

Public Administration and Constitutional Affairs Committee

Oral evidence: [Status of Resolutions of the House of Commons](#), HC 1587

Tuesday 23 October 2018

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Members present: Sir Bernard Jenkin (Chair); Ronnie Cowan; Mr Marcus Fysh; Dame Cheryl Gillan; Kelvin Hopkins; Dr Rupa Huq; Mr David Jones.

Questions 1-135

Witnesses

I: Sir David Natzler, Clerk of the House of Commons, and Mark Hutton, Clerk of the Journals.

II: Professor Petra Schleiter, Professor of Comparative Politics, University of Oxford, Professor Robert Blackburn QC, Professor of Constitutional Law, King's College London, and Dr Andrew Blick, Director, Centre for British Politics and Government, King's College London.

Written evidence from witnesses:

– [Professor Petra Schleiter](#)

Examination of witnesses

Witnesses: Sir David Natzler and Mark Hutton.

Q1 **Chair:** This is our very first session in our inquiry into the role of Parliament in our constitution. We are particularly interested in the relationship between Parliament and the Executive. May I welcome our two witnesses? Would you tell us who you are for the record, please?

Sir David Natzler: I am David Natzler. I am Clerk of the House of Commons.

Mark Hutton: I am Mark Hutton. I am Clerk of the Journals in the House of Commons.

Q2 **Chair:** We are grateful to have you both. Sir David, before we get on to our substantive discussion, your job is always challenged by unexpected events and new challenges, and the Cox report into harassment and bullying has been a particularly traumatic thing for Parliament to confront. A certain amount is laid at the door of the House service, and I wanted to give you this opportunity to put something on the record about how you think the leadership of the House service should respond to the report, regardless of how the rest of Parliament responds.

Sir David Natzler: Thank you, Chairman. I am happy to do that, with the slight reservation that the meeting of the Commission of the House of Commons that was to have been yesterday was postponed until tomorrow. It is there that our first formal reactions will be decided, but on a personal basis, of course the Cox report and its conclusions were shocking—not altogether surprising—and I think we are all taking time to absorb what is a complicated and very long report and to work out from that what is the way forward.

I would say that since I was appointed acting Clerk almost exactly four years ago today, I have done my best to make the House service a better and happier place for those who work here, but I and others have always been aware that there is a subculture of bullying and harassment of House staff—not only by Members, which is of course not tolerable, but by other House staff. It was made plain in the Cox report that this is not something where anyone in the Westminster community can feel happy.

When the “Newsnight” programme came out in March, I made clear that the only acceptable outcome would be a workplace culture free of bullying and harassment, and that revised procedures and processes for dealing with the consequences, which is what the House agreed in July, are no substitute for the cultural change that we need so that the bullying and harassment never happen in the first place.

I think in the last few years we have been moving in the right direction. We have a legacy of unresolved and serious issues from past years that



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continue to—if I can put it like this—poison the well, and we have to deal with those. But we also have to remember that the vast majority of House staff are proud to work here and are not bullied or harassed; that Members—that’s you—have, I believe, a high regard for the House service; and that the vast majority of you and your colleagues get on perfectly well with us, and we with you. But there are problems and they need to be urgently addressed—and they will be.

Chair: Thank you very much. Do colleagues want to ask any supplementary questions?

- Q3 **Dame Cheryl Gillan:** I have read the Cox report. One of the aspects of life in public service in the House of Commons that does not appear to have been particularly covered is the sort of bullying and harassment that can actually come from outside this House to people within this House. I think particularly of Clerks who may be exposed to the public during the course of legislation or various procedures in this House. Do you think that is a lacuna? Do you think that, too, should be considered and covered in whatever response is made to the Cox report?

Sir David Natzler: I do not want to get into the business of discussing what might have been in the Cox report and is not, or those parts of it that we are still having difficulty understanding. Yes, I am sure members of the House service get pressures from all over the place, including as you describe, as of course do you as Members. What we want is simply to make this a safe and proper workplace for the staff who work here. It is a very simple ambition. There may be quite a lot of players in this other than Members and our own staff. I entirely recognise that we do not live in a bubble here—we connect with lots and lots of people, and sometimes those relationships can go wrong.

- Q4 **Chair:** Speaking for myself, I greatly value the work of the House service, and I would hate to think that anybody I know who works for the House service is subjected to any kind of bad treatment. I am sure every Member of Parliament wants to make sure that we have a safe working space for members of the House service. If we can talk much more freely about it in private than perhaps we have done, and generate an atmosphere in which the leadership of the House service can take action to change the culture, that is what I would like to support you in doing.

Sir David Natzler: Thank you for that offer.

- Q5 **Chair:** Moving on, can we go straight into the meat of this? When is a substantive motion an order, and when is it a resolution of the House? What is the distinction between the two?

Sir David Natzler: I will start and then hand over to Mark, whose job it is in the Journal Office to decide at the end of each day, when the House has passed something, which word to put in italics at the beginning of the text—“Resolved” or “Ordered”.

Very simply, an order is when the House orders one of its officers or sometimes—I think I am right in saying—itself to do certain things that are



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within its ambit of power. You have to judge what are the House's powers to do things. If the House does not have the power to do it, it is not an order—it is called a resolution. You might call it anything else. A resolution is an expression of the House's views, however strongly held, but it has no immediate effect.

Q6 **Chair:** So an Opposition day motion is a resolution, not an order?

Sir David Natzler: Not necessarily. If the Opposition were to put down a procedural motion of some sort that related to the business of the House, if that were permitted on the paper, the result would be an order and not a resolution. The conventional Opposition day motion, which expresses an opinion and often demands certain things—for example, funding or a different approach to policy—would be a resolution.

It is not dependent on who moves a motion. Some people think that if it is an Opposition day or a Back-Bench business day, there can only be a resolution, which is not the case. If the Backbench Business Committee were to put down a Standing Order change for a decision by the House, that would become an effective change to the Standing Orders. In one recent case of a Back-Bench day that was not on great public policy, I was directed in the text of the motion, which I took to be effective, to write to my opposite number in the House of Lords about the House's resistance to the abandonment of vellum.

Q7 **Dr Huq:** I have only been here since 2015, but I hear on the grapevine that the current Speaker is more generous than previous ones. How have procedures for motions other than those tabled by the Government changed over time?

Sir David Natzler: The two principal sources of non-Government motions are the official Opposition and Back-Bench business. Quite separate is private Members' legislative business, which we shall leave aside. The Backbench Business Committee was introduced as a result of the recommendations of the Wright Committee, which sat in 2009. It recommended that there should be a Committee to bring forward motions to the Floor of the House, because private Members—Back Benchers—had effectively lost the right to bring forward any motions. Eventually, the House agreed to set up the Backbench Business Committee, which started work in 2010. In the last eight years, that has changed the number of resolutions that are passed by the House—Mark may have an idea of the quantity—massively, so we now pass a lot of resolutions on many Thursdays and on occasional ends of other days.

In earlier days, private Members—Back Benchers—did have the right to bring forward motions on the basis of a ballot, which in some ways was equivalent to the private Member's Bill ballot, except that there was not just one at the beginning of the Session. Whenever there was a Friday coming up—I cannot remember how long before, but perhaps between four to six weeks—there was a ballot where you put in your name. If you came out, within a week or so you had to come up with a motion, and that was then debated on the Friday. That was abandoned, and there was a



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gap of some years where there wasn't any possibility. It was partly because of that, as the Chair will remember, that the Wright Committee felt strongly that something needed to be done about the right of Back Benchers to bring forward motions to the House.

Opposition day motions have been where they are now for about 30 years.

Mark Hutton: Since 1980, I think.

Sir David Natzler: 1980. Gosh, time has passed—that's almost 40 years. Opposition day motions replaced what used to be called supply days, which were broadly similar, and which in turn replaced a system where the Opposition had an understood right to bring forward amendments when the House went into supply about the grant of money to the Government. The Opposition would then move amendments as a peg on which to hang a debate—generally one that was critical of Government policy.

In the 1980s, there was a move to the current Opposition day system, where the Opposition have a fixed number of days every Session to bring forward their motions. Those have been the two big changes, but I suspect the Backbench Business Committee is the most significant.

Q8 **Dr Huq:** Westminster Hall debates sort of have a motion, but it is not—

Sir David Natzler: Indeed. The way Westminster Hall is currently run, the motions are not in themselves significant. The debates are often, obviously, very significant, but it is effectively on a general debate that the House has considered a certain matter. That itself replaced an antique system, as I suppose it is now, where the House kept on debating things on the motion, "That this House do now adjourn". Indeed, at the end of each day we still debate that the House do now adjourn, although otherwise it is very similar to a half-hour debate in Westminster Hall. That is the only remainder of the older system.

Q9 **Dr Huq:** How do you think that is having an impact? You have seen a lot of stuff—since the mid-1970s, I think—while you have been here. How has that had an impact on what the Opposition and Back Benchers can achieve through introducing substantive motions?

Sir David Natzler: I'm not sure it has had very much impact on the Opposition, because they always had an understood right to something around 20 days, or equivalent to the tariff of 20 days a year.

Q10 **Dr Huq:** And that is between the parties, in proportion to how many there are.

Sir David Natzler: There used not to be a specific right for the third party—or the second largest Opposition party, sorry—to have the days that it now has. It now has that as a right, rather than it being an understood convention, which I believe existed. To be honest, I don't know what existed in the 1960s and 1970s, but I believe they had an understood right to have occasional days.



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I am not sure that anything has changed very much in that period in terms of Opposition days, but the right for Back Benchers to bring in motions through the Backbench Business Committee has had, I think, a significant impact. There have been a lot of significant debates, both controversial and on subjects that Members actually want to debate or talk about. That is as opposed to how the Government used to control Thursdays in particular: they would bring forward debates on subjects mainly to expose the talents of a particular junior Minister who had a minor announcement to make, very few people would turn up to take part in those debates and we would go home early—being, in the privacy of this room, very candid.

- Q11 Dr Huq:** I think it was at the beginning of this calendar year that it felt as though no Opposition days were coming forward. It felt as though there was general debate on this, that and the other. It was a bit frustrating for us as Opposition MPs.

Sir David Natzler: The way in which the 20 days are distributed over time is, of course, in the hands of the business managers—effectively the Government, hopefully in discussion with the Opposition. Yes, I do recall there being disquiet expressed on when they had them, because they do not have the right to one every two weeks or whatever. It happens when the Government say in their business management, “This is now an Opposition day.”

- Q12 Kelvin Hopkins:** Sir David, you have touched on the first part of my question already, but I will ask it anyway. Under what circumstances are resolutions of the House effective or binding in law?

Sir David Natzler: They are effective and binding in law when the statute law provides that they are. The obvious example is affirmative instruments. When we resolve to approve a draft instrument, that is then a binding resolution, owing to the text of the Statutory Instruments Act. There is no doubt about it. We are not ordering anyone to do it, but we have resolved under statute.

In 2017, you also collectively resolved to have an early general election, if that is not a painful memory. That was an extremely binding resolution and not an order—I think I am right in saying that. That is because the Fixed-term Parliaments Act lays down the text of the resolution and says that if the House passes such-and-such a resolution, these quite dramatic things will happen. Otherwise, a mere resolution cannot change the law. The only way we can change the law is by law.

- Q13 Kelvin Hopkins:** It is interesting that there are relative degrees of binding. You said “extremely binding”; it is an interesting concept having relative degrees.

Sir David Natzler: Extremely binding in that its impact was very visible not just within the House, but to the nation as a whole.

- Q14 Kelvin Hopkins:** The other part of my question is, to what extent is the law of Parliament binding on the Executive?



