HOUSE OF COMMONS

Joint Committee on the Fixed-term Parliaments Act

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

Thursday 21 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; Mr Shailesh Vara; Craig Whittaker.

Questions 180 - 219

Witnesses: **Professor Anne Twomey**, University of Sydney, Australia, and **Professor Philippe Lagassé**, Carleton University, Canada.

Examination of witnesses

Chair: This is a meeting of the Joint Committee on the Fixed-term Parliaments Act. This morning, we have two witnesses, whom we are delighted to welcome and thank very much for giving us their time. There are considerable time differences between where they both are and where we are—I think the witness in Australia is 11 hours ahead of us and the witness in Canada is five hours behind us—so thank you very much for facilitating this meeting, Professor Twomey and Professor Lagassé. May I ask for the first question, please, from Aaron Bell?

Q180 **Aaron Bell:** Thank you both very much for giving us your time today. Could I ask you both, starting with Professor Twomey, what your understanding is of how the law and conventions on Dissolution, the calling of new Parliaments and Government formation in the United Kingdom operated before the introduction of the Fixed-term Parliaments Act?

Professor Twomey: First, the Prime Minister requested, rather than advised, a Dissolution. Of course, in the ordinary case, the Queen would grant that request, but she has the discretion to reject it, because it is effectively a reserved power, as we in Australia would call it, or a personal prerogative, as you would call it.

The Queen had no power herself to initiate a Dissolution, except, of course, in very extreme cases, where the doctrine of necessity would apply, such as where all your Ministers have been blown up in another gunpowder plot, or if you are somewhere like Fiji and you are all being held hostage. Assuming that that is not an issue, it is true to say that the Queen needs

ministerial advice—so that is where advice comes in—in order to proceed with the steps of summoning Parliament, issuing electoral writs and the like. So when it comes to issues of advice and requests, the first stage is to request a Dissolution. If that is then agreed to by the monarch, the monarch must have advice in order to proceed with the steps in the Dissolution. The monarch has no discretion themselves to initiate that Dissolution without advice.

Finally, a Prime Minister who has lost the confidence of the House of Commons and is therefore no longer responsible, under the system of responsible government, must either resign on behalf of the Government or seek a Dissolution. If the Dissolution is refused, he or she, in those circumstances, must resign. That's pretty much it in a nutshell.

Q181 **Aaron Bell:** Professor Twomey, on the other side of a general election, Government formation, what if it is not clear who should be the Prime Minister and who should form the Government? What is your interpretation of how conventions operated in the UK before the Fixed-term Parliaments Act and, indeed, operate now?

Professor Twomey: Again, in those circumstances, it is a personal prerogative of the Queen, in terms of who is chosen, but that is dictated by a very, very strong convention that it is the person who is most likely to command the confidence of the lower House who is appointed. Ordinarily, that is absolutely clear: it is the person who is the leader of the political party or the coalition of parties that hold a majority in the lower House. It's a bit more difficult when it's a hung Parliament. In the United Kingdom, at least in more recent times and particularly with what your "Cabinet Manual" says, there is an obligation on the politicians themselves to try to sort that out in advance, so that the Queen is not put in the awkward position of trying to make an assessment as to where confidence lies. That is my understanding of how it is best sorted out in the United Kingdom, but ultimately the Queen, in making her decision of whom to appoint, is required to meet that convention that it is the person who is most likely to command the confidence of the lower House—that is the key aspect of the principle of responsible government.

Q182 **Aaron Bell:** Thank you. Professor Lagassé, do you have anything to add to Professor Twomey's points on Dissolution, the calling of Parliaments and Government formation?

Professor Lagassé: Thank you for having me. The point that I would stress, which created some confusion following the enactment of the current legislation—the Fixed-term Parliaments Act—is this notion that a vote of no confidence led to the resignation of Government prior to the FTPA, and that is simply not the case, as was articulated by Professor Twomey. In most cases—we see this not only in the United Kingdom and other Commonwealth realms—it would lead to a request for a Dissolution. Much of the debate around the existing legislation was around section 2(4)—this notion that a vote of no confidence leads to a resignation, when in fact it did traditionally lead to a request for a Dissolution. This is an important nuance that I believe is quite material to this debate, in so far as returning to the status quo ante returns to this notion that the first avenue that a First Minister would seek in the event of a vote of no confidence is Dissolution and not resignation. Much of the clouding of the prior convention is around this notion that no confidence is somehow automatically tied to resignation.

By the same token, I think it is important to recognise, in terms of the formation of new Governments, that a First Minister always remains in office until they resign or are dismissed.

So in this sense one of the advantages of the Westminster system of government is that you do not have a situation where you have gaps in who governs. Even in the event that you were to have an election with an unclear result, you would still have a First Minister and their Administration in place who would have the ability to lead the House and determine whether or not they could carry the confidence.

Aaron Bell: You have raised a lot of interesting questions. I know my colleagues have follow-ups on those, so I will hand over to them.

Q183 **Lord Grocott:** Before the Fixed-term Parliaments Act 2011, in what circumstances could a monarch refuse a Dissolution request?

Professor Twomey: There are three obvious ones. One is where there has been a very recent election. That is the primary one. If an election has been held very recently and another Government can be formed, a defeated Prime Minister does not have the right to keep on having new elections until the voters give him or her a win. Parliament has to be allowed to be able to operate, and the vote of the people in the election has to be taken seriously. So that is the most likely circumstance in which a Dissolution would be refused. We all know the example that arose in Canada, in British Columbia, in 2017.

The second of the possible circumstances is refusal of supply—sorry, absence of supply—during the course of the election period. The monarch could refuse a Dissolution if there was insufficient supply to cover the election period. This is primarily a problem in other countries where you have an upper House that can block supply, so it has been an issue in Australia. There have been numerous examples, particularly the 1940s and 1950s in the state of Victoria, when that happened. If the Government have been denied supply and supply is about to run out, the monarch is entitled to require the resignation of the Prime Minister and to appoint someone else who is capable of securing supply in order for supply to be passed before a Dissolution is later held. The idea there is that you shouldn't ever run out of supply. Again, this is not a problem in some countries, such as Canada, where you can have the Governor-General issue warrants to cover you in the meantime. It is just a problem in those countries where there actually would be a complete running out of supply during the election period.

The third obvious issue is in relation to a shift of majority. The Government may have lost the confidence of the House, and there may be a new, stable Government that can be formed—for example, there is a coalition split and one of the parties moved to support another party to form a Government. If it was also potentially damaging for an election to be held—perhaps there was a pandemic, a war or an economic crisis—there might be a good reason not to hold an election in those circumstances, and the monarch could refuse a Dissolution, appoint a new Government and let them get on with governing. In most cases, that will not be the case. The monarch is far more likely to grant a Dissolution, because it is almost always better to ask the people to choose who the Government is. It would only be in those circumstances where, for one reason or another, holding an election at that time would be damaging. This goes back to the Lascelles principles, whereby it is likely that a shift in a majority would result in a baton change without an actual election.

Lord Grocott: I have a couple of supplementary questions, but perhaps we can hear from Professor Lagassé first.

Professor Lagassé: I would emphasise two particular points, the first being on the importance of an alternative Government. In the absence of that alternative, the option of refusing a request to dissolve becomes much more difficult. We have seen situations, particularly the infamous Canadian case of 1926, when Prime Minister William Lyon Mackenzie King requested Dissolution but the Governor-General refused that request on the pretext that there was an alternative Government in waiting. Ultimately, that alternative Government were not able to maintain confidence, and Dissolution was ultimately granted. In the absence of an alternative Government, the options for the Crown to refuse a request are quite narrow.

Similarly, I think this is tied into the duration of the Parliament at hand—this returns to the Lascelles principles. Generally, we say six months, but in my view that can extend to six to nine months, depending on how long Parliament has been sitting and how much time Parliament has had to express itself.

In general, those are the two conditions that I would say have to be met: there has to be a clear alternative Government, and how that manifests itself is not always obvious—for instance, Opposition parties can come together, as they did in Canada in 2008, and attempt to express to the Crown that they are a Government in waiting; and on the clear vote of no confidence, whether or not the Crown has the discretion to refuse advice from a First Minister who still formally holds confidence in order to allow an alternative Government to come into place is a matter of contention.

Q184 **Lord Grocott:** Thank you for both those answers. I put it to you that, as far as the United Kingdom's experience is concerned, the answers you have given are necessarily various speculative things that might happen—one or two of them are almost on a par with Professor Twomey's suggestion about all parliamentarians being detained in Fiji for some reason—and I wonder about the fact that, in practical terms, it has been an absolutely automatic assumption in this country, at least since 1945, that the Queen will accept the advice of the Prime Minister on Dissolution, and she has never rejected it. That is 75 years of practice.

Do either of you think there is any strength at all in the argument that, in practice, the situation now is that the monarch accepts the advice of a Prime Minister on Dissolution, and not to do so would be almost as unlikely as the monarch refusing to give her assent to the passage of a Bill into an Act?

Professor Twomey: I have to say that I quite disagree with that. The Queen herself has asserted that her prerogative in relation to Dissolution continues. If you read some works, they suggest that she actually made people rewrite their request for a Dissolution because they used the word "advice" rather than "request". So I do not accept that it is impossible.

I also point out that in the works of A.B. Keith—Berriedale Keith—there is a lovely passage in which he says it became automatic that George V granted a Dissolution in these circumstances without even thinking before he did it, because it was simply an automatic thing. It was not until we got Harold Nicolson's biography many years later that we discovered that, actually, the King really did contemplate refusing a Dissolution, and in the end he granted the Dissolution only because he could not find anyone else who was able to form a Government.

Berriedale Keith was wrong because nobody knows what actually happens behind the closed doors. None of us here can assert what has happened during Queen Elizabeth's time behind closed doors—whether she did influence the outcomes of elections or suggest to a Prime Minister that maybe it is not a good idea to ask for a Dissolution in these circumstances and then a Prime Minister just did not ask for it.

In relation to monarchs and exercising reserve powers, nearly always it happens without ever being formally done. There is no formal rejection of a Dissolution, because it is all done informally by hints, suggestions and queries. "Is that wise, Prime Minister? Would it really be appropriate to do this now?" That is how the reserve powers work in practice. We really cannot say whether that has been exercised during Her Majesty's reign, so I would not be suggesting at all that the power had in any way disappeared.

