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Public Administration
and Constitutional Affairs
Committee

**The Fixed-term
Parliaments Act 2011**

Sixth Report of Session 2019–21

*Report, together with formal minutes relating
to the report*

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Public Administration and Constitutional Affairs Committee

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Summary

The Government and the Opposition have committed to repealing the Fixed-term Parliaments Act 2011 (FtPA), respectively saying it has led to “paralysis” and “stifled democracy”. A statutory review of the Act is also due to start this year. In light of this, the Committee has identified and considered the key concerns and issues with the Act and its replacement to inform the review committee’s and Government’s considerations and proposals.

The FtPA is poorly named as while it purports to fix parliamentary terms, it actually moved the UK from a flexible to a semi-fixed system by creating an expectation that a Parliament will last a full term, with mechanisms for early elections to be called. It was introduced to serve the dual purposes of delivering a permanent constitutional reform—transferring the power to call an early general election from the Prime Minister to the House of Commons—and to provide an additional measure of stability to the Coalition Government. While the changes may need to be made to the current arrangements, whatever replaces the FtPA should not alter the expectation that a parliament will run its full term, and ‘fairness’ should be maintained.

The FtPA includes a provision to establish a review committee between June and November 2020. The Committee is glad the Government has recognised the importance of appointing this review committee and not rushing through replacement legislation. The review committee should be a joint select committee subject to parliamentary approval and not an executive-appointed committee.

The commitment to repeal the FtPA raised the question of whether the prerogative can be revived, a question which is highly complex and contested. It is clear that a simple repeal would not bring back the prerogative and that whatever comes next would have to be clearly set out in statute.

It was clear that much of the concern with the FtPA, which led to the commitments to repeal the Act, come from the perceived inability for an early general election to be triggered earlier in 2019. Early elections can have a role in breaking parliamentary deadlock. There were several unsuccessful attempts to use the early election provisions and a situation was created where the Government was defeated on several key votes, but the House was unwilling to trigger a general election. Ultimately this deadlock was broken by the passage of the Early Parliamentary General Election Act 2019, which circumvented the requirement for a two-thirds majority in the House of Commons.

The FtPA left the power to set the date of an early election to the Queen on the advice of the Prime Minister. It also removed the Prime Minister’s ability to attach confidence to a substantive vote, with the direct threat of triggering an election. The Committee heard from some witnesses that this should be included in any new arrangements, and the Government indicated it is considering this. We also heard, however, that reinstating this power would strengthen the executive, and in particular the Government Whips office.

As was clearly set out by our predecessor Committee, confidence remains central to the UK’s system of parliamentary democracy, while the FtPA clearly established the route

by which a no confidence vote could directly trigger an election, this did not replace the pre-existing conventions regarding confidence. A mix of statute and convention remains the best way for this area to be governed, but requires the actors involved to act in ways which engender trust. While the FtPA does not, as the Government has asserted, divorce confidence from dissolution, it did enable the situation that occurred last year where the Government lost the confidence of the House, but the House was not prepared to trigger an election. Providing the House of Commons with the power to set the date of an election could provide a route to avoid unnecessary paralysis, and the review committee should include this in its terms of reference.

1 Introduction

1. At the 2019 election, both the Government and the Official Opposition committed to repeal the Fixed-term Parliaments Act 2011 (the FtPA or “the Act”). The Conservative manifesto said the FtPA had “led to paralysis at a time the country needed decisive action”,¹ and the Labour manifesto said the FtPA “stifled democracy and propped up weak governments”.² The December 2019 Queen’s Speech further committed the Government to “repeal the Fixed-term Parliaments Act”.³
2. Under the provisions of the Act, a committee should be established in 2020 to review the operation of the Act. Given this, the Committee undertook this inquiry to identify the key concerns with the Act, and establish the key issues ahead of the review committee and the Government producing its proposals for replacing the Act.
3. The Committee sought evidence on five key issues: the review committee; the purpose and effect of the Act; the royal prerogative of dissolution; early elections; and prorogation. The Committee has not sought to develop proposals for what should replace the Act, but instead highlights the key issues to start the conversation about what the arrangements for dissolution of Parliament and calling of general elections should be.
4. The Committee received 13 written submissions and took evidence in public. We would like to thank all those who gave evidence in this inquiry.

1 Conservative Party, [Conservative Party Manifesto: 2019 Get Brexit done Unleash Britain’s Potential](#),⁴⁸

2 Labour Party, [Labour Party Manifesto 2019: It’s time for a real change](#), 82

3 Prime Minister’s Office, [Queen’s Speech December 2019](#), 19 December 2019

2 The purpose and effect of the Act

What the Act Does

5. The Fixed-term Parliaments Act 2011 was introduced by the Conservative/Liberal Democrat Coalition Government established following the May 2010 election. The Act is, as Professor Gavin Phillipson, Professor of Law University of Bristol, suggested, misleadingly named, as it does not fix parliamentary terms, in the way, for example of congressional and presidential terms in the United States of America, are fixed and essentially unchangeable.⁴ The Act is better understood as moving the UK from a flexible to a semi-fixed system, as the expectation under the Act is that a Parliament will run a full term, although there is provision for early dissolution and election.⁵

6. The Act provides for Parliamentary general elections to take place on the first Thursday in May every fifth year. An early general election may be called if the House of Commons passes a Motion in a prescribed form by a majority of two-thirds, or if the House passes a Motion of no confidence in Her Majesty's Government and does not then pass a Motion to the contrary within a period of 14 days.

Purposes of the Act

7. The evidence makes clear that the Act was intended both to deliver a permanent constitutional reform—transferring the power to call an early general election from the Prime Minister to the House of Commons—and to provide an additional measure of stability to the Coalition government.⁶

The Constitutional purposes

8. Addressing the motivation for the constitutional changes the Act made, Lord O'Donnell, Cabinet Secretary 2005–11, told the Committee that the Coalition Government felt that the previous system under the prerogative “was unfair”, as it was “biased towards the incumbent Government, because they could choose, whenever they were ahead, to have a snap election”.⁷ Lord O'Donnell explained arguments for replacing the arrangements predated the Coalition Government, as it had been part of the previous Labour Government *Governance of Britain* agenda, but had not been implemented due to a change in priorities following the 2008 global financial crisis.⁸ Professor Meg Russell and Professor Robert Hazell of the Constitution Unit, University College London, provided further context, explaining that a range of proposals to set the power of dissolution in statute had been put forward over the previous three decades.⁹ At the 2010 General Election, the Labour and Liberal Democrat manifestoes explicitly committed to introducing fixed-term parliaments and the Conservative manifesto included a commitment for “making the use of the Royal Prerogative subject to greater democratic control so that Parliament

4 [Q70](#)

5 Mr Daniel Pitt ([FTP0002](#))

6 [Q2](#); [Q4](#); [Q131–132](#); Mr Daniel Pitt ([FTP0002](#));

7 [Q2](#)

8 Ministry of Justice, [The Governance of Britain Review of the Executive Royal Prerogative Powers: Final Report](#), October 2009, para 39

9 Meg Russell and Robert Hazell ([FTP0011](#))

is properly involved in all big national decisions”.¹⁰ Professor Philip Cowley, Professor of Politics Queen Mary University of London, explained that the Act addressed the principled question of who should control the point at which an election is called: should it be the Prime Minister, acting as then through the royal prerogative, or should it be the elected House of Commons.¹¹

9. The evidence to this inquiry identified three aspects of the constitutional purpose of the Act:

- Removing the Prime Minister’s ability to unilaterally choose the date of an election for partisan advantage.
- Moving the power from the executive to legislature by giving the Commons the power to make the decision over an early dissolution.
- Creating an expectation that a Parliament will run for a full five-year term.

