

Public Administration and Constitutional Affairs Committee

Oral evidence: [The Fixed-term Parliaments Act 2011, HC 167](#)

Tuesday 2 June 2020

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Members present: Mr William Wragg (Chair); Ronnie Cowan; Jackie Doyle-Price; Rachel Hopkins; Mr David Jones; David Mundell; Tom Randall; Lloyd Russell-Moyle; Karin Smyth; John Stevenson.

Questions 68 – 129

Witnesses

I: Professor Alison Young, Sir David Williams Professor of Public Law, Cambridge University; and Professor Gavin Phillipson, Professor of Public Law and Human Rights, University of Bristol.

II: Professor Petra Schleiter, Professor of Comparative Politics, University of Oxford; and Professor Philip Cowley, Professor of Politics, Queen Mary University of London.

Examination of witnesses

Witnesses: Professor Young and Professor Phillipson.

Q68 **Chair:** Good morning and welcome to another virtual meeting of the Public Administration and Constitutional Affairs Committee. I am in a Committee Room in Portcullis House with a small number of staff required to facilitate the meeting, suitably socially distanced from one another, and my colleagues and witnesses are in their offices and homes across the country.

The Committee is extremely grateful to our witnesses today. We are first going to hear from Professor Gavin Phillipson and Professor Alison Young, who will constitute the first panel. I should say at the outset that we do not have enough time in this session to cover everything that we might like to ask, so we will be writing to our witnesses if there is anything to follow up.

To begin with, could I ask our first panel to introduce themselves for the record?



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Professor Young: Good morning. I am Alison Young. I am the Sir David Williams Professor of Public Law at the University of Cambridge, and I am coming to you from Ely.

Professor Phillipson: Good morning. My name is Gavin Phillipson. I am Professor of Public Law at the University of Bristol, coming to you from Bristol.

Q69 **Chair:** Excellent, thank you very much indeed. I wonder if I might begin with the first question directed at Professor Phillipson, please. From a legal perspective, what were the arrangements prior to the Fixed-term Parliaments Act for dissolving Parliament and calling a general election?

Professor Phillipson: The legal power to dissolve Parliament lay in the Queen's royal prerogative. By long-established convention, this was exercised following a request from the Prime Minister. In particular, the Prime Minister was normally expected to request a dissolution if there was a successful vote of no confidence in the Government, which last happened in 1979. The power was also routinely used by Prime Ministers to choose a date for the next general election that was thought to be politically favourable to their party. The actual date of the election was set by the Queen, advised by the Prime Minister.

There was an uncertainty in the old system, which was whether the Queen had the power or, indeed, the duty to refuse a request for dissolution in some circumstances. This was governed by some wonderfully vague principles known as the Lascelles principles, named after a letter written to *The Times* by the Private Secretary to King George VI in 1950. So, a rather important part of the British constitution appeared to be a letter in a newspaper written in the 1950s.

That letter argued that the Sovereign could refuse a request from the Prime Minister to dissolve Parliament if three conditions were met: the existing Parliament was still vital, viable and capable of doing its job; a general election would be detrimental to the national economy; and if the Sovereign could rely on finding another Prime Minister who could govern for a reasonable period with a working majority in the Commons. Peter Hennessy, who is traditionally meant to be one of only three people who knows all the arcane mysteries of the British constitution, says that the second of those conditions was dropped in 1994. Some other people deny that the Queen, nowadays anyway, had any power to request a dissolution because it is unacceptable in a modern democracy that a hereditary monarch could decide something like that. That is one of the matters about the old system that was somewhat shrouded in mystery.

Q70 **Chair:** How did the Fixed-term Parliaments Act change those arrangements, and what does the Act do?

Professor Phillipson: First, I think it is important to note that the Act is somewhat misleadingly named. It does not, in reality, make the terms of Parliament fixed in the way that, for example, presidential and



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congressional terms are fixed in the United States. What it crucially did was transfer the power to call an early general election from the Queen, advised by the Prime Minister, to the House of Commons. It did that by, first, removing the prerogative power to dissolve Parliament. The Act fixes the terms of Parliament at precisely five years but provides for two triggers for an early general election. It says in section 3(2) that Parliament may not be dissolved otherwise.

There are then two triggers for an early general election. The first is a two-thirds vote of the entire House of Commons, which as we know was used successfully in April 2017 by Theresa May to call an early general election. We also know Boris Johnson's Government had three unsuccessful attempts to use this provision to get an early general election in September and October, which did not get the two-thirds majority because the Opposition abstained.

The second trigger for an early election is a formal motion of no confidence, the wording of which is specified in section 2 of the Act. If that is passed, in other words that this House has no confidence in Her Majesty's Government, and if no positive motion of confidence in the Government is passed within 14 days, Parliament dissolves. What actually happens is that Parliament dissolves five weeks, or 25 working days, before the date set for the next general election, but crucially—because it was this provision that caused all the trouble last autumn—the Commons is denied the power by the Act to itself set the date of the next election. Instead, under section 2(7), the Queen sets the date on the advice of the Prime Minister. It was the fact that the House itself could not set the date that led to the Opposition's reluctance to use the Act to bring about an early general election and, as we know, in the end the deadlock was broken when the Early Parliamentary General Election Act 2019 was passed, which fixed the date of the 2019 general election in law.

Q71 **Chair:** Professor Young, is there anything that you want to add? It is comprehensive, I am sure, but is there anything from your perspective that you wish to add?

Professor Young: The only thing I would add is to make it very clear that, prior to the Fixed-term Parliaments Act in 2011, we were dealing with legislation that set maximum terms: originally, the Septennial Act, which set it to seven years, and then the Parliament Act 1911, which set it as a maximum term of five. The Fixed-term Parliaments Act repeals both of those provisions, so I think you need to be aware of the fact that not only does it fix it and set a fixed term, but it removed the earlier maximum term. If you are thinking of replacing or repealing the Act, you have to recognise that if you just removed the fixed terms and said, "I am repealing the Fixed-term Parliaments Act," you run the danger of shifting to a position where you have no maximum term of Parliament. That is something else you need to be aware of.

Be aware also of the fact that, as well as the prerogative powers, there are obviously conventions governing how they work. We set out the Lascelles



criteria as to how that works with regard to the Queen, whether or not she can refuse to dissolve, but there are also conventions governing what happens within Parliament around votes of no confidence, both those set out under the form of the Fixed-term Parliaments Act and those that might take place outside of that.

Q72 David Mundell: I want to ask both witnesses about what they understand the relationship of the Act to be with the provisions that allow for fixed terms in the Scottish Parliament and Welsh Assembly. From my perspective, this piece of legislation did not take into account those arrangements, and ultimately those arrangements had to be changed and are now proceeding on an ad hoc basis, which was never envisaged when the electoral cycles were created for those institutions.

Professor Young: You need to be aware of the difficulty that, when the original devolved Assemblies and legislatures were established, they had fixed terms of four years, and then fixing it at five years meant that every 20 years you would have an election at exactly the same time. There are provisions in the Fixed-term Parliaments Act to avoid that problem, because it was perceived as a difficulty if you had elections in devolved legislatures and an election to the UK Parliament taking place at the same time.

The situation now is slightly different. Scotland enacted a specific provision to deal with one particular clash but is still fixed at four years. Wales and Northern Ireland are fixed at five years now because they have used their powers to change those particular provisions in order to ensure that, if there is a fixed term of five years in all of them, they should not occur at the same time.

Yes, when you are dealing with the Fixed-term Parliaments Act in the UK, it is very important to take account of the consequential impact on the fixed terms in Scotland, Wales and Northern Ireland.

Q73 Chair: Professor Young, after the passing of the Fixed-term Parliaments Act, you wrote that it was a small change and that it might be one of a series of small incremental changes that modify the fundamental nature of the UK constitution. Do you think the FTPA has modified the fundamental nature of the constitution and, if so, how has it done that?

Professor Young: Yes, I did write that. I think it is important when we look at the UK constitution to recognise that just one piece of legislation will then be read in line with other pieces of legislation, other developments of the common law, and that can then be perceived as a change in the nature of the UK constitution.

If we look at the Fixed-term Parliaments Act, one thing it does is it alters the balance of power between the Government and the legislature. It takes the power that was originally predominantly in the hands of the Executive and gives more power to the legislature. You can then put that in the context of other aspects of the UK constitution that can be seen to be doing



a similar function. For example, more recently, though now repealed, you could look at section 13 of the European Union (Withdrawal) Act 2018, which we all know very well as setting up the meaningful vote. Again, that is seen as transferring powers from the Executive to the legislature, giving the legislature a greater role in setting terms and conditions on ratification of a treaty. All these, perceived together, can be seen as a shift of the balance of power.

You can also see it as a move away from using prerogative powers to using legislative powers, and you can see it as a move towards a political constitution, towards more of a legal constitution, when you put it against the backdrop of the devolution legislation and the Human Rights Act—all very important constitutional pieces of legislation.

Whenever you change one thing, it is important to recognise that it has to be seen in the context of the constitution as a whole, as it can start changing the whole way in which we perceive the UK constitution.

Q74 Mr David Jones: Professor Young, you have touched on this already, but both the Government and Opposition parties have said that they wish to repeal the Fixed-term Parliaments Act. Can it be simply repealed or is further legislation necessary?

Professor Young: It is important to ensure that it is repealed by legislation. It is an Act of Parliament so, yes, it can be repealed, but obviously it needs to be repealed by a further Act of Parliament. It is very important when you do so to ensure that you make that very clear by setting it out very clearly and specifically, and there is also an argument that the Fixed-term Parliaments Act itself is a constitutional statute. Although there is no clarity necessarily in the law at the moment on that issue, it is very, very arguable that it would be perceived as a constitutional statute. As such, it would need to be repealed specifically, expressly, and not just by implication.

It can be repealed, but I think you need to do so clearly and specifically and make it very clear what other aspects of legislation you might be repealing as well.

Q75 Mr David Jones: If it were simply repealed, what would be in its place?

