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A Question of Confidence? The Fixed-term Parliaments Act 2011

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Evidence is published online at <https://committees.parliament.uk/work/14/fixedterm-parliaments-act-2011/publications/> and available for inspection at the Parliamentary Archives (020 7219 3074).

Q in footnotes refers to a question in oral evidence.

SUMMARY

The Fixed-term Parliaments Act 2011 (FTPA) was introduced to set the length of parliaments at five years and to require the approval of the House of Commons for any early general election. It removed the prerogative power of the Monarch to dissolve Parliament and bring about a general election at the request of the prime minister and vested authority instead in Members of Parliament.

These constitutional changes have proved controversial. In 2019, during a period of minority government, the Prime Minister sought an early general election under the provisions of the Act and was refused by the Commons on three occasions. The election only came about as a result of a short bill to side-step the provisions of the Act.

These events put the FTPA in the spotlight. It has been stress-tested and, in the eyes of the two main political parties and many political commentators, it has been found wanting. Both the Conservative and Labour parties promised to repeal the Act in their 2019 manifestos and the Government has reiterated that commitment since taking office.

However, repealing the Act is not straightforward, as it is the only piece of legislation setting the length of a parliament. If it were repealed without new provision being made, the current parliament would last indefinitely, without the prospect of another general election.

Further, repealing the Act raises a thorny legal question about prerogative powers. There is a contested legal debate as to whether repealing the Act would revive the prerogative power of the Monarch to dissolve Parliament or, with the Act having removed the power, it is extinguished permanently. Uncertainty about such an important constitutional matter—and the risk it would raise of politicising the role of the Monarch—would be unacceptable, and so replacement provisions to the FTPA are required for repeal to proceed.

Replacing the Fixed-term Parliaments Act poses a number of linked questions for Parliament to answer:

- Should the length of parliaments be fixed absolutely or should mechanisms allow for early general elections?
- What should be the maximum length of a parliament?
- Should the calling of an early general election require the consent of the House of Commons?
- If the consent of the Commons is required for an early general election, what threshold, if any, should be set for approving the motion?
- If the consent of the Commons is required for an early general election, should the Commons be asked to approve the date for the election?

Rather than making definitive recommendations, in this report we explore these questions, set out the evidence and clarify the issues to inform Parliament's choices, because repealing the Act is not a simple matter.

Following the contested prorogation of early autumn 2019, and the Supreme Court judgment in *Miller/Cherry*, Parliament will also need to consider the further question of whether the House of Commons should be required to approve prorogation in future.

A statutory review of the Act is due to begin later in 2020. We emphasise that constitutional change must be designed to stand the test of time and that is most likely achieved by building on consensus.

A Question of Confidence? The Fixed-term Parliaments Act 2011

CHAPTER 1: INTRODUCTION

Introduction

1. Parliamentary sovereignty is the beating heart of the constitution. Parliament is the supreme legal authority in the UK and has the power to create or end any law, preventing any one Parliament from binding a successor. In most instances, the Government is only able to exercise its executive functions when authorised to do so by Parliament.
2. Parliamentary sovereignty also has a political context—the government is formed from Parliament, is accountable to Parliament and can be overridden by Parliament. The ability to dissolve Parliament therefore runs right through the heart of constitutional arrangements.
3. Prerogative powers are an exception to the sovereignty of Parliament. These are powers held by the Monarch or the Government that do not require the consent of Parliament. Until 2011, the dissolution of Parliament was a personal prerogative power exercised by the Monarch, at the request of the Prime Minister. The only legal constraint on this power was that the maximum term for a parliament was five years.¹ The passing of the Fixed-term Parliaments Act 2011 (FTPA or “the Act”) made new provision for dissolving Parliament and by extension the calling of general elections.
4. The Act touches upon several complex and interlinked constitutional issues: parliamentary sovereignty, the notion of confidence in a government, the power to call, and the timing of, general elections, and the length of parliaments. Changes to the fundamentals of the constitution should be based on widespread support and designed to last, but in the nine years since its passage the Act has proved sufficiently contentious that both main parties promised to repeal it in their manifestos for the 2019 general election. Few support the retention of the FTPA in its current form and the Government has subsequently confirmed its intention to repeal the Act.
5. In view of the disquiet about the FTPA in July 2019 we began an inquiry into it. Following the instigation of the *Miller/Cherry* legal actions, we expanded our work to consider the issue of proroguing, as well as dissolving, Parliament. In this report we explore the genesis of the Act, the effects of its provisions and ideas for reform. We are grateful to all those who assisted our work by providing oral or written evidence.

Genesis and provisions of the Fixed-term Parliaments Act 2011

6. Prior to the FTPA, the dissolution of Parliament and the calling of elections operated on the basis of conventions, practices and understandings. While there were critiques of the power of the prime minister to call elections at a time of his or her choosing, the system largely operated smoothly and with a degree of consensus between the two largest political parties.

¹ The maximum length of a parliament was set at seven years by the Septennial Act 1715. This was reduced to five years by the Parliament Act 1911.

7. The Fixed-term Parliaments Bill was introduced into the House of Commons by the Coalition Government on 22 July 2010 and received Royal Assent on 15 September 2011. Fixing the lengths of parliaments was a priority for the Coalition—both for the 2010–15 parliament and the longer term—with the importance of this commitment demonstrated by it featuring in the second paragraph of the Coalition Agreement:

“The Government will put a motion before the House of Commons in the first days of the Government stating its intention that, subject to Her Majesty The Queen’s consent, the next General Election will be held on 7 May 2015, to be followed by legislation for fixed term Parliaments of five years. The passage of the legislation will be subject to a whip in the Parliamentary Parties in both Houses.”²

8. During the second reading of the Bill in the House of Commons, the then Deputy Prime Minister, Rt Hon Nick Clegg MP, explained the Government’s justification for this reform:

“The Bill has a single, clear purpose: to introduce fixed-term Parliaments to the United Kingdom to remove the right of a Prime Minister to seek the Dissolution of Parliament for pure political gain. This simple constitutional innovation will none the less have a profound effect because for the first time in our history the timing of general elections will not be a plaything of Governments. There will be no more feverish speculation over the date of the next election, distracting politicians from getting on with running the country. Instead everyone will know how long a Parliament can be expected to last, bringing much greater stability to our political system. Crucially, if, for some reason, there is a need for Parliament to dissolve early, that will be up to the House of Commons to decide.”³

9. Once enacted, section 1(2) of the FTPA set the date for the next general election as 7 May 2015. For each subsequent general election, “the polling day ... is to be the first Thursday in May in the fifth calendar year following that in which the polling day for the previous parliamentary general election fell.”⁴

10. The FTPA therefore moved the UK from a position of executive flexibility regarding the calling of elections, to a semi-fixed-term arrangement. We noted the range of possible systems in our report on the Fixed-term Parliaments Bill in 2010:

“There is a spectrum between rigidly fixed terms, of which Norway is the prime example, and flexible systems such as in the UK, Australia, New Zealand and Ireland where the Prime Minister broadly retains the flexibility to call an election at any point before the expiry of a maximum term. In between, there are semi-fixed arrangements under which a fixed term is the norm, but where there are safety valve provisions which enable an early election to be called. Such arrangements operate in Germany, Sweden and the devolved institutions in Scotland, Wales

2 *Coalition Agreement for Stability and Reform*, May 2010: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78978/coalition-agreement-may-2010_0.pdf [accessed 30 July 2020]

3 HC Deb, 13 September 2010, [col 621](#)

4 Fixed-term Parliaments Act 2011, [section 1](#)

and Northern Ireland. Such arrangements are generally referred to as fixed-term arrangements, though the terms of these Parliaments are not fixed in length in the pure sense.”⁵

11. Beyond the stated aims of stability and the principle of transferring power to Parliament, the Act was also perceived by some as a measure of political expediency, as it strengthened the prospects of the Coalition Government lasting for a full five-year parliament. Sir Malcolm Jack, Clerk of the House of Commons from 2006 to 2011, suggested that the Act was “drafted in a hurry to bolster the coalition of Conservatives/Liberal Democrats.”⁶ The then Prime Minister, Rt Hon David Cameron MP, acknowledged this reasoning, suggesting that there was a “fear” from the Liberal Democrats “that the Conservatives might wait for an opportune moment, then collapse the Coalition and seek a general election. The move made the Coalition more stable.”⁷ Lord Norton of Louth, Professor of Government at the University of Hull, concluded the FTPA was introduced “to deal with a particular circumstance but the solution was made an enduring one.”⁸
12. However, the issue of fixed-term parliaments did not suddenly materialise in May 2010. As Lord Young of Cookham, who was Leader of the House of Commons during the passage of the legislation, observed:

“The Fixed-term Parliaments Act has had a bad press and has itself come to the end of its term. It was not, as some have claimed, a knee-jerk reaction to the formation of the coalition Government, preventing its unilateral dissolution by David Cameron at a time inconvenient to our partners. It was actually a manifesto commitment by both the Labour Party and the Liberal Democrats before the 2010 election that was generously, but perhaps ill-advisedly, adopted by my party.”⁹
13. The FTPA does not definitively fix parliaments on a five-yearly schedule. Section 2 provides two mechanisms to dissolve Parliament prematurely and bring about a general election. These mechanisms require either:
 - A number equal to or greater than two-thirds of all MPs to vote in a favour of the motion “That there shall be an early parliamentary general election”;¹⁰ or
 - A simple majority of MPs to vote “That this House has no confidence in Her Majesty’s Government” and, in the 14 calendar days following this resolution, no motion “That this House has confidence in Her Majesty’s Government” to be moved successfully.¹¹
14. Mr Clegg suggested at the time that such mechanisms were required because of the “possibility of exceptional circumstances that would make it appropriate for Parliament to dissolve before completing its full term.”¹²
15. Since the Act came into force the UK has had three general elections, each coming about through a different route. The 2015 election took place on

5 Constitution Committee, *Fixed-term Parliaments Bill* (8th Report, Session 2010–12, HL Paper 69)

6 Written evidence from Sir Malcolm Jack ([FPA0002](#))

7 David Cameron, *For The Record*, 2019 (London: William Collins), p 289

8 [Q 8](#) (Lord Norton of Louth)

9 HL Deb, 8 January 2020, [col 216](#)

10 Fixed-term Parliaments Act 2011, [section 2\(1\)–\(2\)](#)

11 *Ibid.*, [section 2\(3\)–\(5\)](#)

12 HC Deb, 13 September 2010, [col 268](#)

7 May, as set out in the Act. The 2015 parliament lasted for two, rather than five years, with 522 MPs supporting an early general motion tabled by the then Prime Minister, Rt Hon Theresa May MP, leading to an election on 8 June 2017. Following three failed attempts in 2019 to secure an early general election through this route,¹³ the Government led by Rt Hon Boris Johnson MP introduced a short bill that set aside the provisions of the FTPA to enable an early general election.¹⁴ The Early Parliamentary General Election Act 2019 was fast-tracked through both Houses of Parliament and led to the election on 12 December 2019.

16. In addition to the FTPA's provisions regulating the length of parliaments, section 6(1) stated "This Act does not affect Her Majesty's power to prorogue Parliament."¹⁵ The prerogative power to prorogue Parliament therefore remained, in practical terms, in the hands of the Prime Minister. The exercise of this power became the subject of controversy following the Government's decision to prorogue Parliament on 9 September 2019 for five weeks and the successful legal challenge to this use of the power.

