



House of Commons  
Political and Constitutional  
Reform Committee

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**Fixed-term Parliaments  
Bill**

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**Second Report of Session 2010–11**

*Report, together with formal minutes, oral and  
written evidence*

*Ordered by the House of Commons  
to be printed 9 September 2010*

**HC 436**

Published on 10 September 2010  
by authority of the House of Commons  
London: The Stationery Office Limited  
£0.00

## The Political and Constitutional Reform Committee

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# Contents

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<b>Report</b>	<i>Page</i>
<b>Summary</b>	<b>3</b>
<b>1 Principle and process</b>	<b>4</b>
<b>2 Clause 1: The length of the fixed term</b>	<b>6</b>
Going with the constitutional grain	6
Precedent	7
Enough time to govern	7
Conclusion	8
<b>3 Clause 2: Premature ending of a fixed term</b>	<b>9</b>
Impact on parliamentary privilege	10
Alternatives to a super-majority	12
Keeping the clock ticking following an early general election	12
Ensuring cross-party agreement to an early general election	13
Motions of no confidence	14
<b>4 Conclusion</b>	<b>16</b>
<b>Conclusions and recommendations</b>	<b>17</b>
Principle and Process	17
The length of the fixed-term	17
Premature ending of a fixed term	17
Conclusion	18
<b>Formal Minutes</b>	<b>20</b>
<b>Witnesses</b>	<b>21</b>
<b>List of written evidence</b>	<b>21</b>
<b>List of Reports from the Committee during the current Parliament</b>	<b>22</b>



## Summary

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The principle behind the Fixed-Term Parliaments Bill is that it is wrong that a Prime Minister should be able to time a general election to his own partisan advantage. We regret the unnecessarily rushed way in which the Bill is being proceeded with, without any prior consultation or pre-legislative scrutiny, which a bill of this legal and constitutional sensitivity deserves.

Because of this expedited process, our Report has been produced at speed to ensure that the House is aware of some key issues and concerns, before it begins to debate the Bill. We trust that the recommendations made in this Report will provide a context for the detailed examination of the Bill by the House at committee stage, if it decides to give the Bill a second reading.

Most of the opinion we have received in the limited time available to us suggests that it would be better for general elections to be held every four years, rather than every five as the Government proposes.

If the Bill is enacted, our expectation is that future Parliaments would run for their full fixed term, and that this will become an unremarkable aspect of our modern democracy. In this context, it is unsurprising that most of the anxieties we have heard have centred on those circumstances in which the Bill would allow for a fixed term to be broken prematurely. The proposed requirement for a super-majority in the House of Commons to vote for an early general election is novel for the United Kingdom, and the consequences of the provisions for confidence motions contained in the Bill are uncertain.

Our Report proposes two options that the House may wish to explore as possible ways of simplifying the provisions in the Bill for ending the fixed term prematurely:

- A super-majority might not be necessary if a Parliament following an early general election lasted for only as long as the remainder of the term of the previous Parliament.
- A super-majority could be dispensed with if an early general election could be called only with cross-party agreement.

Dispensing with the super-majority could also arguably avoid the need for separate provision for an early general election where no government could be formed that commanded the confidence of the House.

The Clerk of the House believes that the Bill as currently drafted could allow the courts to question aspects of the House's internal proceedings. We have concerns about whether a super-majority could be adequately entrenched in the House's own Standing Orders, but the Government needs to respond to the Clerk's concerns, and the purpose of the Bill needs to be achieved without inviting the courts to question aspects of the House's own procedures or the actions of the Speaker, except where this is absolutely unavoidable and clearly justifiable.

# 1 Principle and process

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1. There have long been calls to curtail the Prime Minister's power to hold a general election at a time of his or her choosing for the purpose of seeking a partisan political advantage for himself and his party,<sup>1</sup> although views are mixed on whether fixed-term Parliaments would be a welcome development. **It is questionable whether a Prime Minister should be able to use his position in government to give him and his party an electoral advantage by choosing to hold the next general election to a schedule that best suits him. We therefore acknowledge the principle behind the Fixed-term Parliaments Bill.**

2. Fixed terms might bring practical advantages to Government and Parliament, by giving both a greater degree of predictability and continuity. There could be greater certainty about planning for a government's legislative programme, including proper parliamentary scrutiny of that programme. There would also be far less space for political and media speculation about the likely date of a general election, which has been a negative distraction in recent years.

3. Concerns have been raised with us, however, about some of the detail of the Bill, in particular by the Clerk of the House.<sup>2</sup> He has promised to return to us with his views on the wider impact of fixed terms—positive as well as negative—on the workings of the House.<sup>3</sup> More generally, the Bill sits in complex legal and constitutional territory. It proposes to abolish one executive prerogative power, to dissolve Parliament, but, where the House votes for an early dissolution, it leaves the choice of the timing of this dissolution to the Prime Minister of the day. It also leaves untouched other prerogative powers, in particular the power to prorogue Parliament, the power to set the date for the meeting of the next Parliament, and the monarch's power to choose who to ask to form a government after a general election or after the resignation of the government of the day. **We expect to consider the prerogative powers and Executive power more generally in the course of our scrutiny of wider constitutional issues.**

4. A range of eminent academics have commented to us on the way in which the Bill has been prepared:

The Fixed Term Parliaments Bill was prepared on an extraordinarily rushed timetable. It was introduced with no prior consultation, no Green or White Paper. Nor has time been allowed for pre-legislative scrutiny of a draft bill.<sup>4</sup>

The Bill therefore has far-reaching implications going to the heart of our political democracy, and ones that inter-lock with other parts of the constitutional structure. Successive governments have followed an ad hoc approach to constitutional reform,

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1 See for example HC Deb 7 May 2002 c46 [Dr Tony Wright]; Robert Blackburn, Memorandum on Electoral Law and Administration, Appendices to Minutes of Evidence, Select Committee on Home Affairs, May 1998; Q 58 [Professor Robert Blackburn]

2 See paragraphs 24 to 32

3 Qq 12–14

4 Ev 23-44, para 2.2. See also Hansard Society, para 26

but it would be wise, in my view, for a more overarching approach to be taken to political and constitutional reform generally and one that is constitutionally joined-up, particularly since other major changes are now or in the near future being planned.<sup>5</sup>

the implications of the change need to be fully explored in public debate, and if this is done it should help to create a broad consensus in favour of the change. The Labour government under Mr Blair was responsible for initiating major reforms affecting the judiciary (eventually incorporated in the Constitutional Reform Act 2005) in a wholly inept way that prejudged informed debate and ran the risk of prejudicing some beneficial reforms. The coalition Government needs to take a more skilful path than this in building a consensus for the long-term constitutional reform that it wishes to see.<sup>6</sup>

The Clerk of the House suggested to us in oral evidence that “it would have been better for these matters to be dealt with in a draft bill”, and that “pre-legislative scrutiny in this sort of area is really important”,<sup>7</sup> while Professor Blackburn told us that a bill of this kind on a “fairly complex legal, constitutional and political issue” is “a major reform that requires some gestation period”.<sup>8</sup>

5. The Fixed-Term Parliaments Bill is ill-thought through, rushed and does not appear to provide a satisfactory solution, which ideally should be one around which there can be political consensus. It is unacceptable that a Bill of this legal and constitutional complexity has not been the subject of any prior consultation or pre-legislative scrutiny. This is exacerbated by the fact that it was not contained in the Conservative Party manifesto at the General Election. Indeed, during that election, the current Prime Minister argued that in the event of there being a change of Prime Minister during the course of a Parliament, there should have to be a further General Election within six months.

6. There is no urgency for this Bill because the Prime Minister has volunteered not to call a General Election before May 2015. There is therefore time for this Bill to be returned to the drawing board and for a draft Bill to be produced. Ideally this draft Bill should be brought forward at the same time as the draft Bill for reforming the House of Lords so that these two important fundamental constitutional issues can be considered alongside each other.

7. It is acutely disappointing to us that we have needed to criticise the Government for the process it has chosen to adopt in the passage of its first two constitutional Bills, the other being the Parliamentary Voting System and Constituencies Bill.<sup>9</sup> **While we understand the political impetus for making swift progress in this area, bills of such legal and constitutional sensitivity should be published in draft for full pre-legislative scrutiny, rather than proceeded with in haste. We intend to inquire very soon, in co-operation**

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5 Ev 45-48, para 37

6 Ev 48-50, para 5

7 Qq 33-34

8 Qq 58, 91

9 First Report from the Committee, Session 2010-11, Parliamentary Voting System and Constituencies Bill, HC 422

**with the Procedure Committee if possible, into how proper pre-legislative scrutiny of such Bills can best be ensured in future, whether through the House’s Standing Orders or otherwise.**

8. Within this very short timescale, we have been able to gather some written evidence from a limited number of established academic commentators on constitutional issues, and to examine only two witnesses orally: the Clerk of the House,<sup>10</sup> and Professor Robert Blackburn of King’s College London.<sup>11</sup> The submission from Professor Robert Hazell of University College London provides a particularly comprehensive background from both the United Kingdom and international perspective.<sup>12</sup>

9. The Constitution Committee in the House of Lords is conducting its own in-depth inquiry into fixed-term Parliaments, but it will not be reporting in time to inform consideration of the Bill in the House of Commons. The aim of this short Report is to ensure that the House is aware of the key issues raised with us by our witnesses, and of our own concerns about some of the detail of the Bill, before the House decides whether to give the Bill a Second Reading on Monday 13 September.

## 2 Clause 1: The length of the fixed term

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10. The Bill provides for general elections to be held every five years in May, starting in 2015. The Deputy Prime Minister told us that there were three reasons for proposing this five-year term:

- a) “going with the grain of some of the founding texts of our unwritten constitution”—referring specifically to the Septennial Act 1715,
- b) “following the precedent set by the immediate outgoing government” (the 2005–10 Parliament lasted five years), and
- c) “to give any government of whatever complexion enough time to govern and deliver a programme of change and reform”.<sup>13</sup>

### Going with the constitutional grain

11. Between 1715 and 1911 the maximum parliamentary term was seven years. The five-year maximum term was introduced in 1911 by the Parliament Act, as a *quid pro quo* for reducing the powers of the House of Lords, to ensure that the House of Commons was held accountable to the electorate more frequently. However, in asking for leave to introduce the Parliament Bill, Herbert Asquith, the then Prime Minister, told the House that the reduction to five years would “probably amount in practice to an actual legislative

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10 Qq 1–57

11 Qq 58–91

12 Ev 23–44

13 Evidence taken before the Committee on 15 July 2010, HC 358-i, Session 2010–11, Q 71



working term of four years”.<sup>14</sup> **The current five-year maximum term was introduced with the expectation that it would probably amount in practice to a four-year term.**

12. This expectation was based on the long-standing ability of Prime Ministers to call elections at any time of their choosing. The Bill as drafted seeks to convert the existing maximum term into a fixed term, giving the five-year Parliament a new integrity. The Government’s expectation appears to be that the fixed term would be the norm, and that only in exceptional circumstances would an early general election be held. This is a significant change to current culture and practice.

## Precedent

13. It is simplest to use 1979 as a start date for a brief analysis of the precedents, as Parliaments before 1979 were more irregular in length.<sup>15</sup> There have been seven general elections since 1979. Four (in 1983, 1987, 2001 and 2005) have been called after four-year Parliaments: all resulted in the return of the incumbent government. Three have been called after five-year Parliaments: two of these (in 1997 and 2010) resulted in the defeat of the incumbent government, the other (in 1992) in its return, but with a much smaller majority. As Professor Robert Hazell has written:

The balance between four and five years is more even than folk memory might suggest. But those parliaments which lasted for five years did so because the government had become unpopular and did not want to hold an earlier election. The Prime Minister stayed on hoping that his or her party’s luck might change. It did not, save for the case of John Major, who scraped through with a narrow majority in 1992.<sup>16</sup>

**Precedent gives no clear answer as to whether Parliaments should last four years or five.**

## Enough time to govern

14. Many British governments have governed successfully on a four-year term. As suggested above, governments that have gone to the polls every four years have in practice been more likely to extend their mandate for a further term, giving them further time to govern. Professor Blackburn suggested to us that when governments have lasted five years between elections, “the last year of every one has been pretty awful”.<sup>17</sup> The Scottish Government, Welsh Assembly Government and Northern Ireland Executive are expected to seek a renewed mandate every four years. Practice internationally is varied, but Australia and New Zealand, both with Westminster-style Parliaments, are subject to three-year maximum terms. We are by no means convinced that parliamentary terms of less than four years would provide sufficient stability and continuity, particularly in a context in

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14 HC Deb 21 February 1911 c1749

15 Professor Robert Hazell’s written evidence (Ev 23-44) provides a fuller analysis of the length of Parliaments since 1945. See figure 4.2.

16 Ev 23-44, para 4.1

17 Q 63

which the executive and legislature remain interwoven, but we see no argument to suggest that four-year terms would undermine stability or continuity in government.

15. Coalition government is relatively untried in this country, and it could be argued that a coalition might need more time to implement a programme than a single-party government, especially as there may need to be a period before a general election in which the parties of government re-establish themselves as separate entities with separate policies for campaigning purposes.

16. The counter-argument to this is that a coalition governs to a programme which, unlike party manifestos, has not been put directly to the electorate. When Asquith talked of “an actual legislative working term of four years”, he did so on the basis that it would “secure that your House of Commons for the time being, is always either fresh from the polls which gave it authority, or—and this is an equally effective check upon acting in defiance of the popular will—it is looking forward to the polls at which it will have to render an account of its stewardship”.<sup>18</sup>

## Conclusion

17. Under existing legislation, the Prime Minister has the right to call the next general election for 7 May 2015. If the coalition wants five years in which to govern, it has the legal right to do so, for as long as it can command the confidence of the House. But we are not persuaded that current circumstances are a sensible basis on which to commit future governments to five-year terms.

18. Much of the evidence we have received has expressed concern about establishing a five-year, rather than a four-year term for future Parliaments:<sup>19</sup>

the period between general elections should clearly be four years and this is by far the prevalent view among those who have favoured fixed intervals between elections in recent years, including Liberal Democrats.<sup>20</sup>

In my view, the Bill is wrong simply to apply the present maximum life of five years to a fixed-term system. The five-year rule came into being in different historical circumstances. I believe that many electors would take the view that they should be able to exercise their fundamental democratic right to vote more frequently than once in five years. The public concern over the scandal of parliamentary expenses surely provides support for this view. Moreover, many recent Parliaments have shown that a four year period is well capable of enabling a government to carry through a programme of legislative and administrative reform. More detailed arguments, including comparative material, could be made in support of a four-year term. In summary, I consider that the change to a fixed-term system should not be made unless at the same time the life of Parliament is reduced to four years.<sup>21</sup>

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18 HC Deb 21 February 1911 c1749

19 See also Professor Robert Hazell, Ev 23-44, Summary, Professor Dawn Oliver, Ev 22-23, para 3, Hansard Society, para 22, Scottish Youth Parliament, para 3.7.

20 Ev 45-48, para 20

21 Ev 48-50, para 7

Professor Blackburn also told us in oral evidence that there was an “irony”<sup>22</sup> to a Government committed to making the country’s political systems more accountable<sup>23</sup> proposing five-year parliamentary terms, in that they would make general elections—in his words, “for most people, the one occasion when they participate in the political process”<sup>24</sup>—less frequent than they are now.

19. There would, however, be a practical consequence of allowing this Parliament to run for five years, but to limit future Parliaments to four years, in that it would put general elections in lock-step with four-yearly elections to the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly, which are also scheduled for 7 May 2015. (Professor Hazell suggests that this could be avoided by holding general elections in October.<sup>25</sup>) It would also be likely to require a re-assessment of the five-year rolling programme of parliamentary constituency boundary reviews being proposed in the Government’s Parliamentary Voting System and Constituencies Bill.

**20. In the limited period we have had to receive evidence, most of the opinion suggests that it would be better for general elections to be held every four years, rather than every five. This is an important point, but not one that we would wish to see obstruct the passage of the Bill through the House. We would, however, expect the Government to explain more fully to the House the advantages and disadvantages of four and five-year terms, and how it weighed these up in reaching its decision on the length of the fixed term.**

**21. In any case, there is likely to be pressure to re-examine the timescales for elections across the country—including general elections—in the not too distant future.** The Bill as it stands would produce an occasional coincidence between general elections and other elections held in different parts of the United Kingdom. There is an argument to be had about whether different elections should be held together or separately: the oddity of this Bill is that it would produce simultaneous elections sometimes but not always, with no sense of a desired overarching outcome. Elections to a reformed House of Lords may well prove a further complicating element, and one that the Bill before the House is unable to take into account.

## 3 Clause 2: Premature ending of a fixed term

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22. Our expectation and that of the Government is that a fixed term should in all normal circumstances be exactly that. However, provision has to be made for the extraordinary circumstances which might require an early election, particularly where there is broad cross-party agreement that an early election is required, or where there is no viable

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22 Q 65

23 The Coalition: Our programme for government, p 26

24 Q 66

25 Ev 23-44, para 4.2

government that can command the confidence of the House. We have heard some concern about the Bill's provisions in this area.

23. The Bill provides that an early election would only be held if either:

- a) at least two thirds of the Members of the House so agreed, or
- b) the Government having lost a vote of no confidence in the House, within 14 days no Government had been formed that had shown that it could command the House's confidence.

24. The aim of these proposals is laudable. But neither of these mechanisms is without its critics, as we explain below.

### Impact on parliamentary privilege

25. The mechanism for triggering an early general election would be a Speaker's certificate, attesting to the fact that the events above have taken place. The use of a Speaker's certificate is not entirely unprecedented. The Parliament Acts provide for the Speaker to certify if a Bill meets the criteria set down in those Acts which would allow for it to become law without the agreement of the House of Lords.

26. In the case of this Bill, the certificate would be "conclusive for all purposes", and thus, in theory at least, not subject to challenge in court. The Clerk of the House has told us, however, that the courts have a duty to interpret statute, and that the Bill could lead to scrutiny by the courts of any Speaker's certificate and the parliamentary proceedings underlying them:

embodying these internal proceedings in statute radically changes their status since, by reason of being embodied in statute law, they become questions which are ultimately to be determined by the judiciary rather than by members of the legislature accountable to the electorate whom they serve.

The history of the courts' involvement in interpreting the meaning of words in the Bill of Rights and the implications of human rights aspects of European law, provide no basis for concluding that the courts will keep out of this new statutory territory. Indeed, it is the purpose of the courts to interpret and apply the law to individual cases.<sup>26</sup>

27. One way in which the courts might become involved would be if a case was brought claiming that the provisions in the Bill had not been followed, and that a purported Speaker's certificate was not in fact a properly constituted certificate at all.

28. The Clerk's concern is thus that the Bill would infringe the House's exclusive cognizance over its own proceedings: the House's right to decide for itself how its business should be done, and the concomitant principle that the courts will not interfere in this business. How valid this theory of 'exclusive cognizance' is in an age when the Executive dominates Parliament is not a debate for this Report. The Clerk reminded us in the context

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26 Ev 19-22, paras 17-18

of clause 2 of the Bill of the view of Committees of both Houses in past Parliaments that “piecemeal dabbling with privilege” was to be avoided, and said that it seemed “odd” to him “that a significant privilege matter” was being dealt with before publication of the Government’s draft bill on parliamentary privilege, which is scheduled for pre-legislative scrutiny in due course.<sup>27</sup>

29. We would very much wish to have had time to have put the concerns of the Clerk of the House of Commons direct to the Deputy Prime Minister in an evidence session. It appears that the Clerk was consulted by the Government in advance of the publication of the Bill but there is nothing to indicate that the Government has responded to these concerns. **The Government needs to respond to the concerns expressed by the Clerk of the House of Commons about the potential impact of clause 2 of the Bill on parliamentary privilege.**

30. Other witnesses who have commented on justiciability do not share the Clerk’s concerns, although the issue was not central to their evidence. Professor Hazell asks “whether there could be recourse to the courts to enforce the requirements of a fixed term law”, and answers his own question by stating that “the probability is that they would consider the issue to be non-justiciable; an obligation to be enforced in the political but not the legal sphere”. He claims that “the international experience demonstrates that courts are unwilling to engage with such politically sensitive decisions, and a similar response is to be expected from the British courts.”<sup>28</sup> Professor Blackburn finds likewise that the Bill “has been technically well-drafted by the Cabinet Office’s parliamentary counsel, particularly in avoiding judicial review of its provisions on early elections by way of Speaker’s certificates”.<sup>29</sup>

31. Failing to embed these provisions in statute for fear of unprecedented judicial activism could open the House to another danger: Executive interference. One of the benefits to placing on a statutory basis the requirement for certain parliamentary proceedings to have been fulfilled for an early election to take place, rather than leaving them for the House to determine itself, is that it would take further primary legislation to alter or remove this requirement. For this further bill to be enacted would require a number of days of debate in public in both Houses of Parliament, which might well dissuade a Prime Minister from introducing such a Bill should he or she be so tempted.

32. In his evidence, the Clerk has proposed an alternative route “by which the purpose of the Bill on fixed-term Parliaments could be achieved which would avoid the constitutional innovation of moving such matters into the judicial province and so leave undisturbed the House’s mastery of its own proceedings”:

It would be possible to avoid these privilege problems if the provisions of the Bill relating to the calling of early parliamentary general elections were instead to be written into the Standing Orders of the House, thereby preventing them from being questioned or interfered with outside Parliament. Moreover, a Standing Order

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27 Qq 19, 27

28 Ev 23-44, para 9.2

29 Ev 45-48, para 28

regulating the matters in the Bill could provide for its staying in effect unless repealed by a specified majority.<sup>30</sup>

This alternative has the advantage over statute that it could require a super-majority to undo the requirement: a simple government majority in one or both Houses would not be enough. It would, however, allow the House of Commons alone to alter or remove the requirement by a single vote, with potentially little public or parliamentary scrutiny. Governments have a long record of using their majority in the House to set aside Standing Orders at will. It would be a pity if the Executive gave up the power to call an election at a time of its own choosing only for the legislature to hand it back by a simple suspension of Standing Orders to that same end.

33. We of course accept the Clerk's principal point that **the purpose of the Bill needs to be achieved without inviting the courts to question aspects of the House's own procedures or the actions of the Speaker, except where this is absolutely unavoidable and clearly justifiable.**

34. **Although a number of our witnesses believe that the current drafting of the Bill is already adequate to avoid unwarranted judicial challenge of this kind, the House would be wise to consider whether the approach suggested by the Clerk of the House could be made to work in practice without significantly altering or diluting the purpose of the Bill or opening the door to abuse by Government. His suggested approach is that those parts of the Government's proposals relating to proceedings in the House could be transplanted from the Bill to the House's Standing Orders, and entrenched in Standing Orders so that they could not be overturned by a simple majority.**

### Alternatives to a super-majority

35. The novelty of a parliamentary super-majority is not the only way in which to ensure that a Prime Minister is unable to call a general election at a time solely of his choosing. Indeed, it would not stop a Prime Minister with a very large majority from doing precisely that.

36. This part of the Report describes two alternatives to the super-majority, both of which would avoid the problem identified by the Clerk of the House. One, proposed by Professor Blackburn among others, would limit the advantage to a serving Prime Minister of calling an early general election. The other would seek to ensure that an early election could take place only with cross-party agreement.

### *Keeping the clock ticking following an early general election*

37. As currently drafted, the Bill would reset the clock if an early general election was called, so that the new Parliament would last for a full four to five year term. Professor Blackburn suggests that the House of Commons should be able to vote for an early general election by a simple majority, but that:

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30 Ev.19-22, para 28

To ensure a governing majority does not abuse its ability to push through an early election resolution for no good reason other than being a favourable time to itself to go to the polls, the duration of the Parliament following the early election might be equivalent to the remainder of the term of the Parliament in which the resolution takes place.<sup>31</sup>

So, on a five-year parliamentary cycle, an early general election called two years into a Parliament would be followed by an ordinary general election three years later. Professor Dawn Oliver suggests something very similar.<sup>32</sup>

38. This proposal has the advantages of simplicity and regularity, and is consistent with the rules on the timing of elections to the Scottish Parliament. Professor Hazell points out that it would be “a strong disincentive to a government inclined to call an early election”, but that “it may also serve as a disincentive to opposition parties tempted to force a mid term dissolution, if the only prize is the remainder of the term”.<sup>33</sup> It would also avoid the cycle of parliamentary constituency boundary reviews becoming decoupled from that of general elections, which would arise under the Government’s current proposals if an early general election were held.

**39. We recommend that the Government and the House should consider whether a Parliament following an early general election should last for only as long as the remainder of the term of the previous Parliament, and whether such a provision would make a super-majority for a dissolution unnecessary.**

### ***Ensuring cross-party agreement to an early general election***

40. Another way of avoiding a general election being held at a particular moment for partisan reasons would be to require that an election could be called only if the leaders of the two or three largest parties in the House believed that the time was right to go to the polls, and the House agreed to a motion to this effect by a simple majority. A provision in these terms would be in keeping with other statutory provision,<sup>34</sup> and would not require the complication of a Speaker’s certificate.

**41. The problem that some have identified with the existing situation is that general elections can be timed to partisan advantage. There is a simple and obvious solution to this problem, which deserves to be explored: the Bill could provide that the only situation in which an early general election could be called was where there was cross-party agreement that this was desirable. This could be achieved by amending clause 2 of the Bill to provide that an early general election should take place only where the House agreed by a simple majority to a motion in the name of the Prime Minister to this effect, tabled with the agreement of the Leader of the Opposition, and possibly also with the agreement of the leader of the third largest party in the House.**

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31 Ev 45-48, para 27 (d)

32 Ev 22-23, para 4

33 Ev 23-44, para 7.7

34 For example, section 1 (1) of the National Audit Act 1983; paragraph 2 (8) of Schedule 1 to the Constitutional Reform and Governance Act 2010



## Motions of no confidence

42. **If the Bill was to be amended in this way, it might avoid the need for separate provision for an early general election where no government could be formed that commanded the confidence of the House.** In such a circumstance, it seems improbable to us that the leaders of the main parties would not ask the House to vote for an early general election, and unlikely that the House would not agree.

43. **This would be a considerable advantage, because the consequences of the current provisions for confidence motions contained in clause 2 (2) of the Bill are uncertain.**

44. A government can lose the confidence of the House in a number of ways: the Queen's speech could be voted down, or a request for supply (Government spending), or a key piece of legislation. But, on one reading of the clause at least, only if the House resolved specifically that it had no confidence in the Government would there be the possibility of an early general election. This could play into the hands of an Opposition wanting to force a minority government to resign without wanting to face the possibility of an early general election: it could simply make the Government's life impossible while avoiding tabling an explicit motion of no confidence.

45. Professor Hazell suggests an alternative scenario:

At first blush this appears to contemplate only formal confidence motions in the classic form. But the Bill goes on to provide that the Speaker's certificate is conclusive for all purposes. So the Speaker would have discretion to certify any of the motions listed above as confidence motions. If the government or the opposition have declared an issue to be one of confidence, the Speaker is likely to indicate at the beginning of the debate that the motion is a confidence motion, so that all MPs know what is at stake.<sup>35</sup>

It is hard to see, however, how a Speaker could certify that the House had "passed a motion of no confidence in Her Majesty's Government", as the Bill requires, if it had voted down a motion designated as a matter of confidence by the Government, even a motion 'That this House has confidence in Her Majesty's Government', but not in fact "passed" a motion at all. **We recommend that there should be clarity, before the Bill enters its remaining stages in the House, as to the circumstances in which a government losing the confidence of the House could trigger an early general election, and those circumstances, if any, in which it could not.**

46. There would also be nothing to stop a government from subverting the purpose of the Bill by tabling and voting for a motion of no confidence in itself in order to trigger an early general election without the need for a super-majority. Professor Oliver has proposed that a motion of no confidence should potentially trigger an early general election only if tabled in the names of members of an Opposition party.<sup>36</sup>

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<sup>35</sup> Ev 23-44, para 7.3

<sup>36</sup> Ev 22-23



47. The Bill leaves certain other constitutional questions unanswered. Let us assume that the House passes a motion of no confidence, and the Government resigns. The monarch asks the Leader of the Opposition to form a new government, and a week later the House votes against a motion expressing confidence in this new government. What happens next? Does the monarch ask a third person to seek to form a government? Who, crucially, is the Prime Minister who will recommend to the monarch under Clause 2 (6) of the Bill what the polling day should be for an early general election if there is no government that can command the confidence of the House? These questions may seem hypothetical, but they could become relevant at a moment of political crisis.

48. Finally, the requirement that the House would need to show that it had confidence in any alternative government within fourteen days to avoid an early general election could be made impossible if the Government ensured that the House was adjourned or prorogued for any substantial length of time. The problem associated with an adjournment could be avoided if the Speaker had the power to recall the House, without the need for this to be at the Government's initiative.<sup>37</sup> The retention of the Royal Prerogative to prorogue Parliament could potentially allow an incumbent Prime Minister to force an early general election and frustrate the formation of a rival government following the loss of a motion of no confidence.