Professor Young: This is the big problem. Obviously, on the one hand, if you just were to say, "Fixed-term Parliaments Repeal Act 2020, section 1. We are repealing the Fixed-term Parliaments Act, the end," the difficulty you have with that particular scenario is twofold. First, you have not done anything to deal with the fact that you have moved from maximum terms to fixed terms. Do you end up with a situation where you have unlimited parliamentary terms? That would be highly problematic and would obviously trigger all sorts of potential confusion and potential legal action in the future.

Secondly, there are arguments in the literature as to whether the prerogative would just come back. There is academic discussion as to



whether, if you have a piece of legislation that deals with a prerogative power, the prerogative would just come back once you then repeal that legislation. Academics dispute whether it is possible for it to come back. You then have to look very precisely at the terms of the Fixed-term Parliaments Act itself to see if the intention of that Act was to remove the prerogative or only to regulate the prerogative, and that will then have an impact as well.

What you are doing is replacing something that is very clearly set out in legislation with two aspects of uncertainty. First, do we then still have any form of limit on our parliamentary terms and, secondly, how do we dissolve? Would the prerogative just come back or not? It is so uncertain that I think just repealing it like that creates far too many constitutional problems.

Professor Phillipson: The most immediate result of a simple repeal is that the current Parliament, as things stand, would last forever. You would need further legislation to enable it to be dissolved if you wanted to have more elections at some point, which I assume you would.

Q76 **Mr David Jones:** Oh, I don't know. Is it your view that further legislation putting something in place of the Fixed-term Parliaments Act, and not simply to repeal it, is necessary?

Professor Phillipson: It depends. Do you want us to address separately the question of whether the prerogative is going to revive, or shall we deal with that now?

Chair: If we could come on to that it would be helpful.

Professor Phillipson: There is a school of thought that thinks prerogative powers can be revived. I think that depends partly on what happened to the old one.

There are three situations in this case. The first one is the classic, what is known as De Keyser's, after the case of that name in the 1920s. What happens there is that something was previously governed by the prerogative and you then have a new statute that governs the same area, so the two areas of law overlap. The very clear finding by the courts was that, in those situations, the Government can only act under the statute, and the prerogative, as it were, goes into abeyance. In other words, it sits underneath the statute, but if the statute was removed the prerogative would still be there.

The second situation is where Parliament appears to have intended to abolish the prerogative power. The most clear example of that would be express abolition, and I am not sure I can think of an example but, "The former prerogative of dissolution is hereby permanently abolished" would have been a hypothetical example. The Fixed-term Parliaments Act does not expressly do that, but section 3(2), which we have mentioned, says that Parliament may not otherwise be dissolved. I think that, by necessary implication, abolishes the prerogative power by saying that there is now



no way of abolishing Parliament other than this statute. Necessarily, that impliedly, I think, abolishes the prerogative.

If the prerogative has been abolished, I think there is a serious legal question mark over whether it can be “revived” or not. Some people think that it can. My own view would be that it cannot. I think Alison thinks that that is perhaps slightly more likely, but I think we both agree that this is a question of serious legal doubt. As far as we both know, I do not think there is an example of Parliament ever reviving a prerogative, so we just do not know whether it can be done.

My own view would be that, if it is abolished, it is no longer there and cannot be revived, and what Parliament would be seeking to do would be to create a new prerogative power, which obviously it cannot do as a matter of legal logic. Parliament is sovereign but it cannot create, for example, an international treaty. It cannot create common law by definition, and it also cannot create prerogative powers because prerogative powers are defined as those that historically belong to the Crown. If it is in a statute, it is statute law; it is not prerogative.

In short, I think our collective view is that there is serious legal doubt as to whether the prerogative can be revived. If you tried to do it, you would almost certainly end up in litigation and probably have to go to the Supreme Court because it is an open point of law. Therefore, the more sensible course of action would appear to be to deal with it by replacement legislation rather than by a simple repeal.

Q77 **Jackie Doyle-Price:** Your comments just now, Professor Phillipson, really go to the nub of what we need to do to replace what we have. We heard from Lord O’Donnell that the intention in 2011 was to abolish the prerogative power. To an extent, the intention of the Government is one thing, but we still need to think about what we replace it with. Sir Stephen Laws thinks abolition is unimportant because the sovereignty of Parliament means that, if it wanted to bring the prerogative back, it has the power to do so. Building on what you have just said, do you think a prerogative can be brought back or created anew?

Professor Phillipson: It certainly cannot be created anew by Parliament. If Parliament creates a new legal power, it is, by definition, a statutory power and not a prerogative one. That point I think is clear and unarguable.

As we just said, the question of whether a prerogative can be revived is one on which there is no legal precedent. As far as we know, it has never been done and legal scholars take different views, so it is a completely open point of law on which I think there are reasonable arguments on both sides. I would argue that it cannot be revived.

Professor Young: The only situation I can think of would be if a piece of legislation were to say specifically that the prerogative power of prorogation is now revived. The question then would be: how would the courts interpret that? Would they see it as a valid way of saying we have



returned the prerogative, or would the courts turn around and say, as we know very clearly from the recent prorogation case, it is their job to determine the scope of the common law and that prerogative powers are common law powers that also interact with the backdrop of legislation?

It becomes a very arguable point before the Supreme Court as to whether putting in a piece of legislation, "The prerogative power of dissolution is now revived," would suffice or not. I think both Professor Phillipson and I would argue that, rather than have that element of uncertainty, it is much better to put it on a statutory basis, which can achieve exactly the same purposes. As we may go on to discuss further, when you are dealing with statutory powers there is more power in the hands of Parliament on the scope of that statutory power than if you are dealing with a prerogative power.

Q78 Jackie Doyle-Price: It might feel very attractive to a Government to restore prerogative power because, on the face of it, they have more freedom to determine when to have the general election. Would you argue that that would still leave the potential open for the court to challenge and, therefore, statutory would be a more certain position?

Professor Young: Absolutely. The only thing I would add further is that, in his original answer, Professor Phillipson mentioned that not only is there the aspect that the Queen may refuse to grant dissolution, but there were also arguments prior to 2011 that there may be a prerogative power that the monarch could force a dissolution in certain circumstances to resolve a constitutional crisis.

The other aspect is what you would be reviving. Would you be reviving just the aspect of the monarch being requested by the Prime Minister and then dissolving, or would there also be arguments as to whether you were potentially reviving an ability of the monarch to force a dissolution in order to resolve a constitutional crisis? Again, that is an aspect of uncertainty that I do not think you really want to open. I think it is much clearer to set out very precisely in legislation when you want Parliament to be able to dissolve.

Professor Phillipson: I understand the idea that the Government are often keen on using traditional prerogative powers because they often give them a great deal of leeway but, as we saw with the prorogation case in the Supreme Court, that can have unexpected consequences where it turns out the courts discover when they rule on it for the first time that, in fact, the power is far more sharply limited than the Government thought. Paradoxically, if you want to put Parliament and, in a way, the Government in the driving seat, it is better to set it out very clearly in legislation, which removes all manner of doubt on these matters, rather than leaving it in these rather vague prerogative powers that, once the courts rule on them, turn out to have a much more narrow scope than you might have thought beforehand, as with prorogation.

Q79 Jackie Doyle-Price: We are getting to a view expressed by both of you,



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then, that statute would be far more certain. Would you say generally that if we were to rely on prerogative we are just always making these decisions justiciable?

Professor Young: It is not necessarily the case that they are always justiciable. What you have to be aware of is that, when you look at the way in which the court deals with prerogative powers, there are two different aspects. One aspect of the prerogative that is always justiciable is that the courts will tell you what the scope of the prerogative power is. That is not just an element of, "Does it exist?" but also its precise scope, what its extent is, which is exactly what came out of the prorogation case.

There is a separate issue, then, of whether it would be justiciable as to how you exercise a particular prerogative power, which we may come on to later, but the key element here is that this is about whether it exists and what is its scope. As we saw from the prorogation case, the courts will use background constitutional principles to limit the scope of a prerogative power regardless of the prerogative power. They are all justiciable in that sense.

Q80 **Jackie Doyle-Price:** That becomes a matter of law, the way in which the power is exercised and the degree to which that becomes a judgment, whereas in statute it would be much clearer?

Professor Young: Absolutely.

Q81 **Jackie Doyle-Price:** Professor Phillipson, do you have anything to add to that, particularly about the Miller-Cherry case?

Professor Phillipson: The other point to add is that if you want to keep the courts out of dissolution decisions, as I imagine the Government and many MPs may wish, the simplest and most guaranteed way of doing that is to give Parliament a role. We will come on to what the mechanism could be, but a suggestion is to have something like the Fixed-term Parliaments Act giving the House of Commons a role in calling an early general election, perhaps without the two-thirds majority requirement.

If you make it a parliamentary motion that triggers a general election, no one doubts that that is squarely protected by Article 9 of the Bill of Rights, which means that the courts cannot rule on it. Whereas on the other hand, if it remains a pure Executive power, like prorogation or dissolution, there is now a chance the courts can rule on it. If you give Parliament a role—the Fixed-term Parliaments Act obviously allows the House of Commons itself, by motion, to trigger an early general election—the courts cannot rule on that because it is clearly and unequivocally protected by Article 9 of the Bill of Rights and the courts cannot question that. If you want to keep the courts out, that is another reason why a statute is preferable to trying to revive the prerogative.

Jackie Doyle-Price: Thank you. That is very helpful.

Q82 **Lloyd Russell-Moyle:** I guess we have touched on this. The question is



for Professor Young and then Professor Phillipson. Do you think calling a general election is an area that should be non-justiciable?

Professor Young: Personally, in terms of whether the courts should be deciding when you call a general election, of course not. I do not think it is justiciable for the courts to step in and say, "We think this is a good time for a general election."

