

## **Professor Petra Schleiter, Professor of Comparative Politics, University of Oxford – written evidence (FPA0008)**

I am pleased to submit evidence to the committee. I am a Professor of Comparative Politics at the University of Oxford. My expertise is in the comparative politics of developed parliamentary democracies.

In assessing the Fixed Term Parliaments Act (henceforth FTPA) it is essential to distinguish the effect of the institutional rules from the effect of the political circumstances in which it has operated in the UK since 2011 (including minority government, the extensive breakdown of party discipline and political gridlock over Brexit). This is difficult, since the FTPA is a relatively recent piece of legislation. The merit of considering the Act in the light of comparative evidence is that it helps us to identify better the systematic effects of institutional rules as distinct from the specific political context in this case.

Summary:

1. *The FTPA has transferred significant power from the prime minister to the House of Commons by three mechanisms:* (i) it restricts the power of the prime minister to call an early election for political gain, (ii) it limits the ability of the prime minister to deploy the threat of an early election in parliamentary bargaining, and (iii) it increases the procedural choices for Parliament in holding the executive to account through a no-confidence motion.
2. *Four year parliamentary terms strike a better balance between giving the government enough time to legislate and ensuring electoral accountability at appropriate intervals than five year terms.*
3. *Restricting the power of the prime minister to call snap elections for partisan gain improves good governance in four areas:* It enhances (i) electoral fairness (by reducing the 6% vote share bonus that UK governments realized on average by calling elections for partisan benefit). It increases both (ii) government accountability to Parliament and (iii) parliamentary effectiveness, and it (iv) supports more responsible (and less short-term) governing strategies and administrative effectiveness.
4. *The mechanisms envisaged in the FTPA to trigger an early election are appropriate and align the UK more closely with contemporary practice regarding early election calling in other developed parliamentary democracies.* They form part of an international constitutional trend to limit executive dominance.
5. *The FTPA alters the confidence relationship:* It gives Parliament greater procedural choice in holding the executive accountable through no-confidence motions. It also limits the executive's power. However, it is still possible for the executive to raise the stakes in legislative bargaining by (i) invoking a vote of confidence and threatening government resignation or (ii) threatening to call an early election under the FTPA if a major policy is defeated.
6. *The challenges that arise during the 14 day period highlight problems with the UK's caretaker conventions, and the rules of government formation.*

Both issues require urgent attention but may best be dealt with independently of the FTPA.

7. *If the Act were repealed, the prerogative power of the monarch to dissolve Parliament would have to be re-instated by statute.*

**(1) To what extent has the Fixed-term Parliaments Act 2011 led to a meaningful transfer of power from the Prime Minister to the House of Commons, removing "the right of Prime Minister to seek the Dissolution of Parliament for pure political gain"?**

1. All parliamentary executives face constitutional constraints that limit their ability to deviate significantly from the will of the legislature. Yet, within these bounds, the UK's political system has historically been a case in which the executive has been comparatively dominant.
2. The FTPA has significantly constrained the prime minister and altered the confidence relationship between the government and parliament in two ways:
  - a. It removes the prime minister's discretion to call an early election, including when the government has lost parliamentary confidence. Early elections can now only be brought about by Parliament, either with a two-thirds majority of all members of the House of Commons or as one possible consequence of a specifically phrased vote of no confidence.
  - b. The FTPA introduces one formal way of wording no-confidence and confidence motions. At the same time, no-confidence and confidence motions that do not adhere to this wording continue to be binding by convention (PACAC, 2018).
3. These changes weaken the power of the government relative to other actors in Parliament, including its own backbenchers and the opposition parties for three reasons:
  - a. They reduce the power of the prime minister to call an early election strategically for partisan advantage when s/he expects to win.
  - b. They limit the power of the prime minister to deploy an early election as a threat in parliamentary bargaining.
  - c. They increase the procedural choices open to Parliament in holding the executive to account. There are now effectively two different ways for Parliament to express no-confidence in the government (PACAC, 2018): No confidence motions worded according to the FTPA have statutory force, and only this type of confidence motion can lead to an early election. No confidence motions that are not worded according to the Act still retain their force by convention, but can now only trigger a government resignation, not an early election. This increases the choices available to Parliament. Legislators now have the option of using different forms of no-confidence motions, which have divergent consequences.
4. In the international constitutional context, the changes introduced by the FTPA are part of a broader constitutional trend. Most contemporary democracies restrict the discretion of the executive to call early elections, formally define the confidence relationship in constitutional law, and