49. It also seems to us peculiar that the House would need to express confidence in a government in this particular set of circumstances, but not in any other: for example, when a minority government had been formed immediately after a general election, or when a Prime Minister had resigned and been replaced mid-term. Professor Blackburn has made a similar point, and suggested that “the logic of this proposition is likely to gather momentum”.<sup>38</sup> **We will examine as part of a future inquiry the possibility of the House formally endorsing a new government, after a general election and in other circumstances.**

50. While the provisions in the Bill for no confidence motions are problematic, there is one important area in which they are entirely lacking. The Deputy Prime Minister told the House in July 2010 that the Bill would “strengthen the power of this House to throw out a Government through a motion of no confidence”.<sup>39</sup> The Bill does not seek to achieve this, however, but leaves the requirement that a Government should resign if it loses the confidence of the House to unwritten convention. **We recommend that the Government should explain why the Bill contains no formal provision requiring a government to resign if it loses the confidence of the House.**

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37 See House of Commons Standing Order No. 13.

38 Ev 45-48, para 35

39 HC Deb, 5 July 2010, c32

## 4 Conclusion

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51. We acknowledge the Coalition's proposal that the current and future Prime Ministers should no longer have the power to call general elections at a time of their choosing, that general elections should be held to a fixed schedule, and that departures from that schedule should be rare, and decided by the House, not the Prime Minister. We regret, however, the rushed timetable that the Government has unnecessarily adopted for the Bill, and the incremental and piecemeal approach to constitutional change that the Bill seems to represent. We trust that the recommendations made in this Report will provide a context for the detailed examination of the Bill by the House at committee stage, if it decides to give the Bill a second reading.

# Conclusions and recommendations

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## Principle and Process

1. It is questionable whether a Prime Minister should be able to use his position in government to give him and his party an electoral advantage by choosing to hold the next general election to a schedule that best suits him. We therefore acknowledge the principle behind the Fixed-term Parliaments Bill. (Paragraph 1)
2. We expect to consider the prerogative powers and Executive power more generally in the course of our scrutiny of wider constitutional issues. (Paragraph 3)
3. While we understand the political impetus for making swift progress in this area, bills of such legal and constitutional sensitivity should be published in draft for full pre-legislative scrutiny, rather than proceeded with in haste. We intend to inquire very soon, in co-operation with the Procedure Committee if possible, into how proper pre-legislative scrutiny of such Bills can best be ensured in future, whether through the House's Standing Orders or otherwise. (Paragraph 7)

## The length of the fixed-term

4. The current five-year maximum term was introduced with the expectation that it would probably amount in practice to a four-year term. (Paragraph 11)
5. Precedent gives no clear answer as to whether Parliaments should last four years or five. (Paragraph 13)
6. In the limited period we have had to receive evidence, most of the opinion suggests that it would be better for general elections to be held every four years, rather than every five. This is an important point, but not one that we would wish to see obstruct the passage of the Bill through the House. We would, however, expect the Government to explain more fully to the House the advantages and disadvantages of four and five-year terms, and how it weighed these up in reaching its decision on the length of the fixed term. (Paragraph 20)
7. In any case, there is likely to be pressure to re-examine the timescales for elections across the country—including general elections—in the not too distant future. (Paragraph 21)

## Premature ending of a fixed term

8. The Government needs to respond to the concerns expressed by the Clerk of the House of Commons about the potential impact of clause 2 of the Bill on parliamentary privilege. (Paragraph 29)
9. The purpose of the Bill needs to be achieved without inviting the courts to question aspects of the House's own procedures or the actions of the Speaker, except where this is absolutely unavoidable and clearly justifiable. (Paragraph 33)

10. Although a number of our witnesses believe that the current drafting of the Bill is already adequate to avoid unwarranted judicial challenge of this kind, the House would be wise to consider whether the approach suggested by the Clerk of the House could be made to work in practice without significantly altering or diluting the purpose of the Bill or opening the door to abuse by Government. His suggested approach is that those parts of the Government's proposals relating to proceedings in the House could be transplanted from the Bill to the House's Standing Orders, and entrenched in Standing Orders so that they could not be overturned by a simple majority. (Paragraph 34)
11. We recommend that the Government and the House should consider whether a Parliament following an early general election should last for only as long as the remainder of the term of the previous Parliament, and whether such a provision would make a super-majority for a dissolution unnecessary. (Paragraph 39)
12. The problem that some have identified with the existing situation is that general elections can be timed to partisan advantage. There is a simple and obvious solution to this problem, which deserves to be explored: the Bill could provide that the only situation in which an early general election could be called was where there was cross-party agreement that this was desirable. This could be achieved by amending clause 2 of the Bill to provide that an early general election should take place only where the House agreed by a simple majority to a motion in the name of the Prime Minister to this effect, tabled with the agreement of the Leader of the Opposition, and possibly also with the agreement of the leader of the third largest party in the House. (Paragraph 41)
13. If the Bill was to be amended in this way, it might avoid the need for separate provision for an early general election where no government could be formed that commanded the confidence of the House. This would be a considerable advantage, because the consequences of the current provisions for confidence motions contained in clause 2 (2) of the Bill are uncertain. (Paragraphs 42-43)
14. We recommend that there should be clarity, before the Bill enters its remaining stages in the House, as to the circumstances in which a government losing the confidence of the House could trigger an early general election, and those circumstances, if any, in which it could not. (Paragraph 45)
15. We will examine as part of a future inquiry the possibility of the House formally endorsing a new government, after a general election and in other circumstances. (Paragraph 49)
16. We recommend that the Government should explain why the Bill contains no formal provision requiring a government to resign if it loses the confidence of the House. (Paragraph 50)

## Conclusion

17. We acknowledge the Coalition's proposal that the current and future Prime Ministers should no longer have the power to call general elections at a time of their choosing, that general elections should be held to a fixed schedule, and that

departures from that schedule should be rare, and decided by the House, not the Prime Minister. We regret, however, the rushed timetable that the Government has unnecessarily adopted for the Bill, and the incremental and piecemeal approach to constitutional change that the Bill seems to represent. We trust that the recommendations made in this Report will provide a context for the detailed examination of the Bill by the House at committee stage, if it decides to give the Bill a second reading. (Paragraph 51)

# Formal Minutes

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**Thursday 9 September 2010**

Members present:

Mr Graham Allen, in the Chair

Mr Christopher Chope  
Sheila Gilmore  
Simon Hart  
Tristram Hunt

Mrs Eleanor Laing  
Catherine McKinnell  
Mr Andrew Turner  
Stephen Williams

Draft Report (*Fixed-term Parliaments Bill*), proposed by the Chair, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 51 read and agreed to.

Summary agreed to.

*Resolved*, That the Report be the Second Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House.

Written evidence was ordered to be reported to the House for printing with the Report, together with written evidence reported and ordered to be published on 7 September.

[Adjourned till Tuesday 14 September at 9.45 am]

## Witnesses

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**Tuesday 7 September 2010**

*Page*

**Dr Malcolm Jack**, Clerk of the House of Commons

Ev 1

**Professor Robert Blackburn, PhD, LLd**, Professor of Constitutional Law,  
King's College London

Ev 10

## List of written evidence

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1	Dr Malcolm Jack, Clerk of the House of Commons (FTPB01)	Ev 19
2	Professor Dawn Oliver, University College London (FTPB02)	Ev 22
3	Professor Robert Hazell, University College London (FTPB03)	Ev 23
4	Professor Robert Blackburn, King's College London (FTPB04)	Ev 45
5	Professor Anthony Bradley (FTPB05)	Ev 48
6	Professor Justin Fisher, Brunel University (FTPB06)	Ev 50

# List of Reports from the Committee during the current Parliament

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The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

## Session 2010-11

First Report	Parliamentary Voting System and Constituencies Bill	HC 422
Second Report	Fixed-term Parliaments Bill	HC 436



# Oral evidence

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## Taken before the Political and Constitutional Reform Committee on Tuesday 7 September 2010

Members present:

Mr Graham Allen (Chair)

Nick Boles  
Mr Christopher Chope  
Sheila Gilmore  
Simon Hart  
Tristram Hunt

Mrs Eleanor Laing  
Catherine McKinnell  
Sir Peter Soulsby  
Mr Andrew Turner  
Stephen Williams

*Witness:* **Dr Malcolm Jack**, Clerk of the House of Commons, gave evidence.

**Q1 Chair:** Malcolm, welcome. I am sure that everyone—if they do not know you by name—knows you as a figure who flits around the corridor doing good deeds and spreading magic dust on the proceedings of the House of Commons. You are very welcome. Thank you for the paper you have prepared for us.

I am not clear from your evidence whether you think we have a separation of powers in this country or a unitary system where the Government control Parliament. That seems fundamental to some of the things that you are proposing in your document. Where do you stand on that issue?

**Dr Jack:** First of all, Chairman, I thank you very much for your welcome. I am very happy to be before the Committee in its early days. I am sure that you will do important scrutiny work for the House—and, indeed, already have done.

I think that is a broad and difficult question. We have partial separation. I have always thought the term [odq]separation of powers[cdq] is rather misleading. As you know, when Montesquieu used that term in the 18th century, he was thinking of something probably quite inaccurate in our context. What we do have is a separation of the activities of the Houses—of both Houses of Parliament—and the judiciary, and that is the core of the separation that I am talking about in the paper.

**Q2 Chair:** Do you believe that, where Government may abuse their power, there is no role at all for the judiciary as a separate institution to blow the whistle, if Parliament is the creature of Government and is unable to do so itself?

**Dr Jack:** There could be such circumstances if we had a written constitution, which, I think, is what you are hinting at. I think it is a matter for Parliament to sort out its affairs with Government, without the interference of the judiciary. I don't think judges should be involved in political decisions taken in the House.

**Q3 Chair:** On the general principle of five years or four years, many of the witnesses whose evidence we have read indicate that, although we have a five-year term at the moment—there have been two recent examples—it is quite rare to go the full length. If we had four-year Parliaments with provisions to have early general elections, which you seem to be favouring, wouldn't you actually have not four-year Parliaments but often three or possibly two and a half year or even shorter Parliaments? Aren't there, therefore, some strong political consequences, in terms of a Government being able to implement their programme, things that require a length of time not coming to fruition and the media playing an ever larger role in a permanent campaigning environment for Members of Parliament? Isn't it a highly political question that you're delving into?

**Dr Jack:** Yes, I think it is. It gives me the opportunity to say to the Committee that I am not challenging the principle of fixed-term Parliaments. As Clerk of the House, it would be quite wrong for me to do that. The main purpose of the Bill is to achieve fixed-term Parliaments. What I am saying really is that the method by which it does so—particularly in clause 2, which I am sure we shall come to—in a sense invades the privileges of the House.

In answer to your question, I think you are absolutely right. Whatever fixed-term we have, the natural processes will tend to make things come before that time. I think I am right in saying that there are one or two Parliaments, or countries or other constitutions, where there is a fixed-term Parliament and also a minimum term within the fixed-term before Parliament can be dissolved. I think the South Africans have that in their constitution. That could be one mechanism. But I reiterate that I am not arguing either for or against fixed-term Parliaments as such.

**Q4 Chair:** If I can press you further on that, I think you are arguing for both. You are happy to accept that the Government have a right to put forward a proposal for a fixed-term Parliament if they wish, but you are inserting a large number of caveats that actually mean that nothing changes in the system. A

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7 September 2010 Dr Malcolm Jack

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Prime Minister could promote a vote of no confidence and a number of other issues, and call an election when he liked, whereas the Prime Minister—to his great credit—has for the first time given away a prerogative power. If we are to have lots of caveats about when that is suspended, we are not going to advance very much at all. We're having our cake and eating it, aren't we?

*Dr Jack:* Yes, I think it will depend on how that is done. Perhaps as we discuss the matter further, what you are saying could be achieved through the Standing Orders of the House. These matters could still be kept within the House and restricted in the way that you're suggesting.

**Q5 Tristram Hunt:** Just to pursue that issue, could you lay out the concerns that you have about the threat to exclusive cognisance from the Bill, and particularly the threat, as you see it, of opening up the House to judicial review or to legal challenges?

*Dr Jack:* Yes. First of all, may I say that the term [odq]exclusive cognisance[cdq] doesn't roll off the tongue easily? It is pretty archaic. I think Members will have noticed that in my memorandum I have tried to use the term [odq]jurisdiction[cdq], which is a little clearer, rather than [odq]cognisance[cdq]. We are talking about the exclusive right to settle the way both Houses do their business—to put it crudely. By the way, this is about both Houses, although we are concentrating on the Commons in these matters.

There are very experienced Chairs on the Committee who have chaired various Committees of the House, and they know that it is the duty of the Chair to enforce the rules of the House as laid down in the Standing Orders. Of course, in the House itself that is entrusted to the Speaker and his Deputies. They maintain those rules of order. We are really talking about the way that the House controls its internal affairs. The most obvious modern example is the Standing Orders, because the House has now codified the way it deals with its procedures and practices in the Standing Orders. They are not exclusive of course; there is still precedent and practice.

The Standing Orders are the way the House does its business and entrusts, as I said, the Speaker or the Chair of Committees, whoever it is, to interpret them without interference from anyone; no one is able to question the Speaker's rulings outside this place. My belief is that clause 2 of the Bill enables some questioning of those decisions in the courts. It may be that we'll come on to that in greater detail. I hope that the Committee will see that is why I say I am not disputing the policy objectives of the Bill—I have tried to put forward a way in which I think this can be done within the jurisdiction of the House.

**Q6 Tristram Hunt:** And your particular concern is the move from what happened to how it happens—the process by which a Parliament is dissolved?

*Dr Jack:* Yes, that's right, or the two processes in clause 2.

**Q7 Tristram Hunt:** There's a real concern—you point to the German example—about this being challenged in the court, an election being stalled and consequences from that.

*Dr Jack:* Yes, that's right; it's that sort of thing. If I can just pluck out one example—no doubt we will come to others in due course—I have one or two little precedents that might interest the Committee. In the matter, for example, of section 2(3), it says that [odq]A certificate under this section is conclusive for all purposes[cdq]—that is, the Speaker certifies that one of these two routes has been used. I'm sure that legal members of the Committee will immediately realise that those words are challengeable if the procedures have not been complied with under section 2, so that the piece of paper the Speaker might sign might be regarded as invalid—not a certificate under section 2 of the Act. It is that sort of question that could arise in the courts.

**Q8 Mr Chope:** These are very fundamental issues. I remember many years ago when I first served on the Procedure Committee, Enoch Powell said that in the absence of a written constitution, the procedures of the House are effectively the constitution of our country. Having regard to that, can you tell us to what extent you have had consultation with the Government about the contents of the Bill, which it seems to many of us is being rushed through? It hasn't been the subject of widespread consultation. Obviously, you, as the Clerk of the House, presented this memorandum to us, which seems to raise quite significant issues. I wonder whether these are issues that you've had the chance to deal with with Government Ministers informally beforehand, and whether they basically rejected your line of argument or whether these are things that don't seem to have been thought about until now.

*Dr Jack:* I think the short answer, Mr Chope, is that my responsibility is to the House, not to the Government. The Clerk of the House and all the staff here serve the House and not the Government. As I said, it is entirely up to the Government what proposals they bring to the House. It is my duty to advise the House on privilege aspects, as I see it, of those matters. There is some informal consultation, but I don't necessarily think that it is the duty of Government to consult me before introducing legislation of this sort. I think it is a matter for them to consult the House. Whether the House should deal with a Bill like this without having a draft Bill and so on is of course a matter that has been brought up by previous witnesses of yours, and has been discussed publicly.

**Q9 Mr Chope:** Can I press you on that? You say that it's not the duty of the Government to consult. I wasn't suggesting it was. I was just asking whether the Government had consulted you, because you are

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7 September 2010 Dr Malcolm Jack

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part of the House and there is no formal machinery established whereby the Government can consult the House, particularly since the Leader of the House is a member of the Government. I wonder whether you could be a little bit more forthcoming.

**Dr Jack:** Well, the answer is yes. There was informal consultation.

**Q10 Stephen Williams:** I would like to ask the Clerk some questions about the practicalities about the issue of certificates triggering early Dissolutions. As I understand it, there needs to be a 66% or two-thirds majority of the theoretical full membership of the House, which is 650. How will that be interpreted? Does the Bill allow for flexibility when we have a situation where four Members from Northern Ireland choose not to sit here? There may also be vacant seats through death or people being incapacitated in some other way. How can you reach the threshold needed? Is there going to be any sort of variability? Do you think there should be variability, because at the moment, you would need 433 MPs to vote in favour?

**Dr Jack:** Yes, I'm glad our arithmetic agrees. I did a quick calculation and reached that figure as well. I think the Bill talks about the number of seats in the House, including vacant seats, so there is a fixed number. However, I think your question raises a whole lot of problems of a practical nature. I will just pluck out one of them, which is very fresh because apparently there was a little difficulty last night about a Division in the House—whether certain Members were counted or not. I will pause there—I won't say any more about that. The Bill talks about a motion passed on a Division. There are experienced Members around the Committee table, and they will know that irregularities do occur in Divisions. In fact *Erskine May* has five pages on irregularities in Divisions. They range from mistakes in counting, to Tellers leaving the Lobbies before all Members have gone through—I believe this may have been the case last night. I can see from their expressions that Members have had this experience. There are also minor things, like the ringing of Division bells, and the locking of doors before Members have been able to get into the voting Lobbies. Then there are conventions of the House, which would pose other problems. Members are perfectly legitimately able to vote in both Lobbies—that is a practice of the House—in order to cancel out their votes. There is the whole business about nodding through sick Members who are on the precincts. Some of this may sound a bit dramatic, but I think we have to remember that at Dissolution a confidence motion could be a very dramatic occasion. The Government may be in a very tight political situation.

I mentioned that I thought that precedent would be of interest: I have brought one. I won't bore the Committee with too many precedents, but I couldn't resist this one. This is from 1974 and it's to do with the passage of the Trade Union and Labour

Relations Bill. I will read a very short extract from the *Journal* of that year. [odq]Mr Harold Lever, Member for Manchester Central, acquainted the House, That in the Divisions on Amendments Nos.to the Trade Union and Labour Relations Bill...he was recorded as having voted with the Noes, but he had to inform the House that he was not within the Precincts of the House at the time of those Divisions and that in consequence his vote ought not to have been so recorded.[cdq]

You might think, [odq]Well, so what?[cdq] But there was a [odq]so what[cdq] because the decision on those amendments had been made on casting votes by the Speaker<sup>1</sup>. There had been an equality of votes, and those amendments had been rejected by the Speaker on the principle that, as far as legislation is concerned, he should leave the Bill as it is, as it is decided by a majority. In this case, when Mr Lever came to the House and acquainted the House about his absence, the whole procedure was declared null and void, including the Third Reading of the Bill. The Bill had to be called back from the House of Lords and the whole process had to happen again. I don't think I need labour the point of what this would mean in terms of a no confidence vote.

**Q11 Stephen Williams:** Have you had to advise either the Speaker or the Deputy Prime Minister that the Standing Orders of the House may need to be changed—for instance, in terms of the timing of a Division? It always strikes me as odd that you have eight minutes precisely to get inside the voting Lobby, but you can take as long as you like to vote. I just wonder whether it's actually physically possible to get 433 Members through the doors of the Division Lobby within eight minutes, because quite often you're trying to get into the Lobby—people just don't get out of the way—and I just wonder what would happen if the doors were slammed and people were actually queuing to get in. It's a bit like not being allowed to vote at 10 o'clock.

**Dr Jack:** There have been disputes about the locking of the doors in the past, but I am sure that Committee members are much more experienced than I am in rushing at those doors. There are problems in large Divisions. But I think what I'm actually trying to say is that these problems are resolvable within the House, by the authority of the House, by the authority of the Speaker. If there are these problems, they are soluble. These sorts of problem would become justiciable under clause 2 of the Bill. Someone could argue that the vote of no confidence had not been passed according to the circumstances of the precedent that I have given you.

**Q12 Chair:** Dr Jack, forgive me for saying this, but it seems all your focus is on a premature Dissolution. Don't you see any advantages for someone in your position to promote the power of Parliament, given that there could be a five-year term? Have you looked, for example, at whether there could—on a

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<sup>1</sup> *Witnesses clarification:* In one case and the Deputy Speaker on another.

7 September 2010 Dr Malcolm Jack

five-year term—be much better scrutiny of legislation? There is a whole raft of issues—opportunities, for example, to look at other parts of prerogative powers, which in this instance the Prime Minister is seeking to give away. It seems that you are looking at how this would work if in effect the system carried on. Nominally we have a fixed-term Parliament, but let's just examine the nuts and bolts around a premature Dissolution. Have you a view of what opportunities exist for Parliament if there were to be a serious five-year term, which would enable Parliament to do a large number of other things?

**Dr Jack:** As I said, Chairman, I don't have a view as Clerk of the House. I shouldn't, really, because this is a matter for the House to determine, and the Bill is before the House; but yes, I can certainly see advantages in a fixed-term Parliament, if that is what you are asking me.

**Q13 Chair:** Would you consider doing some work in the Clerks Department to prepare for that eventuality?

**Dr Jack:** Of course, Chairman. If you ask us that, we will certainly do it. Of course.

**Q14 Chair:** There are things related to Prorogation of Parliament and royal prerogative powers. We will now all enjoy a five-year term, which gives us some consistency and some ability to pursue issues in the longer term—sustainable long-term inquiries rather than fly by night stuff just in case there is going to be an early election. Are there not lots of opportunities, and could we perhaps ask you through your good offices, to explore some of those and actually let Members of Parliament know some of the advantages that would accrue to Parliament in this rather fundamental change of the Executive-legislative relationship?

**Dr Jack:** Of course, Chairman. Certainly. We can do that.

**Chair:** That would be very helpful.

**Q15 Mrs Laing:** I was going to ask, generally, about the confusion or clarity that might arise during the 14-day period if there was going to be a Dissolution. It just occurred to me, when you raised the issue of the confusion in the Lobbies last night. That is an immediate example. Apparently, a Division bell did not ring and lots of people came running in for the third Division. I have no idea what the result was but we know, within the last 24 hours, that things can go wrong and you do not always have an immediate and definite result if it's likely to be close. You raised the issue of the fact that it is a Member's right to vote in both Lobbies. I ask this question to flag up the possibility of there being utter confusion, because in the Bill, as I understand it, there is provision for a certain percentage—we are talking here about percentages. In the House of Commons we are used to talking about there being either more ayes than noes, or *vice versa*—that's it. It is a simple 50% of

those voting. There are either more or not more and that part is clear. But when you have a percentage, when you have a proportion, it has to be a proportion of a certain number. Now, is it possible that there might be total confusion if some Members were to vote twice, as you just said is their right? Then the number of votes cast in the House of Commons could very easily be far more than the number of Members present to vote. In which case, would that percentage, as expressed in the Bill, be a percentage of the number of Members of Parliament currently sitting in the House, or would it be a percentage of the votes cast on that particular occasion?

**Dr Jack:** On that matter I think the Bill is pretty clear. It says the [odq]number equal to...two thirds of the number of seats of the House[cdq], so it doesn't matter how many people vote or don't vote in both lobbies.

**Mrs Laing:** Thank you for that answer. I merely ask the question to put it on the record. I put it to you and the world in general that it does matter, because supposing 20 Members voted twice then that would confuse the numbers. But I merely make that point to show that if such a thing were to occur, this Committee thought of it first.

**Dr Jack:** Very important.

**Q16 Mrs Laing:** Of course. That brings me on the real issue. The example I have just given may or may not lead to confusion. My real concern is the possible lack of clarity during the 14-day period after a vote of confidence. I suggest that it would be bad for Government, and it would be bad for the country, if there was no clarity about who was actually in government. I wondered if you had anything to say about that part of the Bill and the confusion or clarity that might arise.

**Dr Jack:** Obviously it is an innovation in our terms, because I think, as all Members recognise, in Westminster there is a sort of impatience—if I can put it that way—to get things decided and done. On the other hand, periods of this sort are written into the constitutions of many other countries—I can see the Chair nodding—and this is perhaps something we have to get used to. It is certainly a change in our culture, if I can put it that way, that there is a longer period than normal for such a matter to be resolved.

**Q17 Tristram Hunt:** I was going to pursue the nature of no confidence motions, and whether you are also concerned about a lack of clarity in the Bill as to what would constitute a no confidence motion. There are a number of examples of previous Bills suddenly becoming confidence motions and then Dissolutions. Could you explore those ideas?

**Dr Jack:** Yes, I think there could be areas of difficulty on this matter. One of them where I think there would not be a difficulty is the straightforward motion that this House has no confidence in Her

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**7 September 2010 Dr Malcolm Jack**

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Majesty's Government. I think it must be pretty clear that that is a confidence motion, however clever a forensic examination of the words might be. So there is one category, I think, that is pretty clear. The Speaker in considering these matters would have no difficulty with that motion.

I think members know that that is not the only kind of no confidence motion. The practice about no confidence is really again, Chair, echoing a little of what you said at the beginning, a matter for the Government; the Government decide what is confidence and what is not. The Second Reading defeat of a major piece of legislation introduced under manifesto, I think, would probably be regarded as a confidence matter, and possibly the defeat of a Finance Bill implementing a Budget. In the past, these things have been defined as confidence motions: the Second Reading of the European Communities Bill was defined as a confidence matter. Going back in history there have been quite obscure things that Governments have decided should be matters of confidence. I came across an Adjournment motion that was regarded as a matter of confidence by the Government.

I think that what is a confidence motion—other than the very straightforward one, [odq]There is no confidence in Her Majesty's Government[cdq]—is an ambiguous matter. I am being a bit myopic, Chair, and I know that you are thinking that, about clause 2. Those are matters within the House that are easily soluble. The Speaker would simply ask the Government, [odq]Is this a confidence motion or isn't it?[cdq], or the Government would announce it. When the matter is before the court, this will lead to arguments.

**Q18 Chair:** Just on a point of clarification. So, it would be a sensible way forward to specify a form of words that constitutes a confidence motion?

**Dr Jack:** Yes.

**Chair:** And nothing else—

**Dr Jack:** And nothing else, yes.

**Chair:** It isn't, [odq]We think that might have been the sort of one we had the other day. [cdq] No, it's, [odq]It is in the Standing Orders. It is very clear. You must move it in the following terms and sustain the relevant majority.[cdq]

**Dr Jack:** Yes. What's happening here, I think, is that the provision of the Bill is, as it were, incorporating the convention without making that clear. It is talking about a no confidence motion, but it is not clear exactly what that means in terms of the convention. I have no doubt, of course, that the Government would prefer that to be the case. The Government would not wish to be pinned down too closely.

**Q19 Tristram Hunt:** You have outlined a number of problems with this hastily concocted Bill. Is part of the solution, as you see it at the end of your report, simply for elements to be written into the Standing Orders, to solve all these particular problems, to avoid the problems of judicial review and legal interference?

**Dr Jack:** Yes.

**Tristram Hunt:** So there is actually a way through; it's just not in this Bill.

**Dr Jack:** Yes, that is the case, Chair. That is really what I am saying. You have invited us to look into the advantages of fixed-term. It is clause 2 of the Bill; it is the way in which the Bill affects parliamentary privilege that concerns me now. I wonder if I can just slip in that the Government have announced that they intend to produce a draft parliamentary privileges Bill. It therefore seems odd to me that a significant privilege matter is being dealt with in advance of legislation that is coming to the House.

**Q20 Chair:** But in response to Mr Hunt's question, do you think it is sensible to have an explicit provision in the Standing Orders of the House?

**Dr Jack:** Yes. The Standing Orders of the House could deal with specific situations. That could indeed translate the requisite majority as well. I agree with Eleanor Laing that the notion of percentages, as opposed to numbers, is rather alien to us. But it could be written into the Standing Order that 433 Members must vote in the affirmative. As you know, Chairman, the closure motion—the motion for a closure in the House that brings debate to an end—needs a specified majority in the affirmative: you have to have 100 Members voting aye. So the notion of a qualifying number in the Standing Orders is nothing unusual. It could be put into the Standing Orders.

**Q21 Chair:** So it seems that we share a view around the table that it should be written. One view is that it could be in the Standing Orders, and another is that it could be in the statute. The advantage of a statute is that the Government must go through what they think is a very long public process of producing a Bill, whereas Standing Orders can be amended by a Government majority in the House, pretty much on a couple of days' notice. These things could therefore be changed despite the view of many parliamentarians, whereas if it is a statute, at least it's out there and we can see what they are up to.

**Dr Jack:** That is your view, Chair, yes. [Laughter.]

**Chair:** I'm sorry—there was a question mark at the end of the statement.

**Dr Jack:** I thought that you were putting a proposition to me.

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7 September 2010 Dr Malcolm Jack

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**Chair:** Is that your view?

**Dr Jack:** There are two ways, yes.

**Chair:** Do you share that view?

**Dr Jack:** My view is that these matters should be in the Standing Orders of the House, because they are matters of jurisdiction that should be kept within the House.

**Q22 Nick Boles:** I am a new boy so I don't know these things and just want to be clear on something. Can even a Standing Order that requires a super majority for a particular kind of motion be changed by a simple majority?