At the same time, you have to recognise that it might be required in some circumstances if you were put in a position where there was a constitutional crisis. If, for example, you had just repealed the FTPA and set no maximum term, I think there would be a possible role for the courts to step in and say it would be a breach of convention rights to hold regular general elections if you were not holding regular general elections, and would be a breach of constitutional principles if you were to abuse your position and not hold regular general elections. It is that kind of level, a severe constitutional crisis avoidance backstop. Other than that, I think setting when you should have general elections and those factors that influence that are predominantly questions for Parliament.

Q83 **Lloyd Russell-Moyle:** Is that the same view as you have, Professor Phillipson?

Professor Phillipson: Certainly, the political judgment as to when a general election should be called is no business of the courts and I cannot imagine they would ever get involved in that.

The problem for the courts is that there was definite legal uncertainty around the monarch's power to dissolve Parliament, whether or not she should refuse that request, which is more governed by convention. Obviously if, for example, a monarch tried to dissolve a perfectly viable Parliament, there would be serious question marks as to whether that is a proper use of her prerogative powers. The courts might say, for example, that is an improper purpose, which is an established ground of judicial review. There must be some limits around the power to dissolve Parliament, at least as exercised by the Queen, which suggests that there could be a possible role for the courts in setting the scope of the dissolution power, as Professor Young said.

The political calculations as to when to have an election obviously should never be judicially reviewable, but the question of the scope of the power in unusual circumstances could be something that the courts could properly get involved in.

Q84 **Lloyd Russell-Moyle:** You mentioned earlier, Professor Phillipson, that there is a potential way of keeping the calling of a general election in normal times, when it is just about political point scoring, out of the courts but within Parliament or the Executive. Could you expand a bit more on the mechanisms you think would be best to do that?

Professor Phillipson: Under the law as it is now, the general view would be that the exercise of the power, in other words the decision of when to



hold the general election, is non-justiciable. That was stated expressly to be the case in a 1984 decision of the House of Lords, which was then the top court. That is generally stated as setting out the modern law of judicial review, and it has been slowly modified by case law. I think the view right now is that the normal exercise of the power to call a general election is not justiciable. That is the last statement by the courts, which was in the 1984 GCHQ case.

Q85 **Lloyd Russell-Moyle:** Do we not find, following on from some of the arguments in the Miller-Cherry case, that there is a danger or a likelihood that the courts could end up reviewing the ability to call an election if it was done with Executive power?

Professor Young: If you were in a situation where you had resorted back to the prerogative and had just said it is a general prerogative power for the Prime Minister to request dissolution and that is what we are going back to, then yes.

If you look at the aspects of Miller-Cherry with regard to the scope of a prerogative power, then they drew on the background principles of parliamentary sovereignty and parliamentary accountability to limit the extent to which you can prorogue. You could do exactly the same with regard to dissolution because then you are looking at whether it exists and what is its scope. What Professor Phillipson is pointing out is that if it was not to do with those elements and it was just to do with the exercise in a different way, then it is likely, as the law currently stands, that the exercise, once you had determined that it existed and what its scope was, would not be justiciable.

Obviously, this is relying on a statement that was advisory from a case in the 1980s, the GCHQ case, and again, as we know with common law, it evolves, it changes. The question would be whether it is still deemed to be non-justiciable—I think most constitutional experts would say yes, it probably would—in terms of its exercise, but as circumstances change that might not remain the case as the constitution modifies over time.

Q86 **Lloyd Russell-Moyle:** So a way of preventing the scope from being justiciable would be to put it into statute more clearly?

Professor Young: Absolutely. If you put the scope within a statutory provision, then the courts will go away and they will say, “As this is a statutory power, our job in these circumstances is to interpret the legislation, so we will look at the legislation that sets out”—

Lloyd Russell-Moyle: Being followed to the letter?

Professor Young: Absolutely. The only way they would read down in those particular circumstances is applying what we call the principle of legality, which is where broad words cannot be used to restrict fundamental common law rights. If you have specific, precise and clear words, even if it interferes with a fundamental common law right, the court will only ensure that any restriction is no more than is necessary to achieve your



particular purpose. In essence, if you put it in legislation, the courts look at the legislation. If it was a prerogative power, the courts say, "This is common law so we determine the scope and we determine how far it extends, not just whether it exists but what its precise extent is."

Lloyd Russell-Moyle: I think that is clear. Thank you.

Q87 **David Mundell:** The Government have indicated that they want to review the functioning of the royal prerogative. What are your respective views of the role of the royal prerogative in the UK's constitutional arrangements in the 21st century?

Professor Young: The way in which most of us see the prerogative at the moment is that it is essentially there to perform a similar function to reserve powers. If you look at most constitutional arrangements, a written constitution or a codified constitution, for example, set out the precise powers of different institutions of government, but it will recognise in those particular circumstances that you might need some kind of reserve or contingency power that is not precisely set out. In those particular provisions, you will find some kind of clause that will say, "In order to achieve these particular purposes, if there is not a specific power set out in this particular constitutional document, nevertheless this provision in the constitution will grant you that power." The one with which I am most familiar is within the EU treaties, because I specialise in EU law as well as UK constitutional law.

If you transfer the equivalent across to the UK, we do not have a constitution that is codified and sets that out, but we do have a series of legislation that will set out various statutory provisions. If they do not give the Executive the precise power to act, then you look at whether there is a residual contingent prerogative power that the Executive has had historically that they can use to act in those particular circumstances. There is a kind of catch-all provision: if I do not have a statutory power to act, can I nevertheless find some kind of ancient prerogative power that used to vest in the Crown that I can use to act in those circumstances? That is the role it plays at the moment.

Professor Phillipson: In particular, the conduct of foreign affairs and the use of force is traditionally an area that is entirely governed by the prerogative and not by legislation. It does provide very important powers for the Government particularly to conduct the UK's external relations.

Q88 **David Mundell:** Do you think, then, it is a power that we should be contemplating continuing, that it is something that is necessary, that there are no further codification or statutory arrangements that could be put in place that would diminish or, in fact, completely take away the need for such powers?

Professor Young: It is always possible to transfer a prerogative power to a statutory basis, which is what you are discussing. It is really a policy choice, and those policy choices come back to: are these going to be powers that are specifically set out by Parliament that define precisely what



the scope of the power is and how it is exercised, and the courts will then look at those statutory provisions when looking at the exercise of those particular powers, or is this something where we feel that if we are not careful we might not have everything set down precisely, so we need a broad prerogative that is there to cover some contingencies we might not have thought of? It is a question of choice as to whether it rests in the hands of the legislature or the courts to determine its scope and a question also, if we have not dealt with a particular contingency, of thinking about how we deal with that.

To give you the very recent example of the coronavirus regulations, because health is a devolved issue—although England and Wales were able to rely on a 1984 Act—Scotland and Northern Ireland had to wait for the Coronavirus Act 2020 to be enacted to give them equivalent powers. It is those kinds of scenarios. Do you need some kind of backup reserve power because the legislation somehow has not provided for you to act in specific circumstances? It is really a policy choice as to how well you feel you are able to deal with those scenarios.

Professor Phillipson: There are some very broad prerogative powers: obviously, the foreign relations power; the power to use force; and so on. The dissolution power is quite narrow and specific, which is why it was fairly straightforward for the Fixed-term Parliaments Act to place that instead on a statutory basis. Obviously, the way the British constitution has been reformed is generally not big bang—for example, replacing the whole lot, and you would be coming close to thinking about adopting a codified formal constitution at that point—but rather to look at particular prerogative powers and ask whether there is a good reason why we would like to put Parliament in charge of this, rather than it being an ancient monarchical power, usually exercised on advice but always open to judicial review that may turn out to give it a different scope than what we thought it had, as with the prorogation case.

Q89 **David Mundell:** I should know this, but is there a definitive list of prerogative powers, or is it just that when a situation arises like the one you referenced, Professor Young, somebody decides a prerogative power will fill that gap?

Professor Young: I would love to be able to provide you with a definitive list. What I can give you is an example of how, in certain circumstances, courts will find a prerogative power through an ancient series of precedents. The case we often teach our students is *ex parte Northumbria Police Authority*, which discovered the broad prerogative power of keeping the peace, which in those specific circumstances empowered the police to use tear gas and rubber bullets when it would not have been permitted under legislation.

I think the answer to your question is that they are there, they are historical and they are ancient, and trying to determine precisely the scope of a broad prerogative power like the ability to keep the peace is nigh on impossible.



Professor Phillipson: When the Government are asked, they traditionally say it is not possible to provide a definitive list. They provide a series of well-known examples and say there may be others, because they like to keep them in reserve.

Q90 Mr David Jones: Professor Young, the Fixed-term Parliaments Act provided that, in the event of an early general election being called for, a supermajority of two thirds of the House of Commons would be required. That was very neatly circumvented last year when Parliament simply bypassed it by passing the Early Parliamentary General Election Act. Given that we have a system of parliamentary sovereignty, does this illustrate that such provisions are not an effective constitutional check if a Government supported by the House of Commons want to do something outside it?

Professor Young: Yes, we do have a principle of parliamentary sovereignty, and there are lots of ins and outs of how that applies and where it applies. With regard to your specific example, there was a clever way around this because, as Professor Phillipson has already explained clearly, section 3(2) said you could only be dissolved in certain ways, which includes setting polling dates provided for in another section, so legislation came along and set a specific polling date. It was a very clever way around it.

There are other deeper questions. If you had entrenched this particular provision, so if you had said it is only by a two-thirds majority and you can only repeal this requirement by a two-thirds majority, then that would cause all sorts of deeper issues in constitutional theory as to whether it was possible and, if it was possible, whether you could impliedly repeal that particular provision, which would require far longer than the time I have to explain all the different permutations. The answer to that is we would find out when it went to the courts.

Q91 Mr David Jones: Is it your feeling, however, that no matter how hard you try, it is not possible by statute to entrench something in the British constitution that deprives Parliament of the right to do something it wants to do?

