



HOUSE

OF LORDS

Select Committee on the Constitution

Corrected oral evidence: Fixed-term Parliaments Act 2011

Wednesday 4 September 2019

11.23 am

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Members present: Baroness Taylor of Bolton (The Chairman); Lord Beith; Baroness Corston; Baroness Drake; Baroness Fookes; Lord Wallace of Tankerness.

Evidence Session No. 2

Heard in Public

Questions 9 - 18

Witnesses

[I](#): Professor Robert Hazell; Dr Catherine Haddon.

USE OF THE TRANSCRIPT

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

Examination of witnesses

Professor Robert Hazell and Dr Catherine Haddon.

Q9 **The Chairman:** Professor Hazell and Dr Haddon, welcome. You have had the advantage or disadvantage of hearing our first session. Perhaps we could start in the same way and put current affairs to one side for a moment to ask about your general view of the Act and whether you think it has made any difference in terms of transfer of power from the Prime Minister to Parliament along with your general approach to and assessment of the Act so far.

Professor Robert Hazell: Perhaps I may make two preliminary comments. One is that it is early days to sit in judgment on the Act because it has been in force for fewer than 10 years so we have very few instances yet of the Act in operation although, clearly, we have a rather dramatic one this week. If I may, in my evidence I am going to refer to comparative experience in other parliamentary systems which have fixed-term parliaments because most parliamentary democracies around the world have fixed-term parliaments. It is a normal thing in other parliaments to have fixed terms.

Regarding the advantages of the Act, although it is early days, I would maintain that it has the potential to deliver electoral fairness in denying the Prime Minister the opportunity to call an election when his party is riding high in the polls. It denies the Prime Minister a tactical advantage and thus, in that sense, as previous witnesses have said, reduces prime ministerial power. Also—this is a small point which has not been mentioned—it can lead to better electoral administration because the Electoral Commission and electoral officers around the country know with greater certainty the timing of the next general election. In Whitehall it can lead to better government planning. That was touched on a little in the first session but there can be better budgeting and that kind of thing as well if they have the confidence that a Parliament is likely to last for a five-year term. Finally, it protects the Crown because it removes the Crown from any controversy, as could have happened under the old conventions when a Prime Minister sought a Dissolution in possibly controversial circumstances.

Dr Catherine Haddon: It is very hard for me to set aside current circumstances in my views of the Act because my views have changed even in the last few days, frankly. I am going to respectfully disagree, but I have not fully formed my view of what should be done as a result of all this. I think that it is now a major problem. The problems of the Act though are not entirely down to the Act itself. The situation we are in at the moment is because of Brexit and a minority Government.

My problem with the Act, which I have had to acknowledge, is the perceptions of it. It is now so closely linked with views of how we command confidence, the role of the Queen, how we get general elections and now even Prorogation. There is confusion among political actors as to how it works. Some of that could work itself out over time as

we get more precedents in its use and as people become accustomed to it, but it is also causing confusion in the wider world and it is becoming more and more associated with these problems. We can go into this in more depth, but I think it has also opened up some big questions about the very issue of how you know if a Prime Minister can command confidence, how Parliament indicates that to the Queen, what is the Queen's role and so on and so forth. These are many issues which should not and have not been addressed by the Fixed-term Parliaments Act itself, but it has opened them up. I do not think we should try to resolve those now in the midst of all this, but all of that has led us on a journey towards having to tackle more than just the Fixed-term Parliaments Act itself, and I am not sure that we can revert back to the situation as it was.

The Chairman: I think we would all agree, Dr Haddon, that it is quite difficult to have an academic view of this because of the realities of the situation we are in. I want to ask Professor Hazell, as he mentioned electoral administration being easier to plan, that surely our electoral administration should be able to cope with any situation. It is an ongoing registration, et cetera. You also said, Professor Hazell, that it could protect the Crown, but from what Dr Haddon was saying, at the present time this Act is certainly not protecting the Crown. In fact, it could put the Crown in a very difficult position.

Professor Robert Hazell: On those two points, I am not an expert on electoral administration and you may want to ask for evidence from the Electoral Commission or from the Association of Electoral Administrators. They could tell you whether I am right in saying that it enables them to plan with greater certainty. It is what I have heard in the past but I would hope that you can get an updated view from them.

On protecting the Crown, it is certainly the case that there has been some wild speculation about the role of the Crown but, as Dr Haddon has said, that is based largely on misperceptions. There is a risk of making the Fixed-term Parliaments Act a whipping boy for aspects of the extraordinary situation we are in, which, as Dr Haddon has also rightly said, is really more down to the fact that we have a minority Government, that Brexit is such an extraordinarily bitter and divisive issue and that there is a very serious breakdown in party discipline, not just in the governing party but in other parties in the House of Commons.

