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The Select Committee on the Constitution

Corrected oral evidence: Fixed-term Parliaments Act 2011

Wednesday 23 October 2019

11.20 am

Watch the meeting

Members present: Baroness Taylor of Bolton (The Chair); Lord Beith; Baroness Corston; Baroness Drake; Lord Dunlop; Lord Faulks; Baroness Fookes; Lord Howarth of Newport; Lord Pannick; Lord True; Lord Wallace of Tankerness.

Evidence Session No. 4 Heard in Public Questions 27 - 34

Witnesses

I: Carl Gardner, BPP University of Law; Professor Gavin Phillipson, University of Bristol.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witnesses

Carl Gardner and Professor Gavin Phillipson.

Q27 **The Chair:** Welcome to our two witnesses. They have heard some of what we have just been talking about and are perhaps already geared up to give an overall impression. May I start by thanking you for coming and asking for your overall impression of the workings of the Fixed-term Parliaments Act as you see them? Who would like to go first? You may have decided between yourselves already.

Professor Gavin Phillipson: I am happy to start. In my view, the Fixed-term Parliaments Act has made an extremely positive change to the constitution. Dissolution is one of those old royal powers that I have described as the bones poking through the democratic veneer of our constitution. The Executive ought not to have the power to simply dismiss the legislature. Now that such powers are exercised on the advice of politicians, the recent Prorogation crisis shows that they are open to partisan abuse. This is also bad for the Queen, because she gets dragged into grubby episodes like that, in which her name is associated with an Act that is subsequently found unlawful by the courts.

You could also instance the Canadian Prorogation crisis as another example of why these reserved royal powers exercised on the advice of politicians are not a good idea. In that case, as you have probably discussed in this Committee, the Governor General was requested by Stephen Harper, the then Prime Minister, to prorogue Parliament to avoid a Motion of confidence being brought against him and the fall of his Government. The Governor General acceded to that request—somewhat reluctantly, I think—which caused enormous controversy in Canada. Some people said that he was wrong to have acceded to that request, and others said, "No, we had to act on advice". This simply illustrates how these powers are open to abuse and do no good either to the Executive or indeed to the Queen.

Carl Gardner: I take an opposite view. I think the Fixed-term Parliaments Act has had a very damaging effect on the constitution, partly because of all the ambiguities and disputes that it permits within 14 days—as the Committee has just heard from other witnesses—and because it has had a wider effect; a point was made in the previous session by Lord Howarth about wider potential damage to the notion of confidence, and the Government must have confidence in the House of Commons. There has been damage, plainly because there is the potential for a Government who have lost the confidence of the House of Commons none the less to carry on for at least 14 days.

This may seem a small matter, but I do not think so. It has damaged generally the general for constitutional conventions. It is an attempt at partial codification of the constitution. I think it has failed, because there is a gap between the understandings that parliamentarians, academics and constitutional lawyers may have of the way statutes and convention interact and the way what you might call an informed public think about

it—political journalists and so on. They look at the text of the Act and quite reasonably think, "There are all the solutions". But once you start thinking like that, you have lost the sense of constitutional duties in the gaps of the text. The Fixed-term Parliaments Act has encouraged that feeling.

Professor Gavin Phillipson: Can I come back on that?

The Chair: Please do, and please consider public perception of Parliament and our democracy. We have recently seen more people watching the Parliament channel than ever before, yet there is a sense of public frustration about the paralysis, as Lord Butler called it.

Professor Gavin Phillipson: The problem with the Fixed-term Parliaments Act is that it has been subject to an extremely skilful campaign of disinformation, which has persuaded a large number of people that it has somehow changed the confidence rule of the constitution, which of course has never been a matter of law and is not addressed by the Act except insofar as it triggers a general election.

The Act says nothing whatever about when a Prime Minister should resign and their constitutional obligations in that regard, because that has never been a question of law in this country. It has always been addressed and governed by constitutional conventions, because it does not seem to be something which the courts should get involved in it.