Constitution Committee scrutiny of the Fixed-term Parliaments Bill

17. Given the constitutional significance of the Fixed-term Parliaments Bill, we conducted an inquiry during its passage through Parliament. Our key conclusions and recommendations were:
- "We take the view that the origins and content of this Bill owe more to short-term considerations than to a mature assessment of enduring constitutional principles or sustained public demand. We acknowledge the political imperative behind the coalition Government's wish to state in advance its intent to govern for the full five year term, but this could have been achieved under the current constitutional conventions.
 - We recognise that, in promoting this Bill, the Prime Minister is prepared to relinquish an important prerogative power. This is a significant aspect of the Government's stated aim of reducing executive power. However, the balance of the evidence we heard does not convince most of us that a strong enough case has yet been made for overturning an established constitutional practice and moving to fixed-term Parliaments.
 - We conclude that it is sensible for the Bill to contain some form of safety valve which would allow for an early election in circumstances such as the government losing the confidence of the Commons or where a political or economic crisis has affected the country ... We conclude that it is appropriate for the Bill to contain two different safety mechanisms as long as each one is workable and fulfils its purpose.
 - In the light of our conclusion ... that there needs to be a safety valve mechanism ... we consider that the best way to do this is to enable Parliament to dissolve itself when there is a cross-party majority that an election should be called. Although it is not possible to determine the relative majority which might be held by governments in the future, a requirement of two-thirds of MPs voting in favour of a dissolution

13 See Commons Hansard on 4 September 2019, 9 September 2019 and 28 October 2019.

14 This bill was widely referred to as a 'notwithstanding' bill, as it provided for an early election notwithstanding the provisions of the FTPA.

15 Fixed-term Parliaments Act 2011, [section 6\(1\)](#)

motion would most likely necessitate the agreement of cross-party MPs. We therefore conclude that this safety valve is appropriate.

- We recognise that the 14 day period for formation of a new government may result in a period of uncertainty. However, it is not possible to determine in advance the many different circumstances under which a vote of no confidence may be passed. We therefore conclude that 14 days is an appropriate period to allow for formation of a new government.
- We agree that the risk of abuse of the power of prorogation is very small. We therefore conclude that Her Majesty’s power to prorogue Parliament should remain.”¹⁶

We revisit these conclusions and recommendations throughout this report.

Review and possible repeal

18. During the Bill’s passage, members of the House of Lords added a sunset clause to the Bill to allow “the next Parliament and subsequent Parliaments the opportunity to decide whether the provisions of this Bill, subjecting them to a fixed term, should apply to them.”¹⁷ The Government did not agree, suggesting the

“purpose is that the fixed-term Parliament is not for this Parliament only but, subject of course to the fact that any legislation can be repealed by a future Parliament, it should nevertheless apply to future Parliaments. Further, the purpose is to make fixed terms for the United Kingdom Parliament the norm, just as they are for local government, the devolved legislatures set up by this Parliament, and the European Parliament. This will deny the Executive the ability to choose a date for a general election to suit its own political ends. It will create certainty as to how long a Parliament should last.”¹⁸

19. After ping-pong between the Houses, this impasse was resolved by a Government amendment, supported by a majority of members in the House of Lords, committing to a review of the Act in 2020. Consequently, section 7 of the Act stipulates that “no earlier than 1 June 2020 and no later than 30 November 2020” the Prime Minister “must make arrangements for a committee to carry out a review of the operation of this Act and, if appropriate in consequence of its findings, to make recommendations for the repeal or amendment of this Act” and that a majority of the committee must be MPs.¹⁹
20. The Conservatives’ manifesto for the 2019 general election committed to “get rid of the Fixed Term Parliaments Act—it has led to paralysis at a time the country needed decisive action.”²⁰ This commitment was echoed in the Queen’s Speech, which said “Work will be taken forward to repeal the Fixed-term Parliaments Act.”²¹ The Labour election manifesto also committed to “repeal the Fixed-term Parliaments Act 2011, which has stifled democracy

16 Constitution Committee, *Fixed-term Parliaments Bill* (8th Report, Session 2010–12, HL Paper 69)

17 HL Deb, 18 July 2011, [col 1078](#) (Lord Butler of Brockwell)

18 *Ibid.*, [col 1076](#) (Lord Wallace of Tankerness)

19 Fixed-term Parliaments Act 2011, [section 7](#)

20 Conservative Party, *2019 Election Manifesto*, p 48: https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf [accessed 30 July 2020]

21 HL Deb, 19 December 2019, [col 8](#)

and propped up weak governments.”²² However, repeal of the Act on its own is insufficient—replacement provisions will be required to, at the very least, set the maximum term for a parliament.

21. **The Fixed-term Parliaments Act 2011 changed core aspects of the UK constitution. It has proved controversial. Given the Government’s commitment to repeal the Act, for which it has support in principle from the Official Opposition, a review of it is timely.**
22. In this report we examine the issues raised by the Act and its amendment or repeal. In particular, we consider the series of linked questions that any proposals for change must address:
 - Should the length of parliaments be fixed absolutely or should mechanisms allow for early general elections be permitted?
 - What should be the maximum length of a parliament?
 - Should the calling of an early general election require the consent of the House of Commons?
 - If the consent of the Commons is required for an early general election, what threshold, if any, should be set for approving the motion?
 - If the consent of the Commons is required for an early general election, should the Commons be asked to approve the date for the election?
23. In addition, we explore the provisions of the FTPA relating to confidence motions and the question of whether the House of Commons should be required to approve any prorogation of Parliament.

22 Labour Party, *2019 Election Manifesto*, p 82: <https://labour.org.uk/wp-content/uploads/2019/11/Real-Change-Labour-Manifesto-2019.pdf> [accessed 30 July 2020]

CHAPTER 2: FIXING THE LENGTH OF PARLIAMENTS

Transferring power

24. Nick Clegg said that the Fixed-term Parliaments Bill had a “single, clear purpose ... to remove the right of a Prime Minister to seek the Dissolution of Parliament for pure political gain.”²³ Assessed narrowly, it is indisputable that this objective was achieved: before the Act dissolution was a prerogative power; following enactment, Parliament can be dissolved only at the end of the five-year period set out in section 1 of the Act, or if the House of Commons votes in favour of an early general election.
25. The Act transferred power to dissolve Parliament from the Prime Minister to Parliament. While this unarguably was a transfer of *legal* power,²⁴ there was disagreement among our witnesses about the extent to which it had transferred meaningful *political* power. Professor David Howarth, Professor of Law and Public Policy at the University of Cambridge,²⁵ said:
- “Conventional wisdom had it that the Fixed-term Parliaments Act had produced no meaningful transfer of power from the Prime Minister to the House of Commons because no Opposition would ever turn down the opportunity to call a general election. Conventional wisdom was decisively refuted by the events of 4 and 9 September 2019, when the Commons twice refused to pass an early election motion by the required two-thirds majority.”²⁶
26. Professor Gavin Phillipson, Professor of Law at the University of Bristol, agreed that “there has been a meaningful transfer of power, and it is a major and welcome one ... the Commons will, at times, choose to refuse a general election”, which has “prevented the Prime Minister from being able to call an election.”²⁷
27. Other witnesses argued the Act had the opposite effect and that in some situations the executive may have greater powers than previously.²⁸ Sir Malcolm Jack suggested that “The Fixed-term Parliaments Act 2011 was heralded as a transfer of power from the Executive to Parliament. In fact its provisions allow the Government as much control and, in the area of no confidence motions, more control than previously in settling the length of any parliamentary term.”²⁹
28. Some witnesses thought the Act had sought to solve a problem that did not exist. Robert Craig, from the Department of Law at the London School of Economics, said:

23 HC Deb, 13 September 2010, [col 621](#)

24 Written evidence from Dr Craig Prescott, University of Winchester ([FPA0001](#))

25 Professor Howarth was the MP for Cambridge between 2005–10. During this time he introduced the [Fixed Term Parliaments Bill 2007](#) to: fix the date of the next general election and all subsequent general elections; forbid the dissolution of Parliament otherwise than in accordance with the Act’s provisions; and to allow the House of Commons to change the day of the week on which a general election is held. The bill did not proceed beyond its first reading.

26 Written evidence from Professor David Howarth, University of Cambridge ([FPA0007](#)). After the submission of this evidence the Government tried for a third time to secure an early general election under the two-thirds provision but was unsuccessful.

27 [Q 31](#) (Professor Gavin Phillipson)

28 Written evidence from Carl Gardner, BPP University of Law ([FPA0006](#))

29 Written evidence from Sir Malcolm Jack ([FPA0002](#))

“It is frequently suggested that determining the date of a general election is an unfair political advantage for the Prime Minister. It is sometimes described as handing the starting pistol to one of the competitors. This argument is seriously misconceived ... even if the pistol is in the hands of the Prime Minister, there is every chance he or she will shoot themselves in the foot with it, thereby hobbling themselves in the race. Examples include Theresa May in 2017, Ted Heath in [February] 1974 and Gordon Brown’s change of heart in 2007 which was arguably grounded in precisely his fear of such a decision going wrong.”³⁰

29. Dr Ruth Fox, Director at the Hansard Society, thought that the power to call an election at a politically opportune moment was rarely abused and that it was not the “biggest problem facing the democratic system that we had. It was a pretty minor issue. If the Government have a majority for what they want, they will continue and if they have not, the best thing is to go to the electorate.”³¹
30. **The events of the early autumn of 2019 demonstrated that the Coalition Government’s objective “to remove the right of a Prime Minister to seek the dissolution of Parliament for pure political gain” has been achieved. Even if the Early General Election Act 2019 circumvented the requirements of the Fixed-term Parliaments Act 2011, it demonstrated that the consent of the House of Commons—irrespective of the legislative mechanism used—was necessary for the Government to dissolve Parliament.**
31. **That the consent of the House of Commons is needed does not mean that the power of the Prime Minister has been markedly reduced. A Prime Minister with a majority, or who can muster one in favour of an early election, is not encumbered by the Fixed-term Parliaments Act 2011.**

Legalities of returning power to the Prime Minister

32. Some witnesses favoured repealing the FTPA and reverting to the power to dissolve Parliament resting with the Monarch, following advice from the Prime Minister.³² This raised the question of whether, if the Act was repealed, the prerogative power could be revived, or whether a replacement statutory power for the Prime Minister would be needed.
33. Former Government lawyer Carl Gardner suggested that the prerogative power could be revived:

“Repeal would not create a new prerogative power, or extend one. All it would do is remove the statutory ‘rug’ to uncover the common law floor underneath it ... So long as the repealing legislation clearly disclosed Parliament’s intention to disapply section 16(1)(a) of the Interpretation

30 Written evidence from Robert Craig, London School of Economics ([FPA0013](#))

31 [Q 8](#) (Dr Ruth Fox)

32 *Ibid.*

Act 1978³³, the result of repeal would be to ‘revive’ the Queen’s prerogative power to dissolve Parliament.”³⁴

34. This view was shared by Robert Craig:

“otherwise the 2011 Parliament will have successfully bound future parliaments. Unless a later parliament can completely unwind an earlier Act and restore the status quo ante, there is a sense that the ‘continuing’ theory of parliamentary sovereignty would be breached. Famously promulgated by HLA Hart, the continuing theory requires that later parliaments cannot be constrained by earlier parliaments and that must logically include a later parliament wishing to unwind entirely what an earlier parliament tried to do.”³⁵

35. Professor Phillipson did not agree:

“In my view, the prerogative probably cannot be revived. I accept that this is an issue on which lawyers take different good-faith positions. However, the very legal uncertainty as to whether the prerogative can be revived means that it would be irresponsible simply to legislate to repeal the Act and try to revive the prerogative without being sure that you could. As far as I know, there is no instance of statute successfully reviving the prerogative, so it is an open matter of law.”³⁶

36. A similar argument was advanced by Philippe Lagassé, Associate Professor of International Affairs, Carleton University:

“In the event that the Act were repealed, there would be no mechanism to dissolve Parliament to hold a general election. While this might suggest that the prerogative of dissolution would be revived to compensate and ensure democratic representation, Parliament would retain the option of dissolving itself with new legislation. Indeed, even if this new legislation only dealt with the dissolution of the existing Parliament, it would still mitigate against the necessity of reviving the prerogative. Accordingly, the availability of other means to dissolve Parliament weighs in favour of permanent abeyance, and thus abolishment for all intents and purposes.”³⁷

37. The balance of legal opinion, as we understand it, is that the prerogative power to dissolve Parliament would not be revived if the Fixed-term Parliaments Act was simply repealed with no further provision made. This view holds that prerogative powers are the vestiges of monarchical power and when put into statute they are extinguished permanently. Regardless of which view is correct, there is certainly doubt and dispute as to whether a prerogative power can be revived.
38. That there is doubt about whether prerogative powers can be revived opens the possibility of legal challenge. If the FTPA was repealed without specifying replacement arrangements for dissolution, and subsequently the

33 This concerns when a new Act repeals existing statute. Unless the contrary intention appears, the repeal does not “revive anything not in force or existing at the time at which the repeal takes effect.” Interpretation Act 1978, [section 16](#).