Dr Catherine Haddon: I have not really talked about the value of it, and I think it is worth looking at the value of having fixed terms, leaving aside the mechanisms for early election which are a different part of this. The previous witnesses and Professor Hazell have talked about a lot of them. In terms of planning for elections I cannot speak as to the role of the Electoral Commission. The value to Whitehall and to the Civil Service in having fixed terms has been touched on. There are many other aspects to that though, one of which is the ability to prepare for potential alternative Governments. In this country we woefully underestimate what a huge challenge it is for the Civil Service to have an electoral campaign

which might be of very short duration and then to engage with the Opposition parties to understand what policies they might bring in. This has an effect on the quality of policies and the ability of a new Government to get them up and running. The Institute for Government reported in 2011 and found that many civil servants value the idea of a fixed term and having clarity about the run-up period to an election.

Another part of that is the Opposition because for opposition parties it is also valuable to have a chance to prepare for going into government. In this country we do not value enough the effort that needs to be put in, not just on policies around manifestos but in helping potential Ministers to understand what the role might involve. In theory it can provide both of those. However, again, this is being disproved by the current circumstances. We could have an election at any time and the Civil Service is completely prevented from having any engagement with the Opposition. I find myself at a bit of a crossroads in being able to say it is doing the job it could do.

The Chairman: Are you saying you would support fixed-term parliaments without any mechanism for a change of Government in between, because as long as you have that mechanism you have the potential for the problems you are outlining?

Dr Catherine Haddon: In other circumstances, having a fixed term with a high threshold for an early election is not necessarily a bad thing. I would have to go away and think about that some more. Obviously, in the current circumstances where you have a minority Government, you must accept that the Government could fall at any time. It is different when there is a coalition Government in place, but again that goes to why the Act was put into place in the first place.

The Chairman: Absolutely. What about the basic principle that this was transferring power to the Commons with your bigger threshold?

Dr Catherine Haddon: Again, I think that that is a direction of travel which you cannot easily reverse. It seems difficult to think of the Commons, especially—I am sorry to keep mentioning the current circumstances—given the controversy around the degree of power that Prime Ministers have and the mistrust that exists about how they might use or misuse prerogative powers. Again, this could change and we could revert to a position where constitutional norms are respected much more, but at the moment it seems difficult to envisage a world in which we return prerogative powers to the Prime Minister, particularly at this crucial time. At the moment it appears to be a foregone conclusion that Parliament would want to retain it.

The Chairman: We certainly cannot legislate for respecting norms. Lord Beith, do you want to follow up on this?

Q10 **Lord Beith:** One wonders if the genie is out of the bottle or the toothpaste is out of the tube, whichever of those old analogies best fits. Professor Hazell, you outlined a number of the benefits which arise if the

Act can produce a general presumption that Parliament will last five years, including a reduction of prime ministerial power, better electoral administration and better government planning. There is a parliamentary dimension, is there not, for example in the work of Select Committees and making Governments accountable, in being able to follow through a series of reports over a period rather than seeing what they can cram in this year in case there is an early election? Is that is a positive benefit in terms of parliamentary accountability?

Professor Robert Hazell: Indeed. Dr Haddon has reminded us about the benefits for Whitehall as well as for the Opposition and you rightly remind us of the benefits for Parliament of having fixed terms and therefore being able to plan for the whole of the fixed term. We saw that, I think, in the 2010-15 Parliament. We certainly have not seen it in the last three years, but I would say that is as a result of Brexit and not a consequence of the Fixed-term Parliaments Act. Brexit has made it impossible for Whitehall to do any serious planning or, indeed, any serious work on anything other than Brexit. Please let us not blame the Fixed-term Parliaments Act for the many travails that Brexit has inflicted upon the Government and, indeed, upon Parliament. Brexit makes it extraordinarily difficult to plan.

Lord Beith: Dr Haddon, you amplified the potential benefits for the conduct of government and the operation of the Civil Service. That is based, is it, on what you have been able to pick up from people within the system that the degree of predictability people thought the Fixed-term Parliaments Act was going to give them made it possible to govern better?

Dr Catherine Haddon: I think so. Given the onus we place on the Civil Service to be the continuity between Governments, we have to accept that it must have some opportunity to prepare for a change of Government. That involves a certain degree of trust, that in doing such preparation it is not looking ahead to a future Government and starting to do the work for them that it would do if that Government are then elected, rather it is about long-term planning for how it as a Civil Service can adapt in the future. This has been accepted by multiple Prime Ministers and it is why they have repeatedly allowed the Civil Service opportunities to engage with the Opposition. The more we recognise that that is a valuable thing and the more it is, as it were, an expected part of the period—perhaps six months before an expected general election—the easier it is for the Civil Service to do that while also continuing to serve the Government of the day.