That is why the 14-day period is silent on those matters. That is a good thing, not a gap in the Act. If the Act had sought to govern that area, it would have turned what has always been part of the political constitution, governed by constitutional conventions, into a legal matter. Does anyone seriously think that we want the courts adjudicating on when a Prime Minister should resign or who should be appointed as their successor? Had the Act tried to specify those matters in the 14-day period, it would have converted them into matters of law.

Those who are arguing that it therefore leaves a gap and that no one knows what happens now are, I think, neglecting to consider that that matter has always been considered by constitutional conventions, which continue to apply and provide the necessary constitutional obligations but also ensure that they are not and cannot be enforced by courts because they are rightly regarded as unsuitable matters for judicial adjudication.

Q28 **Lord Howarth of Newport:** Professor Phillipson, how would you respond to the contention, if it were put to you, that you and the authors of the Act have contrived a non-problem? When was this abuse perpetrated? When did a Prime Minister seek an election for purely expedient, opportunistic and cynical reasons—delete "cynical"—before the 2017 election, which took place in the period when this legislation prevailed?

Indeed, how would you respond to the case that I have heard put that the FTP Bill was itself a product of abuse, in the sense that it was contrived by the coalition for expedient and tactical purposes to make

sure that they would have a reasonable duration of time in the 2010 Parliament?

Professor Gavin Phillipson: I agree that the Act was probably brought in partly for short-term political reasons. That is often how constitutional reform happens in this country: it is driven by a short-term political crisis and a way is found to resolve it. We have a flexible constitution in that way, but that does not mean that there were not good reasons for that change. Constitutional reformers have been arguing for some time that the power of the Prime Minister to set the date of the next general election at his political convenience was not a good power to have.

To answer the point of principle, if you read any recent political biographies, it is clear that the date of the next general election is clearly and openly set by the Prime Minister to get partisan advantage. I do not think anyone denies that; it was openly admitted during the Governments of Tony Blair, for example, that the next election was chosen at the time of maximum advantage. Gordon Brown dithered about it, and the dithering was entirely to do with whether it would be to Labour's partisan political advantage to hold a general election then.

In my view, allowing one set of partisan politicians to set the date of the election to maximise their political advantage is just as undesirable and unprincipled as allowing one set of politicians to set constituency boundaries to their own political advantage.

We all know the extent of the gerrymandering in the United States. That happens because elected politicians are allowed to set constituency boundaries—ours are not—and they openly do this to their own advantage and to an enormous degree. In my view, setting the date of the general election—in other words, being able to set the rules of the democratic game for one party's advantage—is also unprincipled. That is the problem that has rightly been addressed.

I also do not think that the Executive should be able to dismiss Parliament, as a matter of principle. Parliament should decide itself when it wishes to dissolve if it is going early before the fixed term of five years.

The Chair: The Fixed-term Parliaments Act did not stop a Prime Minister choosing the date of the election in 2015.

Professor Gavin Phillipson: No, indeed. That is a loophole of royal power that is left over that should be dealt with. Parliament itself should set the date of the next general election. Had the current Prime Minister been able to dissolve Parliament, either last month or this month, it would have been open to him to advise the Queen to set the election date after 31 October and therefore prevent a Government elected with a fresh mandate from being able to change the decision to leave the European Union with no agreement by 31 October if the election had gone that way. That shows that the power is open to abuse and should be reformed.

The Chair: There are lots of points there. We could all ask about the

length of that Parliament and Parliament deciding never to dissolve itself.

Lord Wallace of Tankerness: There is no question of Prime Ministers using it for party advantage, although Professor Phillipson says otherwise. I was first elected to the House of Commons in a general election in 1983, called on 9 May for an election on 9 June. The date of 9 May is significant, because the local elections in England and Wales were on 5 May. The Prime Minister had the weekend to consider whether to call an election.

Can I ask a hypothetical question? If the Conservative Party had not done very well in the local elections on 5 May, do you really think that Margaret Thatcher would have called the election on the following Monday?

Professor Gavin Phillipson: I do not know. I do not think it is in dispute that Prime Ministers have used election-date setting to party advantage. That is openly debated, admitted and seen as fair enough, as an example of being in government and getting that advantage.