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Sir David Natzler: The law of Parliament tries to crystallise what the powers of Parliament are, or what we in Parliament think they are, but we cannot always enforce them against other statutory regimes—that is to say, against statute law or against any other sort of law. Can Parliament bind the Executive by mere resolution? No. Parliament cannot instruct Ministers. Can Parliament pass resolutions, which, by the passage of time if nothing else, effectively bind the Executive and become part of not the temporary set of resolutions that dictate the way we behave—or the way the House conducts itself—but the whole relationship between Parliament and the Executive? I would say yes.

One example is the scrutiny reserve resolution, with which you will be familiar. Basically, Ministers cannot agree to stuff in the Council of Ministers if the scrutiny Committee has said there should be debate first, unless such a debate has been held—that is the so-called scrutiny reserve. The scrutiny reserve has no force of law, but it is observed by the Executive and always has been from one party in Government to the next party in Government. So, gradually, it is reasonable to see that some resolutions, which become part of the law of Parliament—I am hesitating to use Latin phrases—can by practice become binding, such that any Executive disregarding them would seem to people here to be in breach of an understood part of the constitution. I ask Mark to add to that.

Mark Hutton: The phrase “the law of Parliament” is open to a number of interpretations. At its narrowest and, I would suggest, possibly most correct, it is that part of the common law where Parliament is able to regulate its own affairs. The core of that is the power of Parliament to regulate its own proceedings and its own parliamentary activities. That has been expressed in the Bill of Rights, article 9, for a very long time, and that is certainly seen by the courts as being the statutory version of that principle. There is an older principle, but that is the statutory version the courts will look at now.

There is a slighter wider sense in which Parliament has a right to manage its own affairs beyond its own proceedings, which is sometimes termed exclusive cognisance. That is a vaguer term, and one where the courts are more inclined to examine the proper use by Parliament of that power. The boundaries are not clear. They are not clear in either of these circles, if you like. In the end, the adjudication of the boundary is a matter for the courts.

I would say that is the core of the law of Parliament but, as David has said, there are areas in which Parliament takes an action that has a statutory effect, because that is what is provided, or that in effect has a political/legal effect, as in the scrutiny reserve. No aspect of law is engaged in the scrutiny reserve. An aspect of law is engaged in agreeing to an affirmative statutory instrument or agreeing to a motion to have an early election, or indeed agreeing to the motion at the start of the Budget debate that certain taxes are imposed immediately under the Provisional Collection of Taxes Act. Again, that is a resolution having immediate impact and immediate effect, but under a statutory provision.



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- Q15 **Kelvin Hopkins:** I have just a brief comment as a member of the European Scrutiny Committee. On very rare occasions on matters of written scrutiny of the European Union, the Government have exercised long delay in responding. That may not be resisting it, but I wonder if that is a problem that could be overcome.

Chair: Very briefly.

Sir David Natzler: Well, I started my career in 1975 on the European Legislation Committee, so things have obviously not changed. That doesn't undermine the fact that Ministers feel bad about it when they do it.

Mark Hutton: It is also a characteristic of the distinction that I was trying to draw, in that you cannot take legal action to force a Minister to comply with the scrutiny reserve, because it is not that sort of law.

- Q16 **Chair:** This touches upon the European Union (Withdrawal) Act and the procedures set out in section 13, which run to several pages, about how resolutions will impact on the Government's negotiations with the European Union and the approval of the withdrawal agreement and the framework for the future relationship. I wonder whether you could just explain briefly your understanding of what will actually happen.

Sir David Natzler: No, Chairman, I don't think I can. I am certainly not going to try to explain what will actually happen.

- Q17 **Chair:** In terms of what comes to the House first, assuming there is an agreement.

Sir David Natzler: When you say it runs to several pages, I have my copy on two sides of a laminated card, which I recommend to others.

If a statement is made, which is in subsection (1)(a), that a political agreement has been reached, a resolution of the House of Commons is needed to approve the withdrawal agreement and the framework in order for—it is a condition precedent; a necessary condition—eventual ratification of the withdrawal agreement. It is not enough in itself. That is the first thing, one assumes—a motion to approve those two things: the agreement and the relationship. That will presumably be moved by a Minister and the House will then have to decide on it. If it is not agreed, they cannot ratify the withdrawal agreement.

They also have to pass an Act of Parliament, which I think is a little less regarded in the section—section 13(1)(d)—“which contains provision for the implementation of the withdrawal agreement.” Those are the two big hurdles they have to meet. The third hurdle does not concern you, I think, which is that there has to be a debate in the House of Lords, but it does not matter what the outcome is.

- Q18 **Mr Jones:** Would that motion put down by the Minister be amendable?

Sir David Natzler: Amendable means different things to different people, which is why I am going to be careful and not necessarily brief, because there was a UQ on this in the House yesterday. Whether an amendment is



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selected, working at the far end of the telescope, is a matter entirely for the Speaker. Whether it is tabled and is allowed on the paper is also a matter for the Speaker. So the question is: is it likely to be a motion where the Speaker would be advised not even to allow amendments on the paper? The answer to that is no. It is likely to be a motion where amendments would be allowed on the paper. It is also likely to be a motion where there might well be amendments selected and amendments not selected.

The means by which the House has a chance to amend a motion, which was the matter of controversy yesterday, is a different question. Are there unamendable questions? The answer is yes. There are questions that, by long convention, successive Speakers have not been willing to take amendments to. They include, for example, motions to approve a statutory instrument, which has always been held to be yes or no, as simple as that—no amendments are permitted. The same, we think, applies to the most recent and dramatic statutory motions under the Fixed-term Parliaments Act 2011—which is to say, the motion to have an early election, the motion to have no confidence or the motion to have confidence.

Chair: We will come back to that.

Sir David Natzler: I am so sorry—I have wandered off the path.

Q19 **Mr Jones:** If the motion were to be amended, what effect would that have on the procedure set out in section 13?

Sir David Natzler: If an amendment to the motion was passed, and then the motion as amended was passed, which is not a foregone conclusion—if you amend a motion, that is not enough; you also have to agree the motion as amended. If a motion was passed by the House as a resolution in an amended form, it would be for the Government and their legal advisers to interpret whether that met the bar—the gate that has been raised in section 13(1)(b)—of having to have a motion that approves the two documents. It would be for them to decide whether that was sufficient to enable them, in due course, to ratify the withdrawal agreement. I would say that, as they also have to get a Bill through Parliament, which is arguably a bigger hurdle, I suppose it is possible that if there was any doubt, they could deal with that doubt, or seek to deal with it, in a Bill.

Q20 **Mr Jones:** Is there any danger of this becoming justiciable if the Government were to proceed in the face of an amendment that required a condition precedent or sought to amend the terms of the withdrawal agreement or the future framework?

Sir David Natzler: There is a possibility—there must be a possibility—that it is justiciable, because those who do not like it will say, “You have not met the condition under (1)(b).” Yes.

Q21 **Chair:** The condition precedent is a resolution of the House, albeit one required by statute. Would that resolution have any binding effect on the Government? If it said that there should be a second referendum, for



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example, does that become binding because it is a resolution required by statute?

Sir David Natzler: No; it is an expression of the House's opinion. It does not, of itself, create a second referendum. Its political impact I leave to you.

Chair: We are not asking about that.

Sir David Natzler: I know.

- Q22 **Mr Jones:** The subsection provides that the motion should be moved by a Minister of the Crown, presumably in order to secure a veto for the Government over the form of the motion—in other words, they have the control of the form in which the motion is put down. Would the conditions set out in subsection (1) be satisfied if the motion were passed in that amended form?

Sir David Natzler: If it were passed in an amended form, it is a matter of law and not of parliamentary procedure whether the conditions would have been necessary for ratification.

- Q23 **Chair:** There is the ambiguity, but beyond that, it is not a matter for you, is it?

Sir David Natzler: It is not a matter for me, no; it is a matter of law and not of parliamentary practice and procedure, so I am happily ignorant.

- Q24 **Mr Jones:** Proceeding onwards with section 13, there are later provisions that require further motions to be put down in certain circumstances—essentially, where the Government either run out of time or are unable to conclude an agreement. The section provides that that motion should be in neutral terms. What is the significance of it being in neutral terms?

Sir David Natzler: I imagine that, in the eyes of the drafters and of the House that agreed the proposition, it was intended to engage in some way the language of Standing Order 24B, which states that where a motion that the House has considered a certain matter is couched in neutral terms, no amendment is even to be tabled. I think it was intended to engage that Standing Order. Whether it does so successfully, we will have to see.

Evidently, if the House of Commons decides not to pass a subsection 1(b) resolution, that similar provision is triggered. I am sure that any Secretary of State will then want to obey the law and will put down a motion that, so far as he or she is able to, will be couched in their minds, and those of their advisers, in neutral terms, to the effect that the House of Commons has considered the statement they have had to make. It would then be for the Speaker to decide, on seeing the motion taken in the round, whether he considers Standing Order 24B to be engaged.

Chair: There is no reference in the Act to Standing Order 24B.

Sir David Natzler: Of course, it is not referenced in the Act. I am saying that once the motion is tabled, it is for the Speaker to decide whether the



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motion engages the terms of Standing Order 24B. He and his advisers look at every motion, but in this particular case they will ask whether this is a Standing Order 24B motion. If it is, that means no amendment can be tabled; if it is not, they can.

- Q25 **Chair:** So what would happen if the motion in neutral terms was amended to give some instruction or to express some opinion? Would it still comply, the motion having been tabled? Would that satisfy the terms of the Act?

Sir David Natzler: Yes. The Act says only that the Minister of the Crown has to make arrangements to table the motion. What happens to the motion has no statutory significance anyway, even if it is agreed, disagreed, amended, adjourned or whatever; it just says that there will be a debate. The outcome of the debate has no statutory significance.

Mr Jones: But it could have considerable significance if it was decided that it was amendable, and if indeed it was amended.

Sir David Natzler: When you say “considerable significance,” that is political and not statutory.

- Q26 **Chair:** I have just one thing about Opposition day resolutions. If the Government abstain on an Opposition day, does that affect the status of the resolution in any way?

Sir David Natzler: No.

- Q27 **Chair:** So it is still just a resolution, whether or not there is a vote.

Sir David Natzler: Yes.

- Q28 **Dr Huq:** The phenomenon of Humble Addresses, and praying and all that seems to have made a comeback with the Brexit sectoral impact analyses, or whatever they are called. What would you say makes a successful motion for return binding?

Sir David Natzler: The motions for return that we have seen the Opposition move, on which they have obviously taken prior advice, are a recognised exercise of the House’s historical and never challenged powers to call for, in this case, papers from Government Departments. No one has ever challenged the House’s right to do that, and therefore it is an exercise of the House’s existing and recognised jurisdiction. That is what makes them successful. If the question is whether you can you imagine an Address for a return of papers or some other action that was not within the House’s recognised powers, that would be unsuccessful because it would be resisted by at whomever it were directed.

Mark Hutton: Yes, that is absolutely right. Historically, if we go back and look at when these procedures were used regularly in the 19th century, we see that when the House discovered that an Address had been made incorrectly, either for a class of papers—for example, someone’s private papers—or to the wrong organisation, the Address was normally withdrawn and not persisted with. It is clear that the House has an



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understanding of the appropriate use of an Address. The form of the motion is only an Address when it is directed to a Department headed by a Secretary of State, otherwise it would be an order without being an Address—it would simply be an order for papers and would be equally effective. It is worth noting that the distinction between a resolution and an order is sometimes more one of form rather than substance. It is a resolution if it is an Address, and an order if it is simply an order for papers.

Sir David Natzler: So it doesn't matter; it has the same effect. It is exercising the House's unquestioned powers, and a power that the Government avail themselves of at regular intervals to make what is called an "unopposed return" when they want to lay a paper and get the protection of parliamentary privilege, for example for the results of an inquiry report.

- Q29 **Dr Huq:** So the limits on what Parliament can call for by way of a motion for return would be if it is a Department that is not headed by a Secretary of State.

Sir David Natzler: No, that affects the form of the motion. It is purely a matter of, to be honest, slightly antique distinction.

