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Fixed-term Parliaments Act (2011): Placing the Act in Comparative Context

About the authors

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- Schleiter and Fleming. 2020. "Parliamentary prorogation in comparative context." *The Political Quarterly*. Early view: <https://doi.org/10.1111/1467-923X.12864>
- Fleming and Schleiter. 2020. "Prorogation: comparative context and scope for reform," *Parliamentary Affairs*. Early view: <https://doi.org/10.1093/pa/gsaa017>
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- Schleiter and Issar, 2016. Constitutional rules and patterns of government termination: The case of the UK Fixed-term Parliaments Act. *Government and Opposition*, 51(4), pp.605-631.

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- Schleiter and Fleming. 2020. "Parliamentary prorogation in comparative context." *The Political Quarterly*. Early view: <https://doi.org/10.1111/1467-923X.12864>
- Fleming and Schleiter. 2020. "Prorogation: comparative context and scope for reform," *Parliamentary Affairs*. Early view: <https://doi.org/10.1093/pa/gsaa017>
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Executive summary

- This evidence aims to inform the Committee's review by placing the Fixed-term Parliaments Act 2011 (henceforth FTPA) in comparative context.
- Our overall conclusion is that the FTPA should be reformed rather than repealed.

We advance five main arguments:

- First, the FTPA had three, principled, longer-term purposes: to (i) prevent Prime Ministers unilaterally timing elections for partisan advantage, (ii) transfer power from the executive to the legislature, and (iii) provide greater stability to politics through more predictable election cycles.
- Second, we note that it is critical, in evaluating the Act and potential changes of it, to disentangle the effect of the legislation from other confounding factors. Making this distinction is challenging in the context of a single case (i.e., the UK), which is why it is important to consider comparative evidence.
- Third, comparative evidence from other comparable democracies suggests that fixed parliamentary terms generally work, that is, they achieve the broader, principled goals envisaged by the FTPA:
 - They reduce the executive's ability to secure electoral incumbency advantages by timing early elections for partisan advantage and they increase executive accountability for poor outcomes;
 - They curtail opportunities for executive drift (i.e., opportunities for the executive to act against the will of parliament);
 - They increase parliamentary stability on average;
 - They reduce the incidence of early elections, but do not (and should not) abolish access to early elections as a means to resolve gridlock and conflict.
- Hence, aspects of the FTPA that should be preserved because they are normatively desirable and can be expected to work include (i) constraining the unchecked use of early elections by the executive for partisan advantage, and (ii) placing the power to call early elections in the hands of parliament, while also (iii) providing two effective routes for parliament to call early elections as a means to resolve deadlock.
- Finally, we recommend two areas for reform: A revised Act could be improved by providing parliament with greater control over the precise timing of early elections and over prorogation. In both areas, the UK's current rules give the government a normatively undesirable, and internationally unusual, degree of power over parliament. A modified FTPA could address these issues, provide greater clarity and predictability, safeguard the role of parliament and prevent executive overreach.

Note: Key passages are highlighted in **bold type**.

[1] The broader purposes of the Fixed-term Parliaments Act (2011):

1. Government statements before and during the Bill's passage suggest three, principled longer-term purposes of the FTPA in addition to its shorter-term coalition-related goals:
 - a. First, the Bill was intended to **prevent incumbent Prime Ministers from timing elections unilaterally for partisan advantage**. This was the stated aim of the reform when it was promised in the Liberal Democrats' 2010 manifesto. It was also described as the "single, clear purpose" of the Bill, and its "key principle", during its second reading in the House of Commons.¹
 - b. Second, the Bill served the broader goal of **transferring power from the executive to the legislature**. Specifically, it was intended to **give the Commons the right to make decisions about its own dissolution**. For example, during the bill's second Commons reading the then Deputy Prime Minister Nick Clegg stated that fixed-term parliaments "constitute a major transfer of power away from the Executive and a major strengthening of Parliament's authority over its own lifetime."²
 - c. Third, the government's aim in introducing fixed-term elections was to bring **greater stability to politics by increasing the probability that legislatures last their full term** giving rise to more predictable election cycles.
2. The provisions of the FTPA reflect these goals. It removes from the executive the unchecked power of calling early elections and vests in parliament the power to call early elections in some, clearly defined situations.