Q29 **Baroness Fookes:** How far do you feel that there has been a meaningful transfer of power from the Prime Minister to Parliament as a result of the Act?

Professor Gavin Phillipson: I think there has been a meaningful transfer of power, and it is a major and welcome one. It is interesting to compare the reaction to 2017, when Theresa May called her election. Then, opponents of the Act—in fact, I had an event with Carl—said, "That shows that the FTPA is a dead letter. It has changed nothing, because the Opposition will never not be able to vote for an election and therefore it is a whole waste of time".

We have now had these two refusals proving the exact opposite: that the Commons will, at times, choose to refuse a general election. To me, that shows the worth of the Act. Opponents of the Act certainly cannot have it both ways. It is clear now that it has engineered a real transfer of power, which prevented the Prime Minister from being able to call an election where there was a risk that in doing so he would prevent a future Government being able to alter the terms of our departure from the European Union.

Carl Gardner: I do not think there has been such a transfer of power. If anything, more power has been given to the incumbent Executive, in my view.

To go back to the old system for a few moments, I think it is true that Prime Ministers have always sought Dissolutions at advantageous times. Politics has always played a role in it. The question we have to face is: what are the limits to that? In the Thatcher years, the Blair years, et cetera, when we observe actual practice it is difficult to identify a general election that we could say was abusively called or that the Opposition really opposed. It did not happen.

My view is that the old system worked because of the imperceptible effect of the Queen's gatekeeping role. We can disagree about the likelihood of the Queen refusing Prime Ministers Dissolutions in the past. Perhaps this power was never going to be used to refuse Dissolution. But its mere existence as a power influenced political behaviour and nudged it—to use a more modern phrase—in a more restrained and constitutional direction. Here, the question of effects on faith in conventions perhaps comes in.

Since the Act, there is no such gatekeeping role any more. There are written rules that can be gamed by politicians in a way that a gatekeeper cannot be. In the previous set-up, the uncertainty in the Queen's role was a feature, not a bug, if I can put it that way. One reason why I am in favour of a repeal is that it would be better to have a procedural gatekeeping role like that again, rather than fixed rules for when there can be a Dissolution.

Baroness Fookes: This is the point that you made in section 7 of your written evidence.

Carl Gardner: Yes, I think so. I am trying to recall the thread of my thought in answering—it was the transfer of power to the Prime Minister. The key area where the Act has transferred power to the Prime Minister is in the 14 days. Whatever view we take—or I take, anyway—of what Prime Ministers ought to do in those 14 days, I believe that the constitutional convention still operates so as to give the Prime Minister a duty to resign at some point and in some circumstances in those 14 days.

But no matter what I believe, I think that the Act permits the Prime Minister to impose his view of what should happen. Because much of that informed public that I mentioned earlier would simply look to the text, it would be relatively easy for what I might call an aggressively self-serving Executive to get away with saying, "We can simply choose to run the clock down to an election if we wish". I think that is wrong, but I do not see what stops it happening.

The Chair: We may come on to some of those issues in a moment. Baroness Corston, do you want to start us off on that?

Q30 **Baroness Corston:** What, if any, are the constitutional and legal obligations or limitations on the Prime Minister in the 14 days following a defeat on a no-confidence Motion?

Professor Gavin Phillipson: The position is essentially unchanged, except insofar as the Prime Minister obviously cannot request a Dissolution from the Queen. It is governed by the pre-existing conventions, as it always has been. If we are saying that we must repeal this Act because we cannot explain to the British public that sometimes constitutional conventions govern things instead of law, we might as well as go home.

It was always up to the Prime Minister's sense of constitutional obligation. Why does a Prime Minister resign after they lose a general election? There is no law compelling them to do so. They do so, because it is their

constitutional duty. That is backed up by the ultimate legal power of the Queen to dismiss a recalcitrant Prime Minister if they are clearly behaving unconstitutionally. However, the very simple explanation that you give to the public is, "This is a matter of constitutional convention, and that is what governs the Prime Minister".