34 Written evidence from Carl Gardner, BPP University of Law ([FPA0006](#))

35 Written evidence from Robert Craig, London School of Economics ([FPA0013](#))

36 [Q 33](#) (Professor Gavin Phillipson)

37 Written evidence from Philippe Lagassé, Carleton University ([FPA0012](#))

prime minister advised the Monarch to dissolve Parliament, the decision to dissolve might be contested in the courts. A litigant might argue that the prerogative power had been extinguished, that the prime minister was not in a position to advise the Monarch to dissolve Parliament, and that therefore the general election that resulted should be cancelled. Even if such a case did not succeed, it would be an unwelcome distraction during an election campaign.

39. **The possibility of legal challenge to the prime minister’s advice to the Monarch, or the Monarch’s decision to dissolve Parliament, must be avoided. If the power to dissolve Parliament were to be returned to the Prime Minister, it must be done in such a way that a legal challenge to its use is put beyond doubt. We suggest that this is more likely to be achieved by creating a new statutory power rather than attempting to revive the prerogative.**

Effects of fixing the 2010–15 parliament

Parliamentary business

40. Beyond the headline benefits of the FTPA for its proponents—certainty of the date of the next general election and transferring power from the Monarch and Prime Minister to the House of Commons—there were other potentially positive effects of fixed-term parliaments. Mark Ryan, Senior Lecturer in Law at Coventry University, said:

“It undoubtedly helps the legislative process which can be more structured and organised, particularly in relation to the planning of pre-legislative scrutiny and draft Bills. Moreover, it should (theoretically) remove the legislative anomaly of the ‘wash-up’ process which undermines the integrity of legislative scrutiny. It also enables select committees to plan projects more coherently.”³⁸

41. Another benefit of certainty on the end of the final session of a five-year parliament is for the management of business in the House of Commons. Dr Fox observed that knowing the final session will run its full course can prevent the Government manipulating the allocation of time in the Commons for business such as Backbench Business debates and Opposition Day Debates: “they could be manipulated in that final Session in the run-up to an election if a Government know when it is going or is planning.”³⁹
42. It is also the case that general elections create a period of several months in which scrutiny of government by select committees does not operate; this absence of scrutiny is more limited if Parliaments last for all or most of the five-year term.
43. Other witnesses were more sceptical of these benefits. After observing proceedings in the 2010–15 parliament Lord Lisvane, Clerk of the House of Commons 2011–14, told us: “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.”⁴⁰ Lord Norton of Louth added: “If you go into a fifth [session] it might help for planning with

38 Written evidence from Mark Ryan, Coventry University ([EPA0005](#))

39 [Q 1](#) (Dr Ruth Fox)

40 [Q 22](#) (Lord Lisvane)

select committees, but it may not benefit the Chamber because Members are basically treading water if they are looking towards the election, and quite often not a lot of serious business is done during that fifth session ... in 2014 I was checking what got through and it was not a very full session.”⁴¹ However, we note that 38 Bills were enacted during the 2014–15 session, including the Modern Slavery Act 2015 and the Wales Act 2014.

44. **Fixing the length of parliaments could have practical benefits for Parliament. However, there is insufficient evidence from the 2010–15 parliament to draw a firm conclusion.**

Electoral administration

45. A further argument in support of fixing the lengths of parliaments is that it gives a greater certainty to those administering elections, principally the Electoral Commission, returning officers and local authorities. Robert Hazell, Professor of Government and the Constitution, University College London, said: “The Electoral Commission has long had an interest in fixed term parliaments, which enable electoral administrators to be better prepared because the election date is potentially known long in advance.”⁴²
46. Peter Stanyon, Chief Executive of the Association of Electoral Administrators, explained that there could be significant challenges for electoral administrators if a fixed term is truncated leading to an early general election:

“With the extremely short timetable electoral administrators are often left explaining to the electorate as to why they were unable to vote, for example overseas postal votes not being returned in time, or limited time to register to vote as a result of an unexpected election with the minimum statutory timetable and no lead in time. As demonstrated only this year the late notification of the European Parliamentary elections introduced significant pressures to already stretched electoral administrators ... There remains an unrealistic expectation that elections will always be delivered regardless of the landscape, timing, funding or capacity of the professionals administering them.”⁴³

47. Furthermore, the time of year at which an unexpected general election is held can create difficulties for electoral administration. While elections have most commonly taken place in May, and the Act provides that the five-yearly elections happen on the first Thursday of that month,⁴⁴ they may take place at other times in the year which can cause additional challenges. Responding to a letter from the Secretary of State for Education on the use of schools as polling centres for an election in December 2019 and the speculation that Christmas events may have to be cancelled, Mr Stanyon wrote:

“We recognise the inconvenience that this election will cause, none of it the fault of Returning Officers and their employing local authorities, and every effort is being made by the electoral community to work with schools and other public premises to mitigate those difficulties. However, the simple truth of the matter is that when Parliament decided

41 [Q 1](#) (Lord Norton of Louth)

42 Written evidence from Professor Robert Hazell, University College London ([FPA0003](#))

43 Written evidence from Peter Stanyon, Association of Electoral Administrators ([FPA0009](#))

44 Fixed-term Parliaments Act 2011, [section 1\(3\)](#)

to hold the poll in December, at short notice, significant and unintended consequences followed.”⁴⁵

48. There are other implications when there is an unexpected general election, particularly in winter. Ahead of the 2019 general election, the Electoral Commission drew up contingency plans to deal with winter weather, while pointing out that changes to the electoral register take place in winter because elections are not usually scheduled then. It was not anticipated that this would prevent anyone from voting, but voters would have different polling card numbers from those the electoral administrators were checking off.⁴⁶ The Lords Committee on the Electoral Registration and Administration Act 2013 explored these and related issues in greater depth in its recent report.⁴⁷
49. **The dissolution of Parliament ahead of its fixed-term at an untypical time of year may pose a challenge for electoral administrators. In such instances the Government must ensure that individuals and organisations overseeing and administering elections are appropriately resourced and that any risks to free and fair elections are mitigated.**
50. **We congratulate electoral administrators for overcoming the logistical challenges posed by the early general election in December 2019 and the smooth running of the poll they oversaw.**

The civil service

51. The length of parliaments and the timing of elections also affect the civil service and the preparations they can make for any new government. The Cabinet Manual sets out the process for how the main opposition parties can engage with the civil service in advance of an election:

“At an appropriate time towards the end of any Parliament, as the next general election approaches, the Prime Minister writes to the leaders of the main opposition parties to authorise pre-election contacts with the Civil Service. The meetings take place on a confidential basis, without ministers being present or receiving a report of discussions. The Cabinet Secretary has overall responsibility for co-ordinating this process once a request has been made and authorised by the Prime Minister. These discussions are designed to allow the Opposition’s shadow ministers to ask questions about departmental organisation and to inform civil servants of any organisational changes likely to take place in the event of a change of government. Senior civil servants may ask questions about the implications of opposition parties’ policy statements, although they would not normally comment on or give advice about policies.”⁴⁸

45 Letter from Peter Stanyon, Association of Electoral Administrators, to the Secretary of State for Education: <https://www.aea-elections.co.uk/wp-content/uploads/2019/11/aea-letter-to-sos-education-061119.pdf> [accessed 30 July 2020]

46 Oliver Wright, ‘December election could bring curtain down on nativity plays’, *The Times*, 24 October 2019: <https://www.thetimes.co.uk/article/december-election-could-bring-curtain-down-on-nativity-plays-bgm55hd3h> [accessed 30 July 2020]

47 Select Committee on the Electoral Registration and Administration Act 2013, *An electoral system fit for today? More to be done* (Session 2019–21, HL Paper 83)

48 Cabinet Office, *The Cabinet Manual*, October 2011, para 2.21: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf [accessed 30 July 2020]

52. There has been controversy over how far in advance of an election the incumbent Prime Minister has allowed contact between opposition parties and the civil service. David Cameron allowed the opposition Labour Party to engage with the civil service in October 2014, more than six months before the general election in May 2015.⁴⁹ In contrast, the early general election of 2017 meant that the Opposition had access to the civil service for only 51 days.⁵⁰ In 2019 the Opposition had just two months in which they could talk to the civil service.⁵¹
53. Dr Catherine Haddon, Senior Fellow at the Institute for Government, outlined the value in greater dialogue between the civil service and the Opposition:
- “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 ... for opposition parties it is also valuable to have a chance to prepare for going into government.”⁵²
54. **It is an important constitutional convention that the main opposition parties have access to the civil service in the period before a general election. It is essential that this continues, as it helps to ensure a smooth transition when there is a change of party in government following a general election.**
55. **The Fixed-term Parliaments Act was intended to provide greater certainty about the timings of general elections, but this has not been the case since 2015. A consequence of an early general election is that the main opposition parties do not have as much time to engage with the civil service. This may hamper the ability of the civil service to support an incoming administration.**

The length of parliaments

56. In our 2010 report on the Fixed-term Parliaments Bill, we said a
- “majority of the Committee consider that a four year term should be adopted for any fixed-term parliamentary arrangement at Westminster. In the view of the majority, the shift from a five year maximum to a five year norm would be inconsistent with the Government’s stated aim of making the legislature more accountable, inconsistent with existing constitutional practice and inconsistent with the practice of the devolved institutions and the clear majority of international legislatures.”⁵³

49 Oliver Wright, ‘Exclusive: Labour will be given only six months to plan policies in Whitehall before the general election in 2015’, *The Independent*, 30 March 2014: <https://www.independent.co.uk/news/uk/politics/exclusive-labour-will-be-given-only-six-months-to-plan-policies-in-whitehall-before-the-general-9223706.html> [accessed 30 July 2020]

50 Institute for Government, *Access talks with the civil service*, 10 October 2019: <https://www.instituteforgovernment.org.uk/explainers/access-talks-civil-service> [accessed 30 July 2020]

51 Becky Smith, ‘No. 10 gives Labour the go-ahead for pre-election talks with civil servants’, *Civil Service World*, 10 October 2019: <https://www.civilserviceworld.com/articles/news/no10-gives-labour-go-ahead-pre-election-talks-civil-servants> [accessed 30 July 2020]

52 [Q 9](#) (Dr Catherine Haddon)

53 Constitution Committee, *Fixed-term Parliaments Bill* (8th Report, Session 2010–12, HL Paper 69)

57. In our current inquiry, Petra Schleiter, Professor of Comparative Politics at the University of Oxford, said: “In continental Europe, the average maximum length of parliamentary terms is 4 years. In Australia and New Zealand it is 3 years. The devolved parliaments in the UK in Scotland, Wales and Northern Ireland have 4 year fixed terms.”⁵⁴
58. Many witnesses said that four years was the appropriate length of a parliament. Professor Schleiter said that this “gives governments enough time to legislate and achieve key goals while ensuring electoral accountability at appropriate intervals.”⁵⁵ Mark Ryan said:
- “Five years is too long for a parliamentary term and four years is instead preferable ... this period [is] more democratic by ensuring more regular electoral and political accountability ... it is contended that—historically—a Government having to make use of a full five year term was no doubt perceived as a failure owing to the lack of confidence to call an early election.”⁵⁶
59. Dr Craig Prescott, Senior Lecturer in Law at the University of Winchester, observed that before the Fixed-term Parliaments Act a popular Prime Minister “might call a general election around four years into a parliament against the backdrop of favourable opinion polls. For example, Margaret Thatcher called general elections in 1983 (following the 1979 election) and 1987, while Tony Blair called elections in 2001 (following the 1997 election) and in 2005.” On the other hand, “Prime Ministers in weaker political positions, such as John Major and Gordon Brown, tended to let Parliament run its full course, as happened prior to the 1997 and 2010 general elections.”⁵⁷
60. During the passage of the Fixed-term Parliaments Bill there may have been an expectation that parliaments would usually last for the full five years and that the early election mechanisms would not frequently be used. This has not proved to be the case. Indeed, the Act has not markedly changed the status quo, in that parliaments last for a maximum of five years but may end sooner if a Prime Minister desires an early election. The main difference is the need for the consent of the House of Commons to the decision to dissolve Parliament early. **The Fixed-term Parliaments Act was not revolutionary in its provision for the length of parliaments.**
61. **It is for Parliament to determine, whether in the Fixed-term Parliament Act, or any replacement, what the maximum length of a parliament should be and the mechanisms to bring about an early general election.**

54 Written evidence from Professor Petra Schleiter, University of Oxford (FPA0008). Following the passage of the FTPA in 2011, elections to the UK Parliament and the devolved legislatures in Scotland and Wales were all due to take place in 2020. To avoid these elections coinciding, the terms of the Scottish Parliament and National Assembly for Wales (now the Welsh Parliament) commencing in 2016 were extended from four to five years.