[2] Has the Act achieved its goals?

3. **In its proposal to repeal the FTPA, the government makes several claims about the operation of the Act**. It claims that the Act "created parliamentary paralysis", and that since 2015 it "has not had its intended effect" (Cabinet Office 2020, 5). **We disagree with both of these claims**, for the reasons set out below. The Act has largely achieved its goals, and the recent parliamentary deadlock is not attributable to the Act. None the less, fully disentangling the Act's effects from other recent features of UK politics poses challenges. In evaluating the Act and potential reform, it is therefore important to consider comparative evidence to establish the effects of fixed-term election rules (see section 3 below).
4. **The FTPA successfully effected the transfer of the power of early election calling from the prime minister to parliament**. Since 2011 parliament (rather than the prime minister unilaterally) has controlled the calling of early elections. In 2017, parliament triggered an early election under the Act by voting with a 2/3rds majority for an early election. In 2019, parliament repeatedly rejected motions to trigger an early election under the Act in order to gain precise control over the election date. This it eventually achieved by circumventing the FTPA with the *Early Parliamentary General Election Act 2019*, which set the date of the election for 12 December 2019.

¹ HC Deb 13 September 2010, cc621-701

² HC Deb 13 September 2010, c635

5. **Did the Act fail in its purpose of providing greater stability?** Recall that the FTPA is not designed to *guarantee* that a parliament will serve its full term. Rather, it envisages two pathways to early elections as a means to resolve gridlock and conflicts and gives parliament control over the calling of such elections. In 2016-2019, the Act operated in the context of the divisive political conflict over Brexit, which caused an unprecedented breakdown of parliamentary party discipline. As a result Prime Ministers May and Johnson struggled to advance the Brexit-related priorities of their governments. This was a central motivation for both Prime Ministers to seek - and for parliament to vote for - early elections in 2017 and 2019. Both elections were called by parliament to resolve gridlock over Brexit.
6. **Did the Act lock a minority government in place that was unable to progress its agenda because the PM could not use a confidence motion to force her own MPs to choose between the Withdrawal Agreement and early elections?** The minority government's inability to advance its agenda was not due to the FTPA. The FTPA did not prevent Prime Minister May from declaring the Withdrawal Agreement a matter of confidence and threatening to table a motion for an early election under the FTPA in the event of defeat. While such a motion would have required a two-thirds majority to pass, Labour's consistent support for an early election throughout spring 2019 made that path available to Mrs May. Her decision not to raise the stakes, then, was not a consequence of the FTPA, but of doubt, given the scale of dissent within the Conservative party, that a sufficient number of her own MPs preferred the Withdrawal Agreement to an early election. If the threat of an early election is less costly to government MPs than the bill to which it is attached, then a vote of confidence would also fail under the rules that preceded the FTPA.
7. **Disentangling the effects of fixed-term legislation from confounding factors:** Clearly, though, interpretations of the relative importance of the FTPA and other confounding factors in events over the last 10 years in the UK vary and are difficult to disentangle. For this reason, an understanding of the comparative evidence is essential in evaluating fixed-term legislation and its effects.

[3] Comparative context: Fixed-term rules in comparable parliamentary democracies, prevalence and effects

8. Comparative evidence is a crucial guide in the debate about the FTPA and its reform, precisely because the effects of the Act in the UK over the last 10 years are richly confounded by a range of other powerful factors including the divisiveness of Brexit for both main parties, the consequent erosion of party discipline within government and the opposition, and the prevalence of coalition and minority government for a significant part of the period. Comparison helps us to take account of such confounding factors and makes it possible to do draw clear distinctions between the effect of particular constitutional rules and other influences on outcomes. This section summarizes the comparative evidence regarding the effect of fixed-term rules in comparable parliamentary democracies.