To answer your question, there are essentially three situations—two simple ones and one more difficult—as to what they should do. If it is clear that there is someone else who can commend a majority in the Commons, the Prime Minister's duty is to resign immediately and the other person should be appointed. If they will not resign, the Queen must dismiss them. Secondly, if it is clear that there is no one with any realistic chance of commanding confidence, the Prime Minister is not obliged to resign. As before, a general election will happen after 14 days.

The tricky one is if a candidate does not command an overall majority in the Commons but has a reasonable chance of forming a Government. There are two views there. Jeff King has advanced the view that the person should be appointed if they have a chance that is, in the words of Tina Turner, "Better than all the rest" of being able to form a Government. Robert Craig, who gave evidence to this Committee, says that the test should be whether the candidate who is being put forward as a potential replacement has more support than the Prime Minister who has just been given a vote of no confidence. On balance, I prefer this as it gives slightly more certainty.

In other words, this is what should happen in the 14-day period: the House of Commons should find a way of expressing a view if necessary and pass a Motion saying, "This House believes that X should be appointed as PM". If that Motion gets more votes than the number of people who voted in favour of the Prime Minister in the Motion of no confidence, X commands more support in the House of Commons and should be given the chance to form a Government, at which point the Prime Minister should resign. That is what should happen in a 14-day period. As it always been, it is governed by constitutional convention and not by law.

Carl Gardner: My view of the way the convention operates is that there is a constitutional duty on the Prime Minister to resign when confidence has been definitively lost and if the Opposition want to try to govern. In other words, my view of the convention conceptually sees a duty to resign as arising slightly earlier than in Gavin's view.

It seems clear to me that the 14 days permits an opportunity for the incumbent Government to attempt to restore confidence in themselves and pass the antidote Motion, if I can call it that. If the Government lost that Motion, that attempt, or did not dare to try within a certain period, perhaps the first week, the constitutional duty to resign would occur then—at least if the Opposition wanted to govern. The advantage of seeing things this way is that it permits an incoming minority Government to attempt to govern. We have had these in the past. Harold Wilson's Government in 1974 is the most recent example, I think.

Actually, David Cameron's Government were—overnight, or for a few hours.

I would prefer that. Seeing the duty to resign as arising only later, when someone else is better placed than the incumbent Government to command the confidence of the House, or when somebody else can prove that they actually have the confidence of the House—what I have called the somewhat more and much more deferred duties to resign—those theories would shift power a little bit away from the Opposition and towards the incumbent Government, as compared with historical practice. One of the unfortunate effects of the Act has been encouraging a belief in that shift. The *Cabinet Manual* has also served that purpose.

That is my belief in the way conventions operate. But, as Gavin says, these are conventions. I also believe that the Act has damaged belief in them. There is no legal duty to resign in the Act. I have heard an argument on Twitter from Tom Hickman, the academic, who believes that a view like Gavin's is inherent, implicit, in the Act.

That is an interesting and ingenious argument. It is dangerous to say what will succeed in the Supreme Court nowadays, but it seems to me an uphill argument to make. The danger is that there are no legal duties reflecting what we both broadly agree are those constitutional duties. Particularly in the atmosphere of today, I am afraid that a Government could successfully simply insist on their legal rights here. I do not see what there is to stop them. That is the big flaw in the Act.

Professor Gavin Phillipson: I do not see what there was to stop a Prime Minister who lost a general election by law refusing to resign. There never has been. It has always been governed by convention, ultimately backed up by the Queen's legal power to dismiss a Prime Minister should they behave flagrantly unconstitutionally. It has never been governed by law.

Lord Beith: Do either of you believe that the Lascelles principles still have force or are accepted by principal participants?

Carl Gardner: I certainly used to believe in them. I mentioned the Queen's gatekeeper role earlier. I have certainly always thought that this was an important and underestimated constitutional safeguard. I take the point that there is force in the opposite argument, particularly given what has just happened with the Prorogation that never was. It appears that the belief that the Queen has an entirely passive role in the constitution is growing. The more that is accepted, the less faith you can have in this gatekeeper role. I wish for belief in that role to be restored, because I think that a procedural gatekeeping role is the best way to manage this.