All that aside, it is worth remembering, as came up in your previous session, that in the run-up to an election after a five-year term, even before the Fixed-term Parliaments Act came in, you would often see a tailing off not just of legislation but of activity within government, and that has often allowed the Civil Service the space and time to do this kind of preparation because it is not necessarily as busy as it would be at an earlier stage in that Parliament.

Q11 **Baroness Corston:** Perhaps we may now turn to the issue of confidence. What has been the effect of the Act on the notion of the House of Commons now having “confidence” in the Government?

Professor Robert Hazell: As the previous witness said, formally there is now only one kind of fatal confidence Motion and that is the statutory Motion set out in the Act, “That this House has no confidence in Her Majesty’s Government”, but it does not prevent the Government from declaring that other issues will be treated as a matter of confidence, and I would suggest that we saw that yesterday in the vote when the Prime Minister made it quite clear that he expected all Conservative Members of Parliament to support the Government in that crucial vote, with disciplinary consequences if they failed to do so. The Act did not prevent the Prime Minister declaring yesterday that something would be an issue of confidence and Prime Ministers still have, I would suggest, plenty of other weapons at their disposal to encourage, cajole or in other ways persuade their supporters in Parliament to support a particular measure.

Dr Catherine Haddon: I would agree that maintaining the confidence of the House is, as the *Cabinet Manual* says, central to the Government’s authority to govern. You cannot get away from this. It has to mean something more than just the mechanism by which we get an early election. I have been arguing throughout the lifetime of the Fixed-term Parliaments Act that the concept of confidence ought to still exist and it should still be there in other kinds of confidence Motions. I am not sure whether the previous session touched upon it but another issue is whether a vote of confidence that is not worded under the Act should still have that same weight. I find it very difficult to believe that if the Commons puts forward a Motion saying, “We have no confidence in this Government; we wish a new Government to be formed under person X”, the Queen could not pay attention to that, and it should have some force in our system.

I completely agree with Professor Hazell that, despite a lot of discussion about whether during Theresa May’s premiership other forms of confidence existed, the fact that the Government declared yesterday’s vote a confidence matter shows that the convention still exists and is still useful to Governments as a means trying to threaten—but in this case unsuccessfully.

The issue is that the Act has affected what Prime Ministers can do after that. They cannot unilaterally say, “I will call an election”. They can say, “I will put down a vote for a general election”, but, as we may see in the next week or so, that does not mean that you can get that vote passed. There is another aspect being discussed at the moment which is that a Prime Minister can always resign. If they do not have the confidence of the House and believe that their situation is impossible and they cannot continue, they can resign and ask the Queen to call for a successor. Again, politics is the reason why the current Prime Minister will not, I assume, countenance that. It is nothing to do with the Act. They still have that ability.

Baroness Corston: Is the effect of all this to strengthen Parliament over the Government in that if you cannot now make a policy issue a matter of confidence does that hand powers to the Commons that it did not have before?

Professor Robert Hazell: Yes, it reduces prime ministerial power, which we have touched on already, and it strengthens the role of the House of Commons in deciding whether or not Parliament should be dissolved. If we are coming to the two-thirds majority that is stipulated in the Act, I referred earlier to our work on how fixed-term parliament legislation operates in other countries. It is quite rare in other countries to have a higher threshold for what we might call a voluntary dissolution, namely a dissolution sought by the incumbent Government, rather than a dissolution forced upon it by a successful no-confidence motion, but in many of those other countries there are other mechanisms to try to ensure that there is cross-party support. For example, in some countries the Motion has to be signed not just by the Prime Minister but by the leader of the opposition or, in some cases, the leaders of three parties in parliament to signal strong cross-party support in terms of a wish for dissolution.

In other countries there are also restrictions during the term of a parliament when dissolution might be voluntarily sought. Often at the beginning of a parliament you cannot seek a dissolution in the first year. Quite often towards the end of a parliament you cannot seek a dissolution in the last year because an election will be pending at the end of the fixed term. In other countries there are restrictions of those kinds. As I say, our two-thirds in comparative terms is unusual but essentially I understand it to be there to ensure that a majority Government—not like the present Government but let us think, for example, of one of the Labour Governments led by Tony Blair or Gordon Brown between 1997 and 2010—it would have ensured that they could not unilaterally call an election relying simply on the support of the governing party. They would have had to get the support of at least one other party in the House of Commons, despite their big majorities, to get the two-thirds threshold required.