- Q30 **Dr Huq:** So what would the limits be? When would a Department not be compelled to produce papers?

Mark Hutton: Historically, one of the limits has been perceived to be that the House may not use the power to call for legal advice given to Ministers by the Law Officers, for example.

- Q31 **Mr Fysh:** Are papers given to the Cabinet also off limits for such calls for return?

Mark Hutton: I am not aware of any precedented ruling to suggest that they are off limits, so no.

Sir David Natzler: These are the rubbing points between Parliament and the Executive, are they not? Obviously, this happened much more 200 or 300 years ago, but it will no doubt happen again, and the proof of the pudding will be in the eating. Will the Government resist and claim that they are under no obligation to release the papers? In the case of the motions for an Address that we have had so far in recent Opposition days, the Government claimed in one case that the papers did not exist, but at no time have they suggested that if they had existed they would not have made them in some way available.

- Q32 **Dr Huq:** What other effective motions are within the power of the House of Commons to use?

Sir David Natzler: If you are talking about motions that might be moved on an Opposition day, or indeed a Back-Bench business day, it is fair to say that we have discussed this with quite a lot of Members, and I don't think there is a hidden class of motion that has not been revealed to anyone. There are no secrets. There isn't a sort of Harry Potter magic



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motion that can suddenly get everything everyone wants and that we are not telling you about—putting it very crudely. I mean, there might be, but we haven't discovered it.

Chair: This place is often compared to Hogwarts.

Sir David Natzler: I didn't know that, Chair.

- Q33 **Chair:** Is there any motion that the House can bring forward and approve that could compel the Government to legislate in some way? I am thinking in particular of section 24 of the European Union (Withdrawal) Act, which would require a Minister of the Crown to lay a regulation to delay the date. Is there any way in which a Humble Address could compel a Minister to do that?

Sir David Natzler: No.

- Q34 **Chair:** There is no precedent for anything like that?

Sir David Natzler: I know of no precedent for the House of Commons, by resolution or order, being able to tell a Minister how to perform his statutory functions.

- Q35 **Chair:** If the House did that, it would be going into the untested and unproven territory of Humble Addresses.

Mark Hutton: There have long been classes of legislation that have been introduced on founding resolutions, such as Finance Bills and estimates Bills, so there has been a class of Bills where the House has had to pass a resolution beforehand to enable a Minister to introduce a Bill, but it has not been an act of compulsion. The House could agree the Budget resolutions and a Minister could then decide not to present a Finance Bill—you cannot compel the presentation of the Finance Bill.

- Q36 **Chair:** There was a case, I believe, when a Humble Address altered the postal services on a Sunday. This is referred to in "Erskine May". Would that be exercising parliamentary authority over the royal prerogative, or what?

Mark Hutton: What you are talking about probably dates to the early part of the 19th century. I am not a historian, so I am speaking a bit tentatively, but at that stage the use of Humble Addresses did extend to Parliament expressing its purposes—resolutions express opinions and purposes—in respect of matters that were still run under the royal prerogative. I suspect that that was what the Humble Address was doing—expressing Parliament's view of how the postal services should be run—and, in a constitutional monarchy, the sovereign and her advisers took note of that.

- Q37 **Chair:** But the decision of a Minister to introduce a piece of legislation into Parliament is presumably a power that he exercises under the royal prerogative.

Sir David Natzler: Or under statute.



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Chair: Or under statute, yes.

Sir David Natzler: The case you gave, of section 20, involves statutory powers, although indeed some of them are exercised under prerogative as well.

Q38 **Chair:** Well, the statute defines the nature of the instrument that the Minister introduces—

Sir David Natzler: Yes.

Chair: But it does not require or empower him—

Sir David Natzler: It may sometimes require the Minister to introduce orders in certain circumstances. Statutes are larded with things where the Secretary of State has to do something—

Q39 **Chair:** But in this case he is not required to change the date.

Sir David Natzler: No, but you were asking whether there were cases—sorry. If you are just interested in this case, the Minister is not required to do so but he can do so.

Q40 **Chair:** But my point is that if a Humble Address is about directing use of the royal prerogative, this would seem to be a possibility of where the royal prerogative could be directed.

Mark Hutton: I very much doubt whether that is a use of the Humble Address that persists to this day. Nowadays, and for a very long time, where Parliament has wished to encroach on the royal prerogative, it has done so by introducing statute law. That, to me, is probably no longer effective—

Sir David Natzler: A dead letter.

Chair: Very good.

Q41 **Dr Huq:** Actually, no. If it was a regular thing in the 19th century, at what point does non-use of a parliamentary procedure render it defunct? Do such procedures wither on the vine in our organic and evolving—

Sir David Natzler: Our technical answer is that the law does not generally recognise desuetude—in other words, things not being used—so that is why the House still asserts that, technically, it has the power to imprison or fine, but also, following successive Joint Committees on privileges, as again your Chair will know, we are in effect no longer asserting that we would use it. I don't know whether that helps. There is not a magic time limit—

Q42 **Dr Huq:** So they could be exhumed at any minute.

Sir David Natzler: We did not say whether it was 50 years or 100 years—it is not like a release of public records—and a power once there if not removed is technically still there, but it is again mainly of interest to antiquarians.



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- Q43 **Mr Fysh:** On the concept of desuetude—things falling out of use—would any attempt to bring something such as that back into use be justiciable, on the basis that it had fallen out of use?

Sir David Natzler: The fact that the Commons had chosen—the Speaker had allowed the tabling and the putting to the House of the Question—would not be justiciable. The House can come, within reason, to any resolution or order that it wishes. As for whether it would have any effect on those to whom it was directed, if they simply refuse, the question is: who can make them comply? At the end of the day, as we know from summoning witnesses to Select Committees, you have to say what happens and the courts are the only recourse, because we are a law-based society.

Mark Hutton: There are two different categories, perhaps. One is where, as David has described, the House has a power that it is confident it does own, such as the power to summon witnesses, and it may not have the enforcement mechanism to hand and may struggle to find an agency that will exercise enforcement on its behalf. That question has been raised in the context of Select Committees for some years and is still a live question.

There is a separate question whether the House can, on its own initiative, by means of a resolution or order—in other words, something it has agreed to—have an effect beyond the scope of its own proceedings. The history of its attempts to do that is that they have been largely unsuccessful. I'll mention the two most famous examples. The first is *Stockdale v. Hansard*, from the early 19th century, when the House, by resolution, decided it had the power to publish its own proceedings outside its precincts and the courts said, "No, you don't." The second one, which involves a rather more complex process, is where the House, by resolution, applied taxes, particularly income tax, from the point of a Budget announcement, without statutory cover. It did so for quite a long time, but in the end that was challenged in the courts, and again the House lost, because resolution alone was not sufficient. That was when the first Provisional Collection of Taxes Act was introduced—in 1913, I think.

- Q44 **Dame Cheryl Gillan:** I have a couple of general questions, for the record. What conventions are you aware of around how resolutions of the House are treated by Government and others outside Parliament?

Sir David Natzler: I don't think that, formally speaking, we are aware of how the Government treats resolutions—other than that I am quite confident, with respect, that it is no part of our job to sort of chase them through to see whether something is happening.

Mark Hutton: There are resolutions that have statutory effect, as we have described, but I assume you mean—

Sir David Natzler: Do you mean non-statutory resolutions?

- Q45 **Dame Cheryl Gillan:** Yes. And what in your opinion should be the shared understanding of the constitutional force and status of resolutions of the



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House?

Sir David Natzler: Well, I hope there is shared understanding, not just between Government and Executive but with the wider world, because we do not make these resolutions in private. I hope there is a shared understanding that they should be treated for what they are, which means treated with respect as the expression of the will of the elected representatives of the United Kingdom, and that even if what the resolutions call for does not always happen, it is a matter of real significance that Members of the House of Commons have come to this conclusion. Even if it is without a vote or even if, as you say, the Government Members have abstained, or indeed Opposition Members have abstained, this is what the House of Commons has said. And anything, including anything that we do here carelessly, that diminishes the standing that resolutions should have is really regrettable. That, I think, should be borne in mind by people when they bring forward—sometimes—resolutions that may well get passed but that they know do not really express the majority view of the House, in the confidence that no one is going to vote against them. I think it is really important that they are treated with proper respect as the expression of that opinion.

Q46 **Dame Cheryl Gillan:** That does not necessarily always happen. How can you assure that status?

Sir David Natzler: I cannot. I think—

Q47 **Dame Cheryl Gillan:** Is there anybody who is capable of assuring that status, or what would need to change to be able to assure that status?

Sir David Natzler: I think you all have a part to play, as Members, by making sure, when you sign up to, promote or put down a resolution of some sort, that you realise it is a matter of some significance—and that includes early-day motions, if I may say so. The more lightly you treat them, the more lightly the world outside will treat them.

Q48 **Dame Cheryl Gillan:** Do you think that early-day motions are an instrument of the House that have any great value in this day and age?

Sir David Natzler: I think they have some value. Some of them are significant—not just prayers against statutory instruments, which are potentially effective, but the expressions of political opinion and the weight of gathering a number of names in support of a matter, particularly one that is non-partisan, to which Members wish to draw attention, to establish that it should be taken more seriously. You will be able to think of many examples of where a matter has arisen first through an early-day motion, a lot of people have signed it, and that creates some sort of political snowball effect to say that it really needs examination.

Q49 **Dame Cheryl Gillan:** Surely an aspect of our procedure here that includes congratulations to a football team devalues an EDM? I have always described EDMs as pieces of political graffiti, because in many instances they are not on substantial subjects.



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Sir David Natzler: That is what I was hinting at in saying that the solution to making sure that they are treated with respect lies in the hands of those who table them, not in the eyes of those who read them, because they will treat them with contempt if they are unworthy of being a draft resolution of the House of Commons.

Q50 **Dame Cheryl Gillan:** Could you ever see a point where the Table Office would turn round to a Member and say, "Really, this is not a suitable subject for an EDM."?

Sir David Natzler: I don't think it is for the Table Office to do it, nor even really for the Speaker. The Table Office certainly would not, unless the House had so instructed. From years in the Table Office I am aware that what may seem a very small matter to some people may seem a much bigger matter in the eyes of those who table it.

Q51 **Mr Fysh:** I wanted to move on to the Fixed-term Parliaments Act.

Sir David Natzler: Ah.

Chair: I am very sorry that we are detaining you beyond 10 o'clock.

Sir David Natzler: No, no—it was the phrase "the Fixed-term Parliaments Act" that aroused my interest.

Mr Fysh: Is there such a thing as a confidence motion outside of the Fixed-term Parliaments Act?

Sir David Natzler: The Fixed-term Parliaments Act establishes a statutory proposition about no confidence in the form of two specified motions: the traditional no confidence motion and the one that was invented in the Act, which is the positive act of confidence after a fortnight. Those are, in a sense, a particular class of statutory motion. Is it possible to put down a no confidence motion in other terms than those in the Act? Yes. Would it have statutory effect? Even if it included, surrounded in a carapace of other words, the magic formula in the Fixed-term Parliaments Act, would it be effective? That is actually a matter of statute—it is the misfortune of putting motions into statute—and not of procedure. We sense that it would not, but that is the general legal view. However, as your Chair has said, would it be justiciable? The answer is yes, if there was some doubt. What its political effect would be is, of course, quite another matter. It is perfectly possible to imagine a politically extremely damaging motion being passed, effectively of no confidence either in the Government or in a specific Minister or Ministers that had a massive political effect but did not trigger the terms of the Act. Is that what you are after?

Q52 **Mr Fysh:** Yes. So would there be any other practical implications, other than the justiciability that you referred to earlier?

Sir David Natzler: Of passing a non-statutory binding motion? No. I can see none. It is a motion as the expression of the House's opinion and it has political force.