Professor Lagassé: I would build on Professor Twomey's point with respect to the position of the Queen, in particular—namely, she has a distinct position, I would argue, relative to her viceregal representatives in the Commonwealth realms, in so far as bringing the Queen into politics in the United Kingdom is of greater import and must be weighted with greater care than bringing a viceregal representative into politics. As we see even in Canada as recently as 2017—Professor Twomey referenced this case in British Columbia—the willingness of politicians to play with the Crown's powers in other Commonwealth realms is far more prevalent as a result of that. We have seen a greater number of times where a First Minister will argue that their advice must be accepted on Dissolution, only to discover that, no, quite the opposite—the viceregal representative is willing to exercise the reserve powers.

There is this greater hesitancy in the United Kingdom—not to involve the Queen—whereas involving a Governor-General or a Lieutenant Governor in these matters is considered less problematic. As a result of that, it may be that the norm is less around refusing Dissolution—that it would never happen—and more a question of not willing or not wanting to intervene directly in such sensitive decisions, returning to Professor Twomey's point that perhaps most of these refusals are happening in a much more subtle way in the United Kingdom than they would in other Commonwealth realms, where bringing a viceregal representative into the public realm is far less prohibited.

Q185 **Lord Grocott:** That is a very interesting response. May I ask one further supplementary? What seems to be agreed by all people commenting on the British constitution is that the monarch simply must not be involved in political issues, if at all humanly possible. Indeed, very recently, when we had a dispute in this country that went to the High Court, because an unusual Prorogation was being requested, as far as I know, no one actually criticised the monarch for following the advice of the Prime Minister. They criticised the Prime Minister, but not the monarch. I therefore put it to you that, if we are simply saying that the monarch must not get involved in political issues, it is impossible to think of a more political decision than to say to an elected Prime Minister, "No, you cannot put this proposition to the British people"—for a hereditary monarch to say to an elected politician, no, we cannot consult the electorate.

Professor Twomey: I agree obviously that it is very important that the Queen not be involved in party politics, but the role of the Queen is to protect and defend the constitution. That is a different matter, and it does not involve party politics. So, the Queen can stand up to party politics and exercise the power, and explain that it is being exercised, to support various

constitutional principles. That is what is done in the colonies, so to speak, with governors-general and the like, when they do exercise powers.

Although there have been one or two occasions when it has obviously been very controversial—1975 in Australia, with the dismissal of the Whitlam Government, or the King-Byng affair in Canada—on nearly every single other occasion, however, it has not resulted in the Governor or the Governor-General being embroiled in politics, as you would suggest. The Governors and the governors-general are regarded as defending the constitution and fulfilling a proper role in doing so, precisely because it is non-political, and their role is non-political.

It actually gives greater constitutional support to their role. Let me give you the small example from Australia here: if it were not for the fact that the Governor-General does have a substantive role in defending the constitution against party political action, we would be a republic by now.

The only thing that keeps the monarchy in Australia, and the role of the Governor-General, is that they are entrenched in the constitution as having a substantial role. The fight in Australia that preserves the monarchy as the default mechanism is because no one can agree on how you would get somebody else who was independent of politics to fulfil that critical role. Do you have a direct election or an indirect election and so on? That is the fight in Australia. But if you say that the Queen is simply an automaton—just a rubber stamp who acts on advice and nothing else—that makes her very vulnerable in your political system, because it leaves her as a tourist attraction. One day, you will find another tourist attraction is more attractive and cheaper, and the monarchy can be tossed out with that. It is actually in the interests of the monarchy and its survival in the United Kingdom that it is seen as having this non-partisan role of protecting the constitution—being the last stopgap to do that. That is what preserves the monarchy in your system.

Of course, some of you may be republicans and want to get rid of the Queen. If you did, the best way of getting rid of the Queen would be to ensure she had no substantive constitutional role, because then it is very easy to get rid of her. But if you want to continue her position, you really should think about this notion of never involving the Queen in politics at all. It is actually damaging her constitutional role and status and will eventually lead to the end of the monarchy. That is my potentially controversial view.

Professor Lagassé: I would take a middle position which is to re-emphasise again that the constitutional culture in the United Kingdom is such that preventing or avoiding situations where the Queen has to exercise her discretion is paramount in a way that it is not in the other Commonwealth realms, given the position that the Queen occupies not only formally within the system but politically in terms of the overall UK constitution. That said, I will take the other position that if we look at the trajectory that the British monarchy is on constitutionally, one could make the case that it is becoming increasingly more akin to a Nordic model where the powers are less likely to be used and pushed almost to the margins, and it takes on more of a figurehead role.

But I would say that in the case of Miller 2, the issue there is that we need to distinguish between Prorogation and Dissolution in so far as the situations in which the advice to prorogue has been refused are few and far between, and we would be hard pressed to find

clear examples of that occurring. This was quite a controversy in Canada in 2008 as well, but generally speaking the case that the Queen can refuse a Prorogation is far less evident than cases where she might be able to refuse a request to dissolve if the principles we have laid out thus far are clear: namely, that there is an alternative Government and the duration of the Parliament since the last election has not been long enough. But, to return, I would say again that the key point here is a desire and recognition on the part of all political actors in the United Kingdom as well as those who surround the monarch to avoid situations where she would be asked to make that kind of clear declaration or call using her own discretion, which is something we do not see in the other realms.

Chair: Thank you. Baroness Doreen Miller.

Baroness Lawrence: Lawrence.

Chair: Sorry, Doreen. I am getting too many mentions of Miller. Sorry about that.

Q186 **Baroness Lawrence:** Thank you both for being here today to support us in getting around the Fixed-term Parliament Act. Before fixed-term Parliaments, what constituted a vote of confidence and a vote of no confidence in Her Majesty's Government? To Professor Twomey, please.

Professor Twomey: I will concentrate here on votes of no confidence, because they are the more pressing ones. The first one is an express vote of no confidence. That is the easiest. Secondly, there is defeat on an Address to the Queen, after an election. Thirdly, there is defeat on a money Bill. That can happen in quite symbolic ways. Previously there was a custom that if you reduced the Budget by £1, that was enough to indicate the Government was defeated. Examples of that are, in Australia, the Fadden Government in 1941; in Victoria, the Dunstan Government in 1945; in Canada, the Pawley Government in 1988 in Manitoba. They all fell on reductions to the Budget.

Then there is defeat upon a major Bill or a Bill that the Government has declared is a matter of confidence. Examples there are, in Australia, at the Commonwealth level, the fall of the Deakin Government in 1904, and the Bruce Page Government in 1929; in Manitoba, the Norris Government in 1922.

Another example is the ongoing loss of Government control over the business of the House. In Australia, the Deakin Government in 1908 fell on the defeat of a motion about the hour of the next sitting of Parliament. The Fisher Government of 1909 was defeated on the Adjournment. The Scullin Government in 1931 was defeated on the Adjournment. The idea here is just simply that the Government has lost control over the business of the House and can no longer operate.

Next is defeat on a confidence motion that was put by the Government when there was doubt about confidence—the Government puts a motion itself to declare confidence in it, and then is defeated on it. An example where that didn't quite happen is going back to the Major Government. After the social protocol in relation to Maastricht was defeated, it then put a confidence motion and succeeded in that confidence motion. That is an example of confidence actually working.

They are the main ones that come to mind. Having said that, they are the traditional ones. Whether or not all of those things now would be counted as a matter of confidence or no confidence, it is hard to say, because the conventions and the usage of them change over time, so that is a list that is a bit old. It is a mid to early 20th-century list. How much of that now would work—this is the difficulty with all of this—is quite hard to say.

Professor Lagassé: I would simply build on Professor Twomey's last two points—major legislation and Government policy and control of the Commons. I suspect that this is the area where there would be the greatest degree of contention, particularly in the United Kingdom constitution today.

As you might imagine, the idea that the Government almost always must get its way when it comes to how the Commons operates would be an area of great contention today. That is at the heart of the intersection between Brexit and the Fixed-term Parliaments Act in 2019—the extent to which a Government can claim that it must be able to control the Commons or get its agenda through the Commons and whether, if it does not have that ability, it no longer retains confidence. Similarly, if a Government is unable to get its signature piece of legislation through the Commons or through the two Houses, whether that represents a clear situation where the Parliament has withdrawn its confidence in the de facto sense in the Government and that therefore a Dissolution should occur.

I would say that that notion that the Government must get its way on major policy and must be able to control what occurs in the Houses of Parliament is fraying in the United Kingdom. That would be an area that merits far greater investigation as you look to repeal the Fixed-term Parliaments Act. Defining when the Government can claim or should be able to claim that because it cannot get its way or because it cannot pass major legislation through the Houses that that constitutes grounds for Dissolution—I suspect in an era of far greater Back-Bench independence in the United Kingdom that might not be as well seen as it would have been in the past, as Professor Twomey indicated.

Q187 **Baroness Lawrence:** Thank you. Can I ask you another question, Professor Lagassé? What, if anything, can we learn from convention on confidence matters for other Commonwealth countries?

Professor Lagassé: I would say that most other Commonwealth countries would first look to the United Kingdom for inspiration, so it is a bit of an odd question. However, many of the other Commonwealth countries operate with more of an Executive-dominant position. Therefore, a number of the items listed by Professor Twomey are still very much operative. So it would very much be the case, for instance, in Canada—in 2008, for example—that when the Government do not feel, in a minority Parliament situation, a hung Parliament situation, that it can get its agenda through or that—*[Inaudible.]*—its ability to govern effectively, that would constitute grounds for Dissolution. Again, this might be a principle that has to be clarified in the United Kingdom—whether or not, in this day and age, when the Commons and Lords are asserting themselves far more and when there is far less tolerance for the Executive dominance of Parliament that we have seen over the past 30 years in the United Kingdom, that principle is still considered operative in the United Kingdom.

The other point is that you can look to other countries in the use of constructive non-confidence. This is not really something that we see as much in the core former dominions, but there is the idea that if you are going to withdraw confidence, you should also do so while

effectively appointing or naming an alternative Government. That would be another means of withdrawing confidence without necessarily having recourse to a Dissolution.

Baroness Lawrence: Thank you. Have you anything to add, Professor Twomey?

Professor Twomey: No. I will let us move on.

Q188 **Alan Mak:** Thank you to Professor Lagassé and Professor Twomey for joining us today. My question is to both of you, but perhaps Professor Lagassé can begin. What impact do you think the Fixed-term Parliaments Act had on the election cycle in the UK? In particular, did the Act meaningfully shift control of elections away from the Government and to Parliament?

