent a Dissolution without the Fixed-term Parliaments Act until certain conditions had been met—namely, the withdrawal agreement being implemented. I know that this is a vexed and controversial topic on which opinions will be widely different, but abstracting from all of that, as a matter of historical fact it is pretty clear that it was not the Fixed-term Parliaments Act but the fact of the majority that would have prevented a Dissolution even under the old system under those circumstances.

Chair: Can we move on, finally, to Maria Miller, please?

Q143 **Mrs Miller:** Thank you so much for your time this morning, Oliver. You set out in your evidence earlier that the Fixed-term Parliaments Act was actually a very pragmatic solution to a problem that the coalition Government faced. It changed things for 10 years, but now the Government are really trying to go back to the way things were before—the way things were done for many, many years before the Fixed-term Parliaments Act was passed. Do you think there is the same common understanding within Government and Parliament of the constitutional conventions that were so necessary before the Fixed-term Parliaments Act? Do you think people are as understanding of those conventions as they were, say, 20 years ago when you joined Parliament for the first time? Do you think that MPs are as strong defenders of those conventions as they once were?

Sir Oliver Letwin: It is a very pertinent question, and I think the answer is no. I do not think the conventions are as strong as they were. The point of overriding importance is that, notwithstanding the appearance, and indeed notwithstanding the commentary that has been published, the Bill does not go back to the position that did obtain in one deeply material respect, which is the ouster clause and, in particular, clause 3(c).

There was absolutely nothing legislative that removed the courts from oversight of the Dissolution power. Whether the courts would have taken the view that they could apply the same logic that they applied in the Miller cases to a Dissolution, we do not know, because it did not arise. There was no House of Lords action—no appeal to the Appellate Committee of the House of Lords in those years on this subject. What is absolutely certain, however, is that there was no statutory inhibition on the courts from exercising oversight over the Dissolution

power. The draft Bill specifically, and in the widest possible way, removes the courts from the scene of the action, and that means it is a different situation.

Q144 **Mrs Miller:** Surely the reason the ouster clause is in there is because, as you have said, the courts never before looked at that, but have now seen that they could have a role to play in those sorts of decisions. Surely the ouster clause is simply there because of recent interventions by the courts, particularly around Prorogation.

Sir Oliver Letwin: That is right, I think. That is why it is there. But, expanding on that statement, what we are saying is that we have discovered that the courts took the view that it was always the law that the courts had a role. The courts exercised that role. The Government now intends to change that situation so that, in future, the courts will not have any role. That may be right or it may be wrong—clearly, that is for Parliament to decide, not me. I am just saying that the draft Bill cannot be accurately represented as a return to the status quo ante, because it changes the statutory position of the courts.

Q145 **Mrs Miller:** One of the things the Government has tried to do to assist with the establishment of the status quo as it was before the Act was passed is to prepare the "Dissolution Principles" document. Do you feel that it exhaustively and accurately captures the conventions on Dissolution, the calling of Parliaments and Government formation as they existed before the Fixed-term Parliaments Act? I wondered whether you had any views on those principles that you want to share with us.

Sir Oliver Letwin: Lord Butler is in a far better position than I am to comment on the process of Dissolution and the principles that have traditionally been used in approaching that. He will have been involved in numerous Dissolutions, which I certainly was not.

It is a matter of extreme interest, however, that that document does not make the slightest reference to the courts or the ouster clause, and hence does not make any reference to the question of scope. What it is describing are the conventions—perhaps, for all I know, entirely accurately—that applied under normal circumstances. What it does not describe is how the courts would have reacted had those conventions not been followed and had the Dissolution been used for other purposes way beyond the ordinary commonly accepted purpose of holding an election in an orderly fashion. It does not describe how the courts would have reacted to that. That is, of course, the material point. From the point of view of actually illuminating the scene, I would say that that commentary is thoroughly useless.

Chair: Sir Oliver, thank you very much indeed for giving us your time and evidence this morning. That has opened a number of issues that no doubt the Committee will want to reflect on. Thank you very much.

Examination of witness

Witness: Lord Robin Butler.