Professor Young: I think the best answer I can give is that it depends how you do it. For example, if you look at the provisions of the European Communities Act 1972, the effects of which are currently being preserved during the transition period, that was a very clever way of making sure that we could provide for a situation where EU law could override legislation in certain circumstances. There are mechanisms. They are very complex. They are very difficult. Whether they succeed or not depends upon how the courts interpret the principle of parliamentary sovereignty at the moment.

My theory would argue that it is possible, but to do so you have to modify what I would call the fundamental constitutional principles that are effectively agreed upon by Parliament and the courts. That would be very complex and could not necessarily be done by legislation alone. There are



other constitutional theorists, for example, who would argue that it might be possible in certain circumstances if you were to modify the manner and form in which you enact legislation. The best I can tell you is that constitutional theorists disagree about this. If you had three constitutional theorists in a room, I am afraid you would get three different answers.

Professor Phillipson: Professor Young is quite right as to the deeper uncertainties around whether Parliament can protect any of its enactments from subsequent repeal. In practical terms, I think that what happened in 2019 does show us that a two-thirds majority can be got round simply by enacting fresh legislation, and there was never any real chance that that legislation would be challenged in the courts, obviously.

In practice, I think I would tend to agree with you that a two-thirds majority is always subject—the simplest way of saying it is that you can put it in legislation but it is always subject to later legislation that changes it and, therefore, enables you to have your general election when you want.

Q92 **John Stevenson:** The confidence vote is a key part of our constitutional affairs. Before the Act was passed, the traditional convention was that a Government would either resign or call an election if it lost a vote of confidence. Under the Act, there is provision for an election by a simple majority in a vote of no confidence. Do you think that section provides sufficient clarity to guide Government, Members of Parliament and the public as to how the confidence vote would operate?

Professor Phillipson: Yes, this became very contentious, obviously, under the Act. There was a widespread view that there was an uncertainty or a hole in the Act because it did not tell us what happened during the 14 days. All it said was that if no motion of confidence in a Government—which it was assumed meant either possibly a new Government or the existing Government having regained confidence—was passed within 14 days of the no confidence motion, Parliament would be dissolved, but it did not say anything about what happened during the 14 days.

However, there was a very good reason for that. I always disputed that this was a problem in the Act. The whole point was that this had never been dealt with by law. It was a matter of constitutional convention. The appointment of a Prime Minister, as we know, is not governed by law; it is governed by constitutional convention, namely that the Queen must appoint the person best placed to command the confidence of the House of Commons. The reason why it was not dealt with in the Act was quite simply that this was never a matter that had been regarded as something that should be dealt with by the law. You risked then bringing the courts into questions such as should a Prime Minister resign or who should be appointed as Prime Minister, and those have been regarded as matters that should be dealt with politically and by constitutional convention.

I think the fact that the statute was there meant people assumed that it should deal with everything, whereas, in fact, the statute only dealt with the circumstances in which Parliament should be dissolved early. It was



never intended to deal with the question of when a Prime Minister should resign and who should be a replacement Prime Minister, if anyone, because, quite simply, that has never been a matter of law in this country. It has always been dealt with by constitutional convention, and the drafters of the Act wanted to make as little a change as they could. They wanted to provide for early general elections. They did not want to introduce the law and the courts into the question of who should be Prime Minister and when a Prime Minister should resign. Therefore, they simply left that out of the statute. That continued to be governed by constitutional convention, so you had to read the Act with the constitutional conventions that governed appointment and resignation of the Prime Minister.

Q93 John Stevenson: Do you think this mix, therefore, of convention and statute actually works?

Professor Phillipson: There is no particular reason why it should not have worked. For example, the old system was a mixture of prerogative and convention. Whenever you get a prerogative, you always get a convention that tells you how it should be exercised or who really exercises it, often the Prime Minister rather than, obviously, the Queen herself personally. In principle, we are used to dealing with mixtures of law and convention, but I think in this case, because it was a statute, it led people to think all the answers should be in the statute and, for some people at least, kind of weakened their belief in the pre-existing conventions. Although when the Act was passed, the Government were very clear that things like the appointment of a new Prime Minister and when a Prime Minister should resign would continue, of course, to be dealt with by convention because that is how they had always been dealt with under the British constitution. They had never been a matter of law.

I think, as it turned out, it did create doubt, but I could never particularly see why there was doubt. There was no doubt that many people did look at the Act and say that it does not say what happens in the 14 days, to which—

Q94 John Stevenson: Just for clarity then, from your perspective, do you think the way it was drafted is effective? If we were to leave the Act in place, would you be quite comfortable with that arrangement?

Professor Phillipson: Yes.

Q95 John Stevenson: Thank you. Professor Young, any comment on those issues?

Professor Young: I agree it is necessary to have conventions to deal with in the 14 days, and I think there are provisions in the Cabinet Manual that can be used to try to provide clarity. There is a possibility of adding more detail into that in order to provide further clarity as to what to do within that particular 14-day period.

The only other element I would add is that another possibility is a Prime Minister who did not want to face another possible vote of confidence in a



different possible Government. Could they then seek prorogation to prevent the 14-day period? That, again, is a difficult legal question. I would argue, with regard to Cherry-Miller, that the courts would probably say that is not within the scope of the prerogative power of prorogation. Again, there are uncertainties around that particular element. I think it might be effective to state quite clearly that, within that 14-day period, you are not able to use the power of prorogation to prevent the formation of other possible Governments within that period.

Professor Phillipson: There is a problem in the drafting of the Act that was revealed in the autumn, which is that while the Commons gets to decide if there is going to be an early general election, the Prime Minister advising the Queen gets to decide when that is. What we found out in the autumn was that, in some circumstances, the Commons may be so reluctant to allow the Prime Minister to set the date of the general election—obviously, the fear in that case was that it would be after the UK had left the European Union—that it is not willing to allow a general election to take place. In fact, if the Commons had been able to fix the date of the next general election, I think the problems with the Act would not have arisen in September and October last year.

Q96 **John Stevenson:** If we were to amend the Act but retain the fundamentals of it, is that the sort of provision you would like to see incorporated into an amended piece of legislation?

Professor Phillipson: Yes.

Q97 **Tom Randall:** Do you think conventions are still an important and effective tool in governing our constitutional arrangements, or is it time that the harder edge of legislation is now necessary?

Professor Phillipson: You have to hope that conventions are an effective tool, because without conventions we do not have a democratic Government in this country. If you take constitutional conventions completely out of the picture and just look at the law, then you have an elected House of Commons. You have as head of state an unelected hereditary monarch, and she can appoint whoever she likes as Prime Minister. Once she has appointed a Prime Minister, they can do whatever they like and it does not matter what the House of Commons says because the convention that they must resign if there is a motion of no confidence in them is itself only a matter of convention.

I say quite seriously to my students that we only have a democratic Government, that is a democratic Executive branch, by reason of conventions, because it is the convention that the Queen must appoint as Prime Minister the person best able to command confidence in the Commons that gives us a democratic Government. They are still extremely important in the UK system, and foundational in the sense that they give us a democratic Government.



Professor Young: I agree that they are extremely important and foundational. To think carefully about whether you should put conventions on a statutory basis, it depends very much on the particular convention in question and how effectively you think that particular convention can be enforced. When we are thinking about convention powers that govern how the monarch uses powers of dissolution or powers of prorogation, for example, they are governing the monarch's actions. Against that particular background, if the monarch were to act in a way that undermines democracy and undermines constitutional principles, I think, first, it is highly unlikely that she would be advised to do so and, secondly, it would be highly dangerous if she did. In those particular circumstances, there are sufficient mechanisms to ensure those particular conventions are enforced.

I think exactly the same is true if you had a Government that decided they cannot command a majority of the House of Commons but nevertheless they are going to continue governing. It would be very difficult for a Government to continue in those particular circumstances.

Where there are difficulties is when there is a lack of clarity about conventions that govern acts within the constitution, where it might be easy for those being governed by those conventions to breach them with impunity by arguing the convention has changed. Those are not the kinds of conventions at play in this particular issue, but in that regard we might need to think carefully about particular conventions and how they operate in practice.

Q98 **Lloyd Russell-Moyle:** When the Fixed-term Parliaments Act was going through Parliament there was some consideration, I understand, of whether prorogation should be included in the Act as well. The Government rejected it, saying that the conventions were strong and it would be unnecessary and unwise. Of course, in light of Miller-Cherry, should a power to prorogue Parliament be set in statute so that it is clearer and not liable to uncertainty?

Professor Young: Personally, I think it becomes a policy choice again as to whether you think it is better for the legislature to tell you when prorogation can take place and the circumstances in which it can be exercised, or whether you think it is suitable to leave that as some form of backstop with either the Queen being able to decide not to follow advice or the court stepping in and saying, "You breached constitutional principles."

The difficulty with leaving it as it is at the moment is that the courts are going to intervene only in extreme circumstances. That could still leave potential for the prerogative power of prorogation to be abused, as in, for example, the hypothetical scenario of having your 14 days and the Prime Minister deciding to prorogue within that particular period. On that basis, it might be wise to think about putting it on a statutory basis as well.

Q99 **Lloyd Russell-Moyle:** Can you put on a statutory basis part of the prerogative power, kind of, "In these circumstances it cannot be used", et cetera? Can you limit it, but allow it to continue elsewhere, or does it all



need to be adopted into statute?

Professor Young: Absolutely, it is possible. The way in which the law looks at the relationship between legislation and prerogative is it looks at the extent to which legislation is doing exactly the same job, the same function as the prerogative. It is possible to have some controls that are set by legislation but still have residual prerogative powers if you make it clear that there are still prerogative powers in existence. If you were to put in a section that says it can only be prorogued in these particular circumstances, for example, then the court would read that to say that it is the only way we can prorogue—the prerogative has gone. If you just put certain conditions on its exercise, then that would be possible, yes.

Professor Phillipson: If you ended up with some kind of mixture of prerogative and statute, that would itself be a recipe for uncertainty. My own view on prorogation is that there is no good reason why the Executive should have the power to suspend the sitting of our Parliament. You obviously need some days in which to allow for a new sitting of Parliament, but that could be achieved by a very simple statute.