Professor Lagassé: It is fair to say that it did shift control over to the Commons. We saw this very much during the Brexit period, and in particular, in that period from 2017 to 2019, but a number of other factors were at play as well. I do not think that the situation that we saw in those Parliaments would have been as tense in the absence of Brexit. As well as that, the fact that the Speaker of the House of Commons was willing to interpret certain Standing Orders, such as Standing Order No. 24, in a manner that allowed the Commons to wrest control of the agenda more effectively away from the Government contributed to the overall tension and confrontation between the Commons and the Government during that time. But yes, it is fair to say that it gave the Commons a far greater ability to say no to the Government on major pieces of legislation and policies, and that in the absence of the Fixed-term Parliaments Act and with the way that the Act shifted and changed the Government's understanding of confidence, we would not have seen the same type of brinksmanship between the two branches of the state in that context.

To simplify the answer, it is fair to say that the Government would have been far better placed to go back to the people and secure the election that they ultimately did in 2019 if the Commons was not able to effectively limit the power of Dissolution in the way that it did under the Fixed-term Parliaments Act.

Professor Twomey: I would just add that one of the very peculiar things about your Fixed-term Parliaments Act is that it wasn't terribly fixed, because you could change it by ordinary legislation. So if you are a Government that has control of your own House and can pass something through the House of Lords, you can change it any time you like, so it was not really a very fixed-term Parliament at all. In addition, you had the other thing where you had the resolution where the House of Commons, by a two-thirds majority, could also have an early election.

If you want a real fixed-term Parliament, come and have a look at New South Wales. Our fixed-term Parliament provision is in the New South Wales constitution. It is entrenched. You can only change it with a referendum, so the likelihood of that is zip. The only way you can get an early election is if you have a vote of no confidence. There is no issue of a resolution of the House passing it and you certainly cannot use legislation to do it. From a New South Wales perspective, your fixed-term Parliament was the weakest fixed-term Parliament you could possibly imagine—not very fixed-term at all.

You mentioned the question of how meaningful the shift to the role of Parliament in Dissolution is. That is not really the point of a fixed-term Parliament provision. The fixed-

term Parliament provision is that you are supposed to run your whole fixed term and that automatically expires, so that the House does not have a role in that at all. That is how it is supposed to work. The idea is that everybody should know exactly when the election will be, so they can plan on the basis of that, etc. It is not really about giving control back to the Houses. I know that with the whole Brexit debacle the House did have a substantive role, but that is not really the point of why you have a Fixed-term Parliaments Act.

Q189 **Alan Mak:** Thank you. Just to get a final comment from both of you, do you regard the Fixed-term Parliaments Act reforms as being an improvement or a retrograde step, vis-à-vis the system they replaced? How do you feel about that?

Professor Lagassé: I would begin by saying that the current legislation is deeply flawed. Therefore, in the absence of some remedy to the existing legislation, the status quo ante is probably your preferred course of action. Currently, as the legislation exists, the provisions that we find in section 2, subsections (4) and (5), regarding how you have a change of Government within a single Parliament, are very opaque and unclear, and they have done significant damage to how the confidence convention operated in the United Kingdom. The extent to which you can return to a period where it was far clearer what matters of confidence are and what matters of confidence are not, that would be an improvement. That could be done in other ways. The legislation could have been amended to clarify section 2, to make clearer when an election should be held after a vote of no confidence and when the intention was to replace the existing Government. Currently, that 14-day waiting period, in which it is unclear whether the Government must resign, or they can wait it out, I would argue, is the biggest flaw in the legislation. It is not preferable to returning to the prerogative of Dissolution.

Professor Twomey: I would agree with that. There are advantages and flaws in the system. Personally, I worked with a fixed-term Parliament system in New South Wales for a long time. I ran the legal branch in the Cabinet Office in New South Wales. This was my legislation. I could make it work. It was fine.

I think there are advantages in having a fixed-term Parliament system. It is fairer to all political parties. It ensures everybody knows when the election will be, and they can all plan for it. For political parties, that is really important, because they can plan their finances. They know exactly how much money they need to raise over a period of five years to run their campaign. They can book their advertising. You don't end up with the Government booking all the advertising in advance, when they know when the election will be, but you don't.

It gives greater political and economic stability, because there is an economic cost that results from political uncertainty. It results in fewer elections overall. That means there is less cost to political parties in running campaigns. Less fundraising is required. The best part of that is that it reduces the potential corruption risk that comes from having to go around extorting donations from people.

It allows public servants to plan and implement policies with confidence that they can do so on a long-term basis. You know this Government will be there for five years, so you can do this particular thing and you will not be interrupted by an election. It allows for better management of the caretaker or, as you would say, the purdah period before an election. It also allows you to enact laws that concern things like limitations on political advertising and

campaign finance laws, because you know precisely when the election will be, so you can start those laws applying six months before the due date of the election, etc.

There are lots of advantages to having fixed-term Parliaments. The problem in this particular case, however, is that your legislation was very poorly drafted—it was not well considered. The 14-day period, as Phil said, was a disaster. What actually happened in that period needed to be better explained. One of the flaws was that you could prorogue Parliament during that period.

I have to say, I was one of the people who spoke to your parliamentary Committee while that Bill was going through Parliament, and I said, "Hello! That's a big mistake. Don't do it. You need to put in a provision that stops Prorogation happening there. You also need to put in a provision that stops the Prime Minister having control over the date of the Dissolution in those circumstances." Those flaws were known before the Bill was originally passed. Nobody seemed to care then; they just wanted to get the thing through, not thinking that those things would be a problem. Actually, they really were a problem.

If you wanted to have fixed-term Parliaments still, you could fix all that—ensuring that you cannot prorogue in the 14 days and making clear what happens during the 14 days—or, where you had in your Bill what resolution you needed to get your election when there is a vote of no confidence, you could instead say that you have only two choices. Choice A is to say, "This House has no confidence in the Government, and no confidence in anyone else to form a Government, and requests that Her Majesty dissolves Parliament, for an election on X date." That would give the House the power to make that decision. Choice B is to have a resolution that says, "This House has no confidence in the Government, but does have confidence in X to form a Government." That would leave it to the Queen to appoint X to form a Government.

You could leave the role of the Queen to do either of those things—dissolve or appoint someone to fulfil the position—but the best part about it is that the right forum is making the ultimate decision on where confidence lies. If you go back to constitutional principles, under responsible Government, your Government is formed of the people who have the confidence of the lower House. If the lower House decides that nobody has that confidence and you need an election, then you have an election, and the Queen would therefore be absolutely entitled to do that, and no one could say that it was a political decision on her part because the House would have told her where confidence lies. Equally, if the House decided that somebody else had its confidence, the Queen would not be engaging in any political activity, and would be appointing that person as Prime Minister because the House has told her where confidence lies.

You could do things like that and fix the system—that is not hard. But your present legislation is terrible, and it caused problems.

Alan Mak: Thank you both for your comments. I have no further questions.

Chair: Professor Twomey, you have certainly pointed out a number of the problems that were faced, and the subsequent problems about when elections start—how the Electoral Commission can start monitoring expenses 12 months from an election if it

does not know when the election will be, for example. Those are certainly all problems that came through.

I think we should try shortening our questions, as we are overrunning slightly at the moment, but we will see how things go. I call Peter Gibson.

Q190 **Peter Gibson:** Good morning to you both. Do you think that the Fixed-term Parliaments Act, either directly or indirectly, changed the conventions around Government formation in the UK?

Professor Twomey: Well, on the face of it, I do not think that it did actually change the conventions, such as those concerning no confidence and when a Prime Minister ought to resign. On the face of it, it was clear that the no confidence motion referred to in the Act sought only to cause an early election, and that it did not otherwise affect things such as other forms of losses of confidence. I note that that was also the conclusion reached by the Public Administration and Constitutional Affairs Committee in its report back in 2018.

The difference, however, is that if the House showed its loss of confidence by other means, such as rejecting a Budget measure, the problem was that the Government's only option was to resign, because it could not just go out and ask for a Dissolution—subject, of course, to amending the Act or getting a two-thirds resolution passed.

The way the system is supposed to work is a bit awkward. In those circumstances, the Government resign and then somebody else is appointed to form a Government. That person is subject to a vote of no confidence. The vote of no confidence passes, because there is no confidence in the other person who forms the Government, and then you have your election. That is how it is supposed to work, but it is drawn out and means that a Government have to sacrifice themselves and let somebody else be in charge when you go off to an election. We all know that whoever is in Government at the time of an election has immense resources and advantages over the Opposition, and therefore nobody wants to do it. That was how the system was supposed to work.

None the less, the May Government and the Johnson Government faced votes that in any ordinary circumstances would have been regarded as votes of no confidence—they were defeated on absolutely major policies. In the case of the Johnson Government, they were defeated on every single Division from 3 September to 15 October—if that is not losing control of the House, I don't know what is—but in those circumstances they did not resign. It seems that either they took the view genuinely, or they just took the view that it was to their advantage to say that the only kind of loss of confidence was the one specified in the Act. Either way, the Fixed-term Parliaments Act was used as some kind of a fig leaf to protect their position, and that is what happened.

Did the Johnson Government's failure to resign create a new precedent and change convention? Personally, I do not think so. I do not think that breaches of convention create a new convention. If that is the case, a convention is essentially meaningless. Conventions not only set out agreed practices that are based on precedent; as Sir Ivor Jennings said when he looked at these things, they must also be underpinned by a reason. In my view, the reason is to give effect to constitutional principle. The role of convention is to be a bridge between the current situation—the factual situation—and the relevant constitutional principle. It makes sure that Governments act in a way that supports and serves those constitutional principles,

rather than simply acting in their own political self-interest. Conventions can change and adapt to new circumstances, such as fixed-term Parliaments, but only if they actually serve those fundamental constitutional principles. If a Government acts in self-interest and contrary to constitutional principle, in my view it is simply breaching convention. In doing so, it does not create a new convention; it merely behaves badly, and it is up to the electorate to decide.

Peter Gibson: I will put the same question to Professor Lagassé, please.

Professor Lagassé: I would argue that it did alter the confidence convention, in so far as when you remove the Government's ability to request a Dissolution on a vote of confidence, that drastically changes the Government's willingness to consider certain matters of convention or matters of confidence. When you then add as well the provision that a change in Government occurs through an explicit motion of no confidence, as the legislation did, that further reinforces the argument that was made, and that currently still exists, that matters of confidence that require a change in Government are only those that fall under section 2 of the existing legislation.

I would argue that the removal of the power of the Government to request a Dissolution in the event of a vote of no confidence did alter the balance of power between the Government and the Commons in the British constitution. As a result, it had a marked impact on how the confidence convention operated. That may have been an unanticipated consequence of how the legislation operated. I agree that, in principle, matters of confidence stayed as they are, and that the conventions of Government formation in the United Kingdom still are as they existed prior to the Fixed-term Parliaments Act. But the way the Act actually operated was to lead the Government to conclude or to argue that only matters of no confidence found in section 2 counted as veritable matters of confidence, because it had had its power to dissolve removed.