Chair: Lord Butler, welcome to the Committee. Thank you for agreeing to give evidence to us this morning. There are a number of issues that we want to cover with you, and I would like to ask Doreen Lawrence whether she would like to lead off with the first question.

Q146 **Baroness Lawrence:** Thank you, Chair, and good morning, Lord Butler. We have listened to Sir Oliver, who touched on quite a few of the issues where my question comes in. Sir Oliver talked about the action that more or less took place in 2019, when the courts got involved in the Dissolution of Parliament. What is your understanding of the convention on Dissolution, calling a new Parliament and how the Government formation operated before the fixed-term Parliament? Can you start by saying a little about that, please?

Lord Butler: I can start on the position before the FTPA, which I thought worked perfectly well. In those circumstances, the Prime Minister could ask the Queen to dissolve Parliament either at the end of the five-year term, or at such earlier time as seemed necessary because the Government had lost the support of Parliament or needed a mandate from the electorate for some other reason. I believe that worked perfectly well. I am not worried about the ouster clause in the Government's repeal Bill, because the only circumstances that have been suggested as needing the courts to come in is if the Government used Prorogation repeatedly to try to stop Parliament sitting, but there is a safeguard against that: Governments cannot operate without Parliament, for the simple reason that they run out of money. The Government has to allow Parliaments to work, so it is Parliaments that are the controllers of that sort of excess. It is not accidental that the courts have never been involved before this recent incident of Prorogation, which was just one minor incident. The Government, if it is going to govern, needs there to be a Parliament, and it is Parliament that will control Government.

Chair: Does that answer your question, Doreen?

Q147 **Baroness Lawrence:** I would like to hear a little more. You are saying that the Government cannot operate without money, and you mention the fact that the Government looked to prorogue Parliament because it thought that it could not do what it wanted to do; hence, the people eventually took action and went to court about that. It seems to me at the moment that what the Government is trying to do—this is part of what Sir Oliver said—is to take the courts out of what Parliament wants to do. I just find it a little confusing that, on one hand, the Government now wants to be able to move forward without making sure the courts cannot get involved in the Dissolution of Parliament. At the other end, it says it wants to go back to before the Fixed-term Parliaments Act 2011. Can you say a bit more about that, please?

Lord Butler: Yes. I am content with that. As history shows, the courts have not needed to get involved, except in this latest situation about Prorogation. The reason one needn't fear that a future Government could use Prorogation continuously to stop Parliament acting is that it can't govern without Parliament being in existence, and Parliament will exercise control over it. The courts don't need to come in, except in that very limited incident of Prorogation that happened before the last election. In general, the courts historically have not needed to get involved, and in my view there is no fear in the future that they would have to get involved.

Q148 **John Spellar:** Robin, can we come to the other route by which Governments can be removed, which is the question of votes of confidence and the interpretation, therefore, of what the consequences are? From your time, what was your understanding of what constituted votes of confidence, and indeed of no confidence, and their impact and outcome?

Lord Butler: I think there were four situations. One was the vote on the Government's programme, as set out in the Queen's Speech—not just in the first Queen's Speech, but at the opening of each Parliament. If the Budget was voted down by Parliament, that would be a matter of confidence, as, indeed, would any measure that the Government regarded as so central to its programme that it described it in advance as an issue of confidence. That happened on the Maastricht treaty, for example. Finally, there are explicit motions of no confidence. Those are the four examples.

Q149 **John Spellar:** And what would be the consequences flowing from that?

Lord Butler: In each of those cases, the Prime Minister of the day would have asked for a Dissolution. Parliament would have expected the Prime Minister to ask for a Dissolution, and there would have been a general election. That, I think, would have been the right way of resolving the difficulty that the Government had got into.

Q150 **Maria Eagle:** Good afternoon, Lord Butler. I want to talk a little about the Lascelles principles. You told the Lords Constitution Committee that under the fixed-term Parliament arrangements, the Queen would not necessarily have to act on the advice of the Prime Minister following a vote of no confidence if confidence in another Administration could be independently demonstrated. Was that the situation prior to the Fixed-term Parliaments Act? If so, could you explain the circumstances in which, following the loss of confidence, a Prime Minister might be refused a Dissolution?