Baroness Corston: If it is possible now for a majority of MPs to hold confidence in the Government while it is impossible for there to be a majority to deliver the most significant government policy, how can that be sustainable?

Dr Catherine Haddon: One would think that it is not and that is the dilemma we find ourselves in at the moment. I do not think that is down to the Fixed-term Parliaments Act but down to a combination of a minority Government and the particular dynamics around both the policy and the arithmetic in Parliament. It all comes down to whether there is a majority. It does not feel like it should be a sustainable position to have a Government in office but not in power and to maintain in that role, but, again, this comes down to whether the politics and the arithmetic between the parties can find a solution. If a simple majority was required

rather than two-thirds that could still be a problem. I am not sure that the Fixed-term Parliaments Act is the root of the particular issue we are facing at the moment.

Q12 Baroness Fookes: Turning to the provision about the two-thirds majority needed, Professor Hazell has spoken about other systems and other ways of dealing with it. I would be interested to know what you think would be preferable. Would you like to keep the two-thirds majority as it stands? Would you like to introduce, if you could, elements which you have seen in other countries?

Professor Robert Hazell: For now I would like to see the two-thirds retained. As I said at the beginning, it is very early days to sit in judgment on the Fixed-term Parliaments Act. I see the two-thirds ensuring that the Government of the day, even if they are a majority Government, are very unlikely to have two-thirds of all the seats in the House of Commons. If they wish to seek an early Dissolution, they have to get the support of at least one other party in Parliament. Professor Lord Norton rightly said that that, in effect, gives a veto to the Opposition or the Government's own Back-Benchers. I see nothing wrong in that. I think it is very desirable, if the Government want to seek an early Dissolution, that they have to obtain some cross-party support, and that in effect is what the different mechanisms in other countries also provide in other ways.

Baroness Fookes: Is that sufficient on its own and we do not need to borrow from these other countries which you have been mentioning?

Professor Robert Hazell: In my written submission I give a bit more detail about practice in other countries and if the Committee becomes interested in this, I can easily supply further detail. It is in a 40-page report that we published in 2010, so that is where all the comparative evidence is. Forgive me, I will not labour you with it today in my oral evidence.

Dr Catherine Haddon: I will defer on the issue of two-thirds because I can see that there are benefits to retaining cross-party support and difficulties in terms of the high threshold that it places on any such decision. Again, we have come to another flaw in the Act that is not catered for and which we are talking about at the moment: the possibility of the Government bringing in a short notwithstanding Bill that just sets it aside. Once again, this goes back to the tube of toothpaste. Once it is open—and Governments are increasingly aware that they could do this themselves if they have a majority—they might just start setting it aside all the time.

In certain circumstances it is valuable to an incumbent Government to ensure that the Opposition is also agreeing to a general election if they are worried about the consequences of a general election or the public not wanting another general election. It can be useful to co-opt the other parties in that way. But in other circumstances where the Opposition does not want a general election but the incumbent Government do, and they

have enough of a majority, they are probably going to start using notwithstanding Bills if the Fixed-term Parliaments Act continues. I would be interested in what Professor Hazell thinks about that.

Professor Robert Hazell: Could I add one other thing? In the other countries that we have studied it is very rare to find any complaint that the fixed term is excessively rigid. In all those countries, with the one exception of Norway, there is provision for early dissolution. In effect, what fixed-term legislation creates is a norm; it does not create an excessively rigid framework. It creates a norm and expectation that parliaments will normally last for the duration of the fixed term. We do not yet know whether at Westminster we have a new norm. As Dr Haddon has said, a Government with a majority could easily circumvent the Act by introducing emergency legislation which says, "Notwithstanding the Fixed-term Parliaments Act, the next general election shall be held on a date next month". That in effect would breach the norm, but at the moment we have, I hope, the norm of fixed terms in our Fixed-term Parliaments Act.

The Chairman: Did we not previously have a sort of norm in that although the maximum was five years it was very unusual for any Government to go to the wire?

Professor Robert Hazell: On the whole—and the history of the duration of Parliaments at Westminster since 1945 is in my written submission—from memory there were five Parliaments that went to the wire and lasted for five years. In most of those cases it was because the Prime Minister, who might otherwise have gone after four years, was not doing very well in the polls at the time and decided to hope that their luck would change.

The Chairman: That is the reality of politics.

Professor Robert Hazell: In most cases that did not happen. Can I mention one other thing to remind the Committee about what I recall from the situation prior to 2011? That was the debilitating effect when we had a maximum of five years but we did not have a fixed term where from about year three onwards there was speculation about whether the Prime Minister would call an election in the next year or in the next six months. I was then a civil servant in Whitehall and it was quite debilitating for us in terms of our planning because there was this "Will he, won't he?" speculation which made planning more difficult than if you have a fixed term.

