



# The Select Committee on the Constitution

## Corrected oral evidence: Fixed-term Parliaments Act 2011

Wednesday 23 October 2019

10.30 am

Watch the meeting

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

Evidence Session No. 3

Heard in Public

Questions 19 - 28

### Witnesses

I: Lord Butler of Brockwell; Lord Lisvane.

### USE OF THE TRANSCRIPT

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## Examination of witnesses

Lord Butler of Brockwell and Lord Lisvane.

Q1 **The Chair:** You are not strangers to this Committee. Welcome. We are, yet again, in a timely position discussing the Fixed-term Parliaments Act. We would like to start by giving you the opportunity to give us your view of that Act in general terms and what you perceive of its advantages and disadvantages.

**Lord Butler of Brockwell:** Thank you. My overall view is that the Act, though well intentioned, was based on a misconception and has turned out to be very damaging. The perceived advantages were a presumption of greater certainty about the length of Parliaments and a limitation of the discretion of the Prime Minister. The disadvantage is that both those perceived advantages turned out to be illusory. The first, a presumption about the length of a Parliament, is illustrated by what happened with the 2017 election. If the Prime Minister with the agreement of the Opposition decides to shorten Parliament and have a general election, as happened in 2017, that is not difficult to do and, indeed, would normally be the case because the Opposition would not usually pass off the opportunity to get the Government out. We are also seeing, however, that the limitation of the discretion of the Prime Minister to call a general election can paralyse the Government if it has lost its majority, as current events show. That cannot be in the national interest.

There is also the disadvantage regarding a no-confidence vote and the effect of that. The way in which the Act is drafted, the no-confidence vote introduces uncertain results. That is yet to be tried. It does not define what happens during the 14 days if the no-confidence vote is passed and there can be a difficult situation if that happens.

**Lord Lisvane:** I agree with everything that Lord Butler has said, but I would like to add a couple of points. I remember as Clerk of Legislation when I first saw the Bill for this Act, I said to the then Clerk of the House "This is going to end in tears", and I have not had to change my view since then.

One of the problems is that it excludes by specifying because there are just the two humane killers in the Act. One is the loss of a vote of confidence, if not assuaged by the subsequent Motion within 14 days, and the other is the two-thirds majority. What I mean by excluding by specifying is that all the things which in constitutional practice and theory we have come to expect are correct are turned on their heads because losing the Queen's Speech, for example, which may be circling around considerations now, or losing Second Reading of the Finance Bill, are always thought to have been a matter of confidence and losing them would result in an Administration going or radically changing its policies. Walter Bagehot is probably spinning in his grave.

I also agree with Lord Butler's remarks about paralysis, because that is where you end up. I have serious concerns about the 14-day period and

what happens during that time but you may want to discuss that in more detail later.

**Q2 Baroness Fookes:** You have probably answered the question, but I will put it anyway. To what extent has that Act led to a meaningful transfer of power from the Prime Minister to Parliament?

**Lord Lisvane:** In theory it has but in practice, as we have seen, it has not. When you get into the unexpected results of the Act that becomes very plain. There is always the with-one-bound option to bring in a short Bill to override the Act or to provide an exception to it. For that, however, you need a majority. That would be difficult and risky, but it remains there in theory.

**Baroness Fookes:** Yes, but is it possibly another form of paralysis?

**Lord Lisvane:** Certainly if you tried it and failed or it would be a Bill with a narrow scope. The scope for amendments, therefore, would be very limited but nevertheless there is no certainty about these things.

**Lord Butler of Brockwell:** Power has been transferred to Parliament. As Lord Lisvane said, normally that would be ineffective because the Opposition would agree to an election, but in the curious circumstances that we have at the moment it turns out that power has been transferred to Parliament because the Opposition have not been willing to agree to an election and, as Lord Lisvane said, the Government become paralysed.

**Lord Wallace of Tankerness:** Given that there is not a majority in the House of Commons for leaving the European Union without a deal, what is wrong with the House of Commons using the Fixed-term Parliaments Act to frustrate a Prime Minister who seemed at one point intent on leaving the European Union without a deal?