9. Fixed parliamentary terms reduce unfair incumbency advantages in elections and increase accountability for poor outcomes:

- a. Unchecked executive discretion to dissolve parliament is, on average, employed by politicians for partisan electoral advantage. Leaders who are empowered to dissolve parliament call elections at the most advantageous time for them—when they expect to win. A comparative study of 27 East and West European countries shows that this generates an average vote share bonus for the incumbent of as much as 5 percentage points (Schleiter and Tavits 2016).³ This is a substantial advantage that can easily make the difference between winning and losing an election.
- b. Research also shows that discretion to time elections allows incumbent governments to avoid electoral accountability for poor policy choices, for instance, by calling elections before the full adverse consequences of their interventions unfold (Smith 2004; Goplerud and Schleiter 2016). These outcomes attenuate government accountability and are normatively undesirable.
- c. For this reason the vast majority of comparable parliamentary democracies constrain executive discretion to call early elections.

10. Curtailing executive discretion to call early elections reduces executive drift (i.e., opportunities for the executive to act against the will of parliament):

- a. Curtailing executive discretion to call early elections reduces opportunities for executive drift: (i) It takes away from the prime minister the power to dissolve parliament against its will following a no-confidence vote. (ii) It gives to parliament (rather than the defeated government) the power to decide next steps after a vote of no confidence (i.e., whether to form a new government or to trigger early elections).
- b. A comparison of dissolution powers in 39 OECD and EU parliamentary democracies from 1945 (or democratization) to the present shows that comparable parliamentary democracies overwhelmingly constrain the discretion of a prime minister to dissolve parliament following a loss of confidence (Goplerud and Schleiter 2016).
- c. Normatively, the reason for this is that votes of confidence and no confidence are procedural tools for parliament to hold the government accountable and to reduce the government's opportunities to enact controversial legislation in the face of significant parliamentary opposition.
- d. This is the second reason for which the vast majority of comparable parliamentary democracies constrain executive discretion to call early elections.

11. Fixed parliamentary terms work, that is, they increase parliamentary stability on average:

- a. Comparative evidence (based on a study of 586 cabinets in 26 East and West European countries) shows parliaments have a significantly higher probability of completing their full term when the constitution restricts the executive's discretion to trigger early elections. When the executive's discretion to dissolve parliament is *not* constrained only 12.5% of all governments end in regular

³ This study takes care to identify the causal effect of discretionary election timing by the executive, using an instrumental variables strategy, and accounts for potential confounding factors.

elections. Twice as many governments end in regular elections (33%) when the constitution constrains executive discretion to dissolve parliament (Schleiter and Issar 2016, 615).

12. Reducing executive discretion to call early elections does not - and should not - abolish early elections.

- a. Providing a pathway to early elections in circumstances of gridlock is normatively desirable. For this reason all parliamentary democracies in Europe, with the exception of Norway, permit early elections under some circumstances (i.e., as a means to resolve crises and gridlock), typically subject to checks by the legislature or the head of state (Goplerud and Schleiter 2016).
- b. Permitting parliamentary dissolution under appropriately restricted circumstances and subject to appropriate checks is normatively desirable in parliamentary democracies in which the government depends on assembly confidence because it offers a democratic mechanism to resolve situations in which parliament cannot agree to form a government or to lend it the support to govern. Dissolution offers a means to refer such crises to the electorate for resolution.

[4] Which aspects of the FTPA should be retained?

13. The FTPA achieved several normatively desirable goals. It (i) constrained the unchecked use of early elections by the executive for partisan advantage, (ii) and limited the scope for executive drift by placing the power to call early elections in the hands of parliament. (iii) It also provides two effective routes for parliament to call early elections as a means to resolve deadlock. These features of the FTPA are normatively desirable for the reasons set out above and should be preserved. A repeal of the Act is not desirable.

[5] How might the Act be improved?

The Act might be improved in two ways.

Allowing parliament to set the date of early elections

14. Section 2(7) of the FTPA gives a degree of discretion to the prime minister in recommending to the Queen a date for a general election.

