Written evidence submitted by Dr. Andrew Blick (FTP0018)

Submitted in a personal capacity

1. I am grateful for the opportunity to submit written evidence to this inquiry. It deals with a matter of the highest possible constitutional importance: how and when an election to the central legislature takes place, who makes the decisions, and what rules and limitations they are subject to. These are matters that would, in a system that had a 'codified' or 'written' constitution, almost certainly be provided for in such a text.

2. It is therefore appropriate, as the government has suggested in its foreword to the *Draft Fixed-term Parliaments Act 2011 (Repeal) Bill*, that any change in this area is subject to the fullest possible scrutiny and consideration. No country has a perfect system. But a defect of the UK model is that substantial constitutional change can be brought about in a casual, swift manner, possibly without the level of consensus that would ideally be achieved. Under a 'codified' or 'written' constitution, an amendment procedure of some kind would probably make this kind of approach harder to take. The *Fixed-term Parliaments Act 2011*, as the government suggests, was 'passed with limited scrutiny', an unsatisfactory circumstance for such a significant measure.

3. Despite stressing the importance of good democratic practice in bringing about constitutional change, the government approach to the repeal of the 2011 Act is not entirely satisfactory. In particular, it has to some extent pre-empted the work of this Joint Committee in that it has reached a conclusion in advance that the 2011 requires repeal. This outcome is – as stipulated in the 2011 Act – supposed to be only one option for the review among others. The Joint Committee might, within the terms of the 2011 Act, decide that it need not make any recommendation; or suggest amendment to the Act rather than repeal. But knowing the firm view of the government, the focus of this Joint Committee will necessarily be skewed towards repeal and the precise system the government envisages as a replacement for the 2011 regime. In this sense the government has undermined the statutory purpose of the Joint Committee. No doubt under the circumstances it will perform its role as well as possible.

4. The government would presumably argue that it has an electoral mandate for constitutional change, since it pledged to 'get rid of the Fixed-term Parliaments Act' in its 2019 General Election manifesto. However, that it is considered possible to override good constitutional practice on the basis of a manifesto commitment is itself an unfortunate feature of the UK system. Ideally, an inquiry on this subject would commence with a blank sheet, rather than with the view that a repeal was coming regardless. But the government has forced this outlook upon it, also putting forward a specific model that seems likely – perhaps in slightly modified form – ultimately to be enacted.

5. Though this position may be regrettable, scrutiny of the draft bill and accompanying government texts is the most sensible activity at this point. I make the following observations regarding the substantive proposals and underpinning arguments offered by the government, taking into account the stated government objective of providing 'legal, constitutional and political certainty around the process for dissolving Parliament'. This submission is written against a background assumption, that I have advanced elsewhere. It is that there is some evidence to suggest that the system of self-regulation upon which the UK constitution is heavily dependent is less effective than it once was, and that certain senior politicians are more disposed to ignoring established understandings in pursuit of partisan gain. If this tendency is real, informal arrangements that might have seemed satisfactory in the past are more vulnerable to damaging abuse and manipulation. Even if it is not, it is wise to consider the dangers that can arise from reliance on informal regulation.

6. It is important to assess the chief objections the government has offered to the 2011 Act. The government states in the draft bill document that the Act 'created parliamentary paralysis at a critical time for our country'. One might argue that the 'paralysis' to which it referred, during the second half of 2019, was an expression not of a problem with the Act but with the majoritarian political culture of the UK, intersecting with a particular issue, Brexit, that produced a divisive climate, and the Commons arithmetic of the time. That the government was not able to secure a dissolution precisely when it wanted one, because it had lost its majority, was inconvenient for it, but not in itself a constitutional problem. In any case, ultimately, a General Election took place. Indeed, it transpired there was sufficient Commons support for it to have been achieved in accordance with the two thirds supermajority requirement of the 2011 Act rather than the separate legislation that was passed. It was also possible, through the confidence procedure that exists under the 2011 Act (the flaws of which are discussed below) for a simple majority to achieve an early election.