**Lord Butler of Brockwell:** Because it is frustrating the power of the Prime Minister and the Government. If it is to be frustrated, it ought to be frustrated by a vote by Parliament on that issue of whether one should leave without an agreement. In normal circumstances, if it is the policy of the Government, which is a very important policy, to leave, and they cannot get that through Parliament, the people should then decide whether they want a different Government, but the Act frustrates that and has been used to frustrate it on this occasion.

**Lord Wallace of Tankerness:** Lord Lisvane said that if the Government lost the Queen's Speech this Act frustrates an election, which may be true, but am I right in thinking that the Government lost the Queen's Speech in late 1923 and it resigned? It did not have an election. The King called upon Ramsay MacDonald. Where in the Act is there anything which stops the Government, should it lose the Queen's Speech vote tomorrow night, from resigning?

**Lord Butler of Brockwell:** Nothing, but the Government could resign, and we will come on to that, with the vote of confidence. The loss of the Queen's Speech is effectively, or was, a vote of confidence and in those

circumstances the Government could resign. If it is clear that another Prime Minister could form a Government, you could proceed to that.

**Lord Wallace of Tankerness:** There is nothing, therefore, to stop the Government resigning tomorrow night should it lose the vote of confidence and it would be a matter to see who could be called upon to form a new Administration.

**Lord Butler of Brockwell:** Indeed.

**Lord Lisvane:** If I could add on the Queen's Speech, Second Reading of the Finance Bill and so on, this is a major plank of policy and it is thrown into even sharper relief by losing on a major plank of policy by 230, 149 and 58 votes successively.

Q3 **Lord True:** I should preface by saying that I have presented a Private Member's Bill to repeal the Fixed-term Parliaments Act and restore the prerogative power. I did not want to pursue that at this point. I am interested in the question of power which goes beyond the 14 days where we have, effectively, a limbo Government. In a fused constitution we have an Executive, a Parliament and a Cabinet. Cabinet Government seems to me to be important. In the wisdom of our constitution, we have an established leader of the Opposition and a shadow Cabinet. In my wild youth I kept the minutes for the shadow Cabinet.

What happens regarding accountability? It seems that the transfer of power from the Prime Minister to Parliament is not binary because great decisions are being made affecting the future of our nation by a group of folk, we know not whom unless we see them go into rooms in camera and come out and say, "We do this". Is it not a problem of the Act that it creates albeit transient but potentially longer-lasting nexuses of power which keep no minutes, which have no accountability and whose identity is not known? That worries me. I do not know if I am being foolish about this and invite your comments.

**Lord Butler of Brockwell:** Parliament is sovereign and if Parliament chooses, or whatever groups getting together decide that they are going to vote against the Executive, that is Parliament's right. However, there needs to be a solution to that. The old solution is that the Government would resign or would ask for a Dissolution so that a new Government that could get a majority could be formed. The trouble is that the Fixed-term Parliaments Act prevents that. I do not think there is a problem with accountability, there are always groups in Parliament who are talking to each other and producing a result of a vote. That is not a problem of accountability. What Parliament decides, it has a right to decide.

**Lord Lisvane:** I would not comment on part of Lord True's question, but on the latter part the issue is that you find these parliamentary phenomena when there is uncertainty, and the greater the uncertainty the greater the incidence. As we have been saying, the Fixed-term Parliaments Act has in its operation a measure of potential uncertainty.

**Lord Beith:** Is there a list of other things that are normally treated as

fatal to a Government, such as losing the Queen's Speech? It reminded me that one of the ways in which power has been transferred from Prime Minister to Parliament, not necessarily in an undesirable way, is that, before the Fixed-term Parliaments Act, it was relatively easy for Whips to say to Members, "Although this is not formally a vote of confidence, this is a vote of confidence. If this goes the wrong way, you will be knocking on doors trying to persuade people that the Government were right all the time". Is that not a genuine transfer and also a clarification of what should constitute a vote of confidence?

**Lord Lisvane:** You might consider it in the context of whether to amend rather than repeal the Act. If something were designated formally by a Prime Minister as a vote of confidence, as John Major did with Maastricht or as Edward Heath did in 1972 with the European Communities Bill, which he won by eight votes, that is a different way of handling the confidence issue. I would not be an advocate for that because it seems to introduce an additional set of statutory provisions to engage with proceedings. I am always extremely uneasy about statute impacting upon parliamentary proceedings.