- a. Though this discretion is limited, it can still be consequential when there are other hard deadlines during the window in which the election could be held. For example, there were concerns in 2019 that if parliament triggered an election before the UK's scheduled departure from the EU, the prime minister could still delay this election until after the UK had left, potentially without an agreed deal.
- b. This prime ministerial discretion can be limited by parliament only if it schedules early elections outside of the provisions of the Fixed-term Parliaments Act. This occurred in the case of the 2019 election, which was triggered by the *Early Parliamentary General Election Act* that enshrined the election date in law.
- c. Only the date of the 2017 early election has been set under the provisions of the FTPA. On that occasion, Prime Minister May announced the government's

proposed date – 8 June 2017 – before introducing the motion for an early election to the Commons. This was a political, rather than legal, commitment.

15. **This situation is undesirable for two main reasons.** First, it leaves some scope for the executive to manipulate the date of early elections for partisan advantage. Second, the fear of this kind of manipulation might induce greater deadlock by limiting MPs' willingness to vote for elections that they would otherwise support (as initially occurred in 2019).
16. How does this situation compare to practice elsewhere? Table 1 summarizes which political actor determines the date of early elections once they have been triggered in 25 European democracies. **All but 5 of these 25 democracies constrain the discretion of the prime minister to pick the election date** by involving the president or government collectively (which in most European countries has the effect of requiring the agreement of coalition partners), or they place the power to set the election date with parliament, its speaker or the electoral commission. These provisions effectively limit the ability of any one party to pick the precise election date for partisan benefit.

Table 1: Actors empowered to set the date of early elections in 25 European Democracies

Actor Setting Election Date	Countries
Monarch (on the advice of the Prime Minister) ⁴	Belgium, Denmark, Luxembourg, Netherlands, Spain
President (with a degree of formal or informal involvement of the cabinet and/or Prime Minister)	Bulgaria, Croatia, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Iceland, Lithuania, ⁵ Poland, Portugal, Slovenia.
Government collectively	Austria, ⁶ France, Ireland, Romania, Sweden ⁷
Parliament	
-in the motion triggering dissolution	Lithuania ⁸
-Speaker of Parliament	Slovakia, Sweden ⁹
Electoral Commission	Latvia

⁴ Commonwealth countries that modelled their constitutions on the UK's and also apply this rule include Australia, Canada, and New Zealand.

⁵ If the President triggered the election.

⁶ In consultation with a parliamentary committee.

⁷ If the government calls the election.

⁸ If a motion of parliament triggers the early election.

⁹ In consultation with electoral authority if the election is triggered by failure to form a government.

- a. In the devolved administrations of the UK, the rules aim to ensure that the setting of early election dates is handled non-politically: If early elections are called for the Scottish Parliament or Welsh Assembly, the impartial Presiding Officer proposes the date which is then announced by the Queen. If they are called for the Northern Ireland Assembly, the date is chosen by the Secretary of State for Northern Ireland.

17. This issue could be remedied if the Fixed-term Parliaments Act were revised to reduce the prime minister's discretion in picking the date of early elections. The exact process for this would depend on the route by which the early election was called.

- a. Section 2(2) of the Act allows MPs to call an election by passing a simple motion "That there shall be an early parliamentary general election". This might be amended to require that any such motion names the precise date of the election. This would need to be legally binding, albeit with some flexibility for the date to be varied in certain extraordinary circumstances.
- b. Section 2(3) of the Act provides for an election to be automatically triggered within 14 days of a motion of no-confidence being passed, if MPs do not subsequently support a motion of confidence in a government. This procedure gives no obvious opportunity for MPs to specify the date on which such elections should be held. However, the Act might still be amended to mandate a fixed period between when such elections are triggered, and when they take place.

18. These changes would allow MPs to have greater certainty about what they are voting on when considering motions under the Fixed-term Parliaments Act. This would reduce the executive's direct discretion over the date of early elections and might make it easier to secure agreement for calling those elections.