Q53 **Mr Fysh:** If the Government simply declared that an issue was a matter



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of confidence, would that have any formal procedural effect?

Sir David Natzler: No.

- Q54 **Mr Fysh:** In terms of any other pragmatic effects of such a declaration, does it make a difference whether it is the Government that bring such a thing forward or somebody else?

Sir David Natzler: The declaration, which sounds by now almost old fashioned, that this is a matter of confidence I take to be something to do with whipping, and I know very little about that. Whoever brings forward any motion, what the Whips tell you is between them and you.

- Q55 **Mr Fysh:** Finally, what happens in the time period between the first and second motions under route 2 of the Fixed-term Parliaments Act for no confidence? Would ministerial positions remain the same in all circumstances?

Sir David Natzler: I really don't know—I don't think anybody knows. Your next panel will be able to speculate, with much more fun than I am allowed, on what might happen. All I know is what it says. As you say, under route 2 you have the first motion, you have the period and then you can try a second motion to get confidence. What has to change will be mainly determined by what people can get away with in order to get the second vote, I assume, of getting confidence. But that is a matter of politics and not of procedure.

- Q56 **Chair:** If the Prime Minister made a matter a motion of confidence and lost the vote, there is nothing automatic that follows from that in terms of the shape and nature of the Government.

Sir David Natzler: If the Prime Minister or anyone says, "I am treating the vote on Second Reading of this Bill as a matter of confidence," and loses, will that have any effect other than political? No.

- Q57 **Chair:** Even if it was the Budget resolutions?

Sir David Natzler: That is right. It will obviously have a practical effect, if they are unable to bring in the Finance Bill that they intended to, but I do not think that is what you are getting at.

- Q58 **Mr Jones:** In order to engage the Fixed-term Parliaments Act does a motion of no confidence have to be expressed to be pursuant to the Act, or does it just have to use the magic words set out in the Act?

Sir David Natzler: My sense is the latter—if somebody tables that motion, it becomes a statutorily effective motion. We have not had one yet, but it would not say, "The terms of the motion pursuant to"—I don't have my laminated copy—"section 2 or whatever of the FTPA, this House has no confidence." It would just have to say it. I know it sounds much smaller, but when we have a resolution approving an affirmative instrument, it does not set out the terms of the Statutory Instruments Act, under which it becomes effective—it just says it—nor does it give the basis on which the Order has been made.



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Mark Hutton: No it doesn't.

Sir David Natzler: It doesn't give the statutory basis; it is sufficient that it is the right motion. We will recognise it when we see it.

- Q59 **Mr Jones:** The motion of confidence—which, so to speak, neutralises the passage of a motion of no confidence—could presumably be in respect to precisely the same Government. In other words, there could be no change in Government in the intervening 14 days or so.

Sir David Natzler: I think that is a political question. Procedurally, the motion would be accepted. There might be a statutory challenge—I can't quite imagine it—if the House has expressed that it has confidence. When you say, "The same Government," as you will know—

Mr Jones: Sorry, if there had been no change of personnel in the meantime.

Sir David Natzler: Well, yes, but obviously the Government are rather more than their personnel. If they change their policy, presumably the House—but that would be a political decision for the House, had something changed, or maybe nothing had changed and they changed their mind.

- Q60 **Chair:** But that is the point: it becomes a game of chicken between the Government and the House, or the Government and their own supporters. The first vote of confidence is a kind of opening salvo, designed to create some political effect, but the decision whether the Government remain in office or have the power to call a general election is not taken until the second vote.

Sir David Natzler: Sorry, I do not quite understand the point about the power to call a general election, but you are quite right that there is an interval, and then the House is asked the countervailing, neutralising question.

- Q61 **Chair:** But the Prime Minister does not have the power to advise the Queen to dissolve Parliament until—

Sir David Natzler: The Queen cannot dissolve the Parliament. That was ended by the Fixed-term Parliaments Act 2011.

- Q62 **Chair:** All right. So even two votes of confidence lost by the Government does not empower the Government to dissolve Parliament.

Sir David Natzler: The Government cannot dissolve Parliament. It was a prerogative power removed by the Fixed-term Parliament Act, effectively. In other words—

- Q63 **Chair:** So it is only the early general election motion that gives the power to the Prime Minister to advise the Queen to dissolve Parliament.

Mark Hutton: I am not an expert on the FTPA, but I think even that gives the Prime Minister the power to set a date for the election, which, working backwards, has the statutory consequence of a dissolution on a certain earlier date.

Sir David Natzler: So dissolution is by statute.

Chair: Have we missed anything out, do you think, or should we let you go?

Sir David Natzler: That is a binary choice.

Chair: We are very grateful to you both for joining us today. Thank you very much indeed. We will go into private session for a few minutes, before our next panel.

Examination of witnesses

Witnesses: Professor Petra Schleiter, Professor Robert Blackburn and Dr Andrew Blick.

Q64 **Chair:** May I welcome our second panel? Our inquiry is about the role of Parliament and particularly the status of resolutions of the House of Commons. We plan to have a fairly involved discussion about the meaning of the Fixed-term Parliaments Act, so if you reserve your comments about that until we get to that question, we will accelerate through the other parts of the discussion. May I ask each of you to identify yourselves for the record?

Professor Blackburn: My name is Robert Blackburn. I am professor of constitutional law at King's College London, with a special interest in parliamentary affairs. I am co-author of "Griffith and Ryle on Parliament" and of the "Halsbury's Laws" title on Parliament, as well as lots of articles. I did my PhD on the prerogative of dissolution of Parliament.

Dr Blick: My name is Dr Andrew Blick. I am director of the Centre for British Politics and Government at King's College London. I have written about the Cabinet manual and the Fixed-term Parliaments Act, among other things, and I am currently writing about Brexit and the constitution.

Chair: And you are a veteran of this Committee.

Dr Blick: Yes. It's good to be back.

Professor Schleiter: My name is Petra Schleiter. I am a professor of comparative politics at the University of Oxford. I have done comparative work on election-calling rules and on parliamentary democracies' procedures for votes of confidence and votes of no confidence.

Q65 **Chair:** Thank you all for being with us. We will ask brisk questions if we can. Because there are three of you, please do not feel you all have to answer every question, and please do not just repeat what someone else has said. If you could keep your answers brief, that would be very helpful.

I will start by asking a very broad question. How would you describe the



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role of the United Kingdom Parliament within our present constitutional framework?

Professor Blackburn: That is a very profound question. It reminds me slightly of a favourite question of mine that I put to first-year constitutional law students: "Is Britain a monarchy, a republic or a democracy?" That obviously raises lots of issues.

The role of Parliament is what it has always been—to represent the nation and for the ventilation of opinions and views. Historically, the common law requirement for parliamentary consent to legislation and taxation for the security of its continuing existence is at the core of what we call the rule of law, which we celebrated on Magna Carta's 800th anniversary a few years ago. Obviously, there are certain types of business that the House of Commons transacts—legislation, debates, Question Time or whatever—but it is probably important to realise that the House of Commons hardly ever acts as a cohesive entity or body in itself. It is a clearing house of competing or conflicting pressures.

The parliamentary process is all about pressures. We do not have a system of checks and balances like the Americans. We have what Lord Hailsham, the former Conservative Lord Chancellor and party chairman, once described as looking like an "elective dictatorship". Of course, a majority in the House of Commons can always get its way, but if you asked a Prime Minister how easy or difficult it was to get their own way, they would tell you it was extremely difficult. We have a system of pressures rather than formal checks and balances—pressures from the Opposition, Back Benchers, the House of Lords and the media, but none of those could overrule.

The purpose of Parliament, as I said, is essentially to apply pressures—it is all about pressures—and for the ventilation of expressions. I would just add that it has been a tremendous success in terms of the robustness of its discourse and the tolerance of dissent, which is not to be taken for granted. Finally, some might say that the whole Brexit process, which looks a mess and a great crisis, actually shows how a very complex and difficult decision can be debated robustly in the House of Commons.

Chair: I feel a little better as a consequence of that.

Professor Schleiter: I agree with everything that has been said. Given my expertise, I will focus a little on the role of Parliament in relation to the Executive. What we have in the UK is a Parliament that has been institutionally always better equipped to support the Executive than to hold it to account. Consistent with that, we have an Executive that has a lot of power to reach into Parliament in order to progress its business. It controls parliamentary time, it could until recently call an early election at its own discretion, and it has the tool of confidence motions at its disposal. Parliament's main tool for holding the Government to account is the no confidence vote. Beyond that, as we heard in the previous session, Parliament has limits in terms of its ability to bind the Government. Executive accountability sometimes is not entirely helped by the fact that

conventions, on which so many of the constitution's aspects are based, are malleable and therefore open to interpretation.

Chair: Wonderfully brief—thank you.

Dr Blick: I like to look at things historically. It is interesting to ask what has changed for Parliament. If you went back to the 1960s and compared it with where we are now, I think you would see that Parliament has shared power with institutions—sometimes pre-existing and sometimes newly created institutions—in a way that it was not doing in the 1960s. I am thinking of the devolved institutions that have been created, particularly since 1997, although there was a devolved Government in Northern Ireland before then. That is one area where it has shared. Another area where it has shared power—partly through choice, partly through changing practice—is the judiciary. They have taken on an increased role in political decision-making. Those are examples of sharing power. That does not necessarily mean that it has been weakened, but it means that it is operating within a different framework.

Another area where there has been change is the internal balance of power within Parliament. Particularly since changes to the composition of the House of Lords, the House of Lords has become more assertive than it once was. It is still reluctant to fully use the powers that it has, probably rightly so, but it is more assertive than it once was. That is a shift within.

To pick up on the point that Petra made about the relationship with the Executive, I agree that, traditionally, we have had an Executive-dominated Parliament, and particularly an Executive-dominated House of Commons, but in recent decades there has been a shift away from that. The institution that we are sitting in today—the Select Committee—is an important example of how the House of Commons has developed more mechanisms for overseeing the Executive.

If we look at areas such as pre-appointment hearings for major public appointments, that would have been undreamt of if you went back a few decades—the idea that you could get people in who are going to be appointed for a job, talk to them and, possibly, not be entirely deferential regarding their credentials for the post they are being proposed for. Those are examples of change, and I think it is important to be aware that there is a shifting dynamic going on. That is something that should be taken into account.

The final point that we have to think carefully about in terms of sharing is that, again, if we go back to pre-1973, referendums were things that took place at a local level on significant decisions such as whether pubs should be open on Sundays, but they were not the major decision-making device that they have become since 1973. In a sense, that is another entity that has been brought into the constitutional mix—the public being asked directly to express a view on very important decisions. Are we going to have more of them in future? That is another question. It is certainly another area where power has been shared—willingly—by Parliament, but nevertheless it has been shared, and it has to be taken into account.



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Q66 **Chair:** In one sentence each, how true is it that we have a parliamentary Government rather than Government by Parliament?

Professor Blackburn: A realistic terminology for understanding the parliamentary process is to say that its role and function is not to exercise direct power commands or obstruct Government policy and action, but to influence it by generating advice, criticism and scrutiny.

Professor Schleiter: I fully agree with that. This is a parliamentary democracy, so in a sense, you can think of the Government as the most important Committee of Parliament. The Government is accountable to Parliament. It exercises its power only on the basis of parliamentary confidence. That is how the Government is, in a sense, governing on behalf of Parliament.

Dr Blick: Government by Parliament is an impossibility, and if we did have it, it would mean Government by factions within Parliament, which I would not recommend.

Q67 **Dame Cheryl Gillan:** May I start with you, Dr Blick? You talked about how Parliament has changed, but now I want you to take out your crystal ball. How do you think the role of Parliament might change in response to the evolving nature of the constitution, particularly because of the huge tension between the increased use of referendums—or referenda, depending on where you sit—and representative democracy, which is becoming very apparent?