Lord Butler: I think that, since the Lascelles principles in 1950, things have moved on in a favourable direction—favourable from the point of view of the Queen not having to become involved. I think the situation now is that if a Prime Minister lost support, but it became absolutely obvious that an alternative Government could be formed without a general election, it would not be necessary for the Queen to refuse a Dissolution. I think the situation would be that politicians would get together—the parties would get together—and agree among themselves how an alternative Government that commanded the support of Parliament could be produced. For example, it has happened repeatedly that a party can change its leader without the Government having to ask for a further mandate; it might ask for a further mandate, but it does not have to.

Similarly, circumstances may arise in which it is really obvious that an alternative Government could be formed. I will give you one example. Let us suppose that, following the 2010 election of the coalition, the Lib Dems suddenly changed their minds and decided that they didn't want to support the Conservatives; they wanted to support the Labour party and were willing to form a coalition with them. In those circumstances, I think the Prime Minister of the day would have been obliged to accept that and to advise the Queen to send for the Leader of the Opposition, and an alternative coalition would have been formed.

My view is that the Lascelles principles really are no longer necessary. The electorate expect politicians to work these things out and, if an alternative Government is possible, to agree on that without the need for a general election. If the Prime Minister does call a general election in circumstances that the electorate regard as unnecessary, the electorate will punish the Government very much. There have been quite a lot of examples of Governments calling elections before the five-year time, at a time when the electorate was not convinced it was necessary, and the incumbent Government have done very badly out of that.

Q151 **Maria Eagle:** Thank you. I am interested that you say that we have moved on from the Lascelles principles; I wonder to what extent that is the case. There was a draft Cabinet manual from February 2010, written under the Brown Government, that suggested that the Queen could refuse a Dissolution if it was asked for soon after the previous election.

Was that your understanding? Do you think that applied before the Fixed-term Parliaments Act? If so, how would you have judged this issue of what was too soon for another Dissolution under that provision?

Lord Butler: The circumstance that I think was envisaged in that draft chapter of the Cabinet manual was one that I was used to. I think it was rather an extreme situation. What was envisaged was the following. Suppose there was a hung result of a Parliament, as in 2010, and the Prime Minister had tried to achieve a coalition with another party, but had failed to do so, but there was a prospect that the Leader of the Opposition would be able to form such a coalition. If the Prime Minister had gone to the Queen then and said, "I want there to be another election. I would like a Dissolution of Parliament, please; I have not been able to negotiate a coalition", that would clearly have been unreasonable, and the Queen would have been justified in refusing the Dissolution—she would have had to, I think.

The point I am making is that things have moved on and Gordon Brown never asked for a further election when he did not form a coalition with the Lib Dems in 2010. He did the right thing and said, "I cannot form a coalition. Your Majesty, I am going to go," and she called on David Cameron.

Q152 **Maria Eagle:** Are there any other sorts of circumstances, apart from the one you have just described, in which the Queen would be able or required to refuse a Dissolution with the arrangements surrounding Dissolution before the Fixed-term Parliaments Act? Was it just that kind of extreme circumstance that you have described, or were there other circumstances where she would be allowed or required to refuse a Dissolution?

Lord Butler: That was the situation envisaged in that draft chapter of the Cabinet Office manual. It is possible theoretically to think of such a situation, but I do not think it would arise in practice.

The only circumstance in which the Queen might refuse a Dissolution on the basis of the Lascelles principles was that Parliament with a different Government could operate in a perfectly viable way. But now the situation is that if Parliament could operate in a perfectly viable way, the current Prime Minister would give way and there would be negotiations and a new Government would come in. If it was so obvious that there could have been an alternative Government and the Prime Minister had asked for a Dissolution, that would have been electoral suicide. I do not think the Queen would ever have been put—or, in modern circumstances, would ever be put—in that position.

Q153 **Maria Eagle:** Okay. So even in that situation, which was envisaged in the Lascelles principles, before the Fixed-term Parliaments Act, the Monarch would not really be thinking about refusing a Dissolution, in your view.

Lord Butler: That's right. In practice, it would not arise.