If I was dealing with this, I would have a statute that says the Queen gets to set the date of a new parliamentary session, advised by the Prime Minister. Parliament would automatically be prorogued by operation of statute five working days before the new session of Parliament was due to begin. Then I would say Parliament may not otherwise be prorogued, and that would give you what you need, which is that you need Parliament to be briefly prorogued before a new sitting, but it would abolish the potential for what is called political prorogation; in other words, to suspend Parliament from sitting for other reasons. I simply do not see a good reason why the Government should have the power to suspend Parliament in that way.

Q100 **Lloyd Russell-Moyle:** So there would be a sufficient safeguard. How does the Miller-Cherry case not effectively give that safeguard already? They said that a political prorogation would not be possible, so why would you need to put in statute the five days, et cetera? To some extent, the power bars political prorogation.

Professor Phillipson: In fact, Miller-Cherry said not that you cannot have political prorogation but that to prorogue Parliament for longer than is required simply for a new session requires sufficient justification, and we do not know what sufficient justification is. They just said there was not any in that case. In fact, they said there was not really any justification in that case, but we do not really know. It is one of the uncertainties of the judgment. We do not know what sufficient justification would be. It is quite a short judgment. They did not give any indication of the kinds of factors that might legitimately allow the Government to suspend Parliament for much longer than the short time required for a new session.

Q101 **Lloyd Russell-Moyle:** Is there a danger that it will end up back in the courts?



Professor Young: Absolutely, I agree. It is also not necessarily clear that it is five days. It is the particular context of Miller-Cherry that the extent to which it was being prorogued, which was for five weeks, eight weeks before an important constitutional decision, was sufficient to see the courts regard parliamentary sovereignty and parliamentary accountability as being affected and being harmed in those circumstances. The question is when else it would be harmed. Would it be harmed automatically if it was more than five days? Does it depend on the extreme constitutional circumstances? Because it is such a short judgment on a particular set of circumstances, it is very difficult to work out from that the precise scope of the prerogative power.

Q102 **Lloyd Russell-Moyle:** Finally, Professor Young, do you broadly agree with Professor Phillipson that a short piece of statute that limited it or explained it would be an advisable way forward in this case?

Professor Young: Yes, I do. I would agree that is the best way forward.

Chair: Ronnie Cowan, very quickly if you could. Sorry to rush you.

Ronnie Cowan: No, I am absolutely fine. My questions have been covered, thanks very much.

Chair: Thank you ever so much.

Q103 **Tom Randall:** Could I just look at the review committee that is provided for in the Act? The Cabinet Secretary has suggested that the Government could move forward with legislation without establishing that committee. How important do you think establishing that committee is, and what would be the consequence of failure to comply with the Act by not establishing the review committee?

Professor Young: I will deal with the first issue first. Obviously, there is a clear statutory obligation to hold a committee. The problem there is you would be breaking the law if you do not do so, unless you enact a new piece of legislation before the end date, which is 30 November, saying, "We are not going to have a committee."

In terms of your second question, I would say it is very unwise to modify constitutional provisions without having a committee that looks at those particular provisions. We have seen from the discussions today that there were some elements of lack of clarity, that there were some consequences of the Fixed-term Parliaments Act that might not necessarily have been fully considered at the time. We have also discussed how changing one particular piece of the constitution can have knock-on consequences in all sorts of other areas. I think it is very wise in those circumstances to ensure that you do have a committee, be it a review committee of the Act or a prelegislative scrutiny committee, setting out a possible piece of new legislation because I think it is highly important to ensure that, when you are making these changes, you do so carefully, thinking through all the permutations and also thinking about how it might apply in unusual circumstances, as we saw in 2019.



Professor Phillipson: I do not have anything to add to that. It is a clear legal obligation, so it would be unlawful not to establish the committee. I am not sure why anything else was suggested.

Q104 **Tom Randall:** The Act requires that a majority of the committee should be Members of the House of Commons. What do you think should be the composition of that committee, Professor Young?

Professor Young: I can see that it requires to be a composition of the House of Commons. Personally, I would see it as preferable to be through a Joint Committee because I think it would be very important to gain the expertise of Members of the House of Lords. Within the House of Lords, you have former justices of the Supreme Court. You have longstanding parliamentarians. You also have people with constitutional legal expertise, and I think it would be very wise to get their advice as well.

Professor Phillipson: Agreed.

Chair: I just wonder if I could rudely interrupt, as we are going to move on to our second panel shortly. To finalise this session, can we have a supplementary question from Karin Smyth, please?

Q105 **Karin Smyth:** I know time is short, but could you elaborate on the working of that review committee now that we are into June and something needs to happen fairly quickly? You mentioned it could be a prelegislative committee or a Joint Committee. That prediscussion has to happen somewhere and with someone. What is your recommendation for the format of the review committee?

Professor Young: If we are convening a committee under the provisions of the Act, it would go through the normal procedures of the Commons to establish a particular review committee within the terms of the legislation. If there had been legislation prior to the end date for forming that committee, which is 30 November, saying that we are not going to do that because instead we are repealing that provision and we are going to introduce a new piece of legislation, then I think you would be looking at thinking through broader prelegislative scrutiny, maybe having a specific committee but also sending it to other committees like this Committee and the Constitutional Committee in the House of Lords to have broader prelegislative scrutiny of a new piece of legislation.

Chair: My apologies to colleagues for cutting some questions short, but I thank Professor Young and Professor Phillipson for their participation in our first panel on the legal aspects.

Examination of witnesses

Witnesses: Professor Schleiter and Professor Cowley.

Q106 **Chair:** Without further ado, we will move on to our second panel, Professor Cowley and Professor Schleiter, to discuss the political dimensions. If I can



dive in straightaway and ask a similar question to what we asked our first panel, can I ask Professor Cowley how the system for calling a general election operated prior to this Act? Could you comment in particular on the political aspects?

Professor Cowley: I have very little to add to what the first panel said. They covered it really well. I suppose there are probably about three points that are worth drawing out.

First, we are talking here about a system that has evolved and changed. Prior to 1867, for example, we had elections triggered by the death of a monarch. I do not think anyone is suggesting we go back there when we reform things.

Another aspect is that other conventions around elections have changed as well. It is not entirely true to say that the convention was that if a Government was defeated in a vote of confidence it triggered, prior to the Fixed-term Parliaments Act, an election. It either led to the resignation of the Government or to an election. It is true that over time, particularly after mass franchise was established, that the norm was for there to be an election, although in 1924 the King did consult with the Opposition parties before granting Ramsay MacDonald's request for a dissolution, to see if they were willing, and able, to form a rival Administration after he was defeated on a vote of confidence.

I suppose the only other point to add, which was not made in the previous panel but which I think does have quite important political consequences, is that as well as formal votes of confidence or no confidence, it was also possible for the Government to deem bits of legislation or other votes as matters of confidence. So they might lack the formal wording of a vote of confidence or of no confidence, but the Government treated them as votes of confidence. That has been one of the most important consequences of the Fixed-term Parliaments Act.

Q107 **Chair:** Professor Schleiter, what were the particular concerns about that system?

Professor Schleiter: The key concerns were twofold.

First, it concentrated tremendous power in the hands of the Executive to call early elections, and that power could be employed for partisan advantage. When we look comparatively at 27 European countries and examine how that power shapes the performance of Governments in early elections, it generates an average vote share bonus of about five percentage points. That is a lot. It also allowed Governments to avoid electoral accountability for poor choices by, for instance, calling early elections before the full adverse consequences of their policies unfolded. Both of these outcomes with respect to calling early elections are undesirable.

Secondly, the system generated quite a lot of speculation around the calling of snap elections and preparations for them, which arguably



distracted the Government and the Opposition by making them focus on short-term electoral objectives rather than long-term issues of governance.

Professor Cowley: I agree with that completely. The other thing it did, though, was it gave the Prime Minister, or the Prime Minister's party, the advantage that they knew they were working towards a particular date for an election while the Opposition did not, so there was definitely this issue of the level playing field.

The reason I think this issue is important is that the Fixed-term Parliaments Act is often discussed as if it was just some cobbled-together compromise in the 2010 coalition agreement, where actually there is a longstanding heritage, political and intellectual, in this country, particularly on the left, although not solely on the left, of supporting the idea of fixed-term Parliaments.

Petra is right, and her answer is about the pragmatic consequences, but for some people—if you read Tony Benn's writings on the royal prerogative, or even if you look at Gordon Brown's *Governance of Britain* paper—this is a matter of principle; this is about who should control the point at which we have an election. Should it be the Prime Minister, acting through the royal prerogative, or should it be the elected body? That is a political question, and it is not one to which there is a right or a wrong answer, but I think it is important to see this debate in terms of that principle and not just solely in terms of the pragmatic consequences.

Q108 **Chair:** That leads me neatly on to my next question, which is to consider the political purposes of the Act. You allude to the coalition situation in 2010. From your perspective I take it that it was more, as you say, building on a tradition of seeking to bring something like this into effect, rather than the political convenience of the time.

Professor Cowley: No, the Act itself was about the political convenience of the time—I am not that naive. I am just saying that there is this intellectual heritage behind it. It happened when it happened because the Liberal Democrats needed to be given some assurance that they were not going to be dumped by the Prime Minister whenever it became electorally convenient to do so, and that is why they got the measure through. I accept that completely.

I would make a broader point about 2010, and about the Act in general. The Act was born out of a hung Parliament. The Act, for all the limitations that we know all about and which we will probably come on to discuss later, is still quite effective in a hung Parliament because, even with the ability that we saw in 2019 of Governments to subvert it, it still requires majority support for an early election if you keep it in place. It may be difficult to understand that right now, when you have a Government with a comfortable majority, but we should not assume that will last forever. Therefore, although at the moment it might look as if this Act is not carrying out a particularly important function, even if you left it in its



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current form, it is not the case that it can simply be subverted by Governments at will. The context in which it was formed is really important.