The minute you started changing that equation, the balance of power that did exist whereby the Government could say to the Commons, "If you do not pass this legislation, or if you do not let us control the agenda, we will have recourse to an election," and removing the Government's power to, in a sense, not threaten the Commons but at least attach a consequence to the Commons' actions—namely, an election—the removal of that piece of the overall ecosystem of the confidence convention did lead to a change in how the confidence convention operated.

So I would say that it did mean a change, and I would add that returning to the pre-Fixed-term Parliaments Act relationship may be difficult, because of the change that has been brought about. It may now be more difficult to return to the confidence conventions as they existed prior to the existence of the Act, even if you repeal the Act.

Q191 **Peter Gibson:** Can I press you a little further on that last point? Does that mean you don't believe that repeal of the Fixed-term Parliaments Act would restore the position to that which it was before, automatically?

Professor Lagassé: When it comes to the confidence convention, I think there is more going on, to be frank. We can't simply view the Fixed-term Parliaments Act as a monocausal event that changed all these relationships. The fact of the matter is that, over the past decades, there has been a shift from the power of the Executive as the dominant actor in the British constitution to a far greater emphasis on the Commons and the Houses of Parliament in their

role and in their desire to maintain and control their own agendas, in their desire to be able to use Standing Orders in such a way that they can stand up to the Government far more effectively, and in the case of far greater Back-Bench independence. When you add all this together, it may lead to a situation where Governments are unable to get their way as much as they would like. In the past, that might have led to a Dissolution. However, it may be that there is going to be a greater acceptance that the Commons and the Lords have a far greater ability to say no to the Government, but that that does not necessarily lead to a Dissolution.

So I would say that the dynamic is changing in the UK constitution, in terms of where or how the relationship between the Executive and the legislature operates, and this goes beyond the Fixed-term Parliaments Act, even though the Act in a sense exposed the problems far more explicitly.

Peter Gibson: Professor Twomey, do you have any comments on that last point?

Professor Twomey: In the interests of time, I will just let that one pass. Let's move on to the next one.

Q192 **Lord Mancroft:** The Government's central criticism of the Fixed-term Parliaments Act is that it caused political paralysis in the 2017-to-2019 Parliament. It argues that the Brexit process was unnecessarily prolonged by the House of Commons being unwilling to endorse the Government's Brexit strategy and unwilling to give the Government the opportunity to secure a mandate for that strategy by going to the electorate. Is that a fair criticism of the Fixed-term Parliaments Act?

Professor Twomey: Obviously, the other major problem for the Government was that it actually hadn't produced a policy that could even convince all of its own side. So there was obviously a political problem that the Government faced, in terms of its ability to persuade people to support its own policy. If you can't get your own side to agree to it, you have no hope of getting anyone else to, so I would imagine that that was actually the major problem.

But was the Fixed-term Parliaments Act completely flawed as well? Well, yes. As I previously said, there are major flaws in the Act. It was not the fact that it was a fixed-term Parliaments Act that was the problem; it was just that that particular version of a fixed-term Parliaments Act was abominably badly drafted and ill thought through. You could have had a much better one, and potentially that would not have led to the same problems. The political problems, however, of getting through your Brexit strategy probably would still have been there. Getting rid of the Fixed-term Parliaments Act is not going to solve those sorts of problems.

Professor Lagassé: I agree with that assessment. Returning to the point that was made earlier, the Act merely amplified existing tensions not only around Brexit but around who controls the agenda and the right of the Houses of Parliament to reject the Government's primary policy priorities. In that sense, the Act gave the Commons far greater control over certain aspects of Government formation and the timing of elections that, had they not existed, may have allowed the Government to regain a certain amount of control. But, as Professor Twomey said, ultimately this was a question of not only the politics around Brexit but the fact that the Government has to be able to control its Back Benchers and the members of its party, and in the United Kingdom that has been increasingly difficult for political

parties. That is a reality that is far greater than any particular piece of legislation and, in particular, the Fixed-term Parliaments Act.

Q193 **Lord Mancroft:** Do you think that the Fixed-term Parliaments Act significantly altered either the Brexit timeline or the outcomes?

Professor Twomey: I can give a really quick answer on that. Obviously yes, it did alter the timelines, but I think it is unclear what effect it had on the outcomes. It is a bit imponderable. I cannot add more to that. Phil might have a better idea.

Professor Lagassé: I would argue that it extended the timelines but that ultimately it all would have been the same as we saw. The Act drew out the process, but the outcome was going to be the same. Ultimately, the Commons and the Government were in two very different positions when it came to what they wanted to see out of Brexit and how they wanted to see it come together, and that would have existed in the absence of the Act as well. It just drew out the process.

Q194 **Lord Mancroft:** Lastly, under a prerogative system, would there still have been a deadlock in a situation like the last Parliament?

Professor Twomey: It is possible. It is not inconceivable, for example, that a Government loses confidence but the Opposition does not want to go to an election for some reason. For example, maybe it does not have sufficient money to fund its election campaign at that time, or it may be that due to a vote of no confidence in the Government you needed the support of some Cross Benchers who held the balance of power but did not want an election because, if they had one, they would lose the balance of power and become irrelevant again—or possibly even lose their seats. That was certainly the situation in Australia when we had a minority Government. So it is possible in those circumstances, even under a prerogative system, that they would refuse to vote for no confidence in the Government.

Of course, the Government could always choose to have an election, but at the same time the Government might not want to have an election at that time simply because it fears losing office. It is always risky for a Government to go for an election, because you can never be absolutely confident of the outcome and you might end up no longer having a job.

So you could end up with circumstances in which a Government remains in office but is subject to continuing defeats on the Floor of the House and is essentially a lame duck Government until one side or the other is prepared to pull the pin. That can happen in a system where the prerogative exists as well as a system where you have got a fixed-term Parliament. Admittedly, when you have fixed-term Parliaments, the number of triggers you can pull and your flexibility is much less, but it is not impossible for the same sorts of problems to arise in a prerogative-based system. It is less probable, but not improbable.

Professor Lagassé: I would agree with that. It may be, ironically enough, that the current Government secured its majority simply because of the tensions that increasingly mounted between the Commons and the Government in 2019. Had it been able to dissolve earlier, it may not have gotten the majority that it did, simply because the country may not have been as fed up, or it may have wanted to punish the Government for going earlier.

We also need to bear in mind the earlier election under Prime Minister May. She managed to get that election, but it didn't exactly turn out as she wanted. Ironically enough, a prerogative

system does not necessarily provide you with that automatic stability, and nor does it always work in favour of the Government of the day. It may very well be that the drawn-out process and the confrontation between the Commons and the Government ultimately allowed the current Government to secure the majority it did owing to the nation's desire to move on.

Q195 **Mr Goodwill:** I would like to turn to the issue of the revival of the prerogative powers. The Bill talks about reviving the powers, as if they are like Sleeping Beauty and all Mr Johnson has to do is administer a kiss and bring them back to life. The opinion that has been expressed to us is that once these powers are gone, they are gone—you can kiss Sleeping Beauty as much as you want but she will never get off her deathbed. May I ask whether you think that approach that was in place before 2011 would be a realistic way forward?

Professor Twomey: This is more a technical legal question, so it is probably less in Phil's area and probably a bit more in mine. Apologies if this answer is a bit technically legal, but that is nature of the issue. From a legal point of view, I think that what is being proposed is problematic, because it gives rise to uncertainty as to the nature of the resultant power.

Clause 5(2) of the Bill essentially says that powers that were exercisable by virtue of Her Majesty's prerogative are exercisable again by virtue of this statute. That seems to give a statutory source to the revival of the power.

Much has been made of the sovereignty of Parliament and its full powers to make laws. So yes, Parliament can of course enact a statute that replicates the power of the prerogative, but if Parliament does that, what Parliament is doing is legislating, so it is a statutory power. Parliament has full power to do that. But no, Parliament cannot by statute, for example, make common law, because by definition common law is law made by judges and courts. Parliament may recognise the common law, it may preserve it, it may alter it, it may give effect to it by statute; but if the statute becomes the source of the law then it is statutory law, not common law.

The same is the case with respect to the prerogative. Parliament may, by enacting a statute, abolish the prerogative. If it does so, it cannot create a new prerogative, or revive it as prerogative, because by definition a prerogative is a non-statutory Executive power. But if the source of this power is now statute—if it is statute that does the kiss, the revival—then it is, of its nature, a statutory power.

Q196 **Mr Goodwill:** Does that matter? Does it make any practical difference?

Professor Twomey: I think it does. I just want to add that that is reinforced by clause 5(3) of the Bill. It states that a court of law may not question the limits or extent of those powers, but if it is a prerogative power, it is the courts that determine the extents or limits of the prerogative. If they do not have that power—that is what subsection (3) says—that shows that it is a statutory power.

Does it make a difference? The answer is maybe; it depends on the circumstances. The courts, for example, determine the existence and extent of the prerogative. If it is a statutory power, however, it is the statute that determines the existence of the power—a court cannot do that, but a statute has said it is there, so it is a statute that does that.

The courts identify the scope of the power in the statute by the process of statutory interpretation. There may be significant differences in how a court does statutory interpretation, taking into account the intention of Parliament, as opposed to how a court deals with the extent of a prerogative power. Equally, when it comes to judicial review, there may be significant differences in how a court treats it.

It is true that this could all be hypothetical. You would need to have some kind of exact and possibly bizarre factual circumstance to see how those differences would play out, because it is very hard to imagine any circumstances in which, frankly, there would be challenge to a Dissolution. But, if it did happen, yes, there would be uncertainty and yes, the consequences may be different.

Given the array of different opinions—I have read the transcripts of the previous sessions, with Lord Sumption and various other people giving different views as to what it all means—and the mere fact that you have all those differences of opinion from quite distinguished witnesses, the one thing that the Committee should draw from all this is not that any particular one of us is right, but that there is significant disagreement as to what the status of such a power would be. We also know that there is at least the potential for that to make a big difference in terms of how it is interpreted and applied, and that is particularly dependent on the effectiveness of clause 3—the ouster clause—which, quite frankly, I do not think works. We can come to that later.

Q197 **Mr Goodwill:** Before I turn to Professor Lagassé, are there any implications from all this for other Commonwealth countries, where the prerogative is used by governors-general? Or can this be viewed completely in isolation from the existing situation in places such as Australia, Canada or wherever?