Maria Eagle: Thank you.

Q154 **Alan Mak:** Good afternoon, Lord Butler, and thank you for joining us. I want to ask you about Dissolution and a few related matters. The Fixed-term Parliaments Act clearly changed the law on Dissolution and the calling of new Parliaments, but not Government formation. To what extent did it also change the constitutional conventions in these areas, and do you think that conventions on elections and Government formation have been complied with since 2011?

Lord Butler: Well, I don't think that the situation really depends on conventions, and the Fixed-term Parliaments Act really hasn't had an opportunity, hasn't had time, to settle new conventions.

The only sort of conventions that apply are those about Governments not taking crucial decisions in the lead-up to a general election, or, for example, about informal, confidential discussions between the civil service and the Opposition. I think those conventions have continued to apply, and there aren't other conventions that are changed by the Fixed-term Parliaments Act.

Chair: Does that cover your point, Alan?

Alan Mak: It does. Thank you.

Q155 **Mrs Miller:** Thank you, Lord Butler, for coming along and speaking to us today. That is incredibly helpful. I want to stay on that point about conventions. How effective and appropriate do you feel conventions are in governing core constitutional functions and behaviour? I am really just reiterating the question that I put to Sir Oliver. Do you think that MPs are as strong defenders of, and as prepared to observe, constitutional conventions now as they might have been 20 or 30 years ago? I am interested in your views on that, given your length of tenure in your positions.

Lord Butler: There is evidence that Governments these days are less inclined to observe conventions, if those conventions don't suit them, than they would have been in the past. But in this area, I don't think that matters very much. The sort of conventions, as I say, that surround a Dissolution of Parliament and calling of a general election are conventions like not taking significant decisions during the election period and the Government agreeing that the civil service can have discussions with the Opposition. For the rest, I think the thing follows electoral law and conventions really aren't material to it.

What I would like to say is that I always regarded the Fixed-term Parliaments Act as misconceived and unnecessary because—as subsequent events have shown—it wouldn't even have been effective in its purpose. There is no doubt that if, in 2010, the Government had decided to ditch the Lib Dems and call a general election, it could have got the necessary majority in Parliament to do that, because Labour would have agreed to calling a general election.

The only way in which you can have a fixed-term Parliament is to say there is no possibility of having a general election except at four or five-year intervals, as in the United States, and that, I think, would be disadvantageous, because if a Government gets into a position where it has lost the support of Parliament or it cannot carry out its programme, it really is in the national interest that a new Government should be formed and there should be a general election.

For those reasons, I always regarded the Fixed-term Parliaments Act as misconceived. It was a solution that didn't work to a problem that didn't exist.

Q156 **Lord Jay:** Good afternoon, Robin. I want to ask you a question about "Dissolution Principles". I think a number of us have thought the document rather exiguous, but I was quite struck that Oliver Letwin just now described it as—I think I am quoting him correctly—"thoroughly useless". Would you go so far as to say that? In particular, do you think that it exhaustively and accurately captures the conventions on Dissolution, the calling of Parliament and Government formation as they existed before the Fixed-term Parliaments Act?

Lord Butler: No, I don't. I think it is thin. It is satisfactory, as far as it goes, when the Government have been defeated in a vote of no confidence, or have lost the confidence of Parliament, but it does not address at all the situation, which has always existed, in which a Prime Minister asks for a Dissolution without having lost the confidence of Parliament, in order to get a mandate or a reliable majority.

Examples of that are Heath and Wilson in the two elections of 1974. Heath went to the country because he could not find a solution to the coalminers' strike; Wilson went to the country in 1974 because he did not have an overall majority and he felt that he needed that to deal with the economic crisis. Similarly, Theresa May went to the country in 2017 when she felt that she needed a bigger majority to deal with Brexit. With all of them, actually, the incumbent Prime Minister did less well than they had hoped to—there is a lesson to be drawn from that.

Q157 **Lord Jay:** If you had been drafting this document, would you have included some reference to those particular examples? Would you have done, and could you have done, do you think?