**Lord Pannick:** May I put the argument the other way? You are both forceful about it being a bad idea, but the argument in principle surely is that it is wrong for a Prime Minister, particularly one in a weak position, to have a power to determine whether to have a general election and, if so, when. Surely that power should not be enjoyed by the Prime Minister; it should be subject to some control.

**Lord Butler of Brockwell:** I think it should be in the power of the Prime Minister to do that because if a Prime Minister has lost the ability to get their business through Parliament, in the interests of the country that issue needs to be resolved and this is a way of resolving it. It was supposed that the old arrangements gave the Prime Minister too much discretion. I think that is the implication of your question. Having worked inside Governments, however, I know, as people would expect, that Prime Ministers do not want to have a general election unnecessarily. They would much rather stay in power and get their business done.

I remember when it was thought that the power of the Prime Minister to call a general election at a time that suited them that might be to their advantage was unfair. Margaret Thatcher took the view that the fifth year of a Parliament was an open season for a general election. You could not have a general election before that because the public would punish you if you did, and there is quite a lot of evidence that the public do punish Governments that call general elections which they think are unnecessary and 2017 might be an example of that. The actual discretion of the Prime Minister, therefore, was very limited. Even in that last year of a Parliament you only effectively have a choice between May and October. It is a very limited discretion indeed. I think that the advantages to the nation of a Government being able to secure an election if it cannot get its business through outweigh that very limited advantage that the Prime Minister's discretion gives the Government of the day.

**Lord Lisvane:** I have some sympathy with what Lord Pannick is saying. I think there are two categories of issue. One is the Gordian knot where there is either a crisis or the government are denied freedom of action. I am thinking of February 1974 where calling an election assuaged that problem. The other is the referee blowing the whistle when his side is several goals ahead. That falls perfectly into Lord Pannick's definition of unfairness and it may be an answer to a conundrum that I am not going to suggest an answer to now but which your Committee may want to address.

**Lord Faulks:** The Fixed-term Parliaments Act requires a two-thirds majority. Reading David Laws's book *22 Days in May*, it seems to have been a slightly arbitrary figure which probably reflected the then balance in parliamentary parties. Other figures were suggested. Do you think that by changing the figure, lowering it I would suggest from 66%, you could improve the Act or is it beyond improvement?

**Lord Lisvane:** I have seen suggestions that it should be 50% plus one. Given the fragmented representation in the House of Commons, as we see it at the moment, that may be an option. I feel there is a deckchairs-on-the-"Titanic" issue about the Act, so I would not fiddle with that myself.

Q4 **Lord Beith:** On planning parliamentary activity, if we think of legislative planning, of the ability of Select Committees to plan a programme and complete that programme, the ability of Bills to get through without being lost at the wash-up stage, even Prorogation has cost us a number of useful Bills which have not reappeared in the Queen's Speech. Is not the ability to have an orderly Parliament an advantage of a fixed term in most circumstances?

**Lord Lisvane:** Lord Butler has seen this from within, but from a parliamentary perspective I do not think it is. I retired in 2014 and I saw no sign in the 2010 Parliament that the expectation of five years was making a substantial difference to legislative planning, because it is a natural phenomenon that business managers look at the current Session or the one just about to approach. Although certain Bills can be tagged as a second Session Bill or a third Session Bill because they are too big or complicated or contentious to deal with in the first Session of a Parliament, I do not think overall that there was a discernible change in the quality of legislative planning in the 2010 Parliament.

As far as wash-up is concerned, I would say that is a purely sessional phenomenon because you have two or three weeks, sometimes much less, to make the final dispositions. Those will always depend on the state of play on the Bills that have not been passed and differences between the Houses. That is a micro set of considerations which are quite separate from the strategic ones that you raised in your question.

**Lord Beith:** And on Select Committee work?

**Lord Lisvane:** Select Committees are infinitely adaptable. Having planned Select Committee programmes and inquiries for a number of years in the past, it would have been great to have had the assurance that things would proceed in a reasonably predictable fashion.