**Dr Jack:** Yes. Standing Orders are changed by a simple majority, although it is not inconceivable that the Standing Order could contain a provision for a majority to change the Standing Order. But that would be quite an innovation. These would be [odq]constitutional[cdq] Standing Orders that might require—

**Q23 Nick Boles:** On another related point coming from my ignorance, is there any way of linking? One of the advantages of putting this in legislation is that it will then, of course, have to go through the Lords as well. Is there any way of doing it by Standing Order that somehow makes it necessary to also go through some kind of Standing Order process in the Lords, so that you have a bicameral lock that the legislation provides?

**Dr Jack:** Not necessarily. These would be motions in the House, so there would not necessarily be a link. That is correct.

**Q24 Chair:** For colleagues around the table, particularly new ones, Standing Orders are regularly suspended by Government, probably on a daily basis. The 10 o'clock rule is just nodded through as a suspension, so what's in the Standing Orders, unlike the statute, can be altered very rapidly at the whim of someone like the Chief Whip. Is that correct?

**Dr Jack:** Yes, that is correct, Chair.

**Chair:** Back to my list—I am sorry to have left people waiting. Andrew, can I just get a few other people in, because they have been very patient, particularly with me?

**Q25 Catherine McKinnell:** This relates to the previous point that we discussed. We have highlighted a few issues that would need to be clarified within the Standing Orders in order to eliminate, as far as possible, potential judicial challenge to a decision. But this is not going to take away entirely the issue of handing over exclusive jurisdiction, presumably. We are just trying to whittle down the number of potential challenges that might be brought. I just wanted to ask you, because

I presume that you have considered it, about the potential consequences of a judicial challenge to a motion of no confidence of this sort, in order to put a bit of a picture, in practical terms, on what it might mean for the country, the Government and this House if these things were not clarified in the Standing Orders.

**Dr Jack:** Well, we would be in new waters, I think, if there was such a situation. As I said, there are countries where there are constitutional courts to consider these matters and that is where they would end up—in a Supreme Court. Incidentally, we have a Supreme Court but it has not yet got its teeth into this kind of thing. But, it would be a process by which a High Court would have to decide this. The other thing is that once you are enmeshed in the legal process, you know very well that there are different levels of courts, and different levels of courts come to different decisions. I think that I am right in what I am about to say, Chair, but there are other witnesses who would know more about these things. There was a dispute in the German constitutional court about this very matter, about whether there had been a Dissolution or not. I think that it was in 2005. So, there is a constitutional court that deals with that. But once in the courts, the process would be in their jurisdiction and not in ours, if I can put it that way.

**Q26 Catherine McKinnell:** And in the meantime, presumably, we are left in a suspended state.

**Dr Jack:** In the meantime, we would be left in suspension.

**Q27 Catherine McKinnell:** So, on that basis—apologies Chair, one more question—are you fundamentally opposed to the idea of handing over the rights to exclusive jurisdiction or, if it can be managed through the Standing Orders, is it something that you can see could be managed going forward as a workable solution?

**Dr Jack:** I think that it could be managed in the Standing Orders at the moment. If we move further along the line towards a written constitution—as I mentioned, we have a privileges Act coming along—then the whole matter can be reviewed in the round, and that is how it should be done. And I might just add, Chair, that last year you were asking me, when I came, how many Select Committees I had appeared before. There were a number of Joint Committees and Select Committees last year on various aspects of privilege, including very specific matters: bribery on the one hand and the working of the IPSA Bill on the other. Joint Committees and the Justice Select Committee of this House have said that a piecemeal dabbling with privilege is not a good idea. So, it is not my view, it is the view of Committees of both Houses. The Joint Committee on Parliamentary Privilege—a Committee of both Houses of Parliament—whose great tome, which was the last authoritative investigation into this matter, I have here, also advocated a comprehensive privileges Act

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7 September 2010 Dr Malcolm Jack

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and said that the dabbling with privilege in a piecemeal fashion had been very unsatisfactory in the past.

**Q28 Chair:** You are raising the bogey of judges coming in and walking down the corridors telling us all what to do, but don't you accept that there are some not only legitimate but essential areas and cases in which the judiciary must defend the rights of the citizen if they are threatened by an over-powerful Executive, even when that over-powerful Executive is in control of the House of Commons?

**Dr Jack:** Yes, I do, and we have a system of human rights protected in the European courts and so on, and they are extremely important, but they do not impinge upon proceedings in the House of Commons.

**Q29 Mr Chope:** It seems that what you are concerned about is that we are having a proposal to have a partly written constitution—an incremental written constitution—without actually officially saying that we are tearing up our unwritten constitution, which is, as I said earlier, comprised in the Standing Orders of the House. And, therefore, instead of going along the lines that the Government are saying, these ideas could be incorporated into the Standing Orders in our unwritten constitution. Did the Government ask you to draw up some draft Standing Orders to see whether those draft Standing Orders could meet this objective?

**Dr Jack:** The short answer is that they did not. I am not challenging the right of the Government to introduce whatever legislation they wish to introduce, but what you have said is indeed my view: these matters should be incorporated in the Standing Orders of the House—clause 2 only. There would still be fixed-term Parliaments.

**Q30 Mr Chope:** Do you agree with Professor Dawn Oliver that clause 2(2) would permit the incumbent Government to have a vote of no confidence motion passed by their own supporters to secure an early Dissolution?

**Dr Jack:** There must be ways in which any system could be used. Again, there are examples in the German context where it is alleged—or has been said—that the Government have manoeuvred Dissolutions in the German Parliament. Clearly, any system can be manipulated, but probably other witnesses might be better at answering on that subject.

**Q31 Mr Chope:** When it was challenged in Germany, it was because it had a written constitution. It was challenged in a constitutional court.

**Dr Jack:** Precisely.

**Q32 Mr Chope:** We could safeguard against that possibility by our Standing Orders. If it turned out that those Standing Orders were inadequate, we

could change them overnight. We could change them without the problem that we would encounter if we had legislation whereby we would have to get the agreement of the other House to change the legislation, even if we wanted to change it in this House. We would be limiting our own powers even more by having legislation.

**Dr Jack:** Yes, I agree with that.

**Q33 Chair:** At a tangent on Standing Orders, are you satisfied that this Select Committee has had due opportunity to do its job of pre-legislative scrutiny effectively in terms of the Bill?

**Dr Jack:** That is a very leading question. Do you want me to answer yes or no? Is that not for the Committee itself and the House to decide?

**Q34 Chair:** You have been very forthright in giving us your views on the intricacies of how a premature Dissolution can take place. I wondered if you felt on the bigger issue of parliamentary scrutiny that so far this has been a process that you would commend to other Committees.

**Dr Jack:** I think that the Committee is doing a fantastic job. That is the first thing that I have to say. The second thing, if you press me on this, is that it would have been better for the matters to be dealt with in a draft Bill.

**Q35 Chair:** Would you concur with the views of the Leader of the House that normally Bills should enjoy a 12-week pre-legislative scrutiny period?

**Dr Jack:** Yes. I think that pre-legislative scrutiny in this sort of area is really important. As the Committee appreciates, these are complex matters and they need examination. They need outside views as well.

**Q36 Chair:** Would that view be best founded in the Standing Orders of the House so that, in future, it would just be a standard part of Bill making, like a Second Reading and a Committee stage, so that we could enjoy the possibility of proposing changes or improvements to Bills?

**Dr Jack:** I think that such a Standing Order would fall into the category of those that you said were suspended frequently. Governments would be very reluctant to be tied down in their legislative programme to that extent, but I share your sentiment.

**Q37 Mr Turner:** I think we have established that the Commons could do this on its own and that the Lords need not have a view. May the Lords have a view on imposing this procedure, without the current proposed legislation?

**Dr Jack:** To achieve the fixed-term Parliament part, we need a Bill. That Bill, of course, goes to the House of Lords as well and must go through all the usual

7 September 2010 Dr Malcolm Jack

stages. But I think that this matter could be dealt with in Standing Orders. There would have to be a peg in the Bill, but the peg would relate to the Standing Orders of the House of Commons only. I don't think the Lords need be involved in that, but it would have to pass the Bill, of course.

**Q38 Mr Turner:** Right. These are just two or three random thoughts, not in any particular sequence. We've agreed that the Supreme Court, under any system with legal intervention, could almost inevitably control or attempt to control what the House has done. I take it therefore that the European Union could also, with a sort of further legislation, take over what the Supreme Court has decided to tell us to do. Is that correct?

*Dr Jack:* Yes. I think there would be various avenues of legal challenge, and I think it's the business of courts to apply the law to individual cases; that is what courts do. There could be various challenges in the different jurisdictions. The European Court has entertained cases that British courts would not look at, in terms of parliamentary privilege. That may be a good thing or a bad thing, but it has done so. That's an additional avenue, if you like. There are various legal avenues that could be explored.

**Q39 Mr Turner:** Earlier today, you pointed to some clause and said [odq]they do not impinge[cdq]—those were your words. I wasn't quite sure what you meant. I think it was with reference to clause 2, but beyond that, I'm not clear what you meant.

*Dr Jack:* I'm just trying to think back to what part of the discussion we were having. Was it that if these provisions were in Standing Orders, they would not impinge on legal proceedings, whereas if they were in the Bill, they would?

**Mr Turner:** I can't remember either, but thank you for that attempt.

**Q40 Sir Peter Soulsby:** Can I just return to the question of your obvious and powerful arguments for using Standing Orders rather than legislation to govern the mechanism for early Dissolution? The concern that the Chair and others have expressed is the ease with which Standing Orders can be suspended. Is there any precedent for finding ways of making it more difficult to suspend particular Standing Orders?

*Dr Jack:* That's a very interesting question. I think that there could be ways of building in some sort of relative majority or something like that. We have discovered a precedent—quite an old one, I have to admit—where a decision could only be taken relative to a certain number of the House. In principle, I don't see why it can't be done. I have to admit—I would be silly if I didn't—that it would be creating a distinct type of Standing Order, which was qualified in some way.

**Q41 Sir Peter Soulsby:** But obviously the concern is the ease with which Governments can, with a very simple majority, often at the whim of the Whips, suspend or change Standing Orders.

*Dr Jack:* Basically, Standing Orders can contain whatever the House wishes to contain in them.

**Q42 Sir Peter Soulsby:** So there could, in principle, be some form of lock that would be difficult to undo.

*Dr Jack:* Yes. There could be.

**Q43 Chair:** As Enoch Powell didn't say, if we don't have a written constitution, we have to go by Standing Orders, which themselves are a constitution that can be suspended by the Executive at will.

I have a rather detailed question, which is about some of the things for which I may have been a little critical of you—the minutiae. I am going to get into the minutiae. If the House adjourns, or you promote the Adjournment of the House to avoid a Dissolution motion, there is no redress. Let's say the Government feel they are in a bit of a crisis in July—we'll adjourn the House—and that gives you three or four months' grace to try and pull together a coalition, to try and pass an emergency economic package or get over some scandal in the Government. Have you considered that, and is one way to circumvent that abuse to give power to the Speaker to recall the House rather than the Government acting through the Speaker to recall the House?

*Dr Jack:* I know, Chair, that this is one of your favourite subjects—recall of the House.

**Chair:** Only for the last 20 years.

*Dr Jack:* Certainly, that would avert that sort of situation. Actually, an example springs to my mind. I think exactly what you've said has happened in Canada, where Parliament was prorogued by the Government in order to put things off. They didn't want an election and they didn't want to face a confidence motion. That's exactly what has happened.

**Q44 Chair:** Is that not a wrinkle we ought to be looking at as the Bill proceeds through the House—how to block that possibility?

*Dr Jack:* I know, as I said, that you are committed to that subject, yes.

**Q45 Chair:** Thank you, Sir Humphrey.

My second detailed question flips the equation right over, which is the Government—effectively the Prime Minister—retaining the right under royal prerogative to prorogue the House. Similarly, do you



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7 September 2010 Dr Malcolm Jack

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think we can play this game of chess to try to stop that happening if it is the will of the House that a Dissolution takes place?

**Dr Jack:** Again, that brings to mind the Canadian example, because I think in Canada the position is that some of this sort of provision is contained in their constitutional arrangements, but the Governor General has retained the prerogative to dissolve, so they are in a kind of uneasy situation where there is both a fixed arrangement and an unfixable arrangement—I think that’s what you’re getting at—to eliminate that. The Bill itself eliminates the royal prerogative in this area. The Standing Order arrangement for these provisions could be the only way in which such a thing could happen.

**Q46 Chair:** Would those be two items that you would consider looking at as you look at perhaps enhancing Parliament’s role in such circumstances?

**Dr Jack:** Yes, of course.

**Q47 Mrs Laing:** I have a very brief question, again for the sake of clarification. Is it correct that in effect this Bill is only really determining the date of the next general election, because immediately upon the election of a new Parliament the Bill could be immediately repealed? Would we then go back to what is now the *status quo*?

**Dr Jack:** I think you are asking the question, can Parliament be bound? The answer is no. Any Parliament can repeal any previous enactment.

**Q48 Mrs Laing:** So it would not be wrong to say that the real effect of the Bill is to determine the date of the next general election, and in fact it really doesn’t have a further reach.

**Dr Jack:** That is literally what it does. It just determines the date 7 May 2015.

**Q49 Chair:** If it is not repealed—to take Mrs Laing’s point a little further—it stays on the statute book, but it is otiose.

**Dr Jack:** Yes. I would defer to others’ more detailed knowledge of the Bill, but presumably—

**Chair:** I think it probably does, thereafter, under clause 1(3), so it would continue unless repealed, as do all statutes.

**Dr Jack:** Yes, that’s right.

**Q50 Mrs Laing:** For the sake of clarity, am I right in thinking that there is nothing in this Bill that would prevent it, or could possibly prevent it, from being repealed by a one-clause Bill in June 2015? Therefore, what this Bill actually does is determine the date of the next general election, and really nothing further?

**Dr Jack:** There is no reason why the provisions of this Bill could not be repealed.

**Chair:** Which is the same with all statutes.

**Dr Jack:** Yes, which is the same with all statutes.

**Chair:** Unless they are given the sort of bulwark that I think Mr Boles and Mr Chope alluded to, of the Second Chamber requiring the consent of the Second Chamber to pass this sort of law, through the 1911 Act. There is a possibility of entrenchment but obviously, as you said, not as a written constitution.

**Dr Jack:** Yes.

**Q51 Nick Boles:** Just a quick follow-up on this point, so that I understand. Of course, that is true, isn’t it, of all statutes?

**Dr Jack:** Yes, it is.

**Q52 Nick Boles:** But the way our informal constitution works is that there are certain things that become entrenched because of the way in which they were brought about and the general mood around them. Am I right in thinking that if the Government had a big majority and really wanted to they could repeal or massively amend the Parliament Act?

**Dr Jack:** Yes, of course.

**Q53 Nick Boles:** But there is a sense that they couldn’t; that they could, but couldn’t. The question is then a more vague and informal one. Does this become seen as a constitutional measure, which it would be inappropriate for a party—a Government with a majority—to change arbitrarily, or not? What determines that?

**Dr Jack:** Those are matters of convention in our system. If you had a written constitution they would be defined. There are countries where these things are defined but in our case it would be a convention. It would be hard to imagine, for example, any Government introducing a Bill to repeal the Bill of Rights of 1689, but they could in theory. So it is convention.

**Chair:** They could come in and abolish 50 Members of Parliament, for example.

**Catherine McKinnell:** Or change to a four-year term.

**Q54 Mr Chope:** This Bill is unusual in that it is seeking to introduce a fixed-term Parliament for the Parliament that has already started. In that respect it is completely different from what happened in Scotland. Indeed, it is not necessary to have a Bill to determine the date of the next general election, when the Prime Minister has already announced it and he has the prerogative power to determine that. Would you think, Dr Jack, that it might be more appropriate for this Bill to deal with fixed-term

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7 September 2010 Dr Malcolm Jack

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Parliaments from after this Parliament—in other words, the next Parliament and subsequent Parliaments—so that we could have proper consultation and debate about it, bearing in mind that it is not necessary to have this Bill to fix the date of the next general election?

*Dr Jack:* I have to be careful, Chair. I think you have already got me to commit myself to the fact that I would have preferred a preliminary stage, shall we say, to the Bill—a draft Bill. I think you are really asking me to answer a political question, which is not for me to answer.

**Q55 Mr Chope:** Not asking a political question, can I ask you a precedent question? Are you aware of any other precedent, anywhere in the world, for a Parliament deciding during the course of its own Parliament that it is going to introduce a constraint upon the length of that Parliament; in other words, introduce a fixed Parliament during the course of that Parliament?

*Dr Jack:* I don't think I am qualified to answer that. My knowledge pertains mostly to this Parliament.

**Chair:** Professor Blackburn may be able to enlighten us, if we give him a little bit of notice by raising this issue.

**Q56 Mr Turner:** Let us say that, on 6 November, the Queen's Speech fails to get passed. There would be a fortnight's delay and then there would be a general election, which would presumably take place on 24 December. That would be the date in the future when the next five years was up. Is that true, or does it go back to the normal 5 May?

**Chair:** I think there is a degree of discretion to pass it.

*Dr Jack:* Yes, I think there is a degree of discretion of two months in the Bill.

**Mr Turner:** Is it a month either way?

**Chair:** I think we can look that up.

Dr Jack, thank you very much. You have been as urbane as always.

*Dr Jack:* Thank you.

**Chair:** We have totally failed to provoke you in any way.

*Dr Jack:* I am very sorry about that, Chair.

**Q57 Chair:** We completely failed to get you to answer political questions, which is not your role. Would you like to make a one-minute closing statement?

*Dr Jack:* I don't think so, Chair. I think we have had a pretty good bash around the course and I hope my view has been fairly clear. I would just say in summary that I think that clause 2 raises practical problems also for the Speaker, or challenges to what the Speaker does, that are very easily dealt with within the House if those matters are kept in the Standing Orders. By putting them in statute, you are opening them to challenge in the courts. That is really the nub of my difficulty with just the privilege effect, particularly, as I said, in advance of a privileges Act. I don't see the hurry to do that.

**Chair:** We look forward to receiving your other paper.

*Dr Jack:* Thank you very much, Chair, and good luck with your work.

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*Witness:* **Professor Robert Blackburn**, Professor of Constitutional Law, King's College London, gave evidence.

**Q58 Chair:** Welcome, Professor Blackburn. I'm sorry that we have overrun by a couple of minutes, but we can make that good if we get to 12 o'clock. I was remiss—Mr Hunt and Mrs Laing put me right—so it might be helpful if you just take a few minutes to introduce your remarks and your paper to give a refresher to colleagues around the table.

*Professor Blackburn:* Thank you, Chair, and thank you for inviting me to speak to you today.

In the written paper that I sent in advance, I just gave a few thoughts. This is a fairly complex legal, constitutional and political issue, and even now I am not sure that I have managed to digest all the implications of the Bill as you yourselves are in the process of doing.

The point I tried to make by historically looking at the genesis of this Bill was that it is, I think, fairly clear that it is driven by the political self-interest of the coalition Government. They want to fix the lifetime of this Government—not the Parliament, but the Government—and I explain that in various ways. It is clear what the advantage is, both to the Conservative Party leadership and the Liberal Democrat leadership, of fixing this arrangement for five years. The Liberal Democrats want to be sure that the Conservative leadership would not cut and run in the same way that a minority Administration with an informal pact with the Liberal Democrats in Parliament might—as in 1974, although there wasn't a pact then—without some assurance. The other side of the coin, of course, is that the Conservatives want some guarantee that the Liberal Democrats won't change their mind.

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7 September 2010 Professor Robert Blackburn

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This is particularly important in the present financial climate whereby some fairly unpopular measures are going to have to be taken, such as public expenditure cuts and raising taxation. So it is to the advantage of the Government to help to implement their financial programme and hopefully, from their own point of view, come out the other side restoring some popularity before they meet the electorate again.

That leads me to the conclusion that there is a confusion of purpose behind this Bill between, on the one hand, dealing with the immediate situation, or crisis, in the coalition Government, and, on the other—this should be the main purpose of the Bill—reforming the law relating to election timing. I think it's a shame that they are not being dealt with in two different processes; they very easily could be dealt with in two separate processes.

I very briefly touched on the consequences of the Bill, which I could say more about later. I have also put forward what would probably be my own preference for a fixed-term Parliament arrangement, but I hasten to add that I think that there is no perfect model that can be taken for election timing. There are a number of different schemes that would work, and perhaps we will discuss those later.

If one took some of the conclusions from what Dr Jack has just been saying, for example, you could adopt a much more minimalist reform, which would solve some of the main mischiefs. Perhaps I should also say that in approaching this Bill, as it does have quite a lot of consequences and aspects to it, one obviously needs to be clear about what you think its main purposes are. What is it you are trying to achieve through this legislation and what are the main mischiefs that you are trying to resolve? There might not necessarily be consensus about that.

In my own view, the guiding principle or purpose behind reform of election timing should be to do something about curbing the excessive power that a Prime Minister has had over the general election date. That is the main objective. There are other things that would be desirable as well, such as ensuring that the monarchy doesn't get drawn into politics, which would be damaging to the institution itself, and could very well end up with the result that one political party was seriously upset about the outcome. Later on, we might look at some historical episodes that show how that could arise again in the future. I think that's all I should say for now.

**Q59 Chair:** On a point of history, while of course there is a current political situation—as there always is—and that has been a trigger, none the less all parties at various points have been committed to fixed-terms. I'm thinking back: the Labour Party was certainly committed to that under its leader Neil Kinnock, and I know that on occasions stuff has been approved through the policy-making process through the Labour Party on a fixed-term Parliament. Of course there have to be the right political circumstances for something like this to

happen, but none the less there's a long history of people proposing changes in the relationship between the Executive and the legislature, of which this is one part.

**Professor Blackburn:** I think that's right. The idea of fixed-term Parliaments has slowly gathered momentum over the last 20 years, and it is quite striking that there does now seem to be a virtual consensus that something ought to be done about election timing, and that the Prime Minister has an excessive amount of power over the issue. But, of course, the devil is in the detail of exactly how you draft a fixed-term arrangement. So, yes, I absolutely agree with that.

**Q60 Mrs Laing:** Can we call on your knowledge of similar legislatures in other countries to examine the issue of the actual term of a fixed-term Parliament? In practice, during the past 70 or 80 years, in normal times, Parliaments have generally tended in this country to last for four years rather than five, although of course there have been different arrangements. In some parts of the world, Australia, for example—I might be wrong—there is a three-year term, although Australia at the moment is an interesting example perhaps of how not to construct a constitution, and how not to call an election for political purposes. Is there a body of evidence of which we ought to be aware that would suggest three, four or five years or some other term of Parliament?

**Professor Blackburn:** My feeling on that is, no, generally speaking. One can look around the world, and there are 101 different ways of organising election timing. I think one has to evaluate this proposal within our own indigenous political and constitutional circumstances. I don't think there is a lot to be gained by going around the world, shopping around looking for the best scheme. The other thing is that you can hardly find two schemes that are identical. They are all slightly different. They all have slightly different nuances attached to them. Even within the Commonwealth where there might be a Governor General, the position of a Governor General is not the same as a monarch, so the relative powers are slightly different. Some fixed-terms relate to where there is a separation of powers, as in America of course. But there are, as you suggested, three and, probably most commonly, four-year terms. There are three-year terms in Australia and New Zealand, as you say. There are some five-year terms as well, such as in the National Assembly in France, but they have a president and a different system of Government. It is useful looking back on how long our own terms have been in the last 100 years or so. While we can take an average—the average does in fact come out almost exactly at four years—of course, the range has fluctuated depending on particular circumstances.

**Q61 Chair:** But it would be true to say, wouldn't it, that most western democracies have fixed-terms for their legislature and their Executive?

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7 September 2010 Professor Robert Blackburn

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**Professor Blackburn:** Yes. Most. Quite a few systems have floating dates.

**Q62 Chair:** None the less, there are provisions that are not normally used for extraordinary circumstances. If the President of the United States is indisposed, there are means by which—for example, in the Nixon presidency—handovers can take place, but those are for extraordinary circumstances rather than a way of getting round having a president for four years or whatever.

**Professor Blackburn:** Absolutely, and of course in our own system we have the extraordinary process of a no confidence motion. There is no good reason why, in the past, Parliament couldn't have served its full term, but it has suited the Executive, particularly over the last 100 years, to keep the machinery of Dissolution well-oiled by using it on every occasion.

**Q63 Simon Hart:** Both my questions have been answered, but I will think up a third one instead. We are looking at a five-year fixed-term. In a paragraph, why should we vote against that when the opportunity comes next week?

**Professor Blackburn:** A judgment has to be made by yourselves as to what the right balance is between giving a Government a sufficiently long period of time to carry out their programme for office and, on the other hand, having a mechanism for accountability and responsibility to the electorate. My own feeling is that in this country five years is held to be a very long time. If you think back to five-year terms in the past, the last year of every one has been pretty awful. I think everybody has felt, [odq]For God's sake let's have an election[cdq], and usually it redounds badly on the Government as well.

**Q64 Chair:** Is that because it is the last year, or because it is the fifth year? Won't there be a last year in a four-year Parliament which would be pretty awful?

**Professor Blackburn:** There is a combination of both. I am not so sure, actually, that—this might confuse the issue—seven years isn't the time when people start getting fed up and want a change.

**Simon Hart:** I thought that that applied to marriage rather than Parliament.

**Professor Blackburn:** I think there might be something in that.

**Chair:** Is this an evidence-based scientific view, Professor Blackburn? Is this your opinion?—  
[Laughter.]

**Professor Blackburn:** All I am saying is that this might explain why Governments tend to win their second terms. If you look back at elections, it is the

incumbency that usually wins a general election—even more so under a system where they can determine the election date themselves.

**Q65 Simon Hart:** I rather support your view that it is not much good going round the world to try and pick decent examples. We had a debate yesterday about whether Papua New Guinea was a shining example of what was under discussion, so it doesn't always work very well. Surely there must be some examples we can call upon which help us come to a decision about whether fixing the term, if you like, at the maximum—which is what we are doing next week—is a more desirous route than fixing it perhaps at what has tended to be the average, which is four years.

**Professor Blackburn:** I am not sure that you can. You can look at particular examples, but the political equation will always be different. Relative size and strength between the Government and the Opposition—all these are variables. It really comes down to a question of how strong you want Government to be and how strong you want the mechanism for accountability to the electorate to be. Things would be different if we had a separate Executive of course.

If we had a separate Executive, the arguments for having much more frequent elections for Parliament would be much stronger—the Chartists' idea of annual Parliaments could even come into play. I have to say that I think that there is some irony in the fact that one of the big issues that has troubled the political class over the past few years—over the past 10 years I think—is disengagement from politics. How can we promote greater popular participation in politics? The irony in the proposal is that it makes elections less frequent.

**Q66 Chair:** We are not confusing media participation in politics with grass-roots activism in politics, are we? They may wish to have an election every year because it's great fun and you can take strips off anybody.

**Professor Blackburn:** For most people, the one occasion when they participate in the political process is a general election. I say [odq]most people[cdq] because, of course, the turnouts for other electoral processes are pretty low. This is an incredibly important issue on which legislation is being introduced. A general election really is the main political event of our democracy; it determines not just the composition of our representatives in Parliament, the legislature, but the composition of the Executive—in one act. It is a really important issue.

**Q67 Sheila Gilmore:** Having read a lot of these papers, I wondered if, in fact, the difference between the impact of having fixed-terms and not having fixed-terms is slightly exaggerated, or whether it changes the mindset. For example, there seem to be ways in which, certainly in some countries and

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7 September 2010 Professor Robert Blackburn

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Governments, despite there being a fixed-term, elections can come along relatively frequently or can be encouraged, in one way or another, to happen. Equally, the politics of early elections—the argument that the Prime Minister can use it as a lever over his own party—still exists to some extent within the fixed-term arrangement, but maybe in a slightly different way in Scotland.

In the current Scottish Parliament, it appears that no one has wanted to trigger that kind of vote of confidence, and, to some extent, that still gives the First Minister the power to say, [odq]If you rock the boat, we'll have an election[cdq], and people don't want that. Is this not more about the political context than the legal one?

**Professor Blackburn:** I think that's right. I don't think we should get too hung up on ensuring that there isn't a general election within the fixed-term. General elections aren't necessarily a bad thing. My own feeling is that the Bill as drafted sets the threshold too high; the term is too long and it is too difficult to have a Dissolution. Personally, I'd prefer a more straightforward Bill that goes more with the grain of our system of voting in the House of Commons, and that is reflected in the alternative scheme that I put to you.

**Q68 Sheila Gilmore:** In terms of making it simpler, do you therefore argue that even if it could be triggered more easily, the political realities are that that will happen only when there is a real need for it? The political parties themselves don't necessarily want to defeat a Government just for the sake of it. That has very much been the context in Scotland, certainly in the three years since the previous Scottish Parliament election. Arguably, the Government might have been overthrown, but no one has wanted to do it.

**Professor Blackburn:** Absolutely, I think that there is no tradition of manipulating the power of Dissolution for party purposes in Scotland yet, whereas there has been a tradition of that over here.