55 Written evidence from Professor Petra Schleiter, University of Oxford (FPA0008)

56 Written evidence from Mark Ryan, Coventry University (FPA0005)

57 Written evidence from Dr Craig Prescott, University of Winchester (FPA0001)

CHAPTER 3: EARLY GENERAL ELECTIONS

62. The FTPA includes two mechanisms for dissolving Parliament before the end of a five-year term. We consider the operation of each of these in this chapter and the implications of bypassing the FTPA with a ‘notwithstanding’ bill.
63. In doing so, we consider what mechanisms, if any, are appropriate for bringing about an early general election; what threshold should be set for any such mechanisms; whether legislation should make provision for confidence votes; and whether the House of Commons should be required to approve the date for an early general election.

Two-thirds in favour of an early election

64. Section 2(2) provides that, if two-thirds of all MPs vote in favour of the motion “That there shall be an early parliamentary general election”, the Prime Minister sets the date of the general election, with Parliament dissolving 25 working days before this date.⁵⁸ In our report on the Fixed-term Parliaments Bill we concluded that the requirement for a two-thirds majority was appropriate and meant such an early election would most likely require cross-party support from MPs.⁵⁹
65. Subsequent events allow us to evaluate this conclusion. Theresa May had little difficulty in securing the two-thirds majority of MPs required to dissolve Parliament for a general election in June 2017. In contrast, Boris Johnson was unable to obtain the necessary two-thirds majority on three occasions, and was only able to secure the early general election that he sought through a bill to sidestep the FTPA.
66. There was debate amongst witnesses about whether the support of two-thirds of all MPs was an appropriate threshold. Professor David Howarth thought that “Calling an early election should be a matter of broad consensus, not party advantage. The two-thirds requirement achieves that consensus.”⁶⁰
67. Professor Petra Schleiter agreed, noting that the two-thirds majority is “unusual, but not inappropriate.” Some other countries have a lower threshold to initiate an early general election, she said, but this is combined “with further checks, for instance, by placing the ultimate decision to dissolve parliament in the hands of the Head of State (President). Since no such additional checks are used in the UK, a high majority threshold is the appropriate mechanism for checking the government.”⁶¹
68. Conversely, Vernon Bogdanor, Research Professor at the Centre for British Politics and Government, King’s College London, said that the two-thirds threshold for an early election was “too high. It could mean that a House of Commons in which the majority seek a dissolution is unable to secure it.”⁶²

58 The Act originally provided for dissolution 17 days ahead of a general election. This was later amended by the Electoral Registration and Administration Act 2013 to 25 days.

59 Constitution Committee, *Fixed-term Parliaments Bill* (8th Report, Session 2010–12, HL Paper 69), para 102

60 Written evidence from Professor David Howarth, University of Cambridge ([FPA0007](#))

61 Written evidence from Professor Petra Schleiter, University of Oxford ([FPA0008](#))

62 Written evidence from Professor Vernon Bogdanor, King’s College London ([FPA0004](#))

Lord Lisvane mooted the possibility of lowering the threshold: “I have seen suggestions that it should be 50% plus one.”⁶³

69. Alternatives to either a two-thirds or simple majority were identified by Professor Robert Hazell:
- “A minimum number of MPs to be signatories of the motion. In the parliaments of Sweden, Spain and Italy such a motion must be signed by 10 per cent of the members.
 - A requirement that the motion be signed by the Prime Minister and Leader of the Opposition, or the leaders of the three largest parties, in order to ensure that the motion has cross-party support.”⁶⁴
70. There was debate among witnesses as to whether the two-thirds threshold was a *meaningful* constraint on a government seeking an early election. Some argued that, in practice, it was very difficult politically for an opposition party to refuse an early election to a government seeking one. Events in April 2017 appeared to verify this theory. Labour, as the largest opposition party, whipped their MPs to back the Government’s motion, resulting in a comfortable victory for Theresa May and thus enabling the early election that she desired.⁶⁵
71. The argument that this threshold is a negligible constraint was challenged by the Government’s three failures to achieve the necessary two-thirds support for an early election in September and October 2019.⁶⁶
72. Professor Gavin Phillipson, speaking after the first two unsuccessful attempts to use the provision in 2019, said:
- “It is interesting to compare the reaction to 2017, when Theresa May called her election. Then, opponents of the Act ... said, ‘That shows that the FTPA is a dead letter. It has changed nothing, because the Opposition will never not be able to vote for an election and therefore it is a whole waste of time’. We have now had these two refusals proving the exact opposite: that the Commons will, at times, choose to refuse a general election. To me, that shows the worth of the Act.”⁶⁷
73. **It is difficult to draw conclusions from the unusual circumstances of autumn 2019. In this period the House of Commons rejected holding a general election on three separate occasions before consenting to one through a different route. While the two-thirds threshold can, in certain circumstances, be a meaningful constraint, it can also perpetuate political instability.**
74. **It is for Parliament to decide whether, if the House of Commons maintains a role in the approval of early general elections, a threshold beyond a simple majority should apply to those decisions.**

63 [Q 21](#) (Lord Lisvane)

64 Written evidence from Professor Robert Hazell, University College London ([FPA0003](#))

65 Written evidence from Carl Gardner, BPP University of Law ([FPA0006](#))

66 On each occasion Hansard recorded that the “Question [was] accordingly agreed to, without the majority required under the Fixed-term Parliaments Act 2011.” See HC Deb, 4 September 2019, [cols 314–315](#).

67 [Q 31](#) (Professor Gavin Phillipson)

Votes of no confidence

The impact of the Act on confidence

75. The second provision in the Act that may result in an early general election is set out in section 2(3)–(5). This initiates the dissolution of Parliament if a Government loses a statutory vote of no confidence in the House of Commons and, in the subsequent 14 calendar days, the Commons does not pass a motion of confidence in the Government.
76. This provision is one of the most contentious features of the Act, leading to debate on the impact it has had on the notion of ‘confidence’ in the Government. Before the Act it was a constitutional principle that a government’s authority was conditional on having the confidence of the House of Commons. Dr Prescott set out the different scenarios in which the Commons might demonstrate it had lost confidence in a government:
- (a) “An explicit motion of no confidence;
 - (b) An amendment to the Loyal Address expressing no confidence in the government;
 - (c) A defeat on a vote that the government states that it intends to treat as a matter of confidence;
 - (d) Potentially other votes, such as the budget or the Loyal Address itself could be a matter of confidence ... Furthermore, a government could choose to resign following a serious defeat or series of defeats.”⁶⁸
77. If a government lost the confidence of the House of Commons, the Prime Minister had two choices: to resign and allow the formation of a new government or to seek a dissolution from the Monarch and a general election. These options were constitutional conventions and not codified.
78. Since the passage of the FTPA there has been only one use of the statutory no-confidence motion. On 15 January 2019 the Government was defeated in a “meaningful vote” on its agreement for the UK to leave the European Union by 432 votes to 202.⁶⁹ The following day the Government made time for a motion of no confidence tabled—using the wording specified in the Fixed-term Parliaments Act—by the Leader of the Opposition. The motion of no confidence was unsuccessful, with the Government winning by 325 votes to 306.⁷⁰
79. Before the Act, the Government would have been able to declare a vote on such a significant policy as a confidence issue—meaning that if it was defeated the Government would resign to allow an alternative to be formed or, more likely, would seek a dissolution from the Monarch. Declaring a matter an issue of confidence traditionally encouraged recalcitrant backbenchers of the governing party to support the Government. Without the prerogative power of dissolution, this was not as straightforward.
80. In subsequent months, the Government lost two further votes on its withdrawal agreement, yet at no point did the House of Commons indicate that it had lost confidence in the Government. This created the unusual

68 Written evidence from Dr Craig Prescott, University of Winchester ([FPA0001](#))

69 HC Deb, 15 January 2019, [cols 1122–1125](#)

70 HC Deb, 16 January 2019, [cols 1269–1273](#)

situation of the Government possessing the confidence of MPs in a statutory sense, but not in a manner which allowed it to deliver its most significant policy through the Commons.

81. The effect of the Act was distinctly to separate losing a vote on key policy matter from losing a vote of confidence. A Government might still attempt to declare a vote to be a matter of confidence for political purposes, but it can no longer strongarm MPs with the promise of an immediate election. This is because the power to request a dissolution is no longer in the hands of the Prime Minister but requires a separate vote of the House of Commons. It allows MPs to oppose the Government and resist an early general election.
82. We heard wide-ranging views on the extent to which the doctrine of confidence had been altered or damaged by the Act. There was disagreement about how the conventions around confidence, as previously understood, applied following the creation of the statutory process in the FTPA. Professor David Howarth, suggested that the Act had not materially changed the confidence principle:

“The Act does not affect the ability of a government to threaten to resign or to remove the whip from recalcitrant backbenchers or to ask for a dissolution if it loses a specific vote, and so it is difficult to see how the Act could have replaced the doctrine of confidence or even affected the content of the doctrine. For example, the Johnson government treated the vote in the Commons on 3 September 2019 on the Standing Order 24 motion as a matter of confidence and deprived those who rebelled of the whip. It then proceeded to ask for a dissolution by putting down an early election motion.”⁷¹

83. Philippe Lagassé acknowledged that the Act:

“does not prevent the Government from declaring that a vote or signature piece of legislature is a matter of confidence. Nor does the Act negate the notion that the reply to the Queen’s Speech and money bills should be considered matters of confidence. Likewise, the Act does not prevent the Commons from effectively withdrawing its confidence in the Government in other ways, such as finding it in contempt or preventing the executive from moving ahead with its legislative agenda.”⁷²

He went on to say that the Act “indirectly” changed the notion of confidence, as a government could argue that the statutory vote of no confidence had “become the only binding vote of confidence.”⁷³

84. Robert Craig argued that the Act had “significantly affected the operation” of the confidence doctrine:

“At one level, the government must retain the confidence of the Commons to continue in government. But at a second and alternative level, the government is, or was before the FTPA, entitled to seek the confidence of the electorate as a whole, directly, and the FTPA prevents that unless two thirds of the Commons consents. The very calling of an

71 Written evidence from Professor David Howarth, University of Cambridge ([FPA0007](#))

72 Written evidence from Philippe Lagassé, Carleton University ([FPA0012](#))

73 *Ibid.*

election is an important aspect of the doctrine of confidence that has been detrimentally affected by the advent of the FTPA.”⁷⁴

85. Professor David Howarth concluded:

“The link [the Act] creates between allowing an early election and the doctrine of confidence is confusing and should be eliminated. The lack of detail about what happens in the 14-day period provides another reason for simply eliminating the vote of no confidence route to an early election.”⁷⁵

86. Professor Vernon Bogdanor wrote: “The provision in relation to a no confidence vote should be repealed so as to restore the status quo ante.”⁷⁶

87. **A government’s authority derives from possessing the confidence of the House of Commons. The Fixed-term Parliaments Act did not change this constitutional principle, but it has clouded the situation. It is now possible for the Government to retain the confidence of the House of Commons in a statutory sense—winning a vote on a motion of no confidence—while having lost it in the political sense of lacking support for a key part of its policy agenda.**

88. **It is for Parliament to decide whether the Fixed-term Parliaments Act—or any replacement legislation—should continue to make provision for confidence motions.**

Mechanics of a vote of no confidence

89. While the consequences of a vote of no confidence were changed by the Act, the process by which a motion is debated and voted on in the House of Commons remains largely unaffected.⁷⁷ Lord Lisvane explained “a motion of no confidence [is] put down by the Official Opposition and typically it will appear as an EDM ... Erskine May says that [such] an Early Day Motion is invariably found time [for debate], but in my experience that [happens within] two to three days maximum.”⁷⁸ Lord Norton of Louth agreed that “The convention is if [a motion of no confidence is tabled by] the Leader of the Opposition by virtue of being the Leader of the Opposition—in other words the alternative Government—the Government will find the time fairly quickly for confidence to be tested.”⁷⁹

90. In December 2018, following the postponement by the Government of the first “meaningful vote”, members from the smaller opposition parties—but not from the frontbench of the Official Opposition—tabled a motion of no confidence in the Government. No time was allocated to debate that motion. Lord Lisvane set out the rationale:

“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

74 Written evidence from Robert Craig, London School of Economics ([FPA0013](#))

75 Written evidence from Professor David Howarth, University of Cambridge ([FPA0007](#))

76 Written evidence from Professor Vernon Bogdanor, King’s College London ([FPA0004](#))

77 As the language of the no-confidence motion is set out in the FTPA, the motion is subject to House of Commons Standing Order No. 16 and therefore debate is limited to 90mins unless a prior Business of the House motion makes alternative provision. Prior to the FTPA, no-confidence motions would not have been subject to this Standing Order.