Professor Schleiter: I agree with that entirely. Focusing on the broader goals beyond the narrow partisan interest of the coalition, it is important to note that these goals existed and they were twofold. The first goal was to prevent the Prime Minister from timing elections unilaterally and for partisan advantage, and the Act was also explicitly designed to move power from the Executive to the legislature by giving the Commons the right to make decisions about its own dissolution. I think these are important principles and political purposes behind the Act, and they have changed the interpretation of aspects of the constitution in the way the previous panel made very clear. There has been a rebalancing of powers.

Q109 **David Mundell:** Do you both have any thoughts on the political consequences that the changes have had for the elections in the devolved institutions? Obviously, they already had fixed parliamentary terms and these arrangements disrupted that.

Professor Schleiter: Phil, do you want to go first?

Professor Cowley: I was going to suggest you went first, Petra.

I am not sure that I do, except for the potential for the five-year cycle to clash with the cycle in the devolved Administrations. Elections could have clashed with the devolved Administrations previously. I am not sure there is any way round that, that I can foresee. I may not be answering your question properly.

Q110 **David Mundell:** The question was really in the context that we had a set of arrangements in place, which had been envisaged when the devolved arrangements were created. This arrangement was put in place and cut right across them, without, certainly in my opinion, seeming to take them into account in any meaningful way.

Professor Schleiter: Are you referring to the electoral cycles and the adjustment of electoral cycles in the devolved Parliaments?

David Mundell: Yes.

Professor Schleiter: The FTPA has essentially necessitated some ad hoc changes in Scotland and a change in Northern Ireland and Wales to five-year terms, instead of four-year terms. When these decisions were initially made about the parliamentary terms in the devolved Administrations, the four-year term was deemed to strike the right balance between the accountability of the devolved Administrations to the electorate and allowing these devolved Administrations to make enough progress with their policies. Is your question that now we have the FTPA with a five-year term, and suddenly that balance is struck very differently and the devolved Administrations have to adjust, why is the five-year term better?

Q111 **David Mundell:** The question is that we had determined how election



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cycles would work for the devolved arrangements and now, certainly in Scotland, we have ended up with an ad hoc arrangement.

Professor Schleiter: Yes, and I understand that difficulty. I agree with Professor Cowley that, even previously, you could have had clashes between devolved elections and Westminster elections, but I understand that Scotland has now made ad hoc arrangements. Whether that is the way forward, I don't know.

Q112 **Tom Randall:** The Government and the Opposition have been clear in their commitment to repealing the Fixed-term Parliaments Act, but what is less than clear is what would replace it. There has been one suggestion about attempting to restore the previous arrangements under the prerogative. What do you think might be the potential implications of such a move?

Professor Cowley: I know that the Government and the Opposition have both said they will repeal it, and neither has said what they will replace it with, which is another great example of well thought through joined-up policy making.

It seems to me there are three political implications here. If you effectively repeal—although for reasons explained at great length in the last panel, that in itself does not really work—and you pass something that tries to go back to something very similar to the status quo ante, I think there are three problems.

The first, and to me this is the least important but other people may differ, is simply one about the direction of travel of British democracy over the last 300 or 400 years. I don't think it is a particularly republican position to say that it feels quite weird to be discussing restoring prerogative powers. If you look at the development of British democracy over the last 400 to 500 years, it has been a gradual erosion of the power of the monarch and then the Executive. It is a curious discussion to be having, to reverse, to take powers away from the legislature in this way.

Then there is the point, not just a historical point but the point that Petra was talking about earlier, that this would lead to a transfer of power to the Executive and the Prime Minister. It is non-trivial amount of power. I will read out a quote which described the FTPA as "an unprecedented transfer of Executive power". They are not my words. That is from the Conservative manifesto in 2015, boasting about the Fixed-term Parliaments Act, and that is what it was. It took power away from the Executive and gave it to Parliament. This is a political question, and it is one to which I don't think there is a wrong or a right answer, but does anybody in this virtual room think that the problem with British politics is that the Executive is not strong enough? This is a very curious position to be arguing, I think.

The third bit, and I think this is not discussed enough, is the consequence that the Act has had within Parliament, within Westminster, because the thing that the Act did is that it prevented Prime Ministers from making pieces of legislation de facto votes of confidence that would trigger a



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general election. This tactic is a nuclear option, but it was used by Prime Ministers in the 1970s, and it was used by John Major when dealing with his European rebels. It allows Prime Ministers to push through, against their own party, controversial bits of legislation arguing, "You either back this or we go to the country and you all get slaughtered." On the occasions it has been used, it has worked. Taking that away weakens the power of the Prime Minister in relation to his or her party, and of the Government Whips in relation to their party. I say this with no disrespect to the Whips I know, many of whom I like. I say again that I find it really strange to be discussing an idea that will enhance the power of the Government Whips, which this will almost certainly do.

Professor Schleiter: I agree with those points. I also agree with the points that were made in the previous panel about the restoration of the prerogative. I would like to break your question down into two parts.

One question is whether it would be desirable to return to the previous rules and, for the reasons that Professor Cowley and the previous panel have set out, I think the answer to that is probably no.

The second question is whether to restore them under the prerogative or whether to do something under statute, and I agree entirely with Professor Cowley that the restoration of monarchical power exercised by convention on the advice of the Prime Minister would be extraordinary at this point in time. To my knowledge, it has not occurred before in the UK or in any other constitutional monarchy that I have examined, and I think there are probably two reasons for this. Politically, I think it would be a very difficult step at this point in time for a democratically elected Parliament, because restoring prerogative power would make it clear that, when faced with this complex issue, Parliament prefers to hand power back to the monarch rather than rising to the challenge, working through the issues and regulating it adequately by statute. I think that would be an admission of failure in some way. Secondly, I think it would set a really troubling precedent.

If this crucial prerogative can be restored, giving the Executive wide discretion to call early elections, what other parliamentary checks can the Government disable by restoring discretionary powers to act under the royal prerogative? I think it would be particularly troubling to do this because Westminster is an example for many other Westminster democracies that are looking to Westminster for precedents. You would also need to think about the kind of example that you are setting for Executives in other Westminster democracies who may be intent on encroaching on the power of Parliaments.

If the goal is to let the PM and the Government call early elections, I definitely agree with the previous panel that a more appropriate way to do this would be by statute, and then you could think about clarifying the limits of this power and the process for using it, which would also ensure



that the power is actually granted by Parliament rather than resting on royal prerogative.

Q113 Tom Randall: This is a question that you may have partially answered already. The Government have indicated that they want to review the functioning of the royal prerogative. In your view, what is the role of the royal prerogative in Britain's constitutional arrangements in the 21st century?

Professor Cowley: I have almost nothing to add to what the previous panel said. I thought they covered it really well. It is extensive. There is a school of thought—again, Tony Benn was very keen on getting rid of the whole gamut but I don't think many people take that line—that a lot of people think of it as a sort of backstop, as a pragmatic way of governing. Even the holding of elections and the fact that they have to be held under certain time limits was itself, over 300 years ago, a limitation on the royal prerogative. There is a clear direction of travel here, as a democracy, that we do not give powers back once we have gained them. It is extensive. It probably should stay extensive. I just do not want to see it grow.

Professor Schleiter: Some prerogative powers, those that are directly exercised by Ministers without the approval of Parliament—including the power to prorogue Parliament, making and unmaking treaties, declaring war and making peace—give exceptional discretionary scope for action to the Executive, and the Executive can use this far-reaching discretion to govern even in the absence of parliamentary confidence, to advance policies for which there is no legislative support or to short circuit parliamentary accountability. These outcomes are tricky and have led to prerogative powers being contested. Yes, the royal prerogative is for historical reasons still a central part of the UK constitution, but the exercise of these powers without parliamentary check can have troubling implications. So to the extent that the royal prerogative is reviewed, I agree entirely with Professor Cowley that the direction of travel cannot be to restore more of it; it must think about how we limit some of the undesirable implications.

Q114 Lloyd Russell-Moyle: One of the central arguments that you are both making now is that the Fixed-term Parliaments Act adjusted the balance between Parliament and the Executive. I do not quite buy the argument about the problematic royal part, which I think is dancing on a pinhead a bit. The royal prerogative is just Executive power, and that is how we should think about it. I do not think anyone really thinks about it as a power of the royal family. I do not think that is the problem or an issue.

You are quite right in identifying it as about balancing between the Executive and Parliament. We have seen moves where the Executive has gained more power in recent years, with Henry VIII-type clauses and the Executive using more and more secondary legislation, which was not so common in the past, but we have also seen, as you mentioned, Parliament taking powers itself. Did the Fixed-term Parliaments Act find that right balance, particularly in terms of calling elections and dissolving Parliament?



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If you don't think it passed the right balance, where do you put that balance? What changes would you make to rebalance it, to be the right balance between the Executive being able to function and to govern and Parliament being able to hold them to account?

Professor Cowley: Yes, I think it did. There is no doubt that it altered the balance. I agree with you. I don't want to dance further on the pinhead. I agree with you on the point about the royal prerogative. It just seems to me that there is a general direction of travel. To me, it is the least important part of the argument. The more important ones are about power, and there is no doubt that the Fixed-term Parliaments Act shifted power, for the reasons I set out in the previous answer, both in terms of choosing the election and also in terms of the relationship between the Executive, the Prime Minister and his or her Back Benchers.

Also, as I said earlier, I think the extent to which it shifts the balance of power depends—and probably to an extent we did not realise when the legislation was going through—on the parliamentary majority of the time. When there is a minority Administration, or a coalition, it is a much more significant piece of legislation than when the Government have a comfortable majority.

