EVIDENCE TO THE JOINT COMMITTEE

ON THE FIXED-TERM PARLIAMENTS ACT 2011

TOM HICKMAN QC

Professor of Public Law, University College London and barrister at Blackstone Chambers

1. This note of evidence addresses clause 3 of the draft Fixed-Term Parliaments Act 2011 (Repeal) Bill.

2. Clause 3 seeks to oust the ability of the courts to review the exercise of powers referred to in clause 2. In order to evaluate clause 3, it is therefore necessary to understand the powers that would be caught by that clause.

3. Clause 2 refers to the power to dissolve and summons Parliament, including the issue of writs of summons and writs of Parliamentary elections. These represent legally distinct acts and different considerations apply to the different legal acts that are referred to. The concerns about courts reviewing decisions to *dissolve* Parliament cannot be carried over to the power to *summons* Parliament. My principal concern in this note is the power to summons Parliament by proclamation and the associated powers to require writs to be issued. However, my general objection to ousting the courts applies to both contexts.

4. Under the Representation of the People Act 1983, a timetable for a general election is triggered by the dissolution of Parliament under s.3(1) of the Fixed Term Parliaments Act 2011. The draft Bill would revert to the pre-2011 Act position whereby the issue of writs to returning officers follows a proclamation summonsing Parliament (Schedule, para. 8).

5. Prior to the 2011 Act, it was a long-standing practice that a proclamation dissolving Parliament would at the same time summons the next

Parliament and set a date for writs to be returned and for Parliament to meet after a general election had been held. Proclamations were made in this conjoined form throughout the twentieth century, but they go much further back: for example, the dissolution of the last Parliament of Great Britain in 1796 and the summons for the first Parliament of the United Kingdom in 1802 were both in this form, as were others in the seventeenth century.

6. But dissolving and summonsing Parliament are legally distinct and separable acts. This is illustrated by events in 1713 (and possibly on other occasions) when a proclamation dissolving Parliament was made without a new Parliament being summonsed. Hence, a further proclamation summonsing Parliament was required and was issued a short period later.[1] Ancient statute imposes a long stop on the permissible separation between dissolution of one Parliament and the meeting of the next at three years: Meeting of Parliament Act 1694.

7. The issuing of writs to returning officers triggers the timetable for elections under the Representation of the People Act 1983. However, as I have observed, the summonsing of Parliament, which would trigger the issue of writs, is not automatic upon a proclamation for the dissolution of Parliament. Therefore, in theory that timetable can be delayed.

8. Indeed, the mechanics of our constitution would make it possible for a Prime Minister to either:

   (1) Procure a dissolution of Parliament but not procure a summons for a new Parliament at the same time and delay doing so for a significant period thereafter; or

   (2) In a proclamation summonsing Parliament, set a date for the new Parliament to convene a long time in the future.

[1] https://www.thegazette.co.uk/London/issue/5148/page/1

9. The ability to separate the dissolution of one Parliament and the meeting of the next serves no modern purpose and it would be contrary to modern democratic principle, upon which the doctrine of Parliamentary sovereignty finds its continuing justification, for any modern premier to dissolve Parliament without providing for elections and a new Parliament then promptly to convene.

10. However, as recent events in the United States have reminded us, constitutional stability and those holding high office playing by the rules cannot be taken for granted. It would be foolish to legislate on the basis that no Prime Minister would ever seek to abuse his or her constitutional powers. If such a situation did ever arise and this Parliament had effectively ousted the jurisdiction of the courts, there would be no checks and balances left. Parliament would itself not be in a position to check such abuse since it would have been dissolved. If a writ of summons was not procured and writs had not been issued to returning officers, the prime minister would not even have to answer to the electorate.

11. Were such a constitutional crisis ever to arise, any notion that Her Majesty the Queen would or should be responsible for intervening and unilaterally issuing a proclamation summonsing Parliament, or by refusing to agree a lengthy delay before Parliament reconvened, must be dismissed. It is a constitutional principle of first importance that Her Majesty must not be drawn into politics. Parliament should not legislate on a basis that would implicitly rely on Her Majesty as an active constitutional check or in a way that would require the Queen to shoulder constitutional responsibilities, however remote the prospect might be.[2]

[2] Similarly, one should not rely on the assumption that it would be necessary for Parliament promptly to convene in order to make financial provision. Quite apart from the fact the assumption may not prove well founded on a particular set of future facts, the line of argument relies implicitly on the courts—by preventing unlawful taxation or expenditure. In which case, better that they are able to address abuse directly.

12. It is to be noted that the envisaged situation in which the courts might be required to protect democracy stands well apart from a scenario in which the courts might seek to review a decision of the Prime Minister to *dissolve* Parliament. The argument underpinning the application of clause 3 to the decision to dissolve is that such a decision is inherently political and subject only to political accountability, in particular a forthcoming general election. But the contention that the Prime Minister is politically responsible—and solely politically responsible—for a decision to dissolve Parliament has as its very premise that the electorate and Parliament are in a position to hold the Prime Minister to account, a premise which, as explained above, depends upon the proper exercise of the power to summons Parliament.