78 [Q 23](#) (Lord Lisvane)

79 [Q 5](#) (Lord Norton of Louth)

the Floor of the House ... 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.”⁸⁰

91. **It is an important constitutional convention that if a Leader of the Opposition tables a vote of no confidence in the Government time is quickly made available to debate it.**
92. A peculiarity of the Act is that, in some circumstances, a government might consider it advantageous to table a vote of no confidence in itself. This might arise if a government wanted an early general election but could not obtain the necessary two-thirds majority, was reluctant to seek to pass a ‘notwithstanding’ bill, and saw little risk of an alternative administration being formed.
93. Philippe Lagassé expanded on this hypothetical situation:

“Orchestrating a motion of no confidence to force an early election would face two hurdles: it would either be embarrassing for the Government to present such a motion or the opposition would be aware of what the Government was seeking to achieve and refuse to cooperate. Yet such manipulations of sections 2(4)–2(5) are not beyond the realm of the possible or the plausible.”⁸¹
94. Dr Craig Prescott thought that: “Such shenanigans may be controversial in the short-term, but this is likely to dissipate during the ensuing election campaign.”⁸²
95. **In some situations a government could manipulate the no-confidence process to enable an early general election. This would be against the spirit of the Fixed-term Parliaments Act, but perversely the Act makes such a scenario possible.**

The 14 days following a successful vote of no confidence

96. A successful vote of no confidence is unusual. According to the House of Commons Library, “Since 1895, governments have been defeated on questions of confidence on four occasions. The defeats on questions of confidence in 1895 and January 1924 led to the resignation of the Government and the defeats in October 1924 and 1979 were followed by requests for a dissolution.”⁸³ In each of these instances there was an immediate “event” following defeat. Section 2 of the Act introduced a period of 14 calendar days before a potential dissolution, allowing several different possibilities to arise. Dr Prescott envisaged four such outcomes:
 - (a) “The government could regain the confidence of the House following negotiations with other political parties.
 - (b) It is clear that someone else is best placed to command the confidence of the House. Typically, this might be the Leader of the Opposition,

80 [Q 23](#) (Lord Lisvane)

81 Written evidence from Philippe Lagassé, Carleton University ([FPA0012](#))

82 Written evidence from Dr Craig Prescott, University of Winchester ([FPA0001](#))

83 House of Commons Library, *Confidence Motions*, Briefing Paper, [Number 02873](#), 14 March 2019

whose party has reached an agreement with other parties to support it in office. For example, if the junior partner of a coalition government decides to support the main opposition party.

- (c) No agreement is possible between the parties, and the 14-day period elapses without the Commons passing the motion, “That this House has confidence in Her Majesty’s Government”.
- (d) 66% of MPs vote for an immediate early general election, and so dispensing with the remainder of the 14-day period.”⁸⁴

The range of possibilities illustrates the potential for significant political uncertainty.

Length of the period

- 97. Section 2(3)(b) provides for a 14-day—calendar days rather than House of Commons sitting days—period following the Government losing a vote of no confidence before the dissolution of Parliament and an early general election. The introduction of a 14-day period as an extra step following a successful vote of no confidence was a change from past practice and convention.
- 98. Most witnesses considered that 14 days was at the upper end of what might be considered a tolerable amount of time following a vote of no confidence. Mark Ryan thought that the 14-day period could be shortened to “reduce any political chaos or instability which could arise following a vote of no confidence in an incumbent Government. After all, if there is a credible Government in waiting, is the period of 14 days really necessary? Perhaps this period could be halved in order to minimise any political uncertainty.”⁸⁵
- 99. Former Cabinet Secretary Rt Hon Lord Butler of Brockwell was more sympathetic to having 14 days:

“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.”⁸⁶
- 100. **We do not envisage many circumstances where a successful vote of no confidence would result in a change of party in government. It is more likely that there would be a dissolution or a reshaping of the existing Government such that it can regain the confidence of MPs.**
- 101. Under the provisions of the Fixed-term Parliaments Act, if it appeared unlikely that a new administration could be formed within 14 days, the two-thirds early parliamentary general election motion provides a mechanism to truncate the period of uncertainty.

84 Written evidence from Dr Craig Prescott, University of Winchester ([FPA0001](#))

85 Written evidence from Mark Ryan, Coventry University ([FPA0005](#))

86 [Q 24](#) (Lord Butler of Brockwell)

Role of a government following a successful no-confidence motion

102. As Lord Butler explained, one of the issues with the 14-day period is that, “Because the Act has not been tested in that way so far, conventions have not been established.”⁸⁷ There are few historical or analogous situations for the key actors in the 14 days—the Government, the opposition parties seeking to form a new government, the civil service and the Monarch—to draw on. For instance, one of the uncertainties during this period would be how the Government might behave after having lost the confidence of the House of Commons. This was a moot point before the Act: a government either resigned or there was a dissolution and the purdah convention commenced. Now, under the Act, there would be a period of political uncertainty, during which the country would continue to be governed by the incumbent ministers, with potentially difficult and contentious decisions needing to be made.
103. Professor Robert Hazell observed that “The caretaker convention applies when a government cannot command the confidence of Parliament: for example, after it loses a formal no confidence motion under s2(4) of the FTPA.”⁸⁸ The Cabinet Manual does not explicitly refer to the caretaker convention, but under the heading of “Restrictions on government activity” it states:
- “While the government retains its responsibility to govern and ministers remain in charge of their departments, governments are expected by convention to observe discretion in initiating any new action of a continuing or long-term character in the period immediately preceding an election, immediately afterwards if the result is unclear, and following the loss of a vote of confidence. In all three circumstances essential business must be allowed to continue.”⁸⁹
104. Dr Ruth Fox said that the caretaker convention included “decisions of a long-term nature, senior appointments to the Civil Service, [and] spending significant sums of public money.”⁹⁰ Dr Catherine Haddon raised concerns about the caretaker convention:
- “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.”
105. Professor Petra Schleiter also thought the caretaker convention had shortcomings. She said the caretaker convention principles:
- (a) “do not clarify effectively the normative basis for limitations on government power during caretaker periods;
 - (b) do not stipulate unequivocally that a caretaker government cannot resign until its successor is formed and do therefore not fulfil the

87 [Q 25](#) (Lord Butler of Brockwell)

88 Written evidence from Professor Robert Hazell, University College London ([FPA0003](#))

89 Cabinet Office, *The Cabinet Manual*, October 2011, para 2.27: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf [accessed 30 July 2020]

90 [Q 7](#) (Ruth Fox)

minimal function of all caretaker conventions, i.e., to secure the continuing existence of a government at all times;

- (c) do not clearly specify when caretaker situations terminate; and
- (d) lack clarity regarding the nature of restrictions on the executive during caretaker periods and their enforcement.”⁹¹

106. **It is unknown what might happen in the 14 days following a government losing confidence in the House of Commons. But, for the avoidance of doubt, the Cabinet Manual should state that the existing Government remains in office until the Monarch invites a new Government to be formed. This remains the case even if the Government has lost a vote of confidence in the House of Commons. The Prime Minister would not be “squatting” in Number 10 in such circumstances; rather, they would be doing their duty in maintaining Her Majesty’s Government until such time a replacement was appointed.**

Formation of a new Government in the 14-day period

107. The only provision in the Act about the formation of a new Government during the 14 days is section 2(5). This stipulates that there will not be an early general election if a majority of MPs support the motion “That this House has confidence in Her Majesty’s Government.”⁹² It is possible that this could be the incumbent Government regaining the confidence of the House of Commons, which would provide it with the authority to return to governing free from the constraints of the caretaker convention. Alternatively, it is possible that the party or parties of Government might change.
108. One issue with the latter possibility is how an alternative administration could demonstrate to the Monarch that it is best placed to become the next Government. Dr Ruth Fox explained that there is a “procedural gap” in the Act as to what happens in the 14 days:
- “we do not have procedures in place to be clear about exactly how the identity of an alternative Administration would come about ... the problem is if there is a potential Administration and it is not exactly clear who it might be, there needs to be clarity on the part of Buckingham Palace in terms of next steps. It would have been better if, for example, the House of Commons, knowing that these provisions were in the Act, had looked at this and determined what the range of options might be, if needed, in order that the procedural rules of the game are clear before they had to be confronted and dealt with once the circumstances arise.”⁹³
109. Lord Butler suggested that the lack of clarity on sequencing had led to a “Catch-22” situation: “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.”⁹⁴
110. Witnesses offered different approaches as to how a potential alternative administration might use House of Commons procedures to provide clarity to the Monarch. Dr Fox thought that there were two possible options: “One

91 Written evidence from Professor Petra Schleiter, University of Oxford ([FPA0008](#))

92 Fixed-term Parliaments Act 2011, [section 2\(5\)](#).

93 [Q 6](#) (Dr Ruth Fox)

94 [Q 24](#) (Lord Butler of Brockwell)

option is indicative votes. Another option might be something such as an Early Day Motion signed by the MPs who would support an alternative Administration led by X.”⁹⁵

111. Lord Lisvane was hesitant about using an early day motion (EDM) for this purpose:

“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 ... 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.”⁹⁶

112. **The Fixed-term Parliaments Act is silent on the process for finding an alternative administration during the 14 days after a vote of no confidence, save for the provision for a vote of confidence. The Act may create a circular situation whereby an alternative administration would need to demonstrate a majority in support in the House of Commons, but may not be able to demonstrate said support until it is in office.**

113. The Cabinet Manual states:

“In modern times the convention has been that the Sovereign should not be drawn into party politics, and if there is doubt it is the responsibility of those involved in the political process, and in particular the parties represented in Parliament, to seek to determine and communicate clearly to the Sovereign who is best placed to be able to command the confidence of the House of Commons. As the Crown’s principal adviser this responsibility falls especially on the incumbent Prime Minister, who at the time of his or her resignation may also be asked by the Sovereign for a recommendation on who can best command the confidence of the House of Commons in his or her place.”⁹⁷

114. **It is a cardinal principle that the Monarch should not be drawn into the political debate regarding who should govern. There should therefore be a process for MPs to demonstrate who is best placed to command a majority in the House of Commons in order to signal to the Monarch who should be invited to form a government. It is for the House of Commons to decide what process would be appropriate.**

115. **Under the current system a Prime Minister opposed to any alternative administration could block its formation by preventing any effort to command a majority and waiting out the 14 days until an election was triggered. Such behaviour would be deprecated, but it underlines the need for greater certainty on this matter.**