structure it to limit the executive's ability to govern in a manner that contradicts the wishes of Parliament. Parliamentary republics tend to give less discretion to the executive to dissolve parliament than constitutional monarchies have historically done. But constitutional monarchies are reforming, too. A range of Westminster democracies, including Australia, New Zealand and Canada, have debated or implemented reforms that curtail the executive's power to call early elections or use the threat of early elections at the national level, or at the sub-national level. Sub-national and devolved administrations within the UK, Canada and Australia have adopted fixed-term parliaments along with statutory confidence procedures that detail what happens when the executive loses parliamentary confidence. The FTPA has therefore aligned the UK to a greater extent with present day practice regarding election calling and confidence relationships in the majority of other developed parliamentary democracies. It forms part of an international constitutional trend to limit executive dominance, requires executives to build legislative support for their proposals, and constrains their opportunities to depart too far from the preferences of a majority in the popularly elected parliament.

**(2) *Is five years the appropriate length for fixed-terms between general elections?***

5. Five year terms are long by international comparison. In continental Europe, the average maximum length of parliamentary terms is 4 years. In Australia and New Zealand it is 3 years. The devolved parliaments in the UK in Scotland, Wales and Northern Ireland have 4 year fixed terms.
6. The parliaments in Westminster (despite the maximum term of 5 years) have in fact on average served approximately 4 years since 1945 given the practice of early election calling. This suggests that a 4 year term in practice gives governments enough time to legislate and achieve key goals while ensuring electoral accountability at appropriate intervals.

**(3) *Does the certainty of knowing when the next election will be – notwithstanding the section 2 provisions for triggering an early general election – have an impact on good governance?***

7. As the question indicates, the FTPA does not determine the date of the next election *with certainty* because it envisages two mechanisms by which early elections can be called.
  - a. The 2/3 majority route (section 2.2) imposes a *meaningful constraint* on the prime minister's ability to call early elections for partisan gain by requiring cross-party support: In 2017, Theresa May was able to trigger an early election only because Labour supported the motion, giving the Prime Minister the required 2/3 majority in Parliament. However, opposition parties may also choose not to approve an early election call, as was illustrated in September 2019, when they twice refused Boris Johnson's request for an early election.
  - b. Section 2.4 of the Act requires an early election if Parliament has voted no-confidence in the government and does not express confidence in a government within 14 days. This provision offers

access to an early election as a *gridlock resolution* device in the event that no government can be formed that commands parliamentary confidence.

These provisions render the calling of snap elections more difficult.

8. Comparative evidence shows that constitutional restrictions on a prime minister's discretion to call early elections significantly reduce the frequency of snap elections.
9. Restricting snap election calling improves good governance in four areas.
  - a. *Electoral fairness*: Restricting the prime minister's discretion to call early elections when s/he expects to win improves electoral fairness. Prime ministers enjoy multiple advantages that allow them to skew the electoral playing field in their favour when they have constitutional discretion to time elections strategically. They can ask voters to assess their performance at the most favourable time as far as they can forecast. Their advantages in picking the election's timing are formidable since they have access to privileged government information in assessing current and anticipated economic and other policy performance. This information advantage also enables governments to evade responsibility for adverse policy decisions by "cutting and running" before the detrimental effects of their choices fully unfold. Furthermore, when governments can determine the timing of elections, they are better prepared for the campaign than their opponents. By springing a surprise election, they can catch the opposition unprepared. This enables the government to better control the overall tone and direction of the electoral campaign. The short notice of opportunistic elections can catch even a strong opposition off guard. The comparative analysis of 318 parliamentary elections in 27 countries shows that these advantages translate into an average vote share bonus of around 5 per cent. In the UK since 1945, the vote share bonus in elections called for partisan benefit has been slightly larger and amounts to about 6 per cent of the vote share on average, doubling the probability that the prime minister survives in office.
  - b. *Government accountability to Parliament*: By restricting the ability of the prime minister to deploy the *threat* of early elections in parliamentary bargaining, the Act provides the institutional underpinnings for a more consultative and inclusive policy process by requiring the prime minister to build broader support within the legislature. Several analysts stress the potentially negative implications of the changes, describing them as leaving the executive hamstrung by its inability to use designated confidence motions to discipline rebels. However, this is not strictly true — a prime minister can still use confidence motions to invoke the threat of government resignation and can also threaten to table a motion calling for an early election under the FTPA in the event of a major policy defeat. However, rebels can now also use the threat of an early election by backing a no-confidence vote under the FTPA in order to extract policy concessions from the government. This can prove crucial when a governing party is split on a major issue. This raises a normative question: When public policy choices prove