Lord Butler: Yes, I certainly would, because as I say this is not just a question of policy, but a question of fact. As things are, even under the Fixed-term Parliaments Act, as Theresa May showed in 2017, a Prime Minister can decide to ask for a Dissolution and a general election in circumstances other than when the Prime Minister has lost the confidence of Parliament.

Q158 **Lord Jay:** Why do you think that the document is so thin in that case? Why is there not more? As you have just said, it could be more comprehensive and more useful.

Lord Butler: Fortunately, I do not have responsibility for that, and I do not have to speculate on it. I find it difficult to explain because, as I say, it does not cover circumstances that not only existed before the Fixed-term Parliaments Act but have existed since.

Q159 **Lord Beith:** If you were Cabinet Secretary in such a situation and this was the document you had, would you be happy to rely on it, or would further discussions around what Peter Hennessy called the "golden triangle" bring to bear wider considerations than that document contains?

Lord Butler: Let us envisage that situation. Suppose the Prime Minister—let us say Theresa May in 2017—were to say, "Look, I haven't got a big enough majority in Parliament to do what I want; I haven't lost the confidence of Parliament, but I haven't got a big enough majority. I would like to ask the Queen for Dissolution and a general election, but I'm afraid it isn't covered in the document about the circumstances of a Dissolution." I would reply,

"Well, Prime Minister, the fact that it isn't covered doesn't prevent you from doing it, so, yes, these are circumstances in which you could ask the Queen for Dissolution and a general election."

Q160 **Lord Beith:** Let us go back to the "too soon" problem, which was discussed earlier. Indeed, you made reference to 1974, which I remember vividly, having been a candidate in both the February and the October elections that year. Harold Wilson had the opportunity, since he believed he would be granted a Dissolution later in the year, to govern for a few months, doing nothing controversial and making a few giveaways, in the hope of achieving a significant majority at an early election.

Were there any considerations of how long that interval had to be, do you think? For example, could he come along to say, "I want another election in March", or April, or May, or was October about as close to the bone as he could go, in the minds of the Cabinet Secretary and the Queen's Private Secretary?

Lord Butler: I do not think there were any constitutional objections to his going earlier and asking for an election. I think there were political objections to it, in that—as I say, it is a tenet of my belief—the electorate does not like to be troubled unnecessarily to have a general election. By the autumn, it could be demonstrated, or Harold Wilson thought he could demonstrate, that the economic problems of the country were such that he needed to have an overall majority. That was the case that he made to the electorate, and that was how he justified his decision to ask the Queen for a Dissolution. He did that. I think that those were reasonable grounds, but it was interesting that he did not do as well as he expected.

Q161 **Lord Beith:** Could he have done that in March or April?

Lord Butler: I think he would have found it very difficult to make a case then. If he had made such a case, I think the Queen would have had to grant it, but the electorate would have punished him for it.

Q162 **Lord Beith:** Generally, leaders believe that they know what the electorate thinks; perhaps Mrs May thought that in 2017. You give the impression that the so-called golden triangle had almost no discretion, even when considering the calling of an election very, very shortly after one had been held and the public had presumably given their view.

Lord Butler: No, certainly I do not think the golden triangle comes into effect then. What Peter Hennessy called the golden triangle was the Cabinet Secretary, the Queen's Private Secretary and the Prime Minister's Principal Private Secretary. Where they have a role—and you will remember this from 2010—is when there are negotiations going on about the formation of a new Government. The way it works is that it enables the Palace and the Executive to be closely in touch. It enables advice to be given about the constitutional conventions, and it is, in that way, a sort of cartilage—it is a facilitator for the constitution working following a hung Parliament.

Q163 **Lord Beith:** But are you not in a position, along with the other members of the golden triangle, of effectively saying to the politicians sometimes, "This is not really a question you should ask the Queen at this point, because to invite her to give a controversial Dissolution"—let us assume it is a controversial one—"is to place her in difficulty"? I remember a former Queen's Private Secretary saying in a previous

discussion, "It's our job to make sure that we don't get to that point."