10. When introducing the Fixed-term Parliaments Bill, the then Deputy Prime Minister Nick Clegg set out that the single clear purpose of the Bill was to “remove the right of a Prime Minister to seek the Dissolution of Parliament for pure political gain”.¹² Lord O’Donnell reiterated that this was one of the main concerns of the Coalition Government when bringing forward the legislation. He said that from a constitutional point of view, the Act “created a fairer system: it removed the bias towards incumbents being able to choose”.¹³ Professor Petra Schleiter, Professor of Comparative Politics St Hilda’s College Oxford, took the view that the previous arrangements “concentrated tremendous power in the hands of the Executive”, which could be “employed for partisan advantage”.¹⁴ As Professor Cowley explained, the Prime Minister’s Party had the “advantage that they knew they were working towards a particular date for an election while the Opposition did not, so there was definitely this issue of the level playing field”.¹⁵ Professor Schleiter set out that a comparative study of 27 European Countries found that the ability of leaders to dissolve Parliament and call elections at the most advantageous time, generates an average vote share bonus for the incumbent of about five percentage points.¹⁶ In addition to this, Professor Schleiter said such arrangements potentially enable “incumbent governments to avoid electoral accountability for poor policy choices, for instance, by calling elections before the full adverse consequences of their interventions unfold”.¹⁷

11. The Minister of State, Chloe Smith, said that she thought if the public felt that there was something “nefarious” in the Government’s timing of an election, the Government would be punished for this.¹⁸ She suggested to us that the five percentage point advantage highlighted by Professor Schleiter seemed “like a correlation rather than necessarily a

10 Liberal Democrat party, [Liberal Democrat Party Manifesto 2010: Change that works for you building a fairer Britain](#), p88; Labour Party, [Labour party Manifesto 2010: A Future Fair for All](#), Section 9; Conservative party, [The Conservative Manifesto 2010: Invitation to Join the Government of Great Britain](#), p 67

11 [Q107](#)

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

13 [Q3](#)

14 [Q107](#)

15 [Q107](#)

16 [Q107](#); Petra Schleiter and Thomas Fleming ([FTP0006](#)); Petra Schleiter and Margit Tavits, “*The Electoral Benefits of Opportunistic Election Timing*”, *Journal of Politics*, Vol 78 no 3 (2016), pp836–850

17 Petra Schleiter and Thomas Fleming ([FTP0006](#))

18 [Q157](#)

causation” and that “there are lots of ingredients in what a public uses to make its choice”.¹⁹ However, Professor Schleiter’s research controls for potential confounding variables including the previous vote share or seat share of the Prime Minister’s party and economic performance, suggesting that the vote share advantage through opportunistic election timing cannot be described as simply a correlation rather than causation.²⁰

12. In removing the Prime Minister’s discretion to dissolve Parliament at a time of their choosing, the FtPA gave the power to call an early general election to the House of Commons. This was the second purpose of the Act and, as the Deputy Prime Minister set out at the time, this represented “a major transfer of power away from the Executive and a major strengthening of Parliament’s authority over its own lifetime”.²¹ Dr Mark Ryan, Assistant Professor of Constitutional and Administrative Law at Coventry University, said that “the purpose of the Act, at least from a purely constitutional perspective, was to reduce Executive power within the British constitution”.²² Professor Alison Young, Professor of Public Law at Cambridge University, and Professor Schleiter both told the Committee that the Act purposefully sought to alter the balance of power between the Executive and legislature, by taking the power of early dissolution, predominantly in the hands of the Government and moving to the House of Commons.²³ Professor Russell and Professor Hazell, explained that this move of power was in line with other constitutional changes in legislation, common law and conventions, which when read together “can then be perceived as a change in the nature of the UK constitution”.²⁴ Citing the examples of public appointments, governance of the civil service, approval of treaties and military action, they told us:

In several areas, powers were moved into statute or transferred to Parliament either as a matter of law or of convention. Such changes enhance government accountability, and reinforce the UK’s central constitutional principle of parliamentary sovereignty.²⁵

13. Sir Stephen Laws, First Parliamentary Counsel from 2006–12, described the third constitutional purpose of the Act as to change the default expectation in regards to when election will occur. The default expectation had been that a Parliament would not run its full course, and an early election would be called often in its fourth year. The practical effect of this he said was that ...

...from the end of two and a half years—you would have a long first Session and a year as a second Session—you would start planning the fourth Session, and the fourth Session you would normally plan as a short one, running up to an election. So Government had a very short period to get going.²⁶

Sir Stephen said that the Act “did change the default expectation. Obviously, events

19 [Q158](#)

20 Petra Schleiter and Margit Tavits, “*The Electoral Benefits of Opportunistic Election Timing*”, *Journal of Politics*, Vol 78 no 3 (2016), pp836–850; Petra Schleiter and Valerie Belu, ‘*Electoral incumbency advantages and the introduction of fixed parliamentary terms in the United Kingdom*’, *The British Journal of Politics and International Relations*, Vol 20(2) (2018)

21 HC Deb 13 September 2010, [col 635](#)

22 Dr Mark Ryan ([FTP0005](#))

23 [Q73](#); [Q108](#)

24 Meg Russell and Robert Hazell ([FTP0011](#))

25 Meg Russell and Robert Hazell ([FTP0011](#))

26 [Q4](#)

have shown that it has not guaranteed five-year Parliaments, but I think it did change the expectation”.²⁷ Lord O’Donnell also set out his view that one of the main purposes of the Act was to create a fairer system that “would provide for better government by having a longer fixed term, namely five years, so that you could do serious planning”.²⁸ Mark Harper, the Minister in charge of the Fixed-term Parliaments Bill in the House of Commons, was also clear on this purpose of the Act. He said that “one of the arguments for a Fixed-term Parliaments Act was to have Governments that could think a little bit more long term”.²⁹ Under the previous system, he highlighted the tendency of calling an early election after four years resulted with “truncating a five-year Parliament into three years of getting stuff done and a year when everybody is focused on the next election”.³⁰ Reflecting on whether the Act was needed, Mr Harper said:

the impetus to having Parliaments that in usual circumstances run their term and therefore moving to, on average, a Parliament sitting for its full five years I think personally is a good thing. I do not think, if you look at all the history of British politics, there has ever been an argument that we think too long term. There is a very strong argument that on many issues we think too short term, driven by the electoral timetable.³¹

14. Evidence from both the Association of Electoral Administrators and the Electoral Commission argued that the certainty over electoral dates that the Act was intended to establish had major benefits for electoral administration.³²

15. The Minister made clear that the Government’s position was that any future legislation would “entail repealing the concept of the fixed term”, continuing:

We do not think that a fixed term per se is in itself an ideal part of the design here. Principally that is driven by the fact that the events of the last few years showed that at times it is necessary to be able to dissolve Parliament in order to move the country on and a fixed term was shown to be undesirable in that context. I think it is a prima facie case that fixed terms are not always desirable.³³

16. The Minister added that, while the Government was committed to getting rid of fixed terms, it was not opposed to maximum terms.³⁴

17. The Fixed-term Parliaments Act clearly achieved the purpose of removing the discretion of the Prime Minister to call an election at a time of his or her choosing. It removed the ability of the incumbent party of government to time an election to gain an advantage over its opponents. *Whatever legislation replaces the FtPA it is important that this fairness is maintained.*

18. It is clear that the Act has shifted the balance of power from the executive to the legislature. It is less clear if the right balance of power has yet been struck. *While*

27 [Q5](#)

28 [Q2](#)

29 [Q132](#)

30 [Q132](#)

31 [Q136](#)

32 Association of Electoral Administrators ([FTP0007](#)); Electoral Commission ([FTP0009](#))

33 [Q159](#)

34 [Q170](#)

there should not be a return to the Executive dominance of election calling, careful consideration needs to be given for how the power of early election calling is balanced between the Executive and the Legislature.

19. The Act has clearly also altered the default expectation with regards to the timing of elections. The expectation is now that, where the Government has a working majority, a Parliament will normally last a full five-year term. Given that there are mechanisms for an early election included in the Act, the length of a Parliament is never truly a fixed term and, in this regard, the Act was misnamed. *While changes may need to be made to the current arrangements, the Committee can see no good reason for altering the default expectation that parliaments should run their full term and elections will occur at scheduled times, thereby providing certainty for those administering elections and for the public who vote in them. The only exceptions should be in circumstances where an early general election is the only means of resolving political deadlock, or if the House of Commons expresses no confidence in the Government.*

The political purpose

20. It is clear from the evidence to the inquiry that a significant reason for bringing forward the original Bill was the hung Parliament following the 2010 Election. The purpose of the Act in this regard was to maintain the Coalition Agreement between the majority Conservative and minority Liberal Democrats. Lord O'Donnell told the Committee that there was “obviously a political element” to the Act.

We were talking about putting together the first full coalition Government and, not surprisingly, the Liberal Democrats were worried that, without some kind of commitment, they would go into full coalition, the Conservative party would decide to go for a snap election whenever it happened to be ahead, and that that would be a real problem for them, so they were quite keen politically that this go through.”³⁵

He further explained that at the start of the Coalition “there probably wasn’t that much trust” so the Liberal Democrats wanted “an absolutely clear commitment that there would be no snap election, and the way to do that was to legislate for a fixed-term Parliaments Act”.³⁶

21. While setting out that there was a strong intellectual heritage for what the Act did constitutionally, Professor Cowley was clear about the political need for legislation:

The Act itself was about the political convenience of the time...It happened when it happened because the Liberal Democrats needed to be given some assurance that they were not going to be dumped by the Prime Minister whenever it became electorally convenient to do so, and that is why they got the measure through.³⁷

22. When asked what the purpose of the Act was, Mark Harper was clear that, along with the constitutional purposes, it was part of the Coalition Agreement. He went on to say that “there were many people at the beginning of the 2010 Parliament who did not

35 [Q2](#)

36 [Q3](#)

37 [Q108](#)

think the Coalition Government would last. Of course, that Parliament did run its full term, so you could say in the narrow terms of the Act it fulfilled its objective”.³⁸

23. It is clear that one of the main purposes of the Fixed-term Parliaments Act 2011 was to provide assurance to the Coalition partners that an early election would not be called. The fact that the Coalition Government was maintained for the full 2010–15 Parliament, makes it evident that the Act achieved this narrow purpose. Whatever system replaces the Act needs to be able to accommodate the formation of future coalition governments without further changes to the law for dissolving Parliament and calling elections. *The Government and review committee in considering what should replace the Fixed-term Parliaments Act must establish a system that will support majority, coalition and minority governments to be formed, and for them to govern for a full term, notwithstanding circumstances in which an early general election is the only means of resolving political deadlock, or if the House of Commons expresses no confidence in the Government.*

3 Review committee

24. The FtPA includes a provision that the Prime Minister must make arrangements for a committee to be established to review the operation of the Act, and for that committee to make recommendations for the repeal or amendment of the Act. It also requires the Prime Minister to make arrangements for the publications of the committee’s findings and recommendations. This committee should be established no earlier than 1 June 2020 and no later than 30 November 2020.