7. It is not clear that developments of 2019 would have proved any more satisfactory had earlier arrangements for the dissolution of Parliament that the government now proposes restoring been in place. Had, for instance, the Prime Minister requested a General Election as a means of precluding parliamentary activity in the lead up to the Article 50 deadline of 31 October 2019, the monarch would have found themselves in a difficult position.

8. However we are to interpret them, the exceptional circumstances of 2019 are unlikely precisely to repeat themselves. But they suggest that arrangements for the calling of elections, though they might function well most of the time, can come under pressure in ways that are difficult to predict. To rely solely on goodwill and good judgement from senior political figures involved in such circumstances might be to court difficulties.

9. The government notes that the 2011 Act has failed to lead to more regular periods between elections. It is correct in this point. However, this criticism is difficult to reconcile with an objection to the Act lacking in flexibility. Moreover, to return to an

arrangement whereby prime ministers decide when to request dissolutions seems unlikely to lead to greater stability in the length of parliaments. It could, furthermore, be argued that the Act was effective in that it ensured that governments or prime ministers were no longer able solely (subject to the consent of the monarch) to determine the timing of elections, and needed support from the Commons.

10. Another objection the government advances regarding the 2011 Act is that it undermined the principle that governments must possess the confidence of the House of Commons. This claim has some substance. The attempt made by the 2011 Act to codify the confidence concept had the unwelcome effect of tying it to the possibility of an early General Election. However, another – equally valid – outcome of a loss of confidence is resignation of a government.

11. The government notes that '[t]he 2011 Act…created uncertainty as to what happens when a no-confidence vote is passed under the Act and how it might operate in practice.' If a Prime Minister lost a confidence vote under the 2011 Act, they could seek to block the formation of another government by refusing to resign for a 14-day period. At this point, a General Election would be triggered. In such circumstances, the only clear way of removing them within this two-week window would be an intervention by the monarch – a difficult proposition, to which I return below. It is notable that, in October 2019, the media reported a 'senior source' as stating that the present Prime Minister intended to pursue just such a course of action should his government lose a confidence vote and were there a potential alternative administration.

12. The uncertainty connected to confidence votes and the 14-day period is an undoubted flaw in the 2011 Act. However, it is not clear that an attempted return to the pre-2011 position would entirely remove the possibility of a problem of the type discussed in the paragraph above. It would appear to remain possible that, following a loss of confidence, rather than resign and be succeeded by another government (assuming this potential replacement existed) a Prime Minister could recommend a dissolution to the monarch, who would again find themselves in a difficult position, the correct response to which would be difficult to discern. If some senior politicians have indeed become less willing to restrain themselves in ways that safeguard the integrity of the system, such a scenario is more likely (in the event of a House of Commons in which no one party had a firm majority, or perhaps a serious split in the governing party, or revolt within it against the Prime Minister). In this respect, the government proposals fall short in delivering the 'political and constitutional certainty' it espouses.

13. The government notes that the 2011 Act 'was passed by the Coalition in unique circumstances'. It is true that the particular political position of the time prompted this legislation. But the idea of fixed-term parliaments was not invented purely for this circumstance. Reformers had been advocating a change in this direction for a number of years. They drew partly on observation of foreign practice. Their objections to the system the government now purportedly seeks to restore included

that it provided the Prime Minister of the day with excessive discretion and an unfair advantage over political opponents. Such complaints could be expected to revive under the reversion the government envisages.

14. The draft bill states (clause 2 [1]) that:

    'The powers relating to the dissolution of Parliament and the calling of a new Parliament that were exercisable by virtue of Her Majesty's prerogative immediately before the commencement of the Fixed-term Parliaments Act 2011 are exercisable again, as if the Fixed-term Parliaments Act 2011 had never been enacted.'