Professor Twomey: I think the answer is probably not. The bigger problem would be the acceptance of the fact that when a prerogative has been displaced by legislation, it would automatically revive when that legislation is repealed. This is a controversial question, but if there was acceptance of that generally, that would be problematic, because there are probably a lot of very archaic prerogatives around that have been got rid of by legislation, and then that legislation itself gets overtaken by time and is replaced by something else, and there is no longer a thing that actively gets rid of the prerogative so, hey presto, it pops up again. You could have all sorts of fairly nasty, oppressive Governments in other countries—Commonwealth countries—who would love that, because they could say, "Look, I suddenly have a prerogative to pressgang people" or to do any of those sorts of things that we all thought had disappeared a long time ago.

Q198 **Mr Goodwill:** This sounds a bit like the law that allows you to shoot a Scotsman within the city walls of York after dark, which apparently is still on the statute book.

Professor Twomey: Well, there you go. You do not want those sorts of things to just accidentally revive.

What you are doing with the particular provision we are discussing is a statutory thing. It is not something that would apply to any other jurisdiction. You are doing it quite deliberately as a statute, so I think it is sui generis and would not have an impact on other places. That is my guess, but Phil might have a different view.

Q199 **Mr Goodwill:** Professor Lagassé, do you agree with those points?

Professor Lagassé: I take a slightly different perspective—namely, that I think this strikes at the core question of what prerogative powers are and how they exist currently. The existing theory has generally been that they can be either abolished or put into abeyance. If one were to try to think of a situation in which a prerogative is in abeyance and brought back, this would be the most explicit attempt to do so. If it does not work—if it is ultimately determined that this is a statutory power—I cannot think of a situation in which you will be able to say we are taking a prerogative back out of abeyance. This legislation says that so explicitly that if that is not what is occurring, we are coming to the conclusion—I suspect this is little bit of what Anne was getting at—that any time a statute displaces a prerogative, it has effectively abolished it. That has wider implications in terms of the prerogatives, because they do fill a number of gaps in statutes, and oftentimes statutory construction is lacking.

If you come to the principle that the minute a statute displaces a prerogative and that statute is changed, then the power exists in a vacuum and is no longer there, that could lead to different sets of problems. For instance, imagine a situation in which the Fixed-term Parliaments Act is simply repealed. Under the interpretation that the prerogative is simply abolished by the statute that removes it, there would currently be no mechanism to dissolve Parliament, except Parliament's passing a new piece of legislation to dissolve itself. We might say that that would be somewhat absurd and that, necessarily, the prerogative would come back to fill that gap in legislation.

I should also point out that this is not completely unprecedented, because we can point to the transition from the Commonwealth in the 17th century. Did that represent a revival of the prerogative? You can look at various pieces of legislation such as the Militia Act under Charles II. Was that a revival of the Crown's prerogatives over the armed forces? You can say most likely yes, and that is how it was interpreted at the time. So the idea that prerogative is only common law power interpreted by the judges is one view, but another view is that it represents "power" *[Inaudible.]* that exists independently in its own right in order to be able to fill foundational functions within the state. If that is the idea, then surely there is likely to be a view that certain prerogatives have to be able to exist over a term if Parliament is not providing sufficient legislative authority to the Executive.

That is a very long-winded answer, but I will also note that all the issues that have been raised by Professor Twomey are likely to arise in courts. I am also of the view that the ouster clause can be easily gotten around by a court that is determined to say, "No, you can't tell us what we can or cannot review." This is touching on the authority of the courts in a way that they might not be willing to accept or play along with.

Mr Goodwill: It sounds like one of these legal issues where we say, "Opinion is divided", but thank you very much indeed.

Q200 **Lord Jay of Ewelme:** This has been a fascinating discussion. A number of the questions that I was thinking of asking have already been asked, but there is one point I would like to focus on. On the assumption that we want to preserve the monarchy and at the same time keep the monarch out of politics, who is best able to provide the necessary safeguards to do that? Might that be Parliament, as Professor Twomey has already suggested, or the courts, or perhaps something else such as formal or informal advisers? Will you comment on that point, Professor Twomey?

Professor Twomey: Certainly there has been discussion. I am trying to flick through my notes to find where I had written something down about this. There has been discussion about whether there should be other advisers to the Queen. This comes back to this notion that the Queen should only ever act on advice and never actually fulfil any substantial function or make a decision for herself. As I say, I am not particularly enamoured of that particular view. But I think one needs to be quite careful to make a distinction between types of advice. Buckingham Palace makes that distinction itself, as it talks about capital-A advice and small-a advice. Capital-A advice is the type of ministerial advice that constitutionally and conventionally is binding on the Queen, and small-a advice is just the sort of advice that you take to inform yourself so that you can make a sensible decision.

It has long been the case that Governors, governors-general and the monarch himself or herself have taken small-a advice from all sorts of different sources—maybe academics, judges, lawyers; all sorts of different people. I have to say I do give that kind of small-a advice to viceregal officers from time to time when they find themselves in a pickle or they just need to have someone to talk to who can explain things to them. When I give advice to them, I am not telling them what to do—I would never do that; I think that is inappropriate. But I explain, "Here are the precedents; here are the principles; here are the conventions; here are the traps you can fall into; here are the factors you need to consider; and here are the various issues to keep in mind." That allows the person to be fully informed.

There was some discussion with Lord Sumption and others about some kind of constitutional council and whether you formalise it. Phil is probably best placed to advise you on the Canadian position, but certainly there was a period of time in Canada when the Governor-General did have a group of informal advisers. There was a leading constitutional lawyer, a leading person in the area of constitutional politics and a practitioner, and collectively they would give one set of informative small-a advice to the Governor-General, if the Governor-General asked for it.

My understanding is that that no longer happens, which is probably more the pity because I think they did a reasonably good job of advising the Governor-General. But that was done informally and it was also done secretly. If you were on that panel, you were not ever allowed to tell anyone that, at least until you were off it—that is how I found out about it, from people who were no longer on it. But you can do that kind of thing, so it does happen informally.

We have some records prior to the current Queen. George VI and George V took small-a advice from all sorts of people, but it always happened to be through the private secretary. The private secretary goes out and takes soundings from various types of people—academics and the like—and still does so today. That kind of informing process exists, but it is not formal advice in the constitutionally binding sort of way.

Q201 **Lord Jay of Ewelme:** Is that a better system than having it more formally?

Professor Twomey: I think so. You need flexibility, but if all you are doing is replacing the Prime Minister as the formal advisor to the Queen with somebody else as the formal advisor to the Queen, you are not using your Queen for the purposes for which she is there: to be the independent person who is untouched by politics and who can eventually make those sorts of calls. That is the whole role of the Governor-General; that is what you employ them for. You want them there as someone who is not affected by politics and who can make that kind of a

decision. I doubt the efficacy of trying to pass this on to another group of people. I don't know that it would actually achieve a lot.

Lord Jay of Ewelme: Professor Lagassé, do you have any thoughts on that?

Professor Lagassé: Personally, I believe that the current system in the United Kingdom, of relying on the private secretaries and their institutional knowledge, has served the country well. The Canadian experience of relying on external experts to help advise the Governor-General is fraught with difficulties, in so far as the experts are not always veritable experts and they may have very different views. They may have partisan leanings. They may have views about the Crown's powers that are not in keeping with internal practice. There are a number of thorny issues around that.

However, I will say that, as we saw in the Miller 2 case, in almost all circumstances the Crown—be it in a personification as the Queen or her group of representatives—is almost always better placed waiting for other institutions of the state to come forward and serve their function before she has to make some of these decisions. In the case of Miller 2, the Supreme Court was able to intervene. The courts were able to do their part without having to have the Queen formally reject advice, which would create a whole other set of constitutional problems and crises.

Increasingly, as we see the courts taking a greater role in these debates, I suspect that is going to be the first course of action. The impact that will have on the Queen's role is likely to further diminish what is considered her area of discretion and when she can exercise her powers. It will become a fire extinguisher in the most extreme of circumstances, as opposed to a constitutional referee, which I think some people would be more comfortable with. We can debate whether that is good or bad, but I would simply point out that, ultimately, if another branch of the state—the Commons, the courts or others—can act, as opposed to the Queen, that is probably for the best for the monarchy overall.

Lord Jay of Ewelme: Thank you very much.

Q202 **Dame Angela Eagle:** Professor Lagassé, do you think that it is possible to return to the status quo ante? The draft Bill that we have in front of us at the moment basically proclaims that the status quo ante shall exist after the Fixed-term Parliaments Act has been repealed, yet conventions, as you said earlier, have begun to evolve and change. In fact, the House of Commons now contains a small minority of people who were in the House when this claimed status quo ante was meant to exist. Do you think that this bold statement in the draft Bill that we can go back through time to the status quo ante is even realistic?

Professor Lagassé: I believe it is realistic in terms of where the power lies. You may be able to return to a situation where the Prime Minister requests a Dissolution from the Queen and the Queen grants the Dissolution. But, as you say, a return to the status quo ante when it comes to how people understand confidence and how they understand the relationship between the legislature and the Executive—that strikes me as highly unlikely. There has been a change in power. The relationship between the legislature and the Executive has evolved in the United Kingdom. The idea that the Government will return to a dominant position through the use of the Dissolution powers strikes me as unlikely.

Similarly, I suspect that the idea that we will simply return to a situation where the Commons is deferent to the Government's overall agenda, and that the Government, if it doesn't get its way, can have recourse to a Dissolution, does not strike me as in keeping with what I have been observing in British politics over the past 20 or 30 years.

Q203 **Dame Angela Eagle:** Anne Twomey, what are your thoughts on this? Is it possible to go back to the future just by asserting that that is what we are going to do?

Professor Twomey: I think the biggest problem in this is ascertaining what the status quo was back in 2011, and who decides that. One of the problems we have here is that we now have a piece of legislation—assuming this gets passed—with a statute saying that the power is now what it was in 2011.

Problem No. 1 is that that then freezes everything as at 2011. As you go on in time, that becomes more and more problematic. Let me give you a small example. In Australia, under section 49 of the constitution, the powers and privileges of the Houses of Parliament, until legislation occurs, are the same as those of the House of Commons as at the date of federation in 1901. Every time we have an issue about which there is no legislation, we have to go back and look at the 10th edition of *Erskine May*, because that was the last edition before 1901—by the way, if any of you happen to be throwing out a 10th edition of *Erskine May,* I would really like it. It would be nice to have one.

Dame Angela Eagle: It is probably very valuable now, by the sounds of it, at least in Australia.

Professor Twomey: The 10th edition is great for Australia.