**Q69 Tristram Hunt:** The Committee notes your advocacy of four rather than five years and your comments about the political agenda behind the Bill. I just wanted to tease out a couple of things, first, the very interesting idea that this takes away what you call the facility, and what others might call the prerogative, of the Prime Minister to make an appeal to the people. So one goes from making something an issue of confidence—dissolving a Parliament and having an election on an issue, be it a war or a major piece of legislation—and moves towards referendum politics. Can you tease out that idea?

**Professor Blackburn:** I think, historically, the idea of an appeal to the people has been one of the main justifications for the prerogative of Dissolution. As you all know, it hastended not to be a very useful weapon for the Prime Minister; it has tended to be counter-productive. Even when there was an appeal

to the people over the House of Lords back in 1910, the Asquith majority went down. Of course, it also backfired famously with Edward Heath in 1974. But yes, it is there, and if there is some issue or principle on which a Prime Minister specifically wants the backing of the people, it is a mechanism for an issue of confidence: a vote of confidence in the Government that they are doing a good job and that we trust them with this particular issue. Removing it raises the whole issue of the desirability of referendums. I have some reservations about referendums, but if one was enthusiastic about them and thought people should be consulted much more, we would have to go down the route of having more referendums outside our Dissolution arrangement.

**Q70 Tristram Hunt:** The other element you suggested is rather than reducing the power of the sovereign, which it does in Dissolution affairs, it could heighten the power of the monarch in terms of appointments during prolonged hung Parliaments. How would that work?

**Professor Blackburn:** I think this is an interesting issue. It was an interesting issue in the May 2010 general election as well. There is a bit of a story behind all this, some of which has taken place behind closed doors. You all know that in the past when there has been a hung Parliament, it was dealt with slightly differently. With what happened in 1974, the convention was much clearer that the incumbent Prime Minister had the first opportunity to form an Administration. So Edward Heath entertained Jeremy Thorpe at 10 Downing Street to have negotiations about that. The monarchy was in the background, of course. You can look at other situations going back where the monarchy has been quite heavily involved in Dissolution or Government formation issues.

I suppose 1931 is the most famous example to remind ourselves of where the monarchy played the leading role in what happened. From 1929 to 1931 there was a minority Labour Administration. There was the Wall Street Crash and the financial crisis. The American bankers, J P Morgan, were threatening to call in the loan that the British Government had with them unless effectively public expenditure cuts were made and agreed by the Cabinet. The Labour Cabinet could not agree on those cuts, so Ramsay MacDonald went to see King George V and informed him about all this. King George V returned from Balmoral, as I recall, in the summer in a crisis mentality. Normally, what would have happened in this type of situation is that either there would have been a general election, or MacDonald would have resigned and Stanley Baldwin, the Leader of the Conservative Party, would have taken over. Baldwin was on a yacht in the Mediterranean or somewhere and wasn't around. The King started brokering what should happen in the circumstances, consulting Sir Herbert Simon, the Liberals and so on. He more or less put together the National Government, reappointing

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7 September 2010 Professor Robert Blackburn

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Ramsay MacDonald as Prime Minister with the Conservatives joining in. Stanley Baldwin was quite happy to go along with that because the National Government would be implementing unpopular public expenditure cuts, yet there was a Labour figure fronting them. The Labour Party, which knew absolutely nothing about the negotiations, were outraged and expelled MacDonald, Philip Snowden and a few others from the Labour Party. That was regarded by some as a palace coup, but it just shows what can happen. The monarch was playing a very leading role in Government formation.

Times have changed since then, but we should not be lulled into a false sense of security by the fact that, on the throne over the past 50 years, we have had a monarch who has been an absolute model of constitutional propriety. She has had absolutely no problems in suppressing her private views for her public duties. In the future, different personalities will be on the throne who will be more interventionist-minded. The whole idea behind having an hereditary Head of State is that we do not know what human nature will throw up. We need to have some constitutional machinery to deal with the position of a Head of State and, by the same token, to deal with exercising the royal powers of Government formation and the appointment of a Prime Minister.

**Q71 Tristram Hunt:** My final question is about your own model for what should happen, the idea of the permanent Parliament. An early election is followed by another term of Parliament, which makes up the length of the Parliament as it were. Have I got that right?

**Professor Blackburn:** I always feel rather uneasy during the election campaign because there is no Parliament in existence for about five weeks. There might be an emergency, there could be a terrorist outrage or an environmental disaster, and no Parliament would be in existence. Of course, the Government still carries on. This might be seen as a small matter, but it would be more logical if we were trying to construct a good electoral and constitutional process, for Parliament to be kept in continuous existence. Of course, it would go into recess and adjourn during the election campaign, but it could be recalled by the Speaker at any time if a national crisis or disaster had to be dealt with.

You are a professional historian, so perhaps I can digress. To answer the question in a slightly different way, it helps to have an historical perspective when evaluating the current system. The basis of our system of election timing is the relationship between the Crown and Parliament. The Crown is the ultimate authority in the state and, historically, Parliament came into existence, was summoned and dissolved as the personal creature of the Crown. As a result of the 17th century constitutional conflicts, Parliament was very concerned with its existence and, during the written constitutions in the

interregnum—fascinating documents to look at—there was great concern with making sure that Parliament was summoned.

Particularly as a result of King Charles II and his extraordinary long period of 17 years without convening a Parliament, the Triennial Act came into existence so that a Parliament should be summoned within three years and last for no longer than three years. There was then the Septennial Act in 1716. In the 20th century, as we moved into the modern era, the rather archaic system of election timing has been manipulated by the Prime Minister. We must remind ourselves that, in the 19th century, Parliaments were expected to last their full term. If we look at 19th century constitutional texts, there was an idea that Parliament could be dissolved only in certain constitutional situations, such as if there was a conflict between both Houses, a Representation of the People Act had just been passed, or if there was a division in the Cabinet.

In the 20th century, all those conventions disappeared and we have just been left with a naked power of a Prime Minister being able to manipulate the power of Dissolution for some advantage in the electoral outcome. That is also seen to some extent in the way in which the public announcement of the general election is made, which has evolved interestingly—going back to Dr Jack's point about Standing Orders. In the first half of the 20th century, the Prime Minister usually announced a general election in the House of Commons. That was normally accompanied by a motion being put forward to give precedence to Government business for the remainder of the Session. Asquith, Baldwin and MacDonald all did this.

Since the second world war, Standing Orders have been changed to give automatic precedence to Government business, so in the wash-up period, as it were, the Government have automatic precedence anyway. So things were replaced by the Prime Minister just putting out a press release and MPs feeling somewhat disgruntled that they were hearing the news of their own demise in the same way as everybody else, through the media. More recently, John Major turned the public announcement into a photo opportunity in 1992 outside No. 10 Downing street, and in 2001 Tony Blair took that one stage further to a photo opportunity in a schoolroom—in you remember—in south London.

It is useful, I think, to have a historical perspective on this whole scheme of arrangement, and it would be better really, in an ideal world, to start again and not be starting from the point of view of having the royal prerogative controlling the summoning and Dissolution of Parliament. But you are talking here, I think, about a written or codified constitution. The idea of a permanent Parliament would work best in that arrangement. The German Bundestag has a system not dissimilar to this, whereby it is kept in more or less permanent existence, but there are fixed periods between the election dates.

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7 September 2010 Professor Robert Blackburn

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**Q72 Chair:** So the Government continue come what may, whereas Parliament is unstable in that it finishes and restarts again, really at the behest of the Executive. So, you're suggesting that Parliament should have a degree of continuity and stability, punctuated by only general elections—that it has a life of its own.

**Professor Blackburn:** Absolutely. A point I make in my written evidence also, is that there are much wider issues to consider. In looking at constitutional reform more generally and being joined up, where does reform of the House of Lords fit into this electoral cycle? If you have a permanent Parliament, it makes it much easier to set up a system of elections in the second Chamber. I think that will probably emerge as the preferred option, whereby there is rotating membership or elections at different times, so that you do not have a new House being elected all at the same time.

**Q73 Mrs Laing:** I was going to come on to another subject, but just to continue this idea about the permanent Parliament, you have prompted me to consider the other side of a Member of Parliament's duties, and that is our pastoral duties in our constituencies. You rightly said that Government goes on and there is no possibility for scrutiny or holding to account because there is no Parliament here in the House of Commons, but, of course, Members of Parliament have pastoral duties towards their constituents. It is a strange situation that for a month or more, a Member of Parliament has to say to constituents, [odq]I'm not your Member of Parliament. I hope I might be in another few weeks, but I'm not just now.[cdq] If one is dealing with a difficult personal case for someone, of course you don't stop doing it because there is a general election. If somebody is in difficulties, you keep helping them. Have you considered that side of a permanent Parliament?

**Professor Blackburn:** No, I haven't. I think it's a very good point. I think that you should continue with your constituency duties at the same time as electioneering.

**Q74 Mrs Laing:** Thank you. On to the other matter, which is the balance of power between the legislature and the Executive, the Deputy Prime Minister has said, on the record several times, that he believes that the proposals he has put forward in this Bill effectively [odq]strengthen the power of the House[cdq]. Do they, in fact, strengthen the power of the House, given that, at present, on a simple majority of Members of Parliament, the Government can be defeated on a vote of confidence, and that will no longer be the case? Does that strengthen the position of the House?

**Professor Blackburn:** I'm not sure that it does. I feel that I need to still reflect upon all the implications of the Bill regarding that. My feeling is that it certainly curtails the power of the Prime Minister to control the election date, so it does something to place some

limitation on the power of the Executive. I'm not sure about the extent to which it enhances the power of the House of Commons.

**Q75 Mr Chope:** Does it enhance the power of the House of Commons at all?

**Professor Blackburn:** I am not sure that it does. Of course, one has to take into account the influence of the party Whips and the extent to which party Back Benchers will follow the wishes of party leaders.

**Q76 Mr Chope:** May I ask you the question I raised earlier with Dr Jack about what's happening with this Bill? Parliament's already begun and we are now legislating to have this Parliament with a fixed date. In Scotland, there were proposals for a fixed-term Parliament, which were then legislated on, and then that applied to subsequent Parliaments. Are you aware of any precedent whereby a Parliament has decided, after it has already been elected, to change the terms of engagement?

**Professor Blackburn:** I heard you ask that question. I am afraid that my knowledge of foreign legislatures doesn't extend to a specific example of that, although I could go back and try and consult my reference books to find out. I would imagine that there are quite a few examples of that happening. Of course, the British Parliament extended its own life in the Septennial Act, so I would not be surprised if there were examples. I don't think this is an extraordinary thing to do.

**Q77 Mr Chope:** What about the idea that the Bill could be amended to have fixed-terms of seven years?

**Professor Blackburn:** Yes, if later on Parliament wants to change the scheme of arrangement, it can certainly do so.

**Q78 Mr Chope:** You are saying in your paper that you would be in favour of just a simple majority being sufficient to trigger a general election and a Dissolution?

**Professor Blackburn:** Yes.

**Q79 Mr Chope:** That appeals to me, simplistically. How would that work in a hung Parliament?

**Professor Blackburn:** The scheme of arrangement I had in mind was that the Prime Minister would not be able to call a general election in the same way that Harold Wilson did in 1974, unless other non-governing party Members supported the resolution. So the Prime Minister couldn't call a snap election just to try and gain a majority. Otherwise the scheme would work as at present but curtail the length of the Parliament following an early Dissolution as outlined in my written evidence. What I suggest in my scheme was that you could have a constructive

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7 September 2010 Professor Robert Blackburn

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motion of no confidence, whereby you could actually present the alternative Prime Minister, as well.

**Q80 Chair:** On the question that a number of colleagues have raised about the balance between Executive and legislature, it may be that the legislature *per se* hasn't got a paragraph where it says, [odq]And this is really strengthening Parliament[cdq], but I would have thought that defining a prime ministerial power for the first time ever legitimately inhibits the Executive to an extent, and therefore, in the balance of things, Parliament in that equation is slightly stronger. Would that be true?

**Professor Blackburn:** Yes. I think that's probably right. In my paper, I pointed out that the reform removes not only the tactical advantage of a Prime Minister, but what I call a sort of penal power that a Prime Minister has over his colleagues by threatening a Dissolution if they don't support him. To that extent also I think it extends the power of his parliamentary colleagues.

**Q81 Chair:** We always tend to look for the things that might go wrong if there's any change, and we're a bit cautious. The Clerk produced a very good paper outlining some of the potential difficulties, but we've asked him to go away—I don't know if you were in the room at the time—and also mention one or two of the positive things. Obviously, having a full five-year session to implement a programme is not only useful for the Executive. In terms of scrutiny, having five years' worth of Select Committees and elected members and Chairs who would be able to set out a programme for five years so that perhaps we would not need to rush a couple of very important Bills on to the Floor on virtually day one, but have a measured programme over five years, are just some of the possible advantages for the legislature in conducting its business more effectively. Are there others that spring to mind, or do you accept that they are in fact useful advantages of a fixed-term?

**Professor Blackburn:** As I said earlier, I think that there is a balance to be struck. There are arguments for five years, particularly in terms of planning. If that can also be combined with a culture—

**Chair:** Sorry, I've confused the issue by talking about a five-year term. What are the advantages of fixed-terms, which could be four or five years?

**Professor Blackburn:** Well, I think the advantage is also one of planning. I will be interested to see if the super-majority procedure goes through. That would make it very difficult for the Prime Minister to call a Dissolution himself. If there was just a simple majority, which is what I have suggested that I would prefer, I would hope that that would be accompanied by some new culture or some expectation that a Prime Minister won't call snap elections for no good reason.

**Q82 Chair:** Finally, do you know of any other western democracy that has initiated a written constitution and said, [odq]We think the Prime Minister should have the power to decide when the legislature meets and when elections take place[cdq]?

**Professor Blackburn:** No.

**Mrs Laing:** There's a surprise.

**Q83 Mr Turner:** I have two questions. First, you said that, in the 19th century, there were particular reasons for which you could call an election, and otherwise not, I assume. In the 20th century, almost the reverse has apparently been true. When did it change?

**Professor Blackburn:** It was a gradual process. There is a similar debate that there used to be a convention—it was thought, anyway; perhaps it was theory and not so much practice—that it was very much a Cabinet decision, a collegiate decision. But, as Lloyd George promoted a much more Executive-minded, president-orientated chief executive—a stronger form of government—perhaps it went with the requirement in the early part of the 20th century that we needed a stronger Executive, because we were running a much larger enterprise with the welfare state, the interventionist state, not to mention dealing with the huge war effort between 1914 and 1918. I think that all those tendencies somehow elevated his position, and that they elevated his position *vis-à-vis* his Cabinet colleagues. So I think that the control over the power of Dissolution has gone hand in hand with the whole process or transition from Cabinet government to prime ministerial government that has taken place over the course of the 20th century.

**Q84 Mr Turner:** Secondly, we are rather talking as if everyone had a break when they had an election, but in the United States there is no such thing. There are four-yearly periods for the President, but two-yearly ones for the Congressmen and six-yearly, broken into three and therefore two-yearly for a third, for Senate. Why should we not have such a system here? After all, when I lived in Oxfordshire, it had a four-yearly term, but Oxford City Council had three separate years for each ward. Why aren't we thinking of those?

**Professor Blackburn:** You mean different terms for the two Houses, or—

**Mr Turner:** No, I was thinking that, let's say, a fifth of the House of Commons shall retire each year.

**Professor Blackburn:** That's quite a radical proposal. It would have a major impact on Government formation; you may find that the Government suddenly lost their majority. It would lead to a fairly unstable form of government perhaps, but, so be it, if Parliament should be the determining factor in these matters. Such a system would, again, throw the whole process of



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7 September 2010 Professor Robert Blackburn

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Government formation into high relief. Linking it back to the question earlier—which I didn't entirely answer—in 2010 the Cabinet Office took a lead in facilitating the inter-party negotiations. There had been a draft Cabinet Manual prepared by the Cabinet Secretary that came into operation, and the previous conventions were slightly modified. I think that that did have a subtle impact on the outcome of the negotiations, but we can only conjecture upon it.

One interesting psychological change was that 10 Downing Street was no longer the forum for negotiations, it was the Cabinet Office. That might be a good thing. Exactly who is going to be brokering this very important decision as to who is to be Prime Minister and which inter-party negotiations or which combination is going to prevail? It needs to be thought about very carefully. Is it going to be the Cabinet Secretary or the monarch? Do you revert to the incumbent Prime Minister playing a key role or should the Speaker play an enhanced role? Those factors need to be thought about very carefully. Similarly, note the idea of a confirmatory vote, which is attached to the no confidence procedure in the Bill. As I said in my written evidence, I think that this is going to give rise to the query, [odq]If you have a confirmatory vote then, should there be a confirmatory vote in the House of Commons when a new Prime Minister is appointed every time?[cdq] That would be the key issue to come out of what you have suggested.

**Q85 Nick Boles:** Why are you so opposed to the super majority? Surely, the point is to stop—given that we have this merging of the Executive and Parliament in our system—a Prime Minister who has won a majority at the previous election of the House of Commons from whipping a Dissolution motion. That is a good thing. What is wrong with it?

**Professor Blackburn:** I am not so opposed to it; I am a pragmatist, and I am just stating my preference. I am instinctively concerned about introducing a super majority. This is an unprecedented procedure. We haven't had this before. In what other circumstances might it be used? It would be a precedent for later on perhaps. I think a simple majority does the trick, and it goes with the grain of our parliamentary tradition in which our culture works at the moment. It means that if the House of Commons thinks that there should be a general election, there should be a general election. An election is not an unwelcome prospect, why should you make it so difficult? Taking away the power of the Prime Minister to control the election debate unilaterally and arbitrarily, and making it subject to the House of Commons—thereby having to carry his colleagues with him and a majority in the House in a minority Government or coalition situations—would be my preferred way forward.

**Q86 Nick Boles:** Are you not then denying that there is any value in distinguishing between constitutional matters, which should require more than the level of support of normal matters of Government business?

Certainly, is it not the case that most countries in the world feel that there should be greater protection for constitutional measures, so that they cannot be changed by the whim of a Prime Minister who happens to have a majority of five?

**Professor Blackburn:** Yes, but you are talking about special procedures to change the constitution.

**Q87 Nick Boles:** Isn't moving an election forward for no reason, when your Government are perfectly functioning and capable, not a constitutional change?

**Professor Blackburn:** I see them as different. I think this is a political decision. I don't think general elections are necessarily unwelcome. If there is a majority feeling in the House that there should be a general election for a good reason—

**Nick Boles:** Like we could increase our majority.

**Professor Blackburn:** The Prime Minister is going to have to come down to the House, and give the reasons and articulate why he wants a general election. If the Opposition think he is just cutting and running because he is ahead in public opinion polls, they will say that. The electorate can then decide whether they think the Prime Minister has behaved properly, or has brought an election unnecessarily in advance and should suffer the consequences. I think there is a cultural aspect to it as well.

**Nick Boles:** An unnecessarily conservative view.

**Q88 Chair:** I think the cultural aspect is very important. Again, because we have 100 years of history behind us of Prime Ministers doing this, we are looking at it from the point of view of how the Prime Minister could wangle his way around a fixed-term, which is an open and clear commitment from the current Administration. Culturally, however, it would be viewed with great disdain if someone wanted to manipulate the system that the House had agreed, which I think was in manifestos—I am not too sure about that—and which has become the way we do things. People would cry foul if other people sought to play around with the rules. You would move to a different cultural view of what the political norm was. Have I got that right?

**Professor Blackburn:** I would anticipate that to be the case. In your discussion with Dr Jack, I think it came out that any system can be manipulated by the Executive. I can foresee that the no confidence mechanism could be manipulated by getting someone else to table a motion and it succeeding through abstentions or whatever, and then possibly even manipulating the power of Prorogation to put off an alternative Government being confirmed within the 14-day period. Anyone who is manipulating a system as blatantly as that would suffer the consequences eventually. I hope that the

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7 September 2010 Professor Robert Blackburn

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new legislation will, possibly with amendments, bring in a new constitutional hygiene, as it were, into the whole process related to general election timing.

**Q89 Mr Chope:** You mentioned earlier the possible interaction of the Fixed-term Parliaments Bill with an elected second Chamber. Do you think the fact that we haven't yet got a draft Bill for the second Chamber, but we're being expected to vote on this without being able to look at the two together, is a disadvantage? Would it not be much better to be able to look at the whole of this issue at one time? Are there not implications with, depending on what was to happen to the other Chamber, having a mid-term election—for want of a better expression—which would give the other Chamber a massive majority against what would be the elected Government in this Chamber?

**Professor Blackburn:** Yes. All my academic colleagues and I think, [odq]For heaven's sake, what is going on with reform of the House of Lords? How long will it be put off for?[cdq] Again, there is obviously some party-political interests about the whole business. Yes, this reform needs to be dealt with in conjunction with the other part of the legislature. I can see that in practical terms it is difficult to get through some constitutional reforms, and perhaps they sometimes need to be driven through to get one change done. However I think we've reached the stage, particularly after the wide number of constitutional reforms taking place over the last 12 years or so, at which a much more joined-up approach to constitutional reform is necessary. That may require some co-operation between Select Committees to take a coherent view of what's going on and join up the different parts of the constitutional structure. The idea of a codified constitution as advocated by some would be not so much a radical reforming measure, but a means by which to bring some stability and coherence to the way forward.

**Q90 Sheila Gilmore:** I have a couple of questions about what you said. Would you think that in fact, by creating fixed-term Parliaments for Scotland and the Welsh Assembly, it has created a culture change and an expectation that it would be exceptional? I would like your comment on that.

One of the practical issues that has arisen out of the particular suggestion for five years—I know it doesn't happen every time—has been the fact that immediately, the first time that we have this new situation, we have a conjuncture of the Scottish and Welsh elections, unless something is done to move

them apart. That is something that people feel quite strongly about, particularly in Scotland. The fear is that the politics in the Scottish Parliament will be subsumed in this. An effort to keep them quite separate might be valuable.

**Professor Blackburn:** I agree. I think the success of the devolved Assemblies has had a subtle impact on the political culture generally within the country, and has some effect down here as well. I was struck, during the 1997 election that brought Alex Salmond to power, by the fact that when the Scottish National party got just one more seat than the Labour Party, everyone simply assumed that Alex Salmond was going to be First Minister. I wondered later on whether that had some impact on the outcome of the 2010 election, whereby there was a much stronger expectation that David Cameron, because he had got more seats, would be Prime Minister and whether that influenced Nick Clegg himself. I think that there is an organic interplay between the cultures between the different legislative assemblies.

**Q91 Chair:** If there are no more questions from colleagues, would Professor Blackburn like to have a minute to conclude?

**Professor Blackburn:** I would like to wish you well in your scrutiny of the Bill. Like Dr Jack, I would like to have seen this in a draft Bill. I think it is very difficult for you to perform your job of reporting to the House with such extraordinary short notice. I think this is a major reform that requires some gestation period, thinking through all its implications very carefully and separating out the different objects that are being desired. There are a few issues that we have not mentioned today, which I think need to be tidied up. If elections are going to be in May, how will that affect the annual parliamentary cycle? Are we always going to have a long period between May and November the following year, and a short final session? You are going to have to readjust that. The Bill seems to also settle the argument that has been running for some time about whether general elections should be at the weekend as part of promoting greater participation and greater turnout in elections. It seems to have been decided that it has to be Thursday.

There are a lot of little and large consequences of the Bill, and I wish you well in your scrutiny. Thank you for inviting me.

**Chair:** Professor Blackburn, thank you very much indeed. Thank you, colleagues.

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# Written evidence

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## Written evidence submitted by the Clerk of the House (FTPB 01) FIXED-TERM PARLIAMENTS BILL: PRIVILEGE ASPECTS

### *Introduction*

1. In this memorandum I address aspects of the Fixed-Term Parliaments Bill which seek to make statutory provision for matters which fall within Parliament's exclusive cognizance and which may affect the established privileges of the House of Commons as well as upsetting the essential comity which has been established over a long period between Parliament and the Courts.

2. I make no comment on the policy purposes of the Bill; indeed it would be improper for me to do so. My concern is with the way in which provisions of the Bill impinge upon Parliamentary privilege and which may bring the Courts and Parliament into conflict.

### *Privilege: exclusive cognizance and Article IX*

3. Exclusive cognizance needs to be distinguished from other aspects of parliamentary privilege such as the privilege of freedom of speech which became articulated in Article IX of the Bill of Rights 1689. In essence, exclusive cognizance is the right of both Houses "to be the sole judge of their own proceedings, and to settle—or depart from—their own codes of procedure."<sup>1</sup>

4. The making of Standing Orders of the Houses regulating their business (and in the Commons their interpretation by the Speaker) is the most significant feature of Parliament's control of its internal affairs. Decisions under or about the Standing Orders cannot be questioned by the courts or in any other place outside Parliament.

5. The origin of Parliament's right to regulate its own affairs is in its status as the High Court of Parliament and its purpose is to prevent interference with its ability to discharge its functions as a sovereign body. Whilst in earlier times the threat of "interference" came from the Crown (and in the case of the House of Commons, from the House of Lords<sup>2</sup>), the later history of privilege centres upon Parliament's right to function without interference from the Courts.

6. Although Parliament's control of its internal affairs predates the Bill of Rights, Article IX nevertheless applies to it since it proscribes the questioning of Parliamentary proceedings in any place outside Parliament, in particular in the courts.

### *The principle of comity between Parliament and the Courts*

7. From the nineteenth century onwards, while the courts held to the notion that the boundaries of privileges enshrined in the Bill of Rights (which is, of course, a statute) were matters for them to determine, they recognized the rights of both Houses to have exclusive control of their internal proceedings.

8. In 1839 in the case of *Hansard v Stockdale*, Lord Denman, while asserting the right of the courts to inquire into whether privilege had been properly asserted, nevertheless emphasized the fact that its internal proceedings were controlled by the House itself. Later judgements confirmed that the Courts should refrain from any interference with the way the Houses regulated their affairs whether formal or informal.<sup>3</sup>

9. The principle of exclusive cognizance, or jurisdiction of its internal affairs by Parliament has been recently re-affirmed in the report of the Joint Committee on Parliamentary Privilege in the following terms:

"Both Houses have long claimed and succeeded in maintaining, the right to be the sole judges of the lawfulness of their own proceedings and to determine, or depart from, their own codes of procedure. Courts of law accept Parliament's claim that they have no right to inquire into the propriety of orders or resolutions of either House relating to their internal procedure or management."<sup>4</sup>

10. It should be noted that the claim to exclusive cognizance of proceedings means that Members cannot be compelled to give evidence in any court unless they agree to do so, and Officers of the House cannot do so without permission of the House on any matter relating to proceedings, including such matters as are provided for in this Bill.

11. For its part, Parliament recognizes the principle of comity with the courts in a number of ways. Both Houses apply the restraining discipline of the sub judice resolution to their proceedings (except in legislating) when matters are active before the Courts. Furthermore, it is a long established convention that the Houses

<sup>1</sup> *Erskine May* 23 edition, p 102

<sup>2</sup> For numerous examples of this aspect of "interference" see J Hatsell *Precedents of Proceedings in the House of Commons*, 4 vols (1818)

<sup>3</sup> See *Bradlaugh v Gosset* [1883–84] 12 QBD 271; *R v Graham Campbell ex parte Herbert* [1935] 1 KB 594, *McGuinness v United Kingdom* 1999 (Application 39511/98)

<sup>4</sup> Joint Committee on Parliamentary Privilege Report HL 43; HC 214 (Session 1998–99) para 232

will not assert their privileges so as to hamper the course of criminal investigations or proceedings. The most recent statement of this mutual self-restraint or concordat was made in a memorandum of the Attorney General, laid before the House in April 2009.<sup>5</sup>

*The provisions of the Bill*

12. The Bill brings the internal proceedings of the House into the ambit of the Courts, albeit indirectly by the route of Speaker's certificates.

13. In Clause 2 (1) (a) of the Bill, the Speaker is empowered to issue a certificate if the House has passed a motion that there should be an early parliamentary general election. Clause 2 (b) and (c) seeks to include in the certification a recording of the fact as to whether the Motion that there should be an early general election "was passed on a division" and that "the number of members who voted in favour of the motion was a number equal to or greater than two thirds of the number of seats in the House (including vacant seats)."

14. In this provision, the Speaker is thus invited to certify not merely what has been decided by the House but how it has reached that decision.

15. In Clause 2 (2) of the Bill,

"An early parliamentary general election is also to take place if the Speaker of the House of Commons issues a certificate certifying that –

- (a) on a specified day the House passed a motion of no confidence in Her Majesty's Government (as then constituted), and
- (b) the period of 14 days after the specified day has ended without the House passing any motion expressing confidence in any Government of Her Majesty."

16. The provisions of this subsection make the Speaker's consideration of confidence motions and the House's practices justiciable questions for determination by the ordinary courts. Not only might the Speaker's decisions involve difficult judgements—for example about what constitutes a confidence motion, the selection of amendments to such Motions and the consequences of their being carried—but they would be made in a potentially highly charged political situation which could also lead to challenge in the House. As these would become justiciable questions, the courts could be drawn into matters of acute political controversy.