I also think it has more impact, even in terms of choosing the date of the election, than people think. It is often dismissed as if, because in both 2017 and 2019 we had early elections, somehow the Act does not matter. It mattered on both occasions. In 2017, although Theresa May did manage to get the two-thirds majority that triggered the early election she sought, she was not sure if she would be able to get that because the Conservative party did not know what Labour would do. Because of that, her team prepared a draft Bill, very similar to the one that passed in 2019, ready to implement to try to bypass the Act. But because they knew that they might need time to get that piece of legislation through, the election campaign was elongated. So the reason we had such a massively long election campaign in 2017 was largely, not solely but largely, because of the Fixed-term Parliaments Act. As everyone in this virtual room knows, the longer that campaign went on, the worse the Conservatives did and the better Labour did, and you could make a pretty good argument that, but for the Fixed-term Parliaments Act, Theresa May would have been returned with a majority in the 2017 election.

Q115 **Lloyd Russell-Moyle:** Was it the right balance of power, to push to take out the election date, or was it the wrong balance of power? Should there be shifts in where we are with the Fixed-term Parliaments Act in terms of that balance of power?

Professor Cowley: I don't know if there is such a thing as an explicitly right balance of power. What it meant was that she could not just call it. She could not just call it and run it. She had to allow for the fact that the Opposition parties might not play ball. She had to allow for the potential to try to subvert the legislation with a short Bill and, because of that, it had political consequences. That is my point.



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Even in 2019, there was only an election because Opposition MPs in the end, for reasons some of them came very quickly to regret, came around to support that election. On both occasions, it was quite a consequence of legislation. In one case a party with a small majority, and in another case a party with no majority.

The fundamental problem, which I think is maybe what the question is partly driving at, is what you could do to make it more consequential if you wanted to. The problem—and this was alluded to in the last session—is that because you cannot entrench the requirement for a two-thirds majority, de facto any Government with a majority, enjoying decent relationships with its Back Benchers, now knows it can subvert the Bill by passing a one-off, short piece of legislation. That to me is not a problem because it still requires the Government to do that, and it only holds in a majority Parliament situation. I notice that one of the bits of written evidence that has been submitted to your Committee suggests removing the two-thirds requirement and replacing the bar for triggering an early election with a simple majority of the Commons. To me, that seems fairly unobjectionable. That may not be what you would like to do, but it is the acceptance of reality, I think.

Q116 Lloyd Russell-Moyle: It removes this strange situation where the Lords are having to agree a one-line Bill about election dates and times. Although they would probably not object to it, it is a strange situation where you have a non-elected Chamber deciding those matters.

Professor Cowley: Yes. I would also say—maybe we will come on to this later, but just in case we don't—that if we were going to look at ways in which we might change the Bill to change that balance further, I would be looking at some of the things that were mentioned in the earlier session, such as the Government's power to prorogue, what you do in the 14-day period and setting the election date. Even if you do not go into statute to resolve that, there is a case for tightening up some of those conventions and the understanding around them. Those seem to me to be two or three areas where, even if you lowered the bar for triggering an election, you could still extend the power of Parliament to control elections in this country without anything too radical.

Q117 Lloyd Russell-Moyle: Petra, could you comment, very briefly because I know we are short of time, on the kinds of areas that should or could change to rebalance or to continue that direction of travel in terms of empowering Parliament?

Professor Schleiter: I entirely agree with Professor Cowley. The FTPA essentially comments on three areas of the balance between the Executive and Parliament: election calling; the confidence relationship; and prorogation. It has successfully achieved its stated goal of constraining Executive dominance and rebalancing with respect to early election calling and the confidence relationship, but not so much with respect to prorogation. If you were looking for further changes, I think prorogation



would be an obvious area, and clearly the election date would be the other area. I agree with that.

Q118 **John Stevenson:** A very straightforward question. What is the purpose of being able to call early elections, and why not just have a fixed parliamentary term, full stop?

Professor Cowley: This was alluded to in an earlier answer, I think in this panel but I can't be sure. There are circumstances where things have broken down completely, or where new issues have emerged that require a mandate to resolve. Most parliamentary systems that have fixed terms allow for them effectively to be semi-fixed. The comparison that was made in the earlier panel—and it was not made in the sense of trying to imply that we should go down this route—with US terms, for example, is not really comparable because it is not a parliamentary system.

Professor Schleiter: I would agree with that entirely. All parliamentary democracies in Europe, with the exception of Norway, permit early elections in some circumstances and as a gridlock-resolution mechanism. That is the key function of early elections. Early elections offer democratic means to resolve situations in which Parliament cannot agree to form a Government or cannot agree to lend it the support to govern. At the same time, most parliamentary constitutions also constrain the unchecked use of early elections by the Executive for partisan advantage, and they typically do that by making early elections subject to checks by the legislature or presidential head of state.

Q119 **David Mundell:** Some of the points I was going to raise have been covered, principally about the effectiveness of the two-thirds majority requirement for an early election. Professor Cowley, you set out how that was capable of being circumvented. I think it is your position that it was not particularly effective at all.

Professor Cowley: In both 2019, when it was circumvented by a short Act, and in 2017, when the Government were privately considering circumventing it with a short Act, on two of the three occasions since the Act was passed, it has either been circumvented or they have been seriously attempting to circumvent it. It is just a problem with not being able to entrench the idea of the two-thirds bar into law. It would make the UK slightly atypical, I think—although Professor Schleiter is better at this than I am in terms of the comparative data—but then the UK is atypical in other ways, so I don't lose an awful lot of sleep over us being atypical. It would almost be an acceptance of reality if you were to lower it from the two-thirds to a bare majority.

Q120 **David Mundell:** Do you think we could ever effectively enshrine some form of supermajority in legislative arrangements, or is that just not realistic?

Professor Cowley: I am not a constitutional lawyer, thank God, but from listening to the earlier panel, there are enough legal questions without trying to impose something that, as I understand it, runs completely



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counter to British parliamentary tradition. I just do not understand how you would possibly do that, because as soon as a new Parliament comes in, it can reverse the decisions made by the previous Parliament. I do not understand how you would ever impose and enshrine a higher bar.

Professor Schleiter: Yes, if you wanted to impose a higher bar that is completely and utterly binding, you would somehow have to move to a system of entrenched constitutional laws that can be changed only by a two-thirds majority, or whatever majority you wish to impose. I do not think that is the world we are in.

From a political perspective, mustering a majority to set aside a procedure is often different from mustering a majority to get a substantive decision. The power of a two-thirds majority requirement should not be underestimated, even in contexts where constitutional rules are not entrenched.

Q121 **David Mundell:** In terms of the specific procedures we are discussing, do you think that the House of Commons should be able to fix a date for an early election?

Professor Cowley: Yes.

Professor Schleiter: Yes, I would agree with that. Had it been able to fix a date for the early election, I think this problem in 2019 would not have arisen.

Chair: Before we move on, there are bonus points for brevity as the clock is against us. Can I go with that challenge to David Jones, please?

Q122 **Mr David Jones:** As we have already heard, before the Fixed-term Parliaments Act the question of confidence in the Government was governed by convention. That has been changed by the Act but, as we have heard, there is uncertainty as to whether previous conventions were left unaltered and unchanged, or whether they were abandoned. What are your views as to how the conventions surrounding confidence were changed as a consequence of the Act?

Professor Cowley: We are pretty clear that, although they have been changed, the idea that there can be motions of confidence in the Government that are not related to the Fixed-term Parliaments Act is now well accepted. I don't think there is any dispute over that. What they do not do is trigger an election, but they still function as motions of confidence in the Administration.

In fact, in 2015 itself, when the election looked like it would produce a hung Parliament, which in the event it did not, the Labour party's preparations for the immediate post-election period involved putting down a motion of no confidence in the Cameron Administration as an amendment to the Loyal Address, deliberately not worded in FTPA language, in order not to trigger the requirement under the Act but merely as a way, as they saw it, of winking David Cameron out if he did not have a big enough



majority to carry on in power. So I do not think there is any doubt that the motions continue to exist; they just do not trigger an election.

Professor Schleiter: Yes, I would agree with that entirely. Under the Act, statutory motions worded according to the Act now co-exist with confidence and no confidence motions that are not worded as prescribed in the Act. A Government that is defeated in either type of motion still forfeits the authority to govern. That is very clear. I do not think there is any doubt about that. The FTPA simply changes the consequences of such a defeat. Once a Government loses the authority to govern, it is Parliament that decides the next steps. Parliament then chooses whether to renew its confidence in the Government, form an alternative Government or trigger an early election.

Q123 **Mr David Jones:** Do you think that the power to attach the threat, if you like, of a general election to a confidence motion should be resurrected? Or do you think that the provisions of the Fixed-term Parliaments Act whereby you have standalone arrangements should continue?

Professor Cowley: If I was in the Whips' Office, I would want it resurrected and therefore it is a political judgment. You enhance the power of the Executive if you do that, and that is okay. If you think what we need in this country is a stronger Whips' Office, a stronger Executive and a weaker Parliament, that is okay; that is a political judgment. It is not, as may be clear, one I share particularly but it is a perfectly honourable stance. If you do hold that position, you will go down that route. If you do not, you will not, or you should not.

Professor Schleiter: Yes, I agree that this is entirely a political judgment. We can turn to comparative evidence to throw some light on the context for that judgment. The Act removes the power to call early elections from the Prime Minister when the Government loses parliamentary confidence. That has two consequences. It takes away the PM's power to dissolve Parliament against its will, and it gives to Parliament, rather than the defeated Government, the power to decide the next step. That better aligns the UK with international constitutional practice. When we compare the dissolution powers of Prime Ministers in 39 OECD and EU parliamentary democracies, the comparison shows that constitutions very rarely give untrammelled discretion to Prime Ministers to dissolve Parliaments following a loss of confidence. The reason for that is that the confidence relationship is an essential procedural tool for a Parliament to hold a Government accountable and to reduce a Government's opportunities to enact controversial legislation in the face of significant parliamentary opposition, so that pushes a Government to find parliamentary compromise rather than ramming through a very controversial piece of legislation.