15. The Joint Committee has already heard that there is scope for doubt about the possibility of the proposed bill genuinely accomplishing this restoration of prerogative powers – calling into question the 'legal' and 'constitutional' certainty to which the government is committed. But I would extend the argument further by asking: even if it is possible to revive this prerogative, is it desirable to do so? Constraining the discretionary authority of the executive was a vital precondition to the development of the democratic system of the UK. It was a difficult achievement, involving centuries of pressure and sometimes violent conflict. Any action that might suggest reversal of this process should surely be avoided.

16. The idea that it is possible – as the government intends – to conjure back into existence the conventions surrounding the operation of the prerogative power of dissolving and calling new parliaments exactly as they were before the 2011 Act is another questionable proposition. Though they might relate to statute, conventions, by definition, are not grounded in it, and the proposed legislation cannot directly instigate or restore constitutions. Nor can conventions be created by any one constitutional player, even the UK government, asserting their existence. Furthermore – as is often the case with important constitutional conventions – there is not a precise and agreed definition of the nature of the conventions as they applied in this area prior to the 2011 Act. Once again, the certainty that the government advocates might prove elusive.

17. The draft bill wants to exclude the courts from reviewing the use of the powers with which it engages, stating that (clause 3):

    'A court of law may not question—
    (a) the exercise or purported exercise of the powers referred to in section 2 [to dissolve and recall a new Parliament],
    (b) any decision or purported decision relating to those powers, or
    (c) the limits or extent of those powers.'

18. Just as the idea of reviving the prerogative is a source of concern from the point of view of principle, so is the exclusion of the judiciary from ensuring compliance with the law. Such an outcome, in connection to such a constitutionally important power, could be seen as in tension with the concept of the rule of law.

19. For the courts to become involved in matters of constitutional and political controversy might seem, in a UK context, unusual and regrettable. But the best way of avoiding such a circumstance, rather than denying legal safeguards, is for politicians voluntarily to adhere to standards of conduct that do not make such judicial intervention necessary. The initial trigger for the prorogation case of 2019 was not an excessively interventionist or powerful judiciary, but the decision of the Prime Minister and the UK government to use the prorogation for an improper purpose – namely to frustrate Parliament in its efforts to carry out its basic function of holding the executive to account. That the actions of ministers led to a high-profile court case, rather than suggesting judicial protections should be removed, shows that they are necessary. If politicians are able responsibly to self-regulate then such essential safeguards need not be activated, and those who dislike their use need not be troubled. Denying the potential for judicial oversight is an improper way of achieving the desired 'certainty'. The existence of arbitrary excessive power might create certainty for the executive that it can behave in a way it sees fit. But from all other perspectives this arrangement would mean a lack of certainty. Certainty comes from the rule of law – the confidence that there are clear, knowable and impartially enforceable regulations in place.

20. Consideration of the unlawful attempted prorogation episode of 2019 leads to further observations about the draft bill and accompanying proposals. The 2011 Act removed the monarch from the dissolution process. A revival of old arrangements would reinsert the ruler into this arrangement, raising certain constitutional questions about the neutrality of the head of state that it seemed had been banished.

21. The 'Dissolution Principles' document tells us that:

    'The Sovereign should not be drawn into party politics, and it is the responsibility of those involved in the political process to ensure that remains the case. As the Crown's principal adviser this responsibility falls particularly on the incumbent Prime Minister.'

22. This text does not offer guidance on how politicians, and especially the Prime Minister, should go about avoiding embroiling the monarch in 'party politics'. Specifically, when is it not appropriate to ask for a dissolution? 'Dissolution Principles' states the intention to return to a position in which the Prime Minister 'can advise the Sovereign to dissolve Parliament at a time of their choosing'. Such a request 'would usually be granted'. The word 'usually' leaves open the possibility that it might not. The foreword to the draft bill, moreover, states that: 'judgement on the Government's actions in such matters should be left to the electorate at the polling booth or, in extremely exceptional circumstances, to the Sovereign'.