**Lord Beith:** Or a reasonable prospect.

**Lord Lisvane:** Indeed.

**Lord Butler of Brockwell:** I was not within the 2010 Government but since Governments will normally plan for a five-year session, I do not think the Act makes much difference in that respect. As for Select Committees, I have just been appointed to a Select Committee whose work was aborted by what has recently happened but has now been reconstituted and we shall start again next week.

Q5 **Baroness Corston:** A question specifically for Lord Lisvane: what assumptions can be made for the timetabling of Motions of no confidence that have been tabled by the Official Opposition and how would that vary from motions of no confidence tabled by others?

**Lord Lisvane:** If it is a Motion of no confidence put down by the Official Opposition then typically it will appear as an EDM, so it would be flashed up on the Blue Pages, as I am old-fashioned enough to call them. *Erskine May* says that an Early Day Motion is invariably found time, and in my experience that is within two to three days maximum. On Motions tabled other than by or headed by the Leader of the Opposition, there is little assumption that those will be found time on the Floor of the House. Indeed, there was one on 18 December last year where some of the smaller parties tabled a Motion of no confidence which sank without trace. There is a logic in that because that is a demonstrative activity. It is very unlikely, were it to be on the Floor of the House, to lead to a possibility of the Government being defeated. Only the Official Opposition is in a position to do that or to orchestrate that.

**Baroness Corston:** What would be the consequences available to the Opposition or others if the Government refused to make time for a debate on a no-confidence Motion?

**Lord Lisvane:** After recent experiences on Prorogation I am very cautious about saying, "Well, there's a very strong conventional expectation". There would, however, be a very strong political expectation as well. I do not have a road map for that.

**Lord Butler of Brockwell:** I doubt in that case whether the courts would become involved.

**Lord Lisvane:** Article 9 can be quite useful from time to time. However, the media would certainly get very excited.

Q6 **Lord Faulks:** I wanted to ask whether you thought 14 days was the appropriate time for a Government to be formed. You have both probably got views on this but, in particular for Lord Butler, to what extent can the

Civil Service actively and effectively support the formation of a new Government following a vote of no confidence in that 14-day period?

**Lord Butler of Brockwell:** I do not think that the Civil Service is an issue here. The Civil Service will do whatever is required of them. I would not argue for longer than 14 days because you want the period of uncertainty to be as short as possible. It should be long enough for the parties to try to see if an alternative Government could be formed without a general election, but 14 days ought to be long enough for that. I do see some advantage in there being that period because if you could solve the issue by another Government being formed without putting the nation to the trouble of a general election there is an advantage in that. I would not expect it to be successful very often.

**Lord Lisvane:** I agree. Of course, 14 days is calendar days and not sitting days. It depends entirely on the nature of what takes place during those 14 days. If it is a straightforward Government-in-waiting, that is one option. If forming an alternative Administration is an impossibility that is another option. Both of those are fairly clear-cut and 14 days is probably plenty long enough. Indeed, people will be twiddling their thumbs in a rather attenuated wash-up in the final days of those 14 days. You might want to come on to the mechanics of what is happening in the third option where there is no obvious alternative grouping, which we can deal with as you wish.

**The Chair:** Yes.

**Lord Faulks:** Please go on.

**Lord Lisvane:** I am not sure how easily it can be cured but it was probably an error to say that the second Motion after 14 days should be a Motion of confidence in Her Majesty's Government. That means there has to be a Government formed at that stage. If you have a situation where the Government have lost a vote of confidence, the clock starts ticking and it will be political ferrets in a sack, if I can use that rather unedifying expression, as to what is then happening. There will be intense competition and perhaps manoeuvring as to whether there is an alternative grouping which can command the confidence of the House.

The difficulty which must be avoided is that it cannot be right that a leader of an alternative grouping says that he or she has the necessary numbers and that an Administration should be formed on the authority of that undertaking. There is the example of Canada in the 1920s where the Governor was asked by Mackenzie King for a Dissolution and refused it. Lord Byng refused because the Leader of the Opposition had said that he had the numbers. As it turned out, he did not have the numbers and Mackenzie King got his Dissolution and Lord Byng resigned shortly afterwards. In this case, you cannot put Her Majesty in the position of operating on the basis of an undertaking of that sort.