Professor Gavin Phillipson: The policy of the Act was to preserve the existing position as far as possible while passing the power to call an early general election to the House of Commons from the Prime Minister. For example, 1979 was the last time a Government lost a Motion of no

confidence before the Act. James Callaghan did not resign at that point; an election took place.

The purpose of the Act was to carry on with the idea that, essentially, if the House of Commons is capable of providing a replacement Government who can command confidence, that Government should take over and there should be no unnecessary general elections. If there is no replacement Government who can take over and plausibly command confidence, the House of Commons needs to be repopulated so that we can have a Government who command confidence. The simple way to look at the Act is that it preserves that existing system as far as possible. That is what should guide the Prime Minister and other relevant constitutional actors.

Q31 **Lord Wallace of Tankerness:** What do you think are the legal effects of repealing the Act? You have both expressed views on this. Could you simply say, "The Fixed-term Parliaments Act 2011 is hereby repealed", or do you need more than that?

As a supplementary, I bring up Mr Gardner's point: in trying to revive what went before, do you think it is acceptable that it would bring the Queen too much into the political domain if there was some expressed view that she ought to have a gatekeeper role? More generally, I ask about the legal position of repeal and whether there should be an amendment.

Carl Gardner: I think that you could repeal. You would need a little more than the very bare provision that you sketched out there. If you wanted to restore the status quo ante, which I think you could, you would need clear words at least to manifest the intent to displace Section 16 of the Interpretation Act and get over that rule. You would at least need to carefully draft a repeal so as to ensure that the right effect was achieved. That could be done. The prerogative power would still be there and revive if a repeal was drafted in the correct way.

That is acceptable in a modern democracy. We are a constitutional monarchy. Of course, people's views about that will differ. However, for me, that means that it is legitimate for the monarch to have a backstop or reserve power to protect proper constitutional behaviour by politicians. This is reassurance that I would give myself about its potential perceived illegitimacy. When the Queen had this role, she was not drawn into debates. There was no problem. The gatekeeper role, with its imperceptible nudge effects, worked much better than we tend to give it credit for.

This will be my last word on this. I accept that the damage that has been done over recent years, not only but including by this Act, to belief not only in conventions but in the role of the monarch and restoring that faith would be difficult. However, I think it would be the best path.

Professor Gavin Phillipson: To address that point, I think it is extraordinary that it is seriously being proposed in the 21st century that the right way to run our constitution is to have a hereditary monarch, not

knowing whether she has the power to refuse Dissolution and, if so, in what circumstances. We are all talking about the "Senex" letter sent by an anonymous civil servant sometime in the 1950s, and that is our best guide. This is as opposed to a democratically elected House of Commons making the decision. It seems extraordinary to me that that would be seriously argued.

If the Act is simply repealed, there will no way of dissolving Parliament. The current Parliament would last indefinitely, because the Fixed-term Parliaments Act repealed provisions from other Acts that limited the life of Parliament. You cannot have simple repeal; you would simply have an eternal Parliament if you did not legislate further.

In my view, the prerogative probably cannot be revived. I accept that this is an issue on which lawyers take different good-faith positions. However, the very legal uncertainty as to whether the prerogative can be revived means that it would be irresponsible simply to legislate to repeal the Act and try to revive the prerogative without being sure that you could. As far as I know, there is no instance of statute successfully reviving the prerogative, so it is an open matter of law.

In my view, once a prerogative power no longer exists—I think it was extinguished by the Act—it cannot be revived. In reality, if Parliament sought to do that, it would be seeking to create a new prerogative power, which we know as a matter of legal logic cannot be done: Parliament can no more create prerogative powers than it can create common law. If the prerogative no longer exists, there is nothing to revive. An attempt to revive it would, in reality, be an attempt to create a new prerogative by statute, which cannot be done as a matter of legal logic.

At the very least, there is too much uncertainty and disagreement between lawyers as to whether this is legally possible. If Parliament was minded to repeal this Act, it should be replaced with a new statutory power. By statute, Parliament can achieve any new scheme it wants for its Dissolution. If it wanted to, it could return it to the Prime Minister's unfettered discretion through a simple Act. However, it would need new legislation. You cannot simply have a bare repeal.