so divisive that they split the governing party (or coalition), parliament, and – by implication – the public, what ought to be the most appropriate response of the prime minister? The majority of present-day developed parliamentary democracies have chosen election calling and confidence procedures that make policy compromise more likely in divisive situations by limiting the executive's ability to diverge from policies that can unite a parliamentary majority. As broader electoral and political changes in the UK have weakened the legitimacy of the traditionally very high level of executive dominance, the 2011 reform has aligned the UK with this international trend.

- c. *Parliamentary effectiveness*: Restrictions on snap election calling enable parliamentary committees to plan their work better and reduce the risk of losing important legislation to a snap election.
- d. *Responsible government and administrative effectiveness*: Restrictions on snap election calling for partisan benefit support more responsible governing strategies. When governments cannot rely on the option of calling a "cut and run" before the adverse effects of policy choices unfold, they are likely to make more responsible policy choices because they must anticipate that they will be held fully accountable for adverse consequences of their decisions. In addition, restrictions on snap election calling reduce electorally motivated short-termism in government. They also allow Whitehall to better plan and implement the government's policy agenda.

**(4) Are the mechanisms in the Act to trigger an early general election appropriate?**

10. As mentioned above, the majority of parliamentary constitutions constrain the discretion of the prime minister to schedule an early election.

11. A study of the constitutional rules regarding parliamentary dissolution in 39 OECD and EU parliamentary democracies from 1945 (or democratization) shows that the constraints imposed fall into three broad categories. Parliamentary democracies may envisage:

- a. Restrictions on the *premier's ability to initiate* the procedure that can lead to an early election: Most parliamentary democracies do not allow the prime minister to make this decision unilaterally, but instead empower the government collectively, parliament (with various majority thresholds) or the head of state (president) to initiate the process that may lead to parliamentary dissolution.
- b. Restrictions on the *time frame* within which parliamentary dissolutions may occur (for instance, not in the last 6 months of a parliament's term, or not for a year following an early parliamentary election).
- c. Restrictions on the *premier's ability to decide dissolution*: Parliamentary dissolution can often only be brought about subject to the binding consent of other actors (such as parliament or the president) or the (non-binding) consultation of other actors (such as the leaders of parliamentary parties).

The magnitude of the constraint on the prime minister is the result of the cumulative effect of restrictions on each of these dimensions.

12. Sections 2(2) and 2(4) of the FTPA specifies restrictions that fall into categories (a) and (c) described above. Section 2(2) enables parliament to *initiate and decide* dissolution with a 2/3 majority. Section 2(4) empowers parliament to *initiate* the process by voting no confidence in the government using the wording provided in the Act and then to *trigger* an early election by failing to express confidence in a government within the following 14 days.
13. Are these mechanisms appropriate? If we compare the UK to other parliamentary democracies in the OECD and EU, the constraints imposed by the FTPA align the UK more closely with contemporary practice regarding early election calling in other developed parliamentary democracies. With respect to the specific provisions in the FTPA:
  - a. The *2/3 majority threshold* envisaged by section 2(2) is unusual, but not inappropriate. Other constitutions often require a lower majority threshold to initiate the process by which an early election can be called, but combine that with further checks, for instance, by placing the ultimate decision to dissolve parliament in the hands of the Head of State (President). Since no such additional checks are used in the UK, a high majority threshold is the appropriate mechanism for checking the government.
  - b. The *14 day period* specified in section 2(4) is not unusual. Many constitutions specify a time period after a no confidence vote during which the formation of a government by the sitting parliament can be attempted. These constitutions allow an early election if no government is formed during that time period. However, other constitutions often provide more detailed information regarding the government formation process in such periods (see response to question 6 below).