Lord Butler: I agree with that. Certainly, if I was Cabinet Secretary, I would urge the Prime Minister not to put the Queen in that position. But in practice, it has not been necessary because Prime Ministers absolutely take that point, and they accept the obligation they have to discuss with other politicians—the sorts of discussions that took place in 2010, in which you were involved—and reach a resolution that does not put the Queen in a difficult position.

Q164 **Mr Goodwill:** My lord, you seem to be saying, in a nutshell, that the situation before the Fixed-term Parliaments Bill was not broken, we should not try to mend it, and, indeed, the Fixed-term Parliaments Bill did not do what it said on the can anyway. Members of the Committee have tried to bowl various constitutional and political googlies at you, which you explain are unlikely to happen or would be headed off by the golden triangle, or, in the last resort, the Queen would have to make a decision based on advice. Do you think that it is fair to put the Queen in that position? Is it appropriate, given that if that did happen, it would be a very exceptional situation and could provoke a constitutional crisis?

Lord Butler: As in so many other circumstances, it is very valuable to have the Queen there as the ultimate authority, on the basis that she should never have to be used. Again, one compares it with the situation in the United States at present. Let us suppose we had a Prime Minister who refused to leave office despite having been defeated in a general election. Of course, it used to be the case in history that Prime Ministers, having been defeated in a general election, did face Parliament on the Queen's Speech, were defeated, and then they departed. That does not happen these days—Prime Ministers accept the result and they leave—but suppose you had a situation like that in the United States. Ultimately, one could resolve that by the Queen dismissing the Prime Minister, and I think she would have full public support in doing so, but it never comes to that, and I think we can rely on it never coming to that in the future, either.

Q165 **Mr Goodwill:** I suspect that if the Queen was still the queen of the United States and had tried to dismiss Trump last week, she might have had a few objections from around the country, given what happened on the national mall.

When we took evidence last week, it was suggested that it would assist the Queen if there was a committee of Privy Counsellors who would advise her, so that it would not just be down to her private secretary and the other two eminent officials, and that there would be some sort of backstop in that unusual situation. Do you think that would help, or possibly not?

Lord Butler: I happen to know from my experience, and I expect it is still the case, that the Queen does have authoritative, informal advisers. She gets advice from them, as indeed her advisers and the golden triangle do, so there is advice that exists there, but the main purpose of this is to avoid a situation arising in which the Queen has to intervene in a political matter.

Q166 **Mr Goodwill:** Do you believe it would assist Her Majesty and her advisers if the principles—the Lascelles principles, or maybe other ones that might want to be included—were set out in statute, or should that be left as a convention?

Lord Butler: I think it should be left as a convention. I do not think it should be set out in statute, because no statute can ever absolutely define the circumstances that will arise, so it is

much better to leave it as a convention. The Queen is there in the last resort, but everyone should make ultimate efforts so that she does not have to be invoked, and they do.

Q167 **Mr Goodwill:** Finally, can you think of anyone who would be better respected, better experienced, or better qualified to make that sort of decision than Her Majesty?

Lord Butler: No.

Mr Goodwill: Thank you very much.

Q168 **Craig Whittaker:** Good afternoon, Lord Butler. You said earlier that you thought the Fixed-term Parliaments Act was misconceived and unnecessary, but at the time of the passing of the Act, some people argued that it represented part of a much broader trend to impose greater parliamentary control over prerogative powers in the 21st century. The repeal of this Act is a partial decline away from that theory. What are your views, and do you think it is desirable?

Lord Butler: As a general proposition, I think it is desirable that prerogative powers should be taken over by Parliament, but this is the one exception. In this case, the way that things work with the prerogative, with the politicians having to work this out and with the Queen as a last resort that never has to be invoked, creates a more flexible situation, and I think that works. I do not think the courts should be brought into this. If you had a statute, it would inevitably bring the courts into it, and as I say, I do not think it is necessary for the courts to intervene. For that reason, I do not actually think that the ouster clause in the Government's Bill is necessary, because Parliament and the politicians can work these matters out for themselves.

Q169 **Craig Whittaker:** For absolute clarity, then, you think that in this instance, taking powers back, away from Parliament, is a good idea.

Lord Butler: Yes, I do.