Allowing parliament to control prorogation

19. The FTPA does not affect the prerogative powers to prorogue parliament.

- a. Section 6(1) of the FTPA specifically states that the Act does not affect the monarch's power to end a parliamentary session by proroguing parliament.
- b. Prorogation thus remains a prerogative power, exercised by the monarch on the advice of the prime minister.

20. A revised FTPA would be an appropriate means to regulate prorogation. The original Act took the prerogative power of dissolution and placed it on a statutory footing. In doing so, the Act moved power from the government to parliament. A revised Act might do the same with the closely-related prerogative power of prorogation.

21. The current rules regarding prorogation have undesirable political and normative implications:

- a. Prorogation significantly limits parliament's ability to hold the executive to account through activities such as questions, committee hearings, parliamentary debates, or even votes of no confidence.
- b. Parliament has no means of vetoing or reversing its own prorogation. It can only meet before the scheduled end of prorogation in certain exceptional, legally defined circumstances, such as the death of the monarch.

- c. The UK's current prorogation rules thus open a pathway for a government to prorogue parliament in order to limit scrutiny and accountability.
- d. This attempt was made in the autumn of 2019, when the government sought to prorogue parliament between mid-September and mid-October. This was seen by many as a bid to avoid parliamentary scrutiny ahead of the UK's scheduled departure from the European Union. The prorogation was overturned by the Supreme Court, which declared it unlawful on the grounds that the prorogation would have frustrated parliament's ability to carry out its constitutional function of supervising the executive.
- e. Because the FTPA does not impinge on the power of prorogation, it is open to a government to prorogue in order to frustrate parliament's use of the Act. For instance, the government could prorogue parliament to (i) forestall a parliamentary vote to call an early election under section 2.2 of the Act, or (ii) prevent the formation of an alternative government under section 2.3 of the Act during the 14 day period after a no-confidence vote. Neither of these courses of action is desirable.

22. By international standards, the UK parliament's very limited power to prevent its own suspension are very unusual. This is evident from a review of the rules that govern the suspension of parliament in other democracies.

- a. Rules that allow some combination of parliamentary actors to prevent or reverse the suspension of the lower chamber of Parliament exist in 25 out of 26 European democracies (the exception is Greece) (Schleiter and Fleming 2020, 644).
- b. Table 2 sets out which parliamentary actors have that power in these 25 cases. All of these countries allow parliament to sit if either the presiding officer/body (equivalent to the Speaker) or a majority of MPs call for it. A clear majority of these countries also allow smaller groups of MPs to insist on parliament sitting. The size of the minority required varies from 40% of MPs in the Danish Folketing to 20% of MPs in Bulgaria, the Czech Republic, Estonia, Hungary, the Netherlands, and Slovakia.

Table 2: Rules governing parliamentary sittings in 25 European Democracies

Parliamentary actors who can insist on parliament sitting	Countries
Parliamentary minority	Austria, Estonia, Hungary, Lithuania, Luxembourg, Slovenia, Switzerland ¹⁰
Parliamentary minority or presiding officer/body	Bulgaria, Czech Republic, Denmark, Germany, Italy, Latvia, Netherlands, Romania, Slovakia, Sweden
Parliamentary majority	France, Iceland
Parliamentary majority or presiding officer/body	Croatia, Poland, Portugal, Spain
Presiding officer/body only	Finland, Norway

¹⁰ This minority right only exists in certain circumstances, but a majority can always extend an ordinary sitting.

23. **The FTPA could therefore be updated to regulate prorogation in statute, and place explicit statutory limits on the executive's power.** In practice, these limits might (i) let parliament itself decide the scheduling of prorogation, (ii) allow parliament to veto or reverse prorogation, or (iii) place explicit limits on the purpose, length, and timing of prorogation.
24. Reforms of this kind would constrain the government's ability to use prorogation politically in order to limit scrutiny of its conduct or policies. Giving parliament a means of blocking prorogation without resorting to legal challenges would also help avoid unnecessary tensions between the executive and the judiciary.

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