The second problem is who decides what it is. You have now got a statute saying that's what it is—whatever it was at that date—so who decides what a statute is saying the law is? Well, it's a court. Then you say, "But hey, we've got this ouster clause in section 3," but your ouster clause, when it does its ousting, is ousting in relation to the powers referred to in section 2. That is where the whole ouster clause fails, because all the court then needs to decide is, "Well, what you have purported to do in relation to your Dissolution actually falls outside the 2011 position. Therefore, the ouster provision doesn't apply to the court because the court's jurisdiction is only ousted if it is within the scope of the power in 2011, and we get to decide what that power is." Do you see the problem? It doesn't work.

Q204 **Dame Angela Eagle:** I think we have seen the problem and there will be other questions on that. How could this best be fixed? Professor, you are in favour of another Fixed-term Parliaments Act, or a constitution. How, within the element of trying put right this mess of the Fixed-term Parliaments Act statute, could this be fixed? Clearly, the draft Bill doesn't do that, in its current form.

Professor Twomey: That question is actually really hard to answer. I would probably have to sit there for a few days and nut it out. I can tell you that what you have got doesn't fix it. That's the easy answer.

Q205 **Dame Angela Eagle:** That is at least progress. Professor Lagassé, how do you think it might be fixed?

Professor Lagassé: I would simply assert that the issue here is less about prerogative powers themselves. That is part of the overall debate that has been happening with the Government's new commission reviewing the constitution, democracy and judicial review. Your focus on the nature or source of authority is contrary to what we should be looking at, in terms of what powers the Executive should have. What powers should the Executive have within the British constitution? That is the nature of the debate going forward, in my mind.

It is less about whether this is a prerogative or not a prerogative, or returning to some past as it existed; it is more a question of, within the current British constitutional construct, what should be the balance of power between the Government and the House of Commons. That should be the nature of the debate going forward. It should far less be a question of whether this is a prerogative power and whether we are returning to previous era.

I would encourage you, as part of your study, to say that ultimately we should be looking at what the Government's power over the lifecycle of a Parliament should be, rather than whether we want to return to what it was before. As you pointed out, returning to that previous era is impossible for a number of reasons. Looking forward, the debate should be far more about what powers the Government should have with respect to Parliament, and what powers Parliament should have in terms of setting and controlling its own life.

Q206 **Lord Beith:** I want to turn to the Government's one-page "Dissolution Principles" document. Answers we have already received indicate that we can cut to the chase. The document states, in terms, that "The Sovereign… is informed by and acts upon the advice of the Prime Minister". But you have made it clear, Professor Twomey, for example, that your view is that Dissolution is something that is requested, not advice that is effectively binding upon the monarch. You have given several circumstances in which a Dissolution might be refused, such as when a very short time had passed since the election had taken place, when there was an issue around supply or there in an alternative Government available. Is this document an accurate statement of what we understand the position to have been, or is it a document that is actually quite dangerous, especially if it were to be written into the "Cabinet Manual"?

Professor Twomey: Well, yes. It is not an accurate or complete description of the relevant conventions and the scope of the power. Putting in an incomplete, somewhat confused and slightly misleading document is not really a very good idea.

When I say it is confused, I refer to the fact that in the first bit it says that you "advise" the monarch, and further down it says that you "seek a dissolution, which would usually be granted". The last paragraph is the most confusing, because it says, "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, and the Prime Minister maintains support as the leader of that Government."

That opens up a massive can of worms. When is "appears" relevant? What happens if the Prime Minister loses the leadership of the Government but then refuses to resign and decides to rush off and call a Dissolution? If you think that is implausible, it almost happened in Australia a couple of years ago. Malcolm Turnbull, when he was Prime Minister, faced a leadership challenge from Peter Dutton. The day before the leadership challenge was held, when he knew he was likely to lose, Turnbull made an appointment to see the Governor-

General to call a Dissolution, to call an election, the day before he was about to lose the leadership of his party and against the wishes of his entire party. He was talked out of it at the last minute. Would such a Dissolution have been appropriate? Would the Governor-General have granted it? Who knows? Again, those circumstances raise interesting questions.

This document raises more issues than it resolves. I would not go anywhere near it. I think it is really problematic. I would drop it like a hot brick.

Professor Lagassé: The "Dissolution Principles" document is more or less correct in the overall argument it makes about what the status quo ante was, in terms of the Government being able to secure or request a Dissolution if they lost confidence. That is a point of clarification.

If you look at a number of other studies that have been prepared by other Committees—to return to an earlier point—this idea that in the past a vote of no confidence led automatically to resignation is simply not correct. In so far as the "Dissolution Principles" document clarifies that a vote of no confidence can lead to either Dissolution or a resignation, it is a helpful clarification of what the convention was earlier. As Anne has pointed out, some of these paragraphs are highly problematic—you would not want to codify this in any way, because it places a far greater emphasis on the power of the Prime Minister to secure any Dissolution at any time and uses words like "advise" instead of "request", and these types of things. Similarly, that last paragraph, which is very muddy around the nature of convention when it comes to the confidence of the House, is not something that you would want to codify in any way, shape or form.

That being said, I would also point out that the "Cabinet Manual", as it exists, is equally fuzzy on these issues, so a lack of clarity around Government formation is a general problem in the existing documentation in the United Kingdom. It is something that is worth reconsidering as part of perhaps even a revision of the "Cabinet Manual" to reflect, going back to an earlier point, what exactly it is we are hoping to achieve in terms of the principles around Government formation and the relationship between the Government and the Commons, as opposed to simply trying to return to a status quo ante where people disagree about how it actually operated.

Q207 **Lord Beith:** What do you think of the fact that the document that has stood the test of time best was an anonymous letter to *The Times* over 50 years ago?

Professor Lagassé: This is my point. Ultimately, these are conventions, and conventions work because they are flexible and because they are meant to have agreement on the part of all political actors. Once that agreement begins to fray—and this is exactly what occurred with the Fixed-term Parliaments Act around what confidence is. Because the Act began to tinker with the conventional agreement around what constituted convention, because it changed the balance of power between the Executive and the Commons and therefore led to a different interpretation of what confidence constituted, it led to loggerheads between the two branches of the state.

This is the danger of trying to codify a number of these things. Often, convention works because it is not codified, because it is meant to work along an ethical imperative. You are meant to play by the rules, as they are understood, and you are meant to play fairly. No amount of codification and no amount of putting things down in writing can ensure that

people act responsibly and honourably. This gets back to Peter Hennessy's point that the British constitution ultimately has relied perhaps too much on the good chap theory of the constitution, but ultimately, trying to replace the good chap with codified rules is not going to be a very successful formula.

Chair: Thank you, Alan. I think we'll all start reading *The Times* a bit more carefully.

Q208 **Jackie Doyle-Price:** Professor Twomey, you have highlighted that on a number of occasions, when an early Dissolution is requested in Westminster-style systems, the Opposition is consulted. Can you tell me how this works in practice?

Professor Twomey: When a vote of no confidence is passed in the Government and a Dissolution has been requested, the Head of State will on some occasions want to consider whether another stable Government could be formed. Otherwise, if the Government is refused a Dissolution and resigns and a new Government cannot carry on, it would have to be granted a Dissolution anyway, so it is therefore better to give it to the first Government to begin with.

To know, however, whether another Government can be formed that would command the confidence of the House and be able to continue for a reasonable period, it may be necessary to consult the Opposition parties and independents. That is not just confined to Australia. King George V did the same on a number of occasions, although obviously through his private secretary, and then complained later on that he was not properly advised, I might add.

The same issue occurs if a Government has been denied supply and the Head of State wants to know if there is someone else who could form a Government that could secure supply. In those circumstances, they have from time to time consulted with the Opposition.

There is a marvellous record of all of this, which was found in a box down the bottom of a building in Victoria, which had handwritten records of the various Governors of Victoria, saying, "And then I called in so-and-so and asked him if he could form a Government or whether he would support somebody else." It is a nice little record of how this actually worked from time to time in Victoria.

In Australia, such consultation usually involves the Governor or the Governor-General directly. In the United Kingdom, it would only ever occur through the monarch's private secretary—the monarch does not get involved at all in those kinds of consultations. It really only happens in that rare circumstance where serious consideration is given to refusing a Dissolution and allowing a baton change to another Government, and that is incredibly rare. In most cases, when a Government asks for a Dissolution, there will be good grounds for it and the Opposition would never be consulted. It would only be in very particular circumstances.

Q209 **Jackie Doyle-Price:** So practically speaking, that wouldn't make a considerable difference. If we return this power to the Prime Minister, for reasons of accountability, do you think a Prime Minister should have to publish reasons for seeking an early Dissolution?

Professor Twomey: I don't know whether they should have to, but it is quite helpful when they do. In Australia, that has become more of a practice in recent times. It happens

particularly if the Government is seeking what is known as a double Dissolution—that is the full Dissolution of the Senate as well as the Dissolution of the lower House. That is an unusual power and it can only be exercised when there has been a deadlock between the Houses. When that happens, because it is based on particular constitutional conditions—there has to have been a Bill that was defeated in the upper House and you have to wait three months and then pass it through the lower House again and so on and so on—it has always been the case that there has to be a letter setting out that the double Dissolution triggers have been meant, but governors-general have also required the Government to explain why a double Dissolution election is needed.

In fact, on one particular occasion in 1983, where the Prime Minister decided to try to bring one of these on very quickly because he thought that the Opposition was about to change their leader to a really popular one, Bob Hawke, and so he tried to get in first with an election before they did it, the Governor-General sent him off and said, "Well, you know, your explanation is not good enough. Come back and give me a better one." He got sent off to do his homework and come back with the letter and in the meantime the Opposition did change their leader.

Those sorts of letters do exist in Australia and they are made public, particularly in relation to double Dissolution elections, but I think these days even for ordinary elections, they normally write a letter to the Governor-General. They say that, you know, "I guarantee that there is supply to cover the period of the election," and all that sort of thing, and it is now all published on the Governor-General's website. It does add to public education and confidence in the system.

I think it is a helpful thing to do. I don't know whether you should require it in any legal way, but it is a useful thing to do.

> **Jackie Doyle-Price:** Thank you. Professor Lagassé, do you have anything to add to that?

Professor Lagassé: In the Canadian context, consultations between the Crown and the Opposition are very poorly seen. It is not something that you would normally have. Generally, we create quite a bit of a firewall between the first Minister and our viceregal representatives.

In situations where the viceregal, be that the Governor-General or the Lieutenant-Governor, is trying to find out if there is an alternative Government, you will have Opposition parties either saying very explicitly that they wish to form a Government or they will put forward a supply and confidence agreement with another party in Parliament to try to express that. Here again, the principle is simply to avoid situations where you would draw the Crown into political machinations—to maintain that firewall is seen as a better course of action for the Crown.