**The Chair:** What if there were to be an Early Day Motion that was signed by a majority of Members of the Commons?

**Lord Lisvane:** I would be very uneasy about an EDM. We all know about the authority of signatures to an EDM. They can be put down. You can go into the Table Office and ask them to take your name off. Casting a vote, on the other hand, is a different matter. I do not think that the House should put the Sovereign in the position of checking her judgment. There has to be a means, therefore, by, and again I hesitate to use this phrase, an indicative vote of demonstrating that a certain grouping will command a majority.

It could be that has to be tackled several times if it is not successful the first time. That is where 14 days starts to look a bit short. There is also the issue of the role of the Chair because some of these Motions may be very similar to other Motions, but if they are going to produce a different result they are probably different enough to be voted on. There is also the question of how amendments are handled. That might be a complex set of issues if we went into mode 3, if we can call it that for shorthand.

**Lord Butler of Brockwell:** To add to what Lord Lisvane said, as the Act is drafted there is a Catch-22. You cannot be Prime Minister unless you can get a vote of confidence, but you cannot get a vote of confidence until you have been asked to be Prime Minister. It is difficult to resolve.

**Lord Pannick:** That was exactly the point that I wanted to raise because if there is a Motion of no confidence in the Prime Minister that is carried, that person remains Prime Minister unless they resign. Does Her Majesty have a constitutional duty in your view to act on the advice of that Prime Minister in relation to whether she should invite somebody else to form a Government and bring the second Motion before the House?

**Lord Butler of Brockwell:** My answer to that is no. It is one case where the Queen does not have to act on the advice of the Prime Minister who has lost a vote of confidence. She and her advisers would give great weight to it, but she would only act on it if it had been independently demonstrated that another Government could be formed.

**Lord Lisvane:** I entirely agree with that and I think that the original state of affairs before the Act has now been fundamentally changed by an alternative mechanism being set down in the Act.

**Lord Butler of Brockwell:** I would like to put one point on the record because I think this may occur. If, in current circumstances, the Prime Minister and Government were to lose a vote of confidence, there are signs that the Labour Party would say that Mr Corbyn has a right to be asked whether he could form a Government. That is not the case. There would have to be discussions. It might be a Member of the existing party in Government who could form a Government. I do worry that the Queen might be criticised if she did not immediately call for Mr Corbyn. It would be helpful if it could be put on the public record that that is not the situation. The Queen is not under that obligation and would not be acting improperly if she did not call for Mr Corbyn.

**Lord Lisvane:** I absolutely agree.

**Lord Wallace of Tankerness:** For reasons I fully understand it is suggested that an Early Day Motion signed by a majority would not work. What about an humble Address to be passed by the House to the Queen in suggesting that she graciously ask X to form an Administration? Would that be a more secure mechanism?

**Lord Lisvane:** It would certainly have the requisite authority, but, in arriving at that conclusion, you might well have had to go through the various vicissitudes I was outlining earlier on.

Q7 **Lord Dunlop:** Could I ask Lord Butler about another aspect of the 14-day period which is: what are the implications for the Government's operations of the Government losing a no-confidence vote and what, if any, limitations are applied to what the Government can do during that period?

**Lord Butler of Brockwell:** Because the Act has not been tested in that way so far, conventions have not been established. However, the conventions would be the same as in a lead-up to a general election. The Government would remain the Government. If there was a terrible international crisis, the Government would have to act, but in general the Government should avoid taking decisions which would prejudice the position of a possible successor Government during that period.

**Lord Dunlop:** To follow up on that, are there any safeguards? We have seen conventions and how conventions are addressed, but what safeguards are there should a Government choose to ignore the conventions around purdah and caretaker conventions and did proceed to make policy decisions?

**Lord Butler of Brockwell:** The only inhibitions would be if it needed parliamentary approval. Parliament might in those circumstances choose not to give approval. Alternatively, there might be heavy criticism in the media. A Prime Minister facing a general election would probably prefer to avoid that.

**Lord Dunlop:** A final question on the *Cabinet Manual*, which is due to be updated. Are there implications for the *Cabinet Manual* in terms of supporting what we are talking about?