25. The FtPA provides that the majority of the committee should be Members of the House of Commons. Therefore, other members could be from the House of Lords or from other sectors, such as academia, the law, relevant bodies, or the general public.

26. The then Cabinet Secretary, Sir Mark Sedwill, told the Committee in March 2020 that the Government was currently weighing up options in regards to the FtPA and that one of these options is not to proceed with the review committee.³⁹ However, the Cabinet Office Minister, Chloe Smith, subsequently made clear that the Government intends to set out the arrangements for the committee before the end of November 2020 in accordance with the Act.⁴⁰

27. The provision for a review committee was an amendment made at the end of the legislative process, in part as a response to the attempt by the Lords to insert a ‘sunset clause’. During the debate, Mark Harper said that it would provide a “categorical reassurance that the Bill will be given full post-legislative scrutiny”.⁴¹ In oral evidence, Mr Harper confirmed this intention, saying that the scheduling of the review was intended to have allowed the committee to review the operation of the Act over two full election cycles.⁴² The review committee would be able to make recommendations for amendment or even repeal, but any changes would be subject to the “full normal legislative process, with its checks and balances”.⁴³ He went on to set out that the committee would review the operation of the Act in general, that it would not be an overly constrained review and so it “would be able to look at the effects in the round and make appropriate recommendations that this House and the other place could then consider.”⁴⁴

28. Mr Harper said that the Government of the time had envisaged a joint committee, with a larger number of Commons members to reflect it was about elections and therefore about the democratic House. He suggested that the review could be carried out by a joint select committee, possibly comprised of members of existing committees of the two Houses with an interest in the area.⁴⁵

29. There was very strong support for the review committee in the evidence to this inquiry, and for far greater pre-legislative scrutiny of whatever is proposed to replace the FtPA. Lord O’Donnell said he thought:

39 Oral Evidence taken on 10 March 2020, HC118, [Q127](#)

40 [Qq173–174](#)

41 HC Deb, 8 September 2011, [Col 583](#)

42 [Q146](#)

43 HC Deb, 8 September 2011, [Col 583](#)

44 HC Deb, 8 September 2011, [Col 586](#)

45 [Q146](#)

the review is a very good idea. This is a difficult constitutional issue and my experience suggests to me that constitutional issues need to be very carefully considered, because they can have unexpected consequences.⁴⁶

30. Sir Stephen Laws suggested that given the Government's commitment to repeal the FtPA, the review committee might best perform pre-legislative scrutiny.⁴⁷

31. Professor Alison Young said:

...it is very unwise to modify constitutional provisions without having a committee that looks at those particular provisions. We have seen from the discussions today that there were some elements of lack of clarity, that there were some consequences of the Fixed-term Parliaments Act that might not necessarily have been fully considered at the time. We have also discussed how changing one particular piece of the constitution can have knock-on consequences in all sorts of other areas. I think it is very wise in those circumstances to ensure that you do have a committee, be it a review committee of the Act or a pre-legislative scrutiny committee.⁴⁸

32. Professor Petra Schleiter highlighted three reasons for the review committee: first, to get it right; second, to create the bandwidth to give this reform the attention it requires; and third, to make rules that have a chance of lasting and that have cross-party support.⁴⁹

33. The Minister gave us assurance that the Government would not rush through the process of reforming or replacing the FtPA, telling us "it is very important that this issue is carefully scrutinised".⁵⁰ She added that it is the Government's "wish to be able to give this proper scrutiny and invite views upon it so that it results in the strongest possible arrangements".⁵¹ On the issue of building cross party consensus, the Minister told us that she saw it as her role as the minister responsible for the policy area and the Bill, "to forge that consensus".⁵² The Minister said that the review committee would be set up in accordance with the Act before the end of November 2020 and accepted that the "Committee would require a period of time to do its work".⁵³

34. The Committee welcomes the Government's commitment not to rush through replacement legislation and to provide adequate time for full scrutiny. We also appreciate the Minister's commitment to forging cross-party support for whatever replaces the Fixed-term Parliaments Act. *The first step, as the Minister recognised, is for the review committee to be set up. It is important that the review committee is given time to carry out its work to its full satisfaction. Following the reporting of the review committee the Government should produce its proposals and allow time for full pre-legislative scrutiny.*

35. *The Committee does not recommend a particular composition for the review committee beyond that set out in the Act. But the Committee believes that the review*

46 [Q37](#)
 47 [Q39](#)
 48 [Q103](#)
 49 [Q127](#)
 50 [Q162](#)
 51 [Q164](#)
 52 [Q163](#)
 53 [Q176](#)

committee should be a Joint Select Committee, subject to parliamentary approval and not an executive-appointed committee. The Joint Committee could require additional provisions to include experts to be included as Committee members.

4 The prerogative of dissolution

36. Prior to the FtPA, the legal power to dissolve Parliament rested with the Sovereign who, by modern convention, would do so at the request of the Prime Minister.⁵⁴ Section 3 of the Act replaced the royal prerogative power of dissolution, and the commitment to repeal the FtPA has raised the question of whether the royal prerogative power of dissolution can be revived.

37. The evidence received by this Committee demonstrates that this is a complex and contested legal question. One point, however, where there was clear consensus was that a simple repeal—such as a one-line Bill saying “the Fixed-term Parliaments Act 2011 is repealed”—would not revive the prerogative. This is because, as Sir Stephen Laws explained, the Interpretation Act 1978 provides that repealing an Act does not automatically reinstate any provisions that the Act itself might have repealed.⁵⁵ Indeed, as Professor Young pointed out, not only would repealing the FtPA fail to revive the prerogative, it would also not deal with the fact that the FtPA repealed previous legislation for maximum terms.⁵⁶ Because of this, Professor Phillipson told us that the most immediate result of a simple repeal would be that the current Parliament, as things stand, would last forever.⁵⁷ It is worth noting that simple repeal legislation would require the explicit agreement by the House of Lords as the powers in the Parliament Act 1911 cannot be used to extend the maximum duration of a Parliament beyond five years. Professor Young was also clear that a simple repeal would be “highly problematic and would obviously trigger all sorts of potential confusion and potential legal action in the future”.⁵⁸ Both Sir Stephen and Professor Phillipson were clear any new legislation to replace the 2011 Act will have to state what will replace it.⁵⁹

Abolished or in abeyance?

38. The question of what should replace the FtPA leads to consideration of whether the revival of royal prerogative of dissolution is an option. There is considerable disagreement on this point.⁶⁰ Professor Philippe Lagassé told us that “statute can have two effects on the royal prerogative: acts of Parliament can either abolish prerogative powers outright or they can displace prerogative, placing them in abeyance”.⁶¹ Professor Phillipson also set out that whether or not a prerogative can be revived depends “partly on what happened to the old one”, that is whether it was put into abeyance or abolished.⁶² There are, he said, three situations to be considered here. The first is where the prerogative is clearly displaced or put into abeyance. Professor Phillipson explained this with reference to the *De Keyser’s* case.