On written reasons, however, I would take a slightly different tack. In Canada, we now require written reasons for Prorogations in the light of our controversial Prorogations in 2008 and 2009. That recently was the subject of a committee hearing here in Canada, because our Government prorogued Parliament for a long period of time this past fall.

What you see is that Governments will come up with any reason that they see fit to explain their behaviour and, ultimately, those reasons, even if they are very thin and even if they don't hold up, are still presented and are still given and that is not really seen as an impediment to improper action.

I would argue it can even breed a certain degree of cynicism on the part of observers, saying, "These mechanisms are simply used to justify any action on the part of a Government." So while they may be useful to have and they may create another mechanism that would discourage action, in the Canadian context they do not seem have been a particularly effective means of constraining the Government's use of this power.

Q210 **Mrs Miller:** Thank you so much for the evidence. You have both already said that you are concerned it is difficult to reinstate conventions that went before. What could we do to make conventions a more effective mechanism to constrain behaviour? Can they still be an effective safeguard against abuse? What could Parliament do to make them more effective now?

Professor Twomey: Do they remain effective and appropriate? Yes, I think they can be effective. I have a preference for having conventions rather than any form of codification. There are real risks in codification—you cannot possibly think of every single circumstance that might arise. Who would have predicted the whole Brexit debacle? I mean the parliamentary debacle as opposed to the substantive Brexit. But those circumstances were completely and utterly unpredictable from a distance. I think we all recognise that you need to have some degree of flexibility, and conventions provide that level of flexibility.

I often look at constitutions that are highly prescriptive. A lot of the constitutions in the south Pacific, which were all written post 1975, decided to try to deal with everything by legislation, setting out all the possibilities to try to get rid of reserved powers and conventions because of the 1975 dismissal experience in Australia, and that has worked really badly, because every time some kind of constitutional stress arises, the constitution fractures and breaks and they end up in circumstances where they are outside constitutional validity and cannot get back to being constitutional again—it is a complete debacle. So, conventions are actually quite good things, but what I think we need to do—it is what I have tried to do in writing a very large book about all of this—is to try to tie the conventions to principle. So conventions can change and flex and adapt so long as they are tied to and anchored in constitutional principle. That gives you the guidance to allow those conventions to become effective and adopt and adapt in the future.

In terms of conventions, I think that is where you need to go. In terms of Parliament and its role, I think parliamentary Committees do an absolutely brilliant job through their reports in trying to explain and clarify conventions and set them out. Parliamentary Committees play a really important role in educating other Members of Parliament about them and giving clarity to them.

Q211 **Mrs Miller:** Professor Lagassé, can I bring you in here? I want you to expand on the comment you made earlier that you cannot codify to get people to act honourably. Is there a way we can get conventions to get people to act more honourably as well?

Professor Lagassé: One point I would make is the importance of being specific about what we are talking about. Too often, the word convention is used to refer to many different things.

When it is used in that way, it refers to things that are often done simply to custom or that are practices currently being tried out. Therefore, the power of the concept is diluted when it is misapplied. I will give an example of the idea of a convention that the House of Commons determines military deployments in the United Kingdom.

As we have seen, that term became used very loosely, so we are now having a debate about whether that convention was abrogated by Prime Minister May when she did not consult prior to allowing airstrikes in Syria. In reality, if we were more careful in the terms that we use, and said, "This is a practice that we are currently following to see whether it works and whether *[Inaudible.]*," we would have a better debate in terms of how we understand the term. Returning to one of Professor Twomey's points, the whole point of convention is that it is meant to tie into a larger constitutional principle. That is the key point here: it is meant to ensure that the system functions in the absence of clear codification to cover all different areas. Linking convention only to those core constitutional areas strikes me as quite important.

What can we do to ensure honourable behaviour? Regularly reviewing the "Cabinet Manual", and updating it to reflect current thinking, is important. Regular Committee hearings about the nature of the rules are significant. Ensuring that political actors, particularly First Ministers, explicitly voice their support and understanding of those rules, as found in the "Cabinet Manual" and guidance documents, is important. We have seen that in our ministerial codes and other things of that nature. In certain circumstances, when you cannot get people to act honourably, or the political tensions are such—as we saw around Brexit—that it is simply too tense and there is too much disagreement, you need some recourse to things such as Cabinet manuals or guidance documents to ensure some compliance.

Overall, I would say that it is a cultural issue. This is a problem that we are seeing across democracies: norms that we take to be central to the functioning of our democracies are more easily violated or discarded, and are increasingly fragile these days. As a result, we have had recourse to these codification efforts. To be successful, I would argue that they require regular renewal and updating. For the confidence convention in the aftermath of the repeal of the Fixed-term Parliaments Act, I would argue that you also need a review of the "Cabinet Manual", updating it to reflect what the political actors believe is the status quo that they are returning to. What do they actually believe they are doing? Greater clarity around that would be helpful.

Q212 **Mr Vara:** A very good morning or a very good evening to our guests, depending on which part of the globe you are speaking from. The substantive part of my question concerns the ouster clause—I know that was covered earlier but I want to move on to other issues around that—but before I come to that, very briefly, in your experience, are decisions about the Dissolution of Parliament and the calling of a new Parliament justiciable or not in other Westminster-style systems?

Professor Twomey: I had a little list prepared for this bit. There are two issues. The more obscure one is whether you can go to court to try to force a Dissolution. There is at least one Privy Council case about that—the case of Bobb *v.* Manning, which concerns Trinidad and Tobago, where there was a hung Parliament, and no one was prepared to provide the Speaker because it would put their side into minority. No Parliament could operate, and the Government just kept on governing regardless without a Dissolution, so they went to court to try to force a Dissolution.

The Privy Council said no, but accepted that in some cases, periods of irresponsible Government will occur, so it did not intervene, but Lord Bingham said that the Government were not immune to legal challenge if they acted unlawfully. The problem here was that there was no actual active illegality, and if there were one that was related to Dissolution—where a law prohibits or requires Dissolution to be held at a particular time, for example—he said that the court would act.

There are some circumstances in which, potentially, a court might force a Dissolution. It is more likely that you will get challenges to Dissolutions, whether a Dissolution has been held and then followed up by an election. These challenges tend to fail, even if the Dissolution was invalid, because once an election is held, that is regarded as a constitutional fact, that people have had their say, and the court will not reverse it.

For example, in Australia, section 57 of the constitution is the special provision that allows for a double Dissolution—the Dissolution of both Houses. Normally, we only have half the Senate going out at each election, so a double Dissolution is quite specific. It deals with deadlock. In that case, it has been held by the High Court to be justiciable, because they have to meet certain factual situations to trigger it, and it is possible for a mistake to be made and for an invalid Dissolution to occur under 57.

That was discussed by the High Court in a case called Victoria *v.* Commonwealth and Connor in 1975. Chief Justice Barwick noted that if the Governor-General dissolved both Houses in the erroneous belief that the conditions for a double Dissolution existed, and the election was held, it would not be overturned. He said that "the dissolution itself is a fact, which can be neither void nor be undone". Justice Gibb agreed with that and accepted that a Dissolution would not be overturned, but he considered that the court would be prepared to prevent an invalid proclamation for the Dissolution of the Senate being given. The court would take pre-emptive action to prevent you from doing the wrong thing, but once you had done it, you would get away with it.

In New Zealand, due to an error of law, there was effectively an invalid election, because Parliament had expired at a period before and no one had realised. But when its validity was challenged, the Court of Appeal avoided the problem by saying that the conditions were directory rather than mandatory, so it got out of that.

In Fiji, courts have held that elections were based on invalid acts but accepted that the clock could not be turned back once the election was held. The people had spoken, and the court would not undo it.

In Vanuatu, a court did overturn a Dissolution in 1988, but that was before the election was held. So, the Dissolution was overturned, but there had not yet been an election at that point. In 1997, also in Vanuatu, a Dissolution occurred after a notice of no confidence in the Prime Minister had been tabled. Thirty-one MPs then challenged the Dissolution, arguing that the no confidence motion should have been determined first. The Supreme Court, at first instance, agreed and declared the Dissolution null and void, but that was then overturned by the Court of Appeal, which considered that the right of the people to choose their Parliament took priority over the right of MPs to express no confidence in the Government.

Lastly, I will just mention that there have been other cases to overturn Dissolutions in Nepal, India and Pakistan. They tend to be the places where they litigate a lot.

So, there are some examples, but pretty much always the answer is that if there has been an election, obviously the will of the people prevails. If a court is going to intervene at all, it will be either before the Dissolution takes place, or before the election takes place. Courts do not seem to overturn an election—except in Pakistan, where they did that, but Pakistan is a bit of an odd place.

Q213 **Mr Vara:** To be clear, where the court application is made before the election, in the examples you gave, it seems to me that the Dissolution was overturned on the basis of technicalities, that proper form had not been followed, or whatever. It was the proper form and etiquette of asking for Dissolution, rather than whether Dissolution could take place or not—that is the impression I got.

Professor Twomey: It was certainly the case that the reason for the invalidity of the Dissolution was breach of a law, rather than some kind of judicial review—"Did you take into account the appropriate things?", or, "Did you behave appropriately in choosing this date?", or whatever—which I have never seen. It has only been, "Have you technically breached a law by doing the Dissolution in this way at this time?"

Q214 **Mr Vara:** Thank you. Professor Lagassé, we have had a good list of the countries, but do you want to come back on the general principle of that, before I go to the ouster clause issue?

Professor Lagassé: I simply reiterate the general principle that this strikes me as a political question. As Professor Twomey has noted, it is extremely difficult for a court to come in and say that the right of the people to express themselves in democracy can be challenged either by a sitting legislature or by a court. Fundamentally, this strikes at an underlying principle. It is extremely difficult to say that turning to the people and asking them to elect a legislature is somehow something that can be invalidated. Even on questions of timing, providing the proper procedures have been followed, it strikes me that this is a political question, and it therefore speaks to the question of the need to develop a better and more thoughtful political questions doctrine in the United Kingdom around which types of decisions are amendable by the judiciary and which ones aren't.

We have this problem in Canada as well. There is a great deal of vagueness around what are political questions and what are matters of high policy that shouldn't be considered justiciable.

Fundamentally, it does strike me as one area in which the right of the people to express themselves, even if it serves the political advantage of one party over another, is very difficult to challenge.