**Lord Butler of Brockwell:** My successor, Gus O'Donnell, did a great public service in 2010 in producing this written document in draft, and I believe I gave evidence on it before this Committee, which made clear that if there was a hung Parliament as it turned out to be in 2010, the Prime Minister Gordon Brown would not have an immediate obligation to resign but should stay until there were negotiations about what should be done. By doing that, it became established and recognised both by the political parties and by the media that the Prime Minister did not immediately have to resign, so it prevented people howling for the Prime Minister's immediate resignation. That was a useful thing to do by means of producing that document. It probably would be timely if it were now updated and would have a similar advantage.

**The Chair:** In those circumstances the Prime Minister did what Lord Hennessy would approve of as the “good chap” theory: he did resign. It would have been a different situation if the Prime Minister had declined to resign.

**Lord Butler of Brockwell:** He would have had to face Parliament and at that point he would probably have lost a vote of confidence.

**The Chair:** The situation is a bit different now where the Prime Minister refuses to resign.

**Lord Butler of Brockwell:** Yes.

Q8 **Lord Howarth of Newport:** I would like to go back on a couple of issues that we have partially discussed to press you a little further. The first we have thoroughly discussed, but I would still like to press you a little more on the question of how, in the 14 days following a vote of no confidence, an alternative Administration might demonstrate that it has sufficient support for Her Majesty the Queen to invite its leader to form a new Government? Lord Lisvane expressed considerable unease at the suggestion that an EDM might provide a solution. He was a little more confident that either a vote or an humble Address would work. Can we have your views on whether under the existing legislation there is a solution to this problem? Is there any mechanism that would be sufficiently authoritative and conclusive and would protect the position of the Queen so that she was not seen to be taking a political decision that it might be inappropriate for her personally to take? Is there an answer to this question within the terms of the Fixed-term Parliaments Act?

**Lord Lisvane:** I do not think that there is because of the choice of the terms of the second Motion. If the second Motion is couched in terms of confidence in Her Majesty’s Government, you must have a Government, ergo you have to go through those steps of establishing the relative strength of support for alternatives. They may fail completely, in which case the clock runs down, we have a Dissolution and 25 days later, subject to the power exercised by the Prime Minister of advising a different date, we have a general election.

**Lord Howarth of Newport:** Lord Butler’s Catch-22 is therefore insuperable.

**Lord Butler of Brockwell:** Lord Lisvane and I discussed this before the sitting. We did our best, but we could not think of a satisfactory solution.

**Lord Howarth of Newport:** The other issue that I would like to go back to is what the impact of this legislation may so far have been on the notion of confidence. Lord Lisvane spoke rather elegiacally about the old days when a defeat on the Queen’s Speech or a defeat on the Second Reading of the Finance Bill would have been taken as a vote of confidence and would have meant that the Prime Minister had to go.

Is it your view that the result of this legislation having specified in legal terms what confidence is that the more informal and fluid notions of

confidence that have played a valuable part in our constitution over many years have atrophied? Do they still exist in any meaningful sense? Are they applicable and, if not, are they retrievable?

**Lord Butler of Brockwell:** The consequences have been very damaging indeed. Under the old arrangements, if Mrs May had been unable to get parliamentary support for the agreement which she had negotiated with the EU on such an important matter and, as Lord Lisvane said, if she had lost, as she did, by such a huge number, that would have been an occasion to apply for a Dissolution because the Government had lost confidence.

**The Chair:** Surely she would have come back the next day to ask for a vote of confidence.

**Lord Butler of Brockwell:** I agree. She could also have declared in advance that she would treat this as a matter of confidence. Either way it could have been done. That did not happen and that has resulted in the impasse that we have been in and that has been very damaging to public confidence in Parliament. It has damaged the public view of Parliament a great deal. To the extent that the Fixed-term Parliaments Act was responsible for that, that is what I mean by saying it has done great damage.

**Lord Howarth of Newport:** And we have lost some valuable flexibilities.

**Lord Lisvane:** I think so. To pick up on what Lord Howarth was saying, I am not a "golden age" merchant but sometimes there are useful things to be salvaged from the wreckage. In this case, however, a loss on a matter of confidence is not necessarily terminal. It indicates that the House of Commons is not prepared to provide support or endorsement on the proposition before it. It can be avoided by a change of personnel or a change of policy.