Q170 **Mr Vara:** A very good afternoon to you, Lord Butler. You have partly covered the issue that I want to raise, but I want to specifically concentrate on the issue of flexibility. The Government take the view that having prerogative powers and conventions is a better way of dealing with the election cycle than to be limited by a statutory system. Do you agree that that is the case, and that it is good to have that flexibility, even if it may mean that one party has greater benefit than another?

Lord Butler: Statute obviously has a role. The five-year Parliament is defined in statute, so it does have a role, but within that I think that flexibility is an advantage because, as I have said, there are circumstances in which the Government lose the support of Parliament or cannot carry out their programme. It is an advantage to us, relative to the United States, for example, that Governments can seek a new mandate if they get into that situation.

Q171 **Mr Vara:** Would you agree, basically, that had the people who drafted the Fixed-term Parliaments Act in the first place envisaged the scenario of an impotent Government, which is basically what we had for two or three years before the last general election, they would have taken a different view? Therefore, it became inflexible to have the restrictions of the statute.

Lord Butler: Here I do agree with Sir Oliver. I think that the deadlock mainly arose not as a result of the Fixed-term Parliaments Act. There was a point at which the Fixed-term Parliaments Act prevented the Prime Minister from asking for a Dissolution, but there were other times during that episode when she could have asked for a Dissolution and would have got one. The deadlock arose because Parliament could not agree on the terms that she had negotiated for leaving the EU. That was the reason there was deadlock. It was true that at one point she was prevented from calling an election, but that was not the ultimate reason for the deadlock that we saw a year ago.

Q172 **Mr Vara:** But ultimately, if you have an impotent Government, a Government that face record losses in terms of parliamentary arithmetic, the kinds of numbers that no Government previously had ever experienced, and the Government are unable to get through their flagship legislation, is it not the case that the Prime Minister should be able to go to the country, go to Her Majesty and say, "I'm losing with horrible figures. I can't get my flagship legislation through. I need a general election to be rid of this stalemate"—and she could not do that?

Lord Butler: There was one occasion on which she could not do it, but I agree with you. Certainly, any Prime Minister ought to be able to deal with that by asking for a Dissolution and a general election. The point I am making is that that would not have necessarily resolved the difficulty over Brexit. It could have produced a new House of Commons where there would have been exactly the same sort of difficulty.

Q173 **Mr Vara:** I hear loud and clear what you are saying, Lord Butler, but what I am trying to say is that when you are talking about the governance of a country, a day is a long time, let alone a week being a long time in politics. If the Prime Minister cannot get a Dissolution when she or he wants it, that causes a crisis not only for the country itself but on an international level and in terms of reputation. While I hear what you say, my view is that she was unable to do what she wanted to do, and the Act was something that prohibited her from doing so, but you have said your piece and I have said my piece.

Lord Butler: Can I just say that you and I are in absolute agreement about that?

Mr Vara: Thank you very much.

Q174 **Maria Eagle:** I wonder, Lord Butler, what you think of the current draft Bill and whether it does what it is meant to do. The Government have told us that they want it to take us to the status quo ante the Fixed-term Parliaments Act. Does it do that?

Lord Butler: Yes, I think it does. I am in favour of the Bill. I don't like the ouster clause—I don't like clause 3—just because I think that to have in legislation something that says we are not going to allow the courts under any circumstances to be involved is undesirable. It is something that should not happen. For the reasons I have given, I don't think it is necessary, because, except in the limited example of Prorogation that we had before the last election, I don't think the courts are ever likely to get involved.

Q175 **Maria Eagle:** Thank you. That is helpful. We had a bit of an exchange in the previous question about the extent to which the Fixed-term Parliaments Act was the cause of what Shailesh Vara referred to as paralysis. The Government themselves have said that the Fixed-term Parliaments Act has caused paralysis, and that is why

they want it removed, but how would the old arrangements have dealt with these very difficult Brexit issues differently?

Lord Butler: I think that they would have enabled Mrs May to ask for a Dissolution and a general election when her first proposal for an agreement was rejected, or subsequently. It was only at one point, when I think she saw that the Labour party would not give her the necessary votes for a general election, that she was inhibited from asking for one. I think that that was a disadvantage. I think that the Prime Minister ought always to be able to ask for a Dissolution and a general election in those circumstances.