116. There is a possibility that an incumbent, caretaker Government may refuse to resign, even if it becomes apparent that an alternative administration can be formed and is better placed to command a majority in the House

95 Q 6 (Dr Ruth Fox)

96 Q 24 (Lord Lisvane)

97 Cabinet Office, *The Cabinet Manual*, October 2011, para 2.9: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf [accessed 30 July 2020]

of Commons. Such a Government could argue that it is preferable for the government to change through a general election after the 14-day period. Depending on the circumstances, a Government behaving in this way may be acting unconstitutionally. The ultimate safeguard in such an instance remains the Monarch who, as Philippe Lagassé said, retains the prerogative to dismiss a Prime Minister:

“This reserve power ensures that the Queen can remove a Prime Minister who is incapacitated or involved in criminality or flagrant unconstitutional behaviour. Yet this is not a power that the Queen would normally be expected to exercise. It remains in place to address exceptional circumstances and situations where other actors, such as the Cabinet, the Commons, or the courts, cannot provide a remedy, and the Prime Minister is either unwilling or unable to act honourably or according to the requirements of the constitution.”⁹⁸

117. **After losing a vote of no confidence a Prime Minister must continue to follow constitutional practice. If an alternative Government can be formed during the 14 days prescribed by the Fixed-term Parliaments Act, the incumbent has a duty to resign. A Prime Minister who did not do so would be behaving unconstitutionally.**

“Notwithstanding the Fixed-term Parliaments Act”

118. During this inquiry the Government introduced, and Parliament passed, the Early Parliamentary General Election Act 2019. This approach was possible because the then minority Government had the support of opposition parties for an early election. A minority administration without such support would risk the bill being defeated or amended in ways it considered undesirable. The Early Parliamentary General Election Act bypassed the “fixed term” and “early parliamentary general election” provisions of the Fixed-term Parliaments Act. It allowed for an early election without having to achieve a two-thirds majority of MPs or use the no-confidence procedure.
119. A short ‘notwithstanding’ bill has always been a possible way of circumventing the Fixed-term Parliaments Act and was envisaged by some witnesses in advance of it being used. Professor David Howarth did not see a problem with such an approach, arguing that broad consensus rather than party advantage was necessary for an early election and that the passage of a notwithstanding bill would demonstrate that consensus.⁹⁹
120. However, Dr Haddon said that this was:
- “another flaw in the Act ... 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.”¹⁰⁰
121. Professor Robert Blackburn, Professor of Constitutional Law, King’s College London, said that the Early Parliamentary General Election Act 2019:

98 Written evidence from Philippe Lagassé, Carleton University ([FPA0012](#))

99 Written evidence from Professor David Howarth, University of Cambridge ([FPA0007](#))

100 [Q 12](#) (Dr Catherine Haddon)

“has now driven a coach and horses through the Fixed-term Parliaments Act and as a matter of process is to be greatly regretted. Whatever one thinks of the Fixed-term Parliaments Act, while it is in force its terms should be complied with until and unless it might be amended or repealed. The subject of election timing is fundamental to our democracy and bypassing constitutional law in this manner is akin to disrespecting other legislation of a fundamental character such as the Human Rights Act or Scotland Act.”¹⁰¹

122. **No parliament can bind its successors. Therefore any legislation setting a threshold greater than a simple majority of MPs will be vulnerable to a bill bypassing that threshold.**

101 Written evidence from Professor Robert Blackburn, King’s College London ([FPA0016](#))

CHAPTER 4: THE ACT AND OTHER PRIME MINISTERIAL POWERS

123. Although the primary objective of the Fixed-term Parliaments Act was to remove the prerogative power of the Monarch, acting on advice from the Prime Minister, to dissolve Parliament, the Act explicitly provided for two related powers:

- Section 2(7) provides that if there is an early general election “the polling day for the election is to be the day appointed by Her Majesty by proclamation on the recommendation of the Prime Minister”;¹⁰²
- Section 6(1) provides that “This Act does not affect Her Majesty’s power to prorogue Parliament.”¹⁰³

During our inquiry these powers were the subject of attention and controversy. We assess each in turn.

Setting the date of an early general election

124. If a parliament lasts for its full five-year term, section 1 of the Act provides that the date of general election is “the first Thursday in May in the fifth calendar year following that in which the polling day for the previous parliamentary general election fell.”¹⁰⁴

125. However, the date of an early general election is chosen by the Prime Minister. The Act does not provide a mechanism for the House of Commons to approve it—even if the Government has lost a vote of no confidence and the 14-day period has elapsed. During the debate on the then Government’s third early general election motion on 28 October 2019, several opposition MPs voiced concern that the Prime Minister could choose an election date after the UK had left the EU, enabling a ‘no deal’ Brexit because Parliament’s dissolution would prevent MPs from averting that outcome.¹⁰⁵ Following indications from the Scottish National Party and the Liberal Democrats that they would support an early general election if the bill had a date in it, the Government then introduced the Early Parliamentary General Election Bill, setting the date of the 2019 election in statute.

126. The potential for a Prime Minister to exploit the power to set the date of an early election was explored by witnesses. Dr Craig Prescott said: “as the Act stands, the Prime Minister has considerable latitude over setting the election date, and given the highly political context, prime ministers will be tempted to exercise this power in a manner that best suits them, in deciding the length of the election campaign.”¹⁰⁶

127. Professor Robert Blackburn was also concerned and suggested an alternative:

“The absence in the Fixed-term Parliaments Act of any limitation upon a Prime Minister’s discretion to set the precise date for dissolution following an early election being triggered is unsatisfactory. It could allow a Prime Minister to put off the required election for months in order to

102 Fixed-term Parliaments Act 2011, [section 2\(7\)](#)

103 *Ibid.*, [section 6\(1\)](#)

104 *Ibid.*, [section 1\(3\)](#)

105 HC Deb, 28 October 2019, [cols 56–76](#)

106 Written evidence from Dr Craig Prescott, University of Winchester ([FPA0001](#))

achieve some political advantage. A new provision could be included in the Act therefore, that dissolution is to take place within fourteen days of the Commons passing a motion for an early election or the end of the fourteen day period following a no confidence motion ... This would permit sufficient time for the necessary pre-election procedures to be drawn up and completion of any Bills near Royal Assent.”¹⁰⁷

128. Carl Gardner thought that “Parliament should consider amending section 2(7) of the FTPA to remove the power of the Prime Minister to unilaterally fix the date of an early election.” He said that the consent of the House of Commons or both Houses to a date proposed by the Prime Minister would be appropriate; another possibility “would be to create a new institution to fix this date impartially, or to give the function to the Electoral Commission.”¹⁰⁸
129. Similarly, Professor Robert Hazell thought that “it might be preferable to provide that the polling day should be approved by the House of Commons, before the Prime Minister recommends a date to the Queen.” He suggested an alternative: “following the precedent in section 3 of the Scotland Act 1998, where the polling day is proposed by the Presiding Officer, at Westminster it could be proposed by the Speaker. This would have the same effect: the Speaker would want to propose a date that was supported by the House.”¹⁰⁹
130. **The Fixed-term Parliaments Act transferred power to the House of Commons to decide whether there should be an early general election, but it did not give MPs control over the date of the election.**
131. **When the Fixed-term Parliaments Bill was being considered it was widely believed the risk of a Prime Minister misusing the power to set the date of a general election was small. However, Parliament may wish to consider whether the House of Commons should be required to approve the date on which an early election is to be held.**
132. If an election is due under section 1 of the Act at the end of a five-year parliament, the Prime Minister may delay the polling date from early May by two months by an affirmative statutory instrument. This provision was designed to allow flexibility should an unforeseen incident arise, as happened with the foot and mouth outbreak in the lead-up to the 2001 general election. **While there may be circumstances in which a Prime Minister could seek to misuse the power to delay a scheduled election for political purposes, the requirement for an affirmative instrument provides Parliament with an appropriate level of control.**

Prerogative power to prorogue Parliament

September 2019 purported prorogation and Supreme Court judgment

133. Prorogation is the act of ending a parliamentary session. It is prerogative power held by the Monarch, which in practice is exercised on advice from the Prime Minister via the Privy Council. Short of legislation, there is no opportunity for Parliament to consent to or control the length of a prorogation. While it curtails nearly all parliamentary business and prevents Parliament from meeting, before 2019 the power to prorogue had not recently

107 Written evidence from Professor Robert Blackburn, King’s College London ([FPA0016](#))

108 Written evidence from Carl Gardner, BPP University of Law ([FPA0006](#))

109 Written evidence from Professor Robert Hazell, University College London ([FPA0003](#))

been controversial. Prorogation normally lasts for only a few days,¹¹⁰ which are used to prepare for the State Opening of Parliament.

134. At a meeting of the Privy Council on 28 August 2019, the Queen by Order in Council ordered that Parliament would be prorogued on a day between 9 and 12 September 2019, with a new session beginning on 14 October 2019.¹¹¹ This was an unusual length of time for a prorogation and was controversial. At the time the UK was on course to leave the European Union, with or without a deal, on 31 October 2019. The then Speaker of the House of Commons, Rt Hon John Bercow MP, said it was “blindingly obvious” that its purpose was “to stop [Parliament] debating Brexit and performing its duty in shaping a course for the country.”¹¹²
135. In contrast, the Prime Minister, Boris Johnson, argued that a new session was necessary because: “We need new legislation. We’ve got to be bringing forward new and important bills and that’s why we are going to have a Queen’s Speech.”¹¹³ Mr Johnson said allegations that the length of the prorogation was to force through a no deal Brexit were “completely untrue.”¹¹⁴ Another argument advanced by the Government for the length of the prorogation was that the period included the weeks during which Parliament would normally be adjourned for the party conferences. This did not satisfy opponents, who said that the House of Commons had not approved the dates for that recess—as it would otherwise have been required to do—and that there was less scope to recall Parliament during prorogation than in a recess.
136. Parliament was subsequently prorogued on 9 September 2019. Legal challenges to the decision began in the courts of England and Wales, Scotland and Northern Ireland. The cases in England and Wales, and Scotland, were appealed to the Supreme Court. It handed down a unanimous judgment on 24 September 2019 that the prorogation was “unlawful.” The Court accepted that “the power to order the prorogation of Parliament is a prerogative power: that is to say, a power recognised by the common law and exercised by the Crown, in this instance by the sovereign in person, acting on advice, in accordance with modern constitutional practice.”¹¹⁵ However, it said:

“[t]he courts have protected Parliamentary sovereignty from threats posed to it by the use of prerogative powers, and in doing so have demonstrated that prerogative powers are limited by the principle of Parliamentary sovereignty ... The sovereignty of Parliament would, however, be undermined as the foundational principle of our constitution if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased. That, however, would be the position if there was no legal limit

110 House of Lords Library, *Lengths of Prorogation since 1900*, Library Note, [LNN 2019/0111](#), October 2019

111 Section 3 of the Northern Ireland (Executive Formation etc) Act 2019 provided for Parliament to debate reports on progress towards forming a Northern Ireland Executive and other matters within five calendar days of 4 September 2019, 9 October 2019, and fortnightly thereafter. It further provided that if Parliament was prorogued it would be recalled for such debates. These provisions set the effective maximum window for the prorogation during this period.

112 ‘Parliament suspension: Queen approves PM’s plan’, *BBC News*, 28 August 2019: <https://www.bbc.co.uk/news/uk-politics-49493632> [accessed 30 July 2020]

113 *Ibid.*

114 *Ibid.*

115 *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent), and Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)*, para 30: <https://www.supremecourt.uk/cases/docs/uksc-2019-0192-judgment.pdf> [accessed 30 July 2020]

upon the power to prorogue Parliament (subject to a few exceptional circumstances in which, under statute, Parliament can meet while it stands prorogued). An unlimited power of prorogation would therefore be incompatible with the legal principle of Parliamentary sovereignty.”¹¹⁶

This led the Court to rule:

“It is impossible for us to conclude, on the evidence which has been put before us, that there was any reason—let alone a good reason—to advise Her Majesty to prorogue Parliament for five weeks, from 9th or 12th September until 14th October. We cannot speculate, in the absence of further evidence, upon what such reasons might have been. It follows that the decision was unlawful.”¹¹⁷

137. Following the quashing of the prorogation beginning on 9 September 2019, the 2017–19 parliamentary session recommenced on 25 September. The session was ended with another prorogation, this time lasting for only five days, on 8 October 2019. The 2019 session opened with the Queen’s Speech on 14 October.