17. Although the provision in 2 (3), that the Speaker's certificate is conclusive for all purposes, is meant to mitigate challenge or questioning in the courts, it cannot be a protection against the courts interpreting statute either in the UK or in Strasbourg. The comity established between Parliament and the Courts has relied on the fact that the internal proceedings of the House were entirely matters within the House's jurisdiction and were not for determination by the courts. Thus the principal procedures and practices of the House arise from Standing Orders, Resolutions or Rulings from the Chair, none of which can be legally challenged, nor can the Courts' assistance be sought in interpretation or enforcement. The same applies to the House's control, through the Speaker, of the precincts. But embodying these internal proceedings in statute radically changes their status since, by reason of being embodied in statute law, they become questions which are ultimately to be determined by the judiciary rather than by members of the legislature accountable to the electorate whom they serve.

18. The history of the courts' involvement in interpreting the meaning of words in the Bill of Rights and the implications of human rights aspects of European law, provide no basis for concluding that the courts will keep out of this new statutory territory. Indeed, it is the purpose of the courts to interpret and apply the law to individual cases. In the case of Clause 2(3) it would be for the court to determine whether a document issued by the Speaker was a 'certificate' for the purposes of that clause. It is not impossible for a court to take the view that what appeared to be a certificate was not a 'certificate' because in making it the Speaker had made an error of law.<sup>6</sup>

19. In passing, I would mention difficulties in the operation of Section 2 (4) of the Bill. In the first place, it is the Speaker who has exclusive authority over the records of the House's decisions. Furthermore, the possibility of disagreement with his Deputies could also make the subsection difficult to operate. The provision imposes a legal duty on the Speaker to consult the Deputy Speakers "so far as practicable". The question of whether consultation was "practicable" would become a legal question, with the courts making determinations with respect to the relationship between the Speaker and his Deputies.

<sup>5</sup> Set out in House of Commons Committee on Issue of Privilege, First Report HC 62 (Session 2009–10) Ev 130–1

<sup>6</sup> Cf. the reasoning in the well-known case of *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147 where an error of law by the FCC made its decision a nullity and therefore not protected by a provision in the Act establishing the FCC purporting to oust the jurisdiction of the courts.

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*The Parliament Acts 1911 and 1949*

20. The Parliament Acts 1911 and 1949 regulate the relationship between the two Houses in defined circumstances enabling the will of the Commons to prevail over the House of Lords if the Commons pass a bill originating in the Commons in identical form in two successive sessions of Parliament and it is twice rejected by the Lords. They also involve Speaker's certification and prescribe proceedings on "suggested" or compromise amendments. In 2005, the supporters of hunting launched a legal challenge to the Hunting Act 2004 (which had been passed into law under the provisions of the Parliament Acts).

21. The Court action rested upon a challenge to the validity of the 1949 Act on the grounds that it had gone beyond the powers conferred by the 1911 Act. Although the Law Lords dismissed the case on appeal, the courts were prepared to consider the validity of an Act of Parliament.<sup>7</sup> Moreover, in the Court of Appeal, the judges implied that there were limits to the circumstances in which the Commons could impose its will on the Lords through the Acts.

22. Another procedural matter affecting Speaker's certification might have been challenged if a decision in the Lords had gone a different way during the passage of the Hunting Bill through the Houses. This was in connection with a "suggested" amendment (a compromise involving a delay in the coming into effect of the Act). Different views were taken in the two Houses as to whether the Speaker could include the suggested amendment in his certification, even if the Bill was not passed in the Lords. In the event the suggested amendment itself was rejected by the Lords so that the Speaker was not faced with this decision but had he been and because the matter was highly contentious it too could have been the subject of legal dispute.<sup>8</sup>

23. The case of the legal challenge to the Hunting Act 2004 and the validity of the Parliament Act 1949 indicates the extent to which matters affecting the internal jurisdiction of the Houses may become adjudicated in the courts once they are embedded in statute.

*Challenges to the Bill if enacted*

24. In the case of the existing Bill, the possible areas of challenge are wide-ranging. For example, any interested party (which given the subject of the motion could be widely interpreted) could challenge whether a motion for dissolution had been correctly worded or processed, whether the decision had been correctly reached and recorded, whether the casting vote of the Speaker had been used appropriately, whether nodding through "counted" as voting, and so on. In addition, Members who have been prevented from voting for whatever reason (transport delays, suspension, not taking the oath) may have an argument that they have a statutory right to vote in Clause 2(1)(c) cases, since the qualifying majority is one of the number of seats in the House (as opposed to Members present and voting). Conceivably such an argument could be bolstered by relying on the right to freedom of expression under Article 10 ECHR.

25. Legal challenges of this kind in systems regulated by statute are not a purely theoretical possibility. In Germany in 2005, the Federal Constitutional Court was asked to decide on a case concerning dissolution following a vote of no confidence in the Bundestag. The possibility of an election being delayed or cancelled as a result of legal challenge must be an unwelcome one.

26. Lastly, it should be observed that, by writing into statute law how a decision is taken, divests the House of power to change those procedures without the initiation of further legislation by the Government. In parliamentary systems regulated by a written constitution (or a set of constitutional statutes such as in Canada), adjudication of such matters can take place in a constitutional court. Usually there are safeguards against interference with parliamentary privilege written into the constitution.<sup>9</sup> That is not the position in the United Kingdom.

*Conclusion: a way forward*

27. The focus of my memorandum has been to consider how the provisions of the Bill affect the House's internal jurisdiction or exclusive cognizance and the protection of the questioning of its proceedings under Article IX of the Bill of Rights. I do not, as I said at the beginning of this memorandum, question the policy objective at the core of the Bill, but it is important that the House should understand what the implications of the Bill's provisions are in respect of its internal proceedings.

28. It would be possible to avoid these privilege problems if the provisions of the Bill relating to the calling of early parliamentary general elections were instead to be written into the Standing Orders of the House, thereby preventing them from being questioned or interfered with outside Parliament. Moreover, a Standing Order regulating the matters in the Bill could provide for its staying in effect unless repealed by a specified majority / for example by a number equal to or greater than two thirds of the number of seats in the House. Not only is the principle of specifying majorities already written into the Standing Orders of the House,<sup>10</sup>

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<sup>7</sup> For skeleton arguments for Claimants, see High Court judgement EWHC 94 (Admin) at para 11

<sup>8</sup> See also T Mohan "The Hunting Act 2004 and the Parliament Acts", *The Table* Vol 73 2005 pp 34-45

<sup>9</sup> In the Canadian case it is concluded that "The Canadian House of Commons has, therefore, acquired as one of its more important privileges, the exclusive right to regulate its own internal affairs and to control its agenda and proceedings." *House of Commons Procedure and Practice*, 2nd Edition 2009 p. 253

<sup>10</sup> A specified majority (of not fewer than 100) is needed for the question on a closure to be decided in the affirmative (SO No. 37). Numbers needed for Standing Orders to have effect also apply to emergency debates (SO No. 24) and for quorum (SO No. 41) (not fewer and fewer than 40 Members respectively).

but in the past the House has also required a relative majority for reaching decision. This was the case in questions relating to urgent business where a Question could only be resolved in the affirmative if there was—“a majority of not less than three to one, in a House of not less than 300 Members”.<sup>11</sup>

29. So far as dissolution is concerned, the Standing Order could include the mechanism for an Humble Address to the Crown seeking dissolution when the conditions of the Standing Order were met, thereby incidentally preserving the Crown’s prerogative in the matter of dissolution.

30. There is therefore precedent and a route by which the purpose of the Bill on fixed-term Parliaments could be achieved which would avoid the constitutional innovation of moving such matters into the judicial province and so leave undisturbed the House’s mastery of its own proceedings.

24 August 2010

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**Written evidence submitted by Professor Dawn Oliver, UCL (FTPB 02)**

**1. THE OBJECTIONS TO THE PRESENT SYSTEM:**

The present system enables the Prime Minister to choose a date for the general election before the expiry of the five years since the previous election.

- The PM may therefore choose a date when s/he considers the governing party has the best chance of winning or that particular other parties have the worst chance of winning.
- It is not fair on the other parties or on voters to give the incumbent this advantage.
- It is contrary to any idea that constitutional arrangements, particularly for elections, should be neutral as between parties and their supporters.

There is always a risk that parties and their leaders will assume that their function is to exercise their powers and functions in the interests of their members and voters.

- This is contrary to the general constitutional principle that government is there to serve the general public interest and not the interests of particular sectors of society, whether parties and their members, or religious, racial, sex, class or other interests.
- This risk is illustrated by the way in which David Cameron criticised Gordon Brown when he became PM in 2007 for bottling out of calling an election that year, when he should have criticised Brown for even considering calling an election at a time that would maximise the chances of his party winning and of the other parties doing badly.

In my view our constitutional arrangements should be designed to guard against the natural tendencies of parties and others to promote their own interests rather than general interests.

**2. THE ONLY ARGUMENTS I CAN THINK OF IN FAVOUR OF THE PRESENT ARRANGEMENT ARE**

- that enabling the incumbent to remain in power by choosing the date of the election means continuity of policy—which may be a good thing, but may not be—and
- that fixed terms and the detailed provisions that go with them are worse for the public interest than the present arrangements.

**3. THUS THE PROPOSED NEW ARRANGEMENTS FOR FIXED TERM PARLIAMENTS NEED TO BE CONSIDERED AGAINST THE CRITERIA WHETHER THEY WOULD BE WORSE FOR THE GENERAL INTEREST THAN THE STATUS QUO.**

- In principle I am in favour of fixed term Parliaments.
- I would prefer the term to be of four years than five. Most elections in recent years have been held about four years after the previous one.
- On the other hand I recognise that an election campaign would in effect start about a year before an election is expected and if the term were four years an election campaign would start only after the government had been three years in power.
- Long election campaigns are not in my view in the public interest because they put pressure on the government to adopt policies in their own short term interests in winning the election rather than in the longer term interests of the general public as they see them.
- Election campaigns also involve the parties seeking to undermine trust in other parties and this is not normally in the public interest unless, of course, the other parties do not deserve trust—ie are untrustworthy. But it is not in the public interest that constitutional arrangements provide incentives and possible rewards to unfounded accusations of untrustworthiness.
- One way of reducing these incentives is to lengthen the periods between election campaigns.
- Under current arrangements when elections could be called at any time after about two years since the previous election such incentives exist and are damaging to public trust.

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<sup>11</sup> Commons Journal Vol 136 1881 57

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4. I ACCEPT THAT IT MAY BE IN THE PUBLIC INTEREST FOR AN ELECTION TO TAKE PLACE BEFORE THE EXPIRY OF THE FIVE YEAR FIXED TERM IN CERTAIN SITUATIONS.

- For instance, if no person is able to form a government that can get its business through parliament.
- The normal way in which this is determined is if a motion of no confidence is passed.
- However if that were the only way in which a government could be brought down and an early election called, measures would have to be in place to prevent the government itself engineering a loss of a vote of confidence at a time of its choosing.
- One way of preventing government from taking advantage in this way would be for the newly elected parliament to be dissolved at the date the original parliament would have been dissolved, so that the only advantage of an early election to the incumbent would be the possibility of a larger majority, and the only advantage to opposition parties who hope to win a majority would be forming a government for the remainder of the term, which might be a short period.
- When a motion of no confidence is passed by the Commons it may be possible for another person to form a government which either has a majority, or which will be supported or not brought down by one or more other parties even though they are not parties to a coalition.
- If this is the case, then it ought to be permissible for another possible Prime Minister to have the chance to form a new government even after a vote of no confidence in the existing government has been passed.
- The principle at stake here is that it is in the public interest that there should be a government of the UK that can get its business done. It is against the public interest for there to be no effective government of the country.

5. WITH THESE BASIC PRINCIPLES IN MIND, I CONSIDER THE ARRANGEMENTS FOR EARLY DISSOLUTION THAT ARE SET OUT IN THE FIXED TERM PARLIAMENTS BILL.

- I do not consider the requirement for a two thirds majority under clause 2(1) to be appropriate.
- It may very well be the case that a government cannot command the support of a majority in the House of Commons or cannot rely on sufficient members abstaining on a vote to enable it to get its measures through, but that there is less than a two thirds majority against it (ie such a government, though lacking a majority, may have the support of more than one third of the members of the House).
- In that case either another member of the Commons should have the opportunity to form a government, or an early election may be in the public interest so that a new government is formed and government can be carried on.
- But the two thirds majority requirement for an early dissolution would make an early election impossible.
- Clause 2(2) would permit the incumbent government to have a 'vote of no confidence' (censure motion) passed by its own supporters in order to secure an early dissolution. That would be contrary to the principle of neutrality.

6. I THEREFORE PROPOSE THAT:

1. An early election may only be called if -
  - a. a vote of no confidence in HM government has been passed in the House of Commons on a motion put forward by, say, 20 members of the Opposition party, and
  - b. no other person has been able to form a government within ten days of the vote of no confidence.
2. If an election is held after the vote of no confidence, the newly elected Parliament should then serve only for the rest of the term of the dissolved one.

9 August 2010

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**Written evidence submitted by Professor Robert Hazell,**

THE CONSTITUTION UNIT, UNIVERSITY COLLEGE LONDON (FTPB 03)

FOREWORD

The new Conservative-Liberal Democrat coalition government has an ambitious and wide ranging agenda for political and constitutional reform. One of the main items, on which it is proceeding apace, is the proposal for fixed term parliaments. This featured in the Programme for Government, published on 20 May; with further detail given by the Deputy Prime Minister in a statement to the House of Commons on 5 July. On 22 July the government introduced its Fixed Term Parliaments Bill, just before the summer recess, and indicated that Second Reading should take place in mid September.

The rapid pace has allowed almost no time for public consultation or debate. There has been no Green or White Paper. The bill has not been published in draft, with time allowed for pre-legislative scrutiny. The new Political and Constitutional Reform Committee in the Commons will hold some quick evidence sessions in September; and the Constitution Committee in the Lords is to conduct an inquiry into fixed term parliaments in the autumn. This briefing is being submitted as evidence to both Select Committees. It is also being published to facilitate a wider debate, and to put into the public domain evidence about the experience of fixed term parliaments in other countries.

The Unit's work on this subject started in 2006, when one of our summer interns, Claude Willan, did a lot of research and left us a draft briefing. This was revised and updated by two more interns, Ceri Lloyd-Hughes and Ruchi Parekh, with further help from Jessica Carter. I am grateful to all of them for their excellent research and support for this project. Without our interns we would not be able to produce nearly as many reports, nor such high quality work as we manage to do.

#### SUMMARY OF KEY POINTS

Fixed term parliaments remove the Prime Minister's power to decide the date of the next election. They should create greater electoral fairness and more efficient electoral administration, and enable better long term planning in government. Their potential disadvantage is a loss of flexibility and accountability.

Fixed term parliaments are a big constitutional change. Yet the government's Bill has been introduced with no public consultation, no Green or White Paper, no draft bill. The legislation should not be rushed. It could still be passed with all party support: the Labour party also had a manifesto commitment to fixed term parliaments.

The key issues to decide are: the length of the fixed term; how to allow for mid term dissolution; how to reform the prerogative powers of dissolution and proclamation.

The fixed term should be four years, not five. The norm in other Westminster parliaments with fixed terms is four years; as it is in Europe. To avoid clashes with devolved or European elections, general elections should be held in October, with the next one scheduled for October 2014.

The two thirds majority for mid term dissolution is aimed mainly at majority governments. It should make it impossible for them to call an early election without significant cross-party support. Even if it is sometimes circumvented by engineered no confidence motions, it should help to establish a new norm.

If the new parliament served only the remainder of the previous term that would also be a disincentive to mid term dissolutions.

No confidence motions will continue to come in different forms. If government or opposition have declared an issue to be one of confidence, the Speaker should indicate at the beginning of the debate whether the motion is a confidence motion.

Dissolution rules need not be too elaborate, or restrictive. Political incentives should also prove a force for stability. Political parties do not like frequent elections; nor do the electorate, who may punish a party which forces an unnecessary election.

Investiture votes are a more direct way of establishing who can command confidence, at the beginning of a parliament, and after successful no confidence motions.

The power of proclamation should be reformed so that the Electoral Commission is put in charge of the election timetable, and the date for first meeting of the new parliament is set by the outgoing Speaker.

It is very difficult to entrench the Fixed Term Parliaments Act. A future government and parliament can always amend or repeal it. It will create a norm, not a rigid constitutional rule.

One way of entrenching the Act could be to give the Lords an absolute veto over any amendment under the terms of the Parliament Act 1911. The Wakeham Commission recommended against extending the veto powers of the Lords.

## 1. THE CURRENT SYSTEM IN THE UK

### 1.1 *Length of parliamentary terms*

The electoral timetable in Britain has grown out of several pieces of legislation. The Meeting of Parliament Act of 1694 (also known as the Triennial Act) provided that a UK parliamentary general election must be held every three years. This was amended by the Septennial Act of 1715 which extended the parliamentary term to a maximum of seven years. The Parliament Act of 1911 amended this to provide for the current five year maximum term.



## 1.2 *Dissolution of parliament*

### 1.2.1 The procedure

The decision to call a general election is made by the Prime Minister, who asks the Monarch to dissolve parliament. This is done by a Royal Proclamation requiring the writs to summon a new parliament to be sent out. The general election timetable then comes into effect, running for eighteen days excluding weekends and bank holidays.<sup>12</sup>

### 1.2.2 The Prime Minister's role

Parliament is dissolved by the Crown on the advice of the Prime Minister. The Prime Minister makes his or her choice independently of parliament, government, and often even their closest colleagues in the Cabinet.

### 1.2.3 The Royal Prerogative

Dissolution of parliament is the Crown's prerogative. Theoretically, the Monarch can exercise discretion over whether to grant a request for dissolution by the Prime Minister. The Lascelles principle provided that the Crown may justifiably refuse a request for dissolution where:

(1) the existing Parliament was still vital, viable, and capable of doing its job; (2) a General Election would be detrimental to the national economy; [and] (3) he could rely on finding another Prime Minister who could carry on his Government, for a reasonable period, with a working majority in the House of Commons.<sup>13</sup>

A modern formulation of the circumstances in which the Monarch might refuse a dissolution is in the draft Cabinet Manual: see section 1.3.1 below.

### 1.2.4 Announcing the dissolution

Since 1945, the Prime Minister has made the announcement of dissolution to the press rather than to parliament. Parliament does not need to be sitting. The interval between the announcement and the dissolution itself has become shorter. From 1945 to 1970, there was an average interval of 16 days.<sup>14</sup> But in February 1974 Harold Wilson gave only one day's notice. Since then, the interval between announcement and dissolution has rarely been more than seven days,<sup>15</sup> maximising the advantage the government holds over the opposition.

## 1.3 *Extraordinary dissolutions*

Early dissolutions may take place if the government loses the confidence of the House or decides to resign.

### 1.3.1 Constitutional rules governing issues of confidence

It is a cornerstone of the British constitution that the government must have the confidence of the House of Commons.

Chapter 6 of the draft *Cabinet Manual* says:

A Government or Prime Minister who cannot command the confidence of the House of Commons is required by constitutional convention to resign or, where it is appropriate to do so instead, may seek a dissolution of Parliament.<sup>16</sup>

Should the government resign, rather than seek dissolution, it is for the Monarch to invite the person who appears most likely to be able to command the confidence of the Commons to serve as Prime Minister and to form a government. However, it is the responsibility of the parties and politicians to determine and communicate clearly who that person should be.<sup>17</sup>

The draft *Cabinet Manual* states the following with regard to the choice between dissolution and resignation:

A Prime Minister may request that the Monarch dissolves Parliament and hold a further election. The Monarch is not bound to accept such a request, especially when such a request is made soon after a previous dissolution. In those circumstances, the Monarch would normally wish the parties to ascertain that there was no potential government that could command the confidence of the House of Commons before granting a dissolution.<sup>18</sup>

<sup>12</sup> Representation of the People Act 1983, Schedule 1, §2(1)(a)

<sup>13</sup> "Dissolution of Parliament: Factors in Crown's Choice", *The Times*, 2 May 1950, p.5

<sup>14</sup> For a table of dates relating to general elections since 1918, see: House of Commons Library Research Paper 09/44, *Election Timetables*, 13 May 2009

<sup>15</sup> *Ibid.*

<sup>16</sup> Draft Cabinet Manual Chapter 6 (Feb 2010): *Election and Government Formation*, para.14

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.* para.18

### 1.3.2 Extraordinary dissolutions in practice

There have only been three successful votes of no confidence since the start of the 20th century. On the last two occasions, the government announced the dissolution of Parliament on the following day (October 1924 and March 1979). Following the January 1924 defeat on the Queen's Speech, however, the Prime Minister Stanley Baldwin resigned rather than dissolve Parliament. Parliament need not be dissolved in the case of the resignation or death of the Prime Minister, as made clear by practice and the draft *Cabinet Manual*.<sup>19</sup> However, the government may choose to call an election in such a case.

## 2. THE COALITION GOVERNMENT'S PROPOSALS

### 2.1 *The coalition government's proposal*

"The date of the next general election will be 7 May 2015. This is a hugely significant constitutional innovation. It is simply not right that general elections can be called according to a Prime Minister's whims, so this Prime Minister will be the first Prime Minister to give up that right." Nick Clegg MP in the House of Commons, 5 July 2010<sup>20</sup>

The 20 May 2010 Programme for Government set out the government's initial commitment on fixed term parliaments:

We will establish five year fixed term Parliaments. We will put a binding motion before the House of Commons stating that the next general election will be held on the first Thursday of May 2015. Following this motion, we will legislate to make provision for fixed term Parliaments of five years. This legislation will also provide for dissolution if 55% or more of the House votes in favour.<sup>21</sup>

On 25 May 2010, the first adjournment debate of the new Parliament considered dissolution of parliament and fixed terms. There was considerable uncertainty about the proposals, as well as some resistance from backbenchers and opposition MPs. Much criticism focused on the 55 per cent threshold.

Much of the same ground was covered in the House of Commons debate on the Address on 7 June 2010. Calls for active discussion and pre-legislative scrutiny of any proposals for fixed terms continued, as did confusion and distrust over the difference between a no confidence motion and a dissolution motion.<sup>22</sup> Similar concerns were raised in the House of Lords.<sup>23</sup>

Following criticism of the measures as originally proposed, Nick Clegg announced on 5 July that the coalition government had revised and clarified their proposals:

- A majority of two thirds would be needed to dissolve parliament, as opposed to the 55% first suggested
- Votes of no confidence would still require only a simple majority.<sup>24</sup>

On 22 July 2010 the government published its Fixed Term Parliaments Bill, with the following provisions:

- A fixed term of five years, with the next election scheduled for 7 May 2015
- The Prime Minister can move the election date forward or back by up to two months, by Order subject to affirmative resolution
- Parliament can be dissolved early of its own motion, or following a vote of no confidence
- A motion to dissolve must be passed by a two thirds majority, but a no confidence motion by a simple majority
- A no confidence motion will lead to dissolution if no alternative government is formed within 14 days
- Parliament cannot otherwise be dissolved. The prerogative power of dissolution is abolished, but not the power of prorogation
- A mid term dissolution resets the clock, so that the next election follows five years later
- The Queen by proclamation appoints the day for the first meeting of the new parliament

The committee stage of the bill will be taken on the floor of the House of Commons, as a constitutional measure.<sup>25</sup> Under the Coalition Agreement, the Bill will be whipped through both Houses.<sup>26</sup>

<sup>19</sup> Ibid. para.21

<sup>20</sup> HC Deb 5 Jul 2010 col.23

<sup>21</sup> The Coalition: Programme for Government, p.26, available at <http://programmeforgovernment.hmg.gov.uk/files/2010/05/coalition-programme.pdf>

<sup>22</sup> E.g. Jack Straw MP, HC Deb 7 Jun 2010 col.25

<sup>23</sup> HL Deb 27 May 2010 cols.136-244

<sup>24</sup> HC Deb 5 Jul 2010 col.23. For the full quote from Nick Clegg see chapter 6.1

<sup>25</sup> Nick Clegg MP, HC Deb 5 Jul 2010 col.29; David Howarth MP, HC Deb 25 May 2010 col.146-7

<sup>26</sup> Agreement for Stability and Reform 21 May 2010, Introduction; <http://www.cabinetoffice.gov.uk/media/409174/stabilityreformmay2010.pdf>. Confirmed by David Heath MP, HC Deb 25 May 2010 col.147

## 2.2 *Timetable for coalition government's bill*

The Fixed Term Parliaments Bill was prepared on an extraordinarily rushed timetable. It was introduced with no prior consultation, no Green or White Paper. Nor has time been allowed for pre-legislative scrutiny of a draft bill. The new government felt that fixed term legislation was essential to ensure the stability of the coalition. But the coalition will survive if it is effective; not because it has legislated that the Parliament must last for five years.

A rapid timetable was necessary for the legislation to reduce the size of the House of Commons, because of the need to start the wholesale boundary reviews which are required. But the Fixed Term Parliaments Bill does not need to be rushed. The Labour party also had a commitment to introduce fixed term parliaments. The legislation could still be introduced with cross-party support, if the government is willing to take it slowly. That is what the government is seeking to do with reform of the House of Lords. It should adopt the same approach with this bill.

## 3. ARGUMENTS FOR AND AGAINST FIXED TERMS

### 3.1 *Arguments in favour of fixed terms*

#### 3.1.1 Electoral fairness

The advantage an incumbent government has in calling the election when it chooses has been famously compared to an athlete arriving at the track already in running shoes and being allowed to fire the starting pistol.<sup>27</sup>

Professor Blackburn describes this unfair advantage:

. . . [A] Prime Minister sets an election date at the time when he thinks he is most likely to win it. Conversely, he will avoid such times as he is likely to lose it. The anachronistic state of the law on electoral timing adversely affects the fairness of the election process as a whole. It gives the party in government a tremendous tactical advantage over the opposition parties, and of all the possible flaws to be found in our electoral law and administration, this perhaps above all other matters does most harm to the integrity of the electioneering contest.<sup>28</sup>

#### 3.1.2 Reduction of Prime Ministerial power

The power to determine the date of the election is a source of additional power for the Prime Minister over his colleagues. It enables him to bring into line his ministers and backbenchers. If they threaten to rebel he can in turn threaten them with an early election. John Major as Prime Minister was able to threaten the Maastricht rebels with an early election if they did not fall into line. With fixed term parliaments a Prime Minister could no longer threaten a snap election in this way.

#### 3.1.3 Better electoral administration

The Electoral Commission has long had an interest in fixed term parliaments, which would enable electoral administrators to be better prepared because the election date would be known in advance. It has also argued for a longer general election timetable, to bring it into line with the 25 day local election timetable. There are three main problems: organising simultaneous elections on different timetables; the heavy workload associated with postal and proxy votes; and problems for voters in the short deadline for registering to vote, and organising a postal vote.<sup>29</sup>

The Electoral Commission reported on the 2010 general election:

Returning Officers have—as in previous elections—expressed concerns about the statutory timetable for UK general elections, and in particular the challenges of key deadlines within the timetable. . . .<sup>30</sup>

The report urges the government to use the fixed term parliament legislation to address the issue of lengthening the election timetable.

#### 3.1.4 Better governmental planning

Fixed term parliaments create an expectation that the parliament will run for the whole term, which could reduce short termism. This is particularly important when there is a minority or coalition government, or when the government's majority is narrow. Fixed terms should give the government reasonable time to develop and implement their legislative agenda or programme.

<sup>27</sup> Lord Holme, HL Deb 22 May 1991 col.245. See also Lord Jenkins quoted in section 5.1.

<sup>28</sup> Robert Blackburn, Memorandum on Electoral Law and Administration, Appendices to Minutes of Evidence, Select Committee on Home Affairs, May 1998

<sup>29</sup> Electoral Commission, Election Timetables in the UK June 2003 p 3. Electoral Commission, Securing the Vote, 2005, p 53.

<sup>30</sup> Electoral Commission. Report on the administration of the 2010 general election. July 2010

There should be no need for a wash up, because with good planning all bills should have been passed. Ill timed measures could be avoided, such as outlining a budget just before an election, as happened in 1992. The increased certainty will enable greater confidence in the government's ability to tackle economic issues on a medium to long term basis.

### 3.1.5 Protection of the Crown

By minimising or regulating the discretionary use of prerogative powers, constitutional crises as have occurred in some Commonwealth countries could be avoided. The King-Byng affair in Canada in 1926 and the Australian constitutional crisis of 1975 demonstrate the difficulties for the Crown when faced with requests for early dissolution.

## 3.2 *Arguments against fixed terms*

### 3.2.1 Loss of flexibility and reduced accountability

Fixing terms could prevent a general election from taking place when it may otherwise be seen as appropriate. For example, Anthony Eden's decision to call a premature election in April 1955 can be justified on a mandate basis: he had only taken over as PM nine days earlier after the resignation of Winston Churchill. Fixed terms will remove or at least limit the government's capacity for testing electoral opinion on a major public issue where it might be in the country's interest to do so.