Dr Blick: The recent experience of referendums—I very much fall in the referendums camp—may mean that there is a reluctance to call them again in future, but I would not count on it being possible to evade the calling of them. If you look back to 1979, that brought down the Callaghan Government—the experience in Scotland. They went away for a while, but they came back in a big way in 1997. They could come back again.

They do raise tensions—the Committee has looked at the issue and produced a good report on it—if they are not properly handled. We had a very good example of how not to handle one recently. Parliament legislated for a referendum without really giving any thought on either side of the argument to what actually happens if we get the result that the Government do not want. That is what happened, and we are living with that now. That is probably one of the reasons why we are having this inquiry right now and why we are talking about resolutions, the Fixed-term Parliaments Act and things like that. It got us to where we are, so I think that would have to be looked at very carefully.

Another issue going forward will be the balance of power between the Executive and Parliament because we are—we are assuming we are—bringing certain powers back from a supranational institution. That has not been mentioned yet today. Who will actually be responsible for those powers? Will it be the Executive? Is it going to be Ministers? Where does Parliament fit into that? That will be an ongoing issue.

Issue No. 3 is where the devolved institutions fit into this. Where Parliament could be useful in this regard is in finding ways of incorporating those devolved territories into central decision making. It's easier said than done, but that is something that has got to be looked at very carefully.

Professor Schleiter: May I pick up on the question of the relationship between the Executive and Parliament? One of the things that is interesting about the UK constitution is that it is so malleable. That also means that the parliamentary party system affects the balance of power between Parliament and Government. Increasingly what we have seen in recent years is that the model of single-party majority Government has come under pressure. At the same time, we are in this period where we have to make hugely consequential decisions on very controversial issues, including Brexit.

That, to my mind, has given rise to a contradictory constitutional dynamic in terms of the relationship of Parliament and the Executive. On the one hand, Government has been seeking to interpret its powers and its procedural tools so as to shore up its position and to be able to advance its business. On the other hand, we have seen push-back from a number of different actors to rebalance relationships in favour of Parliament.

So we have seen the Fixed-term Parliaments Act, but we have also seen the use of the Supreme Court—for instance, in *Miller v. Secretary of State for Exiting the European Union*—to basically say an Act of Parliament is required to give notice of the UK's intention to withdraw from the EU. So we have seen a tussle here, and probably will continue to see that tussle.

Q68 **Dame Cheryl Gillan:** Would you like to recommend any changes to the future?

Professor Schleiter: Would I like to recommend any changes to the future? I'm not sure I fully understand the question.

Q69 **Dame Cheryl Gillan:** I asked you how the role of Parliament would evolve, but I wonder how you would see any practical changes being made to resolve some of the tensions that have now sprung up in the system.

Professor Schleiter: I don't think there is a real, practical way to resolve these tensions. It really depends on what Parliament intends and, on the other hand, on what the Government is willing to do and able to get away with.

Professor Blackburn: The two sides of the same coin of parliamentary democracy are representation and responsibility. It is quite striking that in our jurisdiction the emphasis for most of the 20th century was very much upon responsibility—everything was accountable, and we had the doctrine of ministerial responsibility. This harks back to the marked class structure in British society for much of the 20th century until quite recently, which had deference within in. I think that what has happened progressively over the last couple of decades is that that deference has gone and people

want to be involved and represented much more. Within our democracy generally there is an expectation and desire for more representation in our political institutions, and that is what we are struggling with. We are struggling with the concept of referendums and how Parliament engages with the public. So it is within that big shift that we need to think about adjusting parliamentary procedures.

Q70 Dame Cheryl Gillan: What adjustments would you make to those parliamentary procedures?

Professor Blackburn: That's a big question. I have written a lot about political and constitutional reform, so I can only touch on it and perhaps send some articles through to the Clerk later on.

Q71 Chair: What's your top reform?

Professor Blackburn: So far as the House of Commons is concerned—perhaps I can limit it, because I think the Lords does need reforming—at some point in the future we will need to codify the constitution. Those are big issues. The House of Commons has gone through a rapid procedural change in the last 10 or 15 years, and Back Benchers have been considerably strengthened; I think there should be a period of consolidation while trying to explore ways in which it can work out its relationship with the electorate. I know there are procedures, such as the public stages of legislation and petitions, which are not terribly successful so far, but it is that area that probably has to be addressed.

Q72 Dame Cheryl Gillan: None of you has mentioned technology and the impact it has on Parliament.

Professor Blackburn: That's part of the representation, yes.

Q73 Dame Cheryl Gillan: It is very difficult for parliamentarians, who are now driven by the mass access of people pressing one button to send a complex message that they do not necessarily always understand. How dangerous do you think that is to democracy, and does it distort democracy in this House? If you get 1,000 emails, all worded exactly the same, through something called 38 Degrees—that is, of course, if they arrive in your inbox—surely that distorts the priorities for a parliamentarian and therefore could distort the priorities for a parliamentary democracy?

Professor Blackburn: I have no answer to that. It is an enormously complex issue in our runaway world. The technology is running away much faster than we can keep up with.

Dr Blick: I would say that, historically, we have been here before, in the sense that if you went back to the 17th century, the proceedings of Parliament were secret and you could be severely punished for publicly revealing something like an event such as this today, rather than it being broadcast. The printing press helped to change that. It created that pressure, and it also created pressure on MPs to respond to things.



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Technological changes have happened, and Parliament has been pretty good at adapting to them. Eventually we get to a point where *Hansard* is being printed up by the early 19th century. Things are moving a bit more quickly than that—the internet was only really invented in 1969. Where we are now, things are moving a lot more quickly, but I think Parliament is capable of dealing with these things.

Democracy is always about competing interests and distortions. In a way, Parliament's job is to be a channel for all those different interests and to somehow intermediate them and produce something coherent out of the other end. That is the challenge, but it is a challenge that has always been there and has involved technology.

- Q74 **Dame Cheryl Gillan:** But that has to be one of the major changes in Parliament—to be able to respond, and to have the resources to respond, to the technological revolution.

Dr Blick: Yes.

Professor Schleiter: Yes, I'm sure it is.

- Q75 **Mr Jones:** Professor Blackburn, what traditionally has been the understanding of the status of resolutions of the House?

Professor Blackburn: I think you need to understand the law and custom of Parliament, as we call it. Parliament is like a jurisdiction all by itself, with its own procedures and types of resolutions. The courts are not involved; under the Bill of Rights, they cannot inquire into the internal proceedings of Parliament and so on. A resolution binds the House absolutely. That is its constitutional force.

The only other point I would add is that adopting the word "constitutional" is slightly peculiar, because what is constitutional and what is not? We do not have a documentary constitution, so we have no ready definition of what the constitution is. We can construct and try to agree one in the abstract, but I think it is probably best to take out the word "constitutional" and just say, "What is the force of a resolution?" Does that answer your question?

- Q76 **Mr Jones:** Yes, to an extent. It seems to be confined to the House itself.

Professor Blackburn: Yes, and resolutions of the House have limited application outside the Palace of Westminster, but they may be binding on Ministers in terms of ministerial accountability.

- Q77 **Mr Jones:** Yes. My next question is: what conventions are you aware of as to how resolutions of the House are treated by Government and by others outside the House?

Professor Blackburn: In theory, the power of Parliament is unlimited, but it comes up against the royal prerogative of Ministers. Disclosure of some information, for example, may be protected on the royal prerogative grounds of national security or whatever. A lot of this is untested water, even the powers of this Select Committee to require Ministers to do things



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or to allow their civil servants to come before it. Usually there is a bargaining process; it has never actually come to crunch time to find out where that line is going to be drawn.

- Q78 **Chair:** In the absence of statute, Parliament's power is limited, but in terms of statute, Parliament's power is not constrained by anything.

Professor Blackburn: That's right. If it wants to assert itself externally, it needs to pass an Act of Parliament.

- Q79 **Mr Jones:** But in terms of resolutions, again, we have heard recently—in the previous session, I think you were here—about resolutions on Opposition day debates being passed and, apparently, a new convention arising, declared by the Leader of the House, that the Government will respond to those resolutions within 12 weeks. Is that a real convention? Is that the way in which conventions develop?

Professor Blackburn: Conventions are a terminology and construct of constitutional lawyers, made famous by Albert Dicey in 1885 in his book on the "Law of the Constitution", just so that we can understand or make sense of in our constitutional law all these customs, traditions and habits. It is quite easy to use the word "convention" and to think it is a particular type of convention or not, but actually conventions are very elastic and come in all different shapes and sizes. Some are very fundamental, like the Prime Minister must have a seat in the House of Commons, or confidence motions, and some are very trivial.

The convention that you are referring to—I wonder whether that was a wise use of terminology by the Leader of the House—is actually just a statement of intent and practice: "This is what the Government will do." Furthermore, conventions cannot be declared like that; they have to have some sort of force. There has to be some general agreement—if you are going to declare a convention, and there are only a few examples of that happening, such as in the preamble to the 1931 Statute of Westminster on getting the consent of dominion legislatures before making a change in the line of succession to the throne and so on, there has to be some established form. You cannot just declare a convention and say that it exists.

Chair: Thank you. Dr Huq, did you want to come in on that point?

- Q80 **Dr Huq:** I was going to ask about precisely the same thing, the new convention that the Leader of the House has unilaterally declared that within 12 weeks of an Opposition day there will be a response from the Government. I want to make a similar point to the one asked about by Mr Jones. Do you think that that exists within the existing convention to take seriously resolutions of the House passed on Opposition days during Back-Bench time? Also, do you see a new convention developing with the use of military force going before Parliament first, because we have seen that in recent years? Is that turning into a convention? When does a thing become a convention?



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Professor Blackburn: I said earlier that Parliament is all about pressures. The Leader of the House has said that this is a convention—that may be a hostage to fortune, or whatever—and therefore there is great pressure on her to fulfil what she has promised. She has elevated it into the language of a convention, a constitutional rule.

On the war powers convention, academe has had a wonderful time, spending days if not weeks discussing what is going on here. But that is a very good example of the Government declaring what they will and won't do. There is rising expectation, and they have created expectations by having these motions. Tony Blair did have motions, but they were phrased in a particular way, so that they were not absolutely a yes or no, a "Shall we engage in military action?" The fact that David Cameron complied with the will of the House created a very powerful expectation that there should be a debate, but we have just seen this Prime Minister go ahead without one. That shows the nature of conventions.

Another example, incidentally, of just declaring a statement of practice, comparing different types of conventions, would be the Ponsonby rule about treaty making—before the legislation lay down how the treaty should be dealt with. That was just a declaration of what the Government would do before it ratified treaties. It would lay them down in a particular way. If I can compare a couple, it is very important that the Queen will give her assent to Bills passed by both Houses of Parliament—it is absolutely fundamental, it is very, very important—but conventions of Cabinet responsibility that they will speak with one voice or on the confidentiality of proceedings are just a declaration of political common sense. They don't want to embarrass themselves by appearing to be squabbling or whatever. Conventions come in all shapes and sizes and you do need to be aware of that. In my own writing, I usually attach one other word on to convention to make it clear what type I am talking about—conventional practice, conventional principle or something like that.

Q81 **Chair:** Do either of the other witnesses wish to comment at this stage?

Dr Blick: I would add on the conventions point that even if you try to put them into statute, as was recently done with the Sewel convention, they don't necessarily solidify. It is worth bearing in mind that we may see weaknesses in what are called conventions, but actually putting them into law doesn't necessarily answer it because, as we saw with the article 50 case, the judiciary said it is still a convention and we don't regard it as being justiciable.

Q82 **Kelvin Hopkins:** These questions are to Professor Blackburn again. What has been the constitutional effect of the Government's decision not to vote on Opposition and Back-Bench motions expressing criticism of their policies or actions?

Professor Blackburn: So, the question you've asked is about the effect of this new practice of the Government not voting on Opposition day motions.

Chair: It might be one word.