13. Those who make constitutional laws are playing the long game. Such laws must regulate the exercise of power far into the future and provide protections for exceptional circumstances that cannot be foreseen. Constitutional laws set out, "not rules for the passing hour, but principles for an expending future." (B. N. Cardozo, *The Nature of the Judicial Process* (Yale UP, 1921), p83). We cannot contemplate circumstances in which the powers referred to in clause 2 of the draft Bill could ever be abused, but it is precisely the function of constitutional laws that they protect against such abuse. Constitutional laws, more than all other laws, must protect against "known unknowns".

14. When making constitutional laws, Parliament must therefore assume that some gross abuse could occur. Under our constitution the courts have always stood as a key backstop protection against abuse of power. Clause 3 of the draft Bill seeks to remove that protection *whilst putting nothing in its place*. This is not even its intended purpose: it is not aimed at such extreme situations as I have contemplated: it is seemingly directed at forestalling judicially meddling in dissolution decisions in normal times (a jurisdiction that has never been asserted let alone exercised).

15. To legislate in this way would be a grave mistake and contrary to the principles that should govern the making of constitutional laws. It was Edmund Burke who most famously and eloquently outlined these principles. One does not have to subscribe to all of Burke's views to see the good sense in his strictures against tinkering with the constitution by legislating in the abstract without it being needed to remedy some demonstrable problem. Burke added saliently that Parliament should not legislate to impose a theory of how the constitution is supposed to work, which misunderstands its organic nature:

> "On what grounds do we go to restore our Constitution to what it has been at some given period, or to reform or reconstruct it upon principles more comfortable to a sound theory of government? A prescriptive government, such as ours, never was the work of any legislator, never was made upon any foregone theory. It seems to me a preposterous way of reasoning, and a prefect confusion of ideas, to take the theories which learned and speculative men have made from that government, and then, supposing it made on those theories which were made from it, to accuse the government of not corresponding with them…."
>
> It is for fear of losing the inestimable treasure we have that I do not venture to game it out of my hands for the vain hope of improving it." (Speech on a Committee to Inquire into the State of the Representation of the Commons in Parliament, 1782.)

16. It may be said that clause 3 of the Bill is merely seeking to set out in statute what the courts have already said in the law reports. In the *GCHQ case* decided in 1984 Lord Roskill stated that the dissolution of Parliament is a matter that would be considered to be non-justiciable by the courts, and there are far older statements to similar effect. However, his Lordship went on to quote F. W. Maitland, "The only direct utility of legal history …. lies in the lesson that each generation has an enormous power of shaping its own law"; and he explained that the development of administrative law should not be shackled by legal history ([1985] AC 374, 417).

17. By seeking to enact principles of non-justiciability as currently set out in clause 3 of the draft Bill the Government and Parliament *would* be seeking to shackle the development of administrative and constitutional law to history, they *would not* be seeking to address any immediate need and they *would be unwisely* legislating in the face of known unknowns. Clause 3 seeks to remove the residual superintendence of the courts over our democracy when there may be a future need for such protection.

18. It is no answer that the Fixed-Term Parliaments Act 2011 may be thought by some to itself have been an act of constitutional meddling that failed to comply with such structures. There is force in the criticism of that Act that it was too heavily influenced by the immediate political context and in particular the desire to cement the Coalition Government for a full five-year term. Whilst the Act fulfilled that immediate objective, as a piece of constitutional law it has failed to provide a sound long-term substitute for the historic prerogatives to dissolve and summons Parliament. But such observations reinforce rather than detract from the argument in this evidence: Parliament would be committing the very same errors if it enacted clause 3. The draft Bill goes beyond repealing the 2011 Act and restoring the power of dissolution and summonsing Parliament, it goes on to propose a *new form of constitutional experimentation*.

19. Let me emphasise in conclusion that there is no immediate or even foreseeable prospect of the courts asserting jurisdiction to review the powers referred to in clause 2 of the draft Bill should they be restored. They have never done so nor indicated any inclination to do so. Clause 3 of the draft Bill is therefore firing at shadows. If, however, the courts do ever need to assert such jurisdiction it could well be in circumstances in which democracy is under great stress, and I reiterate these would be circumstances in which Parliament itself has been dissolved and thus provides no check. The courts would be stepping in to protect Parliament. Firing shots at shadows is a dangerous game, liable to hit unintended

targets. It is not, I suggest, a sound strategy for making constitutional law, more especially a constitutional law that is so central to the transfer of power in our democracy.

20. I respectfully suggest that Parliament should do what is necessary to restore the position prior to the Fixed Term Parliaments Act 2011 and it should then stay its hand.

19 January 2021[3]

[3] I am grateful to Professor Gavin Phillipson for valuable comments on a draft.