The Chairman: I am not sure most politicians would accept that but that is a personal view. Lord Wallace.

Q13 Lord Wallace of Tankerness: We talk about the 14 days following a defeat on a Motion of no confidence. What do you view to be the constitutional and legal obligations on a Prime Minister who has lost a no confidence vote? In addition, when do you think the caretaker convention should kick in? Should it kick in at the moment of a loss of no confidence

vote or 14 days elapsing and there is going to be no vote of confidence in an election at that point? What are the constitutional requirements on Prime Ministers during that period?

Professor Robert Hazell: There is less ambiguity than perhaps some people believe. The duties on the Prime Minister are very clear if he has lost a formal no confidence Motion under the Act. The first is to remain in office. There will probably be calls in the press on the following day for the Prime Minister to resign. Again, as previous witnesses have said, we must always have a Government and therefore we must always have a Prime Minister. On day one or day two of the 14 days he must remain in office and he can seek to restore confidence in his Government because there will be a reason for the successful no confidence Motion. It might be a reason of policy. In current circumstances it might be because his Government are clearly heading for no deal and the House of Commons in effect have pulled an emergency brake to try to prevent that. The Prime Minister in those circumstances could say, "All right, I hear the very strong clear message that you have given me and we will now reverse the policy which led you to vote no confidence in my Government". The Prime Minister remains the incumbent Prime Minister and, in effect, has first crack at seeking to re-establish confidence in his Government.

He may not choose to do that. He may, as Lord Norton said, seek to sit out the 14 days and then Parliament would be dissolved, leading to an election. If he were to do that, it is open to the House of Commons during the 14 days to seek to establish whether an alternative person could command confidence. That might be an alternative person from within the governing party or it might be from the Opposition or another party. The House of Commons has various means. If it could identify such a person to signal to the Palace and to the public that it would have confidence in an alternative Prime Minister, and if it clearly signalled that through a Resolution, a Motion on an humble Address or an Early Day Motion, I would fully expect the incumbent Prime Minister to tender his resignation and recommend to the Queen that she appoint the alternative who had been identified by the House of Commons. That much I think we can state pretty confidently. It is true that the Act is silent about what might happen during the 14 days, but, as I say, I think we can anticipate the kinds of things that could happen.

Lastly, you asked me about the caretaker convention. That is triggered as soon as the no confidence Motion is passed. The incumbent Prime Minister would become a caretaker Prime Minister and therefore there would be the restrictions set out in the *Cabinet Manual* on what he and his Government could do in terms of initiating new policy-making, senior public appointments, the letting of government contracts, et cetera.

Dr Catherine Haddon: I agree with Professor Hazell that the immediate onus and duty is on the Prime Minister to stay in post because you must have a Prime Minister in place who has an opportunity to see if they can regain confidence, form a new agreement with other parties, or whatever the situation requires. You can also have moves in parallel for an

alternative Government. That is the tricky area because this is the political resolution that the Act basically requires and why the Act is silent because it has to remain in the realm of politics.

The controversy that has been discussed in recent weeks and potentially exists—again, this goes back to whether constitutional norms are accepted—is if the incumbent Prime Minister refuses to resign despite an alternative Government being in place and despite it being clear that the incumbent Prime Minister is not likely to be able to pass that second Motion of confidence. There we are wholly dependent upon a constitutional convention which is about the legitimacy of having lost a vote of no confidence rather than a legal interpretation of the Act, which is what some have been trying to argue is all that exists. I firmly do not believe that it does and we need to keep reiterating that point.

In terms of the restrictions on a Prime Minister, essentially, they have lost a degree of legitimacy having lost a vote of no confidence and, even though they might regain confidence, during that period they ought to abide by restrictions. But again, this is a convention. It is one that is mentioned in the *Cabinet Manual*, but it does not have any justiciable force so it is reliant on the actors involved respecting it. I believe it is fundamental and another area where, increasingly, we will ask whether this should be firmed up. The principles around caretaker government in this country are still very reliant not even just on constitutional convention but on an expectation of it being customary, which is the phrasing that is used in the guidance, and that is possibly too weak a restriction in those periods.

Q14 Baroness Drake: In her evidence Dr Fox said that she thought paragraphs 2.27 to 2.29 in the *Cabinet Manual* were pretty clear on how the caretaker convention kicks in, but in your written evidence you say that the convention is not explained sufficiently or articulated in terms of the restrictions on government activity. Without going into too much detail, what would be your top one or two areas where you think there is a lack of clarity?