**(5) *What impact has the Act had on the notion of the House of Commons having "confidence" in a Government? Is it still possible for the Government to make a vote in the House of Commons on a matter of policy a "confidence" issue?***

14. The principle that a government must retain the confidence of Parliament remains fundamental to the UK constitution, but the Act changes the confidence relationship in two ways.
  - a. First, as outlined above, the Act has increased the procedural choices open to Parliament in holding the executive to account through a *vote of no confidence*. Parliament can now use the wording envisaged by the FTPA (which is binding as a matter of law), or an alternative wording (which remains binding by convention). The FTPA wording enables Parliament to trigger either a change of government or an early election as a result of a no confidence motion; an alternatively formulated no confidence vote only enables parliament to achieve a change of government.
  - b. Second, the Act weakens the bargaining leverage that a government can derive from the *vote of confidence* procedure, but

does not abolish the vote of confidence. It is still possible for the government to raise the stakes in legislative negotiations considerably by calling a vote of confidence on any matter, including a matter of policy. This allows the prime minister to invoke the threat of government resignation (but no longer the threat of an early election). The government can also raise the stakes by threatening to table a motion calling for an early election under the FTPA in the event of a major policy defeat or a defeat on a confidence motion.

**(6) What challenges arise for the political parties, the House of Commons and the civil service in the 14-day period following the passing of a motion of no confidence in the Government? Is there a risk of the monarch being drawn into the political debate during this period and, if so, how should this be mitigated?**

15. The 14 day period highlights the problematic nature of the rules that regulate UK caretaker administrations and government formation. In comparative context, the provisions regarding government formation processes and caretaker periods in the UK are vague. This leaves the country vulnerable to constitutional crises because different political actors may challenge convention or interpret convention in different ways. These issues require urgent attention but may best be dealt with independently of the FTPA.

16. *Caretaker conventions:* Caretaker conventions exist to ensure that a country is never left without a functioning executive by prohibiting the members of the incumbent government from resigning until their successors can be appointed. Many countries also see fit to limit caretaker governments to the 'policy status quo' to ensure that no decisions are made that do not enjoy a democratic mandate.

a. *Current UK rules:* An incumbent government that is defeated under the FTPA in a no-confidence motion is expected to remain in office until a new government can be formed. The incumbent government would become a caretaker administration and its powers would be curtailed. Defeat by a no-confidence motion is only one of three situations in which caretaker conventions are triggered according to the Cabinet Manual. The other two situations are 'in the period immediately preceding an election', and 'immediately afterwards if the result is unclear' (Cabinet Manual, 2011, § 2.27). In all three situations, the same 'restrictions on government activity' apply and 'governments are expected by convention to observe discretion in initiating any new action of a continuing or long-term character'. For instance, the government is expected to defer activity such as 'taking or announcing major policy decisions; entering into large/contentious procurement contracts or significant long-term commitments; and making some senior public appointments and approving Senior Civil Service appointments, provided that such postponement would not be detrimental to the national interest or wasteful of public money' (Ibid, § 2.29). The Manual further states,

'[i]f decisions cannot wait they may be handled by temporary arrangements or following relevant consultation with the Opposition' (Ibid, § 2.29).

- b. *Shortcomings*: In their current form, these caretaker conventions have four shortcomings, which leave the UK vulnerable to crisis and controversy: (i) they do not clarify effectively the normative basis for limitations on government power during caretaker periods; (ii) they do not stipulate unequivocally that a caretaker government cannot resign until its successor is formed and do therefore not fulfil the minimal function of all caretaker conventions, i.e., to secure the continuing existence of a government at all times; (iii) they do not clearly specify when caretaker situations terminate and (iv) they lack clarity regarding the nature of restrictions on the executive during caretaker periods and their enforcement. These issues require urgent attention.