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Professor Blackburn: This is the stuff of politics. It has made no difference to the status of resolutions of the House. That is the first point to make. The principal effect of the change in governing party conduct is purely political, designed, no doubt, to weaken Opposition pressures on Ministers and help protect a fragile governing majority from embarrassing defeats in the House of Commons. I think it is the fragile nature of the governing majority that has produced the practice. As I say, this is the stuff of politics and if the House of Commons objects to this, collectively—I know the Speaker has strong views on the matter—then it must assert itself.

Kelvin Hopkins: That's interesting.

Chair: Do the other panellists have anything to add on that point? No. You are being very patient.

Q83 **Kelvin Hopkins:** Are you aware of any precedent for the Government routinely abstaining from votes in the House of Commons in this way?

Professor Blackburn: No. The Opposition, yes; but no.

Q84 **Kelvin Hopkins:** Is there any constitutional basis for the Government's recent practice of requiring its Members to abstain in relation to certain motions critical to the Government but to vote in other non-critical motions?

Professor Blackburn: Not that I am aware.

Q85 **Kelvin Hopkins:** My last question: to what extent have the Government established a precedent for future Governments to disregard resolutions of the House?

Professor Blackburn: They may have created a rod for their own back. If they are going to play this game then when the Opposition get into power, if it suits them to do this, it will make it easier for them to do so as well.

Q86 **Chair:** What happens in other Parliaments in Europe, for example? Are motions disregarded in this way?

Professor Schleiter: They can be disregarded in this way; it really depends on the nature of the motion. If the motion is for instance about confidence or no confidence in the Government, there is no question of the Government not voting in it.

Kelvin Hopkins: Some years ago, I met many parliamentarians from across Europe. Some Danish parliamentarians said, "You have strong Government, weak Parliament and we are the other way around", because they have proportional representation, multi-party systems, and we have Government and Opposition—usually two big parties.

Q87 **Chair:** Do you think electoral systems make a difference in terms of the relationship between Parliaments and their Governments?

Professor Schleiter: Clearly they influence the composition of Parliament and therefore the relationship between Parliament and the Executive. There is no question but that that is the case.

Q88 **Chair:** So proportional representation systems change the balance of power.

Professor Schleiter: They do, and they change the way that Parliaments organise themselves and set up their standing rules.

Q89 **Chair:** How does that have an effect?

Professor Schleiter: In general, when you have single-party majority Government, the governing party would tend to delegate more power to the Government. When you have a Government who are composed of multiple parties because Parliament is composed by PR—it needn't be that way, but there is a correlation—the governing parties have an interest in keeping a check on each other and therefore reserving some power for Parliament. That means making Committees slightly more powerful or ensuring that they work in slightly different ways.

Q90 **Chair:** We have recent experience of hung Parliaments. Do you see a parallel effect on our politics of the balanced Parliaments that you tend to get in other systems?

Professor Schleiter: This is the interesting process that we are currently all part of, and that is why we are having this debate, I guess. Hung Parliaments bring up the question about the appropriate balance of power between the Government and Parliament. As I said earlier, I perceive there is a contradictory constitutional dynamic, where the Government are trying to say, "Okay, let's try to interpret whatever procedural tools we have in a way that allows us to support the Government best", but there is pushback in the other direction, partly from within Parliament, to say, "Well, let's just move the balance of power a little bit further in the direction of Parliament."

Q91 **Mr Fysh:** What, in your opinion, should be the shared understanding of the constitutional force and status of resolutions of the House? You were talking earlier about the way that "conventions" can help to control them, but how can that status otherwise be assured?

Dr Blick: One general point is that we must be aware not only of what can be done with conventions, but of what cannot be done. We talk about a doctrine of parliamentary sovereignty; we don't talk about a doctrine of House of Commons sovereignty, and we must be aware of that. As was decided in the article 50 case, a resolution of the House of Commons does not have the force of an Act of Parliament, and it cannot. It is actually quite helpful to appreciate the limitations before we go on to look at what can be done with them.

Professor Blackburn: The force of a resolution is simply the political ramifications if it is ignored. The House of Commons has the power to elevate the authority, in effect, of any designated species of resolution if it

so chooses, by passing an Act of Parliament, and if it doesn't, then by involving the courts.

Professor Schleiter: I agree with that.

Q92 **Mr Fysh:** Are there any particular ways that we could change the procedures or ways we practise to change that status?

Professor Blackburn: What is it you want to achieve?

Mr Fysh: It depends doesn't it? From a practical point of view, what might be the interesting things for us to look at in order to strengthen the role of Parliament and the House of Commons within the process?

Professor Schleiter: If you are concerned about ensuring the bindingness of certain types of resolution, the obvious way forward—perhaps Robert or Andrew will contradict me—is to place in statute the nature of the procedure you have in mind. That is the obvious way forward and the only way in which you can limit the ability of other political actors to reinterpret conventions, exploit loopholes, or set new precedents.

Professor Blackburn: If there is an issue that raises difficulties or outrage among Back Benchers, the mechanisms of the parliamentary process should be engaged. We have a particularly robust form of Opposition in our Westminster politics, and we now have this robust structure of Select Committees. That should be enough to secure the force that you want behind a resolution of the House. If a majority has actually resolved something, that should dominate how the Government behave, but through the political process. Because we do not have a written constitution, we have a very politicised constitution. This inquiry is extremely useful.

Parliamentary procedure has a particularly elevated authority in our system of constitutional Government, precisely because we do not have a written constitution. It is only through procedures in the House of Commons that you can hold the Government to account. We do not have a written constitution that will bind Executive action. We have so many conventions—even the existence of the office of the Prime Minister is a convention—that it is down to the House of Commons and its procedures to control the Executive.

Q93 **Mr Fysh:** Should we, for example, try to put hard limits on the number of individuals in the House of Commons who can be in the Government?

Professor Blackburn: I think the 95 limit is about right. I do not know whether my colleagues have different views. I think there has been some disquiet about having non-ministerial persons in Government—

Mr Fysh: Vice-chairs and trade envoys.

Professor Blackburn: Which has inflated the Government payroll.

Dr Blick: I am not clear how you would stop that. We have the statutory limitations, so if the Government want to invent titles and give them to

people as a way of keeping them onboard in votes, that is partly up to them.

Mr Fysh: Thank you.

- Q94 **Chair:** Her Majesty's Opposition, in an attempt to drive through an Opposition day motion that could have a binding effect, used the Humble Address procedure—the motion for a return. What would be the consequence if the Government did not comply with a motion for a return?

Professor Blackburn: That was quite a shrewd move by the Opposition. Harking back to what I said before, there the power of Parliament comes up against the prerogative of the Crown. That is very rarely tested because you have a governing majority in the House of Commons. Even a Select Committee, which usually has a Government majority, very rarely goes for the jugular, as it were, with a complete showdown and a constitutional crisis.

The Government have responded to that particular procedure, but it is an unresolved issue. You have the unlimited power of Parliament to demand the information and you have the prerogative defence of Ministers to claim that it would be contrary to the public interest to declare it. If the House of Commons wanted to take this further, it could attempt contempt proceedings, but the Government majority would probably stop any contempt finally being had. In the old days, you could have resorted to impeachment, but that does not really exist any longer—it is an archaic and anachronistic procedure. If you want to involve the courts, you can legislate on the matter. But this is us—we resolve the stuff of politics through the political process.

Chair: Any other comments? Rupa Huq.

- Q95 **Dr Huq:** Do Opposition parties and Back Benchers have sufficient parliamentary mechanisms to hold the Government to account?

Professor Schleiter: That is not a question for me because it is UK specific.

Dr Huq: As an Opposition MP, it always feels like no, but what do the experts think?

Professor Blackburn: Yes, personally, I think they do. We have basically a two-party system. I know other parties can come in, but because we have first-past-the-post voting, that is an electoral system that produces the least number of parties in the House of Commons. You can see that, historically, the House of Commons is adversarial. We have a highly adversarial system of Government. Traditionally, that has worked very well in our system; it is a very robust form of political discourse. You can see the way in which the procedure that has been used by the Opposition already can be exploited; there are well-established techniques of Opposition day motions. Yes, I think that the Opposition has sufficient powers.



Q96 **Dr Huq:** Andrew Blick? For completeness, I should say that you are also my constituent—I have knocked on your door, I think.

Dr Blick: If we look at the process leading to exiting the European Union, we have seen evidence that groups of Back-Bench MPs working together—in this instance MPs on the governing side—can achieve an immense amount and apply an immense amount of pressure to the Government. Clearly, the instruments are there to secure the outcomes they want, but it probably involves working as groups more than working as individuals—and working with outside groups that can apply pressure, for instance through the Petitions Committee and so on.

The mechanisms are there. There could always be more time available—that is always an issue. Some of the recommendations of the Wright Committee that perhaps could have been implemented were never fully implemented. That comes back to the point that we are in a system where the Government is supported by the House of Commons. One of the primary purposes, if not the primary purpose, of the House of Commons is to produce a Government, so there are limits to the extent to which that system is going to allow for individual Back Benchers, particularly on the Opposition side, to make a difference. In my experience, it is probably a very long and sustained game that achieves things, rather than immediate gains.

Q97 **Dr Huq:** So your answer is, “Yes,” Professor Blackburn, and yours is, “Could do better,” Dr Blick. What additional powers could there be? You can have people on the ropes with things like urgent questions. There is not a votable motion, so nothing happens, but you can make someone squirm a bit.

Professor Blackburn: The procedures exist if the political will is there to use them. Comparatively, you need to remember that the Opposition barely exists in many jurisdictions. I remember some parliamentarians coming from an eastern European country, which will remain nameless. Through a translator, I was explaining to them how the Westminster Parliament operated, but when I got down to the importance of opposition and its formalised nature—we have a Leader of the Opposition, who is given an allowance and 20 days or whatever for Opposition day motions, and has a privileged position at Question Time—the word “opposition” could not be translated. They said, “What’s this word ‘opposition’?” We often take for granted the huge success of the procedures of the House of Commons in the working of our democracy.

Dr Blick: One of the issues there is the leadership of the Opposition—it is a structured Opposition rather than Back Benchers within the Opposition. There are two different models there: individual MPs and the party leadership. The same 1937 Act of Parliament that gave a salary to the Prime Minister for the first time also in effect created the official post of Leader of the Opposition. It is very much institutionalised that you have a Prime Minister and a shadow Prime Minister, so that is the way our system traditionally has tended to work, but there are a lot more routes for Back

Benchers than there once were. This Committee is an example of one that did not exist in the same way before 1979.

Professor Schleiter: It is entirely a political question, and it is entirely in the hands of Parliament just how many mechanisms it wishes to create to hold the Government to account. That is the simple answer to the question. Comparatively speaking, there is an infinite variety of institutional rules that you can use to hold a Government to account. Other countries have, in part, more powerful Committee systems. They might constrain the powers of the Government to allocate parliamentary time. That can be done in a slightly different way. You could alter the rules about the confidence relationship. With the Fixed-term Parliaments Act, you have already altered the right of election-calling. It is entirely in Parliament's hands. Parliament can legislate on anything to create greater accountability, but it has to be able to legislate.

- Q98 **Dr Huq:** But we have seen Short money cut. I remember going to a conference in Berlin—a Government-funded Opposition think-tank put on this thing and flew everyone there. We do not have anything like that. When I was briefly a shadow Minister, I went to see my opposite number, who had two floors of the Home Office and millions of people doing stuff for him, whereas I felt I was googling my own speech on the day.

Professor Schleiter: Yes, resourcing is also a question of that kind, and ultimately it is for Parliament to take a view. If you take a view, you can do whatever.

Professor Blackburn: The facilities of Back Benchers and the Opposition together have improved dramatically over the last 40 years. When I first started coming to the House of Commons to do research, you would meet an MP for a discussion sitting on the stairs writing his notes. Now there are offices and so on. No doubt the facilities could be improved, but the trajectory of strengthening the House of Commons, Members and the Opposition has continued to improve. Historically, it is worth bearing that in mind.