Professor Robert Hazell: One would be that I wish they would call it the caretaker convention. For reasons I have never wholly understood, the Cabinet Office is reluctant to use the term “caretaker” because it thinks it implies some kind of weakness on the part of a caretaker Prime Minister. We have all used it this morning and in other Westminster-style countries it is the normal term to describe a Government that does not command the confidence of Parliament and therefore is subject to certain restrictions in terms of the kinds of new policy that can be initiated. The *Cabinet Manual* talks about purdah, but in so doing it risks confusing two things, because purdah can apply when a Government commands confidence. For example, when there are local elections purdah applies to what the central UK Government can do in terms of making policy announcements and the like in order not to obtain an unfair advantage in those local elections. It is helpful to use two separate terms to distinguish these two separate concepts.

Lord Beith: They could use both simultaneously, could they not?

Professor Robert Hazell: Indeed, and they sometimes do.

The Chairman: Or you could have a situation where you have an announcement on public expenditure on the day that the Prime Minister is trying to call a general election, so purdah kicks in only at a certain point in the day. Baroness Drake, would you like to move us on?

Q15 **Baroness Drake:** In your view, what activities can the Civil Service undertake during the 14-day period? Is there a variation on what they can do if there are circumstances that particularly require redress or urgent action?

Dr Catherine Haddon: The similarities between the purdah period, or period of restrictions on Government activity, as it is often called, and caretaker provisions are similar in some ways but very different in others. In both cases, however, the Government remain in power and Ministers remain in post, and they need to have the ability to act in an emergency when required. In that respect, depending on the circumstances, the Civil Service, working on behalf of Ministers, has to be able to do what we might call essential business, urgent business and anything that cannot be delayed.

In terms of the latter, if one was talking about some kind of emergency across any number of different issues, where the guidance and previous convention has fallen is to say that Ministers in those circumstances should consult with their opposite numbers. Certainly, in the run-up to a general election there is a case to be made that in the 14-day period it also should be true that action should somehow be worked out across party lines. Again, it depends entirely on what kind of scenario we would be talking about.

Professor Robert Hazell: Perhaps I may give two examples to bring this home. One is that I think it is right that in 2010, towards the end of the election campaign, there was an emergency meeting of European Finance Ministers to discuss a eurozone crisis. Alistair Darling as Chancellor of the Exchequer went to that meeting but, quite properly, he consulted with the then shadow Chancellor, George Osborne, about the line which the UK Government would take because the caretaker convention applied. He did not want to tie the hands of a future Government and so he consulted with his opposite number. Another example of an emergency—I think it is right—is the ash cloud which stopped a lot of air traffic happened during an election, and the then Secretary of State might have been Andrew Adonis. That is the kind of urgent action which may be required and Government Ministers will normally consult their opposite numbers about the response they take.

In the *Cabinet Manual* provision is made in paragraph 2.33 that if senior officials believe that the incumbent Government in a caretaker period are not observing the convention, they can seek a ministerial direction, which is how those officials can, in effect, say formally to Ministers, "We think

that what you are doing is improper and therefore we require a written direction from you instructing us to do this. What we think you are asking us to do is wrong”.

Exceptionally, paragraph 2.33 provides that—perhaps I may read out the relevant sentence—“During any period when Parliament is prorogued or dissolved, if the occasion for any such directions arose, and taking account of issues of commercial or other sensitivity, the direction, together with the reasoning provided by the accounting officer, should be made public immediately by the department and laid before both Houses at the first opportunity after Parliament meets”. This is a senior official, in effect, blowing the whistle, but if it were to happen during an election period blowing the whistle publicly.

The Chairman: During the 14 days.

Professor Robert Hazell: Yes, and that is the main safeguard that the *Cabinet Manual* tries to provide if a Minister in a caretaker Government seeks to do something which officials believe breaches the caretaker convention.

Dr Catherine Haddon: There is one difficulty with the 14-day period as opposed to a period preceding a general election, which is that we focus on the fact that essential business must continue and what must not happen is new action of a continuing or long-term character. Obviously, you can wrap into that major policy decisions that may or may not have been continued. During the run-up to a general election one of the key aspects of purdah is to ensure that government resources are not used for electoral purposes and that often focuses on the role of government communications.

I am not sure, and I think it would come down to interpretation, which is why it is important to think about the role of directions because those interpreting them in the first instance might be civil servants considering whether or not they think them proper. It would come down to interpretation whether a government campaign of information about preparation for a no-deal exit should continue during that period, given that that is quite an essential activity to undertake. The style of the campaign, its cost and so forth might be areas in which you start to call it into question but, nonetheless, some kind of communication is arguably essential while no deal remains on the table.

The Chairman: The continuation of an existing approach.