23. The public cannot be expected to make decisions about which way to vote in their constituency purely on a basis of how the Prime Minister has handled a dissolution. Furthermore, even if a majority of voters objected sufficiently to vote for parties other than that of the sitting Prime Minister, they might not be effective, since every

party that has won a Commons majority since 1955 has failed to secure the approval of over half of those participating in the General Election anyway. In any case, in as far as it does take place and is effective, such judgement occurs after the fact and does not directly prevent abuse from occurring.

24. Therefore, in present government plans – with the courts decisively excluded – the monarch remains the final line of defence against transgressions before they are committed. In its 'Statement of Principles' the government suggests no guidance to help either the Prime Minister or the monarch avoid difficulties. An absence of regulation increases the chances of a scenario developing in which a Queen or King was faced with a difficult choice between agreeing to an inappropriate dissolution request (perhaps when a viable alternative government was ready to form); or refusing the advice of a Prime Minister, and possibly needing formally to dismiss them. Such a dilemma might seem a remote possibility – but so, too, did the attempted prorogation incident before it happened in 2019. It is better to plan for the worst.

25. How might we avoid such a difficulty? One means of insulating the monarch might be to make dissolutions subject to a vote on the floor of the Commons. Another could be to incorporate the ideas known as the 'Lascelles principles', or something similar, into an official statement of the principles surrounding requests for dissolutions. This text, included in a letter published in *The Times* on 2 May 1950, written under the 'Senex' pseudonym by Sir Alan Lascelles, Private Secretary to George VI, suggested conditions in which a monarch might deny a dissolution, taking into account the parliamentary position and the possibility of forming a different, credible government.

26. A new 'Senex' might be based on support from the main party leaders and the Palace, and parliamentary scrutiny and perhaps approval. It could help preclude various possible abuses, including – as previously mentioned – an attempt to block the formation of a new government following a loss of confidence; the holding of multiple elections in close succession when other options are available; and the calling of elections as a means of forestalling parliamentary scrutiny at a critical moment. Present government proposals leave all these possibilities open.

27. It is also worth noting that as well as protecting the monarch against their being exposed against their will to unwanted political controversy, there is a need to safeguard against the possibility that – at some point in the future – a different monarch might seek a more active role for themselves, or be plausibly depicted as so doing. Once again, a clear statement of appropriate use of the relevant powers would be useful in avoiding problems.

28. This submission has, necessarily, engaged with matters extending beyond dissolutions and recalls of new parliaments. It has done so because of the interconnected nature of constitutional matters. With this network of rules, practices and institutions in mind, I will make a final point. Even were the government to improve upon its draft bill and supporting texts along lines suggested

here, it would fall short in addressing some of the broader issues that they engage. There are a wider range of matters connected to the calling of elections, the convening and disbanding of Parliament, the constitutional position of the monarchy, and the Royal Prerogative, that require consideration as a whole.

29. For instance, along with a clarification – and possibly legal codification – of the circumstances in which it is appropriate to request (and grant or perhaps refuse) a dissolution, a similar exercise with respect to prorogation, and to the reconvening of Parliament after a General Election has taken place, is desirable. Furthermore, the rules around the appointment (and, in extreme circumstances, dismissal) of prime ministers might also benefit from being considered and formulated. An even more complex – but perhaps necessary – task would be an attempt to formalise the concept of the confidence of the House of Commons, how it is granted, sustained, and removed, and what are the consequences of such decisions for the executive. To avoid confronting these issues, as the experience of 2019 demonstrates, can be to invite difficulties at the most inconvenient of times. Such an exercise would take longer than the government presumably hopes to devote to considering the repeal and replacement of the 2011 Act. But given that a General Election is not due until 2024, an artificial deadline should not be made the enemy of sound constitutional review.

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