Prorogation as a prerogative power

138. In light of the Supreme Court’s judgment, there has been attention on whether prorogation should remain a prerogative power. Witnesses held contrasting views on whether the status quo was appropriate and what if any change was needed.
139. Lord Lisvane did not see any “great attraction” in allowing the House of Commons to decide on prorogation: “The effect of the Supreme Court judgment means that future Governments will approach this very carefully.”¹¹⁸ This position was shared by Lord Butler of Brockwell: “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.”¹¹⁹
140. Other witnesses thought that it was inappropriate that the Government should determine when and how long a prorogation is, and that it would be more suitable for Parliament to decide the matter. Professor Hazell suggested:

“given the risk of possible abuse, it would seem wise to ensure that Parliament cannot be prorogued against its will. One way to do this would be to make the prerogative power exercisable at the request of Parliament rather than on the advice of the Prime Minister. Another would be to put prorogation on the same footing as the power of adjournment, and to enable Parliament to be prorogued when the House of Commons passes a motion to that effect.”¹²⁰

Professor Robert Blackburn thought prorogation should be “subject to a vote in both Houses of Parliament on a motion moved by the Government.”¹²¹

141. Dr Hameed, Lecturer in Law, University of Southampton, suggested that it should be possible for:

116 *Ibid.*, paras 41–42

117 *Ibid.*, para 61

118 [Q 27](#) (Lord Lisvane)

119 [Q 27](#) (Lord Butler of Brockwell)

120 Written evidence from Professor Robert Hazell, University College London ([FPA0003](#))

121 Written evidence from Professor Robert Blackburn, King’s College London ([FPA0016](#))

“Parliament to be summoned by MPs if it is prorogued. Again, examples may be found in other jurisdictions. The 1995 Constitution of Uganda provides under art 95(5): “at least one-third of all members of Parliament may, in writing signed by them, request a meeting of Parliament; and the Speaker shall summon Parliament to meet within twenty-one days”.¹²²

142. It is already possible to recall Parliament when it is prorogued, under the Meeting of Parliament Act 1797, as amended by the Parliament (Elections and Meeting) Act 1943. This allows the Monarch, with advice from the Privy Council, to “issue his or their royal proclamation, giving notice of his or their royal intention that Parliament shall meet and be holden for the dispatch of business on any day after the date of such proclamation.”¹²³ It does not provide a role for either House or their Speakers.
143. **Any Government advising the Monarch on prorogation in the future will need to take into account the experience of the September 2019 prorogation and Supreme Court judgment in *Miller/Cherry*.**¹²⁴
144. **As part of the statutory review of the Fixed-term Parliaments Act 2011, Parliament may wish to consider whether the prorogation of Parliament should require its approval in the same way the Commons approves its recess dates.**

122 Written evidence from Dr Asif Hameed, University of Southampton ([FPA0015](#))

123 Meeting of Parliament Act 1797, [section 1](#)

124 *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent), and Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)*, para 61: <https://www.supremecourt.uk/cases/docs/uksc-2019-0192-judgment.pdf> [accessed 30 July 2020]

CHAPTER 5: FUTURE OF THE FIXED-TERM PARLIAMENTS ACT

Impact of the Act on the constitution

145. If the Fixed-term Parliaments Act had operated during years of comfortable single-party government majorities its practical impact may have been negligible. However, with governments operating with a small or no majority attempting to deliver the biggest political and constitutional reshaping of the United Kingdom for decades, the FTPA had a considerably greater effect.
146. Some witnesses thought that the Act had damaged the constitution.¹²⁵ Robert Craig argued:
- “the Act is antithetical to a long tradition of responsible government as it rebalances the constitution significantly in favour of the Commons at the expense of the executive that has its own legitimate democratic mandate through its manifesto put forward by an executive slate. The main justification for the Act appears to reside in an erroneous view that the political power to call an election is inappropriate in a political constitution. The current difficulties surrounding the Brexit process have been exacerbated by the Act in unhelpful ways.”¹²⁶
147. In contrast, Professor Gavin Philipson said the Act: “has made an extremely positive change to the constitution. Dissolution is one of those old royal powers that I have described as the bones poking through the democratic veneer of our constitution. The Executive ought not to have the power to simply dismiss the legislature.”¹²⁷
148. Professor Robert Hazell said:
- “There is a risk of making the Fixed-term Parliaments Act a whipping boy for aspects of the extraordinary situation we are in, which ... 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.”¹²⁸
149. **The Fixed-term Parliaments Act 2011 was not the cause of the political deadlock in the 2017–19 parliament, but without the Act the deadlock would not have lasted as long.**

Next steps for the Act

150. Section 7 of the FTPA requires the Prime Minister to make arrangements for a committee to review its operation. Such arrangements must be made between 1 June and 30 November 2020. In this section we consider the options the Government will need to address if it wishes to amend the Act.
151. Lord Norton of Louth suggested there were four approaches to the FTPA: “retain, repeal, rejig and replace.”¹²⁹ Given the issues with the Act identified

125 See, for example, [Q 29](#) (Carl Gardner)

126 Written evidence from Robert Craig, London School of Economics ([FPA0013](#))

127 [Q 29](#) (Professor Gavin Phillipson)

128 [Q 9](#) (Professor Robert Hazell)

129 [Q 8](#) (Lord Norton of Louth)

in this report, and the stated aim of the Government, retaining the FTPA in its current form is not an option.

152. **A straight repeal of the Fixed-term Parliaments Act 2011 is not feasible. The Act repealed the Septennial Act 1715, which set the maximum length of a parliament. Repealing the FTPA without any replacement would mean that the current parliament could never end.** This leaves “rejig”—amending the Act to improve it—or replacing it with a new statute. As the practical effect of these two options is largely the same, it is not necessary to distinguish between them further.

Questions to be addressed

153. As we have set out in this report, **to determine the future of the Fixed-term Parliaments Act 2011 a series of linked questions must be answered. These are:**
- **Should the length of parliaments be fixed absolutely or should mechanisms allow for early general elections?**
 - **What should be the maximum length of a parliament?**
 - **Should the calling of an early general election require the consent of the House of Commons?**
 - **If the consent of the Commons is required for an early general election, what threshold, if any, should be set for approving the motion?**
 - **If the consent of the Commons is required for an early general election, should the Commons be asked to approve the date for the election?**

These questions are ultimately ones that Parliament must determine.

154. **In making those determinations, Parliament may also wish to consider the separate question of whether it should be asked to approve the prorogation of Parliament.**
155. **In making these decisions, parliamentarians must be mindful that constitutional change should not be undertaken lightly or with the short term in mind. Constitutional change needs to be able to stand the test of time.**
156. These questions will not go unanswered for long, as the Government is required to appoint a committee to review the Fixed-term Parliaments Act 2011 under the terms of section 7 of the Act before 30 November 2020.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Introduction

1. The Fixed-term Parliaments Act 2011 changed core aspects of the UK constitution. It has proved controversial. Given the Government's commitment to repeal the Act, for which it has support in principle from the Official Opposition, a review of it is timely. (Paragraph 21)

Fixing the length of parliaments

2. The events of the early autumn of 2019 demonstrated that the Coalition Government's objective "to remove the right of a Prime Minister to seek the dissolution of Parliament for pure political gain" has been achieved. Even if the Early General Election Act 2019 circumvented the requirements of the Fixed-term Parliaments Act 2011, it demonstrated that the consent of the House of Commons—irrespective of the legislative mechanism used—was necessary for the Government to dissolve Parliament. (Paragraph 30)
3. That the consent of the House of Commons is needed does not mean that the power of the Prime Minister has been markedly reduced. A Prime Minister with a majority, or who can muster one in favour of an early election, is not encumbered by the Fixed-term Parliaments Act 2011. (Paragraph 31)
4. The possibility of legal challenge to the prime minister's advice to the Monarch, or the Monarch's decision to dissolve Parliament, must be avoided. If the power to dissolve Parliament were to be returned to the Prime Minister, it must be done in such a way that a legal challenge to its use is put beyond doubt. We suggest that this is more likely to be achieved by creating a new statutory power rather than attempting to revive the prerogative. (Paragraph 39)
5. Fixing the length of parliaments could have practical benefits for Parliament. However, there is insufficient evidence from the 2010–15 parliament to draw a firm conclusion. (Paragraph 44)
6. The dissolution of Parliament ahead of its fixed-term at an untypical time of year may pose a challenge for electoral administrators. In such instances the Government must ensure that individuals and organisations overseeing and administering elections are appropriately resourced and that any risks to free and fair elections are mitigated. (Paragraph 49)
7. We congratulate electoral administrators for overcoming the logistical challenges posed by the early general election in December 2019 and the smooth running of the poll they oversaw. (Paragraph 50)
8. It is an important constitutional convention that the main opposition parties have access to the civil service in the period before a general election. It is essential that this continues, as it helps to ensure a smooth transition when there is a change of party in government following a general election. (Paragraph 54)
9. The Fixed-term Parliaments Act was intended to provide greater certainty about the timings of general elections, but this has not been the case since 2015. A consequence of an early general election is that the main opposition parties do not have as much time to engage with the civil service. This may

hamper the ability of the civil service to support an incoming administration. (Paragraph 55)

10. The Fixed-term Parliaments Act was not revolutionary in its provision for the length of parliaments. (Paragraph 60)
11. It is for Parliament to determine, whether in the Fixed-term Parliament Act, or any replacement, what the maximum length of a parliament should be and the mechanisms to bring about an early general election. (Paragraph 61)

Early general elections

12. It is difficult to draw conclusions from the unusual circumstances of autumn 2019. In this period the House of Commons rejected holding a general election on three separate occasions before consenting to one through a different route. While the two-thirds threshold can, in certain circumstances, be a meaningful constraint, it can also perpetuate political instability. (Paragraph 73)
13. It is for Parliament to decide whether, if the House of Commons maintains a role in the approval of early general elections, a threshold beyond a simple majority should apply to those decisions. (Paragraph 74)
14. A government's authority derives from possessing the confidence of the House of Commons. The Fixed-term Parliaments Act did not change this constitutional principle, but it has clouded the situation. It is now possible for the Government to retain the confidence of the House of Commons in a statutory sense—winning a vote on a motion of no confidence—while having lost it in the political sense of lacking support for a key part of its policy agenda. (Paragraph 87)
15. It is for Parliament to decide whether the Fixed-term Parliaments Act—or any replacement legislation—should continue to make provision for confidence motions. (Paragraph 88)
16. It is an important constitutional convention that if a Leader of the Opposition tables a vote of no confidence in the Government time is quickly made available to debate it. (Paragraph 91)
17. In some situations a government could manipulate the no-confidence process to enable an early general election. This would be against the spirit of the Fixed-term Parliaments Act, but perversely the Act makes such a scenario possible. (Paragraph 95)
18. We do not envisage many circumstances where a successful vote of no confidence would result in a change of party in government. It is more likely that there would be a dissolution or a reshaping of the existing Government such that it can regain the confidence of MPs. (Paragraph 100)
19. It is unknown what might happen in the 14 days following a government losing confidence in the House of Commons. But, for the avoidance of doubt, the Cabinet Manual should state that the existing Government remains in office until the Monarch invites a new Government to be formed. This remains the case even if the Government has lost a vote of confidence in the House of Commons. The Prime Minister would not be “squatting” in Number 10 in such circumstances; rather, they would be doing their duty in

maintaining Her Majesty's Government until such time a replacement was appointed. (Paragraph 106)