There is a risk that rigidity could lead to "lame duck" governments, lacking the full confidence of the House of Commons but not capable of being brought down. This concern has been strongly expressed in New South Wales, where a deeply unpopular government cannot be removed (see section 5.3).

### 3.2.2 Ineffective

Experience of fixed term parliaments in other jurisdictions show that governments have been able to circumvent the fixed term requirement and call elections according to their convenience. The 2008 election in Canada is a recent example, when the government ignored its fixed term legislation, passed only the previous year (see section 5.2.1). In Germany, Chancellors Helmut Kohl in 1982 and Gerhard Schröder in 2005 engineered to lose a vote of confidence in order to dissolve parliament mid term. These examples suggest that a government desperate to call an election will find a way, regardless of the safeguards in place.

## 4. LENGTH OF FIXED TERM

### 4.1 *Four years or five*

The coalition government proposes a five year fixed term for Westminster, with the date for the next general election set for 7 May 2015. This is long by comparison with most other parliamentary systems. In the Westminster world, Australia and New Zealand have three-year maximum terms. The legislatures of Canada and many of its provinces have four year fixed terms, as do most Australian states. The devolved legislatures in Scotland, Wales and Northern Ireland all have four year fixed terms. Ireland's lower house has a five year maximum, as in the UK.

In continental Europe most countries have four year fixed terms, and only three (France, Italy, Luxembourg) have five years. The length of parliamentary terms in other Westminster parliaments and in Europe is shown in Figure 4.1.

**Figure 4.1**  
FIXED TERMS IN EUROPE, AND OTHER WESTMINSTER COUNTRIES

<i>Country</i>	<i>Length of Fixed term</i>	<i>Maximum Term</i>
Austria	4	
Belgium	4	
Denmark	4	
Finland	4	
France	5	
Germany	4	
Greece	4	
Iceland	4	
Ireland		5
Italy	5	
Luxembourg	5	
Netherlands	4	
Norway	4	
Portugal	4	
Spain	4	

<i>Country</i>	<i>Length of Fixed term</i>	<i>Maximum Term</i>
Sweden	4	
Switzerland	4	
Australia		3
Canada	4	
India		5
Ireland		5
New Zealand		3
South Africa	5	
Northern Ireland	4	
Scotland	4	
Wales	4	

Five years is also long by comparison with Westminster's recent experience. The average term since 1945 has been 3.7 years, although discounting the three occasions on which parliaments lasted less than two years, this rises to 4.3 years. This has remained stable, with an average term length of 4.4 years since October 1974. The length of each parliament since 1945 is set out in Figure 4.2. Analysis of those parliaments which ran for a full term records seven parliaments which lasted around four years (1951, 1966, 1970, 1979, 1983, 1997, 2001); three which lasted four and a half years (1945, 1955, 1974); and four parliaments which ran for five (1959, 1987, 1992, 2005).

The balance between four and five years is more even than folk memory might suggest. But those parliaments which lasted for five years did so because the government had become unpopular and did not want to hold an earlier election. The Prime Minister stayed on hoping that his or her party's luck might change. It did not, save for the case of John Major, who scraped through with a narrow majority in 1992.

**Figure 4.2**

LENGTH OF POST WAR PARLIAMENTS AT WESTMINSTER

<i>Year</i>	<i>Month</i>	<i>Length (years.months)</i>
1945	July	
1950	February	4.7
1951	October	1.8
1955	May	3.7
1959	October	4.4
1964	October	5.0
1966	March	1.6
1970	June	4.3
1974	February	3.8
1974	October	0.7
1979	May	4.6
1983	June	4.1
1987	June	4.0
1992	April	4.9
1997	May	5.0
2001	June	4.1
2005	May	3.11
2010	May	5.0

Politicians and academics who have addressed the issue support parliaments running for four years rather than five. During the debates on the Parliament Act 1911, which reduced the maximum term from seven to five years, Prime Minister Asquith said:

In the first place we propose to shorten the legal duration of Parliament from seven years to five years, which will probably amount in practice to an actual legislative working term of four years. That will secure that your House of Commons for the time being, is always either fresh from the polls which gave it authority, or—and this is an equally effective check upon acting in defiance of the popular will—it is looking forward to the polls at which it will have to render an account of its stewardship.<sup>31</sup>

Professor Blackburn has also argued for a four year term:

In the UK, there can be little doubt that the period between general elections should be four years. The proposal for fixed term Parliament as a whole should fit as closely as possible into existing constitutional expectations, and the idea that four years is about the right length of time between

<sup>31</sup> HC Deb 21 February 1911 c1749

elections is very prevalent. It was the period expressly approved of as being normal in practice, when the Parliament Act set the period of five years as a maximum. In an ideal democracy it may be that there should be elections as frequently as possible—even annually as supported by the Chartists in the eighteenth century—but a government must be allowed a sufficient period of time in which to put its programme of public policies into effect before submitting its record of achievement, or otherwise, to the voters. Three full legislative sessions, and certainly four, is sufficient for this purpose.<sup>32</sup>

Recent reform proposals by the political parties have all supported a four year term. This can be found in the Labour party's 1992 report *Meet the Challenge, Make the Change*; in the 1993 report of the Labour party's Plant Commission; in the 1992 and 1997 Liberal Democrat manifestos; and in the Liberal Democrat policy papers *Real Democracy for Britain* (2006), and *For the People, By the People* (2007). The three Private Member's Bills introduced in the last ten years, by the Labour MPs Jeff Rooker and Tony Wright, and the Lib Dem David Howarth MP all supported four year terms (see chapter 6). Indeed, none of the proponents of fixed term parliaments have advocated a term of five years.

#### 4.2 *Fitting around other electoral cycles*

Thought also needs to be given to how Westminster's fixed terms will fit with the electoral cycles for the devolved assemblies, the European Parliament and elections to the second chamber. The table below sets out the electoral cycle for future elections to the European Parliament and the devolved assemblies, with separate columns for a four and a five year cycle for the House of Commons. Dates in italics indicate a combination of a UK general election and European Parliamentary election on the same date; dates in bold indicate a clash between a general election and devolved assembly elections.

**Figure 4.3**

#### ELECTORAL CYCLE FOR UK GENERAL ELECTIONS AND OTHER ELECTIONS

<i>European elections</i>	<i>Devolved elections</i>	<i>UK elections 4 yrs</i>	<i>UK elections 5 yrs</i>
<b>2014</b>	<b>2015</b>	<b>2014</b>	<b>2015</b>
2019	2019	2018	2020
2024	2023	2022	2025
2029	2027	2026	2030
<b>2034</b>	2031	2030	<b>2035</b>
2039	<b>2035</b>	<b>2034</b>	2040

Second chamber elections are likely to be for one third of the House each time. They could be held at the same time as elections to the Commons; or if they were to be staggered between general elections, they could be held at the same time as European Parliament elections (five year intervals, 15 year terms), or devolved assembly elections (four year intervals, 12 year terms).

If the government wished to avoid any clash between UK general and other elections, the simplest solution might be to move the date of general elections to October, and provide for the next UK general election to be held in October 2014. That would allow the Conservative-Lib Dem coalition a term of four and a half years, but provide for four year terms thereafter. To enable the electoral register to be as up to date as possible, the annual canvass forms would need to be sent out in the spring or the summer, instead of in the autumn as at present.

#### 4.3 *Time of year, and day of the week*

Although in the last 30 years general elections have been held in April, May or June, four post war elections have been held in October: in 1951, 1959, 1964 and 1974 (see Figure 4.2). Elections have traditionally been held on Thursdays, but in 2007 the Electoral Commission issued a consultation paper on moving general, and potentially local, elections to weekends. The findings of the public consultation show that 53 per cent of those who participated favoured retaining polling on a weekday.<sup>33</sup> This lack of consensus combined with thin evidence that weekend voting would increase voter participation led to the conclusion that "the government do not propose to move forward with weekend voting at this time."<sup>34</sup> Further, the estimated costs of changing to voting across Saturday and Sunday was £105 million.<sup>35</sup>

<sup>32</sup> Robert Blackburn, Memorandum on Electoral Law and Administration, Appendices to Minutes of Evidence, Select Committee on Home Affairs, May 1998

<sup>33</sup> <http://www.justice.gov.uk/consultations/docs/election-day-weekend-voting.pdf> p6

<sup>34</sup> Minister of State, Ministry of Justice (Michael Wills) Hansard: 22 March 2010 <http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/100322-wms0002.htm>

<sup>35</sup> <http://www.justice.gov.uk/consultations/docs/election-day-weekend-voting.pdf> p40

## 5. COMPARATIVE EXPERIENCE FROM OTHER COUNTRIES

Fixed term parliaments are reasonably common in other countries, with one 2005 study categorising three quarters of the 41 democracies analysed as having fixed terms.<sup>36</sup> But within that universe there is a wide variation of practice, ranging from completely fixed terms with no provision for early dissolution, to more flexible systems which allow the legislature to be dissolved before the scheduled date. This range is illustrated in Figure 5.1 (at the end of this report).

Almost all parliaments with fixed terms have a safety valve of some kind to allow premature dissolution, though Norway is a notable exception. There is also variation in the term length, the timing of elections after a premature dissolution, and the mechanism for varying the election day.

### 5.1 *Devolved institutions of the UK*

The devolved legislatures of Scotland, Wales and Northern Ireland all have fixed terms with provisions for extraordinary dissolution. Their elections are scheduled for the first Thursday in May every four years.<sup>37</sup> The date may be varied by up to one month either way by the Monarch on the proposal of the Presiding Officer.

They can be dissolved prematurely if the legislature so resolves (with at least two-thirds of members voting in favour), or if the legislature fails to nominate a First Minister within 28 days of an election. There are thus two routes to dissolution. Either the parliament resolves to dissolve itself by a two thirds majority, or a dissolution may result if a government is defeated on a confidence motion (on a simple majority), if no First Minister is nominated to replace the defeated government.

A new parliament elected mid term serves only for the remainder of that term. But if an extraordinary election is held in the six months before the date of the next scheduled election, that election is vacated: so that the next term runs for slightly longer than four years.

### 5.2 *Canada*

#### 5.2.1 At the federal level: the Canadian House of Commons

Canada introduced fixed parliamentary terms at the federal level in 2006, under Bill C-16 (*An Act to Amend the Canada Elections Act*). This set elections for the third Monday in October of the fourth calendar year after the previous poll, starting with 19 October 2009.<sup>38</sup> However, the Bill provided that the prerogative power of the Governor General to dissolve parliament was not affected.<sup>39</sup> The reason for this was that altering the powers of the Crown would have required a constitutional amendment, which in Canada is a difficult procedure involving all the provinces.

The Bill became law in May 2007, adding the following section to the *Canada Elections Act 2000*<sup>40</sup>:

<i>Powers of Governor General preserved</i>	56.1 (1) Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion.
<i>Election dates</i>	(2) Subject to subsection (1), each general election must be held on the third Monday of October in the fourth calendar year following polling day for the last general election, with the first general election after this section comes into force being held on Monday, October 19, 2009.

A governmental press release on the day the Bill was introduced stated that the fixed election dates were intended to improve fairness and improve transparency and predictability, and that the practice concerning confidence would remain unchanged.<sup>41</sup> This statement was echoed during the Bill's passage through Parliament.<sup>42</sup> This Bill followed several Private Members' Bills tabled since 1970 proposing fixed term parliaments, including one in April 2004 by then Leader of the Opposition Stephen Harper.<sup>43</sup>

However, the change in the law has not made much difference in practice. In September 2008, Stephen Harper requested a dissolution from Governor General Michaëlle Jean a year early. Harper argued that Parliament was becoming increasingly dysfunctional, and that in light of the economic crisis he needed a renewed mandate. The Governor General granted the request, relying on her prerogative powers as preserved by the Bill to do so. Harper headed a minority government which was struggling to get its

<sup>36</sup> Henry Milner, 'Fixing Canada's Unfixed Election Dates: A "Political Season" to Reduce the Democratic Deficit', *Institute for Research on Public Policy: Policy Matters*, December 2005, p.18 Available at <http://www.irpp.org/pm/archive/pmvol6no6.pdf>

<sup>37</sup> Scotland Act 1998 s.1(2); Government of Wales Act 2006 s.3(1); Northern Ireland Act 1998 s.31(1)

<sup>38</sup> Canada Elections Act 2000 s.56.1(2)

<sup>39</sup> *Ibid.*, s.56.1(1)

<sup>40</sup> S.C. 2000, c.9

<sup>41</sup> Government of Canada Privy Council Office, "Canada's New Government Proposes Fixed Election Dates", 30 May 2006. Available at <http://news.gc.ca/web/article-eng.do?crtr.sj1D=&mthd=advSrch&crtr.mnthndV1=6&nid=216599&crtr.dpt1D=&crtr.tp1D=&crtr.lc1D=&crtr.yrStrtV1=2006&crtr.kw=&crtr.dyStrtV1=29&crtr.aud1D=&crtr.mnthStrtV1=5&crtr.yrndV1=2006&crtr.dyndV1=1>

<sup>42</sup> E.g. at second reading, Rob Nicolson MP, HC Deb 18 Sep 2006 col.2876

<sup>43</sup> Bill C-512: An Act to provide fixed dates for the election of members to the House of Commons and to amend the Constitution Act, 1867 (1 April 2004)

legislation passed. His request came after repeated confidence votes proposed by the government, challenging the opposition parties to defeat it and trigger an election. The Liberals repeatedly spoke against government bills but then abstained to avoid an election. When Harper said that virtually every government bill would be a confidence vote, the Liberals abstained from voting even more. The dissolution allowed Harper to take advantage of a rise in his party's poll numbers, so that his party increased their number of seats at the ensuing general election, but still failed to gain a majority.

This episode shows that simply fixing election dates through legislation is not enough if the prerogative power of dissolution remains unaffected. But if the prerogative power of dissolution is retained as a safety valve, it needs to be protected from manipulation. The Governor General was put on the spot by Harper's request for an early dissolution, and the Crown drawn into political controversy.

### 5.2.2 Canadian provincial legislatures

British Columbia was the first Canadian province to introduce fixed parliamentary terms, which it did in 2001. The *Constitution (Fixed Election Dates) Amendment Act 2001* amended the *Constitution Act 1996* to put in place four year parliamentary terms by setting the date for the next election and subsequent elections on the second Tuesday in May every fourth year after that.<sup>44</sup> The Act explicitly retains the prerogative powers of the Lieutenant Governor to prorogue or dissolve parliament at his or her discretion.<sup>45</sup> The Act was not intended to alter the practice concerning confidence. The election schedule has so far been followed, with elections taking place as planned in 2005 and 2009.

Ontario followed suit and passed the *Election Statute Law Amendment Act 2005*, amending the *Election Act 1990* to require elections to be held on the first Thursday in October every four years, from 2007.<sup>46</sup> Again, the prerogative powers of the Lieutenant Governor, including to dissolve parliament as he or she sees fit, are retained.<sup>47</sup> The legislation allows for the day of the election to be moved to any of the seven following days on the recommendation of the Chief Electoral Officer to the Lieutenant Governor in the case of a clash with a religiously or culturally significant day.<sup>48</sup> This mechanism was used to move the election by six days in 2007 to avoid a Jewish holiday.

Most other Canadian provincial legislatures have followed suit and adopted similar mechanisms to implement fixed four year parliamentary terms, including Manitoba,<sup>49</sup> New Brunswick,<sup>50</sup> Newfoundland and Labrador,<sup>51</sup> the Northwest Territories,<sup>52</sup> Prince Edward Island<sup>53</sup> and Saskatchewan.<sup>54</sup> This means that a total of eight out of the thirteen provinces and territories have implemented fixed terms, with moves to introduce fixed terms for the remaining legislative assemblies.

### 5.3 Australia

Australia does not have fixed terms at the federal level, imposing only a three year maximum. However, most of the legislatures of the Australian states have fixed terms of four years with provision for extraordinary dissolutions. For example, election dates have been fixed in Victoria since 2003<sup>55</sup>. Mid term elections can still be called if the government should lose a confidence vote with no reversal within eight days,<sup>56</sup> or if the Premier should request a dissolution in case of a failed dispute resolution procedure following a deadlocked bill between the upper and lower houses.<sup>57</sup> The Australian Capital Territory, New South Wales, the Northern Territory, South Australia and Tasmania also have flexible four year fixed terms along similar lines, with mid term dissolution only allowed to resolve a serious deadlock or in the case of a loss of confidence. Some states have restricted dissolution so that parliament may only be dissolved in the final year of the four year term.

In New South Wales fixed term parliaments have been called into question since the election of the current Labor government, which quickly became deeply unpopular. Pinning the problem on the fixed term is more psychological than rational. The NSW Labor government would be hanging on even with flexible terms, because if they called an early election they would lose. However, under flexible terms there was always the *possibility* that the election would be earlier. The perceived problem with a fixed term is that the election date is far away. So the angry public have started demanding more radical action to force an election. The Governor has received petitions asking her to dismiss the government. The Leader of the Opposition is demanding a right of recall. What is really being sought is not so much a right of individual recall, but a right for voters to petition for an early election.

<sup>44</sup> Constitution Act 1996 s.23(2)

<sup>45</sup> *Ibid.*, s.23(1)

<sup>46</sup> Election Act 1990, s.9(2)

<sup>47</sup> *Ibid.*, s9(1)

<sup>48</sup> *Ibid.*, ss.9.1(6)-(7)

<sup>49</sup> Elections Act, s.49.1(2)

<sup>50</sup> Legislative Assembly Act, s.2

<sup>51</sup> House of Assembly Act 1990, ss3-3.1

<sup>52</sup> Elections and Plebiscites Act 2006, s.39(5)

<sup>53</sup> Election Act 1988, s.4.1

<sup>54</sup> Legislative Assembly and Executive Council Act, s.8.1

<sup>55</sup> Constitution Act 1975, ss.38-38A, as amended by the Constitution (Parliamentary Reform) Act 2003, No.2/2003

<sup>56</sup> *Ibid.*, s.8A

<sup>57</sup> *Ibid.*, s.65C(2)



#### 5.4 South Africa

South Africa's lower house, the National Assembly, has semi-fixed parliamentary terms of five years.<sup>58</sup> The South African model for early dissolution provides a useful example of some imposed stability. Although it could be argued that it is over-flexible and prone to majority party manipulation, all parliaments since 1994 have lasted for five years. Section 50 of the *Constitution of 1996* provides:

50. Dissolution of National Assembly before expiry of its term
- (1) The President must dissolve the National Assembly if:
    - (a) the Assembly has adopted a resolution to dissolve with a supporting vote of a majority of its members; and
    - (b) three years have passed since the Assembly was elected.
  - (2) The Acting President must dissolve the National Assembly if:
    - (a) there is a vacancy in the office of President; and
    - (b) the Assembly fails to elect a new President within 30 days after the vacancy occurred.

#### 5.5 Europe

Many parliaments in European countries have fixed terms, flexible to a greater or lesser extent and with differing safety valves for extraordinary dissolution. Most have four year terms, though a few have five year terms. However, some of those with five year terms, such as France and Italy, tend to have more flexible election dates in practice.

Norway is notable as the only parliamentary system with fixed term parliaments that has no safety valve. There have been numerous debates about reconsidering this, with provision for early dissolution being suggested several times, but they have never managed to obtain the necessary two thirds majority in parliament that is required for a constitutional amendment.

Some European systems demonstrate the importance of practice even in cases where the term is theoretically fixed. In Belgium in recent years, the parliament has repeatedly been dissolved by relying on a declaration to amend the Constitution, which results in the dissolution of both chambers; the mechanism for institutional reform has been used instead of the mechanism to resolve political crises.

In Germany, confidence votes have been manipulated by the government to engineer an early dissolution, as happened in 1982 and 2005.<sup>59</sup> However, on both occasions all the main parties were in favour of an early election. In 2005 in particular, the Chancellor was faced with serious difficulties including intra-party splits and numerous election losses at the regional level.<sup>60</sup> The early dissolution can be justified by the government's need for support for its reform policies.

In France, the President has the power to dissolve parliament upon consultation with the Prime Minister and the Presidents of the two houses.<sup>61</sup> This power was originally intended either as a way of resolving a serious crisis by testing the opinion of the people, or as a way of deciding a disagreement with the lower house, but dissolution has only been used twice for such reasons (1962 and 1968). On other occasions it has been used by the President to increase his support in parliament. In 1981 and 1988 dissolution was declared by the President at the beginning of his term so that he would have a majority in the lower house to support his policies, and in 1997 to bring forward an election to a time considered more advantageous. As a result, the French parliamentary terms appear to be only nominally fixed.

In Italy, there is theoretically a semi fixed term of five years, but in practice this seldom holds; the Italian legislature has been dissolved early eight times in the last 40 years. This is done by the President, upon consultation with the Speakers of both houses, but without formal involvement of the Prime Minister. The example of Italy shows how flexible and uncertain a supposedly fixed term can be.

<sup>58</sup> Constitution of 1996 s.49(1)

<sup>59</sup> REM Irving and WE Paterson, 'The Machtwechsel of 1982-83: A Significant Landmark in the Political and Constitutional History of West Germany', *Parliam Aff* (1983) 36: 417-435

<sup>60</sup> Miskimmon, Paterson and Sloam, 'Germany's Gathering Crisis', (2005) Palgrave Macmillan

<sup>61</sup> Constitution of October 4, 1958 art.12

**Fig 5.1**  
CONTINUUM OF FIXED TERM EXPERIENCE

<i>Completely Fixed</i>	<i>Semi-Fixed</i>	<i>Nominally Fixed</i>	<i>Completely Flexible</i>
Norway	Germany	Canada	UK
	Sweden	France	Australia
	South Africa	Italy	New Zealand
			Ireland

Completely Fixed: No provision for calling an election before the scheduled date  
 Semi-fixed: Mechanisms in place to allow for dissolution before the scheduled election date  
 Nominally Fixed: Safety valves being used in practice to undermine fixed term  
 Completely Flexible: Length of term decided at the discretion of the executive

## 6. RECENT REFORM PROPOSALS AT WESTMINSTER

Fixed term parliaments have been the subject of reform proposals since at least 1991. Three private members' bills have been introduced, in 1994, 2001 and 2007; and Labour and the Liberal Democrats have supported fixed term parliaments. This chapter will discuss these and other proposals, as well as the plans set out by the coalition government in 2010.

### 6.1 Reform proposals in the 1990s

Fixed term parliaments have frequented opposition party discourse. It was a prominent pledge for Labour in 1992 in the wake of the uncertainty on the timing of that election, and fixed term parliaments also featured in the Liberal Democrat manifestos for 1992 and 1997.

In September 1991 the Institute for Public Policy Research issued *The Constitution of the United Kingdom*, recommending the adoption of four year parliaments. On 10 March 1992, Tony Banks MP presented a Bill to make statutory provision for fixed term parliaments. The following day, Lord Jenkins of Hillhead also proposed fixed terms. He said:

To give the pistol in a race to one of the competitors and encourage him to fire it whenever he thinks that the others are least ready—when they are tying up their shoelaces or something of that kind—is not in accordance with the best athletic practice.

. . . On the whole I believe that a fixed four year term would certainly be more rational, somewhat fairer and maybe militate against both the economic uncertainty and the awful cacophony which has been the too long-drawn-out overture to this election.<sup>62</sup>

In 1993 the Labour Party commissioned *The Report of the Working Party on Electoral Systems* led by Professor Raymond Plant. Section 2 of the Report on voter participation made 37 recommendations to improve voter participation in elections, including the introduction of fixed four year parliamentary terms.<sup>63</sup> The relevant recommendation reads:

The current system, which allows the Prime Minister to call an election at the most advantageous time to the party in office, gives the government of the day too much power.<sup>64</sup>

Labour MP Jeff Rooker's *Parliamentary Elections (No. 2) Bill* received its first reading on the 20 May 1994. This sought to implement all 37 of the Plant Report's recommendations on voter participation of the year before.<sup>65</sup> Clauses 1 and 2 stipulated that:

- The Septennial Act 1715 would be repealed.
- The Secretary of State would by regulations specify the regular weekend dates every fourth year upon which general elections would be held.
- Parliament would automatically be dissolved 28 days before the election date.
- Notwithstanding ordinary dissolutions, if the government were subject to a vote of no confidence in the House of Commons then Her Majesty should dissolve parliament by proclamation.
- A parliament meeting following an extraordinary general election should be dissolved on the same date under such calculations as would the previous parliament.

The Labour government in 1998 introduced fixed terms for the Scottish Parliament,<sup>66</sup> the Northern Ireland Assembly<sup>67</sup> and the Welsh Assembly,<sup>68</sup> each of four years.

<sup>62</sup> Lord Jenkins, HL Deb 11 March 1992 vol.536 col.1333

<sup>63</sup> Recommendations 15 and 16

<sup>64</sup> *The Report of the Working Party on Electoral Systems 1993*, Professor Raymond Plant, Labour Party: 1993, Section II, 2 (i)

<sup>65</sup> 'The *Parliamentary Elections (No. 2) Bill* is designed exclusively to put into legislative form all the recommendations in Section 2 of the 1993 Plant report. . . The *Parliamentary Elections (No. 2) Bill*, therefore, does not cover any issue which is outside of those 37 specific issues.' Jeff Rooker, Introduction to *Notes on Clauses*, May 1994.

<sup>66</sup> Scotland Act 1998 s.3

<sup>67</sup> Northern Ireland Act 1998 s.31

<sup>68</sup> Government of Wales Act 1998 s.3

## 6.2 Reform proposals in the 2000s

In the early 2000s, interest in fixed term parliaments continued, but in a low key way.

In its report *Election 2001: The Official Results*, the Electoral Commission commented:

Because of the administrative benefits of fixed term Parliaments, and the anomalous position of Westminster elections in comparison with all other elections held in the UK the Commission plans to look further at the case for adopting fixed term Parliamentary terms for Westminster.<sup>69</sup>

The intention to examine fixed term parliaments at length was reiterated in the Electoral Commission's report on election timetables in June 2003;<sup>70</sup> but no such report has been produced.

A Ten Minute Rule Bill on fixed term parliaments was introduced by Labour MP Dr. Tony Wright on 1 March 2001. Wright's key proposals were as follows:

- To introduce four year terms.
- For parliament to consider itself automatically dissolved 28 days before the fourth anniversary of the previous general election.
- Whenever the House of Commons expresses no confidence in the government, parliament should be dissolved on the seventh day following that resolution.
- Whenever the House of Commons expresses no confidence in a Prime Minister and fails to express confidence in the same or another minister in 28 days, parliament should stand dissolved.
- Should such extraordinary dissolutions occur more than six months before the previous term was due to expire, the poll date would remain unchanged despite any change of government.
- Should such extraordinary dissolutions occur less than six months before the term was due to expire, then the next election would occur on the fourth anniversary of that expiry date.
- The Electoral Commission should decide on the dates for issue of the writs, polling and the meeting of the new parliaments but allowing:
- Three to five weeks between dissolution and election.
- Parliament to reconvene between one and two weeks following the election.

Interest in fixing parliamentary terms began to pick up in the second half of the 2000s. David Cameron reportedly began to consider the idea of fixed term parliaments from 2006.<sup>71</sup> However, this was tempered by his calls that a general election should be required if there was a new PM, in the light of Gordon Brown taking over as Prime Minister.<sup>72</sup>

The Liberal Democrats revived their interest in fixed term parliaments, for example in their papers *Real Democracy for Britain* (2006) and *For the People, by the People* (2007). The Liberal Democrat MP David Howarth's *Fixed Term Parliaments Bill 2007-8* had its second reading on 16 May 2008. It provided for four year fixed parliamentary terms, with elections to be held on the first Thursday in May. Dissolution was to take place 30 days before the scheduled election. Dissolution could only take place on those dates, with no provision for a safety valve.

David Howarth argued that the main problems with the current arrangement were: (1) the unfair advantage to the incumbent party in choosing the election date; (2) the interference with good government; (3) adding to the government's power over their back benchers; and (4) the "macho style of politics" and "game of political chicken" with parties trying to show they did not fear a general election.<sup>73</sup> He also pointed out that fixed terms were widespread in many other elected bodies in the UK and abroad.<sup>74</sup>

In the 2010 election manifestos, both the Liberal Democrats and Labour had pledges to introduce fixed term parliaments. The Conservatives did not, but had a more general pledge "to make the Royal Prerogative subject to greater democratic control so that Parliament is directly involved".