What happens there is that something was previously governed by the prerogative and you then have a new statute that governs the same area, so the two areas of law overlap. The very clear finding by the courts was that, in those situations, the Government can only act under the statute, and the

54 [Q69](#)

55 [Q16](#)

56 [Q71](#)

57 [Q75](#)

58 [Q75](#)

59 [Q16](#); [Q75](#); Stephen Laws, [The Future for Constitutional Reform](#), Policy Exchange, para 37

60 [Q75](#); [Q76](#); Robert Craig ([FTP0010](#)); Meg Russell and Robert Hazell ([FTP0011](#)); Professor Anne Twomey ([FTP0003](#))

61 Professor Philippe Lagassé ([FTP0004](#))

62 [Q76](#)

prerogative, as it were, goes into abeyance. In other words, it sits underneath the statute, but if the statute was removed the prerogative would still be there.⁶³

Professor Lagassé similarly set out that:

When an Act displaces a prerogative, either expressly or by necessary implication, the executive can only exercise the authority granted by statute. Since statute is not always precise or wide ranging, however, prerogative may still provide the executive with authority where the Act is silent. In effect, the prerogative can be used to address gaps that statute failed to address.⁶⁴

39. The second situation is where there is clear intention to abolish the royal prerogative power. Professor Phillipson said that the clearest example of this is an express abolition, although he could not think of a direct example.⁶⁵ Professor Lagassé similarly describes this situation:

When an Act of Parliament abolishes a royal prerogative, the prerogative ceases to exist altogether as a source of legal authority. In the event that the statute that abolished the prerogative is repealed, the prerogative remains a nullity. If the abolishing Act replaces the prerogative with a statutory authority, a new Act will be required to fill the legal gap that the combined prerogative abolishment and statutory repeal creates. If Parliament wishes to replicate or recreate the authority of an abolished prerogative, it will need to do so on a statutory basis.⁶⁶

40. The third situation Professor Phillipson set out is where an Act abolishes the prerogative by necessary implication. This is where an Act does not contain the explicit wording that the prerogative is abolished, but contains provisions that have the same effect, and so abolishes the prerogative by necessary implication. It is this situation that Professor Phillipson suggests applies to the FtPA, as it says Parliament cannot otherwise be dissolved.⁶⁷ Here, however, Professor Lagassé appears to take a different view, arguing:

When statute clearly occupies the same ground as the prerogative, but does not expressly abolish it, the prerogative authority remains but is placed in abeyance. Put differently, the prerogative authority continues to exist at common law, yet it is inaccessible to the executive as long as the government can act through statute. In the event that the displacing statute is repealed, the prerogative authority would, in theory, be revived and exercisable by the executive.⁶⁸

41. For Professor Lagassé, the criteria for determining whether a prerogative has been abolished or put into abeyance is based on whether there is an express statement of abolition. While he sets out arguments on both sides, he concludes that “the case that the FtPA has put this royal authority in abeyance is stronger”.⁶⁹

63 [Q76](#)

64 Professor Philippe Lagassé ([FTP0004](#))

65 [Q76](#)

66 Professor Philippe Lagassé ([FTP0004](#))

67 Section 3(2); [Q76](#)

68 Professor Philippe Lagassé ([FTP0004](#))

69 Professor Philippe Lagassé ([FTP0004](#))

42. Conversely, the evidence taken from those involved in drawing up the Act and its passage through Parliament was that the intention of the Government at the time was to abolish the royal prerogative. When asked, Lord O'Donnell said, "the simple answer to that is yes".⁷⁰ Sir Stephen Laws agreed that the intention was to abolish the prerogative saying, "Section 3(2) says: 'Parliament cannot otherwise be dissolved'. That comes as close as I can see to abolishing it".⁷¹ Mark Harper was clear in his view that:

...it was the intention to abolish the prerogative...In my view, and I think this is supported by many eminent lawyers, the Bill did abolish that prerogative power and the Queen does not have any residual power to dissolve Parliament. That power can only be exercised by statute.⁷²

43. However, Sir Stephen Laws suggested that the question of abolition is a "red herring", as for him the sovereignty of Parliament means that:

If Parliament wants to say the law from 2020 is to be the same as it was before 2011, as if we had never had the Fixed-term Parliaments Act, that is within the power of Parliament to say. Whether that revised something that has been abolished or starts it up again is more or less irrelevant, because the practical effect is that you have got to where we were before.⁷³

44. Robert Craig, University of Bristol, also advocated this view because no Parliament can bind its successor.⁷⁴ He believes that it is not within the power of Parliament to abolish a prerogative. He argues that it is therefore possible to revive the dissolution prerogative, otherwise the 2010 Parliament will have successfully bound future parliaments.⁷⁵ Even here though there remains ambiguity as while Parliament, as Dicey put it "has the right to make or unmake any law whatever", it cannot of necessity undo every effect of a law.⁷⁶ For example, if Parliament were to pass a statute to demolish the Palace of Westminster and move to another location, it could subsequently pass a further statute undoing the move, and order the rebuilding of the Palace, however, it could not undo the demolition. Similarly, it is clear from the evidence there is no doubt that Parliament could create a statutory power that could recreate or at least approximate the previous arrangements for dissolution, but this would be a statutory and not a prerogative power. Professor Phillipson and Professor Young both stated they did not know of "an example of Parliament ever reviving a prerogative, so we just do not know whether it can be done".⁷⁷

The potential role of the Courts

45. If the prerogative could be revived, it is clear that, due to the Interpretation Act, it would need to be done so expressly. Professor Young told us such legislation would have to specifically say "that the prerogative power of dissolution is now revived."⁷⁸ However, she felt that this would raise two questions: first what exactly are you reviving?

70 [Q14](#)

71 [Q15](#)

72 [Q138](#)

73 [Q15](#)

74 Robert Craig ([FTP0010](#))

75 Robert Craig ([FTP0010](#))

76 A.V. Dicey, [Introduction to the Study of the Law of the Constitution](#), Liberty Fund (1915), 5

77 [Q76](#)

78 [Q77](#)

Would you be reviving just the aspect of the Monarch being requested by the Prime Minister and then dissolving, or would there also be arguments as to whether you were potentially reviving an ability of the Monarch to force a dissolution in order to resolve a constitutional crisis? Again, that is an aspect of uncertainty that I do not think you really want to open.⁷⁹

And secondly how the courts would interpret such an act?

Would they see it as a valid way of saying we have returned the prerogative, or would the courts turn around and say, as we know very clearly from the recent prorogation case, it is their job to determine the scope of the common law and that prerogative powers are common law powers that also interact with the backdrop of legislation? It becomes a very arguable point before the Supreme Court as to whether putting in a piece of legislation, “The prerogative power of dissolution is now revived,” would suffice or not.⁸⁰

46. The concern about the involvement of the courts and uncertainty about how they would view any attempt to revive a prerogative, was shared throughout the evidence to the inquiry, and by those on both sides on the debate as to whether it could be revived. For example, Sir Stephen raised the concern that:

...as a result of the prorogation case, an important feature of the previous law on dissolving Parliament (the non-justiciability of political decisions about a dissolution) could no longer safely be relied on, unless expressly addressed. Just as that case has cast doubt on the future non-justiciability of the provisions of the 2011 Act, so it has also cast a similar doubt on whether restoring the pre-2011 law (under which prorogation was an invariable feature of every dissolution) would restore the non-justiciability of dissolution itself.⁸¹

47. Professor Young set out the two aspects of the prerogative that could come into play in the court if Parliament attempted to revive the prerogative. The scope of the prerogative and how you exercise a particular prerogative power. The key element, she suggested, was whether it exists and its scope, and, reflecting on the Supreme Court’s decision in [2019] UKSC 41, known as the Miller-Cherry prorogation case, said “the courts will use background constitutional principles to limit the scope of a prerogative power regardless of the prerogative power”.⁸² Professor Young was clear that reviving the prerogative would introduce an “element of uncertainty” and that “it is much better to put it on a statutory basis, which can achieve exactly the same purposes.”⁸³ Professor Phillipson also said that if the prerogative was revived, it would:

...almost certainly end up in litigation and probably have to go to the Supreme Court because it is an open point of law. Therefore, the more sensible course of action would appear to be to deal with it by replacement legislation rather than by a simple repeal.⁸⁴

79 [Q78](#)

80 [Q77](#)

81 Stephen Laws, [The Future for Constitutional Reform](#), Policy Exchange, para 37

82 [Q79](#); R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland) [2019] [UKSC 41](#)

83 [Q77](#)

84 [Q76](#)

48. Sir Stephen Laws was also clear that whatever arrangements replace the FtPA will need to be set out in an Act, and he suggested “adding a rule to exclude the courts from considering either Dissolution or Prorogation”.⁸⁵ Professor Phillipson suggested that if the concern of Parliament is to keep the courts out of decisions over dissolution, the simplest way was to give Parliament a role. He told us:

If you make it a parliamentary motion that triggers a general election, no one doubts that that is squarely protected by Article 9 of the Bill of Rights, which means that the courts cannot rule on it. Whereas on the other hand, if it remains a pure Executive power, like prorogation or dissolution, there is now a chance the courts can rule on it.⁸⁶

Political concerns with reviving a prerogative

49. There were also broader political concerns with the idea of reviving the prerogative. Professor Russell and Professor Hazell described the idea of restoring the prerogative as “a retrograde step in terms both of international norms and the direction of travel in the UK constitution, which has tended towards greater regulation of prerogative powers”.⁸⁷

Professor Cowley observed:

I don’t think it is a particularly republican position to say that it feels quite weird to be discussing restoring prerogative powers. If you look at the development of British democracy over the last 400 to 500 years, it has been a gradual erosion of the power of the Monarch and then the Executive. It is a curious discussion to be having, to reverse, to take powers away from the legislature in this way.⁸⁸

Building on this point Professor Schleiter expressed her view that:

Politically, I think it would be a very difficult step at this point in time for a democratically elected Parliament, because restoring prerogative power would make it clear that, when faced with this complex issue, Parliament prefers to hand power back to the Monarch rather than rising to the challenge, working through the issues and regulating it adequately by statute. I think that would be an admission of failure in some way. Secondly, I think it would set a really troubling precedent. If this crucial prerogative can be restored, giving the Executive wide discretion to call early elections, what other parliamentary checks can the Government disable by restoring discretionary powers to act under the royal prerogative?⁸⁹