20. The Fixed-term Parliaments Act is silent on the process for finding an alternative administration during the 14 days after a vote of no confidence, save for the provision for a vote of confidence. The Act may create a circular situation whereby an alternative administration would need to demonstrate a majority in support in the House of Commons, but may not be able to demonstrate said support until it is in office. (Paragraph 112)
21. It is a cardinal principle that the Monarch should not be drawn into the political debate regarding who should govern. There should therefore be a process for MPs to demonstrate who is best placed to command a majority in the House of Commons in order to signal to the Monarch who should be invited to form a government. It is for the House of Commons to decide what process would be appropriate. (Paragraph 114)
22. Under the current system a Prime Minister opposed to any alternative administration could block its formation by preventing any effort to command a majority and waiting out the 14 days until an election was triggered. Such behaviour would be deprecated, but it underlines the need for greater certainty on this matter. (Paragraph 115)
23. After losing a vote of no confidence a Prime Minister must continue to follow constitutional practice. If an alternative Government can be formed during the 14 days prescribed by the Fixed-term Parliaments Act, the incumbent has a duty to resign. A Prime Minister who did not do so would be behaving unconstitutionally. (Paragraph 117)
24. No parliament can bind its successors. Therefore any legislation setting a threshold greater than a simple majority of MPs will be vulnerable to a bill bypassing that threshold. (Paragraph 122)

The Act and other prime ministerial powers

25. The Fixed-term Parliaments Act transferred power to the House of Commons to decide whether there should be an early general election, but it did not give MPs control over the date of the election. (Paragraph 130)
26. When the Fixed-term Parliaments Bill was being considered it was widely believed the risk of a Prime Minister misusing the power to set the date of a general election was small. However, Parliament may wish to consider whether the House of Commons should be required to approve the date on which an early election is to be held. (Paragraph 131)
27. While there may be circumstances in which a Prime Minister could seek to misuse the power to delay a scheduled election for political purposes, the requirement for an affirmative instrument provides Parliament with an appropriate level of control. (Paragraph 132)
28. Any Government advising the Monarch on prorogation in the future will need to take into account the experience of the September 2019 prorogation and Supreme Court judgment in *Miller/Cherry*. (Paragraph 143)
29. As part of the statutory review of the Fixed-term Parliaments Act 2011, Parliament may wish to consider whether the prorogation of Parliament

should require its approval in the same way the Commons approves its recess dates. (Paragraph 144)

Future of the Fixed-term Parliaments Act

30. The Fixed-term Parliaments Act 2011 was not the cause of the political deadlock in the 2017–19 parliament, but without the Act the deadlock would not have lasted as long. (Paragraph 149)
31. A straight repeal of the Fixed-term Parliaments Act 2011 is not feasible. The Act repealed the Septennial Act 1715, which set the maximum length of a parliament. Repealing the FTPA without any replacement would mean that the current parliament could never end. (Paragraph 152)
32. To determine the future of the Fixed-term Parliaments Act 2011 a series of linked questions must be answered. These are:
 - Should the length of parliaments be fixed absolutely or should mechanisms allow for early general elections?
 - What should be the maximum length of a parliament?
 - Should the calling of an early general election require the consent of the House of Commons?
 - If the consent of the Commons is required for an early general election, what threshold, if any, should be set for approving the motion?
 - If the consent of the Commons is required for an early general election, should the Commons be asked to approve the date for the election?

These questions are ultimately ones that Parliament must determine. (Paragraph 153)

33. In making those determinations, Parliament may also wish to consider the separate question of whether it should be asked to approve the prorogation of Parliament. (Paragraph 154)
34. In making these decisions, parliamentarians must be mindful that constitutional change should not be undertaken lightly or with the short term in mind. Constitutional change needs to be able to stand the test of time. (Paragraph 155)

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Lord Beith
 Baroness Corston
 Baroness Drake
 Lord Dunlop
 Lord Faulks
 Baroness Fookes
 Lord Hennessy of Nympsfield
 Lord Howarth of Newport
 Lord Howell of Guildford *
 Lord Pannick
 Lord Sherbourne of Didsbury **
 Baroness Taylor of Bolton (Chair)
 Lord Wallace of Tankerness

* Member of the Committee since 29 October 2019

** Member of the Committee since 4 March 2020

Lord True was a member of the Committee from 1 July 2019 to 24 February 2020, while evidence was being taken for this inquiry, before his appointment as Minister of State in the Cabinet Office. He was not a member of the Committee during consideration and agreement of this report.

Declarations of interest

Lord Beith
No relevant interests

Baroness Corston
No relevant interests

Baroness Drake
No relevant interests

Lord Dunlop
No relevant interests

Lord Faulks
Chair of the Independent Review of Administrative Law

Baroness Fookes
No relevant interests

Lord Hennessy of Nympsfield
No relevant interests

Lord Howarth of Newport
No relevant interests

Lord Howell of Guildford
No relevant interests

Lord Pannick
Represented Ms Gina Miller, in R (Miller) v Secretary of State for Exiting the European Union [2017], and in R (Miller) (Appellant) v The Prime Minister (Respondent) & Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland) [2019]

Lord Sherbourne of Didsbury

No relevant interests

Baroness Taylor of Bolton (Chair)

No relevant interests

Lord Wallace of Tankerness

Lords minister responsible for the Fixed-term Parliaments Bill in 2010–11

A full list of members' interests can be found in the Register of Lords' Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

Professor Jeff King, University College London, and Professor Stephen Tierney, University of Edinburgh, acted as legal advisers to the Committee. They both declared no relevant interests.

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at <https://committees.parliament.uk/work/14/fixedterm-parliaments-act-2011/> and available for inspection at the Parliamentary Archives (020 7219 3074).

Evidence received by the Committee is listed below in chronological order of oral evidence session and in alphabetical order. Those witnesses marked with * gave both oral evidence and written evidence. Those witnesses marked ** gave oral evidence and did not submit any written evidence. All other witnesses submitted written evidence only.

Oral evidence in chronological order

**	Lord Norton of Louth, Professor of Government, and Director of the Centre for Legislative Studies, Hull University	QQ 1–8
**	Dr Ruth Fox, Director and Head of Research, Hansard Society	QQ 1–8
*	Professor Robert Hazell, Professor of Government and the Constitution, University College London	QQ 9–17
**	Dr Catherine Haddon, Senior Fellow, Institute for Government	QQ 9–17
**	Rt Hon Lord Butler of Brockwell	QQ 18–26
**	Lord Lisvane	QQ 18–26
*	Carl Gardner, BPP University of Law	QQ 27–34
**	Professor Gavin Phillipson, University of Bristol	QQ 27–34

Alphabetical list of all witnesses

	Junade Ali	FPA0011
	Association of Electoral Administrators (AEA)	FPA0009
	Professor Robert Blackburn, Kings' College London (QQ 9–17)	FPA0014 FPA0016
	Professor Vernon Bognador, King's College London	FPA0004
**	Rt Hon Lord Butler of Brockwell (QQ 18–26)	
	Robert Craig, University of Bristol	FPA0013
**	Dr Ruth Fox, Director and Head of Research, Hansard Society (QQ 1–8)	
*	Carl Gardner, BPP University of Law (QQ 27–34)	FPA0006
**	Dr Catherine Haddon, Senior Fellow, Institute for Government (QQ 9–17)	
	Dr Asif Hameed, University of Southampton	FPA0015
*	Professor Robert Hazell, Professor of Government and the Constitution, University College London (QQ 9–17)	FPA0003

	Professor David Howarth, University of Cambridge	<u>FPA0007</u>
	Sir Malcolm Jack KCB, Former Clerk of the House of Commons	<u>FPA0002</u>
	Philippe Lagassé, Carleton University	<u>FPA0012</u>
**	Lord Lisvane (<u>QQ 18-26</u>)	
**	Lord Norton of Louth, Professor of Government, and Director of the Centre for Legislative Studies, Hull University (<u>QQ 1-8</u>)	
**	Professor Gavin Phillipson, University of Bristol (<u>QQ 27-34</u>)	
	Dr Craig Prescott, University of Winchester	<u>FPA0001</u>
	Dr Mark Ryan, Coventry University	<u>FPA0005</u>
	Professor Petra Schleiter, University of Oxford	<u>FPA0008</u>

APPENDIX 3: CALL FOR EVIDENCE

The Constitution Committee has launched an inquiry into the Fixed-term Parliaments Act 2011 and invites individuals and organisations to submit evidence.

The Fixed-term Parliaments Act 2011 (FPTA) was part of the Coalition Government’s constitutional reform agenda and reflected a commitment in its Programme for Government to “establish five-year fixed-term Parliaments.” Sir Nick Clegg, then Deputy Prime Minister, said that the Bill had:

“A single, clear purpose: to introduce fixed-term Parliaments to the United Kingdom to remove the right of a Prime Minister to seek the Dissolution of Parliament for pure political gain. This simple constitutional innovation will none the less have a profound effect because for the first time in our history the timing of general elections will not be a plaything of Governments. There will be no more feverish speculation over the date of the next election, distracting politicians from getting on with running the country. Instead everyone will know how long a Parliament can be expected to last, bringing much greater stability to our political system. Crucially, if, for some reason, there is a need for Parliament to dissolve early, that will be up to the House of Commons to decide.”

The main provisions of the Act set the date for the next general election (7 May 2015) and provided that each subsequent general election would be on the first Thursday in May in the fifth calendar year after the previous one. It also provided mechanisms to trigger a general election, one of which—a two-thirds vote of the House of Commons in favour of an early election—was used to bring about the general election in 2017.

During its passage through Parliament, this Committee conducted a short inquiry into the Bill. We accepted the Government’s argument that the Bill resulted in the Prime Minister relinquishing an important prerogative power, but we were not convinced that that a strong enough case had been made to overturn an established constitutional practice. We said that the Bill owed more to short-term political considerations than an assessment of constitutional principles. We recognised the need for mechanisms to trigger an early general election, concluding that two-thirds of MPs supporting dissolution, and the 14 days following a vote of no confidence were appropriate. We concluded that the absence of information on matters of confidence (including defeats on key confidence issues such as the Queen’s Speech or the Budget) was problematic and suggested the Bill should be amended to clarify its application.

For this purpose of this inquiry, we are interested in: whether the Act has resulted in a meaningful transfer of power from the Executive to Parliament; what the practical consequences of the Act are; and what the implications of repealing or amending the Act might be.

The Committee welcomes written submissions on any aspect of this topic, and particularly on the issues and questions set out below. Submissions need not address all the questions. Written evidence should be submitted online via the Committee’s website: www.parliament.uk/hlinquiry-fixed-term-parliaments-act-submission-form The deadline for submissions is 5pm on Thursday 24 October 2019.

We welcome contributions from all interested individuals and organisations. We believe that committees are better informed and can scrutinise public policy and

legislation more effectively when they hear a range of different perspectives and we recognise that diversity can come in many forms. We encourage anyone with experience or expertise of an issue under investigation by a select committee to share their views with the committee, with the full knowledge that their views have value and are welcome.

Questions

1. To what extent has the Fixed-term Parliaments Act 2011 led to a meaningful transfer of power from the Prime Minister to the House of Commons, removing “the right of Prime Minister to seek the Dissolution of Parliament for pure political gain”?
2. Is five years the appropriate length for fixed-terms between general elections?
3. Does the certainty of knowing when the next election will be—notwithstanding the section 2 provisions for triggering an early general election—have an impact on good governance?
4. Are the mechanisms in the Act to trigger an early general election appropriate?
5. What impact has the Act had on the notion of the House of Commons having “confidence” in a Government? Is it still possible for the Government to make a vote in the House of Commons on a matter of policy a “confidence” issue?
6. What challenges arise for the political parties, the House of Commons and the civil service in the 14-day period following the passing of a motion of no confidence in the Government? Is there a risk of the monarch being drawn into the political debate during this period and, if so, how should this be mitigated?
7. If the Act was repealed, what provisions for the lengths of Parliaments and the timing of general elections would need to be made in its place? Would the prerogative power for the Prime Minister to dissolve Parliament and call a general election be revived in the event of repeal?
8. What are the constitutional implications for the prerogative power to prorogue Parliament as a result of the recent Supreme Court judgment in *Cherry/Miller*?