## 7. MID TERM DISSOLUTION

### 7.1 Restrictions on mid term dissolution

There must be a mechanism to deal with the situation where the government has lost the confidence of the House of Commons and no alternative government can be found. Having to engineer a declaration of no confidence in order to agree to a dissolution everyone wants would simply bring the system into disrepute. We are proposing that there should be a period of up to 14 days in which the search for an

<sup>69</sup> P.29

<sup>70</sup> P.7, *Election Timetables in the UK: Report and Recommendations*, The Electoral Commission, June 2003, available at [http://www.electoralcommission.org.uk/\\_data/assets/electoral\\_commission\\_pdf\\_file/0016/16054/Timetables\\_10051-7977\\_E\\_N\\_S\\_W\\_.pdf](http://www.electoralcommission.org.uk/_data/assets/electoral_commission_pdf_file/0016/16054/Timetables_10051-7977_E_N_S_W_.pdf)

<sup>71</sup> <http://www.timesonline.co.uk/tol/news/politics/article6368275.ece>

<sup>72</sup> "David Cameron says that the Tories would prevent parties from replacing a serving Prime Minister" 24 April 2010 *Independent*

<sup>73</sup> David Howarth MP, HC Deb 16 May 2008, col.1703-1705

<sup>74</sup> David Howarth MP, HC Deb 16 May 2008, col.1706

alternative government can take place. If no such government can be formed, then dissolution will follow. This will deal with the theoretical possibility of a limbo in which the Government could not command the confidence of the House, but the House refused to dissolve Parliament.

*Memorandum from the Deputy Prime Minister to the House of Lords Constitution Committee, July 2010.*

Mid term dissolutions are the most crucial aspect of any fixed term parliament law. The government must always command the confidence of the House of Commons; and a government which has lost that confidence must be allowed to fall. But governments must not be allowed to fall too easily, or we might experience the volatility of parliaments in Italy, or the Fourth Republic in France; nor can they be too protected, or they will lose their accountability to parliament and the public.

Lord Fraser of Carmyllie said of early dissolution of fixed term parliaments in the House of Lords in 1999:

If there is to be a fixed period, the only real issue is the circumstances in which earlier dissolution is permissible. If the circumstances allowing for that are too restrictively stated, it is not difficult to envisage a wide variety of occasions when it could not be for the good of the country to require a Parliament and government to continue without seeking a fresh mandate from the electorate. If conditions for early dissolution are too loosely framed, the change proposed would in effect be purely cosmetic.<sup>75</sup>

Key considerations are how and by whom dissolution may be initiated, what threshold must be reached, and any limitations on the process. The government initially proposed a 55% threshold for dissolution, but that proposal was widely misunderstood to apply to no confidence motions as well. Nick Clegg set the record straight, and raised the bar for government initiated dissolutions in a debate in early July:

First, traditional powers of no confidence will be put into law, and a vote of no confidence will still require only a simple majority. Secondly, if after a vote of no confidence a government cannot be formed within 14 days, Parliament will be dissolved and a general election will be held. Let me be clear: these steps will strengthen Parliament's power over the executive. Thirdly, there will be an additional power for Parliament to vote for an early and immediate dissolution. We have decided that a majority of two thirds will be needed to carry the vote, as opposed to the 55% first suggested, as is the case in the Scottish Parliament. These changes will make it impossible for any government to force a dissolution for their own purposes.<sup>76</sup>

## 7.2 Thresholds

Clause 2 of the government's Fixed Term Parliaments Bill envisages two routes to dissolution:

- “a motion that there should be an early parliamentary general election”; or
- “a motion that there should be no confidence in Her Majesty's Government”.

A motion for dissolution would require a two-thirds majority of all MPs (not just all MPs voting); while a no confidence motion could be passed by simple majority.

No confidence could still lead to dissolution, but only if an alternative government cannot be formed. The justification for a higher threshold for government-initiated dissolution is twofold. First, it is aimed mainly at majority governments. It should make it impossible for them to call an early election without significant cross-party support. Second, immediate dissolution is a more drastic change. A no confidence motion seeks a change of driver; a dissolution motion seeks a change of car.

But such a dual threshold is rare in other parliaments. Figure 7.1 sets out the threshold requirements for confidence motions elsewhere in Europe. In all cases the threshold for a no confidence motion is a simple or absolute majority (an absolute majority being of the total number of MPs, rather than of those voting). In those cases where dissolution can be triggered by a parliamentary vote, the threshold is the same.<sup>77</sup>

**Figure 7.1**

### THRESHOLDS FOR CONFIDENCE AND NO CONFIDENCE MOTIONS

<i>Country</i>	<i>No Confidence Threshold (Initiative rests with Parliament)</i>	<i>Confidence Threshold (Initiative rests with Cabinet)</i>
Austria	simple majority	
Belgium	absolute majority (constructive)	absolute majority
Denmark	simple majority	
Finland	simple majority	
France	absolute majority	simple majority
Germany	absolute majority (constructive)	absolute majority

<sup>75</sup> HL Deb 11 Mar 1999 col.1367

<sup>76</sup> HC Deb 5 Jul 2010 col. 23

<sup>77</sup> The dissolution procedure in each country is too complex to summarise here. It is very ably summarised in Strom, Muller et al *Delegation and Accountability in Parliamentary Democracy*, Oxford University Press, 2006 at Table 4.12.

<i>Country</i>	<i>No Confidence Threshold (Initiative rests with Parliament)</i>	<i>Confidence Threshold (Initiative rests with Cabinet)</i>
Greece	absolute majority	simple majority
Iceland	absolute majority	
Ireland	simple majority	
Italy	simple majority	simple majority
Luxembourg	simple majority	
Netherlands	simple majority	
Norway	simple majority	
Portugal	absolute majority	simple majority
Spain	absolute majority (constructive)	simple majority
Sweden	absolute majority	

The precedent the government points to for a dual threshold is the devolution legislation of 1998, which also requires a two thirds parliamentary vote for dissolution. Those provisions so far remain untested, and it is not known how they would operate under fire. But it is instructive to read the parliamentary debates on the Scotland Bill, where an amendment was moved to replace the two thirds requirement with a simple majority. The Lords were reminded that high thresholds had been circumvented in other countries. In reply Lord Sewel recognised that risk, but nevertheless felt it was justifiable to raise the bar:

I accept that one cannot guarantee in all circumstances that the way in which something is intended to happen will in reality happen. We can try to make it that little bit more difficult. That is what these provisions seek to do.<sup>78</sup>

There are other possibilities which could be considered to restrict the use of dissolution motions:

- A minimum number of MPs to be signatories of the motion. In the parliaments of Sweden, Spain and Italy such a motion must be signed by 10 per cent of the members.
- A requirement that the motion be signed by the Prime Minister and Leader of the Opposition, or the leaders of the three largest parties, in order to ensure that the motion has cross-party support.

There are also other ways of restricting the use of no confidence motions:

- Requiring an absolute, not a simple majority
- Requiring a “constructive” vote of no confidence, as in Germany and Spain.

A constructive no confidence motion is one which nominates an alternative government, rather than merely seeking to remove the present government. An alternative to a constructive vote of no confidence would be to require an investiture vote for any new government formed after a successful no confidence motion. The government’s bill comes close to this in cl 2(2)(b) (“any motion expressing confidence in any Government of Her Majesty”). It could specifically require the House to nominate a Prime Minister, as the Scottish Parliament is required to nominate a First Minister under section 46 of the Scotland Act.

### 7.3 Confidence motions

The legislation will give legal effect to a vote of no confidence, but will not seek to define a vote of no confidence on the face of the bill. In practice there is little doubt about what constitutes a motion of no confidence in a government, and there is no need to limit the flexibility of Parliament unnecessarily.

*Memorandum from the Deputy Prime Minister to the House of Lords Constitution Committee, July 2010.*

Not all confidence motions take the classic form, “This House has no confidence in Her Majesty’s Government”. In Canada this has recently given rise to confusion and controversy as to whether a particular motion is one of confidence or not.<sup>79</sup> Although motions in the House of Commons at Westminster have been equally varied, there has been little doubt when an issue has been one of confidence.

In particular, any issue which is made one of confidence by the government becomes a motion of confidence in the government. Motions of confidence in specific policies (“this House has no confidence in HM Government’s management of the economy” 19 Nov 1973) are confidence motions. But in addition governments have treated as issues of confidence motions about:

- specific bills: “That the [European Communities] Bill be now read a second time” 15 Feb 1972
- specific issues: “That item A be reduced by £100, in respect of the salary of the Secretary of State” 21 June 1895
- or “a Select Committee be appointed to investigate . . . withdrawal of the proceedings instituted by the DPP against Mr Campbell” 8 Oct 1924
- and even purely procedural motions, eg “That this House do now adjourn” 11 March 1976.

<sup>78</sup> HC deb 8 July 1998 at col 1353.

<sup>79</sup> Andrew Heard, ‘Just What is a Vote of Confidence?’. Canadian Jnl of Pol Science, 40:2 (2007) at 395-416.

In such debates the main speakers are generally the Leader of the Opposition and the Prime Minister; and all MPs know the government's future is at stake.<sup>80</sup>

The government's bill provides that

2(2) An early parliamentary election is also to take place if the Speaker of the House of Commons issues a certificate certifying that:

- (a) on a specified day the House passed a motion of no confidence in Her Majesty's Government. . .

At first blush this appears to contemplate only formal confidence motions in the classic form. But the Bill goes on to provide that the Speaker's certificate is conclusive for all purposes. So the Speaker would have discretion to certify any of the motions listed above as confidence motions. If the government or the opposition have declared an issue to be one of confidence, the Speaker is likely to indicate at the beginning of the debate that the motion is a confidence motion, so that all MPs know what is at stake.

The Speaker's certificate is taken from the procedure under the Parliament Acts. It provides an impartial arbiter, and avoids the need for the Prime Minister or the Crown to get involved in deciding whether the House should be dissolved. The certificate also minimises the risk of the courts being asked to rule on whether a no confidence motion has been properly passed, or a new government properly formed. The Speaker's certificate is final, and conclusive for all purposes.

If a no confidence motion is passed, the government remains in office until a new government can be formed in which the House has confidence. It cannot immediately resign, because there must always be a government. But once it has lost confidence the government should be subject to the caretaker convention, which means it has authority only to transact essential business, and not to make new policy or major appointments or new contracts. The caretaker convention is explained in the new draft Cabinet Manual, but it has not yet been extended to mid term resignations or dissolutions.<sup>81</sup> It needs to be.

#### 7.4 Time limits and cooling off periods

A motion of confidence or dissolution should take precedence over other motions. But a period of reflection may be helpful to allow the motion to be properly considered, debated and voted upon. The German Basic Law states that 48 hours must elapse between a motion of confidence and the vote (Articles 67(2) and 68(2)). The Spanish Constitution of 1978 requires five days (Section 113(3)). The Australian state of Victoria requires three clear days' notice (Constitution Act 1975, s.8A(2)).

Erskine May states that

In allotting a day for this purpose the government is entitled to have regard to the exigencies of its own business, but a reasonably early day is invariably found . . . the government has everything to gain by meeting such a direct challenge to its authority at the earliest possible moment.<sup>82</sup>

The latter argument may be unduly sanguine. In Canada in December 2008 when the government were facing a no confidence motion which they were widely expected to lose, the Prime Minister chose instead to invite the Governor General to prorogue Parliament (see section 8.3). If the UK wanted to guard against this we could consider time limits; and provide in the Cabinet Manual that parliament cannot be prorogued while a confidence motion is pending.

Time limits also apply after a confidence motion. The most important are the time limits on the period in which a new government can be formed, failing which parliament will be dissolved and fresh elections held. In Belgium a new Prime Minister must be nominated within three days of a successful no confidence motion, or parliament stands dissolved. In New South Wales eight days must pass before parliament may be dissolved (Constitution Act 1902, s 24B(2)(b)). In Germany the period is 21 days, and in Scotland 28 days. Many Westminster countries do not have automatic dissolution after a set period, including Australia, Canada, Ireland and New Zealand.

The government's bill proposes 14 days for Westminster, which seems a sufficient period in which the parties can try to form an alternative government, and test whether it has confidence. Given the two thirds threshold for a dissolution motion, it is important to have a trigger for automatic dissolution. Otherwise there is a risk of limbo, as there might be a simple majority to vote out the government, but not a sufficient majority to dissolve.

If a no confidence motion is unsuccessful, some systems also use time limits to restrict further confidence motions until the time has elapsed. So in Spain, the movers of an unsuccessful no confidence motion cannot move another until a new session of parliament.

<sup>80</sup> Richard Kelly and Thomas Powell, *Confidence Motions*, HC Library Standard Note SN/PC/2873, 9 July 2010.

<sup>81</sup> Draft Chapter 6 on Elections and Government Formation, published by the Cabinet Office in February 2010, <http://webarchive.nationalarchives.gov.uk/20100416132449/http://www.cabinetoffice.gov.uk/media/343763/election-rules-chapter6-draft.pdf>

<sup>82</sup> Erskine May, *Parliamentary Practice*, 23rd ed 2004, pp 329-330.

### 7.5 *Time limits on dissolving near beginning or end of parliamentary term*

It is quite common to limit or prohibit dissolution towards the beginning or the end of a parliamentary term. The French Constitution prohibits dissolution in the twelve months following a general election,<sup>83</sup> as does the Spanish Constitution.<sup>84</sup> Other legislatures only allow dissolution in the final year of their four year term, while the South African lower house cannot move to dissolve itself in the first three years of its five year term.<sup>85</sup> At such times, there can of course still be the possibility of confidence motions.

### 7.6 *Flexibility to advance or postpone election*

The bill provides that the Prime Minister may by statutory instrument provide that the polling day is moved forward or backward by not more than two months. This is to provide for emergencies like the foot and mouth crisis in 2001, which led to the local government elections scheduled for May being postponed until June. Similar provisions are found in most other countries. The statutory instrument would be subject to affirmative resolution in both Houses.

### 7.7 *Remainder of the parliamentary term*

An important consideration is whether a parliament elected mid term merely serves out the remainder of that term, or whether dissolution restarts the clock and it serves a full new term. The former is a strong disincentive to a government inclined to call an early election. In Scotland only the remainder of the term is served, unless the dissolution takes place within six months of the next scheduled election. (In that event, the next scheduled election is not held; but the one after that is, to get back on schedule).

An alternative solution to prevent elections taking place too close to each other is a ban on dissolutions in the run-up to elections. Sweden and Finland are two such examples, where no premature election may take place within 75 days of the next scheduled election. As in Scotland, scheduled elections take place every four years, even if during the previous four years a premature election has taken place.

Countries where mid term dissolution restarts the clock and the new parliament serves a full term are the Canadian provinces of British Columbia and Ontario, Belgium, the Netherlands and Hungary. This is the arrangement proposed in the government's bill, which provides that a mid term dissolution initiates a new five year term. The next scheduled election will then take place five years from the previous May. But if the mid term election is held before May, the next general election will be held four years later. So if there is a mid term dissolution in October 2011, the next general election would be in May 2016; but if the mid term election is in March 2011, the next election would be in May 2015.

Which model to choose depends on how strong the disincentives should be against mid term dissolutions. These tend to be conceived primarily from the government's viewpoint. The lack of such a disincentive in Canada may have contributed to Stephen Harper's decision to call an early election following the rise in his party's poll ratings in fall 2008. He stood to gain a further four years in office, rather than the one year he still had to serve. But it may also serve as a disincentive to opposition parties tempted to force a mid term dissolution, if the only prize is the remainder of the term. This need not prevent opposition parties putting down confidence motions leading to a change of government; but it might give them greater pause before seeking a mid term dissolution.

### 7.8 *Political incentives and disincentives*

This chapter began by explaining the need to balance government stability against democratic accountability. The rules for mid term dissolution can be seen as a set of incentives and disincentives to regulate the behaviour of the parties in parliament. Running through the chapter are a whole set of possible incentives to buttress stable government, and disincentives to making it easy to obtain a mid term dissolution:

#### *Procedural restrictions on dissolution or confidence motions*

- Motion to be signed by minimum number of MPs
- Motion to be signed by named office holders
- Constructive no confidence motions

#### *High thresholds for the vote*

- Absolute not simple majority for no confidence
- Two thirds majority for dissolution

<sup>83</sup> Constitution of the 4th of October 1958, art.12 al.4

<sup>84</sup> Spanish Constitution of 1978, s.115(3)

<sup>85</sup> Constitution of the Republic of South Africa, art.51(1)(b)

*Time limits*

- Before debating a no confidence motion
- Before a further no confidence motion can be tabled
- After a no confidence motion, in which an alternative government must be formed
- No dissolution near the beginning or end of a parliament.

*Subsequent parliamentary term*

- New parliament serves only the remainder of the previous term.

But the rules need not necessarily be too elaborate, or too restrictive. Any moves towards a mid term dissolution will be played out in an intensely political context, in which the political incentives are as important in guiding behaviour as the legal rules. The political context is not always that of a government seeking to increase its majority. Although that is the most common reason, it accounts for only about one third of early dissolutions in countries we have surveyed: see Figure 7.2. Other reasons recorded in Figure 7.2 for early dissolution are a constitutional or political crisis, major policy change, loss of a confidence motion, resignation of the Prime Minister, the collapse of a coalition or a government split.

The main question for the parties in any mid term crisis will not be whether dissolution is too easy or too difficult, but whether they stand to gain or lose by forcing a dissolution. And much of the time, the political incentives in themselves may prove a further force for stability. Political parties do not like excessively frequent elections: they are expensive for the parties, who are chronically short of money, and exhausting for the participants. And whatever the polls may say, the outcome is always slightly uncertain. In particular, a party which forces an unnecessary election risks being punished by the electorate, who also dislike frequent elections.

The political incentives can be seen at work in Scotland and in Canada, where the opposition parties have been harassing a minority government, but have not had the courage to combine to force an election for fear of the electoral consequences. In Scotland the opposition parties voted down the SNP budget in March 2009; but when Alex Salmond threatened to resign to force an early election, they backed off and voted the budget through. In Canada Stephen Harper's minority government would have welcomed an early election in 2007–08, but whenever they came close to a substantive confidence motion the opposition parties abstained. They did not want to be held responsible for forcing the third election in four years, nor to face the electorate when their poll ratings were low.

What Canada shows is that a minority government cannot force a mid term dissolution through losing a confidence motion if the opposition parties will not play along. The same is not necessarily true of a majority government. In Germany the Chancellor has twice engineered a vote of no confidence in order to force an early election. The first occasion was in 1982, when the SDP/FDP coalition split, and the FDP joined a new coalition led by the CDU leader Helmut Kohl.<sup>86</sup> To force an election in which he hoped to obtain a stronger majority, Kohl tabled a confidence motion in which the governing parties then abstained. In 2005 the Chancellor Gerhard Schröder followed a similar tactic, following his party's dramatic defeats at the regional level as well as intra-party splits. In both cases the early election was supported by all the main parties.<sup>87</sup>

Germany offers a reminder that no confidence motions can be manipulated to force an early dissolution. The experience in 1982 also shows that a party forcing an early election will not necessarily pay an electoral price, since Kohl increased his majority following the dissolution. On the other hand, the 2005 episode brought the opposition (Angela Merkel) into power. This was not surprising given that at the time early dissolution was contemplated, the CDU-CSU coalition was ahead in all polls.

It is difficult to devise a set of rules robust enough to withstand the wishes of a parliamentary majority. But that does not undermine the case for trying to construct a set of rules in the first place. Rules in politics are occasionally circumvented; but if they succeed in creating a new norm, obeyed by most of the parties most of the time, that can be a net gain.

<sup>86</sup> REM Irving and WE Paterson, "The Machtwechsel of 1982–83: A Significant Landmark in the Political and Constitutional History of West Germany", *Parliam Aff* (1983) 36: 417-435

<sup>87</sup> Miskimmon, Paterson and Sloam, "Germany's Gathering Crisis", (2005) Palgrave Macmillan



Fig 7.2

## PATHOLOGY OF MID TERM DISSOLUTIONS

<i>Reason for early dissolution</i>	<i>Cases</i>	<i>Total</i>
To increase a government majority	UK 1900, 1911, 1924, 1951, 1966, Oct 1974. CANADA 1958, 1965, 2000, 2008. IRELAND Sept 1927, 1938, 1944, 1951, 1954, 1965, 1981, Nov 1982, 1989. FRANCE 1981, 1997. GERMANY 1972, 1983, 2005.	24
After a constitutional crisis / major constitutional change	UK 1910 CANADA 1949 IRELAND 1948, 1961, 1977 GERMANY 1990 SWEDEN 1921, 1970	8
After losing a vote of no confidence	UK 1979 CANADA 1926, 1963, 1974, 1980, 2006 FRANCE 1962	7
After major policy change	CANADA 1911, 1965, 1974, 2000, 2008	5
Resignation of a Prime Minister, new mandate sought	UK 1906, 1923, 1955 CANADA 1957, 1968 SWEDEN March 1920, October 1920	7
Collapse of a coalition / loss of supply	UK 1922 CANADA Feb 1982, 1987, 1992, 1994	5
Post-war	IRELAND 1923	1
After political crisis/ collapse of a government	UK Feb 1974 FRANCE 1968 SWEDEN 1914, 1958	4
After a new constitution	IRELAND 1937 FRANCE 1946, 1958	3
Government split	UK 1931	1
Dissolution before a no confidence motion	IRELAND 1957	1
To form a united government (with the presidential party)	FRANCE 1988	1

## 8. THE ROYAL PREROGATIVE

8.1 *Power of dissolution*

The bill removes altogether the prerogative power of dissolution. Parliament would automatically be dissolved every five years for ordinary general elections. For extraordinary elections, parliament can only be dissolved mid term by its own resolution under clause 2. Clause 3(2) provides that “Parliament cannot otherwise be dissolved”. So there is no residual prerogative power to dissolve.

This should help to protect the Crown from controversy. As Robert Blackburn has argued, the role of the Monarch may be protected rather than eroded by fixed term parliaments:

A final constitutional advantage of fixed term Parliaments would be to remove any prospect of the British monarchy becoming the subject of political controversy if some special difficulty over the legitimacy of a dissolution arises ...

Any monarch who allowed him/herself to be persuaded to go ahead and reject the advice of a Prime Minister ... would be tempting political suicide. ... It is very much therefore in the monarchy’s own interests to avoid such a situation. Until the law is modernised within a framework of a fixed term Parliament, the Palace’s wisest course of action ... will be always to follow Prime Ministerial advice.

[Fixed term parliaments] would remove any question of the personal discretion of the monarch ... Far from diminishing the role of the Crown within the constitution, its future would be better protected.<sup>88</sup>

<sup>88</sup> Robert Blackburn, *The Electoral System in Britain*, London: Blackburn, 1995, p. 61

This view is echoed by the coalition government:

...[It] instead removes a difficult dilemma for the monarch, who is bound under the current conventions to take the advice of the Prime Minister seeking the dissolution. That puts the monarch in an invidious position if that advice is not consistent with the political situation that, it might be suspected, is present in the House. By removing the prerogative exercised by the Prime Minister, the monarch is in the stronger position of not being put in the embarrassing position of having to divine by means that are not clear the intentions of the House.<sup>89</sup>

The prerogative power to dissolve parliament, and in exceptional cases to refuse a dissolution, has long been regarded as an important constitutional long stop. It is a big step to remove a constitutional reserve power. In other Westminster systems such as Australia, Canada and New Zealand the Crown retains the power to dissolve parliament, and to refuse a dissolution. In most western European countries the head of state retains a discretionary power to dissolve parliament.<sup>90</sup> So it is tempting to retain the discretionary power as a deep reserve power, to be deployed only in an extreme political or constitutional crisis.

It is tempting, but unwise. The difficulty is that once the prerogative power is retained, politicians may be tempted to use it. This is what happened in Canada in 2008, when the Prime Minister Stephen Harper asked the Governor General for an early dissolution only a year after the Parliament had passed legislation for fixed term parliaments. The legislation had preserved the prerogative powers of the Crown, in order to avoid the need for a constitutional amendment. The Prime Minister went against the spirit of the fixed term legislation, and inevitably drew the Governor General into political controversy, whether she refused the dissolution, or granted it (in the event, she followed prime ministerial advice and granted it).

### 8.2 *Power to appoint new Prime Minister*

The prerogative power to appoint a Prime Minister is unaffected by introducing fixed term parliaments. The test is who can command the confidence of the House of Commons. As the new Cabinet Manual puts it:

The Sovereign will invite the person who it appears is most likely to be able to command the confidence of the House to serve as Prime Minister and to form a government. However, it is the responsibility of those involved in the political process, and in particular the parties represented in Parliament, to seek to determine and communicate clearly who that person should be.<sup>91</sup>

The occasions when the Monarch will be required to appoint a Prime Minister will be after an election, or following the death, retirement or resignation of the incumbent Prime Minister. On each occasion the Monarch is invited to make an informed guess (“the person who it appears is most likely to be able to command confidence ...”), and that person then faces an early test of confidence in the debate on the Queen’s Speech. One way of avoiding the guessing game would be for the House of Commons to hold an investiture vote, rather than leaving the test of confidence to the Queen’s Speech debate. This is what happens in the Scottish Parliament, where the first business of a new parliament is to nominate a new First Minister, who is then appointed by the Queen. The switch to an investiture vote could be made by statute, or by a change to Standing Orders.

### 8.3 *Power of prorogation*

The Bill does not affect the prerogative power to prorogue parliament. Prorogation has not been called into question in Britain; but it has in Canada. In December 2008 the Prime Minister Stephen Harper asked the Governor General to prorogue Parliament only days before a confidence motion which he seemed likely to lose. In January 2010 he again sought a prorogation until March, leading to allegations that he wanted to shut down a critical parliamentary inquiry. In the British context it may not be necessary to seek to regulate the power of prorogation; but to prevent prorogation being used to avoid a confidence motion, the Cabinet Manual could perhaps specify the circumstances in which prorogation is used, and those in which it should not be used.

### 8.4 *Power of proclamation*

The Bill retains the system of issuing writs for the election, and a proclamation to summon the new parliament and appoint the date of its first meeting. Writs for the election are issued by the Lord Chancellor and the Secretary of State for Northern Ireland (cl 3(3)). The proclamation is issued by the Queen, and the appointed day for the first meeting of the new parliament is chosen on the advice of the Prime Minister. In 2010 the date for the first meeting of the new parliament was set for 12 days after the election, to allow more time for the induction of new MPs, following a recommendation of the Modernisation Committee’s 2007 report *Revitalising the Chamber*. But this incurred criticism from some Conservative MPs, who thought the outgoing government had deliberately delayed the start of the new government’s programme.

<sup>89</sup> David Heath MP, HC Deb 25 May 2010 col.149

<sup>90</sup> Strom, Müller and Bergman, *Delegation and Accountability in Parliamentary Democracy*, Oxford University Press, 2006 pp 163–4 and Table 4.1.2. The countries are Austria, Belgium, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Portugal.

<sup>91</sup> Draft Chapter 6 on Elections and Government Formation, published by the Cabinet Office in February 2010, <http://webarchive.nationalarchives.gov.uk/20100416132449/http://www.cabinetoffice.gov.uk/media/343763/election-rules-chapter6-draft.pdf>

It does seem odd that election writs are still issued by government ministers, and that the date of the first meeting of the new parliament is decided by the Prime Minister. The main justification for fixed term parliaments is to take power from the Prime Minister and give it to parliament. Following the same logic, consideration should be given to the Electoral Commission issuing the writs for the election; and the Speaker deciding the date of the first meeting. In Tony Wright's Fixed Term Parliaments Bill 2001 the power to decide the dates for issue of the writs, polling day, and the meeting of the new parliament was conferred on the Electoral Commission (see section 6.2). That seems right in terms of who should control issue of the writs and polling day. But parliament should decide the date of its first meeting, with the decision being made by the Speaker of the outgoing parliament.

## 9. ENTRENCHMENT AND JUSTICIABILITY

### 9.1 *Entrenchment*

This chapter addresses two questions:

- Would a future government and parliament be bound to observe the new law, or to retain it?
- Would the courts enforce it?

The answer to the first question is almost certainly not. Under the UK's doctrine of parliamentary sovereignty, a government can always invoke the current sovereignty of the current Parliament to repeal the legislation of a previous Parliament. So it would be difficult for the new law to be legally entrenched. A later Act of Parliament could always provide that the next general election shall be held on x date, notwithstanding the provisions of the Fixed Term Parliaments Act 2011; or simply repeal the Fixed Term Parliaments Act altogether.

The question may be raised of whether fixed term parliaments should be more strongly entrenched than this. It is not easy to entrench legislation within the British system of parliamentary sovereignty, but there are three possible mechanisms:

Requiring the consent of both Houses to any measure amending the new law, by excepting amendments to the Fixed Term Parliament Acts from the terms of the Parliament Act 1911 (so that the Lords have a veto)

Requiring special voting majorities for any amendments to the Fixed Term Parliaments Act (as New Zealand requires for amendments to provisions of their Electoral Acts)

A referendum requirement for any amendments.

In the past entrenchment has been considered difficult if not impossible, but attitudes are changing. The Fixed Term Parliaments Bill itself contains a super majority requirement. The Conservatives are proposing a form of entrenchment for another constitutional change (the requirement that future EU Treaties be subject to a referendum). If entrenchment is desired, the first mechanism above is preferable for a strong and effective form of entrenchment: and an appropriate one, since the consent of the Lords is already required to extend the term of a parliament beyond five years. Special majorities are so far unknown in the UK. A referendum seems too high a threshold for what may sometimes be minor amendment; and it is impossible in advance to distinguish a minor from a major one.