Lord Pannick: I would like to ask Mr Gardner about his gatekeeper role for Her Majesty. How would this operate if the Prime Minister had announced earlier this month, assuming that there was no Fixed-term Parliaments Act, that there would be a general election on 2 November, 10 November or whenever it would have been, and that we would therefore leave without a deal? Would Her Majesty step in? Could she? How would she? Would this not inevitably bring her bang into the centre of politics?

Carl Gardner: I do not think there has ever been any doubt that the Queen strictly had a legal power to refuse Dissolution. She has always had that. The question has been whether convention entitled her to two reviews. I fully accept that the circumstances of today pose a real challenge to what I am saying.

Lord Pannick: That is why I asked the question.

Carl Gardner: Many people would say that the Fixed-term Parliaments Act is now saving the country from an abusive general election in a way that the Queen would not or could not have. This will depend on political views. I fully accept the force of that proposition. I also accept that it is possible that the Fixed-term Parliaments Act could be operated in ways that would make even me think that it worked well. If a statutory Motion of confidence is ever passed and there is proper, restrained constitutional behaviour in those 14 days, the concerns of people like me may melt away. My fear is that there will not be such conduct by politicians and that the Act has broken something about that.

To respond to the specific circumstances you have raised, the circumstances of today are quite special. Normally, under the old system, one would have said that a Prime Minister who does not have a majority or the confidence of Parliament in his key policy would be entitled to a Dissolution from the Queen. If one had faith in the gatekeeper role, one might also say that the special circumstances of the fixed date, as there was for a no-deal Brexit on Halloween, make a difference to the situation.

Frankly, if I were at the Queen's shoulder advising her, I think I would have said, "Ma'am, please grant a Dissolution on condition that the Prime Minister will not force a no-deal Brexit by creating circumstances so that one could happen by default during the election period". Had the old system applied in the circumstances of today, that would have been the big danger. I accept the force of particular circumstances against me.

Q32 **Lord Faulks:** I was going to ask you both about whether to amend or repeal. From the answers you have given so far, I think there will be a difference of opinion.

I will pick up a couple of points. In terms of possible amendment, it is two-thirds, 66%. We have a position where, in theory at least, a parliamentary party with only 33% or thereabouts can say, "No, we don't want an election", and 66% can say that they do. Given that we know that the division between two-thirds and one-third was reached largely to reflect the balance of the coalition when it first thought of the Fixed-term Parliaments Act, is that a satisfactory situation? Things change, and so do numbers. We heard Lord Lisvane suggest maybe 50 plus one might be better.

Professor Gavin Phillipson: I think that two-thirds is about right.

Lord Faulks: Why?

Professor Gavin Phillipson: Two-thirds is a common number used for altering codified constitutions by countries with them. The point is that you would need something to prevent it being used for partisan advantage by one political party over the other using its majority in the House of Commons. You could take any number you like, you could say 60:40, but you need to have more than a bare majority, otherwise you are open to it being a partisan decision instead of a cross-party one.

One unforeseen consequence of repealing the Act and trying to restore some kind of monarchical power to dissolve Parliament as advised by the Queen is that, following the Miller/Cherry case, it is now an open possibility that a Dissolution decision that appeared to have an improper purpose could now be challenged in the courts, which would result in the courts being dragged into that matter as well.

Under the Fixed-term Parliaments Act, the courts are completely excluded, because the House of Commons makes the decision by Motion, which is clearly protected by Article 9 of the Bill of Rights as proceedings in Parliament. The courts cannot have a role in challenging a decision by the House of Commons to have an early election. One benefit of the current system is that it keeps the courts and judicial review out of the decision to dissolve Parliament.

