

Written evidence submitted by Paul Evans¹ (FTP0006)

Clarity of purpose

1. The draft bill presented by the government seems to be a flawed way of achieving the aim of clarifying the mechanics of the dissolution of Parliaments.
2. The draft bill is a curious mixture of partial repeal, re-enactment and legislation by reference to an historical constitutional convention. It is a bit of a dog's breakfast, and does not seem an appropriate anchor for a fundamental tenet of the constitution. This muddle is perhaps emblamatised by the possibility that we could end up with such a foundational constitutional statute (which sets the maximum duration of Parliaments) being called the Fixed-term Parliaments Act (Repeal) Act. What visiting Martian would turn to a statute with such a title to find out what the main bulwark against unaccountable government in the UK was? It was a mildly amusing treat to be able to tell students before 2011 that the maximum duration of a Parliament of five years was set out in something called the "Septennial Act". It seems unwise to carry the joke on into the future – especially since it would no longer be funny.
3. As a number of witnesses to all three committees to examine this topic have remarked, the idea of reviving a prerogative power by statute is novel. It seems foolish to experiment when dealing with such an important question, and yet more rash if you try and exclude the courts from assisting in the interpretation of an experimental form of legislation. There are disagreements between experts as to exactly what the conventions surrounding the prerogative power of dissolution were by 2010. Who might be right and who might be wrong is not the point. The existence of disagreements, sincerely held by those who have given serious thought to the matter, demonstrates that the draft bill invites Parliament to legislate by ambiguity, and to try to crystallise a vapour which cannot be made solid. Personally, I am not convinced by the arguments for taking these risks, when the downside risks of taking a more straightforward approach do not seem to have been substantiated.
4. The draft bill fails the test of clarity. This matters where fundamental questions of democracy are involved. It should be called something like the Parliaments (Duration and Dissolutions) Bill, and should be written so as to make the law on those two matters clear and, preferably, understandable by any citizen prepared to put in a modest amount of intellectual effort.

The ouster clause

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5. The idea that the courts are going to interfere in a dissolution seems far-fetched. By the time they were able to reach any judgment the electorate would have (or be on the brink of having) spoken, so what would be the point of entertaining such a cause? Clause 3 looks like a futile piece of political ornamentation designed for declaratory rather than practical purposes. It has also served to open the door to suspicions of some sinister hidden purpose. That is not a good thing to have hanging about a key constitutional statute. If the government is convinced that clauses 1 and 2 do what they say they do, they should have the courage of their own convictions. Clause 3 makes it look like the government does not believe in its own drafting.
6. There are differences of opinion on whether Parliament (or, more precisely, the House of Commons) should continue to control its own fate when it comes to dissolution. Personally, I found the arguments advanced in the recent report from the Public Administration and Constitutional Affairs Committee persuasive. However, the clearest and most honest way of ousting the courts decisively from the matter would be to provide that a dissolution cannot be instigated without the authority of a resolution of the House of Commons. That would not necessarily have to be as complicated as the provisions of the FTPA.

Terms

7. Although the government has set its face against any form of fixed-term, arguments for both the practical (in terms of increased certainty about planning horizons for policy implementation and so forth) and democratic benefits (in terms of lowering incumbency advantage) have been advanced. You could try to have your cake and eat it by combining a default fixed-term with a one-off option to change it. My example of how this might be put in statute is at appendix A. There I use a default of four years and make any change (either upwards or downwards) subject to a vote in the House of Commons, but the mechanism could be used as a unilateral ministerial power without the requirement for parliamentary approval if preferred. This would also overcome the main objection to the FTPA arising from the challenge of securing an early general election – reducing the hurdle to a simple majority, or even to unilateral ministerial decision. I do not pretend the drafting is legally watertight – it is intended as an illustration of an approach that could be adopted.
8. The problem with clause 4 of the draft bill is that the duration of a government could be more than five years, and really dissolutions are as much or more in the modern constitution about limiting the terms of executives as about the length of Parliaments. As, under clause 4, the clock does not start ticking until the day on which Parliament assembles after an election, even given only the 25 days between the preceding dissolution and polling day and between the next dissolution and the next polling day, fifty days could in theory be added to the overall length of a government's reign (assuming it was the incumbent before the preceding election). This does seem a little wrong. There is also the (probably slight) risk that the period could be extended if the government chose to delay the re-assembly of Parliament

after an election – over which there is no statutory control. The problem would seem to be easily eliminated by rewriting clause 4 of the draft bill as follows:

If it has not been dissolved earlier, a Parliament dissolves at the beginning of the day that is the fifth anniversary of the day on which the previous Parliament was dissolved.