Dr Catherine Haddon: Exactly. That is a very different circumstance if we hit a general election restriction on government activity, because in that case it is going to be in conflict. It may continue to be essential business, but it is going to be in conflict with those restrictions on government activity which are about ensuring that official resources are not used in an improper manner.

Baroness Drake: On the more precise or narrow issue of supporting the

formation of a new Government during the period of 14 days, what do you believe the Civil Service could do or be allowed to do to support the formation of a new Government during that period?

Professor Robert Hazell: It would be up to the parties in Parliament if they wanted to ask the Cabinet Secretary for support. One example might be what happened during the coalition negotiations in 2010 when the Cabinet Office was very ready to provide support to the Conservative and Liberal Democrat negotiating teams, but, if I remember correctly—Lord Wallace can correct me if I get this wrong—the parties in fact needed very little support other than the provision of rooms, tea and coffee and the like.

Lord Wallace of Tankerness: I do not think that is fair to the Civil Service. During the election period they prepared briefings on policy points. They did not sit in on any of the negotiations, but my recollection is we had available briefing material and would answer questions on any of those specific topics.

Professor Robert Hazell: Thank you.

Lord Wallace of Tankerness: It was a bit more than tea, coffee and biscuits.

Professor Robert Hazell: Thank you for reminding me that they provided more support. What I remember is that the then Cabinet Secretary was quite keen for officials to be in the room and that was something the parties did not encourage.

Lord Wallace of Tankerness: I say that from the experience of having negotiated a coalition in Scotland. I would say that it was not helpful.

Professor Robert Hazell: During the 14 days the clock will be ticking very fast and my expectation is that there would be, potentially anyway, intensive negotiations between the parties without necessarily very much time or opportunity to consult the Civil Service save possibly on a very few items. It might be the costing of some controversial big item of expenditure that one party wanted and the other did not. It might be that kind of thing.

Q16 **Baroness Fookes:** May we look at another aspect of the 14-day period and that is the role of the sovereign? Could you set out a scenario as to how the Palace and the House of Commons might work in tandem or what would actually happen?

Professor Robert Hazell: I have answered this partly in answer to a previous question from Lord Wallace, so let me briefly recap. If there is a successful no confidence Motion the 14-day period starts to tick, the incumbent Prime Minister remains in office because we must always have a Government. He has the opportunity to seek to re-establish confidence in his Government. He may choose not to try to do that, in which case it is open to parties in the House of Commons to see whether an alternative candidate might be able to command confidence. If they can identify an

alternative candidate who could command confidence, they can signal that in a number of different ways: through passing a resolution, through an Early Day Motion or by communicating it to the Palace through a Motion on an humble Address. In effect, that would invite the sovereign to appoint the alternative person as Prime Minister. In those circumstances I would fully expect that the incumbent Prime Minister would offer his resignation and recommend to the Queen that she appoint the alternative who had been identified by the House of Commons.

To answer a question asked by Lord Wallace in the previous session, if, quite extraordinarily, the Prime Minister refused to resign, the sovereign has the power to dismiss the Prime Minister. I do not anticipate it would ever come to that, but there is no doubt that the sovereign has the power to dismiss the Prime Minister as well as to appoint, and, in those quite extraordinary circumstances, if the Prime Minister refused to resign and the House of Commons had clearly indicated that they had confidence in an alternative, I would expect the sovereign to dismiss the Prime Minister and appoint the alternative.

Baroness Fookes: You have explained that very clearly. I was thinking more of what informal contacts might be made through the Cabinet Secretary and the private secretaries at the palace? I hesitate to use the word underground, but would there be very informal explanations to the sovereign of what is going on?

Professor Robert Hazell: Indeed, and that is what happened during the five days after the 2010 election when the coalition Government was being negotiated before it was formed. We know—and this is no secret—that the then private secretary to the palace, Sir Christopher Geidt, was in very close touch with the Cabinet Secretary and with the Private Secretary in No. 10. They are the golden triangle who conduct these informal communications and they keep each other very closely up to date so that the sovereign is always informed. You may remember that after the 2010 election the Queen announced that she was going to be spending the weekend in Windsor, which she did, and that may have been her plan all along, but it was made public that she was spending the weekend in Windsor and that in a way was possibly her way of signalling, “This is a matter for the newly elected House of Commons to sort out. I am going remain at one remove from the negotiations until the newly elected House of Commons can make it clear to me who can command confidence in the new Parliament so that I can then appoint that person as Prime Minister”.