One amendment suggested to me by a colleague with whom I worked when I was an academic fellow, and who prefers not to have his or her name mentioned, was that if there were a situation during the 14-day period in which a Prime Minister had not resigned and no new Prime Minister had been appointed, the Government would be obliged to lay a Motion declaring confidence in themselves by day 11 or 12 and the Act would make clear that that Motion must be amendable. At that point, if the Commons had confidence in another Prime Minister but the outgoing Prime Minister had not resigned and so the other could not be appointed, that would give the Commons the chance to declare their confidence in the successor through a parliamentary Motion.

That still leaves all the decisions made by the politicians. It does not touch upon the Queen's prerogative to appoint a Prime Minister. However, it would give the Commons a powerful weapon in the face of what has been feared and briefed by Downing Street that a Prime Minister who has been given a vote of no confidence may simply squat during the 14-day period and refuse to resign, even if there were a credible successor.

The point of that suggested Motion, which would obviously be a statutory Motion but would simply allow the Commons to express its view, is that it would be a rejoinder from the Commons and a very clear signal to the Crown that a successor commanded confidence and ought to be appointed. That is one amendment that could be considered.

The other would simply be to get rid of the Prime Minister's power to set the date of the next general election and replace that. If it is a two-thirds Motion, it should now simply state the date of the next general election. If it is done by no confidence, there should be a second Motion in which the Commons votes by simple majority to set the date of the next election.

Lord Faulks: I would like to ask you both about just one more point about the amendment and repeal. You already discussed the difficulties of purely repealing. We have paragraph 38 of the paper provided by Robert Craig, a draft Bill. I do not want to ask you now to comment on it,

but it would be helpful to the Committee if you have other suggestions about why it is inappropriate, or further suggestions. If there is anything that you can briefly say now, please do. It would perhaps be useful to the Committee if you could write in with your comments.

The Chair: That will be online after today.

Carl Gardner: I would like to answer on the 50%-plus point. If you want to have a statutory scheme like this, the intention of which is to take the power out of the hands of the Prime Minister and prevent abusive elections, it needs to be over 50%. I agree with Gavin on that. If it were a bare majority, you would create the situation which the Act was supposedly meant to prevent of a Prime Minister with a majority being able to have an election whenever he or she wanted with no institutional check on them. I would certainly oppose that.

Of course, you may remember that the original plan was for a 55% threshold, which was exquisitely calculated to maximally empower the coalition Government.

Arising from something that Gavin said, I will discuss the question of drawing the Queen in. I accept that that is a problem. With any reliance on the ability of the House of Commons to pass resolutions or other Motions that would somehow signal to the Queen that she ought to dismiss the Prime Minister, any such proposals also potentially bring the Queen into controversy and a decision that makes it into the courts. I do not think it is only my proposals raising serious questions about the position of the monarch.

Professor Gavin Phillipson: I will reply to that very briefly. The point of that is to avoid exposing the Queen. At the moment, there is no formal means by which the House of Commons can signal to the palace that a possible successor can command confidence. I assume there will be channels by which communications can be made confidentially. As things stand, the Commons could use something like an Early Day Motion. If enough MPs signed it, it could show that a given candidate would command confidence. There is nothing to stop the Commons doing that now.

My suggestion was that there would be a clear way that would not be controversial. Instead of having whisperings in back rooms, some people briefing this and others saying that, you would have a clear public Motion that said, "This House would have confidence in X as a replacement candidate". This would remove the Queen from controversy, because it would be clear beyond doubt that there was a candidate who commanded confidence.

I think we all agree that, under the existing conventions, if someone commands the confidence of the Commons, they should be appointed as Prime Minister in replacement of a person who has been found decisively not to command confidence. In my view, that would lift the Queen out of and avoid the possibility of her being involved in controversy.

Q33 **Baroness Drake:** It has been put to us by other witnesses that the Fixed-term Parliaments Act has become a whipping boy for much deeper problems. If all the focus is on amendments to this Act, is the lens missing other pressures on government by constitutional convention in a situation where you have such a minority Government trying to address such a bitterly divisive issue? Are we over-focusing the lens?

Carl Gardner: That is an interesting and important point. I agree that there are much deeper problems and questions raised by sustained minority government that is under bombardment, if I can put it that way, rather than being tolerated more liberally by the House of Commons. There are deeper problems, such as the *Cabinet Manual*.