50. The question of whether or not the dissolution prerogative can be restored is a complex one, which involves fundamental constitutional principles. It clearly was the intention of the Government in 2011 to abolish the prerogative, but the wording of the Act is less conclusive on this point. Some also hold the view that the fact of abolition does not even matter. As all the evidence to this inquiry makes clear, this is a highly

85 [Q16](#) ; [Q41](#)

86 [Q81](#)

87 Meg Russell and Robert Hazell ([FTP0011](#))

88 [Q112](#)

89 [Q112](#)

contested issue. There are also questions as to what exactly would be revived and for example what the legitimate expectations of the Sovereign as a constitutional backstop would be. This is of particular concern in light of the Supreme Court's recent decision about the prerogative power of Prorogation. *It is clear that attempting to revive the prerogative would invite the courts to make the final decision on these issues. These are core political and constitutional questions that neither Parliament nor government should abrogate to the courts. Even if there is a desire to return to the old system for dissolution and calling elections, it would be better setting these arrangements in statute rather than engaging in an unnecessary attempt to revive a prerogative which could have considerable unintended consequences and implications.*

51. While not all members of the Committee would oppose such a move, it is also cognisant that reviving the prerogative would mean taking a power that is set out in statute and regulated by Parliament and handing it back to the Crown. Whether or not adequate consideration was given to the full implications of removing the prerogative in 2011, Parliament now has responsibility for this area of the UK political system. *The Government should not simply rely on reviving the prerogative, but look to establish a new, robust system for dissolution and calling of elections in the UK.*

5 Early elections: avoiding paralysis and propping up of weak governments

52. Early elections, as Professor Cowley described to the Committee, perform an important function in “circumstances where things have broken down completely, or where new issues have emerged that require a mandate to resolve”.⁹⁰ As Professor Schleiter further explained, early elections serve the purpose of gridlock resolution in most parliamentary systems, offering “democratic means to resolve situations in which Parliament cannot agree to form a Government or cannot agree to lend it the support to govern”.⁹¹ With the exception of Norway, every European parliamentary democracy has a mechanism for an early election. The UK under the FtPA is no different; section 2 of the Act contains two routes: a direct vote for an election, and an election following a resolution of no confidence in the Government. Despite the presence of these provisions, many, including the Government and the Opposition, viewed the FtPA as inhibiting the political process, either by “causing paralysis” when decisive action was needed, or by stymieing democracy and propping up a weak government.

53. As the Minister made clear giving evidence to the Committee, it was the inability for an early election to be called at an earlier point in 2019 that led the Government to view the FtPA as causing paralysis. The Minister expressed the Government view that:

What this Act does is divorce, if you like, the issues of confidence from the issues of dissolution or the process of confidence and the process of dissolution and we saw the problems that that caused. We absolutely had the practical example of why that was problematic. It certainly is a key point that needs to be considered in the replacement arrangements, that there ought to be a restored link because of confidence in the Government of the day and the triggering of an election. That may include making it possible once again for the Government to designate certain issues as matters of confidence that, if they were lost, could then trigger dissolution.⁹²

54. In this inquiry, the Committee sought to consider how the early elections of the FtPA have operated, and what were the causes of the concern with the early election provisions.

Early elections under the Act

55. Section 2 of the FtPA established two means by which an early general election and dissolution of Parliament can be triggered. Both routes require resolutions of the House of Commons:

- Section 2(1) sets out that a general election can be triggered if the House passes the motion “That there shall be an early parliamentary general election”, provided it is carried by a number of votes equal to or greater than two thirds of the number of seats in the House, including vacant seats (434 in the current House).⁹³ This route effectively replaced the power of the Prime Minister to ask the Queen for an early dissolution.

90 [Q118](#)

91 [Q118](#)

92 [Q167](#)

93 If a motion is pressed to a division in the House.

- Under section 2(3), a general election can also be triggered through a no confidence vote, where the House passes (by simple majority) the motion “That this House has no confidence in Her Majesty’s Government” and does not subsequently pass (by simple majority) the motion “That this House has confidence in her Majesty’s Government” within the following 14 calendar days. A general election is automatically triggered if this 14-day period expires. Under both routes to a general election, the Act provides that once the election has been triggered the Queen sets the date for an election on the advice of the Prime Minister.

The use of early election provisions

56. The early election provision has only be used successfully once, when in 2017 Theresa May’s Government moved the section 2(1) Early General Election motion, securing over the two thirds majority and triggered the 2017 Election.⁹⁴ As Mark Harper observed, on this occasion it appears the Act operated as intended and expected.⁹⁵

57. In 2019, several unsuccessful attempts to use the early election provisions of the Act were made, in the context of debates around how the UK would leave the EU. First, following a Government defeat of 202–432 on its Withdrawal Agreement, the Opposition put down a motion of no confidence, which was then defeated the following day 306–325.⁹⁶ Before FtPA was passed in 2011, the Prime Minister could have attached confidence to the first vote on the EU Withdrawal Agreement with the threat of triggering an election if the Government was defeated. Under the FtPA, the Prime Minister could have threatened to follow this with a motion for an early general election, but she did not choose to do that.

58. In September 2019, however, Prime Minister Boris Johnson appears to have treated a vote on a Standing Order 24 debate to allow “MPs [to take] control of the Order Paper” as an effective vote of confidence, as following the Government’s defeat he made clear that the Government and the House of Commons were at odds and so put down an Early General Election motion for debate the following day.⁹⁷ While the Government won that motion, the Opposition abstained and so the threshold of two-thirds majority for an election was not met.⁹⁸ The Prime Minister subsequently moved the Early General Election motion twice more on September 9 and October 28, and on both occasions could not reach the two-thirds majority.⁹⁹ The day after the last of these Early General Election motions, the Government introduced the Early Parliamentary General Election Bill which was passed two days later, triggering a dissolution. The Early Parliamentary General Election Act 2019 did this by specifying the date for the Election and stating that it should be treated as if it had been set under section 2(7) of the FtPA. By doing this, the requirement for a two thirds majority vote in the House of Commons was circumvented.

94 HC Deb, 19 April 2017, [col 681–712](#)

95 [Q134](#)

96 HC Deb, 15 January, [col 1122–1125](#); HC Deb, 16 January 2019, [col 1171–1275](#);

97 Graeme Cowie, [The Benn-Burt Bill: Another Article 50 extension?](#), House of Commons Library insight, September 4 2019; HC Deb, 3 September 2019, [col 140](#)

98 HC Deb, 4 September 2019, [col 291–316](#);

99 HC Deb, 09 September 2019, [col 616–645](#); HC Deb, 28 October 2019, [col 54–80](#)

Circumventing the two thirds (super) majority

59. Sir Stephen Laws told the Committee that, when writing the Act, Parliamentary Counsel was aware that circumventing the two-thirds provision through passing an Act for an election was going to be an option. But he said this possibility fit with the purpose of the Act to change the default assumption to one that a Parliament would normally run a full term, as a government choosing to circumvent the procedures of the Act, would have to take whatever political heat came from such actions. Lord O'Donnell agreed with this analysis telling us the presumption of the Act was “Let’s try and do five years if at all possible,’ but clearly you don’t want to override the sovereignty of Parliament”.¹⁰⁰ He said he thought that “some people underestimate the strength of the system that we’ve got with the Fixed-term Parliaments Act”, and added that the Act “actually did find a way through”.¹⁰¹

60. The idea of circumventing the two-thirds provision through an Act was also contemplated in 2017. As Professor Cowley pointed out, the Prime Minister was not sure whether the Opposition would back the election and “her team prepared a draft Bill, very similar to the one that passed in 2019, ready to implement to try to bypass the Act”.¹⁰²

61. Professor Schleiter said if you wanted to impose a binding higher bar such as a two-thirds majority in the UK “you would somehow have to move to a system of entrenched constitutional laws”, but concluded “I do not think that is the world we are in”.¹⁰³

62. Professor Young told us that the Early Parliamentary General Election Act 2019 was a very clever way round the two-thirds majority requirement, but still in line with the principle of parliamentary sovereignty.¹⁰⁴ Addressing the question of whether the two-thirds majority could be “entrenched” to prevent future circumvention, she said trying to do this would cause all sorts of deeper issues in constitutional theory.¹⁰⁵ She speculated that it could be possible to entrench a super majority, but

to do so you have to modify what I would call the fundamental constitutional principles that are effectively agreed upon by Parliament and the courts. That would be very complex and could not necessarily be done by legislation alone.¹⁰⁶

63. The two-thirds ‘super majority’ required to trigger an early election under the Act can, like any statutory provision, be circumvented by passing an Act of Parliament to set an election date. As was made clear to the Committee the option of such a circumvention was clearly always contemplated as a possibility in certain circumstances, such as occurred in Autumn 2019. The principle of parliamentary sovereignty means this will always remain a possibility. *Attempting to entrench a ‘super majority’ would be a difficult, unnecessary and potentially damaging move; the Committee advises against this being included in any proposals to replace the FtPA.*