Q215 **Mr Vara:** Turning to the ouster clause, Professor Twomey, you made a significant contribution earlier on whether the courts can intervene, notwithstanding that there is clause 3 added to the draft Bill, hopefully to become an Act.

If it were the case that a general election was called and Dissolution asked for, and this matter did go to court, would it be right for the court to disagree with clause 3? Would it be right for the court to intervene, despite the fact that the governing party right now that is passing this legislation had the Bill in its manifesto commitment, has gone to a general election and has come back with a huge mandate—a majority of 80—which in recent years, and certainly for the past 15 or so years, has been

unheard of in UK elections? When you have a Government who come in with such a mandate and they pass this Act, is it right, when that Act is implemented, that if somebody takes legal action, the court should ignore the Government's mandate that implemented the Act?

Professor Twomey: First, I find it extremely difficult to imagine any circumstances in which you could or would challenge a Dissolution. My imagination may be lacking, but I just can't really think of any, but assuming that there are, where the problem is going to be is not the court saying, "We are going to ignore section 3"—I don't think it would do that. What is more likely to happen, as I tried to explain before, is that it would say, "Okay, section 3 says that we can't determine the limits or extent of these powers or the exercise of these powers and we can't question them, but what are the powers? What are the powers that we can't question?"

To determine what the powers that you can't question are, you have to go back to section 2, because it says that they are the powers referred to in section 2. Then, you have got to decide, in section 2, what those powers are in order to work out what it is that you are ousted from questioning.

If you happen to decide that whatever those powers were in 2011 did not actually include the particular power in the way that it had been exercised here—the extent and the scope of the power—just as they did in relation to Prorogation, where they said, "Well, the extent and scope of the power of Prorogation doesn't allow you to do something that shuts down Parliament in these circumstances," you could potentially do the same thing here and say, "The extent and scope of the prerogative power of Dissolution in 2011 did not allow you to do this sort of a Dissolution, therefore what you are doing does not fall within the scope of section 2, and therefore the ouster clause in section 3 doesn't work." I'm just saying there is a way around it.

Q216 **Mr Vara:** So you are basically saying that a Government is not in charge and that it's the courts, ultimately. On the basis that Governments make law—

Professor Twomey: No, Parliaments do that.

Mr Vara: Parliaments do that, but Governments usually get their way—well, they do if they have a majority. And I am talking about the present Government, who have a majority of 80. So, on the basis that Parliament passes laws and it is the job of courts to make sure that what the Government have legislated is properly implemented—

Professor Twomey: Yes, and it would be doing so if you took that approach—

Mr Vara: I will finish the point, if I may. On the basis that the courts implement, ignoring section 3 of this Act would not be implementing the legislation—notwithstanding all you say about section 2—because, effectively, section 3 says, "Stay out. This is not for the courts to intervene on. This is a political matter." What you are saying, therefore, is basically that despite the Government saying that and despite Parliament saying that, the courts can still, you feel, intervene. And what you are saying is that the courts are therefore ignoring the law, which says—

Professor Twomey: No, I am not saying that at all.

Mr Vara: But they would be doing that if they did intervene, wouldn't they?

Professor Twomey: No. What I am saying, just to be clear, is this. First of all, I am not saying a court would necessarily do this; I'm just saying this is one possibility. I am not a court—maybe they wouldn't do this. I am just saying that the drafting here is so poor as to potentially allow this. What would happen here is that the court would be saying, "Well, Parliament, we take your law as you wrote it. We accept the words that you, Parliament, put on the page. And the words that you put on the page said we were excluded in relation to questioning the powers as set out in section 2. But the powers set out in section 2 don't say what they are. They just say that they are the powers that existed in 2011. No one gives any context to that. And in order to apply that, we would then need to interpret that." That is applying the law, not ignoring the law or saying, "We won't apply section 3." All it is doing is applying what Parliament put in the words on the page. So if you are Parliament—and you are—be really careful about what words you put on the page, because that is what the court is going to interpret. So you need to draft your legislation well. All I am saying is that you need to draft your legislation better. If you want the courts not to act, you need to draft the legislation better to ensure that that does not happen.

Q217 **Mr Vara:** I am mindful of the time. We could be here a long time on this question, but I am mindful that the Chairman is keen to wind up and move on to the next question. Finally, Professor Lagassé, would you like to come in on this issue as well, to add to anything that has already been said?

Professor Lagassé: Very briefly, I would say that the ouster clause, to my mind, is very likely to discourage any intervention on the question of Dissolution on the part of the courts, but I would sound a note of caution. Point No. 1 is that I would have thought that the Evans case of the black spider memos of Prince Charles would not have been open to access, given a plain reading of legislation, but that was not what the courts found. And I think many would have thought that Prorogation was non-justiciable prior to Miller 2. I would not rule out the possibility that, as Professor Twomey has pointed out, poorly drafted legislation could be used to leverage judicial intervention around a decision, particularly around procedures or the scope of the power. That said, I think it is also worth noting that this is exactly the type of course of action that should be avoided by the courts, given that the very existence of the ouster clause seems to be an indication of a desire to avoid bringing these types of questions before the courts. So it would strike me as the courts going quite far contrary to the will of Parliament in order to preserve the will of Parliament. That might seem a bit of a paradox, but I wouldn't rule it out entirely, given what we have seen over the past 20 years in the United Kingdom.

Mr Vara: I thank both of you very much.

Chair: I think Maria Miller wanted to come in, very briefly.

Q218 **Mrs Miller:** I apologise, Lord Chairman, but I want to ask a point of clarification. I understand you are saying that this ouster clause needs to be drafted better to work but, based on what is currently on the face of the Bill, does the ouster clause stop the court from considering a Dissolution if an individual brought a legal case to say that they felt there had been, in essence, a vote of no confidence in Parliament but the

Government had not sought a Dissolution? Could the court consider that and, in essence, force the Government to fall because they felt that a no-confidence vote had happened but Dissolution had not been sought? I hope that makes sense.

Professor Twomey: Sorry, I got a bit lost in that. Are we working on the assumption that the Fixed-term Parliaments Act has been repealed?

Mrs Miller: Yes—that the Bill has gone forward. I am just putting it the other way around. If somebody brought a case to say, in essence, a vote of no confidence had happened but the Government had not sought a Dissolution, could the courts intervene to say that the Government should have sought a Dissolution?

Professor Twomey: No, I cannot see how that would be an action that was subject to judicial review. There is nothing here that forces a Government to resign or get a Dissolution. I doubt it, but I would have to think about it a bit more.

Mrs Miller: Thank you.

Q219 **Maria Eagle:** In their reports on the Fixed-term Parliaments Act, both the Lords Constitution Committee and the Commons Public Administration and Constitutional Affairs Committee recommended that the prerogative power of Prorogation be considered alongside the replacement of the Fixed-term Parliaments Act arrangements, but the Government decided not to do this. You have both written about Prorogation and its role in the constitutional arrangements of several different Westminster systems so, from an international perspective, does it make sense for the UK to deal with Dissolution separately from Prorogation, or should these issues be considered as part of the same package of proposals for reform?

Professor Twomey: I think you can do either. I do not think they necessarily have to be tied together. Prorogation is sometimes closely connected to Dissolution because Parliaments are often prorogued immediately before Dissolution and sometimes a bit longer before Dissolution. In New South Wales, by the way, there was a controversy about a long Prorogation and the New South Wales Parliament enacted legislation that said in the six months before the fixed-term date—we have fixed-term Parliaments—there is a limit on how long you can prorogue. So we have a legislative limit on Prorogation in New South Wales because of that controversy.

So there are connections between Prorogation and Dissolution, but it is not always the case. Obviously, as you know, in the UK you prorogue pretty much once a year. We do not so much in Australia, but there is flexibility in there. You can have Prorogation and use it for purposes that have nothing to do with a Dissolution, so you could legitimately take the view of treating them separately. Equally, you could legitimately take the view that if your whole concern about these things is the role of the courts, ouster clauses and all the rest of it, there would be some efficiency in having one piece of legislation that dealt with them as a package. I think it is legitimate to do either.

By the way, while we are talking about Prorogation, I should mention one small thing that I think is quite interesting. In Australia, the Turnbull Government slipped into minority for a short period because there was a problem with Members being disqualified as Members of Parliament and there had to be some by-elections. We did not find out until years later on that

the Governor-General had proactively told the Prime Minister and the Attorney General, "Don't come to me and ask for a Prorogation, because you probably won't get one." That is the reserve power of Prorogation—this was a year before your Prorogation crisis—working in practice. There was no refusal of a Prorogation. It never came to that, because he just warned them off to begin with. Normally, no one would ever have known that. It would have been kept secret forever, but for the fact that we had a former Prime Minister who issued a rather indiscreet biography, which let that slip.

It goes to show, first, that Prorogation—before your Prorogation crisis—was treated in Australia by the Governor-General as a reserve power and exercised in that way. Secondly, it shows that most of the action in relation to reserve powers happens in secret behind closed doors and we never hear of it, unless someone decides to be incredibly indiscreet. I think that is an interesting point, which you may not be aware of, about what happened in Australia regarding a Prorogation issue.

Professor Lagassé: I see value in approaching Dissolution and Prorogation together, because they deal with the powers of the Executive with respect to the life and operations of Parliament, so there is value in discussing them together. Similarly, in the light of the UK Supreme Court's ruling in the Miller 2 case, it not only identifies the existence of prerogative, but is able to use constitutional principle to determine the extent to which that power can be used and whether it is legitimate. Returning Dissolution to a prerogative basis, therefore, invites potential judicial intervention on that angle as well. Section 2 of the repeal Act could easily, in spite of the ouster clause, as Professor Twomey has pointed out, invite judicial review with respect to the scope of the power, even if it does return to a prerogative basis.

In the light of all of those issues, I would argue that there would be value in having an overall discussion about what powers the Government should have over the life and duration of Parliaments, and what powers the Government should have with respect to Prorogation—pausing and opening new Sessions—simply because these are now questions that are materially before you and they are worth discussing in the light of not only the Fixed-term Parliaments Act, but the Prorogation of 2019. That said, I can also understand why this is not something that you may want to deal with now, but I suspect that it will be part of the overall discussion of reforms to the British constitution in the near future, so why not address it head on?

> **Chair:** I thank our two witnesses for giving evidence to us today. Professor Twomey, you have just started a new day. I am not sure I have ever interviewed someone over two days in a Committee, but that is what we have achieved this afternoon, as far as we our concerned, and the early hours of the morning for you. Thank you very much. You have given us a number of things to mull over and take on board in our deliberations. Likewise, Professor Lagassé, you are about to start your day, and we wish you well with the rest of that. I thank all my colleagues on the Committee.