17. *Rules of government formation*: In the 14 days following a no-confidence vote under the FTPA, Parliament has the opportunity to vote confidence in the incumbent government or in a *new* government. Two problems arise in this context:

- a. *Unclear procedure*: The FTPA is silent regarding the process by which a *new* government might be formed. This silence reflects a broader lack of clarity regarding the rules of government formation in the UK. The Cabinet Manual says it is for the political parties to work out who can command confidence in the new Parliament. However, if Parliament is hung, there is a risk of confusion and uncertainty in the event of a standoff. The process to be followed is not clear.
- b. *Unclear mechanisms of communication*: It is also not clear how Parliament might communicate to the Queen who is a viable prime minister. There is currently no designated mechanism for doing so. Consequently, there has been speculation that Parliament might use a humble address, a resolution, an early day motion or indicative votes for that purpose. It would be preferable to have a clearly defined procedure.

Both of these problems are discussed in more detail below.

- c. *Clarity of the procedures for government formation*: Currently, the UK lacks clarity in its procedures regarding the question who should be tasked with the attempt of forming a government. This lack of clarity affects all government formation processes, including those that may take place during the 14 day period envisaged by the FTPA.
- d. In an analysis of the experience of other European countries, where it is unusual for a single party to control a parliamentary majority, we identify six rules that are used to guide who should be asked to form a government. These rules make potentially contradictory recommendations, suggesting (i) the incumbent prime minister, the leader of the party with (ii) a parliamentary majority, (iii) a plurality of the seats in parliament, (iv) the largest share of votes, (v) the party most responsible for toppling the incumbent government, or

- (vi) the person most likely to be able to form a government as the appropriate choice.
- e. The UK has, in the past, applied five of these rules in the context of hung parliaments. These principles are potentially contradictory and do not all follow an equally democratic logic. This can jeopardise the monarch's role in the government formation process: Because it is currently ambiguous which rule should be followed, the monarch might appear as if she is exerting a political choice in following any one of them. To protect the monarchy and its political impartiality, the rules should designate a specific choice without room for ambiguity.
  - f. *The case for a nomination vote:* To identify the most appropriate procedure for choosing the person to form a government (henceforth candidate prime minister) we must consider the test that every UK government must pass in order to govern, which is the vote on the Queen's speech that outlines the government programme. This test establishes a positive expression of support in Parliament as the mechanism by which governments are made (or blocked) in the UK. Consequently, a vote by the same body—Parliament—not advice by the incumbent government or any other adviser to the Queen, is the best mechanism to nominate a viable candidate prime minister.
  - g. How might Parliament choose, and vote on, potential candidates for prime minister? A direct vote in Parliament to select the candidate prime minister is the simplest and quickest procedure. All parties may nominate a candidate. Parliament votes on all candidates simultaneously (each member may vote for only one candidate). The candidate who wins an absolute majority is recognised as the candidate prime minister. If no candidate wins an absolute majority either a run-off system or an elimination rule (elimination of the weakest candidate in each round) is applied in subsequent ballots to determine which candidate has the strongest support. There are international and national precedents for the use of nomination votes. In the UK, Scotland, for instance, uses a nomination vote to appoint the First Minister.
  - h. *Communicating to the monarch which government is viable:* In the context of the FTPA, a nomination vote would also enable Parliament to communicate clearly and unambiguously to the monarch that a candidate prime minister is viable and can be appointed so that Parliament can express confidence in a government during the 14 day period.

**(7) If the Act was repealed, what provisions for the lengths of Parliaments and the timing of general elections would need to be made in its place? Would the prerogative power for the Prime Minister to dissolve Parliament and call a general election be revived in the event of repeal?**

18. The prerogative power would not be revived if the FTPA were repealed. Instead the monarch's prerogative to dissolve Parliament would have to be re-instituted by statute. This would pose the challenge of defining

under which conditions a prime minister can request the dissolution of Parliament.

*23 September 2019*