100 [Q21](#)
 101 [Q21](#)
 102 [Q114](#)
 103 [Q120](#)
 104 [Q90](#)
 105 [Q90](#)
 106 [Q91](#)

The power to set the election date

64. One explanation given to us for the “paralysis” or reticence of the House of Commons to call a General Election earlier in Autumn 2019 was that, under section 2(7) of the Act, the power to specify the date of an election is left to the Prime Minister and there was a lack of trust that he would not use this power to achieve a political end. Professor Phillipson described this as “a problem in the drafting of the Act” and observed that:

What we found out in the autumn was that, in some circumstances, the Commons may be so reluctant to allow the Prime Minister to set the date of the general election—obviously, the fear in that case was that it would be after the UK had left the European Union—that it is not willing to allow a general election to take place. In fact, if the Commons had been able to fix the date of the next general election, I think the problems with the Act would not have arisen in September and October last year.¹⁰⁷

65. The Early Parliamentary General Election Act 2019 not only circumvented the two thirds majority, but also allowed Parliament to set the date of the election. The fact that the Act was passed by 438–20 votes, over two thirds of all MPs, indicates that the election date was an important factor in calling the election. Professor Twomey, University of Sydney, said that section 2(7) was a “flaw” in the Act, in particular she expressed concern that a Prime Minister could continue in Government for some time following a vote of no confidence under the Act.

The Prime Minister could choose to advise the Queen to set a polling date 6 months in the future, or later, or could delay giving any advice on the subject to the Queen at all. The Government could then keep governing, without confidence, and no election could be held until the Prime Minister decided the time was propitious.¹⁰⁸

66. There was considerable support in evidence received by the Committee for the House of Commons being able to set or have a role in approving the date of an early election.¹⁰⁹ For example, Professor Russell and Professor Hazell suggested that existing provisions of the Act could be adapted to achieve this and simplify the process.

The process to set a date for an election explicitly approved by Parliament is also currently a two-step process, which is unnecessarily complex. Section 2(2) could be amended to require a motion stating that “That there shall be an early parliamentary general election held on [X date]”. In the event of an early election following a no-confidence vote and the elapse of the 14-day period, the Act could specify a limited period within which an election should be held.¹¹⁰

67. Professor Twomey similarly suggested that an election following a no confidence vote could be required to take place either within a 40-day period, or be specified in the no confidence motion.¹¹¹

107 [Q95](#)

108 Professor Anne Twomey ([FTP0003](#))

109 [Q95](#); [Q121](#); Thomas Fleming ([FTP0006](#)); Professor Meg Russell and Robert Hazell ([FTP0011](#)); Professor Anne Twomey ([FTP0003](#))

110 Meg Russell and Robert Hazell ([FTP0011](#))

111 Professor Anne Twomey ([FTP0003](#))

68. When asked about the idea of the House of Commons having a role in setting the date for the election the Minister told us:

On balance, probably it would be detrimental to the nature of the prerogative to say that the Commons ought to set that date, because the entire idea of the prerogative is that it exercised by the Queen on the advice of her Ministers. That does suggest that such a power would stay with the Executive rather than necessarily the legislature. But to return to why you ask that question, I do recognise that that was a specific issue thrown up by the events of last autumn.

69. It is clear that the inability for the House of Commons to set the date combined with an apparent lack of trust in the Prime Minister, contributed to the paralysis last autumn. There was support in our evidence for the view that allowing the Queen to set the date on the advice of a Prime Minister was a deficiency in the drafting of the Act. *Given the Government’s stated reasons for seeking to repeal the Fixed-term Parliaments Act, it is important that consideration is given to mechanisms providing the House of Commons with the power to set the date of an early general election. The Committee recommends that the review committee consider this issue and the advantages and disadvantages of the power to call an early election and to set the date for that election being held by different institutions or whether the election state should be set in statute with a limited power of delay, as is presently the case in regards to the scheduled election date.*

Confidence

70. The issue of confidence is central to the UK’s system of parliamentary democracy. The FtPA has not changed this fact, as our predecessor committee clearly set out in its report *The Status and Effect of Confidence Motions and the Fixed-term Parliaments Act 2011*.¹¹² In this report, PACAC clearly established that the FtPA included a route (section 2(3)) by which a no confidence vote could directly trigger a general election, but this did not replace the pre-existing conventions regarding confidence.

71. This previous conclusion was endorsed by Professor Twomey in her evidence to this inquiry, stating “it [is] clear the conventions regarding confidence were not dispensed with as a consequence of the application of the Fixed-term Parliaments Act”.¹¹³

72. Sir Stephen Laws, who oversaw the drafting of the Act, was clear that “the law only deals with what the law deals with, and the rest you have to work out for yourself”.¹¹⁴ He went on to explain that the Act did nothing to change the precedents surrounding confidence.

73. There are two interlinked problems with the understanding of the Act and how it relates to the confidence conventions. The first problem, as Professor Phillipson set out, was that it was assumed because there was a statute “that it should deal with everything, whereas, in fact, the statute only dealt with the circumstances in which Parliament should

112 Public Administration and Constitutional Affairs Committee, Fourteenth Report of Session 2017–19, [The Role of Parliament in the UK Constitution Interim Report The Status and Effect of Confidence Motions and the Fixed-term Parliaments Act 2011](#), HC1813

113 Professor Anne Twomey ([FTP0003](#))

114 [Q25](#)

be dissolved early.”¹¹⁵ The second problem, as Sir Stephen Laws set out, was that “lots of people were taking statements of convention and setting them out in words, saying, “if the Government is defeated on a vote of confidence, it must resign or submit itself to an election,” and then trying to construe those words as if they were set out in a statute and it was law.”¹¹⁶

74. One of the areas that has caused the most confusion has been what happens during the 14-day period following a vote of no confidence under the Act.

75. Lord O’Donnell told us that, as Cabinet Secretary at the time of passing the Act, he thought “everyone knew what the new rules of the game were”.¹¹⁷ When asked how the confidence principle should be dealt with in future he said that whether it is in convention or law, comes down to “whether you trust people to behave properly or not”.¹¹⁸ The issue of trust in the Government and the Prime Minister was clearly in question last Autumn, as the concern over the setting of the election debate set out above demonstrated. Further concern over how the Prime Minister would act if a no confidence vote was passed was also expressed in the evidence received.¹¹⁹ In August 2019, it was reported that the Prime Minister would not resign even if a no confidence vote was passed and another person could command the confidence of the House.¹²⁰

76. The ambiguity and uncertainty as to how conventions were followed and enforced is not new to the FtPA. The Institute for Government reflected:

There was ambiguity over confidence conventions in the old system just as in the new—in particular, over whether a Prime Minister was obliged to resign following a vote of no confidence. There was also some ambiguity over the circumstances in which the Monarch could, and should, refuse a Prime Minister’s request for a dissolution. In our view, any attempt to remove those ambiguities in the repealing legislation is likely to end in tears.¹²¹

Attaching confidence

77. The final issue raised in concern as to the operation of the FtPA and confidence was as set out above that the Act removed the ability of the Prime Minister to attach confidence to a substantive vote. That is for the Prime Minister to be able to tell the House that voting against the Government would directly lead to a general election. As Sir Stephen Laws explained, this was one of the changes made during the passage of the Bill. The Bill’s original clause relating to confidence would have used a Speaker’s Certificate to certify that a motion passed was a no-confidence motion. This, Sir Stephen explained, would have “allowed the Speaker to say that something else was a vote of confidence.”¹²² He felt that “back me or sack me is an essential part of any new system” replacing the FtPA. In

115 [Q92](#)

116 [Q25](#)

117 [Q24](#)

118 [Q29](#)

119 Professor Anne Twomey ([FTP0003](#))

120 Steven Swinford, ‘[Johnson to defy any vote of no confidence: Refusal to quit risks drawing Queen into politics](#)’ The Times, 6 August 2019

121 Dr Catherine Haddon ([FTP0017](#))

122 [Q29](#)

evidence to the Committee, the Minister indicated that the Government is considering making it possible for a vote to be designated as one of confidence, which if lost would trigger an election.¹²³

78. Both Professor Schleiter and Professor Cowley were clear that re-establishing the practice of a Prime Minister being able to attach confidence to substantive vote is an issue of political judgement. They argued that the removal of the Prime Minister's ability to do this was in line with the purposes of the FtPA in removing the power of the Prime Minister to dissolve Parliament against the will of the House of Commons, and giving the House of Commons the power to decide the next steps. As such including the ability of the Prime Minister to attach the direct threat of an election to a vote on an issue, would strengthen the executive, in particular the Whips office, and weaken Parliament.¹²⁴

79. The principle that the Government must have, and retain, the confidence of the elected House of Commons is fundamental to our system of Parliamentary democracy. The Committee fully endorses the findings of our predecessor Committee on the operation of confidence since the establishment of the Fixed-term Parliaments Act, and recommends it to the review committee and the Government as an authoritative account of the issue.