In terms of policy, yes, it is true that in Germany there are subsidised policy units and so on, but, quite unique to the United Kingdom, we have a large number of independent voluntary think-tanks. That is something quite special about this country. All the parties have think-tanks that they rely on to feed them ideas and do policy studies—the Conservatives, the Labour party and the Liberal Democrats. I would like to think that the research generated by university departments also provides a considerable amount of policy work that can be picked up or not by parliamentarians, whether they are in Government or Opposition.

- Q99 **Mr Fysh:** What is the historical significance of confidence motions in the UK constitution? Is there now such a thing as a confidence motion that falls outside the terms of the Fixed-term Parliaments Act?

Professor Blackburn: That is one of the most fundamental constitutional roles of our system. It is absolutely at the core of our system of parliamentary control over the Executive working in our non-separation-



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of-powers constitutional structure. That is the significance of it. What was your next question?

Q100 **Mr Fysh:** That status has arguably changed quite dramatically as a consequence of the Fixed-term Parliaments Act. What is the status of something that is expressed as a confidence motion but that is not technically expressed in the terms in the Act?

Professor Blackburn: Stated simply—I thought you might ask that question, so I have written it down, and I have tried to write it as simply as possible—the status and effect of no confidence motions remains largely as it was prior to the Act, except that if the terms of the motion are identical to those provided for in section 2(5), the procedures set out in the Act apply.

Q101 **Mr Fysh:** So what you are saying is that the same pressure would be there.

Professor Blackburn: Exactly the same pressures, yes. The Act may have created some confusion—clearly it has, I think—and lots of academic debates, but really, if a motion falls within the terms of the Act, the provisions of the Act apply and those are statutory. Any other type of motion will have exactly the same effect that it would have had before, and the effects are political.

Professor Schleiter: I completely agree. If there is a motion of no confidence in the Government that falls outside the wording of the Act, my understanding is that, by convention, that motion would still withdraw the authority of the Government to govern, if it has been understood, prior to the motion, that it is a motion that engages confidence in the Government and targets its removal from office, rather than some policy change. A Government that is defeated in a vote that has been declared a no confidence motion cannot carry on in office. That is a political implication.

Mr Fysh: Right.

Q102 **Chair:** That is merely a convention, isn't it? There is no force of law that requires the Government that loses a vote of confidence to relinquish office.

Dr Blick: It is a convention without which we are not a democracy.

Professor Schleiter: Absolutely.

Dr Blick: A Government has to command the confidence of the House of Commons, because that is the essence of our democracy. It is merely a convention that the Queen is not really in charge of the Government, for instance.

Q103 **Chair:** But the Fixed-term Parliaments Act creates a second chance for the Government in office, doesn't it?

Dr Blick: It creates a second chance if that wording is used. If other wording not within the terms of the Act is used, and it is very clear that it is pointing towards the withdrawal of confidence—clearly there is some

scope for debate about what does and does not constitute a confidence motion, as there always has been. It is sometimes used as a disciplinary measure by a Government, to say, "If you don't vote for that, we'll treat that as a confidence motion." But if it is clear that that is what it is, it is very difficult for a Government to continue.

I draw your attention to paragraph 2.12 of the Cabinet manual, issued after the Fixed-term Parliaments Act came in, which refers to early election motions—confidence motions or whatever you want to call them—within the terms of the 2011 Act. It also says that after an election, a Government that has lost its majority can carry on if it wishes to "see if it can command the confidence of the House of Commons". That Cabinet manual, which is not completely decisive but is the Executive's view of our constitution, seems to imply that there is some other way in which confidence can be either provided or not. Again, if a confidence motion of that kind is not constitutionally binding, whether it is legally binding or not, the House of Commons cannot get rid of a Government even if the Government has lost a majority in the House of Commons. That is incompatible with democracy.

Q104 Chair: Some of my colleagues tell me that they can safely vote for a vote of no confidence in order to try to change the Government's policy but not necessarily get rid of the Government. That is not your view.

Professor Schleiter: That is not my view. There are a number of readings—and we may disagree about this. My views on this question are also evolving as I have more conversations about it. Let us take a step back and think about what the Fixed-term Parliaments Act was designed to do, and how it affects confidence and no confidence motions. The Act was designed to establish what the maximum term of a Parliament is and to give us a mechanism to dissolve a Parliament early. Those are the two things it was designed to do. It was never designed or intended to rewrite confidence and no confidence procedures.

So my view is that it works in tandem with existing conventions on confidence and no confidence motions and should be read in a way that is consistent with those conventions. We might disagree about that. I see where you are coming from, and I think there are several ways of reading the Fixed-term Parliaments Act which may contradict what we perceive as current conventions with respect to confidence and no confidence motions.

Professor Blackburn: Is what you are asking about, "We need another Government to get through Brexit"? Is that the question or issue you are trying to address?

Chair: I can't imagine how you could possibly think that was on my mind.

Professor Blackburn: If the suggestion is that the Prime Minister needs to be replaced—if that is what you mean by replacing the Government—normally that would be dealt with by a governing party leadership contest. It would be a bit over the top, to use a casual expression, to have a no confidence motion in the Government to replace the governing party



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leader. That seems the wrong way to go about it, but that could be done. So a majority could have expressed no confidence in the Prime Minister in terms outside the Fixed-term Parliaments Act—perhaps you would have to expressly state that it was a vote of no confidence in the Prime Minister—and that would trigger a party leadership contest and there would be a resolution of confidence in the newly formed Administration, perhaps under your premiership, Chair.

Chair: The practical difficulty is, modern political parties have procedures for changing their leaders that take longer than 14 days.

Q105 **Mr Fysh:** Except that the confidence motion that you describe as outside the terms in the Fixed-term Parliaments Act does not lead to a dissolution of Parliament as it would have done previously.

Professor Schleiter: Or at least, it is not in the Prime Minister's hands.

Q106 **Mr Fysh:** It is not in the Prime Minister's hands—it is in the Queen's hands still.

Professor Schleiter: No.

Dr Blick: No.

Professor Blackburn: No. The Queen has no role in the dissolution of Parliament.

Q107 **Chair:** If the Prime Minister chose to resign, she would tender her resignation to Her Majesty, and Her Majesty would ask her, "For whom should I send?" Under those circumstances, what would the Prime Minister be expected to say?

Professor Blackburn: The Prime Minister could then either by agreement with Cabinet, remain in office until a successor was chosen, just like the situation with Margaret Thatcher, or she could resign immediately and the Cabinet could appoint an interim chair of Cabinet who would be de facto Prime Minister. Remember, there is no statutory requirement for a Prime Minister.

Dr Blick: In 1931, although it did not involve a confidence defeat, Ramsay MacDonald resigned on behalf of the minority Labour Government and then reappeared as Prime Minister of a coalition Government. Many outcomes are possible in these scenarios. When we talk about a change in Government, as Robert suggested, what does that actually mean? Does it mean the Prime Minister has to go? Does it mean that party composition has to change? That is not quite as clearcut, but something has to happen.

Q108 **Chair:** And what would you draw from the precedent in 1940 when the leader of the Conservative party resigned as Prime Minister and another Member of Parliament became Prime Minister who was not leader of the Conservative party but Prime Minister of a coalition Government?

Professor Blackburn: That is a good example of how all these matters and the nature of the motion—I think that was an Adjournment motion in fact—all depend on the political circumstances. There was a growing



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feeling that Chamberlain was not the right person for the job at that particular time, so the Norway campaign was just the trigger for the discontent in the way in which the Government were proceeding.

Dr Blick: And the Government didn't lose that vote.

Professor Blackburn: So this is when you ought to think about other types of convention with a little "c" defeats, whether that is on the Budget or on other matters, such as a major matter of policy. All the circumstances have to be taken into account as the political force upon the Government.

Professor Schleiter: To come back to your question, your colleagues who think they can vote no confidence in the Government without taking a risk would open up a Pandora's box. They cannot be sure that the consequence that they envisage will actually transpire, and especially if they use the Fixed-term Parliaments Act. If they run out of time within 14 days, it is not a question for the Queen or anyone else—running out of time is an automatic trigger for an early election.

Q109 **Mr Fysh:** If it has been expressed in the terms of the Fixed-term Parliaments Act.

Professor Schleiter: In the terms envisaged under the Act.

Q110 **Chair:** In those circumstances, the Prime Minister is required to set a date for a general election.

Professor Schleiter: That is my understanding.

Q111 **Chair:** Or is it in the gift of the Prime Minister to set a date?

Professor Schleiter: There is no discretionary element.

Dr Blick: Regarding the exact date, there is a degree of flexibility but, from memory, not on the actual fact that there has to be an election.

Q112 **Mr Fysh:** Coming back to the role of the Queen, there is an example in Australian constitutional history where the Governor-General intervened to effectively judge that a Prime Minister did not command the confidence of the House. In circumstances such as this, is that something that is conceivable in the British constitution?

Professor Blackburn: Again, you are getting into the area of the nature of conventions. What happens in one country will not necessarily happen in another within the Commonwealth, even though the Queen is Head of State. Perhaps the best way of looking at it is that it is not so much what the Queen can and cannot do as it is what she will and will not do. It would be very much against the interests of the monarchy to get involved in any politicised decision like that. In my view, and I think in that of most other people, it would be unconstitutional for her to do so as well.

Q113 **Chair:** Can I just clarify that all three of you are arguing that, in the event that the Prime Minister decides that a particular legislative proposition or resolution on a fundamental matter of policy is going to be a motion of



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confidence, the Fixed-term Parliaments Act does not alter the status of that decision?

Dr Blick: No.

Professor Blackburn: No.

Professor Schleiter: No.

Q114 **Chair:** All it does is to constrain the Prime Minister from advising the Queen to dissolve Parliament as a consequence?

Professor Blackburn: She is putting her job on the line.

Q115 **Chair:** So the Prime Minister would no longer have that option; the only option would be to resign.

Dr Blick: Or to seek an early dissolution with a two-thirds majority, as happened in 2017, or to inspire the tabling of a motion of no confidence within the terms of the 2011 Act, which would then, within a 14-day period, lead to an early election.

Professor Schleiter: This is a question where I take a slightly different view; I am not sure what everybody's view is. I think the route would probably be the two-thirds majority under the Fixed-term Parliaments Act. It is not clear to me that a Government that has been defeated on a matter that it considers a matter of confidence, and therefore has lost the confidence of the House, could then ask for a vote. It is not constitutionally in a position to ask for a vote of no confidence with the recommendation that that be voted down.

Q116 **Chair:** The original resolution has no statutory status. If the Prime Minister tabled a resolution of the House, "That this House has confidence in Her Majesty's Government," and that was carried, it would rather neutralise the effect of the lack of confidence expressed in the previous day's motion, wouldn't it?

Professor Schleiter: This is the question. If a Government has lost the confidence of Parliament in a motion that is not worded in accordance with the Act, does that have political implications? Does it mean that Parliament has, in fact, withdrawn the authority of that Government to govern? I would say yes, it has, and that is what we have all agreed on. That Government is then not in a position to table another motion, I think.

Professor Blackburn: If the Prime Minister wishes to fortify her position by seeking the confidence of the House, she is better advised to do what John Major did, which is to resign as party leader and secure the confidence and vote of her own party and therefore solidify her majority in the House of Commons.

Q117 **Chair:** That procedure is no longer available under the rules of the Conservative party.

Professor Blackburn: Ah. Then perhaps the Conservative party might like to consider the constitutional ramifications of a change in party rules and restore the old system, which was a wise mechanism.

Q118 **Chair:** Some of us objected to the Fixed-term Parliaments Act, but the rules of the Conservative party were changed before the Fixed-term Parliaments Act.