The other point I am making, however, is that I don't think that that would have necessarily in itself have solved the Brexit difficulty. The difficulty for Mrs May of getting her agreement through Parliament was independent of whether there had been a new Parliament.

Q176 **Maria Eagle:** The Commons obviously then went on not to grant the Government the necessary majority under the legislation of the Fixed-term Parliaments Act to call an election in September. In part, it has been suggested that that was because there was concern that the election might have been timed to ensure that it happened after the UK had left the EU on terms that Parliament had not agreed to. Those are circumstances that would be extremely unusual in political dealings, I suspect. Had the old arrangement been in place, could the Prime Minister have requested and been granted a Dissolution in those circumstances in a way that would have prevented a new Parliament from agreeing to the terms on which we were leaving the EU?

Lord Butler: Yes, she could have done, and she would have been given a Dissolution, I think, but at a cost. What would have happened is that the time at which we were to leave the EU would have come during a general election period. Parliament would not have been able to intervene, and we would have left without an agreement. She could have done it. She would have been within her rights to ask for a general election, but the result would have been something that I suspect—I am sure—she did not want, that nobody wanted, which was that we would leave without an agreement.

Q177 **Maria Eagle:** When, under the Fixed-term Parliaments Act, the Commons was voting, as it did on a number of occasions, to prevent our current Prime Minister from calling an election when he said he wanted to, there was a concern, I am certain, at that time, that caused many people to vote against allowing him the Dissolution that he wanted. Not enough Members of the Commons voted to enable him to dissolve Parliament, in part because there was a concern following the Prorogation issues that he might use the power in a manipulative way to make sure that the UK left the EU before Parliament had agreed, or had a chance to disagree, to the terms on which he wanted us to leave. Had the Fixed-term Parliaments Act not been there, would it have been appropriate for him to ask for and get a Dissolution such that he would have been resolving the issue of the terms on which we left without Parliament having a say?

Lord Butler: Yes, I am afraid so. I would not have wanted us to leave without an agreement, but Parliament had ordained that we left on a certain date and, if that is what he wanted, he had the power to bring it about by asking for a Dissolution. I think it would have been very unpopular, including with Members of his own party—it would have split them right down

the middle—so it would have been politically unwise for him to manipulate it in that way. That, rather than the legislation, would have been the inhibitor.

Q178 **Lord Mancroft:** I am the tail-end Charlie, so forgive me if I labour points you have made once or twice before, but I think the Committee is trying to get clarity in areas that are notably opaque. Could you confirm what I think you said: a Prime Minister should indeed be able to call a general election even if, by a majority vote in the House of Commons, MPs have made it clear that they oppose that?

Lord Butler: I am not quite sure how MPs would make it clear that they were opposed to it, but yes, I do think it would be the Prime Minister's prerogative to decide whether to ask for a Dissolution and a general election. I confirm that.

Q179 **Lord Mancroft:** Thank you. Do you think, even bearing in mind what you said about the withdrawal agreement, the circumstances of last year and the year before, there is a real risk of paralysis if MPs could trigger a general election by a simple majority, or even prevent a general election by a simple majority.

Lord Butler: I do not think the paralysis would arise from that situation. MPs could always trigger a general election by a majority vote because they could pass a vote of no confidence, which would trigger a general election. Could they stop the Prime Minister doing it? No, I do not believe they could, nor should they. That is the Prime Minister's prerogative in most circumstances because the Prime Minister feels that the Government cannot govern effectively and needs a new mandate.

Chair: Lord Butler, may I thank you very much indeed for giving us a fascinating insight into your experiences and your views? Those experiences over a very long period at the very heart of Government have helped the Committee immensely in the practical applications of what was a fixed-term Parliament and what the way forward is. Thank you for sparing us the time this morning. Thank you to Oliver Letwin as well.

Lord Butler: Thank you very much, Chair. I have greatly enjoyed it.

Chair: It has been very useful indeed. I thank the Committee. That brings this week's evidence sessions to a conclusion.