80. It is clear that some mix of statute and convention is the best way for this area to be governed, but this requires the actors involved to act in ways which engender trust.

81. The Fixed-term Parliaments Act is compatible with the confidence principle and has not divorced confidence from dissolution. If the House of Commons wanted to trigger dissolution by removing confidence from the Government, it has that power under the Act. However, as was seen last year, the Act has created a situation where the Government can lose the confidence of the House, but the House is not prepared to trigger an election or support an alternative government. This is an unacceptable situation as it leaves the UK without a government that has the legitimate authority to govern. The ultimate responsibility for this situation under the Fixed term Parliaments Act rests with the House of Commons.

82. Providing the House of Commons with the power to set the date of an election could provide one route to avoid unnecessary paralysis at times of deadlock.

83. Changing the current arrangements to allow the Government to designate a vote a matter of confidence that if lost would trigger a general election—an established practice under the old arrangements—could be a retrograde step. If it were included in any future arrangements, it would clearly empower the Executive (via the Government Whips) and weaken the House of Commons, in particular Government backbenchers. This would be a matter of political judgment and the Committee does not advocate one way or the other at this point. *The Committee recommends that proposals to include the ability for the Government to designate a vote of confidence are included in the review committee's terms of reference, and if this is to be taken forward, it is given proper consideration by the House.*

123 [Q168](#)

124 [Q123](#)

6 Prorogation

What is prorogation

84. Prorogation is an act performed by the Sovereign under prerogative power to bring a parliamentary session to an end and suspend Parliament until the start of a new session. Prorogation ends the proceedings in both Houses for the current parliamentary session. When this happens, all business, unless specifically provided for (using the Standing Orders to “carry-over” Bills) including Bills, EDMs and Parliamentary Questions, fall. While select committee inquiries do not fall, no formal committee proceeding can take place and statutory periods specifying sitting days (for example, for secondary legislation) are also suspended during the period of Prorogation.

85. Prorogation is a prerogative act exercised by the Sovereign on advice of the Privy Council. In practice, this is on the advice of the Prime Minister.

Prorogation in the Act

86. The FtPA directly states that the prerogative power of prorogation is not affected by the Act. During the passage of the Act, concern was raised about the potential for misuse of prorogation, in particular in relation to the statutory provisions following a confidence motion. An amendment to include the power of prorogation and make it a decision for the House of Commons was debated and defeated.¹²⁵ In addressing this amendment and the more general concerns about retaining the prerogative power to prorogue, the Government said that “the conventions of this House are sufficiently strong” and as such the proposals to put prorogation on a statutory footing were “unwise and unnecessary”.¹²⁶ It should also be noted that the House of Lords Constitution Committee also concluded at the time 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.”¹²⁷

The Supreme Court Decision in the Miller-Cherry prorogation case

87. In August 2019, the Prime Minister advised the Queen to prorogue Parliament on 9 September for five weeks. This prorogation was challenged in the courts and ultimately the Supreme Court decided that:

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

125 HC Deb, 18 January 2011, [Col 733–811](#)

Prorogation of Parliament

(1) Parliament can only be prorogued in accordance with this section.

(2) If the House of Commons resolves that Parliament should be prorogued, Parliament shall be prorogued at that time, or by declaration of the Speaker.

(3) The Speaker of the House of Commons shall not make such a declaration unless the House of Commons has passed a resolution directing him to do so on or before a specified date and time.

(4) Where Parliament is prorogued under subsection (2) above, the Speaker may by declaration prorogue it to an earlier or later day.

(5) The Prorogation Act 1867 is repealed.

126 HC Deb, 18 January 2011, [Col 768–9](#) [Commons Chamber]

127 Constitution Committee, Eighth Report of session 2010–12, [Fixed-term Parliaments Bill](#), HL69, para 149

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.¹²⁸

88. This inquiry has not sought to consider the Supreme Court decision in the Miller-Cherry case,¹²⁹ but has sought to consider whether, in light of this decision, prorogation should be included in legislation replacing the FtPA.

89. Concern was raised in evidence given to this Committee about the uncertainty surrounding the current prorogation arrangements following the Supreme Court's Decision. There was a common consensus that prorogation should be an issue which in future the courts should not have to be involved in. There were, however, a range of different views on how this would best be achieved.

90. Sir Stephen Laws said in his view that “what should be set out in statute is that Prorogation is not a matter for the courts”.¹³⁰ The Miller-Cherry case, he argued, arrogated to the courts the function that is really the function of the Sovereign. He advocated the continuation of the current system of restraint, whereby the Prime Minister “does not want to involve the Queen in anything that is politically objectionable”. His view was that the Prime Minister's request for a September 2019 prorogation was “not excessive” as it allowed the House to move a motion of no confidence and complied with the statutory obligations.¹³¹

91. In addressing the question of whether prorogation should be set out in statute, Robert Craig cautioned the FtPA demonstrated that “an attempt to place prerogative powers onto statute can easily backfire”.¹³² While he did not oppose placing the prerogative in statute per se, he said it is necessary to be aware of the potential for unforeseen consequences and of “participants starting to try to ‘game’ the legal rules, once they are laid down in a rigid way”.¹³³

92. Professor Russell and Professor Hazell said that the events that led to the Miller-Cherry case meant that the conclusions expressed by the Government and Lords Constitution Committee—that risk of the abuse of the prorogation prerogative is low—should be revisited.¹³⁴

93. Professor Phillipson said that he could think of no good reason why the Executive needed the power to suspend Parliament, except for a few days to prepare for a new session. As such he advocated an Act that sets out that the Queen states the date for a new session, and Parliament is automatically prorogued five working day prior to this.¹³⁵

94. The Supreme Court's decision in the Miller-Cherry case highlights that at the heart of the UK's constitutional arrangements is a fine but constantly-shifting balance of convention, principle and law, that provides clear guidance, but also flexibility.

128 R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland) [2019] [UKSC 41](#), para 61

129 Miller/ Cherry [2019] [UKSC 41](#)

130 [Q30](#)

131 [Q31](#)

132 Robert Craig ([FTP0010](#))

133 Robert Craig ([FTP0010](#))

134 Meg Russell and Robert Hazell ([FTP0011](#))

135 [Q99](#)

These arrangements, when working successfully, rely as much on self-regulation and collective approbation as they do on the hard edge of the law. This is not a constitutional system in which the courts are intended to be the ultimate arbiter. In areas of prerogative power, the Sovereign remains the constitutional backstop. However, the prorogation case raised questions over the extent to which the Sovereign is now able to perform this role, especially if the convention that the Sovereign should not be drawn into politically-objectionable matters is not adhered to. A range of options of how to prevent this have been suggested to the Committee, including setting out the power of prorogation in statute. *The Committee recommends this is included in the review committee's terms of reference.*

Conclusions and recommendations

The purpose and effect of the Act

1. **The Fixed-term Parliaments Act clearly achieved the purpose of removing the discretion of the Prime Minister to call an election at a time of his or her choosing. It removed the ability of the incumbent party of government to time an election to gain an advantage over its opponents. *Whatever legislation replaces the FtPA it is important that this fairness is maintained.* (Paragraph 17)**
2. **It is clear that the Act has shifted the balance of power from the executive to the legislature. It is less clear if the right balance of power has yet been struck. *While there should not be a return to the Executive dominance of election calling, careful consideration needs to be given for how the power of early election calling is balanced between the Executive and the Legislature.* (Paragraph 18)**
3. **The Act has clearly also altered the default expectation with regards to the timing of elections. The expectation is now that, where the Government has a working majority, a Parliament will normally last a full five-year term. Given that there are mechanisms for an early election included in the Act, the length of a Parliament is never truly a fixed term and, in this regard, the Act was misnamed. *While changes may need to be made to the current arrangements, the Committee can see no good reason for altering the default expectation that parliaments should run their full term and elections will occur at scheduled times, thereby providing certainty for those administering elections and for the public who vote in them. The only exceptions should be in circumstances where an early general election is the only means of resolving political deadlock, or if the House of Commons expresses no confidence in the Government.* (Paragraph 19)**
4. **It is clear that one of the main purposes of the Fixed-term Parliaments Act 2011 was to provide assurance to the Coalition partners that an early election would not be called. The fact that the Coalition Government was maintained for the full 2010–15 Parliament, makes it evident that the Act achieved this narrow purpose. Whatever system replaces the Act needs to be able to accommodate the formation of future coalition governments without further changes to the law for dissolving Parliament and calling elections. *The Government and review committee in considering what should replace the Fixed-term Parliaments Act must establish a system that will support majority, coalition and minority governments to be formed, and for them to govern for a full term, notwithstanding circumstances in which an early general election is the only means of resolving political deadlock, or if the House of Commons expresses no confidence in the Government.* (Paragraph 23)**