Q124 **Karin Smyth:** We touched earlier on the power of prorogation. I think Professor Cowley talked about not enhancing, not letting powers grow, and keeping them as they are. Does prorogation really now have any role in a democracy, beyond the beginning and ending of parliamentary sessions?



Professor Schleiter: By seeking a five-week prorogation in the run-up to the Brexit deadline, the Government did deploy prorogation in a political way that went beyond the routine beginning and ending of parliamentary sessions. I don't think it was successful in doing that, in terms of establishing a precedent that this is a legitimate way of using prorogation, because of course it was overruled by the Supreme Court. So I think we are still in a place where that political use of prorogation is not established.

Professor Cowley: When the FTPA was going through Parliament, there were attempts to discuss this issue at the time. The argument for not doing so was that everybody understood what prorogation was used for, and there was absolutely no dispute about what it would be used for. Given the events of last year, whatever your views of the events of last year, that one might be worth revisiting not least because, as was made clear in the last panel, the Supreme Court's judgment sets a fairly high bar for ruling acts by the Government illegal in the way that they did. You may still think that the Prime Minister has too much leeway.

This might be a good moment to chuck in a further observation about all this, which is that conventions only really work if there is trust on both sides, and understanding on both sides, about conventions. That was also part of the problem in late 2019. There was not an awful lot of trust on either side. Even if we could, or even if we wanted, simply to bring back what we had before, I think we would have to be really clear that people understood the conventions that went along with that bit of legislation, because I wonder whether the events of the last couple of years have changed our understanding to such an extent that those conventions may not apply in the same way.

Q125 **Karin Smyth:** Could a review, which needs to happen under legislation, usefully revisit that issue?

Professor Cowley: Absolutely, yes. I assume the Government's intention is not to include in that review things like the election date, the use of prorogation, and so on, but I think it would be very useful if it did.

Q126 **Mr David Jones:** What do you think the UK should take from how parliamentary sessions are ended and begun in other countries? Professor Cowley first, please.

Professor Cowley: This is definitely not one for me first, I can assure you.

Professor Schleiter: As we explained in our written evidence with respect to prorogation, the UK is a major outlier by international standards. Almost no other Parliament in any comparable democracy has so little power to convene a session or to veto and reverse its own suspension. That is because parliamentary democracies rest on the principle that Governments must be accountable to Parliaments. A Government that can prorogue Parliament at will can upend that relationship, but other democracies prevent that outcome in one of three ways. They place the power to prorogue in the hands of Parliament itself, they give Parliament the power



to unprorogue itself or they place statutory limits on the length and purpose of prorogation. Options one and two are preferable because they afford greater flexibility and do not require legislators to detail what would constitute an appropriate or inappropriate use of the prorogation power by the Executive.

Q127 **Chair:** We will come on now to briefly discuss the political implications of establishing, or indeed not establishing, the review committee. The Act includes a requirement for a review committee but, as we heard in our previous evidence session, it has been suggested by the Cabinet Secretary that the Government might move forward without establishing that committee. Not only as a point of law but politically, Professor Cowley, how important do you think it is to establish that committee?

Professor Cowley: I am probably slightly more of a fan of the Fixed-term Parliaments Act than is the universal view around Westminster, but even its supporters accept that there are things about it that were not properly thought through at the time it was implemented. It would be a real shame if whatever replaced it suffered the same flaws of not being properly thought through and considered.

I also find myself thinking that, not least because we have had a fairly bruising couple of years politically, it is really important that any changes to electoral law have as wide a buy-in from the various interested parties as is practically possible. Again, I do not want to be too naive about it; these things are often viewed through the prism of electoral advantage, and there is nothing necessarily too dishonourable about that. But it would be helpful at the moment, I think, if there could be as wide a buy-in as possible from interested parties into the outcome of this process, as well as drawing on some evidence from overseas of the sort we have heard today.

Leave aside the legality of it, I think it would be a real shame if, however they got round the legality of it, the Government just pushed through some changes to the legislation without consulting widely and reviewing it properly.

Professor Schleiter: I agree with that. Substantively I think there are three reasons for establishing a committee. The first is to get it right. The FTPA touches on some of the most consequential and important rules in our political system—election calling, confidence relationships and the suspension of Parliament. Accurately anticipating the effect of changes to these rules is difficult if decisions are made by a committee that does not include relevant expertise. You need the relevant expertise.

Comparative studies of constitutional reform reveal that politicians have in the past very often thought that they could anticipate the consequences of important institutional changes, including suffrage extensions, electoral-system changes and the design of fundamental constitutional rules, and very often they got it dramatically wrong. Going for procedure for drafting changes to fundamental rules, you should choose a procedure that



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maximises the chances of getting them right, so a review committee that includes the relevant expertise is important. The vagueness of the parties' proposals about what should replace the FTPA is indicative of a need for that expertise.

The second reason to go for a review committee is to create the bandwidth to give this reform the attention it requires. What is the rush? Given that the Government have Covid and the Brexit negotiations to deal with, it is hard to believe that they will have the bandwidth to give the FTPA the careful attention that it requires. So, again, there is a clear advantage in delegating the responsibility to develop some proposals to a review committee.

Thirdly, and to echo what Professor Cowley has said, it is important to make rules that have a chance of lasting and that have cross-party support. They must have legitimacy and they must be accepted because they are seen as even-handed. Drafting rules that have broad support requires a committee that transcends partisan political interests. Establishing a committee to review the Act is crucial for getting the reforms right and for ensuring that the rules we make will last.

Chair: Thank you both for that. I was going to come to David Mundell next, but I think you both adequately covered that line of questioning, so I will leave the final set of questions to my colleague John Stevenson.

Q128 John Stevenson: To a certain extent you have addressed my question but, as you both have said, both parties at the general election said they wanted to repeal the Fixed-term Parliaments Act but they did not offer any vision of what they wanted to replace it with. I would be interested to know what you both think should replace the Act. Also, do you think that we have come to the point where we should be introducing an Act of Parliament that covers confidence votes, elections, dates of elections and prorogation, all at the same time, so we have a comprehensive Act of Parliament covering these key, fundamental, democratic issues?

Professor Cowley: Yes, and I would replace it. I would replace it for two reasons.

The first is because the Government pledged to replace it, and when Governments pledge to do something, on the whole, unless there is a very good reason not to, they should go ahead and do it. I think it is bad for public faith in democracy if Governments do not carry out things they have pledged in their manifestos. They have to do something but I would not go back to the status quo ante, either the exact status quo ante or something very similar. I would replace it with a Bill called something like the Parliamentary Control of Elections Bill, and it would do exactly as you said. It would not only discuss the calling of the election in the way that we have been talking about; it would also cover things like prorogation and the date of the election.



I do think, and this was covered in the earlier panel, that there has to be reasonable scope for conventions to exist—you cannot do it all by statute, and trying to do it all by statute can be a mistake—but I think we should get this right, we should take a bit of time on it and bring in a Bill that would do the job properly.

Professor Schleiter: Yes, I agree with that. I would also like to say that in this debate about what should happen to the FTPA it is important not to lose sight of two normatively desirable goals that the Act did achieve. It provides Parliament with two pathways to call early elections as a means to resolve gridlock. It is very important that that is not lost. This is an important mechanism in a parliamentary democracy. Secondly, it constrains the unchecked use of early elections by the Executive for partisan advantage, and I think that is also a desirable aspect in a parliamentary democracy. Should the Act be amended or replaced, these aspects of it should be given serious consideration and should be preserved. I think we are also now at the stage where prorogation and the setting of election dates possibly deserve some attention. The setting of election dates could be dealt with in the same piece of legislation that deals with election calling in general. I don't know whether prorogation should be dealt with in that same piece of legislation. It is a broader power than just election calling, so maybe that requires a separate piece of legislation.

If you wanted to fully turn confidence relationships into statutory legislation, I would again say that the regulating of early elections is not the place to do it. That would probably require a separate statute.

Q129 **Karin Smyth:** I just want to throw in a slightly wider field for our experts. The fixed term allowed me, in a profession, to decide when to enter Parliament, because it gave some certainty to those of us who had jobs in the real world. It also gave my predecessor some certainty about when she stood down. That wider involvement of people coming into Parliament, I have not seen that particularly looked at in the literature around how the Act has perhaps empowered more people to think about becoming parliamentarians. Are you aware of that sort of issue being considered, and is it something that the review committee should perhaps also consider when looking at the working of the Act?

Professor Cowley: I have not seen anything on whether it encourages a wider field of applicants, which I think is the sort of point you are making—people can plan properly—although I can see it is at least plausible. One of the ironies in 2017 at least was that because the election was called with such short notice—ironically, given the Fixed-term Parliaments Act—lots of the parties were able to railroad candidate selection in various places, often in a way that broadened the diversity of the parliamentary parties. So it actually had the opposite effect to the one that you are outlining, albeit in very curious circumstances, which are probably unlikely to be repeated. Certainly this idea that, at least in normal circumstances, regular terms would allow civil society in general to interact with Westminster in a more



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predictable way has always been one of the supposed advantages of moving to a fixed-term Parliament.

As a very final point—I suspect this is the last question—I really think that one of the dangers of the last three or four years is that it was such an unusual period of British politics that it put all constitutional arrangements under incredible tension. It may be that the FTPA did not behave in quite the way that people expected it to behave because of its nature, but maybe it was just because whatever the political arrangements we had at the time would have struggled to cope. I wonder whether the very unusual circumstances of these elections, in short order, was not really anything to do with FTPA; it was simply to do with the fallout from what happened in 2016 and the extent to which British politics tried to adjust to that. The reason I say this is that one retort to your question might be to say it has not provided any certainty, that there has not been a single full-length parliamentary term governed by FTPA. The first one ran for five years, but the Bill was introduced, and then you had two short ones. I do not necessarily think that in itself is an argument against the Act. It was just a very unusual set of circumstances.

Chair: Thank you. I think that is a very good point at which to leave it, to revisit the unusual times that we have had recently. I am very grateful to all our witnesses today, and to colleagues, and particularly to broadcasting staff as well.