Prorogation

9. Whatever the strength or weaknesses of the arguments are for restoring dissolution as a prerogative power, the arguments for retaining prorogation as a prerogative power seem even thinner. It is obvious that Parliament should decide when it sits – there is no respectable argument that I can see for leaving in place the picturesque archaism of prorogation.
10. This could be resolved in a non-statutory way by creating a constitutional convention that the Sovereign only prorogues Parliament in response to an address from the House of Commons. But constitutional conventions can be slippery things.
11. Parliamentary sessions are not necessary, though they have their conveniences and important consequences, most prominently in the architecture of the Parliament Act. At appendix B I attach an example of some clauses that could be used to get round this issue. Again, I do not pretend that the drafting is perfect as it stands – I am just attempting to demonstrate that the challenge of getting rid of prorogation and giving the House of Commons full control over its assembly between dissolutions is not insuperable.

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Appendix A: possible draft clause for a fixed but variable term Parliament

Polling days for parliamentary general elections

- (1) This section applies for the purposes of the Timetable in rule 1 in Schedule 1 to the Representation of the People Act 1983.
- (2) The polling day for the next parliamentary general election after the passing of this Act is to be 2 May 2024.
- (3) The polling day for each subsequent parliamentary general election is to be the first Thursday in May in the fourth calendar year following that in which the polling day for the previous parliamentary general election fell.

(4) The Prime Minister may by order made by statutory instrument provide that the polling day for a parliamentary general election is to be on an earlier day than the day determined under subsection (2) or (3).

(5) The Prime Minister may by order made by statutory instrument provide that the polling day for a parliamentary general election is to be on a later day than the day determined under subsection (3), but no later than the first Thursday in May in the fifth calendar year following that in which the previous parliamentary general election fell .

(6) A statutory instrument containing an order under subsection (4) or (5) may not be made unless a draft has been laid before and approved by a resolution of the House of Commons.

(7) The draft laid before Parliament must be accompanied by a statement setting out the Prime Minister's reasons for proposing the change in the polling day.

(8) No more than one such order under this section may be made during a Parliament.

Appendix B: possible draft clauses abolishing prorogation

1. The first and last sessions of a parliament

- (1) The first session of a parliament starts at the beginning of the day on which parliament assembles following the dissolution of the previous parliament.
- (2) The last session of a parliament terminates at the end of the day on which that parliament stands dissolved.

2. Intervening sessions

- (1) Other than as prescribed in section 1(2) of this Part, a session of parliament ends on a day determined by order of the House of Commons.
- (2) Other than as prescribed in section 1(1) of this Part, a session of parliament starts on a day determined by order of the House of Commons.
- (3) If an order under subsection (1) is made and no date for the new session is specified in accordance with subsection (2), the Speaker of each House must summon the two houses of parliament to meet on the eleventh working day after the day on which a session ended, and that day will be the beginning of a new session, notwithstanding subsection (2).

3. Effect of the end of a parliamentary session

- (1) Between the end of one session and the beginning of the next, both houses stand adjourned (unless parliament is dissolved) without any resolution so to do.
- (2) If either house is recalled during an adjournment under this part of this Act, the day on which that house sits will be the first day of the next session, notwithstanding any date that may have been determined by an order made under section 2(2) of this Part.

- (3) All proceedings of either house pending on the day on which a session ends are terminated, unless otherwise provided for by a resolution or standing order of either house.
- (4) The exception is that neither house can, by resolution or under a standing order or by any other means, recommence proceedings on a bill sent to it from the other house in a previous session without the consent of that other house.

4. Abolition of the prerogative of prorogation

Parliament cannot be prorogued.

5. Commencement, interpretation, etc.

- (1) This Part comes into force immediately on the first dissolution of Parliament after this Act receives the royal assent.
- (2) The expression “session of parliament” or any cognate or related expression in any other enactment, whether made before or after this Act, shall be interpreted insofar as it relates to the Parliament of the United Kingdom in accordance with meaning given to that expression by this Act.