Review committee

5. **The Committee welcomes the Government’s commitment not to rush through replacement legislation and to provide adequate time for full scrutiny. We also appreciate the Minister’s commitment to forging cross-party support for whatever replaces the Fixed-term Parliaments Act. *The first step, as the Minister***

recognised, is for the review committee to be set up. It is important that the review committee is given time to carry out its work to its full satisfaction. Following the reporting of the review committee the Government should produce its proposals and allow time for full pre-legislative scrutiny. (Paragraph 34)

6. *The Committee does not recommend a particular composition for the review committee beyond that set out in the Act. But the Committee believes that the review committee should be a Joint Select Committee, subject to parliamentary approval and not an executive-appointed committee. The Joint Committee could require additional provisions to include experts to be included as Committee members.* (Paragraph 35)

The prerogative of dissolution

7. *The question of whether or not the dissolution prerogative can be restored is a complex one, which involves fundamental constitutional principles. It clearly was the intention of the Government in 2011 to abolish the prerogative, but the wording of the Act is less conclusive on this point. Some also hold the view that the fact of abolition does not even matter. As all the evidence to this inquiry makes clear, this is a highly contested issue. There are also questions as to what exactly would be revived and for example what the legitimate expectations of the Sovereign as a constitutional backstop would be. This is of particular concern in light of the Supreme Court's recent decision about the prerogative power of Prorogation. It is clear that attempting to revive the prerogative would invite the courts to make the final decision on these issues. These are core political and constitutional questions that neither Parliament nor government should abrogate to the courts. Even if there is a desire to return to the old system for dissolution and calling elections, it would be better setting these arrangements in statute rather than engaging in an unnecessary attempt to revive a prerogative which could have considerable unintended consequences and implications.* (Paragraph 50)
8. *While not all members of the Committee would oppose such a move, it is also cognisant that reviving the prerogative would mean taking a power that is set out in statute and regulated by Parliament and handing it back to the Crown. Whether or not adequate consideration was given to the full implications of removing the prerogative in 2011, Parliament now has responsibility for this area of the UK political system. The Government should not simply rely on reviving the prerogative, but look to establish a new, robust system for dissolution and calling of elections in the UK.* (Paragraph 51)

Early elections: avoiding paralysis and propping up of weak governments

9. *The two-thirds 'super majority' required to trigger an early election under the Act can, like any statutory provision, be circumvented by passing an Act of Parliament to set an election date. As was made clear to the Committee the option of such a circumvention was clearly always contemplated as a possibility in certain circumstances, such as occurred in Autumn 2019. The principle of parliamentary sovereignty means this will always remain a possibility. Attempting to entrench a 'super majority' would be a difficult, unnecessary and*

potentially damaging move; the Committee advises against this being included in any proposals to replace the FtPA. (Paragraph 63)

10. It is clear that the inability for the House of Commons to set the date combined with an apparent lack of trust in the Prime Minister, contributed to the paralysis last autumn. There was support in our evidence for the view that allowing the Queen to set the date on the advice of a Prime Minister was a deficiency in the drafting of the Act. *Given the Government's stated reasons for seeking to repeal the Fixed-term Parliaments Act, it is important that consideration is given to mechanisms providing the House of Commons with the power to set the date of an early general election. The Committee recommends that the review committee consider this issue and the advantages and disadvantages of the power to call an early election and to set the date for that election being held by different institutions or whether the election state should be set in statute with a limited power of delay, as is presently the case in regards to the scheduled election date.* (Paragraph 69)
11. The principle that the Government must have, and retain, the confidence of the elected House of Commons is fundamental to our system of Parliamentary democracy. The Committee fully endorses the findings of our predecessor Committee on the operation of confidence since the establishment of the Fixed-term Parliaments Act, and recommends it to the review committee and the Government as an authoritative account of the issue. (Paragraph 79)
12. It is clear that some mix of statute and convention is the best way for this area to be governed, but this requires the actors involved to act in ways which engender trust. (Paragraph 80)
13. The Fixed-term Parliaments Act is compatible with the confidence principle and has not divorced confidence from dissolution. If the House of Commons wanted to trigger dissolution by removing confidence from the Government, it has that power under the Act. However, as was seen last year, the Act has created a situation where the Government can lose the confidence of the House, but the House is not prepared to trigger an election or support an alternative government. This is an unacceptable situation as it leaves the UK without a government that has the legitimate authority to govern. The ultimate responsibility for this situation under the Fixed term Parliaments Act rests with the House of Commons. (Paragraph 81)
14. Providing the House of Commons with the power to set the date of an election could provide one route to avoid unnecessary paralysis at times of deadlock. (Paragraph 82)
15. Changing the current arrangements to allow the Government to designate a vote a matter of confidence that if lost would trigger a general election—an established practice under the old arrangements—could be a retrograde step. If it were included in any future arrangements, it would clearly empower the Executive (via the Government Whips) and weaken the House of Commons, in particular Government backbenchers. This would be a matter of political judgment and the Committee does not advocate one way or the other at this point. *The Committee recommends that proposals to include the ability for the Government to designate*

a vote of confidence are included in the review committee's terms of reference, and if this is to be taken forward, it is given proper consideration by the House. (Paragraph 83)

Prorogation

16. **The Supreme Court's decision in the Miller-Cherry case highlights that at the heart of the UK's constitutional arrangements is a fine but constantly-shifting balance of convention, principle and law, that provides clear guidance, but also flexibility. These arrangements, when working successfully, rely as much on self-regulation and collective approbation as they do on the hard edge of the law. This is not a constitutional system in which the courts are intended be the ultimate arbiter. In areas of prerogative power, the Sovereign remains the constitutional backstop. However, the prorogation case raised questions over the extent to which the Sovereign is now able to perform this role, especially if the convention that the Sovereign should not be drawn into politically-objectionable matters is not adhered to. A range of options of how to prevent this have been suggested to the Committee, including setting out the power of prorogation in statue. *The Committee recommends this is included in the review committee's terms of reference.*(Paragraph 94)**

Formal minutes

Tuesday 8 September 2020

Members Present

Mr William Wragg in the Chair

Ronnie Cowan	Tom Randall
Jackie Doyle-Price	Lloyd Russell-Moyle
Rachel Hopkins	Karin Smyth
Mr David Jones	John Stevenson
David Mundell	

Draft Report (*The Fixed-term Parliaments Act 2011*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 94 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Sixth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order 134.

[Adjourned till Thursday 10 September 2019 at 1.55pm]

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

Friday 24 April 2020

Lord Gus O'Donnell, Cabinet Secretary 2005–11, Chair of Frontier Economics 2013-present, and **Sir Stephen Laws**, First Parliamentary Counsel 2006–12, Senior Fellow, Policy Exchange 2018-present [Q1–67](#)

Tuesday 02 June 2020

Professor Alison Young, **Sir David Williams** Professor of Public Law, Cambridge University; **Professor Gavin Phillipson**, Professor of Public Law and Human Rights, University of Bristol [Q68–105](#)

Professor Petra Schleiter, Professor of Comparative Politics, University of Oxford; **Professor Philip Cowley**, Professor of Politics, Queen Mary University of London [Q106–129](#)

Tuesday 21 July 2020

Rt Hon Mark Harper MP, Former Minister for Political and Constitutional Reform in Cabinet Office [Q130–149](#)

Chloe Smith MP, Minister of State, Cabinet Office [Q150–203](#)

Published written evidence

The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

FTP numbers are generated by the evidence processing system and so may not be complete.

- 1 Association of Electoral Administrators ([FTP0007](#))
- 2 Constitution Unit (Ms Meg Russell, Director) ([FTP0011](#))
- 3 Craig, Robert ([FTP0010](#))
- 4 Electoral Commission ([FTP0009](#))
- 5 Fleming, Thomas ([FTP0006](#))
- 6 Haddon, Dr Catherine ([FTP0017](#))
- 7 Hameed, Dr Asif ([FTP0008](#))
- 8 Lagassé, Professor Philippe ([FTP0004](#))
- 9 The Law Society Scotland (Mr Michael Clancy, Director, Law Reform) ([FTP0016](#))
- 10 Pitt, Mr Daniel ([FTP0002](#))
- 11 Quakers in Britain (Grace Da Costa, Public Affairs and Advocacy Manager) ([FTP0015](#))
- 12 Raphael Hogarth ([FTP0017](#))
- 13 Ryan, Dr Mark ([FTP0005](#))
- 14 Schleiter, Professor Petra ([FTP0006](#))
- 15 Twomey, Professor Anne ([FTP0003](#))

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2019–21

First Report	Appointment of Rt Hon Lord Pickles as Chair of the Advisory Committee on Business Appointments	HC 168
Second Report	Parliamentary and Health Service Ombudsman Scrutiny 2018–19	HC 117
Third Report	Delivering the Government's infrastructure commitments through major projects	HC 125
Fourth Report	Parliamentary Scrutiny of the Government's handling of Covid-19	HC 377
Fifth Report	A Public Inquiry into the Government's response to the Covid-19 pandemic	HC 541
First Special Report	Electoral law: The Urgent Need for Review: Government Response to the Committee's First Report of Session 2019	HC 327