The increasing power of members of political parties and parties as institutions is a serious constitutional problem that is operating against the public interest. The Act itself raises serious problems and has done constitutional damage, as members of this Committee warned in debates during the Bill's passage. I think that it is part of the problems that we have currently. It is not just minority government that has revealed these problems. In fact, as Lord Pannick was suggesting earlier, it might be in this period of beleaguered minority government that the Act might end up performing best, at least from some points of view.

These problems were all there under Theresa May's Government. When she had a clear majority, it was this Act that enabled her to get the election that she wanted. As Lord Howarth said, this is the kind of partisan election that I am not sure we really saw.

Professor Gavin Phillipson: She clearly would have got the election under the previous system. It would have made absolutely no difference in that situation. No one thinks that the Queen would have refused Theresa May an election in 2017. Before we finish, will we get to address question 7? I would like to speak briefly about it.

The Chair: Yes, I think we just have time.

Q34 **Lord Faulks:** Here is question seven—the big one—on the effect of the Supreme Court decision and whether Prorogation should remain a prerogative power or not. We very helpfully had an evidence session of the Public Administration and Constitutional Affairs Committee. I daresay you have probably read it. A number of experts gave their views, not always agreeing with one another it has to be said, particularly Professors Craig and Ekins.

Lord Sumption expressed the view that the Prorogation should probably be done by statute. I would like your views on his comment, which I will paraphrase: had the Government run the case on the basis that this was a purely political decision—that "There was far too much noise going on about Europe and we really needed to clear the deck so that we, the Executive, could get on to do our job and negotiate the best deal we could"—the court would have to decide what was a political matter. Is there an appropriate metric for a court to decide a political matter like that rather than a legal one?

Professor Gavin Phillipson: I think that the Prorogation prerogative should be replaced by a simple statutory power. It has clearly been shown to be open to abuse. There is no good reason for the Executive to have a power to suspend a sitting of Parliament that was thought to be probably unreviewable and hence without clear limits prior to the Supreme Court judgment.

It is clearly not needed to simply start a new Session. I suggest a simple statute that says that Her Majesty may, by proclamation, acting on the recommendation of the Prime Minister, proclaim a new sitting of Parliament, Parliament should be automatically prorogued for five days—it could be four or six—before that date, by automatic operation of statute in other words, and Section 3 could say that Parliament may not otherwise be prorogued.

That would deal with the problem. You would not have judicial review. You would have automatic Prorogation and new Sessions of Parliament, which the Prime Minister would have flexibility to set. However, you would not have the possibility of political Prorogation for prolonged periods that resulted in the Supreme Court judgment.

Carl Gardner: I will say one sentence on outstanding issues that I have not had a chance to address. If there were no repeal, I strongly support the idea that the best amendment would be to provide a structured process within the 14 days and a clear duty to resign in some circumstances. That would be the best repeal, together with removing the Prime Minister's unilateral power to fix the date of an election.

The danger with Gavin's approach to the question of Prorogation, although it does seem pretty safe and would probably be fine if Gavin were in charge, is that our finger is wobbling towards the flame of fixed rules in statute and fixed timetables. It could be gamed.

Our experience must make us fear what happens if those five days suddenly became extremely politically sensitive. I would caution care about that. It is okay if it is prerogative power, but it would be better if some genuinely independent element were put in there, some institution or clearly understood convention that could be properly enforced somehow, which meant that it would not be a unilateral power to prorogue, subject only to the courts.

Baroness Fookes: Would it help if there were certain maximum or minimum days?

Carl Gardner: Possibly.

Baroness Fookes: Not less than five and not more than nine, for example? I am plucking it out of my head, but it could be that kind of arrangement.

Carl Gardner: Possibly. Rather than having fixed substantive rules, I would insist, perhaps against people disagreeing, that it would be better

to have an independent gatekeeper, a procedural check, rather than fixed rules.

The Chair: It has been really interesting. It is good to have diverse views and we have certainly had those this morning. Thank you for the written evidence that you have sent and for your contributions.