Entrenchment may prove unnecessary. What is sought is to create a new norm. In other countries which have introduced fixed term parliaments, the norm has generally been observed. The one exception is Canada, where it was not a later government which breached the norm, but the very government which had introduced it. But in all the Canadian provinces and Australian states which have introduced fixed terms, the new law so far has been observed.

### 9.2 *Justiciability*

A related question is whether there could be recourse to the courts to enforce the requirements of a fixed term law. The probability is that they would consider the issue to be non-justiciable; an obligation to be enforced in the political but not the legal sphere.

The most likely context for a legal challenge would be an attempt by a government to seek an early dissolution, as happened in Canada in 2008, and in Germany in 1982 and 2005. In the former instance, the Canadian Federal Court of Appeal dismissed the challenge on the basis that section 56.1(1) of the Canada Elections Act 2000 specifically preserved the powers of the Governor General.<sup>92</sup> By convention, this extended to the power of the Prime Minister to advise the Governor General about the dissolution of parliament.

With regards to the 1982 early dissolution in Germany, the German Constitutional Court held that in the absence of unconstitutional actions, it would be politically inexpedient to go against the judgments of the President, Chancellor and leaders of the political parties.<sup>93</sup> The Court accepted that Kohl faced general

<sup>92</sup> *Duff Conacher v PM of Canada* 2010 FCA 131

<sup>93</sup> BVerfGE 62, 1

difficulties due to which he could not rely on a consistent majority in parliament. The Court responded similarly to the 2005 episode; the Chancellor's assessment as to whether continuous governance could be assured was accepted.<sup>94</sup>

The international experience demonstrates that courts are unwilling to engage with such politically sensitive decisions, and a similar response is to be expected from the British courts.

## 10. ROLE OF THE HOUSE OF LORDS

### 10.1 *Does the Bill come under the exception to the Parliament Acts?*

The Parliament Act 1911 states that the Parliament Acts procedure for passing legislation without the consent of the House of Lords cannot be used in the case of bills that extend the life of a parliament. It could be argued that the Fixed Term Parliaments Bill contains "any provision to extend the maximum duration of Parliament beyond five years". It enables the Prime Minister to delay a general election by up to two months, so enabling a parliament to last for five years and two months.

This is a hypothetical issue, which would only come alive politically if the Bill is rejected by the House of Lords, and then reintroduced in the next session with a view to passing the Bill without the consent of the House of Lords under the Parliament Acts. It seems unlikely that it is a bill over which the Lords would have an absolute veto; but equally fanciful arguments were advanced in *Jackson v AG*.<sup>95</sup>

### 10.2 *The Lords as constitutional guardian*

The Wakeham Royal Commission on reform of the House of Lords recommended that the Lords should play a vital role as one of the main checks and balances within the British constitution. One of its most important functions was to act as a "constitutional long stop". This is reflected in its existing veto power over any attempt to extend the life of a parliament beyond five years, and its veto powers over the dismissal of key office holders, such as senior judges and the Auditor General. But although the Commission were invited to extend the veto powers of the second chamber to other constitutional legislation, they declined to do so:

Our fundamental concern about any such proposal is that it would alter the current balance of power between the two chambers and could be exploited to bring the two chambers into conflict. It would be inconsistent with the requirement in our terms of reference "to maintain the position of the House of Commons as the pre-eminent chamber of Parliament" and with our view of the overall role that the second chamber should play.<sup>96</sup>

### 10.2 *Giving the Lords a veto*

Notwithstanding the views of the Wakeham Commission, the House of Lords could be given a special power of veto in relation to certain aspects of the operation of the Fixed Term Parliaments Act, or any attempt to amend it. Under the bill the Lords will already have a power to veto any proposal by the Prime Minister to move the date of an election forwards or backwards by two months. The necessary statutory instrument must be approved by each House of Parliament: and the Lords can if they wish withhold their approval. The Parliament Acts do not apply to delegated legislation. Although the Lords rarely veto such legislation, they have occasionally done so. One recent occasion was in connection with an election, when the Lords vetoed the Greater London Authority Expenses Order 2000, in order to require the provision of freepost delivery in the London mayoral elections.

If there was concern about the risk of abuse of the provisions for mid term dissolution, the Lords could also be given an absolute veto before an early general election takes place under clause 2 of the bill. There is a parallel with the Lords' existing power under the Parliament Act 1911 to veto any extension of the life of a parliament beyond five years. In this case they would also have the power to veto any attempt to reduce the term of a parliament to less than five years. But the two cases are not equivalent. In the former case the Lords has power to prevent a government postponing an election, possibly for ever; in the latter case the proposal is to bring forward the date of an election, which is much less anti-democratic. The Lords might feel uncomfortable with such a power, arguing that it was essentially for the House of Commons to decide whether it should face early dissolution.

A third role for the Lords could be to give them a special protective role in relation to the Fixed Term Parliament Act as a whole. This could be done by excepting amendments to the Fixed Term Parliament Act from the terms of the Parliament Act 1911, so that the Lords have an absolute veto in relation to any amendments to the Act. It would be a means of entrenching the Act against subsequent amendment, which is discussed in chapter 9.1.

<sup>94</sup> BVerfG, 2 BvE 4/05 of Aug. 25, 2005, available at [http://www.bverfg.de/entscheidungen/es20050825\\_2bve000405.html](http://www.bverfg.de/entscheidungen/es20050825_2bve000405.html).

<sup>95</sup> 2005 UKHL 56, 2006 1 AC 262.

<sup>96</sup> *A House for the Future*. Report of the Royal Commission on Reform of the House of Lords. Cm 4534, 2000 at para 5.4.

**Written evidence submitted by Professor Robert Blackburn PhD, LL.D, Professor of Constitutional Law,  
King's College London (FTPB 04)**

THE SIGNIFICANCE OF THE PROPOSAL

1. The proposal to institute fixed-term Parliaments is a radical measure with major implications for our political and constitutional system.

2. Stated most simply, its effect is to replace the traditional UK “floating” date system for general elections (under which a Prime Minister may call an election anytime within a five year time frame) by a scheme of “fixed” election dates (whereby the timing of the next general election will be five years after its predecessor, subject to certain exceptions).<sup>97</sup>

3. The Bill affects the relative position of government and opposition parties in competing for office through democratic elections, by ending the considerable advantage which a governing party enjoys by virtue of the Prime Minister being able tactically to plan and choose an election date most favourable (or least unfavourable) to him/herself and his/er party.

4. An effect of the Bill will be to end the penal influence a Prime Minister’s control over dissolution carries with respect to his/her party, whereby a threat of dissolution can be made known to Cabinet and backbench colleagues should they fail to support him/er on key policy matters or vital votes in the House of Commons.

5. At the same time, the Bill’s effect will be to remove a long-standing mechanism whereby a Prime Minister can make an “appeal to the people”, requesting a popular vote of confidence in the government, particularly if there is some fundamental issue or principle on which it specifically wishes the endorsement of the electorate.

6. The Bill affects the Crown and royal prerogative, terminating the ancient common law power of the Monarch over the dissolution of Parliament and superseding it by a statutory scheme of regulation and procedure for the dissolution and general election timing.

THE GENESIS OF THE FIXED-TERM PARLIAMENTS BILL

7. A surprising feature of this proposal is its sudden adoption and now seemingly near-universal support. Until only a few years ago the idea of fixed-term Parliaments was very much a minority view, firmly rejected by successive Prime Ministers. Down to the 1990s, it was widely regarded as an alien, even ridiculous proposal, completely at odds with the UK’s constitutional traditions.

8. The dominant party in the Coalition, the Conservatives, showed little interest in the subject prior to the 2010 general election. In a 2006 Carlton Club speech David Cameron mentioned, “it is time we looked seriously at fixed-term parliaments”, but such a policy did not appear in his 2010 election manifesto nor in his Democracy Task Force’s recommendations. In fact to the contrary, during the 2010 election campaign, Mr Cameron made the contradictory promise for legislation to require a general election within six months of a new party leader taking over as Prime Minister, following the death or resignation of the previous incumbent.

9. The Liberal Democrats adopted fixed-term Parliaments as party policy in the early 1990s, viewing it not only as essentially fairer than the “floating” date system, but (in combination with its commitment to proportional representation) a device for compelling one of the two main parties to enter into negotiations and a possible pact or coalition in hung Parliament situations.

10. Although Tony Blair as Prime Minister opposed fixed-term Parliaments, a new approach to dissolution practice emerged under Gordon Brown when he became Prime Minister in 2007. In his *Governance of Britain* green paper,<sup>98</sup> and accompanying statements to the Commons, he supported the creation of a new convention whereby a Prime Minister had to obtain the agreement of the House of Commons to a dissolution of Parliament before any prime ministerial request was presented to the Monarch: however, implementation of this proposal stalled under the minister responsible in the Modernisation Committee. Subsequently a promise for legislation on fixed-term Parliaments (though with no details on its form or content) appeared in Labour’s 2010 election manifesto.

11. The catalyst for the Fixed-Term Parliament Bill has been a mutual desire between the two Coalition government party leaders to fix the duration of their inter-party alliance. This was a vital element in the government formation negotiations in May 2010. For the Liberal Democrats, without some guarantee on

<sup>97</sup> On the legal and constitutional position, and the debate on fixed-term Parliaments, see Robert Blackburn, *The Meeting of Parliament: A Study of the Law and Practice relating to the Frequency and Duration of the United Kingdom Parliament* (Dartmouth, 1990); Robert Blackburn, *The Electoral System in Britain* (Macmillan, 1995), chapter 2: “The Timing of General Elections”; Robert Blackburn, “Prorogation or Adjournment before a Dissolution of Parliament”, *Public Law* (1987) 533; Robert Blackburn, “The Dissolution of Parliament: the Crown Prerogatives (House of Commons Control) Bill 1988”, *The Modern Law Review* (1989) 837; Robert Blackburn and Raymond Plant (eds.), *Constitutional Reform: The Labour Government’s Constitutional Reform Agenda* (Longman, 1999); Robert Blackburn and Andrew Kennon, *Griffith & Ryle on Parliament: Functions, Practice and Procedures* (2nd ed., 2003); Robert Blackburn, “The Prerogative Power of Dissolution of Parliament: Law, Practice, and Reform”, *Public Law* (2009) 766.

<sup>98</sup> CM 7170 (2007), paras 34–36.

this the Conservative Prime Minister could simply foster and await favourable electoral conditions to his party, then at the earliest opportunity cut and run with a second general election pitching for an overall majority and return to single party government.

12. For the Conservative leadership, there are two advantages in fixing a timeframe on the inter-party agreement. Firstly, a “confidence and supply” arrangement is notoriously difficult, if not impossible, for a minority government to enforce against the supporting minor party. Without any fundamental vested interest in the life of the government, the Liberal Democrats could at any time change their mind and support a No Confidence motion from the Labour opposition in the House of Commons.

13. Secondly for the Conservatives, the dire financial crisis meant the incoming government had minimal manoeuvre for immediately taking popular measures in order to elevate its electoral prospects at an early second poll. To the contrary, there was an urgent need for public expenditure cuts and taxation increases. A long period in office, sharing responsibility for these unpopular measures with the Liberal Democrats, was the safest political route forward.

14. The general principles agreed during the five days’ negotiations was for the date of the next general election to be fixed for 7 May 2015, there to be legislation creating five year fixed Parliaments, and that an early election within each five year timeframe could be held if 55% of the Commons voted for such a motion. This was then included in the Queen’s Speech of 25 May.

15. Unsurprisingly, as little advance thought had been given to framing legislation on this complex legal and political subject, the proposal ran into some difficulties. There was widespread confusion about how the vote on dissolution of Parliament synchronised with No Confidence motions affecting the life of a government, and public controversy at the suggestion that a special majority of 55% was required.<sup>99</sup> Changes to the original proposal were made after further government consideration. A statement to the Commons by the Deputy Prime Minister on 5 July 2010 indicated the final shape of the Bill to emerge later that month.

#### THE SCHEME FOR FIXED-TERM PARLIAMENTS

##### *The length of the fixed term*

16. There is a multiplicity of different schemes for election timing in existence for legislatures around the world, and it would be wrong to say there is any ideal model suitable for all. Comparison abroad may illuminate, but the most appropriate scheme for the UK Parliament is best constructed by close attention to indigenous political and constitutional factors.

17. The first detail of this scheme is the duration between general elections. The Bill presented by the Coalition provides for five yearly intervals. The present maximum life of a Parliament is five years, laid down by the Septennial Act as amended by the Parliament Act 1911.

18. However, the expectation behind section 7 of the Parliament Act was that this maximum limit would amount to around four years in practice, and the average duration of Parliaments over the past hundred years since has indeed approximated four years. Comparatively abroad too, five years is a long period between elections for most legislative and executive bodies.

19. In theory elections should be held as frequently as possible, even annually as the Chartists agitated for in the 18th century. However, a balance has to be struck between the executive’s interest in having a sufficient period of time in which to carry through its programme for government, and the democratic interest in rendering its political representatives accountable to the electorate.

20. It is likely that the Coalition’s concern with concretising its political alliance, and having the longest period possible in which to implement its tax increases and cuts in public expenditure and then recover sufficient popularity in time for its next meeting with the electorate, has affected its judgement in this matter. In my view, the period between general elections should clearly be four years and this is by far the prevalent view among those who have favoured fixed intervals between elections in recent years, including Liberal Democrats.

##### *Procedures for an early election within the fixed-term period*

21. Virtually all fixed-term Parliament arrangements recognise that there must be some procedure for an early election in emergency circumstances. To this end, the Bill seeks to supersede and modify the existing convention about No Confidence motions in the House of Commons. It is one of the most basic conventions of the British constitution that the consequence of a No Confidence resolution is to compel a Prime Minister to either resign or call a general election.<sup>100</sup>

<sup>99</sup> There was a flurry of critical news reports and articles in the press. One was by David Davis MP, referring to the idea of fixed Parliaments as one of the greatest constitutional changes since 1911, yet the manner of its introduction being “simply wrong” and the 55% rule leaving the Commons with “absolutely no moral authority”. Christopher Chope MP successfully secured an adjournment debate on the subject, enabling an expression of parliamentary opinion.

<sup>100</sup> Naturally a Prime Minister will normally choose to call an election, hoping to be returned to office. However if a resolution of No Confidence is passed at the beginning of a new Parliament upon the government that was in office prior to the election, the Prime Minister has no choice but must resign and allow the Leader of the Opposition to be appointed Prime Minister.

22. The Bill provides that the House of Commons (for which read the opposition and/or majority of MPs in the chamber) can cause an election by successfully moving a No Confidence resolution. The opposition then has a choice to attempt to put together a new government from the existing House, or allow 14 days to elapse with no such action taken.

23. The Bill also provides that the House of Commons (for which read the Prime Minister and governing party) can cause an election by successfully moving a resolution that there should be an early general election.

24. However the Bill proposes a statutory special majority to be imposed on this motion. Instead of the normal simple majority rule of voting, it is suggested that, “the number of members who voted in favour of the motion [is] a number equal to or greater than two thirds of the number of seats in the House (including vacant seats)”.

25. This special voting procedure is unprecedented at Westminster. The only other only set majorities at the moment are 100 voting in favour for closure and 40 for a quorum,<sup>101</sup> and both these procedures are in standing orders, not an Act of Parliament.

#### *An alternative approach*

26. In my view, a fixed term Parliament is a good idea, but the government is taking it too far. Not only has it fixed the term at an over-long length, but it has set the threshold for triggering an early election too high. There is an imbalance in the Bill between competing interests—entrenching the position of the executive, and securing its democratic accountability to Parliament and the electorate.

27. My preference would be that:

- (a) The fixed period of time between general elections is four years, consistent with existing normal practice and the average duration of a Parliament over the past 100 years.
- (b) The House of Commons determines whether or not an early election takes place, by way of a simple majority motion to this effect, which is then transmitted by the Prime Minister to the Monarch. Procedurally, this could be by way of an opposition motion of No Confidence in the government being carried; or by way of the defeat of a Prime Minister’s motion seeking the House’s expression of Confidence in the government. For clarity’s sake with the public, however, a straightforward motion that there should be an early parliamentary general election would be best.
- (c) Where the opposition seeks to remove the government and replace it, similarly a simple majority motion to this effect might be made. Procedurally, this could be by way of a “constructive” vote of No Confidence in the Prime Minister, nominating a successor.
- (d) To ensure a governing majority does not abuse its ability to push through an early election resolution for no good reason other than being a favourable time to itself to go to the polls, the duration of the Parliament following the early election might be equivalent to the remainder of the term of the Parliament in which the resolution takes place.
- (e) Ideally, the scheme of arrangement whereby Parliaments are summoned and dissolved should be replaced by the institution of Parliament being kept in continuous existence.<sup>102</sup> This would mean that elections took place at four-yearly intervals known by all in advance, and then on a prescribed date following the date of the poll, newly-elected Members would take the place those who had stood down or been defeated in their constituencies.

28. In my view, the government’s Fixed-Term Parliaments Bill has been technically well-drafted by the Cabinet Office’s parliamentary counsel, particularly in avoiding judicial review of its provisions on early elections by way of Speaker’s certificates, and in ensuring no personal reserve element in the royal prerogative over dissolution will remain after its enactment. But the political judgement on the central features the Bill (namely the duration of the fixed term, and the early election provisions) is debatable.

29. In evaluating the Bill overall, one needs bear in mind the key problems one is seeking to remove, and the advantages one is seeking to achieve. The key constitutional problems, as I see them, are:

- the virtually uncontrolled power a Prime Minister enjoys over dissolution; and
- the dangers of embroiling the monarchy in any disputation over dissolution.

30. It is dealing with the above two key problems that should be the main focus for the fixed-term arrangement, and general elections should certainly not be treated as though they were a bad thing, made as difficult as possible to happen within a five year timeframe—which is a long time in politics.

<sup>101</sup> In practice 35 voting plus Speaker and four tellers.

<sup>102</sup> The existing legal framework stems from ancient times when Parliament was treated as the personal creature of the Monarch to be called and dismissed at will. In current practice, between the dissolution and meeting of Parliaments ministers remain in office but there is no Parliament in existence to hold them to account. Were any serious national emergency to occur within this hiatus of about five weeks, including one causing it to be impracticable to conduct the poll, there is no legal process for restoring the former Members of Parliament to office. Under a permanent Parliament as proposed, there would be a period of recess during the election campaign and existing Members could always be reconvened at any time if necessary.

## PROCESS AND CONSEQUENCES

31. The manner in which this Bill has emerged shows that constitutional reforms, even of the most fundamental kind, are rarely the product of a carefully thought out and widely consulted upon programme for action. Too often, they are driven and shaped by the vested interests of those who govern us, instead of a coherent principle or plan that is operating in conjunction with other parts of the constitution.

32. There are some major consequences of this Bill which would be best considered and resolved prior to its enactment. One is that if the Prime Minister's facility to make an "appeal to the people" on some major issue or principle of government policy is removed, this will have the effect of promoting referendums as a more established part of British political life. The desirability of referendums, particularly on complex issues of public policy, is in any event controversial; but at the very least, there needs to be some constitutional guidelines determining their usage to avoid their practice descending into devices for obtaining party political advantage or absolving Parliament from its proper responsibilities.

33. Another, more glaring, consequence of the reform is the need for a comprehensive consideration of the process whereby governments are formed in hung Parliament situations. If a hung Parliament is to remain fixed, whether for four or five years, some institutionalised new principles and procedures may be necessary governing the inter-party negotiations and how to resolve competing claims or combinations for office.

34. This is a very important subject upon which the Cabinet Secretary has already taken the lead, producing a draft Cabinet Manual earlier this year describing and modifying existing conventions (some of which were implemented in supporting the inter-party Conservative and Liberal Democrats negotiations in May 2010). However, the production of this Manual has been conducted internally in the Cabinet Office,<sup>103</sup> and there appears to be no minister responsible to Parliament for the process by which it is being prepared.

35. A significant part of the Fixed-Term Parliaments Bill proposes the introduction of confirmatory votes for an alternative government following a No Confidence motion in the Commons. Clause 2(2)(b) provides that where an alternative government emerges, it must be legitimised by a "motion expressing confidence in [the new proposed] Government of Her Majesty". This poses the wider question whether, if a confirmatory resolution applies in this situation, why not in all other cases of prime ministerial appointment.<sup>104</sup> The logic of this proposition is likely to gather momentum, and the general desirability of this procedure should be carefully considered as part of the parliamentary scrutiny of the Bill.

36. Further consideration will also be needed of the Monarch's role in government formation. Currently, the conventions governing a Monarch's personal or reserve powers with respect to prime ministerial appointment are relatively straightforward, whereas those governing a Monarch's intervention in dissolution affairs have been more complex.<sup>105</sup> The effect of the Bill will be to remove problems of royal intervention in dissolution affairs, but heighten them with respect to prime ministerial appointment in prolonged hung Parliament situations.

37. The Bill therefore has far-reaching implications going to the heart of our political democracy, and ones that inter-lock with other parts of the constitutional structure. Successive governments have followed an ad hoc approach to constitutional reform, but it would be wise, in my view, for a more overarching approach to be taken to political and constitutional reform generally and one that is constitutionally joined-up, particularly since other major changes are now or in the near future being planned.

3 September 2010

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**Written evidence submitted by Professor Anthony Bradley (FTPB 05)**

1. This is a short Bill, but it has profound implications for parliamentary government. It seeks to make a permanent change in the relationship between the Prime Minister as head of government, the House of Commons, and the electorate. If we had a written constitution, the changes proposed by the Bill would in all probability require the formality of a constitutional amendment. Our unwritten constitution has both the obvious advantage of flexibility, and the disadvantage that a piecemeal response to a temporary need may bring about a permanent change before all the implications have been fully considered.

2. In my view, it is necessary to distinguish between (a) the immediate circumstances that have led to the Bill, namely the result of the general election at a time of financial crisis, and the formation of the coalition Government with an ambitious programme that it wishes to deliver by remaining in office for as long as the law permits; and (b) the arguments that have been advanced during recent Parliaments (in particular by Dr Tony Wright MP and David Howarth MP) for adopting a system of fixed-term Parliaments. The Bill provides what is essentially the same response to these two sets of considerations. It should be enacted in its present form only if Parliament is satisfied that the long-term changes are justified in their own right.

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<sup>103</sup> A section of the draft Cabinet Manual dealing with elections and government formation was given in evidence to the Commons Justice Committee in February 2010: HC (2009–10) 396.

<sup>104</sup> Including a normal post-general election result, or where a party leader stands down as Prime Minister (as in 2007), or where a government resigns but circumstances preclude an election (as in August 1931).

<sup>105</sup> For the constitutional theorising on this subject, see Vernon Bogdanor, *The Monarchy and the Constitution* (1995), and Robert Blackburn, "Monarchy and the Personal Prerogatives", *Public Law* (2004) 546.



3. One matter that in my view may be left out of account is the position of the Queen. Under the formal process of dissolution, the Queen must by convention accept the Prime Minister's request, but she has no absolute duty to do so. Thus she could refuse a dissolution in exceptional circumstances when it would plainly be an abuse for an election to be held (an unpopular Prime Minister may not follow up defeat at one election with an immediate request for a second election). A more difficult situation in which a request for a dissolution might be controversial would be where a Prime Minister were to seek an election to pre-empt a challenge to his or her position as party leader. Where no party has an absolute majority in the Commons, other difficult situations could emerge. Despite these potential difficulties, which are well explored in Professor Rodney Brazier's book *Constitutional Practice*, concern for the future role of the monarch is not in my view a reason for switching to fixed-term Parliaments.

4. As regards the provision in the Bill that the next election will not be until 7 May 2015, an assurance to this effect could be given by the coalition Government without legislation. Of course, a non-statutory assurance could be set aside if events occurred that made an earlier election desirable. By contrast, a statutory assurance continues in force regardless of changing circumstances: it could be revoked by a later Act, but not by unilateral decision of the Prime Minister or the Government. The proposed statutory assurance rightly does not seek to be absolute, since it is qualified by two provisions for an earlier election: one involving a motion of no confidence, passed by a simple majority; the other a motion for an early election, passed by a two-thirds majority of all MPs. The two-thirds majority of all MPs is indeed a high hurdle, and it could not be secured in the present House of Commons unless enough Labour MPs joined coalition MPs in voting for an early election. Nevertheless, there is plainly an arguable case for giving statutory form to the Government's wish to continue until May 2015, subject to the two forms of override proposed, novel as these provisions are.

5. On the more general question, and leaving aside the immediate political situation, there is certainly a strongly arguable case that democracy in the United Kingdom will be strengthened by a system of fixed-term parliaments, in place of the uncertainty that flows from the present practice by which a general election may take place at a time that best suits the Prime Minister or the Government in power. Speculation about the date of the next election plays much too large a part in our politics. However, the implications of the change need to be fully explored in public debate, and if this is done it should help to create a broad consensus in favour of the change. The Labour government under Mr Blair was responsible for initiating major reforms affecting the judiciary (eventually incorporated in the Constitutional Reform Act 2005) in a wholly inept way that prejudged informed debate and ran the risk of prejudicing some beneficial reforms. The coalition Government needs to take a more skilful path than this in building a consensus for the long-term constitutional reform that it wishes to see.

6. One way of achieving this would be for the present Bill to be split into two: one Bill limited to the present Parliament, which could pass quite speedily into law; and a second Bill making permanent provision for the life of future Parliaments that would be subject to a full process of consultation and debate. If it is too much to expect the Government to accept that there should be two separate instalments of legislation, the Government should be pressed to give ample time in Parliament for the implications of the permanent changes to be fully explored, with a view to promoting a consensus in support of these changes. To take the Bill in committee of the whole House is not in itself enough to achieve this. It is also important that the relevant committees in both Houses (the Political and Constitutional Reform Committee in the Commons, and the Constitution Committee in the Lords) should be able to report on the implications of fixed-term Parliaments before the Houses are called on for a definitive vote.

7. One major issue of principle that needs to be resolved, assuming that the case is made for fixed-term Parliaments, is what that fixed term should be. The switch to a fixed term is so significant that an open debate on this matter is justified. In my view, the Bill is wrong simply to apply the present maximum life of five years to a fixed-term system. The five-year rule came into being in different historical circumstances. I believe that many electors would take the view that they should be able to exercise their fundamental democratic right to vote more frequently than once in five years. The public concern over the scandal of parliamentary expenses surely provides support for this view. Moreover, many recent Parliaments have shown that a four year period is well capable of enabling a government to carry through a programme of legislative and administrative reform. More detailed arguments, including comparative material, could be made in support of a four-year term. In summary, I consider that the change to a fixed-term system should not be made unless at the same time the life of Parliament is reduced to four years. The reduction should, however, not be applied to the present Parliament.

8. A more technical question that arises from the present Bill is the meaning of "a motion of no confidence". Is this limited to a motion that expressly declares that the House has no confidence in the Government, or does it include motions in other terms that strike at the ability of the Government to continue in office—for instance, the rejection of the Government's budget resolutions, or a motion that accuses the Prime Minister or other Ministers of corruption or dishonesty? As the Bill by clause 2(4) provides for the Speaker to consult the Deputy Speakers before certifying that a motion of no confidence has been passed, does this envisage that it may not always be evident when such a motion has been passed? It would appear from clause 2(3) (certificate to be conclusive for all purposes) that the intention is to exclude any possibility of the courts being asked to rule on these parliamentary matters—and this intention is consistent with our historical tradition.

9. Finally, there is always a danger that a specific measure of constitutional reform is treated as a piecemeal matter. The Government's case for fixed-term Parliaments needs to be assessed in relation to other changes in the electoral system that the Government is considering.

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**Written evidence submitted by Professor Justin Fisher (FTPB 06)**

**FIXED TERM PARLIAMENTS AND CANDIDATE ELECTION SPENDING**

The government's proposals to introduce fixed-term Parliaments will, if enacted, reveal an anomaly in the Political Parties and Elections Act 2009. Section 21 of the Act legislates for candidate election expenses in the event of a Parliament exceeding 55 months. It introduces two regulated campaign periods: one for the period from the 55th month until dissolution (the long campaign) and one from dissolution until polling day (the short campaign). The distinction between long and short campaigns is necessitated only by the variable date of an election and introduces variable candidate election expenditure limits depending upon the election date relative to the 55th month.

The introduction of fixed term parliaments will render both the variability in candidate election expenses and the distinction between long and short campaigns redundant. Thus, it is assumed that the Political Parties and Elections Act will require amendment accordingly. In the event of a "snap election" it is assumed that as is currently the position, the regulated period would exist from dissolution to polling day as stipulated in the Political Parties, Elections and Referendums Act.

Notwithstanding, given that the Act did recognize the need to regulate candidate election expenses beyond the period from dissolution to polling day, and in 2010 instituted January 1st as the start point of regulated campaign expenditure, it would seem sensible to introduce a fixed start point in respect of regulated spending of four months prior to polling day, or for administrative convenience, the first day of the year in which an election is due (assuming the election takes place in the first week in May). This would effectively replicate the provision in the 2009 Act, but remove the redundant components of variable election dates and separate regulated periods.

*3 August 2010*

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ISBN 978-0-215-55477-2



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