I think you are trying to argue that a matter of confidence is a matter of confidence. Surely the Fixed-term Parliaments Act creates two categories of no confidence motion? The argument that some of my colleagues make is that the statutory wording is the one that triggers a statutory process and is therefore the only substantive no confidence motion that now exists, and that the others are merely, as the Clerk of the House suggested in the previous session, a matter of whipping. How do you react to his comment?

Dr Blick: I think it underplays the historical and constitutional importance of confidence as a convention that goes beyond what is set out in the 2011 Act. To give an example of the way in which that Act has created confusion, its silence on what happens during the 14-day period is, for me, a difficulty.

Q119 **Chair:** The Cabinet manual does not say anything about that 14-day period.

Dr Blick: It says the caretaker convention comes into force, but it does not say, "This Government has to go and be replaced by another Government," or, "This Government can carry on." It carries with it the implication that it could be the same Government or it could be a different Government—it leaves that open. Again, even if the Cabinet manual did deal with that area, it would come back to the question we talked about earlier: it would only be declaring what it thought the convention was. We do not have any precedents or past experience of what happens during that 14-day period, because—thankfully, perhaps—it has not happened yet.

We do not know. Conventions cannot be created in that way, so even if it did say anything it would not be definitive—but it does not really settle the issue.

Professor Blackburn: I think that what the Clerks have said might well be so, but I go back to what I said at the beginning of the session: Parliament is all about pressures. As to what the ramifications of a confidence motion outside the one in the Fixed-term Parliaments Act would be, it all depends on the context and circumstances.

Q120 **Chair:** Professor Schleiter, you seem to be saying that if the Government loses a motion of confidence, the Prime Minister has no choice but to resign. Have I understood you correctly?

Professor Schleiter: We are in a parliamentary democracy, which means that the Government holds office by virtue of its ability to command the confidence of Parliament. If it loses that confidence in a motion, however it



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may be worded, that Government loses the authority to govern, which takes us back to the question that Andrew just mentioned: what happens next? Conventionally, at that point, the authority to try to form a Government would pass to someone else—not the governing party, necessarily. Is that true?

Dr Blick: If you're Ramsay MacDonald, you can carry on as Prime Minister, but that was 1931.

Mr Fysh: Find another way of getting a majority.

Professor Schleiter: Or an early election would have been called. In my view, it is inconceivable that a Government that has lost the confidence of Parliament simply carries on in office in any way other than in a caretaker capacity. Then the question is: what would a change in Government be?

Q121 **Chair:** Thank you. This has been very illuminating and interesting, if a little like looking over the abyss. What about Budget resolutions? I was always brought up to believe that to vote against the Budget was a cardinal sin against your own party, if it was your party's Budget, and it was a far higher order of rebellion because it touched on the confidence of the Government to obtain its Supply. What is your opinion about the status of Budget resolutions in relation to confidence in the Government?

Professor Blackburn: Again, you are asking us to give a theoretical or academic opinion on what is likely to be the case if that situation arises. It is really up to the House of Commons to decide what is or is not the convention in this situation. The House of Commons is the arbiter of these things at the end of the day.

Q122 **Chair:** You seem to be echoing what the Clerk was saying—that these matters are fundamentally political, rather than constitutional.

Professor Blackburn: Yes, and an expression of opinion by this Committee would carry considerable weight. In so far as I might carry any weight whatsoever, I would say that in my view it is an extremely important confidence motion, and I was brought up to believe that it was fatal as well. I would think that the political circumstances or ramifications and issues of losing a Budget resolution, particularly in present circumstances when it is part of the deal between the Conservatives and the DUP, would be fatal.

I also think that Governments cling to office to a far greater extent than they ever did 100 years ago. To really remove a Government, you need a very clearcut confidence motion. If you want to get rid of the Government, the best one now is probably to frame it in terms of "has no confidence in the Prime Minister". That is outside and goes to the heart of the Government. The only practical difficulty there is that there would be furious negotiating or objections taking place through the usual channels, and negotiations by the Whips as to whether or not to allow that motion to be tabled.



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Professor Schleiter: Comparatively speaking, a vote on a Budget is not necessarily a confidence motion. Of course, a Government can declare a vote on a Budget to be a matter of confidence. If that is the case and it loses the vote, then it has no choice but to step down; it cannot carry on. If the Government loses a vote on an ordinary Budget, it could, in principle, go back and say, "Okay, let's make some changes to the Budget and let's bring it back." It could also say, "Given the political situation, we can't see any way of carrying on, and we resign," but that is then a matter of discretion. I think there is a distinction, technically speaking, between a vote on a Budget and a vote of confidence.

Dr Blick: Doing my homework for this, I looked at Sir Ivor Jennings, who was writing in the mid-20th century. He saw withholding the Budget as a reserve deterrent that the Commons could use if, having expressed a lack of confidence in the Government already, that Government did not want to budget for some reason. That was something they could hold over it.

If in fact the Budget was being used as a means of expressing that lack of confidence, that would be a shift. It would have gone from being a reserve, kind of nuclear, option to get rid of a Government to being the first step. That would be a significant change in the approach to the whole thing.

Q123 **Chair:** That is very interesting; thank you for that. How do you think the Fixed-term Parliaments Act has changed the nature of the relationship between Parliament and the Government? I am reminded in particular of the moment when Prime Minister David Cameron tabled a motion seeking authority to take military action in Syria and lost the vote. He simply stood up and said, "I get it," when one might have expected a resignation of some kind to follow from the loss of such an important vote. Is that one of the effects of the Fixed-term Parliaments Act?

Professor Blackburn: No, I think it fits in with what I said earlier. Governments cling to office to a far greater extent than they did, certainly in the 19th century, when people, as a matter of honour, would resign much more easily. Their salary and position in life were not so dependent on their job. I think it fits into that. If you want to create a resignation, you have to have quite a clearcut confidence motion expressed. David Cameron was otherwise in a strong position as Prime Minister at that time; the circumstances did not add to any feeling that he should go—that this was the last straw and "he had even lost this vote" type of thing.

Q124 **Chair:** But before the Fixed-term Parliaments Act, there was no statutory means of removing a Government. There is now a statutory means of removing a Government. Isn't that now going to be the process that affects everything else?

Professor Blackburn: The intention of the Fixed-term Parliaments Act is to create fixed intervals between general elections.

Q125 **Chair:** It may be unintended. It doesn't achieve that; that has already been proved.

Professor Blackburn: You can remove the Prime Minister through a no confidence motion that falls outside the terms of the Fixed-term Parliaments Act.

Q126 **Chair:** But the effect of it, as I rather feared at the time, is that it makes it easier for the Government to stay in office, and it does not constrain the governing party's ability to call a general election, the reality being that no opposition party is going to vote against having a general election. We have a system in which the Prime Minister has more tenure, because a motion of confidence is now defined in statute, and it rather neutralises the effects of the other kinds of motion, notwithstanding Professor Schleiter's advice on that. Yet the Prime Minister of the day can still manipulate Parliament in order to call an early general election. Hasn't that increased the power of the Executive, rather than reduced it?

Professor Blackburn: I would say—my colleagues can give their view on this—that that is more or less the opposite of the consensus in academic opinion.

Q127 **Chair:** I appreciate that, but some of us in Parliament did point out that this would be the effect of the Fixed-term Parliaments Act.

Professor Blackburn: But the effect of the Act was to weaken prime ministerial power, because it could take away the power to threaten.

Q128 **Chair:** The intention of the Act was to cement in office and stabilise a coalition Government, and it had that effect. It was a reflection of the pact between two parties to go for a five-year term. As we subsequently saw, in the subsequent Parliament, in which one party in government had an overall majority, it was capable of causing a general election when it wanted.

Professor Blackburn: I think there are good arguments for repealing the Fixed-term Parliaments Act. Your party's election manifesto commits to doing so, of course, so no doubt what you wish will come to pass. Personally, I support having fixed intervals between Parliaments, but I do not accept your thesis that they take away the power to remove a Prime Minister.

Professor Schleiter: I fully agree. I would say that the Fixed-term Parliaments Act was designed to fix the term between elections and allow a path to early elections. What we saw in 2017 does not invalidate the Act at all; it was a use of the Act. It was not the Prime Minister but Parliament that scheduled the early election.

The Act shifts power in legislative negotiations from the Government to Parliament. When Parliament defeats the Government—in a no confidence vote, or a confidence vote, say—it is Parliament rather than the defeated Government that decides whether an early election call will follow. As a result, Parliament can now defeat the Government in such motions without risking Dissolution by the Prime Minister against its will.

That has two political effects. First, it enhances the vote of no confidence procedure as a tool for the sitting Parliament to hold the Government to



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account. Secondly, it reduces the Government's opportunities to invoke a vote of confidence to enact controversial legislation in the face of significant parliamentary opposition.

Dr Blick: The Fixed-term Parliaments Act did not help the same Prime Minister on 24 June 2016, when he received another political setback, so it does not necessarily keep Prime Ministers in office.

Q129 **Chair:** That was his choice, though, wasn't it?

Dr Blick: And it would have been his choice before, I suppose. It was his choice to stay and his choice to go.

Q130 **Chair:** He expressed the opposite opinion before the referendum: he said he would stay on. But then he changed his mind.

Dr Blick: For whatever reason, he decided it was time to go.

Q131 **Chair:** Nobody forced the Prime Minister out.

Dr Blick: Well, 17 million-odd voters may have indirectly forced him out.

Q132 **Chair:** But there was no motion of confidence tabled against the Prime Minister. There was no insurrection, even in his own party.

Dr Blick: He may have come to the view that his position was untenable.

The second lesson that the current Prime Minister and other politicians may draw is that calling an early election under the Fixed-term Parliaments Act is not necessarily a great idea. I agree that it is possible, and you are quite right that it is unlikely that an Opposition would ever vote against it, but it can lead to disastrous consequences, as we are witnessing now. It may be that the received wisdom will be to avoid that at all costs.

Chair: Is there anything else to ask?

Q133 **Mr Fysh:** I have one last question. You said that the usual channels would probably intervene to stop a motion of no confidence in the Prime Minister from being tabled directly. Are the usual channels a constitutional feature of the UK that we should be more aware of?

Professor Blackburn: The usual channels are a fundamental safety valve for facilitating the management of political negotiations between the parties. I think the system has worked well; I would not formalise it, personally. Any system has to have some informal mechanism for negotiation across the parties, and the usual channels have worked well, in my view.

Q134 **Kelvin Hopkins:** I have a question for Professor Schleiter that is unrelated to what we have been talking about—but perhaps not totally unrelated.

Electoral systems are very significant in determining political outcomes. What some people see as the great disadvantage of first past the post is that a minority of the population, such as 35% of voters, can elect a



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majority Government. We think that that is a very good way of doing things, because it leads to an effective majority Government and we can always change it next time around. However, after the second world war, most countries on the continent of Europe saw that as a potential danger, because there were many parties on the Marxist left of Italy and France that might well have won elections in those circumstances. Even the German Social Democratic party was officially Marxist until the Bad Godesberg meeting. Is the reality not that the west made sure that most of those countries did not have first-past-the-post systems, so that they could avoid unfortunate political outcomes?

Professor Schleiter: That is not entirely consistent with the historical record of when electoral systems were changed. Typically, early democracies in western Europe had majoritarian electoral systems. PR was typically adopted with the universal franchise. There are multiple explanations for that. One is that the governing parties, which tended to be conservative at the time, were facing a threat from socialist parties, but we are talking about 1910 or 1920, not post world war two or the cold war.

Q135 **Kelvin Hopkins:** But it was the threat from the left that caused it.

Professor Schleiter: That is one explanation, but there are others.

Chair: Thank you very much indeed. This has been a fascinating session. It has made me understand that we need more debate and understanding about the Fixed-term Parliaments Act and its effects, because it seems to be seen and understood in very different ways by the people who are responsible for deciding what happens.