Dr Catherine Haddon: It is very important to emphasise that final point that, effectively, the Queen during all of this process is listening to what is going on and being as well informed as possible, and that is the role that officials play in finding out and understanding that. It has to be kept distant from her. You cannot have a situation where the Queen, or even perhaps her immediate officials, are dragged into the negotiations around, “Would you accept this, that or whatever?” If there is a requirement on the House of Commons to find a mechanism that clearly

indicates who might have confidence, it is up to the House of Commons to innovate and find that mechanism. Again, this goes to an area where I do not think we can go backwards. Previously it was possible for an assumption about who might have confidence because they could say, "I think I have got the numbers". It is possible under our constitution to say, "Appoint me as Prime Minister and give me a chance to prove that I have confidence". There are many examples in our history where Prime Ministers have done that. However, it is becoming harder and harder to find a means to do this, which is why the whole issue around who is likely to command confidence has become more difficult and we may be moving inexorably towards a more formal system of how that is established in a variety of different circumstances.

The Chairman: Are there such options at the moment?

Dr Catherine Haddon: There are plenty of options and many countries that do this very successfully.

The Chairman: Lord Wallace, do you want to come on to the future?

Q17 **Lord Wallace of Tankerness:** Looking to the future and the review of the Act, if I have understood you, you both think there is merit in the concept of fixed terms but the jury is out on this particular piece of legislation. If the legislation was to be amended, what would your principal candidates be for amendment? You can incorporate in that as a bit of an addendum the fact that we have had the recent controversy over Prorogation. The Act expressly preserves the royal prerogative in relation to Prorogation. If an amendment Bill was brought forward, would it be an opportunity to review again the prerogative in relation to Prorogation?

Professor Robert Hazell: In answer to the last point, yes. My written submission starts with four suggestions about small amendments and the very first of those four is the power of Prorogation. That should be put on the same footing as the power of Adjournment and, in effect, I would like Parliament, the House of Commons, to have a say in whether it should be prorogued and not leave that any longer simply to the Prime Minister to advise the sovereign.

On your wider question about possible amendments, as I said at the start and forgive me for repeating this, it is very early days to sit in judgment on the operation of the Act and so I would be quite cautious about proposing amendments. If we were legislating afresh, as I said very strongly at the time, it is wrong to go for a five-year fixed term because since the war the norm in most Parliaments at Westminster has been for a Parliament to sit for four years. However, it may be that it would be difficult to revert to a four-year term as the norm.

We have also discussed the silence in the Act about what would happen during the 14 days. I would not propose any amendments in statute, but in terms of the various mechanisms that we have described, if an alternative candidate could be identified by the House of Commons who

could command confidence instead of the incumbent Prime Minister, it is important for the Commons to be able to indicate clearly who that alternative candidate is and to say that it would have confidence in that alternative person. The sovereign could appoint that person to formally demonstrate that they could command confidence within the 14 days. However, I would suggest that it would be preferable for any new procedure to be in the Standing Orders of the House of Commons rather than any kind of statutory amendment. Lord Wallace, you will know very well that in the Scottish Parliament there is provision after an election, or indeed following a mid-term Dissolution, for the Scottish Parliament, in effect, to hold an election as to who should be the new First Minister and the Presiding Officer communicates that name to the Queen for her formally to appoint that person. The procedures for the election of the First Minister are all set out in the Standing Orders of the Scottish Parliament.

Dr Catherine Haddon: My view is still developing on all of this and, partly for the reasons that Professor Hazell has set out, it is perhaps too early for this Act. From my point of view, as I said in my opening comments, it is largely because there are many other issues that we now have to think how to tackle with which the Fixed-term Parliaments Act interacts. Given that, I am not sure we can tackle one without the other and I do not think we are yet in a position to tackle all these other issues, and certainly not in the current circumstances. The concept of fixed terms is fine and if it can be maintained, that is great. The two-thirds Motion, particularly given that it can interact with a notwithstanding Bill, is fine. It provides two mechanisms for a Prime Minister to challenge or co-opt the Opposition into calling for a general election.

I think the 14-day period is the most difficult and I thoroughly agree that it should remain silent. At the moment, we cannot put the specifics of how Governments can be formed and how to command confidence on to the statute book. We should not do that with undue haste and without great thought because we will create many greater issues for ourselves. I agree that Standing Orders might provide a degree of certainty to Parliament, which is what it is looking for, about what should happen during the period, but, again, all of that is dependent on constitutional norms being respected. If you have a situation where statute is in tension with the Standing Orders of the Houses of Parliament, that is yet another clash between the Executive and legislature that I would very much like to avoid.

The Chairman: Thank you very much. Your point about constitutional norms is something that we would all accept as very pertinent. Thank you for staying with us for a little longer than perhaps we anticipated and for the written evidence that you have sent to us.

Professor Robert Hazell: We wish you good luck with your inquiry. It is very important.

The Chairman: Thank you. We may need it, as with other things.