Picking up on what Lord Butler was saying, the effect of the FTPA is that specification of the only two ways in which you can have a general election. I was saying this long before we got into the situation we are in now, where a Government that is severely wounded is nevertheless required to limp on. I cannot remember exactly, I think it was in discussions before the Bill was even introduced, but it was originally drafted so that the provisions about Motions of confidence simply said, "On a Motion of confidence" or "a matter of confidence". That horrified me and horrified my learned predecessor, the Clerk of the House at the time, because that seemed to invite judicial intervention. What was a Motion of confidence? The idea of having a Motion of confidence with all sorts of Christmas tree provisos about changing this policy or that policy seemed to risk getting us into a real difficulty. There was a strong argument for having specified words, but that has introduced an inflexibility which has its own disadvantages.

**Lord Howarth of Newport:** If the FTPA were to be repealed, could we get back to the culture of conventions that we had before?

**The Chair:** We are moving on now to what Lord Wallace is asking.

Q9 **Lord Wallace of Tankerness:** If we were to move forward, and there has got to be a statutory review in 2020, would you see total repeal of this and what would the consequences of that be? What amendments would you recommend?

**Lord Lisvane:** It has been fairly plain from what we have been saying that we would both be keen to see a repeal. If you are going to repeal you will need to replace the prerogative power which has been extinguished by the 2011 Act. If you remove something by statute you have to replace it by statute. Moreover, there is a highly pragmatic argument that says on this issue of Dissolution you must remove as far as possible any legal uncertainty about the exercise of the power.

My argument would be for repeal. If I were forced to say what amendments— if you had to amend it not repeal it—I mentioned earlier making Dissolution 50% plus one and possibly the concept of something which is designated by the Prime Minister of the day as a matter of confidence. However, these introduce their own complications and repeal is a simpler and more attractive option.

**Lord Butler of Brockwell:** I agree.

**Lord Wallace of Tankerness:** On simple repeal, you need to say what replaces it even if it is a revival of the prerogative. Also, simple repeal would mean that Parliament sits for ever because we need a septennial or quinquennial.

**Lord Lisvane:** There is quite a bit of legislative housekeeping to be done.

**Lord Butler of Brockwell:** Yes.

**The Chair:** Do you think things like defining a vote of confidence or the circumstances of a vote of confidence could be incorporated into Standing Orders of the Commons?

**Lord Lisvane:** No, I do not. It depends. If the result of the operation of the Standing Order is going to be a statutory phenomenon, I would advise against that. I do not think that the two mix.

**The Chair:** Lord Pannick, did you want to pursue further on the prerogative?

**Lord Pannick:** The Fixed-term Parliaments Act preserves the prerogative power to prorogue. Is there any argument for confining the prerogative power by legislation? I declare an interest as a result of the Supreme Court case.

**Lord Lisvane:** It would be an act of temerity for me to suggest to Lord Pannick how this particular problem might be dealt with. The effect of the Supreme Court judgment means that future Governments will approach this very carefully. I do not see any great attraction in providing that the House of Commons should decide on Prorogation.

**Lord Butler of Brockwell:** Nor do I. Except in the recent notorious circumstances, Prorogation is usually used simply to bring a Session to an end and prepare for a new Session. That can be left to the Executive.

**Baroness Fookes:** On the assumption that the Act were to be repealed and we would therefore have to restore some form of limitation on the life of a Parliament, would you recommend going for the five years that we have, because there are some views that there should be a four-year period?

**Lord Lisvane:** It depends whether you regard five years as being a target rather than being a realistic period, because you look over recent Parliaments and the majority, except in special circumstances, have run for about four years. It may well be that the "five years but you only use four" phenomenon works on a "four years but you only use three". I would be quite careful about that.

**Lord Butler of Brockwell:** I remember that, certainly in the House of Lords, during the passing of the Fixed-term Parliaments Bill, this issue was debated at length. It may well have been debated in the Commons as well. We finished, however, with a five-year term and I think that is right.

**The Chair:** Thank you both very much indeed. That was very helpful. We appreciate you putting your views on record.